Opinion issued August 25, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00330-CR

JAMES JACKSON III, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Case No. 1359103

MEMORANDUM OPINION

A jury found appellant, James Jackson III, guilty of the offense of aggravated sexual assault[1] and assessed his punishment at confinement for sixty years. In three issues, appellant contends that the evidence is legally insufficient to

---

1 *See* TEX. PENAL CODE ANN. § 22.021(a) (Vernon Supp. 2015).

support his conviction and the trial court erred in denying his motion to suppress identification evidence, denying his motion for mistrial, and overruling his objections to the State's closing argument.

We affirm.

Background

The complainant testified that at 10:30 p.m. on May 28, 2012, she left the Domino's Pizza restaurant, where she was working, to make a delivery. At the time, the driver's side window of her car was not functioning "properly" and "stuck" "halfway down."

After exiting the restaurant, the complainant sat in her car in the parking lot to enter the delivery address into her cellular telephone's "GPS." She then saw appellant, who was "sitting on the curb of . . . the sidewalk," get up and walk "pretty fast towards [her] car." He was holding in his hand a knife, with a six-inch blade. As appellant approached, the complainant recognized him as someone who had come into the restaurant "two or three nights" earlier and "stolen some chicken wings." When he got to the car, appellant put his arm through the driver's side window and held the knife at the complainant's throat. Appellant, "ke[eping] the knife at [her] neck the whole time," then "climbed in[to] the backseat" of the car and told the complainant, who "thought [that] he was going to kill" her, "to drive."

The complainant followed appellant's directions as she drove. After he directed her to "park in [a] parking spot" on "a side street" near some townhomes, he told her to "give him the [car] keys," "get out" of the car, and "give him all the money [that she] had." The complainant explained that appellant was "pretty pissed off" when he found out that she only had "[$]10 or $11." He then "dug into [the car's] middle console to see if [she] had any change or anything in there." Appellant took the complainant's wallet and driver's license, and he told her to "get back in the car" and "drive."

Appellant then had the complainant "turn into" the Baywood Arms Apartments and "drive straight[,] all the way to the back," where there were only a few cars. Once parked, he, still holding the knife and "point[ing]" it at her, told her "to get out of the car" and "search" it "to find some money." The complainant believed that "if he didn't get any more money, he was going to kill [her]." And when she could not find "any more money," appellant "got really mad." He then noticed the pizza in the complainant's car and told her that she was "going to deliver the pizza." She believed that appellant "thought" that he would "g[e]t some money out of the pizza when [she] delivered it."

As the complainant drove to the delivery address, appellant, "holding [the knife] at [her] neck," sat in the backseat of the car on the driver's side. When they arrived at the Willow Tree Apartments, he told her "[t]o give him the [car] keys"

and that "he was going to walk with [her] to deliver the pizza." As they walked, appellant held the knife at the complainant's side and said "if [she] did anything, he would kill [her] and the person living in [the apartment]." She explained that as appellant stood "out of view of the [apartment's] front door," she delivered the pizza. Once the customer closed the apartment door, appellant "grab[bed]" the complainant's arm and took her back to the car. He was "very mad" that she did not receive "any cash for the pizza."

The complainant further testified that she returned to the driver's seat of her car and appellant again sat in the backseat with the knife "still . . . on" her. He gave her the car keys and told her "to drive." He "seem[ed] to be familiar with the area," and she followed his directions. The complainant explained that they "ended up" on "a dead end" road behind the Oaks of Baytown Apartments, with a "field of grass" to one side. Appellant then told her to "turn the car off," "give him the [car] keys," and "get out" of the car. The complainant "wasn't facing him" when she exited the car, and when he instructed her to "turn around," she saw that appellant "had pulled [down] his pants" and "underwear," leaving his penis exposed. And "thought he was going to rape [her]."

Appellant told the complainant "to get on [her] knees," "pointed the knife" at her stomach," and "put" his penis in her mouth, for "five to ten minutes," while he continued to "push[]" "the back of [her] head" "forward." He then, while still

pointing the knife at her, "told [the complainant] to get in the backseat [of the car] and to take [her] pants off and lay down." The complainant complied because appellant "had [the] knife on [her]." And he then, while making "statements about . . . raping her," "put" his penis "inside" of her vagina for approximately "ten minutes."

