

Review of Recent Juvenile Cases (2010)

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

In aggravated sexual assault adjudication, evidence was sufficient to establish that the juvenile committed the offense beyond a reasonable doubt.[In the Matter of A.C.T.](10-1-7A)

On February 3, 2010, the San Antonio Court of Appeals held that, the evidence when viewed in the light most favorable to the jury's finding, was sufficient for a rational trier of fact to have found that the elements of aggravated sexual assault beyond a reasonable doubt.

¶ 10-1-7A. **In the Matter of A.C.T.**, MEMORANDUM, No. 04-09-00068-CV, 2010 WL 374392 (Tex.App.-San Antonio, 2/3/10).

Facts: On July 10, 2008, the State filed an original petition alleging that A.C.T., a fourteen year-old boy, had engaged in delinquent conduct by committing two counts of aggravated sexual assault on J.K., a female child younger than fourteen years old, and seeking a determinate sentence. Count I of the petition alleged that, on or about July 17, 2007, A.C.T. intentionally and knowingly caused the sexual organ of J.K., a child younger than fourteen, to contact the sexual organ of A.C.T. Count II alleged that, on or about July 17, 2007, A.C.T. intentionally and knowingly caused the sexual organ of J.K., a child younger than fourteen, to contact the mouth of A.C.T. The State filed a pretrial "Notice of Intent to Present Outcry Statement" naming J.K.'s mother, Jeanette, as the outcry witness. After the jury was sworn and opening statements were made, a hearing was held outside the jury's presence to determine whether Jeanette or another witness subpoenaed by the defense, Sonya Vallejo, was the first adult to whom J.K. made an outcry. The trial court ruled that Sonya was the proper outcry witness. Defense counsel objected that the State had not given the fourteen-day notice required by the outcry statute as to Sonya, arguing that the "proper predicate had not been laid" for admission of Sonya's testimony as the outcry witness. [\[FN1\]](#) A discussion was held on the record during which the defense conceded it was not claiming unfair surprise or asking for a continuance. The trial court ultimately ruled that Sonya would not be permitted to testify as the outcry witness. The court later admitted Sonya's testimony about what J.K. told her as a prior consistent statement to rebut a charge of fabrication or improper influence. At the conclusion of the trial, the jury found that A.C.T. had engaged in delinquent conduct as alleged in both counts, and found that disposition was required. The court adjudicated A.C.T. as having engaged in delinquent conduct as alleged in both counts, and entered a disposition order committing A.C.T. to TYC with a possible transfer to TDCJ for eleven (11) years. A.C.T. now appeals.

[FN1.](#) During trial, both the State and the defense referred to the adult outcry statute, [article 38.072 of the Code of Criminal Procedure](#), instead of the juvenile outcry statute, [section 54.031 of the Family Code](#). See [Tex.Code Crim. Proc. Ann. art. 38.072](#) (Vernon Supp.2009); [Tex. Fam.Code Ann. § 54.031](#) (Vernon Supp.2009). The two outcry statutes are interpreted the same. [In re Z.L.B., 102 S.W.3d 120, 123 \(Tex.2003\)](#) (per curiam).

Held: Affirmed

Memorandum Opinion: A.C.T. asserts the evidence is legally and factually insufficient to support the jury's finding that he sexually assaulted J.K. When a juvenile challenges the legal sufficiency of the evidence by a no evidence point, we consider all the evidence in the light most favorable to the finding to determine whether a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. [In re K.T., 107 S.W.3d 65, 71 \(Tex.App.- San Antonio 2003, no pet.\)](#). The jury is permitted to make reasonable inferences from the evidence, and is the sole judge of the witnesses' credibility and the weight to be given their testimony. [Mosley v. State, 983 S.W.2d 249, 254-55 \(Tex.Crim.App.1998\)](#). We resolve any inconsistencies in the testimony in favor of the jury's verdict. [Curry v. State, 30 S.W.3d 394, 406 \(Tex.Crim.App. 2000\)](#). In reviewing a factual insufficiency point, we consider and weigh all the evidence in a neutral light and will set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. [In re K.T., 107 S.W. 3d at 71; Lancon v. State, 253 S.W.3d 699, 705 \(Tex.Crim.App.2008\)](#) (appellate court will reverse for factual insufficiency only if the evidence in support of the verdict, although legally sufficient, is so weak that the verdict is clearly wrong and manifestly unjust, or if, considering conflicting evidence, the verdict is outweighed by the great weight and preponderance of the evidence).

