By
The Honorable Pat Garza
Associate Judge
386th District Court
San Antonio, Texas

Evidence was factually sufficient to support the jury's verdict of two counts of aggravated sexual assault of a child, two counts of indecency with a child.[In the Matter of D.C.G.](06-1-6)

On November 23, 2005, the Houston Court of Appeals (14th Dist.), held that evidence was factually sufficient to support the jury's verdict of two counts of aggravated sexual assault of a child and two counts of indecency with a child, and respondent did receive effective assistance of a counsel.

¶ 06-1-6. **In the Matter of D.C.G.,** MEMORANDUM, No. 14-05-00164-CV, 2005 Tex.App.Lexis 9773 [Tex.App.— Houston (14th Dist.)] 11/23/05.

Facts: A jury found appellant, D.C.G., guilty of two counts of aggravated sexual assault of a child, two counts of indecency with a child, and one count of unlawful restraint. The trial court committed appellant to the Texas Youth Commission for an indeterminate sentence. In two issues, appellant claims the evidence is not factually sufficient to support the jury's true verdicts, and he received ineffective assistance of a counsel when his trial attorney failed to inquire about the venire panel's knowledge of an outcry witness in the case.

Held: Affirmed

Memorandum Opinion: Appellant, who was 13 years old at the time of trial, and complainant, B.E., who was 9 at the time of trial, are cousins. Appellant's mother, Cynthia Garza, and B.E.'s father, Rick Evans, are sister and brother. Appellant, with his family, and B.E., with his family, spent Thanksgiving 2002 in Kerrville, Texas with their grandparents, Ron and Alice Evans.

Located across the street from the grandparents' house is a building with a shed located behind that building. B.E. testified that he and appellant went into the unlocked shed where they found deer antlers and part of an arrow. They went back to the house to show their grandfather and B.E.'s father, Rick Evans, who were working on a car, what they had found. After that, B.E. and appellant returned to the shed.

B.E. testified about what occurred in the shed. B.E. fell in the mud and appellant tried to wipe the mud off of B.E.'s pants. Appellant then pulled down B.E.'s pants and hit them on the ground three times. B.E. grabbed his pants from appellant and put them back on. Appellant then told B.E. to pull his pants down again because he was going to try to wipe the dirt off with his hands. When B.E. refused, appellant, who was stronger than B.E., pushed him down and forced him to stay down. Then appellant "then put his private part inside of my backside." Appellant threatened B.E. that if he told anyone he would shoot him

with his .22 gun. Afterwards, B.E. put his pants back on and ran back to the house. B.E. did not tell anyone at that time what had happened.

B.E.'s mother, Melinda Evans, testified that a few days after Thanksgiving, B.E. was scared to be around appellant. B.E.'s behavior also changed. For example, he started having nightmares of greater severity, throwing fits, not eating, wetting his bed, not wanting to go to school, and not wanting to be out of her or his father's sight. Melinda talked to B.E. about it, and then she talked to Rick.

Rick spoke to B.E. about what had happened with appellant. Rick played pool with B.E. at home, which was their way of spending time together. When Rick asked B.E. what was bothering him, B.E. indicated that something had happened to him in Kerrville. Pointing to his penis, B.E. told Rick "[appellant] made me allow him to touch me there. And then made me touch him there."

In December 2002, B.E.'s parents took him to a professional counselor, Debra King, who is the executive and clinical director of Safe-T Counseling Center in Alvin, Texas. In the first session, King met with Melinda and was led to believe there had been possible sexual abuse. B.E. eventually disclosed the Kerrville incident to King. B.E. told King appellant had hurt his "insides." When she questioned B.E. about his "insides," he told her that he and appellant had been playing in a shed across the street from his grandparents' house when appellant started up "that gross stuff."

