



## Emry v. State

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### MEMORANDUM OPINION

A jury found, appellant, Bobby Wayne Emry, guilty of the offenses of aggravated sexual assault of a child<sup>1</sup> and indecency with a child<sup>2</sup> and assessed his punishment at confinement for seven and one-half years for the sexual assault offense and ten years, probated for ten years, for the indecency offense. In four issues, appellant contends that the evidence is legally and factually insufficient to support both of his convictions, the trial court abused its discretion in admitting the complainant's outcry statement offered by her mother, the trial court abused its discretion in admitting a "nurse's interpretation of the [complainant's] gesture as a statement of the child," and the trial court erred in instructing the jury that it "must unanimously agree as to the commission of different aggravated sexual assault statutory provisions."

We affirm. Factual and Procedural Background T.E., the mother of the complainant, testified that on the morning of April 12, 2007, she left the bedroom that she shared with appellant, her husband, and went to look for him. She proceeded to her children's bedroom, in which the complainant, her eleven-year-old daughter, slept, along with T.E.'s other daughter and son. The door to the children's bedroom was open, and T.E. looked toward the bed shared by the complainant and her sister. There, T.E. saw appellant standing next to the complainant's bed with his right hand on his penis and his left hand on the complainant's vagina. Appellant was wearing swimming trunks, which were down around his thighs, and the complainant's underwear had been pulled down to her mid-thigh. T.E. could see appellant's penis, and she thought that he was masturbating. The complainant, who was looking toward the television and lying on her side with her leg raised, started crying immediately when she saw T.E. T.E. then grabbed the complainant, and appellant stated and kept repeating, "It's not what you think." T.E. immediately took the complainant to another room in which Barney Starnes, a family friend, lived and asked the complainant if appellant had "put his private area in [her] private area." The complainant responded, "Yes," and also stated that appellant had been assaulting her for about one month. T.E. then told Starnes to lock the door to the room, and she called for emergency assistance and reported that appellant had assaulted the complainant and had then gone upstairs to the bathroom to clean up and take a shower.

On cross-examination, T.E. testified that appellant had adopted the complainant when she was three-years old and she and appellant had two other children together. T.E. explained that the complainant shared a bed with her sister and that appellant assaulted the complainant while the other daughter, who is a "hard sleeper," was sleeping in the same bed. T.E. conceded that, when she walked into the bedroom, she did not know whether appellant's finger was in the complainant's



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vagina, but she maintained that appellant's hand was on the complainant's vagina.

The complainant testified that appellant had come into her room while she was watching television, climbed into bed, "pulled his private out," and tried to "stick it in [her]." She explained that as appellant pulled down her panties, his "private" was sticking out of his underwear. The complainant indicated that she referred to her vagina as her "private area" and referred to appellant's penis as his "private area." She noted that when she saw T.E. enter the room, she began crying. The complainant stated that appellant had been assaulting her for about one month, he had told her not to tell anyone, and she did not tell anyone because she was afraid that he would hurt her. On cross-examination, the complainant explained that she did not cry out during the assault because she was afraid that appellant would hurt her. She also explained that, although she had stated in a subsequent interview that appellant had not previously assaulted her, she did not understand the question at the time.

Texas City Police Department Detective P. Edinburg testified that he was assigned to investigate the allegation that appellant had sexually assaulted the complainant. Edinburg took a typewritten sworn statement and multiple video-taped statements from appellant. Each time, Edinburg advised appellant of his legal rights, and appellant indicated that he understood his legal rights and agreed to give the statements. Edinburg never threatened or coerced appellant or promised appellant anything. In his typewritten statement, appellant admitted that, on the morning at issue, he noticed that the complainant was awake and watching television while the other children were asleep. He walked over to her bed, gave her a hug and kiss, and "felt [her] up," inappropriately touching her.