Appellant then told the complainant "to lean up against the car," and he again "put" his penis "inside" of her vagina. The knife remained in his hand, and he held it "kind of . . . at [her] shoulder." After "five to ten minutes," appellant "told [her] to get on [her] knees" again, and he "[p]ut" his penis "back in [her] mouth."

The complainant explained that she was "horrif[ied]" throughout the assault and "didn't know if [appellant] was going to kill [her] or not." Appellant then again told her "to lay back down" in the backseat of the car, where he proceeded to "lick" her vagina, put his penis "back inside" her vagina, and "lick[] one of [her] breasts." After he finally stopped, appellant told the complainant that she could get dressed, gave her the car keys, and told her to drive to a gas station.

When they arrived at an Exxon gas station, appellant, as he sat in the backseat of the car "[s]till" holding the knife in his hand, instructed the complainant to request the outside bathroom key. However, upon discovering that the gas station was closed, appellant had the complainant get back into the car and

drive to a nearby Valero gas station. When she asked why a bathroom was needed, appellant responded that she was "going to go to the bathroom and clean [herself] up."

At the Valero gas station, appellant did not allow the complainant to get out of the car. Instead, he had her drive to another location and told her "to park in a dark area." He then instructed her to "turn the car off," "give him the [car] keys," and "get out of the car." Appellant handed the complainant "a shirt [from] the backseat of [her] car" and "told [her] to pull [her] pants and panties down and to clean [herself] out." She explained that she "tried not to clean [herself] out very well, but he told [her] to do it again more thoroughly," and she complied. Appellant "took the shirt," told the complainant "to get back in the front seat," and "look forward." He then "put the [car] keys [i]n the backseat" of the car and "ran off." Prior to leaving, appellant "used [his] shirt" "to wipe off the [back]seat[]" of the car.

As he left, appellant told the complainant that "if [she] went to the cops or he looked in the newspaper and read about what [had] happened, he would come to [her] address and he would kill [her] and [her] daughter." He took with him her driver's license, the shirt, and her money, about "[$]10 or $11." After appellant "ran off," the complainant drove her car to the Domino's restaurant, which was close by, and told the manager that she had been "robbed." She explained that she

did not initially tell her manager, who called for emergency assistance, that she had been "raped" because she was "embarrassed."

When a law enforcement officer arrived at the restaurant, the complainant "first" told him that she had been "robbed," but then told him that she had been "raped." She provided the officer with a description of appellant and told him and her manager that appellant was the same "man [that] had stolen some chicken wings a couple nights before." After being taken to the hospital for a sexual-assault examination, the complainant told the nurse performing the exam that appellant had "lick[ed] [her] breast," and the nurse "swab[bed]" the breast.

The complainant further testified that she met with Baytown Police Department ("BPD") Detective J. Cervantes the following day. She told Cervantes that she "knew" appellant "as the person from the [chicken] wings" incident. When Cervantes subsequently showed the complainant a photographic array, she was "able to pick the person out who [had] sexually assaulted" her, and she had no "question or hesitation about" the identity of that person. She told Cervantes that the person that she had she selected from the photographic array was "the guy," and she was "110 percent sure that's him."

The complainant identified State's Exhibit 7 as the photograph of appellant that she had selected from the photographic array presented to her by Detective Cervantes. She explained that she was able to identify appellant as the person who

had sexually assaulted her because she had spent "two hours" with him and his face was "pretty close" to hers when "he was on top of [her]." The complainant had "[n]o" doubt that appellant was the person who had sexually assaulted her. And she identified him as "the person that held [a] knife against [her] throat and sexually assaulted [her] on May 28th, 2012."

Finally, the complainant testified that she did not "want to have sex with" appellant, did not "agree to have sex with" him, and only had sex with him because "[h]e had a knife on" her and she "thought that he was going to kill" her. She explained that "[t]he rape took place at one apartment complex inside [of her] car and outside of [her] car," both "vaginal rape" and "[o]ral sex" occurred, and "[i]t was a violent attack." Appellant held "a knife on [her]" for the entire "two hours," and "[w]hile he[] [was] raping [her]," he had "the knife in his hand."