When King asked B.E. about "that gross stuff," B.E. told her appellant asked him to show appellant his private part and appellant showed B.E. his private part. B.E. described to King a scenario where appellant told him to take off his pants. When B.E. did not want to, appellant pushed him to the ground and took or yanked off B.E.'s pants. Appellant also took his pants down. B.E tried to leave, but appellant grabbed his ankles and restrained him. B.E. told King that "appellant put his private in my behind," i.e., that appellant inserted his penis into B.E.'s rectum. King diagnosed B.E. as suffering from post-traumatic stress disorder related to sexual abuse.

FACTUAL SUFFICIENCY OF THE EVIDENCE

In his first issue, appellant complains the evidence is factually insufficient to support the jury's true verdicts. Although juvenile proceedings are civil in nature, an adjudication requires proof beyond a reasonable doubt. *In re J.D.P., 85 S.W.3d 420, 426* (Tex. App.--Fort Worth 2002, no pet.]); *In re C.P., 998 S.W.2d 703, 707-08 (Tex. App.--Waco 1999, no pet.)*. When reviewing the factual sufficiency of the evidence, we need answer only one question: Considering all of the evidence in a neutral light, was the trier of fact rationally justified in finding guilt beyond a reasonable doubt? *Zuniga v. State, 144 S.W.3d 477, 484 (Tex. Crim. App. 2004)*. There are two ways in which the evidence may be insufficient. *Id.* First, when considered by itself, evidence supporting the verdict may be too weak to support the finding of guilt beyond a reasonable doubt. *Id.* Second, there may be evidence both supporting, and contrary to, the verdict. *Id.* Weighing all the evidence under this balancing scale, the contrary evidence may be strong enough that the beyond-a-reasonable-doubt standard could not have been met and the guilty verdict should not stand. *Id. at 485*.

The testimony of a child alone is sufficient to support a conviction for sexual assault. *Jensen v. State, 66 S.W.3d 528, 534 (Tex. App.--Houston [14th Dist.] 2002, pet. ref'd)*; *Ruiz v. State, 891 S.W.2d 302, 304 (Tex. App.--San Antonio 1994, pet. ref'd)*. Therefore, appellant's factual sufficiency challenge is premised on B.E.'s alleged lack of credibility. In support of his factual sufficiency challenge, appellant contends B.E.'s therapist, Debra King, testified that B.E.'s behavior could be due to anything. Appellant, however, takes King's comments out of context. The following exchange occurred between King and appellant's trial counsel:

> Q. Is there anything in your notes of 12-15-02, that shows that you inquired of this family or this mother about reasons why her child, the change in behavior after Thanksgiving, might have been due to anything other than sexual abuse?
>
> A. No. That's what I put the report as. That's what was reported to me. So if I had anything else reported I would have written down.
>
> Q. But you would have had a discussion in your notes that these behaviors could be due to anything else, correct?
>
> A. Correct.

Contrary to appellant's assertion, King's testimony was in response to questioning during cross-examination that she did not include in her report causes for the changes in B.E.'s behavior other than what Melinda had told her about the possible sexual abuse.

Appellant also claims King testified that interviewing techniques can lead a child to believe that a non-event actually occurred. The following testimony does not support this contention:

> Q. You indicated that you've read in several journals that there are studies that indicate that repeated interviewing techniques can lead a child to believe that [a] non-event actually occurred: is that correct?
>
> A. I have not researched it that that indicates that. Actually what I have read is repeated exposure [to] these types of things retraumatizes the child over and over.
>
> Q. But I am asking about children that believe that a non-event actually did occur. Is the research saying as far as your knowledge that one of the things that can cause a child to believe a non-event actually occurred could be repeated suggested interviewing techniques?
>
> A. I would say a very small percentage of research suggests that.

King testified that only "a very small percentage of research" even supports the proposition that interviewing techniques can lead a child to believe a non-event actually occurred. In any event, King testified that when interviewing, she does not "start accusing" anyone of having done anything or ask if something in particular occurred because that method is "overly suggestive." Instead, if a child makes a comment that does not make sense, King probes the child to learn what the comment means on that child's age level. Here, B.E. told King his "insides hurt." When King asked B.E. what he meant by that, he described what happened to him when he was playing in the shed with appellant.

