**Affirmed and Opinion filed December 6, 2001.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-00-01022-CR**

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**DANIEL DALE FRAZIER, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 23rd District Court**
**Brazoria County, Texas**
**Trial Court Cause No. 35,428**

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## O P I N I O N

Appellant, Daniel Dale Frazier, was indicted on three counts of indecency with a child by contact. Appellant was convicted by a jury of counts one and three of the indictment and sentenced to ten years' imprisonment on each count, with the sentences to run concurrently. In one point of error, appellant contends the evidence is insufficient as to the third count of the indictment, charging indecency with Y. B., and thus the case should be remanded for a new punishment hearing. We affirm.

On June 27, 1998, after returning from a barbeque at which appellant had played on a trampoline with three-year old Y. B., the child's mother noticed inflammation in her

daughter's vaginal area. After questioning, Y. B. disclosed that appellant had touched her genitalia. Dr. Lucy Ryan, a pediatrician who subsequently examined Y. B., verified that the child's symptoms were consistent with sexual abuse, but acknowledged that her diagnosis was based, in part, on statements made by Y. B.'s mother. At trial, a then five year old Y. B. could remember nothing of appellant's sexual contact. Appellant argues that Y. B.'s outcry was not spontaneous, but rather was elicited by her mother's questioning. As a consequence, appellant argues in his only point of error that, given the alleged unreliability of Y. B.'s claims, the evidence was insufficient to support his conviction as to that charge. Appellant's point of error does not specify whether he is asserting legal or factual sufficiency; we will consider both. *See In re C.F.*, 897 S.W.2d 464, 472 (Tex. App.—El Paso 1995, no writ).

When both the legal and factual sufficiency of the evidence are challenged, we must first determine whether the evidence is legally sufficient to support the verdict. *Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996). When reviewing legal sufficiency, we view the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000). We consider all of the evidence whether properly or improperly admitted. *Green v. State*, 893 S.W.2d 536, 540 (Tex. Crim. App. 1995); *Chambers v. State*, 805 S.W.2d 459, 460 (Tex. Crim. App. 1991). Moreover, in determining legal sufficiency, we do not examine the fact finder's weighing of the evidence, but merely determine whether there is evidence supporting the verdict. *Clewis*, 922 S.W.2d at 132 n.10. Finally, if a legal sufficiency challenge is sustained, a judgment of acquittal must be rendered. *Clewis*, 922 S.W.2d at 133.

Appellant was indicted for the offense of indecency with a child by contact. A person commits this offense if he engages in sexual contact with a child younger than seventeen years of age who is not his spouse. TEX. PEN. CODE ANN. § 21.11(a)(1) (Vernon Supp. 2001). "Sexual contact" means any touching, including that effected through clothing, of

the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person. *Id.* § 21.11(c). The requisite intent to arouse or gratify one's sexual desire can be inferred from conduct, remarks, and an examination of the surrounding circumstances. *McKenzie v. State*, 617 S.W.2d 211, 216 (Tex. Crim. App. 1981). Appellant contends that, absent Y. B.'s outcry to her mother, the evidence was insufficient to show that he engaged in sexual contact with the child.

Even were we to disregard all testimony adduced from Y. B. herself, the remaining evidence supports a finding of the essential elements of indecency with a child. First, the record shows that Y. B. was five years old and unmarried at the time of trial. In addition, another child on the trampoline that day testified that appellant had made contact with Y. B.'s vaginal area. Further, testimony was adduced that, contrary to appellant's contention, Y. B. had not been injured at the barbeque while cavorting on the trampoline. Finally, her pediatrician confirmed that the vaginal inflammation observed upon Y. B.'s return home was consistent with sexual abuse. Taken in a light most favorable to the prosecution, a rational juror could have found, beyond a reasonable doubt, that appellant made sexual contact with Y. B..

In contrast to legal sufficiency, a factual sufficiency review requires the court to view the evidence in a neutral light. *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000) (citing *Clewis v. State,* 922 S.W.2d 126, 134 (Tex. Crim. App. 1996)). We conduct such a review by examining the evidence weighed by the fact finder that tends to prove the existence of an elemental fact in dispute and compare it with evidence tending to disprove that fact. *Id.* at 7. Under a factual sufficiency review, a court will set aside a verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Id.*

As aforementioned, an eyewitness testified that appellant made sexual contact with Y. B. while both were playing on a trampoline. Appellant, buttressed by the testimony of his brother and nephew, flatly denies this contention and instead argues that Y. B. was

injured in a fall from the trampoline. However, appellant's brother was admittedly intoxicated at the barbeque and did not watch appellant throughout, and none of the other persons present recollect seeing appellant's nephew. Medical testimony established at trial that, while the inflammation in Y. B.'s genital area could have been caused by many things other than touching, it could not have been caused as appellant claimed. The jury, as sole judge of the credibility of the witnesses' testimony and the weight to be given thereto, could thus have determined that Y. B.'s injuries were caused by appellant's touch. The evidence is not so weak as to render the verdict clearly wrong and manifestly unjust or against the great weight and preponderance of the evidence. *See Johnson*, 23 S.W.3d at 11. Appellant's contention that the evidence is legally and factually insufficient to support the verdict is overruled.

Accordingly, the judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed December 6, 2001.
Panel consists of Justices Anderson, Hudson, and Frost.
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