Appellant further admitted that he touched the complainant on her "butt and on the inside of her thighs," he pulled her panties down in the back, he might have had his "hands in [his] pants," and his penis could have been exposed. Also, while he had his hands in his pants touching his penis, he may have touched the complainant's vagina when she lifted her leg up, but "she had her panties on the whole time." Edinburg stated that appellant was agitated and frustrated while giving his written statement and that he stood up when he admitted that he "felt up" the complainant.

On cross-examination, Edinburg agreed that appellant had consistently denied "feeling up" the complainant during his other videotaped statements. Also, Edinburg observed the complainant's videotaped statement at the Children's Assessment Center and noted that, during the interview, she was not crying and had calmed down from earlier in the day. Edinburg agreed that the complainant's statement during this interview that she had not been sexually assaulted before did not conform with her other statements that appellant had been assaulting her for about one month.

Texas City Police Officer L. Jackson testified that he responded to a telephone call regarding the sexual assault and met with T.E., who was standing at the front door and was frantic and upset. Jackson then met with appellant, who appeared to have just taken a shower. Appellant then told Jackson, "It's not what you think happened. It didn't happen like she saw it." Jackson then met with the complainant, who was "emotionless" and "despondent."



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Nellie Loewen, a sexual assault examiner, testified that the complainant told her that appellant had entered her room when she was awake and watching television while her siblings slept. Appellant, who was wearing boxers, "stuck[] it out" of the slot and came into her bed. When the complainant tried to push appellant off of her, appellant pulled down her panties and "started putting his stick in [her private]." Her mother then came into the room and saw appellant with "his private out." Loewen noted that the complainant had no injuries to her hymen, but she had red marks and was experiencing pain on the inner part of her labia minora. Also, Tanya Dean, a forensic scientist at the Texas Department of Public Safety, testified that she found no semen on the complainant's panties, bed sheets, or t-shirt.

Appellant testified that his relationship with T.E. had been shaky. Because T.E. had been sexually assaulted as a child, T.E. had talked to him on multiple occasions about how she expected him to protect all of the children. Appellant stated that he loved the complainant, and he denied assaulting her. He explained that on the morning in question, he went downstairs, saw the children's bedroom door open, and went in to check on them. The complainant was awake and watching television right next to her sister. Appellant leaned down and gave the complainant a hug. He then patted her on the "butt," said good morning, and hugged and kissed her. When the complainant rolled over, his hand rolled off of her behind "right onto her thigh." When she rolled back onto her stomach, appellant saw a motion through the crack of the door and met with T.E. outside the door. Appellant denied touching the complainant's panties.

Appellant stated that Detective Edinburgh aggressively interrogated him and when appellant tried to explain to Edinburgh what had happened, he became frustrated. Appellant explained that he then said, "What do you want me to tell you, is that I felt up my daughter? Is that what you want to hear?" In response, Edinburgh said, "Well, no. How about touching her inappropriately. Does that sound more reasonable or more like what you did?" Appellant agreed, "I guess." Appellant explained that at the time, the officers had made him feel as if he had touched the complainant inappropriately. Appellant denied ever having touched the complainant's vagina. Appellant stated that in the morning after the incident, he had washed his hair but did not take a shower. On cross-examination, appellant conceded that he had been given the opportunity to review his written statement, but he asserted that he did not read some of the statements because he was upset.

### Legal and Factual Sufficiency

In his first issue, appellant argues that the evidence is legally and factually insufficient to support both of his convictions because there is "absolutely no medical, physical, or forensic scientific evidence," there is no testimony that he had "an erect penis when confronted by his wife, it is undisputed that the complainant's sister slept in the same bed throughout the incident, T.E. did not see his "penis or his finger in [the complainant's] vagina," and the complainant's testimony that he assaulted her while she was lying on her side watching television "is contradicted by the testimony relating to the physical layout of the room and the television." Appellant asserts that he testified to



