Affirmed and Opinion filed November 2, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-01106-CR
NO. 14-98-01107-CR
NO. 14-98-01108-CR
NO. 14-98-01109-CR

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GLENN FLOYD SMITH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 10th District Court
Galveston County, Texas
Trial Court Cause Nos. 97-CR-0080; 98-CR-0037; 98-CR-0525;& 98-CR-0748

O P I N I O N

A jury convicted appellant, Glenn Floyd Smith, of four separate charges of aggravated sexual assault of a child and assessed punishment at eighteen years' imprisonment for each charge. Smith brings six points of error, contending that the trial court erred (1) in allowing a social worker to testify as an expert about the typical behavior of sexually abused children; (2) in allowing a social worker to testify whether the victims were truthful; (3) in excluding testimony of a defense expert that Smith did not fit the profile of a sex offender; (4) in allowing hearsay testimony by an outcry witness when the State had not propely predicated

the testimony; and (5) in excluding testimony about whether the children's mother left them alone; and contending that (6) the evidence of penetration is factually insufficient in each conviction. We affirm.

BACKGROUND

Smith is the father of five children, sons, G.S., R.S., J.S., Ke.S., and daughter, Ki.S. Child Protective Services (CPS) had investigated the family on several occasions before April 1996, finding deplorable living conditions and known drug use by the parents, but no signs of sexual abuse in the children. Thus, the five children remained in the home. In April 1996, Appellant's daughter, Ki.S., revealed that her father had sexually abused her. Over the next one and half to two years, all the sons but the youngest, Ke.S., also admitted that they had suffered sexual abuse from their father. Medical examinations of the four children showed changes in the boys' anuses and the girl's vagina that were consistent with penetration.

ADMISSIBILITY OF SOCIAL WORKER'S EXPERT TESTIMONY

In his first issue, Smith contends that the trial court erred in allowing the expert testimony of a social worker, Trudy Davis, about the typical behavior of sexually abused children. A trial court has discretion whether to allow a witness to testify as an expert. *See Steve v. State*, 614 S.W.2d 137, 139 (Tex. Crim. App. 1981). We review a trial court's ruling on the admissibility of evidence for abuse of discretion. *See Prystash v. State*, 3 S.W.3d 522, 527 (Tex. Crim. App. 1999). Texas Rule of Evidence 702 addresses the admission of expert opinion about a scientific, technical, or other specialized information. *See* TEX. R. EVID. 702. When a witness is an expert in a social science or a field that is primarily based on experience and training, we apply a less rigorous test to the witness's theory than we apply to a witness's theory in hard science. *See Nenno v. State*, 970 S.W.2d 549, 561 (Tex. Crim. App. 1998). When addressing fields of study aside from hard sciences, a trial court should consider the following questions: (1) whether the field of expertise is a legitimate one; (2) whether the subject matter of the expert's testimony is within the scope of that field, and (3) whether the expert's testimony properly relies upon and/or utilizes the principles involved in the field. *See id.*

In this case, Trudy Davis testified as an expert for the State in its rebuttal. She explained that she is a licensed social worker, director of the Advocacy Center for Children, and a former caseworker and supervisor of sexual abuse investigations with CPS for eighteen years. She has taught and trained others

in the fields of sexual abuse investigations and interviews. Over twenty-one years, she interviewed many potentially abused children. She described certain characteristics that she observed in many of the cases: delayed disclosure of the abuse, minimization of the abuse (especially in male victims), and changing recollection of the abuse.[1] The Texas Court of Criminal Appeals has already acknowledged research concerning the behavior of sexually abused children as a legitimate field of expertise. *See Cohn v. State*, 849 S.W.2d 817 (Tex. Crim. App. 1993) (recognizing types of expert knowledge about the behavior typically exhibited by sexual abuse victims). Further, Davis's testimony about her background, training, and length of professional observation fulfilled the second two *Nenno* questions. We find that the reliability of Davis's testimony was sufficiently established under Rule 702. Therefore, the trial court appropriately allowed Davis to testify from her own experiences and observations. We overrule point of error one.

In his second point, Smith contends that it was reversible error to allow Trudy Davis to testify whether the victims were telling the truth. In support of this point, Smith cites *Yount v. State*, 872 S.W.2d 706 (Tex. Crim. App. 1993), in which the expert testified, "I have seen very few cases where the child was actually not telling the truth." However, the record in this case does not reflect any opinion testimony from Davis about whether the victims were truthful. Indeed, the prosecutor specifically told the trial court that Davis would not testify about it. Accordingly, we overrule point of error two.