Robert Hunter, a former general manager for the Domino's restaurant at which the complainant worked, testified that she left the restaurant to make a pizza delivery at "roughly" 9:30 p.m. on May 28, 2012. And as a delivery driver, she would have been carrying "$20 or less," pursuant to the restaurant's policy. After the complainant had been "gone" for "about two and a half hours, three hours," Hunter became concerned. And when she returned to the restaurant "around" "midnight," she appeared "really disturbed," "her face was completely blank," and

she started "crying, like bawling." The complainant was "definitely upset," and "[t]he only thing [that] she said was, [i]t was the chicken guy."

In regard to "the chicken guy," Hunter explained that "a couple nights before" May 28, 2012, appellant had come into the Domino's restaurant and "ordered some chicken." Appellant was "intoxicated," "left quite an impression," was inside the restaurant for "maybe 15 to 20 minutes," and the restaurant's employees "noticed his behavior." Thus, when the complainant told Hunter, "[i]t was the chicken guy," he thought of appellant. Hunter noted that appellant came into the restaurant again "three or four days after" May 28, 2012 and "[o]rdered another 14-piece chicken." And, at that time, Hunter called for emergency assistance.

BPD Officer J. Spencer testified that on May 28, 2012 at 12:30 a.m., he was dispatched to the Domino's restaurant in response to a call regarding a robbery. Upon his arrival, Hunter directed him to speak with the complainant, who was "visibly upset, tears coming down her face," "red[] [and] shaking." As Spencer "tr[ied] to get . . . information" from the complainant, she "blurted out, [h]e raped me." She provided Spencer with a description of appellant and stated that he had stolen "some hot wings from the [restaurant] a week before."

Linda Pilcher, a certified adult sexual assault nurse examiner, who worked at the San Jacinto Methodist Hospital in Baytown in May 2012, testified that she

performed the sexual-assault examination of the complainant on May 28, 2012. The complainant told Pilcher that she had been sexually assaulted by "[v]aginal penetration and oral penetration" at approximately 11:00 p.m. that night. She also reported that there was a single "[a]ssailant," a black male. The complainant became "very tearful" when she spoke "about what [had] happened." And she noted that she had "wiped" herself prior to the examination, which, according to Pilcher, "may have altered evidence."

Pilcher explained that her examination of the complainant did not reveal any physical trauma. Specifically, there was "no trauma to the visual aspects of the [complainant's] sexual organ," "no bruises," "no scratches," "no lacerations," and "no bite marks." However, Pilcher noted that, in her experience, "very, very seldom" is trauma actually seen during a sexual-assault examination. And, unless "physical restraints" are used during a sexual assault, there will generally be "no marks" on the victim. Pilcher also noted that because the complainant told her that the "[a]ssailant" "had sucked on her breast," Pilcher "swabbed [the] breast to see if [she] could get any DNA."

Pilcher further testified that during her interview, the complainant described the sexual assault as follows:

> I was sitting in my car in front of the store. I saw him get up and look inside the store. He ran up to my car with a knife in his hand. I screamed. He told me to stop screaming, to shut up. He told me he was going to get in the car and for me to drive.

He told me to back up and drive to a parking lot by the townhomes on Beaumont Street. He had me get out of the car and empty my pockets. I gave him the money and everything I had. He had me look in my purse while he held the knife on me. He took my license. He had me get back in the car and dr[i]ve to the apartments on Beaumont and Largo.

He had me pull in. He had me pull in the back. He had me get out and search my pockets and search my car for anything valuable. He had me get back in the car and drive to Narcel . . . .

To Narcel and Ward. He had me park between two cars. He got out of the vehicle. He had me turn off the car and hand him the keys. When I turned around, he had his pants down. He told me to suck his penis. He had the knife, so I did. He told me to get in the backseat and to take my pants --

. . . .

-- off. He told me he wanted to fuck. He told me to lie down in the backseat and he stuck his penis in my vagina. He started raping me. He said, [f]or someone who is getting raped, you sure are wet. He raped me for ten to 15 minutes and he got off me. He started to lick me down there. After that, he told me to get out of the car. He told me to get on my knees . . . .

After that, he told me to get back in and lay down in the car. He went back inside me and went inside my rectum. He went for a couple of minutes, got off me and licked me some more. After that, he told me to get it from behind. I told him I had never done that before. He said he wanted to enter my [vagina] from behind. He bent me over a red car and went for about ten minutes.

He then told me to get back into the car and he got back inside me. He grabbed my legs and wrapped them around his body. He told me he was going to go off inside me. He got off me and . . . I asked if I could get dressed. He said yes and had me drive --

. . . .