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"the important facts and circumstances surrounding his supposed confession" and, thus, there exists "conflicting evidence" on this point. In sum, appellant asserts that the complainant's "story is inconsistent with the reality of the sleeping situation in the bedroom, the physical layout of the room, and the intense coercion practiced by [T.E] in an attempt to keep [appellant] away from the family."<sup>3</sup>

We review the legal sufficiency of the evidence by considering all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007) (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2788-89 (1979)). In doing so, we give deference to the responsibility of the fact-finder to fairly resolve conflicts in testimony, to weigh evidence, and to draw reasonable inferences from the facts. *Id.* However, our duty requires us to "ensure that the evidence presented actually supports a conclusion that the defendant committed" the criminal offense of which he is accused. *Id.*

In a factual sufficiency review, we view all the evidence in a neutral light, both for and against the finding, and set aside the verdict if the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, i.e., that the verdict seems "clearly wrong and manifestly unjust," or the proof of guilt, although legally sufficient, is nevertheless against the great weight and preponderance of the evidence. *Watson v. State*, 204 S.W.3d 404, 414-15 (Tex. Crim. App. 2006). We note that a jury is in the best position to evaluate the credibility of witnesses, and we afford "due deference" to the jury's determinations. *Marshall v. State*, 210 S.W.3d 618, 625 (Tex. Crim. App. 2006). Although we should always be "mindful" that a jury is in the best position to pass on the facts and that we should not order a new trial "simply because [we] disagree[ ] with the verdict," it is "the very nature of a factual-sufficiency review that . . . authorizes an appellate court, albeit to a very limited degree, to act in the capacity of a so-called 'thirteenth juror.'" *Watson*, 204 S.W.3d at 414, 416-17. Thus, when an appellate court can "say, with some objective basis in the record, that the great weight and preponderance of the (albeit legally sufficient) evidence contradicts the jury's verdict[,] . . . it is justified in exercising its appellate fact jurisdiction to order a new trial." *Id.* at 417.

A person commits the offense of aggravated sexual assault of a child if the person intentionally or knowingly causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor, and the child is younger than fourteen years of age. Tex. Penal Code Ann. § 22.021(a)(1)(B)(iii), (a)(2)(B) (Vernon Supp. 2008). A person commits the offense of indecency with a child by contact if the person, with a child younger than 17 years and not the person's spouse, whether the child is of the same or opposite sex, engages in sexual contact with the child or causes the child to engage in sexual contact. See *id.* § 21.11(a)(1) (Vernon 2003). "'Sexual contact' means the following acts, if committed with the intent to arouse or gratify the sexual desire of any person: (1) any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a child." See *id.* § 21.11(c)(1).



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We note at the outset that the testimony of a complainant, standing alone, may be sufficient to support a conviction for sexual assault. *Jordan-Maier v. State*, 792 S.W.2d 188, 190 (Tex. App.--Houston [1st Dist.] 1990, pet. ref'd); *Ruiz v. State*, 891 S.W.2d 302, 304 (Tex. App.--San Antonio 1994, pet. ref'd). Here, the complainant testified that appellant came into her bedroom while she was watching television, climbed into bed, pulled her panties down, "pulled his private out," and tried to "stick it in [her]." She indicated that she referred to her vagina as her "private area" and referred to appellant's penis as his "private area." After T.E. stopped the assault and removed the complainant to another room, the complainant told T.E. that appellant had been assaulting her for about one month, she had not told anyone, and she did not cry out during the assault because she was afraid that appellant would hurt her. She also stated that when she had stated in an interview that appellant had not previously assaulted her, she had not understood the question at the time.