SEX OFFENDER PROFILE

In his third point of error, Smith argues that the trial court erred in excluding the testimony of a defense expert, David Navarre, that Smith did not match sex offender profiles. Navarre, a clinical social worker and Registered Sex Offender Treatment Provider, administered a test to Smith called the MMPI-2, which indicated that Smith did not fit the sex offender profile. The trial court excluded his testimony under Texas Rule of Evidence 403, holding that the evidence's probative value was substantially outweighed by the danger of unfair prejudice.

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[1] The trial court disallowed testimony about "child abuse accommodation syndrome" and hypothetical questions based on Davis's experience and facts paralleling the victims' circumstances in this case. Such an exclusion has been held proper because child abuse accommodation syndrome has not been proven a reliable scientific theory. *See Perez v. State*, No. 25 S.W.3d 830 (Tex. App.—Houston [1st Dist.] 2000, no pet. h.).

This issue is very similar to the scenario in *Dorsett v. State*, 761 S.W.2d 432 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd). *Dorsett* was an indecency with a child case in which the trial court did not err, based on Texas Rule of Evidence 403, in excluding a psychologist's testimony that the defendant failed to fit the personality profile of a sex offender. Given the trial court's wide discretion in determining the admissibility of evidence and the precedent of the *Dorsett* case, we cannot say that the trial court abused its discretion in refusing to admit the social worker's testimony that Smith did not match sex offender profiles. Accordingly, we overrule point of error three.

OUTCRY WITNESS

In point of error four, Smith contends that the State failed to properly predicate the hearsay statements of R.S. to his grandmother, Gertrude Wilson, as his outcry witness. Article 38.072 of the Texas Code of Criminal Procedure delineates the necessary steps to admit the first statement about the offense made by a child victim to a person age eighteen or older. Smith argues that the State failed to make the proper predicate because R.S.'s statement to his grandmother was not spontaneous, but was the result of leading questions by the grandmother.

Smith's objection at trial to Gertrude Wilson's testimony was that it would mislead and confuse the jury. Complaint made on appeal must comport with the complaint made at the trial court, or the error is waived. *See Butler v. State*, 872 S.W.2d 227, 236 (Tex. Crim. App. 1994); TEX. R. APP. P. 33.1. Because Smith's complaint on appeal differs from his objections to the trial court, he has waived his point of error. We overrule point of error four.

EVIDENCE OF UNSUPERVISED TIME

In his fifth point of error, Smith contends that the trial court erred in excluding evidence whether the victims' mother ever left them alone. The State responds that the trial court acted within its discretion in ruling that the evidence was irrelevant. Smith's argument is that he was entitled to discover whether other persons had access to the children and thus time to commit the sexual abuse.

A determination of relevance will only be reversed for a clear abuse of discretion. *See Frank v. State*, 992 S.W.2d 756 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd). The record reflects that

defense counsel was questioning the victims' mother about CPS investigations when he asked her if she had ever left the children alone. The record also reflects that the trial court believed Smith was attempting to admit specific allegations in CPS investigative reports, which were inadmissible, through questions to witness. Given the trial court's reasoning and the context of the question, we cannot say that the trial court clearly abused its discretion in finding the question irrelevant. Therefore, we overrule point of error five.

FACTUAL SUFFICIENCY

In his sixth point of error, Smith contends that the evidence is factually insufficient to show that he is guilty of aggravated sexual assault of R.S., J.S., G.S., and Ki.S. In particular, he alleges that the State failed to show penetration of his sons' anuses and of his daughter's vagina. In reviewing the factual sufficiency of the evidence to support a conviction, we are to view "all the evidence without the prism of 'in the light most favorable to the prosecution.' " *See Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996) (citing *Stone v. State*, 823 S.W.2d 375, 381 (Tex. App.—Austin 1992, pet. ref'd, untimely filed)). We may only set aside the verdict if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See id.* In performing this review, we are to give "appropriate deference" to the fact finder. *Id.* at 136. We may not reverse the fact finder's decision simply because we may disagree with the result. *See Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997). Instead, we may find the evidence factually insufficient only where necessary to prevent manifest injustice. *See id.*

1. R.S.

The evidence shows that in November 1997, R.S. denied sexual abuse to CPS investigators, although his grandmother reported to them that he masturbated. A physical exam at that time revealed anal funneling, which is consistent with anal penetration. Further, a doctor testified that R.S.'s anal folds were thickened and irregular. R.S.'s grandmother, Debra Wilson, testified that in January 1998, R.S. admitted to her that his father had abused him. In his outcry, he said that his father had played with him, pulled down his pants, put him on the mattress, and "stuck his thing in his butt." At trial, R.S. was reluctant to testify and

originally answered that he forgot what his father had done. He ultimately testified that his father had touched his private parts, but only with his hands.

