Affirmed in Part, Remanded in Part, Dismissed in Part, and Opinion filed July 26, 2001.

In The

Fourteenth Court of Appeals

NOS. 14-00-00450-CV;
14-00-00461-CV;
14-00-00462-CV;
14-00-00463-CV

IN THE MATTER OF M.N. AND H.N., Appellants

On Appeal from the 314th District Court
Harris County, Texas
Trial Court Cause Nos. 99-04899J; 99-04902J; 99-04296J & 99-04299J

O P I N I O N

This is a consolidated juvenile appeal arising from multiple adjudications of delinquent conduct. In the proceedings below, the court found that appellants, H.N. and M.N., had engaged in delinquent conduct when each committed an instance of indecency with a child and aggravated sexual assault of a child. TEX. PEN. CODE ANN. §§ 21.11, 22.021 (Vernon Supp. 2001). Based on this finding, the trial court placed both appellants on probation until their eighteenth birthdays. In addition, the court placed each in a residential treatment center, and also required them to register as a sex offenders. From these orders of adjudication, appellants raise five issues for review. We affirm in part and remand in part and dismiss in part..

Background

On the morning of April 2, 1999, complainant M.H. was asleep in bed with her 17 year-old half-sister, S.E. While M.H. and Summer slept, Ashley Calloway, friend of Summer and a regular visitor of Summer's home, entered the residence to retrieve a purse she had forgotten the night before. Her search eventually led to the bedroom where M.H. and Summer were sleeping. Upon entry, Calloway saw movement under the covers next to Summer. Curious, Calloway lifted the covers and saw M.H. with a scared look on her face. When asked what she was doing under the covers, M.H. began to cry without responding. Calloway then awakened Summer, who began questioning M.H. Amy Hudson, mother of the two children, arrived home some thirty minutes later. After Hudson returned home, M.H. told Hudson that her stepsisters, appellants H.N. and M.N., had touched her "coocoo" during a previous visit to her father's home. Understanding this to mean that complainant's vagina had been touched, Hudson reported the incident to Child Protective Services, and later, to the Harris County Police. This appeal follows appellants' delinquency adjudications for aggravated sexual assault and indecency with a child.

Timliness of Appeal

Prior to addressing appellants' issues, we first consider the State's argument that this court is without jurisdiction to review appellants' adjudications of delinquency for indecency with a child. Here, the State asserts that appellants failed to timely file notices of appeal in cause numbers 14-00-0450-CV and 14-00-0461-CV, and therefore this Court must dismiss these appeals for want of jurisdiction.

Juvenile appeals proceed under the rules governing civil cases generally. TEX. FAM. CODE ANN. § 56.01(a) (Vernon Supp. 2001). The rules of appellate procedure governing civil cases require notice of appeal to be filed within 30 days after the judgment is signed or within 90 days if any party timely files a motion for new trial, a motion to modify the judgment or order, a motion to reinstate, or a request for findings of fact and conclusions of law. TEX. R. APP. P. 26.1(a). Appellants, in the above stated cause numbers, did not timely file any motions

for new trial, motions to modify, motions to reinstate, or requests for findings of fact and conclusions of law immediately following their adjudication proceedings. Thus, to be timely, their notices of appeal concerning matters arising out of the adjudication proceeding were due within 30 days after signing of the original disposition order, or February 28, 2000. Appellants filed their notices of appeal in cause numbers 14-00-0450-CV and 14-00-0461-CV on April 12, 2000; therefore, they failed to invoke the jurisdiction of this court in these causes.