In addition, the State presented eyewitness testimony by T.E. that substantiated the complainant's testimony. T.E. testified that she saw appellant standing next to the complainant's bed with his swimming trunks pulled down and his right hand on his penis and his left hand on the complainant's vagina. T.E. saw appellant's penis and that the complainant was lying on her side with her leg cocked up and panties pulled down. T.E. immediately took the complainant to another room, and, in response to T.E.'s questioning, the complainant confirmed that appellant had "put his private area in [her] private area" and that appellant had been assaulting her for about one month. Although T.E. agreed that she could not tell whether appellant had his finger in the complainant's vagina at the time that she walked into the room, she consistently testified that appellant's hand was on the complainant's vagina.

Moreover, Detective Edinburgh testified that he took a typewritten sworn statement and multiple video-taped statements from appellant. In his typewritten statement, appellant admitted that he had "felt up" and touched the complainant on her "butt and on the inside of her thighs," he may have had his "hands in [his] pants," and his penis could have been exposed. When he pulled the complainant's panties down in the back, he touched her on the "butt." Also, while he had his hands in his pants touching his penis, he touched the complainant inappropriately, and he may have touched her vagina when she lifted her leg up, but "she had her panties on the whole time."

We recognize that appellant denied sexually assaulting the complainant and he testified that some of the admissions he had made in his typewritten statement were not truthful and a product of Edinburgh's alleged aggressive interrogation. However, the trier of fact is the sole judge of the weight and credibility of the evidence, and, based upon the testimony of the complainant, T.E., and Edinburgh, the jury was entitled to resolve any credibility issues against appellant. See *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000); *Robles v. State*, 104 S.W.3d 649, 652 (Tex. App.--Houston [1st Dist.] 2003, no pet.). We also recognize that, but for the testimony that there was some redness on the complainant's labia minora, there was no significant medical, physical, or forensic scientific evidence introduced to show that appellant had committed the sexual assault. However, under the circumstances, the lack of medical or DNA evidence did not render the evidence supporting



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appellant's conviction legally insufficient. See *Washington v. State*, 127 S.W.3d 197, 205 (Tex. App.--Houston [1st Dist.] 2003, pet. ref'd, untimely filed) ("The jury could have reasonably believed that [the complainant] was sexually assaulted, but that, due to the circumstances of the assault, there was no physical evidence of the assault remaining.").

Thus, viewing all the evidence in the light most favorable to the jury's verdict, we conclude that a rational trier of fact could have found the essential elements of the offenses beyond a reasonable doubt. Accordingly, we hold that the evidence is legally sufficient to support appellant's convictions.

Although appellant does not make any specific argument as to his factual sufficiency contention, we note that he asserts that the complainant's and T.E.'s testimony "is contradicted by the testimony relating to the physical layout of the room and the television." Appellant also asserts that he presented "conflicting evidence" on his "supposed confession" by explaining "the important facts and circumstances" surrounding his statement. Finally, appellant asserts that T.E. coerced the complainant into making the allegations.

However, we again note that the jury, as the sole judge of the credibility of witnesses and the weight to be given to their testimony, was entitled to resolve any credibility issues against appellant. See *Johnson*, 23 S.W.3d at 7; *Robles*, 104 S.W.3d at 652. Thus, the jury was free to believe or disbelieve appellant's testimony that T.E. coerced the complainant into making false accusations against him. Also, because of the circumstances presented in this case, the lack of DNA or other physical evidence does not render the evidence supporting appellant's conviction factually insufficient. See *Washington*, 127 S.W.3d at 205.

We conclude, viewing the evidence neutrally, that the evidence is not so weak that the verdict is clearly wrong or manifestly unjust or that the proof of guilt is against the great weight and preponderance of the evidence. Accordingly, we hold that the evidence is factually sufficient to support appellant's convictions.

We overrule appellant's first issue.

### Outcry Statement

In his second issue, appellant argues that the trial court abused its discretion in admitting the complainant's outcry statement offered through T.E. and that T.E. should have been "prevented from testifying about what [the complainant] told her regarding the crime" because this outcry statement was not reliable.