As charged in the petition, to establish that A.C.T. engaged in delinquent conduct by committing aggravated sexual assault of a child, the State had to prove that he (1) intentionally or knowingly, (2) caused the sexual organ of the child to contact his sexual organ (Count I), and caused the sexual organ of the child to contact his mouth (Count II), and (3) the child was younger than fourteen (14) years of age. Tex. Penal Code Ann. § 22.021(a)(1)(B)(iii) (Vernon Supp.2009). It is undisputed that the child victim, J.K., was younger than fourteen years when the abuse occurred. A.C.T. contends on appeal that the evidence was insufficient to prove beyond a reasonable doubt that the alleged sexual abuse actually happened, and that, if it did happen, he was the perpetrator. A.C.T.'s defense at trial was that he was innocent, and a family dispute over housing between his mother and J .K.'s mother caused the allegations to be fabricated, with J.K. being coached to tell the story of sexual abuse.

In its case-in-chief, the State first presented the testimony of the child victim, J.K., who was four years old at the time of the offense and six years old at the time of trial. After an initial period of hesitation, J.K. testified that on the day her mommy went to the hospital to have a baby, "Church's son" was babysitting her and her little brother. They were at Church's son's house in his room; he was laying on the bed and J.K. was sitting on the bed. He told her to take her clothes off and both of them had their clothes "off a little bit." J.K. stated that Church's son touched her with his hand on the part she goes potty with. She testified she saw his "big thingy" which is the part he goes potty with. Church's son put his thingy in between her legs, and his thingy touched on the part she goes potty with between her legs; their skin was touching and "it hurt real bad." J.K. was on top of Church's son when his thingy touched her thingy and he was doing a movement that made her feel scared. J.K. testified this happened only once. Church's son had promised to give her Chuck E. Cheese tickets if she took her clothes off, so she did.

J.K.'s mother, Jeanette, testified that her aunt is named Rose and they call her "Church," and Church's son is A.C.T. On July 2, 2007, Jeanette went to the hospital to give birth to J.K.'s youngest brother, Jesse. At the time, Jeanette and her husband and kids were living in a small house behind a larger house on a piece of property owned by Jeanette's grandfather, Mr. Rincon. Rose and A.C.T. lived on a different street nearby. Jeanette called to ask if A.C.T. could watch J.K. and her brother while she went to the hospital; A.C.T. came over and babysat J.K. and her brother at Jeanette's house. On January 17, 2008, Jeanette learned in a phone call from her mother that J.K. had told the two young daughters of Sonya Vallejo "something of a sexual nature." Jeanette asked J.K. about it, and although she was initially scared, J.K. confirmed the story about sex. Jeanette called the police that night and J.K. told the officer a similar story of a sexual nature. J.K. was then taken to ChildSafe where she was interviewed and examined by Dr. Nancy Kellogg. Jeanette testified that J.K.'s story

has been consistent since that day, even though she has been scared during the whole process. She also explained that J.K. used to call A.C.T. by his first name, but now she refers to him as "Church's son" because J.K.'s father did not want the boy's name used in their household. Finally, Jeanette testified that Rose had become the owner of the property where their small house was located after her grandfather died. She denied any hard feelings or arguments with Rose about the house or making payments for rent or bills. Jeanette stated she told J.K. to "just tell the truth" in court, and never told J.K. to lie or make up a story about A.C.T.

Sonya Vallejo testified that her two young daughters used to play with J.K. when they stayed at their grandmother's house next door to J.K.'s house. On or about January 2, 2008, her daughters told her that J.K. had mentioned "sex" to them, and they asked Sonya "what is sex?" The next day, when Sonya arrived to pick up her daughters after work, J.K. called Sonya over to the fence and asked if Sonya was her friend and if she could tell Sonya a secret. J.K. made Sonya promise not to tell anyone because A.C.T. had told her she could not tell anyone. At that point, J.K. began demonstrating with a funnel-shaped toy, telling Sonya, "this is what A.C.T. makes me do." J.K. got on top of the upside down funnel and moved back and forth, explaining, "he makes me go like this;" she also stated, "and I kiss it." J.K. stated that her reward was Chuck E. Cheese tickets. Sonya testified that J.K. told her sometimes it happened at her house when A.C.T. would babysit or when she was in a bathroom with A.C.T. J.K. told Sonya it happened multiple times in different places. Sonya urged J.K. to tell her mother, but J.K. became upset. Sonya testified, "I believed her [J.K.] 100 percent. I mean, I don't think a four year-old would demonstrate and tell me what she was telling me." Sonya called and told her sister Monica that night, who in turn called and told Jeanette's mother, who then told Jeanette. Sonya testified that Mr. Rincon died in December 2007, and J.K. told her about this in January 2008. Sonya stated that after J.K.'s allegations against A.C.T., Rose and Jeanette began arguing about issues related to the big house and the small house on the property owned by Rose, and there was a break-in at Jeanette's house, the water was turned off, and eviction was mentioned.