2. J.S.

The State's outcry witness for J.S. was his first grade reading teacher, Lillian Forester. She testified that J.S. was generally an unhappy, distressed child and was dirty and neglected. In November 1997, J.S. drew a picture of his favorite character in a book, the Big Bad Wolf, with a large penis and fecal matter coming out of its rectum. When talking with J.S. in his tutorial that day, J.S. explained that his brother G.S. was hurting J.S.'s heart by throwing rocks and sending a big dog after him. When asked did G.S. do anything else to hurt him, J.S. replied, "No. Big Glenn does." J.S. drew a picture and explained that Appellant "crawled in my window and hurt me. He used a ladder. I was in bed. He hurt me." J.S. pointed to his "rear end" when asked where Appellant had hurt him, and, pointing to the penis on the wolf, said that Big Glen (Appellant) had hurt him with this. The evidence also showed that the week before this outcry, J.S. had told his teacher that G.S. had "messed with him" in bed, that it hurt, and that he bled.

A physician and a physician's assistant both testified that J.S. suffered anal abrasions, thickening of the anal folds, and anal funneling, all consistent with penetration of the anus. Finally, J.S. testified before the jury that Appellant had touched his "peanuts" with his hands and touched his "butt" with his private part.

3. G.S.

G.S.'s grandmother, Debra Wilson, was also his outcry witness. She testified that in January 1998, G.S. told her about a time that he was downstairs watching television when Appellant called for him. Upstairs, Appellant rubbed his "ding-a-ling" against G.S.'s "ding-a-ling." He then flipped G.S. over and penetrated his anus. After this outcry, G.S. refused to speak about the incident with his grandmother. At trial, G.S. testified that his father had molested him by touching G.S.'s butt and his private with his hand, rubbing his private part on G.S.'s private part, and putting his private part in G.S.'s anus. He testified that the first person he told was his grandmother. A physician also testified that G.S. suffered from anal funneling.

4. Ki.S.

Finally, Ki.S.'s outcry witness was her mother, Kimberly Gotts. Gotts testified that in April 1996, she arrived home to find Ki.S. and Appellant in the apartment while her sons played outside. Ki.S. was sitting on the sofa, looking "spaced-out" and rocking. Later, when Gotts asked Ki.S. if her brothers had hurt her, Ki.S. responded that her father put his "pee-pee" into her "pee-pee." A medical examination of Ki.S. showed tears to the hymenal ring in her vagina, an abnormality for a child Ki.S.'s age. The damage was consistent with partial penetration by an adult penis. A subsequent medical examination (after Appellant allegedly stopped having any contact with the children) showed this vaginal damage and new damage to the anus. Additionally, her brother, R.S., testified at trial that he once saw his father lying on top of Ki.S., naked.

5. Law

The State may prove penetration by circumstantial evidence. *See Villalon v. State*, 791 S.W.2d 130, 133 (Tex. Crim. App. 1990). A child is not required to be able to testify about penetration, and he or she is not expected to testify with the same ability and clarity as is expected of mature and capable adults. *See id.* at 133-34. Evidence of the slightest penetration is sufficient to uphold a conviction, so long as it has been shown beyond a reasonable doubt. *See Luna v. State*, 515 S.W.2d 271, 273 (Tex. Crim. App. 1974). The court of criminal appeals has defined penetration as "to enter into" or "to pass through." *Vernon v. State*, 841 S.W.2d 407, 409 (Tex. Crim. App. 1992). "[P]ushing aside and reaching beneath a natural fold of skin into an area of the body not usually exposed to view, even in nakedness" is such a penetration. *Id.*

Here, the evidence detailed above shows that Appellant's sons' anuses and his daughter's vagina were penetrated. Pointing to inconsistencies in the testimony, evidence of visits by CPS before April 1996 in which no sexual abuse was indicated, and his absence from the home during his residential drug treatment and incarceration, Appellant suggests that someone else molested his daughter and that his sons were led into allegations of abuse. Because we must give appropriate deference to the factfinder, *see Clewis v. State*, 922 S.W.2d at 136, we can only assume that the jury disbelieved Appellant's theories of the case. Further, our review of the entire record does not reveal that the verdicts are so contrary to the overwhelming

weight of the evidence as to be clearly wrong and unjust. *See id.* Accordingly, we overrule point of error six.

Having overruled all six of Appellant's points of error, we affirm each of his four convictions.

/s/ Ross A. Sears
Justice

Judgment rendered and Opinion filed November 2, 2000.

Panel consists of Justices Robertson, Sears, and Hutson-Dunn.[*]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[*] Senior Justices Sam Robertson, Ross A. Sears, and D. Camille Hutson-Dunn sitting by assignment.