An outcry statement made by a child abuse victim may be excepted from the general preclusion of hearsay evidence. Tex. Code Crim. Proc. Ann. art. 38.072 (Vernon 2005). An admissible outcry statement is defined as the victim's statements made to the first person, other than the defendant, 18



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years of age or older, which describe the alleged offense. Id. § (2)(a). Article 38.072 applies to sexual offenses under chapter 21 of the Penal Code, including indecency with a child, and assaultive offenses under chapter 22 of the Penal Code, including sexual assault, when the offenses are committed against a child 12 years of age or younger. Id. § 1. The statute requires that "the trial court find, in a hearing conducted outside the presence of the jury, that the statement is reliable based on time, content, and circumstances of the statement" and that "the child testifies or is available to testify at the proceeding in court or in any other manner provided by law." Id. § 2(b)(2), (3). "The Court of Criminal Appeals has construed the statute to apply to the first adult to whom the complainant makes a statement that 'in some discernible manner describes the alleged offense.'" *Bargas v. State*, 252 S.W.3d 876, 894 (Tex. App.--Houston [14th Dist.] 2008, no pet.) (quoting *Garcia v. State*, 792 S.W.2d 88, 91 (Tex. Crim. App. 1990)). A trial court's designation of an outcry witness will be upheld when supported by the evidence, and a trial court has broad discretion in determining the admissibility of such evidence. *Garcia*, 792 S.W.2d at 92.

Here, the trial court conducted a hearing on the admissibility of the complainant's outcry statement to her mother and, at the conclusion of the hearing, found that the "outcry witness and the statement [are] reliable." At the hearing, T.E. testified that, immediately after seeing appellant assault the complainant, she pulled the complainant into a separate room while she was still crying and upset. When T.E. questioned her as to what had happened and whether appellant had stuck his private part into her, the complainant then told T.E. what had happened and stated that appellant had sexually assaulted her. We conclude that the complainant's account of the abuse, as relayed to T.E., contained sufficient information about the nature of the acts and the perpetrator to meet the requirements of article 38.072. Accordingly, we hold that the trial court did not abuse its discretion in admitting T.E.'s challenged testimony concerning the complainant's outcry statement.

We overrule appellant's second issue.

### Admission of Nurse's Testimony

In his third issue, appellant argues that the trial court abused its discretion in admitting "the nurse's interpretation" of the complainant's gesture "as a statement of the child" under Texas Rule of Evidence 803(4)<sup>4</sup>

because although "verbalized statements by the child are admissible for the purpose of medical diagnosis" under rule 803(4), a nurse's interpretations of a child's gestures is not admissible. Appellant specifically complains about State's Exhibit 36, a sexual assault examination forensic report form prepared by Nellie Loewen, which includes the following remarks:

HISTORY OF ASSAULT: (Patient's description of pertinent details of assault . . . ) Patient states that "my daddy and mommy, they waked up at 5:30 this morning and then he, Bobby my daddy, came in our room and my sister and brother were asleep. He came by my side because I was awake and



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watching T.V. Wearing just boxers, he has this slot it has a little hole, then he stuck it out. I was wondering what are you going to do (clarified patient did not verbalize this out loud).

(Emphasis added).

During its direct examination of Loewen, the State asked her to explain the remark "clarified patient did not verbalize this out loud," and the following exchange occurred:

[State]: And when you say this part right here, "clarified patient did not verbalize this out loud," what does that mean?

[Loewen]: I asked the patient, she goes: She said, I was wondering and I asked her--asked is that what you said out loud and she said no. That it was just something she had been wondering.

[State]: Okay. By this you mean she did not tell the defendant "I was wondering" and wondering what your're doing. It's just something she was thinking?

[Loewen]: Yeah.

In her testimony, Loewen explained that the challenged remark in the forensic report simply meant that Loewen confirmed with the complainant that she did not state to appellant that she was "wondering" what he was going to do. Thus, appellant's contention on appeal that the trial court erred in admitting a nurse's interpretation of the complainant's gestures is not supported by the record. Accordingly, we hold that the trial court did not err in admitting the challenged evidence in State's Exhibit 36.