We disagree with appellants' contention, raised during oral argument, that the nunc pro tunc orders signed by the trial court on March 1, 2000 commenced the time period for perfecting their appeals in these cause numbers. The court signed H.N.'s adjudication and disposition orders corresponding to appellate cause number 14-00-0461-CV on January 27, 2000. On March 2, 2000, the court signed a nunc pro tunc order in the same cause, correcting the respondent's birth date and changing the dates of adjudication and disposition. The court also signed M.N.'s adjudication and disposition orders corresponding to appellate cause number 14-00-0450-CV on January 27, 2000. On March 2, 2000 the court signed a nunc pro tunc order in the same cause which made no correction but changed only the dates of adjudication and disposition. Because the trial court signed both nunc pro tunc orders 35 days after signing the original adjudication orders, and appellants did not file a motion for a new trial, or a motion to vacate, modify, correct or reform judgment, its plenary power had expired. TEX. R. CIV. P. 329b. Therefore, the appellate timetables in these causes began to run from the date the original adjudications were signed because none of appellants' issues in cause numbers 14-00-0450-CV and 14-00-0461-CV pertain to *nunc pro tunc* corrections TEX. R. APP. P. 4.3(b); *Gonzales v. Doctor's Hosp. -- East Loop*, 814 S.W.2d 536, 537 (Tex. App.—Houston [1st Dist.] 1991, no writ). Accordingly, we dismiss appellate cause numbers 14-00-0450-CV and 14-00-0461-CV for want of jurisdiction.

Legal and Factual Sufficiency

In their first issue for review, appellants complain that State's evidence at trial was legally and factually insufficient to support the court's delinquency adjudication for aggravated

sexual assault. Specifically, appellants complain that the State failed to adduce evidence demonstrating penetration or sexual abuse of M.H.

In juvenile cases, a reviewing court employs the criminal legal sufficiency standard of review. *In re G.A.T.* 16 S.W.3d 818, 828 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). The evidence is legally sufficient if, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319; *Clewis v. State*, 922 S.W.2d 126, 132 (Tex. Crim. App. 1996). In a legal sufficiency review, an appellate court reviews all the evidence but disregards evidence not supporting the verdict. *See, e.g.*, *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991). Finally, if an appellate court sustains a legal sufficiency challenge, it must render a judgment of acquittal. *Clewis*, 922 S.W.2d at 133.

In contrast to legal sufficiency, a review for factual sufficiency dictates that the evidence be viewed in a neutral light. *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000) (citing *Clewis v. State*, 922 S.W.2d 126, 134 (Tex. Crim. App. 1996)). We conduct such a review by examining the evidence weighed by the fact finder that tends to prove the existence of an elemental fact in dispute and comparing it with the evidence tending to disprove that fact. *Johnson*, 23 S.W.3d at 7. Under a factual sufficiency review, a court will set aside a verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

We first address appellant's legal sufficiency issue. Under Texas law, a person commits the offense of aggravated sexual assault if she knowingly or intentionally causes the penetration of the female sexual organ of a child by any means and the victim is younger than 14 years of age. TEX. PEN. CODE ANN. § 22.021 (Vernon Supp. 2001). The State may prove penetration by circumstantial evidence, and the victim need not testify that penetration occurred. *Villalon v. State*, 791 S.W.2d 130, 133 (Tex. Crim. App. 1990). Finally, evidence of the slightest penetration is sufficient to uphold a conviction. *Luna v. State*, 515 S.W.2d

271, 273 (Tex. Crim. App. 1974).

Disregarding all evidence not supporting the court's adjudication of appellants' delinquency, the evidence supports a finding of the essential elements of aggravated sexual assault. Amy Hudson testified that M.H. was born on August 18, 1993, thus making her less than 14 years of age at the time of the offense. In a videotaped session with case worker Lisa Halcomb, M.H. explained that appellants touched the inside of her "coocoo" with their hands. When asked what part of the body her "coocoo" referred to, M.H. pointed to her vaginal area. Based on this testimony, we conclude that any rational trier of fact could have found the essential elements of aggravated sexual assault beyond a reasonable doubt.