Next, appellant points to the testimony of Dr. James Lukefahr, a pediatrician at the University of Texas Medical Branch in Galveston and the medical director of the ABC Center--a facility for examining children who may be victims of abuse or neglect--to support his contention that there were no definitive findings of trauma or injury that would support B.E.'s claim regarding what happened in Kerrville. While Dr. Lukefahr stated there were no findings of definitive trauma or injury, he explained a lack of such findings does not rule out sexual abuse because the anal area can heal quickly and disclosure of the abuse often occurs long after it has occurred:

> A. Well, quite frequently children make a disclosure of sexual abuse after quite a bit of time has lapsed since the incident occurred. And so that even if there were some sort of penetrating injury, frequently there's enough time to where bruising or abrasions or a finding of that nature would have time to heal. Plus there's some types of contact that really we

would not expect to leave a lot of dramatic physical findings.

Q. Two of the 12 charges in this case involve anal penetration. How is it that if he were anally penetrated twice could there be normal findings besides just the amount of time with that tissue in that part of the body?

A. The anal area has a very dramatic ability to heal itself, especially superficial injuries to the anus have been documented to heal very, very quickly. And actually very significant injuries have been documented to heal as quickly as 24 hours.

A. Well, its actually for the reason I mentioned it is quite unusual to have definitive physical findings in the anal area. . . .

Q. (By Mr. Walker) If it's unusual to have definitive medical findings, does that change the likelihood of whether or not any penetration took place?

A. Well, if we don't have definitive physical findings, then that doesn't rule out the possibility that there may have been some penetration and that either did not leave physical injury or that the physical injury was healed. That's particularly true in cases where the incident happened well before our examination.

Q. Do you remember the amount of time that passed between this incident and your examination?

A. Well, the estimate provided by the mother was that the last incident occurred in late November 2002. And my examination was on February 18, 2003. So that's close to three months.

Q. That would give the anal tissue plenty of time to heal?

A. Yes, it would.

Dr. Lukefahr's examination of B.E took place on February 18, 2003, nearly three months after the abuse was alleged to have occurred. Therefore, there was ample time for any injury to have healed.

Appellant also claims the testimony of the grandfather, Ron Evans, casts doubt on B.E.'s credibility. Appellant asserts that Ron testified that it was "only about 20 feet between the shed . . . and another building," and if such things had happened to B.E., he would have known. Contrary to appellant's assertion, there is no reference in the record to the distance between the shed, where the incident occurred, and the building behind which the shed is located.

The shed is located behind a building that was located across the street from the grandparents' house. Ron was working on car in the driveway at his house at the time the incident allegedly occurred. Without mentioning the specific distance between the shed and where he was in the driveway, Ron stated that he would have been able to hear any screaming or commotion in the shed because it is not that far away. However, an investigator for the Kerr County Sheriff's Office testified that adults across the street would not be able to monitor a teenager and young boy in the shed. Moreover, B.E. might not have screamed out because appellant told him he would shoot him if he told anyone, keeping B.E. quiet during the abuse.

Appellant also relies on testimony by Ron that he had observed B.E. lying in the past, but he had never known appellant to lie and appellant was a truthful person. Ron testified about the following:

A. [B.E.] would lie about where he had been while his father or mother would ask him or his grandmother would ask him he would break a toy or a bike and we would say what happened, [B.E.] Did you hit a rock, did you -- what happened here? He'd say, I don't know anything about it. Yet we knew he did. We witnessed it.

Q. Was this just normal kid behavior? I mean did Victoria and Marion and [appellant] do the same thing or was it different in [B.E.]?

A. At the time I just assumed it was normal. I didn't take anything seriously about it.

Q. But you're saying that you observed [B.E.] doing those things about lying. Did you observe [appellant] doing the same thing.?