We overrule appellant's third issue.

### Unanimity

In his fourth issue, appellant argues that the trial court erred in instructing the jury that it "must unanimously agree as to the commission of different aggravated sexual assault statutory provisions"<sup>5</sup> because, under the jury charge, "some jurors could have believed that contact occurred," while "other jurors could have believed that penetration occurred." He asserts that the jury charge was erroneous "by not requiring a unanimous verdict on either contact or penetration."<sup>6</sup>

In its charge to the jury, the court provided,

Now, if you find from the evidence . . . [appellant] . . . intentionally or knowingly cause[d] the contact or penetration of the sexual organ of [the complainant], a child who was then and there younger than 14 years of age and not the spouse of [appellant], by the sexual organ of [appellant], then you will find



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[appellant] guilty as charged in the indictment.

Pursuant to the above charge, the jury could have found appellant guilty only by finding that he caused his sexual organ to contact or penetrate the complainant's sexual organ. The language of the jury charge comported with Texas Penal Code section 22.021(a)(1)(B)(iii), which provides that a person commits aggravated sexual assault of a child by intentionally or knowingly causing "the sexual organ of the child to contact or penetrate" the person's sexual organ. See Tex. Penal Code Ann. § 22.021(a)(1)(B)(iii). "An allegation of 'penetration' of the sexual organ overlap[s] an allegation of 'contact' of the sexual organ because penetration of the genitals necessarily includes contact." *Santee v. State*, 247 S.W.3d 724, 728 (Tex. App.--Houston [1st Dist.] 2007, no pet.) (quoting *Vick v. State*, 991 S.W.2d 830, 834 n.2 (Tex. Crim. App. 1999)). "Thus, a jury that finds a defendant guilty of penetration of the sexual organ necessarily has determined unanimously that the defendant made contact with the sexual organ." *Id.* (citing *Patterson v. State*, 152 S.W.3d 88, 92 (Tex. Crim. App. 2004)); *Vick*, 991 S.W.2d at 834 n.2; *Tyson v. State*, 172 S.W.3d 172, 178 (Tex. App.--Fort Worth 2005, pet. ref'd).

Here, because a finding of penetration necessarily includes contact, the jury must have unanimously determined that appellant contacted the complainant's sexual organ with his sexual organ. Accordingly, we hold that the trial court did not err in submitting the charge in the disjunctive. See *Santee*, 247 S.W.3d at 728.

We overrule appellant's fourth issue.

### Conclusion

We affirm the judgments of the trial court.

Panel consists of Justices Jennings, Keyes, and Higley.

Do not publish -- See Tex. R. App. P. 47.2(b).

1. See Tex. Penal Code Ann. § 22.021 (Vernon Supp. 2008). Trial court cause no. 07CR1142; appellate cause number 01-07-01063-CR.

2. See Tex. Penal Code Ann. § 21.11 (Vernon 2003). Trial court cause no. 07CR1143; appellate cause number 01-07-01064-CR.

3. Appellant does not present specific arguments as to each conviction, so we will consider the arguments as to both convictions together.

4. Texas Rule of Evidence 803(4) provides, Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or



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sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment. Tex. R. Evid. 803(4).

5. This issue pertains only to the aggravated sexual assault conviction in appellate cause number 01-07-01063-CR.

6. Appellant also makes a general complaint that the indictment alleged both contact and penetration, while the jury charge alleged contact or penetration. However, appellant does not cite any authority relevant to any complaint of a variance between the indictment and jury charge. Because appellant's substantive discussion and authority in his fourth issue relates solely to his complaint concerning unanimity, we limit our review to this issue. To the extent appellant attempted to raise a separate complaint about a possible variance between the indictment and jury charge, we hold he has waived such a complaint. See Tex. R. App. P. 38.1(h).

