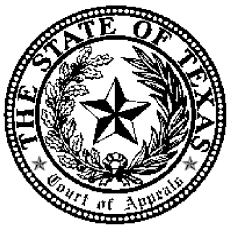
Affirmed as Modified and Opinion filed October 4, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-00030-CR

CLINTON H. SMITH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause No. 813,823

O P I N I O N

Clinton Smith appeals from his conviction for the aggravated sexual assault of a child. B.S., the complaining witness and Smith's biological daughter, charged that Smith assaulted her on four separate occasions when she was eleven years old. Smith pled not guilty, and after a bench trial, the judge found him guilty as charged. The indictment included two enhancement paragraphs, one of which asserted a prior conviction for aggravated sexual assault of a child. The trial court found the enhancements to be true and sentenced Smith to a mandatory term of life in prison.

On appeal, Smith contends: (1) that the evidence was factually insufficient to support

the guilty finding, and (2) that the State failed in its burden of proving the prior convictions. In a cross-point of error, the State requests that we reform the judgment to accurately reflect the results of the proceedings below. We will modify the judgment and, as modified, affirm.

Factual Sufficiency

Smith first attacks the factual sufficiency of the evidence to support the trial court's determination of guilt. In reviewing factual sufficiency, we examine all of the evidence without the prism of "in the light most favorable to the prosecution" and set aside the trial court's determination only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000). We consider all of the evidence in the record and not just the evidence which supports the finding of guilt. *Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App. 1997). The court is authorized to disagree with the fact finder's determination, even if probative evidence exists which supports the finding. *Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996). However, factual sufficiency review must be appropriately deferential so as to avoid the appellate court's substituting its own judgment for that of the fact finder or substantially intruding upon the fact finder's role as the sole judge of the weight and credibility of witness testimony. *Johnson*, 23 S.W.3d at 7. Unless the record clearly reveals that a different result is appropriate, we must defer to the trial court's determination concerning the weight given to contradictory testimony. *Id*. at 8.

A person commits the offense of aggravated sexual assault against a child younger than 14 years of age if the person intentionally or knowingly: (1) causes the penetration of the anus or female sexual organ of the child by any means; (2) causes the penetration of the mouth of the child by the sexual organ of the actor; (3) causes the sexual organ of the child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor; (4) causes the anus of the child to contact the mouth, anus, or sexual organ of another person, including the actor; or (5) causes the mouth of the child to contact the anus or sexual organ of another person, including the actor. TEX. PEN.CODE ANN. §§ 22.021(a)(1)(B) and

(a)(2)(B) (Vernon 2000); *Floyd v. State*, 959 S.W.2d 706, 708 (Tex. App.—Fort Worth 1998, no pet.).

B.S. testified that Clinton Smith sexually assaulted her on four occasions. The first incident occurred when he picked her up for a parental visitation and took her to a Texaco gas station. B.S. testified that he made her go into the bathroom and told her to take off her clothes and lay on the floor. He then took off his clothes and penetrated her vagina with his penis. Afterwards, he told her not to tell anyone, and she said that she did not tell anyone for a time because she was scared of him. B.S. identified photographs of the gas station and the bathroom, which were admitted into evidence. A second assault occurred when Smith took B.S. to his girlfriend's house, instructed her to take off all her clothes, and then "had sex with [her] again." A third occurrence took place at the same Texaco station. And the fourth incident occurred when Smith took her to see a movie, but before going into the theater, he had her take off her underwear and got on top of her and "did it again." She subsequently called her stepfather, Steven Harris, and told him about the assaults. On cross-examination, B.S. acknowledged that she continued to call her father and wanted to see him after the incidents of abuse began.

Steven Harris testified that he has known B.S. since she was one year old and that he raised her. He further testified that on April 23, 1999, B.S. called him at work crying and told him that "daddy's been messing with me" and "daddy did it to me." Harris subsequently alerted the police and the Child Protective Center. He stated that B.S. told him and his wife, B.S.'s mother, that the first assault occurred on February 12 when Smith picked her up for parental visitation and then took her into the bathroom at a Texaco station, had her take her clothes off, fondled her, and forced her to perform oral sex. Harris also stated that B.S. told him about another incident at the home of Smith's girlfriend, when Smith instructed B.S. to take off all her clothes, forced her to perform oral sex, and then penetrated her. Harris said that although B.S. mentioned an incident which occurred at a movie theater, he could not remember for sure what she said happened. He thought that she

said Smith fondled her in the dark.

On cross-examination, Harris stated that he was aware Smith was in the penitentiary and that he knew why Smith was there. After Smith got out of prison, he began supervised visitation with B.S., which eventually lead to unsupervised visits. Harris stated that at some point he determined that the rate of contact should be slowed down, and he sometimes restricted B.S.'s phone calls to Smith and may have caused her to cancel visitations with him. Harris confirmed that after February 12, B.S. continued to make telephone calls to Smith and request visitation with him.

