Affirmed and Opinion filed March 23, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00442-CR

JOSEPH KEVIN LEJEUNE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 727,975

O P I N I O N

Joseph Kevin LeJeune, appellant, was found guilty of felony sexual assault of a child and sentenced by the jury to ten years' community supervision. He presents thirteen points of error on appeal, grouped into complaints regarding (i) the trial court's exclusion of certain evidence; (ii) the trial court's designation of the complainant's mother as the outcry witness; (iii) legal and factual insufficiency of the evidence, and (iv) the trial court's failure to grant a mistrial following an unsolicited statement from the complainant that appellant had attempted to sexually assault complainant's friend. We affirm.

Complainant, who was twelve years old at the time of the offense, was at her apartment pool with her friend and some other residents, including appellant. Appellant resided at the complex with his wife and two small children. Complainant testified that shortly after it started getting dark, appellant swam up behind her and grabbed her around the waist, groping and fondling her as he pulled her towards the other end of the pool. She stated she was too confused and frightened to scream, but that she kept looking at her friend trying to get her attention. Appellant penetrated her with his finger several times and attempted to penetrate her with his penis, at which point the complainant lied that her mom was on her way over and appellant let her go. Complainant swam back to her friend and they immediately left. Later that evening, complainant told her friend what had happened. At trial, appellant and his wife testified that nothing had transpired between appellant and complainant at the pool that evening.

Complainant did not tell her parents about the incident, but they noticed she was not acting like herself. She refused to go swimming, would only fall asleep with the television on, and was withdrawn. Complainant eventually broke down crying and told her parents about the assault, after they had confronted her about an allegedly sexually explicit comment she made to her younger brother regarding a television show. Her mother called the police and appellant was charged with aggravated sexual assault.

In his first eight points of error, appellant complains that the trial court erred in not allowing him to ask certain questions during his cross-examinations of complainant's mother, of the psychotherapist and of appellant's relative. Appellant sought to introduce evidence of complainant's prior sexual experience with a boy her age, her fears about her parents' relationship, the emotional stability of her home, and certain prior police reports filed by her mother. It was appellant's position that this evidence was admissible as it tended to establish a motive for complainant to fabricate accusations against appellant, and to rebut medical testimony that the complainant was suffering from post-traumatic stress disorder caused by the alleged sexual assault. Appellant contends the trial court's denial of these questions

violated his constitutional right to cross-examine witnesses. We will examine and discuss each proposed area of questioning separately under appellant's first eight points of error.

A trial court's decision to admit or exclude evidence is reviewed under an abuse of discretion standard. *Green v. State*, 934 S.W.2d 92, 101-102 (Tex. Crim. App. 1996), *cert. denied*, 117 S.Ct. 1561 (1997). A trial court is given wide discretion in determining the admissibility of evidence. *Breeding v. State*, 809 S.W.2d 661, 663 (Tex. App.-- Amarillo 1991, pet. ref'd). A trial court has not abused its discretion unless it has "acted arbitrarily and unreasonably, without reference to any guiding rules or principles." *Breeding,* 809 S.W.2d at 663. Exclusion of evidence does not result in reversible error unless the exclusion affects a substantial right of the accused. *Id.*; see TEX.R.APP. P. 44.2(b).

Appellant specifically complains that he was not allowed to question complainant's psychotherapist regarding complainant's alleged statement that she got into trouble for having sex with a boy her age a few months prior to this incident, or that she had a negative relationship with her mother and an upsetting home life. Appellant argues this was admissible for impeachment purposes and admissible under TEX. R. EVID. Rule 412(b)((a)(A) to rebut or explain the State's medical evidence by suggesting that complainant's post-traumatic stress disorder may have arisen not from a sexual assault but from complainant's stressful home life or from the earlier sexual relationship with a peer.