A. No, I did not.

Ron testified about minor lies told by a small child, which he admitted he did not take seriously at the time. Moreover, Ron has never believed appellant sexually molested B.E., and wanted this resolved within the family without the authorities becoming involved. Ron testified that he does not like the embarrassment of a sexual assault allegation in his family. Trudy Davis, Executive Director of the Advocacy Center for Children in Galveston County, testified it is typical for family members not to believe what happened and to protect the guilty.

Relying on testimony by the grandmother, Alice Evans, and appellant's mother, Diane Garza, appellant argues B.E.'s testimony that the assault lasted 30 to 40 minutes lacks any credibility. Alice testified that she kept her eyes on B.E. while he was at her house because he was prone to getting into a lot of trouble. Cynthia testified that B.E. and appellant did not play together for more than 15 minutes at a time without her checking on them. However, Ron testified there "was no need" to watch the children:

Well, when Melinda was shopping my wife [Alice] and Cindy was [sic] watching the baby. The kids were just playing. They were playing around the house. Was there anybody sit [sic] there with their eyes specifically watching the children, no. There was no need to. . . . Everybody was having a good time. And they were all old enough that we didn't feel, I didn't feel that they needed to be watched continually except for the baby, and she was."

Moreover, B.E. did not testify that the assault occurred over a 30 to 40 minute period of time. B.E.'s therapist, Debra King, testified that based on B.E.'s description of the incident in Kerrville, it lasted "maybe 45 minutes" and doubted that it could have been as short as 15 minutes. However, there is no definitive evidence regarding the amount of time that elapsed during the incident. King's testimony is based on what was described to her by a young boy.

Appellant also asserts his testimony that B.E. became angry when appellant would not let him play with his PlayStation over Thanksgiving further puts B.E.'s credibility in doubt. According to appellant, B.E. was mad at him and promised to get revenge against him for not allowing B.E. to play with his PlayStation. B.E., however, testified that he never told appellant that he would lie in order to get him in trouble over the PlayStation.

Appellant also relies on his testimony that he "couldn't get away from [B.E.] Everywhere I went he'd follow me," and his sister's testimony (Krystal Garza) that B.E. wanted to be around appellant all weekend, to imply that if any abuse had occurred, B.E. would not have wanted to be around appellant at all. However, Trudy Davis, Executive Director of the Advocacy Center for Children in Galveston County, explained that a child who is a victim of sexual abuse desires a "normal" relationship with the offender and will enter into normal activities with the offender with the hope that the sexual abuse will

not occur again.

Appellant further argues B.E.'s own prior inconsistent statement given to a trained forensic interviewer in which he denied that appellant had ever touched him inappropriately is sufficient substantive evidence to support a reasonable doubt finding. First, we note that appellant has failed to provide a citation to the record to support this claim. In any event, Carmen Crabtree, a forensic interviewer at the Advocacy Center for Children, testified that she conducted a videotaped interview with B.E. on February 10, 2003, in which he told her that no one had touched him and he was not asked to touch anyone else. However, B.E. spoke of "some bad things [that occurred] in the shed in Kerrville." B.E. testified that he told Ms. Crabtree that appellant had touched him on his legs because he had dirt on them, but that when she asked him if appellant had touched him anywhere else, he said no. When Ms. Crabtree asked him if he was scared of anyone, he explained that he said no because he was "really nervous then."

Appellant was charged with terroristic threat, assault, injury to a child, and two counts of indecency with a child with regard to an alleged incident in the bathroom of B.E.'s home ("Galveston incident"). However, the jury found "not true" with regard to each of these offenses. B.E.'s therapist, Debra King, testified that B.E. recanted what he had told her about the Galveston incident when he knew the trial was coming up, but he never recanted the Kerrville incident. King explained a child victim of sexual abuse might recant because he sees his world come apart--his family starts fighting and he has contact with law enforcement officers--and he then begins to regret having told anyone about the abuse. King further stated that the younger the victim, the more likely he is to believe that if he says the abuse did not occur, then his problems will go away. King testified that B.E. was upset about the family discord that arose after he had told about the abuse.