> -- to the Exxon station on Alexander and Texas. He had me pull up next to a car. He told me to get out of the car and ask to use the restroom. They were closed so he had me go to the Valero station on Ward and Alexander. He told me he wanted me to go into the bathroom and clean myself out. I told him I had a shirt in the car. He had me drive to Largo Street where there was no light. He had me get out of the car and wipe deep inside me. He got out of the car. I took the shirt. He told me to get back in the car and put my seat belt on. He ran off and I drove off.

The complainant further reported:

> . . . [A]fter driving to the first apartment, he had me drive to where the pizza was supposed to be delivered. The people paid with a credit card. Before he left, he wiped everything down with his shirt and the red car he had me lean on . . . he wiped down with his shirt.

And the complainant stated that appellant "had her insert the shirt into her vagina to get as deep in as she could in order to wipe herself off." The complainant also told Pilcher that she had "had intercourse with her boyfriend" at "2:00 o'clock in the afternoon," "prior to going to work," on the same day that she was sexually assaulted.

Rhonda Williams, a former DNA analyst for the Harris County Institute of Forensic Sciences ("HCIFS"), testified that she performed the DNA analysis in this case. She noted that the complainant's boyfriend could not be "excluded as a possible source of DNA" from "the vaginal swab[s] of the sperm fraction," "the vaginal slide swabs, sperm fraction," and "the [complainant's] blue panties, sperm fraction." In other words, the DNA of complainant's boyfriend was "found" in

"the vaginal swabs" and her "panties." And appellant was "excluded" as a contributor to those items.

In regard to "the left breast nipple swabs," Williams explained that the sample was "a mixture of three or more individuals"; appellant, the complainant, and the complainant's boyfriend "could not be excluded as possible contributors to th[at] mixture." However, Williams noted that there was "a stronger profile" for appellant as a contributor, as compared to the complainant's boyfriend. And the swab from "the left breast nipple" was the only item tested that was "consistent" with appellant's DNA. Williams further explained that it was "possible" that "semen could [have] be[en] wiped out of someone such that DNA could not be detected," but "[n]ot all wiping would necessarily [have] result[ed] in" sperm being removed.

Detective Cervantes testified that when she showed the complainant a photographic array containing photographs of six black males with similar physical characteristics, the complainant "recognize[d] the person who . . . sexually assaulted her on May 28th, 2012" and had an "immediate[]" reaction "[a]s soon as she saw his picture." Her "eyes got really big," "[h]er hands went to her mouth," and "[s]he said that was him." Cervantes identified appellant as the person that the complainant had "picked out" in the photographic array.

Sufficiency of the Evidence

In his first issue, appellant argues that the evidence is legally insufficient to support his conviction because "the State presented no physical evidence that [the complainant] was assaulted"; "the DNA evidence did not tie . . . [a]ppellant to [the complainant] beyond a reasonable doubt," as it was "found only on [the complainant's] left breast nipple swab"; the complainant's "initial description of her assailant differed strikingly from . . . [a]ppellant's actual depiction"; "the State presented no documentary evidence that [the complainant] initially told the police that her assailant was the 'chicken guy'"; "the State presented no evidence other than [the complainant's] own testimony that she delivered pizzas to a certain address . . . with . . . [a]ppellant hovering just out of sight . . . or that she and . . . [a]ppellant visited any gas stations that night"; the complainant's identification of . . . [a]ppellant was . . . tainted by an impermissibly suggestive pretrial identification procedure"; "the State failed to even check [the complainant's] cell phone to see if it confirmed [her] story"; and the complainant "had been convicted of felony theft . . . after the assault."[2]

[2] In a sentence in his brief, appellant also asserts that "the evidence [is] . . . factually insufficient to support" his conviction. To the extent that appellant challenges the factual sufficiency of the evidence, we note that we now use the same appellate standard of review as that for legal sufficiency. *Ervin v. State*, 331 S.W.3d 49, 52–56 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd.).