The prosecution also elicited testimony from Natalie McClain, who works as a nurse practitioner for the Children's Assessment Center and has specialized training concerning child sexual abuse. She testified that she performed a sexual assault examination on B.S. on May 4, 1999. As part of the examination, McClain asked B.S. about abusive encounters and B.S. responded that vaginal penetration by her father occurred on four occasions. B.S. also provided specific details regarding the assault in the Texaco bathroom. McClain further testified that the results of her physical examination of B.S. were consistent B.S.'s disclosure of vaginal and anal penetration. The medical record prepared by McClain on the basis of the examination was also introduced into evidence, and corroborates her testimony.

On cross-examination, McClain acknowledged that she had not examined B.S. previously, and she was not able to compare her findings with those of any prior examinations of B.S. She also testified regarding the difficulty of pinning down a precise time period for the physical symptoms to have manifested, and she stated that she could not completely rule out the possibility that the symptoms were caused by something other than sexual intercourse.

Smith himself testified that his attempts to visit with B.S. on a regular basis went well initially, but then became increasingly difficult to arrange. Smith stated that he felt like Harris was trying to restrict or stop his visits with B.S. and that he and Harris argued about

it. He said that he and B.S.'s mother had discussions about a reconciliation between them because she and Harris were having marital difficulties. Smith specifically denied that any of the four alleged incidents of abuse actually occurred, and he denied ever having sexual contact with B.S. He further stated that B.S. continued to call him during the time period of the alleged assaults.

Carol Comeaux, Smith's mother, testified that up until April of 1999, B.S. would frequently call her house asking for Smith and that B.S. also expressed an interest in living with her father. Comeaux also stated that she observed Harris and Smith argue on one occasion. The defense also called Nora Jenkins, who stated that she was Smith's girlfriend. She further testified that Smith would bring B.S. to Jenkins's house for visitation, that their relationship appeared to be good, and B.S. seemed to want the relationship to continue. She also stated that she never noticed anything unusual about B.S.

At trial, Smith relied heavily on the notion that Steven Harris had a grudge against him. However, the mere existence of a reasonable alternative hypothesis does not render the evidence factually insufficient. *Ates v. State*, 21 S.W.3d 384, 391 (Tex.App.--Tyler 2000, no pet.); *Richardson v. State*, 973 S.W.2d 384, 387 (Tex.App.--Dallas 1998, no pet.). B.S.'s testimony concerning the assaults was sufficiently specific and detailed to support the conviction. *See generally* TEX. CODE CRIM. PROC. ANN. art. 38.07 (Vernon Supp. 2001); *Rodriquez v. State*, 997 S.W.2d 640, 643-44 (Tex. App.—Corpus Christi 1999, no pet.)(testimony of minor victim of sexual assault may by itself be sufficient to support a conviction). Her testimony was further corroborated by the results of nurse practitioner McClain's physical examination and the testimony from Steven Harris regarding her outcry statement.

In his appellate brief, Smith principally relies on presumed inconsistencies between the testimonies of B.S., Stephen Harris, and nurse practitioner McClain in urging the court to reverse for factual insufficiency. Specifically, Smith points to the fact that although Harris testified regarding oral sex, and McClain testified regarding anal penetration, B.S.

herself did not mention either form of assault in her testimony. While these differences may demonstrate that the testimony was not entirely consistent, our review of the record reveals no actual contradictions on these issues. While it is true that B.S. did not allege in her testimony that oral or anal sex occurred, it is also true that she never denied that such occurred. In fact, she was never specifically asked about those forms of abuse. Her testimony concerning the assaults was detailed to a point, concerning place and activity, but she described the actual assault tersely, *e.g.*, "he had sex with me again," "he got on the top of me and then he did it again." Such brevity of description is certainly consistent with a twelve year old girl who has been sexually assaulted by her father.[1] If Smith's counsel wanted to attempt to establish true contradictions in the testimony, he could have specifically asked her about other sex, but this he did not do. There may have been inconsistencies in the testimony, but such inconsistencies are well within the province of the fact finder and do not render the evidence factually insufficient. *See Murray v. State*, 24 S.W.3d 881, 887 (Tex. App.—Waco 2000, pet. ref'd); *Weisinger v. State*, 775 S.W.2d 424, 429 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd).

We find that the trial court's determination was not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Johnson*, 23 S.W.3d at 7. The evidence was factually sufficient to support the finding of guilt. This issue is overruled.

Enhancement Paragraphs

Smith next contends that the State failed to present sufficient evidence to demonstrate the truth of the allegations in the enhancement paragraphs. The first enhancement paragraph alleges that Smith was previously convicted of aggravated sexual assault of a child, and the second paragraph alleges a prior conviction for aggravated assault. Smith pled not true to both paragraphs, and the court found both to be true.

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[1] As the Court of Criminal Appeals has stated, "we cannot expect the child victims of violent crimes to testify with the same clarity and ability as is expected of mature and capable adults." *Villalon v. State*, 791 S.W.2d 130, 134 (Tex. Crim. App. 1990).

