YEAR 2006 CASE SUMMARIES

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

Evidence was legally and factually sufficient to establish the elements of aggravated sexual assault.[In the Matter of C.E.F.W.](06-1-4)

On November 23, 2005, the San Antonio Court of Appeals held that considering the totality of the circumstances, evidence was legally and factually sufficient to establish the aggravating element of the offense of aggravated sexual assault.

¶ 06-1-4. **In the Matter of C.E.F.W.,** MEMORANDUM, No. 04-05-00073, 2005 Tex.App.Lexis 9759 (Tex.App.— San Antonio, 11/23/05).

Facts: C.E.F.W. was adjudicated delinquent for committing the offense of aggravated sexual assault. On appeal, C.E.F.W. contends: (1) the evidence is legally and factually insufficient to establish the aggravating element of the offense; (2) the trial court erred in denying his request for the lesser-included offense of sexual assault; and (3) the trial court abused its discretion in admitting hearsay testimony. Because the issues in this appeal involve the application of well-settled principles of law, we affirm the trial court's judgment in this memorandum opinion.

Held: Affirmed

Memorandum Opinion: 1. In his first and second issues, C.E.F.W. challenges the legal and factual sufficiency of the evidence to support the aggravating element of the offense, namely that by his acts and words, C.E.F.W. intentionally and knowingly placed the complainant in fear that death or serious bodily injury would be imminently inflicted on her. C.E.F.W. contends that the evidence does not establish that the complainant was placed in fear during the sexual assault but only by threats made after the assault. We apply the well established criminal standards of review applicable to legal and factual sufficiency challenges in appeals from juvenile adjudications. *See*, e.g., *In re A.C., 949 S.W.2d 388, 390 & n.1 (Tex. App.--San Antonio 1997, no writ)*; *In re A.S., 954 S.W.2d 855, 858 (Tex. App.--El Paso 1997, no writ)*; *R.X.F. v. State, 921 S.W.2d 888, 889 (Tex. App.--Waco 1996, no writ)*.

A jury may consider the complainant's injuries and the defendant's objective conduct when evaluating the aggravating nature of a sexual assault. *Mata v. State, 952 S.W.2d 30, 32 (Tex. App.--San Antonio 1997, no pet.)*. The evidence is not required to show that a threat was verbally communicated or that the defendant could have inflicted serious bodily injury, but did not. *Id*. A jury can convict a defendant on the aggravating element of the offense if it can infer from the totality of the circumstances that the victim was in fear of death or serious bodily injury. *Tinker v. State, 148 S.W.3d 666, 671 (Tex. App.--Houston [14th Dist.] 2004, no pet.)*; *Selvog v. State, 895 S.W.2d 879, 882 (Tex. App.--Texarkana 1995, pet. ref'd)*.

The complainant was sixty-two years old. C.E.F.W. repeatedly assaulted her both anally and vaginally.

The complainant was "petrified" hours after the assault occurred and was afraid to open the door to even admit her own daughter. The complainant was "terrified, shaking, and trembling." The complainant had bruises on many parts of her body, and her eye was swollen and bruised. Pictures depicting the complainant's injuries were introduced into evidence. Blood was located in the entryway of the home where the assault occurred. The nurse who examined the complainant testified that the complainant told her that C.E.F.W. "kept hitting me to [sic] my head and my face and my body with his fists." The assault lasted for an hour. The tissue in the complainant's vaginal area was bruised, and multiple tears to the anal folds were noted. The nurse noted "a two-and-a-half inch long tear midline between the gluteus maximus." The nurse further noted that "the perineum [described as the portion of skin between the vaginal area and anal area] had multiple skin tears with active blood-like drainage."

The complainant testified that C.E.F.W. "started beating me all over and then he threw me to the floor and he hit me all over the face and kicked all my body and made a bruise the size of a baseball in my back, and my spine hurts a lot." C.E.F.W. told the victim, "Don't yell, bitch. Don't yell and don't call the police." The complainant testified that she believed C.E.F.W. could hurt her. The complainant further testified:

> Q. Did - What did you think was going to happen to you?
>
> A. He probably was going to kill me. He was trying to strangle me also.

Considering the totality of the circumstances, including the injuries sustained and the complainant's testimony, we hold the evidence is legally and factually sufficient to establish the aggravating element of the offense.