Trudy Davis, executive director of the Advocacy Center for Children in Galveston County, also testified about the reasons a child might recant. Davis explained the child is the one who is usually blamed for the sexual activity and outcry. The family may not believe the child. The child will recant the allegation and say nothing happened so that his world can return to normal. The child wants his family to love and care about him again, even if that includes a continued, forced sexual relationship with the abuser.

The jury is the exclusive judge of the credibility of the witnesses and the weight to be given their testimony. *Whitaker v. State, 977 S.W.2d 595, 598 (Tex. Crim. App. 1998)*. It is within the province of the jury to resolve any conflicts and inconsistencies in the evidence. *Heiselbetz v. State, 906 S.W.2d 500, 504 (Tex. Crim. App. 1995)*. Moreover, the trier-of-fact is free to believe or disbelieve either part or all of a witness' testimony. *Jones v. State, 984 S.W.2d 254, 258 (Tex. Crim. App. 1998)*.

It was jury's responsibility to decide the credibility of the witnesses. The jury was entitled to believe B.E.'s testimony and disbelieve the testimony of appellant and the members of the family who testified in favor of appellant, and to resolve any inconsistencies in favor of B.E., which apparently it did. Considering all of the evidence in a neutral light, we conclude the jury was rationally justified in finding appellant guilty beyond a reasonable doubt. Appellant's first issue is overruled.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his second issue, appellant claims ineffective assistance of counsel due to his trial counsel's failure to strike a juror who was biased in favor of one of the State's outcry witnesses. Both the United States and Texas Constitutions guarantee an accused the right to assistance of counsel. *See U.S. CONST. amend. VI*; *TEX. CONST. art. I, § 10*; *TEX. CODE CRIM. PROC. ANN. art. 1.05* (Vernon 1977). The right necessarily includes the right to reasonably effective assistance of counsel. *Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*. The United States Supreme Court has established a two-prong test to determine whether counsel is ineffective. *Id.* Appellant must first

demonstrate his counsel's performance was deficient and not reasonably effective. *Id. at 688-92*. Thereafter, appellant must demonstrate the deficient performance prejudiced his defense. *Id. at 693*. Essentially, appellant must show that his counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms, and there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*; *Valencia v. State, 946 S.W.2d 81, 83 (Tex. Crim. App. 1997)*.

Without deciding whether appellant's trial counsel's performance was deficient and reasonably defective, we shall address whether trial counsel's performance prejudiced appellant's defense. Counsel's alleged errors, even if professionally unreasonable, do not warrant setting the conviction aside if the errors had no effect on the judgment. *Strickland, 466 U.S. at 691*. Appellant must prove that counsel's alleged errors, judged by the totality of the representation, denied him a fair trial. *McFarland v. State, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996)*, *overruled on other grounds by Mosley v. State, 983 S.W.2d 249 (Tex. Crim. App. 1998)*. If appellant fails to make the required showing of either deficient performance or prejudice, his claim fails. *Id.*

The record shows that while appellant's trial counsel asked the venire panel if anyone knew or had a relationship with appellant or his parents, Lewis and Diane Garza, she did not ask if anyone knew B.E., his parents, or any other members of his family. After the jury had been sworn in and the State had read a portion of the petition, with appellant waiving any further reading of it, one of the jurors, John Jorgensen, raised his hand. The judge called Jorgensen up to bench where Jorgensen informed the judge that he knew B.E.'s father, Rick Evans. The following dialogue took place:

> MR. JORGENSEN: I just wanted to let you know I'm familiar with Rick Evans. I'm friends with him. He's a friend of mine.
>
> THE COURT: Will that make any difference in your decision[?]
>
> THE WITNESS: I didn't know anything about this before.
>
> THE COURT: Nobody asked you about it.
>
> MR. JORGENSEN: I just wanted to be sure you knew.
>
> THE COURT: Do you think that would affect your decision in this case in the way you look at the evidence?
>
> MR. JORGENSEN: *I've known him for a long time. I've always known him to be trustworthy*. n1
>
> THE COURT: You've told us about it and that's exactly what you should do. You can resume your seat at this time.