In order to establish the truth of the prior convictions the State introduced into evidence a "pen packet," and called to the stand a fingerprint expert who testified that fingerprints he took from Smith on the day of trial matched the prints on a fingerprint card in the pen packet. It is well settled that while a pen packet may be admissible to demonstrate prior convictions, the packet by itself is not sufficient to connect the identity of the accused with the pen packet. *Beck v. State*, 719 S.W.2d 205, 209-10 (Tex. Crim. App. 1986); *Zimmer v. State*, 989 S.W.2d 48, 51 (Tex. App.—San Antonio 1998, pet. ref'd). The State must also introduce competent evidence that identifies the defendant in the current prosecution as the person convicted in the prior proceedings. *Beck*, 719 S.W.2d at 210; *Zimmer*, 989 S.W.2d at 51. This is frequently done, as it was here, by the introduction of fingerprint analysis. *See Beck*, 719 S.W.2d at 210; *Zimmer*, 989 S.W.2d at 51.

Smith specifically contends that, although the fingerprint expert did match Smith's prints to those on a card in the front of the pen packet, there is no evidence to connect the prints on that card with the convictions presented in the subsequent pages of the packet. This is simply not so. A fingerprint card contained in a certified pen packet is taken as referring to the packet as a whole. *Cole v. State*, 484 S.W.2d 779, 784 (Tex. Crim. App. 1972); *Petrick v. State*, 832 S.W.2d 767, 773 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd); *Hallmark v. State*, 789 S.W.2d 647, 650-51 (Tex. App.—Dallas 1990, pet. ref'd). In the present case, the certification page of the packet states that the packet contains the photograph, fingerprints, judgments, and sentences for Clinton Smith, TDCJ #470866, in cause numbers 23381 and 88349. The TDCJ number also appears on the photograph and the fingerprint cards in the packet, and the referenced cause numbers are also reflected on the judgments in the prior convictions. Thus, the fingerprint card in the front of the packet is sufficiently connected to the convictions even absent the presumption that the card refers to the entire packet. *See Cole*, 484 S.W.2d at 784 (undertaking similar analysis).[2]

[2] We further note that: (1) the trial court could also have examined the photograph contained in the pen packet and compared it to the defendant, and (2) Smith himself admitted to the prior convictions when he testified in the guilt/innocence phase of the trial. *See Peters v. State*, 575 S.W.2d 560, 562 (Tex. Crim.

The record contains sufficient proof of the truth of the allegations in the enhancement paragraphs; hence, the trial court did not err in determining the paragraphs to be true. Smith's second issue is overruled.

State's Cross-point

In a cross-point of error, the State requests that we reform the order of the trial court to accurately reflect the judgment and sentenced pronounced in open court. The indictment included two enhancement paragraphs, the first alleging the prior conviction for aggravated sexual assault of a child and the second alleging a conviction for aggravated assault. Smith pled not true to both enhancement paragraphs. At the conclusion of the punishment phase of the trial, the judge stated that she found the allegations in both enhancement paragraphs to be true, and based on these findings, she sentenced him to imprisonment for life, which is statutorily mandated when a person is convicted of his or her second offense of aggravated sexual assault. *See* TEX. PEN. CODE ANN. § 12.42(c)(2) (Vernon Supp. 2001).

Despite the court's oral pronouncements, the written judgment of the court states that in regard to the first paragraph Smith pled not true and the court found not true, and it indicates that the second paragraph was simply not applicable. An appellate court may modify an incorrect judgment when it is necessary to accurately reflect the outcome of the trial court proceedings and the necessary information is available to do so. *See Bigley v. State*, 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993); *Abron v. State*, 997 S.W.2d 281, 282 (Tex. App.—Dallas 1998, pet. ref'd). *See also Coffey v. State*, 979 S.W.2d 326, 328-29 (Tex. Crim. App. 1998)(the oral pronouncement of a sentence controls over the written memorialization of the sentence). In the present case, the trial judge's oral pronouncement of its findings was clear and unequivocal, and Smith does not dispute the stated sentence expressed the court's true intent. Furthermore, the judge imposed the mandatory sentence

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App. 1979)(defendant's testimony coupled with pen packet held sufficient); *Pachecano v. State*, 881 S.W.2d 537, 545 (Tex. App.–Fort Worth 1994, no pet.)(jury could have compared photograph to defendant's appearance in courtroom).

for a person twice convicted of aggravated sexual assault of a minor, and this sentence is reflected both in the reporter's record and on the written judgment. This further supports the conclusion that the court did, in fact, find the allegations in the first enhancement paragraph to be true.

Accordingly, we order that the judgment in this case be modified to reflect that: (1) the trial court's finding on the first enhancement paragraph was true; (2) Smith pled not true to the second enhancement paragraph; and (3) the trial court's finding on the second paragraph was also true. As modified, the judgment of the trial court is affirmed.

/s/ Don Wittig
Senior Justice

Judgment rendered and Opinion filed October 4, 2001.
Panel consists of Justices Yates, Edelman, and Senior Justice Wittig.[3]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[3] Senior Justice Don Wittig sitting by assignment