2. In his third issue, C.E.F.W. contends that the trial court erred in denying his request for an instruction on the lesser-included offense of sexual assault. A two-prong test is applied to determine whether an appellant was entitled to an instruction on a lesser-included offense. *Campbell v. State, 149 S.W.3d 149, 152 (Tex. Crim. App. 2004)*; *Rousseau v. State, 855 S.W.2d 666, 672-73 (Tex. Crim. App. 1993)*. First, to be considered a lesser-included offense, the lesser offense must be included within the proof necessary to establish the offense charged. *Campbell, 149 S.W.3d at 152*; *Rousseau, 855 S.W.2d at 672-73*. Second, some evidence must exist in the record that would permit a jury to rationally find that, if the defendant is guilty, he is only guilty of the lesser-included offense. *Campbell, 149 S.W.3d at 152*; *Rousseau, 855 S.W.2d at 672-73*. Given that the evidence only presents one consistent version of the events that transpired and having previously detailed the evidence supporting the aggravating element of the offense, we conclude that no evidence in the record would permit a jury to rationally find that C.E.F.W. was guilty only of the lesser-included offense.

3. In his final issue, C.E.F.W. asserts that the trial court abused its discretion in admitting hearsay testimony of statements made by the complainant to various other witnesses. Hearsay is a statement, other than one made by the declarant while testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted. *TEX. R. EVID. 801(d)*. The Texas Rules of Evidence provide an exception to this rule for "excited utterances." *TEX. R. EVID. 803(2)*. An excited utterance is "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *Id*. When determining whether a hearsay statement is admissible as an excited utterance, we may consider the time elapsed and whether the statement was in response to a question. *Zuliani v. State, 97 S.W.3d 589, 595-96 (Tex. Crim. App. 2003)*. However, it is not dispositive that the statement is an answer to a question or that it was separated by a period of time from the startling event; these are simply factors to consider in determining whether the statement is admissible under the excited utterance hearsay exception. *Id. at 596.* The critical factor to consider when determining if a statement is an excited utterance is "'whether the declarant was still dominated by the

emotions, excitement, fear, or pain of the event'" or condition at the time of the statement. *Id. at 596* (quoting *McFarland v. State, 845 S.W.2d 824, 846 (Tex. Crim. App. 1992))*. In other words, a court must determine whether the statement was made "'under such circumstances as would reasonably show that it resulted from impulse rather than reason and reflection.'" *Id. at 596* (quoting *McFarland, 845 S.W.2d at 846*). Whether an out-of-court statement is admissible under an exception to the hearsay rule is a matter within the trial court's discretion. *Id. at 595*.

C.E.F.W. complains that the complainant's testimony was improperly bolstered when several witnesses were permitted to testify over hearsay objections regarding the statements the complainant made to them about the offense. Initially, we note that no objection was made to the testimony of the examining nurse, and such testimony would be admissible under the hearsay exception for medical diagnosis or treatment. *TEX. R. EVID. 803(4)*. Similarly, the statements made to the EMS technician also were admissible under this exception to the hearsay rule.

With regard to the statements made to the investigating officer, the officer testified that the complainant "was visibly shaken. She had fresh injuries to her. . . . She was just very distraught, almost trembling, being so fearful, had a difficult time talking to me." The officer further testified, "She was petrified. She was trembling, shaking. She was just kind of - Her eyes were darting about. She - Her hands were shaking. She was just very scared and terrified." With regard to whether the officer had to question her and prod her, the officer stated, "A little bit of both. And for the most of it, she was just kind of blurting stuff out, and I was just trying to write down as fast as I could so I could get her information before EMS had to do what they had to do." Although several hours had elapsed between the assault and the complainant's statements to the officer, the trial court did not abuse its discretion in admitting the testimony under the excited utterance exception to the hearsay rule. Given the complainant's age and the brutal nature of the offense, the testimony revealed that the complainant "was still dominated by the emotions, excitement, fear, or pain of the event or condition at the time of the statement." *Zuliani, 97 S.W.3d at 596*. Accordingly, the trial court did not abuse its discretion in allowing the officer to testify regarding the complainant's statements. Finally, no hearsay objection was made to the testimony of the complainant's daughter; therefore, this complaint is not preserved for our review. *TEX. R. APP. P. 33.1*.

Conclusion: The trial court's judgment is affirmed.