Finally, Dr. Kellogg, medical director of ChildSafe, testified that she performed the medical history interview and physical exam of J.K. Dr. Kellogg's written report contains drawings which were created by J.K. during the interview; J.K. was alone with Dr. Kellogg and a medical resident in the interview room, which is the procedure used to minimize outside influences. Dr. Kellogg would ask a question, and J.K. would draw her answer while describing in her own words what she was drawing. Dr. Kellogg testified to the oral statements J.K. made during the interview, which were noted in quotations in her report. Dr. Kellogg began by asking J.K. if something happened to her body that made her feel sad or scared or confused, and J.K. answered, "Yes. [A.C.T.] He did something bad. What big grown-ups do." When asked what happened, J.K. answered, "It happened at my house and at his house. This is my house. Mommy had a baby in her stomach and she went to the doctor with daddy. I was watching TV in the living room. A.C.T. turned off the TV and I was crying. Then we went to the bathroom." J.K. drew a picture of her house and the bathroom and continued explaining, "And he told me to take off my pan ties. I was lying on the floor. He went up and down with this;" she drew a picture of A.C.T. and indicated his "thingy" in his front genital area. J.K. stated, "It was touching me here," pointing to her own genitals. J.K. continued, "Then milk came out and went in my mouth. It was yucky. It tasted like cow." She also said it hurt on her own genitals and her buttocks because she was laying on the floor. A.C.T. warned her not to tell or she would not get the Chuck E. Cheese tickets. J.K. stated this happened one or two times at her house, and between one and five times at A.C.T.'s house. When asked whether the other times were the same or different than this time, J.K. replied, "Different. He also licked [sic] my thingy." The physical exam of J.K. was normal, yielding one "nonspecific finding" that could have been caused by trauma, but also by irritation or inflammation from other causes. Dr. Kellogg testified that it is common to find no physical evidence of sexual abuse when there is a delay between the abuse and the outcry. She also testified that the history of the incidents given by J.K. was "more detailed [and] explicit than average" for this age child. Dr. Kellogg gave her opinion that the sexual abuse did occur based on J.K.'s level of detail and use of age-appropriate language to describe the incidents.

The defense witnesses were A.C.T.'s mother Rose, and an expert witness, Dr. Ferrara. Rose testified that A.C.T. watched the kids at Jeanette's house on the day Jesse was born. She also stated that J.K. would spend the night at her house once or twice a month, but would sleep with Rose or Rose's daughter; Rose had a policy in the household against closed doors. To Rose's knowledge, A.C.T. was never alone in his room with J.K. On the day J.K. made the allegations against A.C.T., Jeanette called Rose to come over and J.K. herself told Rose in her own words about the incidents with A.C.T. Rose was in shock and thought it must be a joke; she stated that A.C.T. is a good boy who attends a private Christian school. With regard to the existence of a family dispute over the houses, Rose testified that while her father Mr. Rincon was still alive Jeanette and her family were living in the small house without paying any rent, taxes, or insurance. Rose stated the small house was unfinished when they moved in, and Jeanette was supposed to complete the house but never did; there was only one interior door inside the house and it was the door to the bathroom. Rose bought the property with the small house and big house from her father in August 2006, before he died in December 2007. After Mr. Rincon died, but before J.K.'s allegations against A.C.T., Rose told Jeanette she had to take over payments on the utilities and bills for the small house, but she failed to pay. In addition, Rose testified that Jeanette asked to move into the big house since she now had three children, but Rose refused because she did not trust Jeanette to take care of the big house. Rose testified that none of this had anything to do with A.C.T. Rose stated that she did not know why J.K. would have lied about A.C.T. Finally, Dr. Matt Ferrara, a forensic psychologist, testified for the defense that children in the three to five-year age range like J.K. are more likely to make a false accusation of sexual abuse, and a false outcry is most likely to occur when someone has influenced the child. Dr. Ferrara stated that an adult may suggest information to the child by the way a question is asked, and the information may then become part of the story the child comes to believe is the truth.

Conclusion: We hold the evidence, when viewed in the light most favorable to the jury's finding, is sufficient for a rational trier of fact to have found the elements of aggravated sexual assault as alleged in Counts I and II beyond a reasonable doubt. The jury had the ability to resolve any conflicts in the evidence and to assess the witnesses' credibility and the weight to be given their testimony. [Curry, 30 S.W.3d at 406; Mosley, 983 S.W.2d at 254-55](#). In addition, the evidence in support of the jury's finding that A.C.T. committed aggravated sexual assault as alleged in Counts I and II is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. [Lancon, 253 S.W.3d at 705; In re K.T., 107 S.W.3d at 71](#). We overrule A.C.T.'s challenges to the sufficiency of the evidence.