We note, however, that when appellant asked these questions *in camera* during trial, the therapist testified that in her opinion, the conflict between complainant and her parents, or a prior episode of sex with a peer, even one with a hypothetical "older man" years beforehand, would not have caused complainant's post-traumatic stress disorder. In fact, the therapist stated that in her opinion based on what the complainant had told her, there was no other possible cause for the disorder except the sexual assault incident with appellant. Furthermore, following the *in camera* presentation the trial court ruled that appellant *could* ask the psychotherapist in the jury's presence whether the parent-child conflicts could have caused the disorder.

We find no error by the trial court in refusing to allow appellant to question the psychotherapist about complainant's alleged prior sexual episode with a peer as a possible cause of the post-trauma stress disorder. Given the psychotherapist's answers to these questions during the *in camera* hearing, she clearly stated that based on the facts presented by complainant, the only possible cause was the trauma of appellant's sexual assault. Appellant's proposed line of questioning did not explain or rebut the therapist's medical records or diagnosis, and did not stand as an exception under Rule 412(b)(2)(A).

Nor do we find error by the trial court in excluding police reports made by complainant's mother of a single gunshot being heard in the neighborhood; of complainant's father requesting police to check on his family as no one was answering the telephone; of the mother reporting two juvenile males harassing her daughter at the pool; of the mother complaining of a neighborhood boy sitting on the stairs who stole a skateboard; a complaint of loud music, and a complaint by the mother that the father was drunk and that she didn't want the children upset. While appellant claims these reports establish sources of stress for complainant, we agree with the trial court that they had no application to the issues of the case, and appellant did not meet his burden of showing they were material and relevant.

In similar fashion, we find no error by the trial court in excluding evidence that "when [complainant] had a consensual sexual experience a few months prior to the alleged offense, she had gotten into trouble" with her mother, as argued by appellant in his brief. Appellant contends that under Rule 412(b)(2)(C), this evidence relates to complainant's motive or bias. It is unclear how this particular evidence would establish a motive for complainant to later fabricate the sexual assault episode when she was forced, according to appellant, to admit to her parents that she was no longer a virgin. If her parents were already aware of the prior sexual relationship, as according to the therapist's records and appellant's own argument, then no fabrication was necessary to explain any loss of virginity. Nor would such evidence be admissible under Rule 803(4) as reasonably pertinent to diagnosis or treatment, as there was no evidence that the prior sexual

relationship was "traumatic" in any respect, and the therapist had already testified outside the presence of the jury that in her opinion, the prior sexual relationship was not a cause of complainant's post-traumatic stress disorder.

While appellant argues that this issue is controlled by *Yzaguirre v. State*, 938 S.W.2d 127 (Tex. App. – Amarillo 1996, pet. ref'd), we disagree. In *Yzaguirre*, the trial court excluded testimony that the complainant's mother had chastised her son (the complainant) for comparing genitals with a male cousin. When the mother later discovered the defendant in bed with her son, the complainant first stated nothing had happened, then said the defendant had molested him. The defendant stated he had been napping when the complainant crawled into bed with him, and that it was the complainant who molested *him*. The court of appeals reversed, holding that the excluded testimony showed that complainant had been in trouble for inappropriate sexual behavior in the past and therefore had a motive to lie when caught a second time.

The controlling factual distinction between *Yzaguirre* and appellant's case here is that complainant was not "caught" in inappropriate behavior with the appellant in the pool; in fact, appellant denied the alleged event occurred. The compelling need for complainant to blame appellant for misadventure observed by a third party simply does not exist in the instant case, nor do we find that her parents' concern over her explanation of a provocative televison show to her younger brother rises to this level of a compelling event. The circumstances of this case are similar to those in *Wofford v. State*, 903 S.W.2d 796 (Tex. App. – Dallas 1995, pet. ref'd), where defendant sought to establish a motive for the complainant to fabricate sexual assault by showing she had offered sex in exchange for cocaine then filed charges against him when he refused to buy more cocaine. The court of appeals affirmed the exclusion of such evidence, holding that appellant could not impeach complainant's credibility with specific instances of prior misconduct, and that complainant's sexual history did not make it more likely that she would fabricate charges against him in retaliation for a refusal to buy more drugs.