We next turn to the merits of appellant's factual sufficiency issue. As stated previously, we conduct such a review by examining the evidence weighed by the fact finder that tends to prove the existence of an elemental fact in dispute and compare it with the evidence tending to disprove that fact. *Johnson*, 23 S.W.3d at 7. A review of the record shows complainant testified that the appellant's touched the inside of her vagina with their hands. Appellants point to a separate portion of the record, however, where the complainant testified that she didn't remember any penetration or abuse by appellants. While this portion of the record does expose some inconsistency in M.H.'s testimony on an elemental fact of the offense, we do not agree that this testimony renders the jury's verdict so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Johnson*, 23 S.W.3d at 9. Here, the jury weighed the credibility of the complainant's testimony in its entirety and chose to believe that appellants digitally penetrated her vagina. Under these facts, we find that the State adduced sufficient evidence to support appellants' adjudications of delinquency for aggravated sexual assault. *Id*. at 8 n.9 ("Absent exceptional circumstances, issues of witness credibility are for the jury, and the reviewing court may not substitute its view of the credibility for the constitutionally guaranteed jury determination."). Accordingly, appellants' first issue for review is overruled.

No Evidence

In their second issue for review, appellants argue that the trial court erred in entering the adjudication order because there was no evidence to support the jury's verdict. Appellant's, however, fail to cite any authority in support of this issue. Therefore, because appellants' brief does not contain any citation to authority in support of this issue, nothing is presented for review. TEX. R. APP. P. 38.1(h); *Emery v. State*, 881 S.W.2d 702, 707 n. 8 (Tex. Crim. App. 1994). Accordingly, we overrule appellants' second issue for review.

Jury Charge Error

In their third issue for review, appellants contend the trial court erred in overruling trial counsel's objection to the jury charge provision containing the date of offense. Specifically, appellants argue that the charge's provision stating that the offense occurred "on or about the 26th day of March, 1999" was error as the State adduced no evidence of the commission of the offense either within the limitations period or before the return of the determinate sentencing petition.

The limitations period for aggravated sexual assault of a child and indecency with a child is ten years from the eighteenth birthday of the victim. TEX. CODE CRIM. PROC. ANN. Art. 12.01(5)(A)(C) (Vernon Supp. 2001). "On or about" language allows the State to prove a date other than the one alleged as long as the date is anterior to the presentment of the indictment and within the statutory limitation period. TEX.CODE CRIM. PROC. ANN. art. 21.02(6) (Vernon 1989); *Sledge v. State*, 953 S.W.2d 253, 256 (Tex. Crim. App. 1997).

Testimony at trial shows that the victim was born on August 18, 1993; therefore, the limitations period would not run for the charged offense until August 18, 2021. Because of the particular limitations statute applicable in this case, the only relevant date requirement was that the State prove the offense occurred anterior to the presentment of the indictment. In this regard, Detective Eta testified that the last weekend M.H. had been at her father's home, where appellants resided, was March 26 through March 28, 1999. Appellants were indicted for the above offenses on August 5, 1999. Therefore, we find nothing lacking in the State's evidence pertaining to the time of the offense, and overrule appellants' third issue for review.

Disposition Order Findings

In their fourth issue for review, appellants complain that the trial court erred by requiring them to be removed from their home and placed into custody of the juvenile probation officer. Specifically, appellants contend that the order did not contain the findings required by Texas Family Code sections 54.04(f) and 54.04(i). As a result, appellant argues that the "case should be reversed."

Pursuant to Section 54.04(i), a court may not remove a child from the home without making the following findings: (1) the removal is in the child's best interest; (2) reasonable efforts were made to eliminate the need for removal; and (3) the home does not provide the quality of care and level of support and supervision necessary to meet the conditions of probation. TEX.FAM.CODE ANN. § 54.04(i) (Vernon 2001). Further, Section 54.04(f) provides "[t]he court shall state specifically in the order its reasons for the disposition." *Id*. § 54.04(f) (Vernon 2001). Compliance with these requirements is mandatory, for such findings "provide assurance that the child and his family will be advised of the reasons for [removal from the home] and . . . be in a position to challenge those reasons on appeal." *J.L.E. v. State*, 571 S.W.2d 556, 557 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ). When a juvenile court does not comply with Section 54.04(f), we do not reverse for a new trial, but instead remand with instructions for the juvenile judge to render a proper disposition order specifically stating the reasons for such disposition. *K.K.H v. State*, 612 S.W.2d 657, 658 (Tex. Civ. App.—Dallas 1981, no writ); *A.Y. v. State*, 554 S.W.2d 805, 806-08 (Tex. Civ. App.—San Antonio 1977, no writ).