The trial court overruled appellant's objections to allowing Mr. Jorgensen to remain on the panel.

> n1 Emphasis added.

Appellant claims that because Rick's testimony was critical to allegations regarding his conduct in Kerrville, there was a reasonable probability that Jorgensen's predisposition to find Rick's testimony regarding B.E.'s outcry credible undermined confidence in the outcome of his trial. In support of this assertion, appellant first relies on Jorgensen's statement that "I've known him for a long time. I've always known him to be trustworthy." Appellant also complains that when asked if he could give no more

weight to Rick's testimony than he would to appellant's testimony because of his relationship with Rick, Jorgensen responded that he could not. Contrary to this assertion, we find no support in the record for the alleged statement. Instead, the page and volume in the record to which appellant cites contains a discussion among the trial judge, defense counsel, and the prosecutor about whether to leave Jorgensen on the jury panel.

The trial court held a hearing on appellant's motion for new trial in which he raised his ineffective assistance claim. Jorgensen was employed as a utilities operations technician at UTMB when he knew Rick. Rick worked for Siemens, a major company that does direct digital control systems for temperature control in the commercial marketplace, which had a contract with UTMB. Rick was the project manager for Siemens' on-site office at UTMB for a little less than two years. Rick's role was to interface with facilities management, not the technicians; Jorgensen was not part of the management.

Jorgensen could only guess, but he thinks he worked with Rick for about a year. Jorgensen testified that he had some dealings with Rick because "they were working out of our shop until they got their own shop." Jorgensen worked in close proximity to Rick for a couple of months two or three years prior to the time of the trial, but once Siemens had its own office at UTMB, Rick was not in his office or anywhere near his office and they did not share the same break room. Rick, on the other hand, testified that he never officed with the UTMB facilities people and never shared an office with Jorgensen.

Jorgensen did not know anything about Rick's private life through his contact with him at work. Jorgensen knew Rick had a son and a daughter, but did not know he had other children. Jorgensen testified that he met Rick's wife once at a function at the Masonic Lodge in Hitchcock where they sat at the same table. Jorgensen knew Rick would be at the Masonic Lodge, but they did not go there together. Jorgensen considered Rick a friend at work, but "we never hung out except for that one time that I can remember that we went to that lodge meeting . . ." Rick testified that although he saw Jorgensen at the Masonic Lodge on that occasion, the only interaction he had with Jorgensen was to say hello. Since Rick left that project for Siemens at UTMB in 2002, Jorgensen has neither worked with him nor had any other relationship with him.

Jorgensen testified that Rick was "very truthful in his business dealings," and personally, "seemed honest" to him. When asked if he found Rick's testimony at trial truthful, Jorgensen responded, "I guess I did. . . . The part where he talked about talking to [B.E.] about what had happened and trying to get, you know, get him to tell him exactly what happened I found that, that seemed very truthful." Jorgensen believes he was fair in this case and his being acquainted with Rick did not have any affect on his verdict.

We find that allowing Jorgensen to remain on the jury panel did not undermine confidence in the outcome of this case. At best, Jorgensen had known Rick in a workplace setting a couple of years prior to trial and had not had any contact with him since Rick had left the Siemens project at UTMB. Moreover, Jorgensen testified that he thought he was fair in this case. Finally, B.E.'s testimony is sufficient to support appellant's conviction. *See Jensen, 66 S.W.3d at 534*; *Ruiz, 891 S.W.2d at 304*. Appellant's second issue is overruled.

Conclusion: Accordingly, the judgment of the trial court is affirmed.