In similar light, evidence of the complainant's prior sexual relationship with a peer and events or fears regarding her parents' relationship do not make it more likely that she would fabricate sexual assault charges against appellant in the instant case. No error has been shown, and appellant's first eight points of error are overruled.

Under points of error nine and ten, appellant complains of the trial court's designation of complainant's mother as the outcry witness. According to appellant, an individual at the pool known only as "Tim," should have been named as the outcry witness, as the complainant had told him that appellant "tried to do stuff" to her.

Under TEX. CODE CRIM. PROC. ANN. Art. 38.072 (Vernon Supp. 1999), a hearsay statement made by a child under twelves years of age , against whom a sexual assault was allegedly committed, is admissible if it is made to the first person eighteen years of age or older to whom the child made a statement about the offense. The statement must be "more than words which give a general allusion that something in the area of child abuse was going on." *Molina v. State*, 971 S.W.2d 676, 682 (Tex. App. – Houston [14th Dist.] 1998, no pet.), citing *Garcia v. State*, 792 S.W.2d 88, 91 (Tex. Crim. App. 1990). While arguably complainant's friend may have told "Tim" in detail about the offense, complainant herself only generally told him that appellant "tried to do stuff" to her. This was not a sufficient description of the sexual assault to constitute an outcry statement, and the trial court did not error in determining that complainant's mother was the outcry witness. *See Hayden v. State*, 928 S.W.2d 229 (Tex. App. – Houston [14th Dist.] 1996, pet. ref'd) (holding that the trial court did not err in finding a CPS caseworker to be the true outcry witness despite the child's earlier, more generalized statement to a school counselor). That complainant's friend may have given details of the offense to Tim is immaterial; under the statute, the statement must have been made by complainant herself. Appellant's ninth and tenth points of error are overruled.

By his eleventh and twelfth points of error, appellant raises legal and factual insufficiency of the evidence. As grounds, appellant re-states the testimony of each

witness, points out various inconsistencies among the witnesses, and argues that taken as a whole, the evidence is not credible to support the conviction.

The standard of review for testing legal sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Clewis v. State*, 922 S.W.2d 126, 132 (Tex. Crim. App. 1996). If there is evidence that establishes guilt beyond a reasonable doubt and if the factfinder believes the evidence, the reviewing court is not in a position to reverse the judgment on sufficiency of the evidence grounds. *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988). To review the factual sufficiency of the evidence, the reviewing court views all of the evidence without the prism of "in the light most favorable to the prosecution" and should set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). The appellate court should be appropriately deferential so as to avoid substituting its own judgment for that of the jury below. *Id*. at 133.

We find the evidence to be both legally and factually sufficient to support the conviction. While it is true that discrepancies existed in the evidence, it was up to the jury to weigh these discrepancies and the credibility of each witness to reach a verdict, and we cannot substitute our own testing of the credibility and inconsistencies. Appellant's eleventh and twelfth points of error are overruled.

In his thirteenth and final point of error, appellant contends that the trial court erred in failing to grant a mistrial following an unresponsive answer by the complainant during cross-examination. In answer to a question from appellant as to whether complainant stayed up all night and told her friend about what had happened, complainant had said, "Yes, but she told me that he had tried to do that to her--" at which point appellant had objected and requested an instruction to disregard and a mistrial. The trial court granted the objection and instructed the jury not to consider complainant's answer

for any purpose, but denied a mistrial. The trial court's instruction to the jury was sufficient to cure any harm appellant may have suffered as a result of the inadvertent testimony of complainant, and no error is shown. *See Coe v. State*, 683 S.W.2d 431, 436 (Tex. Crim. App. 1984). Appellant's thirteenth point of error is overruled.

The judgment is affirmed.

/s/ Sam Robertson
Justice

Judgment rendered and Opinion filed March 23, 2000.

Panel consists of Justices Robertson, Sears and Lee.[*]

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

[*] Senior Justices Sam Robertson, Ross A. Sears and Norman R. Lee, sitting by assignment.