After reviewing the court's disposition orders of appellants, we find that there was partial compliance with section 54.04(i) and no compliance with section 54.04 (f).[1]

[1] Relevant portions of the court's disposition orders read:

It further appears that M. N. (H. N.) is in need of rehabilitation and that disposition should be made for said child's protection and for the protection of the public, and it is in the best interest of said child's health, safety, morals, and education that said child should be placed in the custody of the CHIEF JUVENILE PROBATION OFFICER (CJPO) FOR PLACEMENT AT KRAUSE CENTER under supervision of the Harris County Juvenile

Therefore, we have no choice but to remand the disposition portions of appellants proceedings with instructions to render proper disposition orders in full compliance with Family Code sections 54.04(f) and (i). We note the State's contention that appellants should not be allowed to complain of the court's deficient disposition orders on appeal because appellants reached an agreement with the State regarding their disposition. Whatever the merits of this argument, we recognize that when the Legislature has spoken on a subject, its determination is binding upon the courts unless the Legislature has exceeded its constitutional authority. *Castillo v. Canales*, 141 Tex. 479, 174 S.W.2d 251, 253 (1943). Here the State makes no argument that the Legislature exceeded its constitutional authority in promulgating the requirements of the Family Code sections 54.04 (f) and (i).[2] Therefore, we sustain appellants fourth issue for review.

Entry of Orders Nunc Pro Tunc

In their final issue for review, appellant's complain that the trial court's entry of the April 26, 2000 Nunc Pro Tunc Disposition Orders and Nunc Pro Tunc Adjudication Orders was error. Specifically, appellants argue that the trial court erroneously found them delinquent for commission of offenses they were neither charged with at trial nor adjudicated of by the jury. In raising this issue, however, appellants fail to direct us to that portion of the record complained of or provide authority in support of their complaint. TEX. R. APP. P. 38.1(h). Therefore, appellants' fifth issue presents nothing for review. *State v. Gonzalez*, 855 S.W.2d 692, 697 (Tex. Crim. App. 1993) (interpreting Rule 38.1(h) to mean that an appellant presents the court of appeals with nothing to review when he fails to cite any authority for his argument or arguments in his points of error). Accordingly, we overrule appellants' fifth issue for

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> Probation Department, under rules of probation until her 18TH BIRTHDAY, (OCTOBER 6, 2001), under Determinate Sentencing as approved by the 338th on JULY 7, 1999, as listed on second page attached hereto and which is made a part of this order.

[2] The State also contends that the disposition issue is moot because the trial court signed change in custody orders, and appellants are back in the custody of their mother. These orders, however, are not included in the clerks record and are not in the appellate record. TEX. R. APP. P. 34.1.

review.

Conclusion

We dismiss the appeals in cause numbers 14-00-0450-CV and 14-00-0461-CV for want of jurisdiction. The trial court orders of adjudication and disposition in cause numbers 14-00-0462-CV and 14-00-0463-CV are affirmed as to appellants' first, second, third, and fifth issues for review. Regarding appellants' fourth issue, we remand this cause to the trial court with instructions that appellant's disposition orders be modified in compliance with Family Code sections 54.04(f) and (i).

/s/ Charles W. Seymore
Justice

Judgment rendered and Opinion filed July 26, 2001.

Panel consists of Justices Anderson, Hudson, and Seymore.

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