Affirmed and Opinion filed December 23, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00016-CR

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ALAN GERARD COLANTUONO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 94-18447

O P I N I O N

Appellant was charged by indictment with the offense of attempted sexual assault. In a non-jury trial, appellant was convicted of the charged offense. The trial court assessed punishment at ten years confinement, probated for ten years. Appellant raises two points of error. We affirm.

I. Legal Sufficiency

The first point of error contends the evidence is legally insufficient to sustain the conviction. Specifically, appellant argues the evidence is insufficient to establish the element

of intent.

A. Standard of Review

The standard of review to determine the sufficiency of the evidence is whether, viewing all of the evidence in the light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime charged. *See Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The standard is applicable to both direct and circumstantial evidence cases. *See Geesa v. State*, 820 S.W.2d 154 (Tex. Crim. App.1991).

Relative to the element of intent, our law provides that intent can be inferred from the acts, words, and conduct of the accused. *See Skillern v. State*, 890 S.W.2d 849, 880 (Tex. App.--Austin 1995, pet. ref'd).

B. Factual Summary

In the light most favorable to the prosecution, the evidence establishes the following: The complainant contacted America's Finest to have the carpet in her home cleaned. On July 21, 1994, appellant came to the complainant's home to clean the carpets. During the course of the carpet cleaning, appellant made several comments to the complainant. These comments had sexual connotations.

While appellant cleaned the carpets, the complainant spent most of her time sitting on the sofa downstairs. At some point, appellant called the complainant to the upstairs master bedroom. The complainant, believing the carpet was perhaps torn, complied with appellant's request. Upon entering the bedroom, appellant told the complainant to get on the bed. The complainant refused and turned around to run back downstairs. Appellant grabbed the complainant, picked her up and placed her on the bed. Appellant straddled the complainant's body and used his hands to hold the complainant's arms. Appellant began rubbing his penis up and down, imitating intercourse, on the complainant's abdomen, and fondled her breasts. While still on top of the complainant, appellant exposed his erect penis.

Appellant got off the bed and received a notice from his pager. Appellant stated he had to go clean another house. However, before he left, the complainant asked appellant to write down his name and telephone number. The complainant testified she obtained appellant's name and telephone number by leading appellant to believe she wanted him to date her sister. The complainant testified that she needed appellant's name and phone number to identify him to the police. Appellant wrote his name and telephone number and left the complainant's home. After appellant left, the complainant locked her home, and called her husband and the police.

C. Analysis

We will begin our analysis by setting forth the essential elements of attempted sexual assault. A person commits the offense of sexual assault if the person intentionally or knowingly: (A) causes the penetration of the anus or female sexual organ of another person by any means, without that person's consent; (B) causes the penetration of the mouth of another person by the sexual organ of the actor, without that person's consent; or (C) causes the sexual organ of another person, without that person's consent, to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor. TEX. PENAL CODE ANN. § 22.011(a)(1) (Vernon 1994).

A person commits criminal attempt when that person, with specific intent to commit an offense, does an act amounting to more than mere preparation that tends, but fails, to effect the commission of the offense intended. TEX. PENAL CODE ANN. § 15.01 (Vernon 1994). This statute does not require that every act short of actual commission be accomplished in order for one to be convicted of an attempted offense. *See Cody v. State*, 605 S.W.2d 271, 273 (Tex. Crim. App. 1980). The indictment alleged the act amounting to more than mere preparation by stating appellant did: "force the complainant to her bed, hold her down and while on top of the complainant exposed his penis."

When these elements are considered in the light most favorable to the prosecution, we find the following evidence compelling. Appellant, a stranger to the complainant, called the complainant to her bedroom, grabbed her, and placed her on the bed. Appellant then straddled

the complainant, held her arms, began rubbing his penis on her, imitating intercourse, fondled her breast, and exposed his erect penis. From this conduct, we find appellant had the intent to sexually assault the complainant. *See Skillern*, 890 S.W.2d at 880. Similar evidence has been held sufficient to support a conviction for the offense of attempted sexual assault. *Johnson v. State*, 633 S.W.2d 888, 889 (Tex. Crim. App. 1982); *See Hackbarth v. State*, 617 S.W.2d 944, 945-946 (Tex. Crim. App. 1981); *Walker v. State*, 859 S.W.2d 566, 569 (Tex. App.--Waco 1993, pet. ref'd). The first point of error is overruled.

II. Factual Sufficiency

The second point of error contends the evidence is factually insufficient to sustain the conviction. As was argued above, appellant again challenges the evidence to support the element of intent.

A. Standard of Review

When we determine whether the evidence is factually sufficient we employ the standard announced in *Clewis v. State* and view all of the evidence without the prism of "in the light most favorable to the prosecution" and reverse the conviction only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). The *Clewis* standard was discussed in *Cain v. State*, 958 S.W.2d 404 (Tex. Crim. App. 1997), which also stressed deference to the fact finder. A court of appeals may not reverse a trial court's decision simply because it disagrees with the result. Rather the court of appeals must defer to the trial court and may find the evidence factually insufficient only where necessary to prevent manifest injustice. *Id.* at 407. In other words, the appellate court must avoid substituting its judgment for the fact finder's. *Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App. 1997); *Clewis*, 922 S.W.2d at 133. This level of deference ensures that the appellate court will not substantially intrude upon the fact finder's role as the sole judge of the weight and credibility of witness testimony. *Santellan*, 939 S.W.2d at 164.

B. Factual Summary

The record evidence when not viewed in the light most favorable to the prosecution reveals the following: The complainant, a newlywed, was at home alone while her husband was at work. Appellant, a stranger to the complainant, arrived at the complainant's home to clean her carpets. Appellant and the complainant struck up a conversation and viewed some photograph albums. There was also a conversation about the possibility of appellant dating the complainant's sister when she came for a visit. Appellant did a good job cleaning the carpets. At some point, appellant picked up the complainant and put her on the bed. The complainant asked appellant for his name and telephone number so he could be reached when the complainant's sister came to town. Appellant provided that information and left. The complainant locked the door, and called her husband and the police regarding this incident.

C. Analysis

The principal difference between the versions of the events is whether the complainant consented to appellant's sexual advances.[1] The complainant testified appellant's sexual advances were not invited or solicited; that she was forcefully picked up by appellant and placed on the bed; that appellant straddled her and held her arms; that appellant rubbed his penis against her and fondled her breasts; and that appellant exposed his erect penis.

Appellant's version is much tamer. He states the sexual interaction was consensual and included kissing.[2] However, his version does include picking up the complainant and placing her on the bed.

The question before us is whether appellant's version of the events is so overwhelming that his conviction is clearly wrong and unjust. *See Clewis*, 922 S.W.2d at 129. We find the evidence when viewed in the *Clewis* light, still preponderates in favor of the prosecution. Nothing in the complainant's version of the events is inconsistent with the record evidence.

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[1] Appellant did not testify. However, he gave a custodial statement, which includes his version of the events.

[2] The complainant admits kissing appellant. However, she states she kissed him because she feared she would be thrown down the stairs if she refused.

The trial court obviously chose to believe the complainant's testimony to some degree and to reject the version of events in appellant's statement. We are required to defer to the trial court's findings under these circumstances. *See Cain*, 958 S.W.2d at 407; *Santellan*, 939 S.W.2d at 164; *Clewis*, 922 S.W.2d at 133. In sum, we cannot say the conviction in the instant case is clearly wrong and unjust. The second point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed December 23, 1999.
Panel consists of Chief Justice Murphy and Justices Anderson and Baird.[3]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[3] Former Judge Charles F. Baird sitting by assignment.