We review the legal sufficiency of the evidence by considering all of the evidence in the light most favorable to the jury's verdict to determine whether any "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318–19, 99 S. Ct. 2781, 2788–89 (1979); *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Our role is that of a due process safeguard, ensuring only the rationality of the trier of fact's finding of the essential elements of the offense beyond a reasonable doubt. *See Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988). We give deference to the responsibility of the fact finder to fairly resolve conflicts in testimony, weigh evidence, and draw reasonable inferences from the facts. *Williams*, 235 S.W.3d at 750. 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.*

A person commits the offense of aggravated sexual assault if he intentionally or knowingly causes the penetration of the sexual organ of another person by any means, without that person's consent, and he uses or exhibits a deadly weapon in the course of the same criminal episode. TEX. PENAL CODE ANN. § 22.021(a)(1)(A)(i), (a)(2)(A)(iv) (Vernon Supp. 2015).

As detailed above, the complainant testified that as she sat in her car in the parking lot of the Domino's restaurant, appellant, holding a knife in his hand with

a six-inch blade, approached her "pretty fast." She recognized him as someone that had come into the restaurant "two or three nights" earlier and "stolen some chicken wings." While holding the complainant at knife point, appellant got into the backseat of her car and told her "to drive." The complainant thought that he was "going to kill" her.

The complainant followed appellant's directions and drove her car to various locations as he directed. During this time, he kept "point[ing]" the knife at her. Eventually, they "ended up" on "a dead end" road behind the Oaks of Baytown apartments. Appellant then told the complainant to "turn the car off," "give him the [car] keys," and "get out" of the car. The complainant "wasn't facing him" when she exited the car, and when he instructed her to "turn around," she saw that he "had pulled [down] his pants" and "underwear," leaving his penis exposed.

Appellant told the complainant "to get on [her] knees," "pointed the knife" at her stomach," and "put" his penis in her mouth for "five to ten minutes," while he continued to "push[]" "the back of [her] head" "forward." He then, while still pointing the knife at her, "told [the complainant] to get in the backseat [of the car] and to take [her] pants off and lay down." The complainant complied because appellant "had [the] knife on [her]." And he then, while making "statements about . . . raping her," "put" his penis "inside" of her vagina for approximately "ten minutes."

Appellant then told the complainant "to lean up against the car," and he again "put" his penis "inside" of her vagina. The knife remained in his hand, and he held it "kind of . . . at [her] shoulder." After "five to ten minutes," appellant "told [her] to get on [her] knees," and he "[p]ut" his penis "back in [her] mouth." The complainant explained that she was "horrif[ied]" and "didn't know if [appellant] was going to kill [her] or not." Appellant then again told her "to lay back down" in the backseat of the car, where he proceeded to "lick" her vagina, put his penis "back inside" her vagina, and "lick[] one of [her] breasts."

Eventually, appellant gave the complainant a shirt and told her to "clean [herself] out." Although she "tried not to clean [herself] out very well," appellant "told [her] to do it again more thoroughly," and she complied. Appellant then "took the shirt," told the complainant "to get back in the front seat" of the car and "look forward." He "put the [car] keys [i]n the backseat" of the car and "ran off."

The complainant identified State's Exhibit 7 as the photograph of appellant that she had selected from the photographic array presented to her by Detective Cervantes. She explained that she was able to identify appellant as the person who had sexually assaulted her on May 28, 2012 because she had spent "two hours" with him and his face was "pretty close" to hers when "he was on top of [her]." The complainant had "[n]o" doubt that appellant was the person who had sexually assaulted her. And she noted that she did not "want to have sex with" appellant,"

did not "agree to have sex with" him, and only had sex with him because "[h]e had a knife on" her and she "thought that he was going to kill" her.

Pilcher, who conducted the complainant's sexual-assault examination, testified that the complainant told her that she had been sexually assaulted by "[v]aginal penetration and oral penetration" by a single "[a]ssailant," a black male. Because the complainant told her that the "[a]ssailant" "had sucked on her breast," Pilcher "swabbed [the] breast to see if [she] could get any DNA." HCIFS DNA analyst Williams testified that appellant "could not be excluded as [a] possible contributor[]" to the swab taken from the complainant's "left breast nipple." And appellant had "a strong[] profile" as a contributor.

Detective Cervantes testified that when she showed the complainant a photographic array containing photographs of six black males with similar physical characteristics, the complainant "recognize[d] the person who . . . sexually assaulted her on May 28th, 2012." She had an "immediate[]" reaction "[a]s soon as she saw his picture," her "eyes got really big," "[h]er hands went to her mouth," and "[s]he said that was him." And Cervantes identified appellant as the person that the complainant had "picked out" in the photographic array.

Additionally, both Officer Spencer and Hunter testified that the complainant was "visibly upset," "crying" extensively, and "shaking" after she had returned to the Domino's restaurant. And she told each of them that the person who had

sexually assaulted her was the same person who had previously stolen "some hot wings from the [restaurant]." Hunter further testified that appellant was the "the chicken guy" who had come into the restaurant "a couple nights before" May 28, 2012 and "ordered some chicken." He was "intoxicated," "left quite an impression," was inside the restaurant for "maybe 15 to 20 minutes," and the restaurant's employees "noticed his behavior."

Initially, we note that, as appellant concedes in his brief, the complainant's testimony, standing alone, is sufficient to support his conviction of the offense of aggravated sexual assault. *See* TEX. CODE CRIM. PROC. ANN. art. 38.07(a) (Vernon Supp. 2015); *Garcia v. State*, 563 S.W.2d 925, 928 (Tex. Crim. App. [Panel Op.] 1978); *Jensen v. State*, 66 S.W.3d 528, 534 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd); *see also Ilodiguwe v. State*, No. 01-14-00231-CR, 2015 WL 5076285, at *2 (Tex. App.—Houston [1st Dist.] Aug. 27, 2015, no pet.) (mem. op., not designated for publication) (article 38.07(a) applies where complainant "reported the alleged sexual assault to law enforcement on the night of the events in question").

Further, the testimony of the law enforcement officers, the sexual assault nurse examiner, the DNA analyst, and the former Domino's restaurant general manager also support appellant's conviction. *See Johnson v. State*, 227 S.W.3d 180, 186 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (evidence of

investigating law enforcement officer meeting with complainant, who was crying, "had a hard time talking," appeared "very, very scared," and was "shaken up," supported conviction for aggravated sexual assault (internal quotations omitted)); *see also Lauderdale v. State*, No. 01-13-00539-CR, 2014 WL 6679634, at *3–4 (Tex. App.—Houston [1st Dist.] Nov. 25, 2014, no pet.) (mem. op., not designated for publication) (testimony of nurse examiner complainant "reported that a man approached her with a gun and forced her to perform oral sex" and law enforcement officer "that when he met with [complainant] she was panicked and hysterical" supported conviction for aggravated sexual assault).

Additionally, we note that the law does not require a sexual-assault complainant's testimony to be corroborated by medical or physical evidence. *See Garcia*, 563 S.W.2d at 928 (complainant's testimony sufficient to prove sexual contact occurred even in absence of physical evidence); *Jones v. State*, 428 S.W.3d 163, 169 (Tex. App.—Houston [1st Dist.] 2014, no pet.) ("The State has no burden to produce any corroborating or physical evidence."); *Lovings v. State*, 376 S.W.3d 328, 336 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (rejecting defendant's "contention that the lack of evidence of vaginal or anal trauma render[ed] the complainant's testimony suspect or legally insufficient").

Moreover, to the extent that appellant's arguments focus on the credibility of the complainant's testimony or the consistency of the evidence, the jury was the

sole judge of the credibility of the witnesses at trial, and we defer to the responsibility of the fact finder to fairly resolve conflicts in testimony, weigh evidence, and draw reasonable inferences from the facts. *See Williams*, 235 S.W.3d at 750.

Viewing all of 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 offense beyond a reasonable doubt. Accordingly, we hold that the evidence is legally sufficient to support appellant's conviction.

We overrule appellant's first issue.

Identification Evidence

In his second issue, appellant argues that the trial court erred in denying his motion to suppress evidence regarding his pretrial identification because the photographic array shown to the complainant was "impermissibly suggestive and created a very substantial likelihood of irreparable misidentification."

A pretrial identification procedure may be so suggestive and conducive to mistaken identification that subsequent use of that identification at trial denies the accused due process of law. *Barley v. State*, 906 S.W.2d 27, 32–33 (Tex. Crim. App. 1995); *Mendoza v. State*, 443 S.W.3d 360, 363 (Tex. App.—Houston [14th Dist.] 2014, no pet.). In reviewing a trial court's decision on the admissibility of a pretrial identification, we defer to the trial court's rulings on mixed questions of

law and fact if they turn on the credibility and demeanor of witnesses. *See Loserth v. State*, 963 S.W.2d 770, 772–73 (Tex. Crim. App. 1998). However, whether a pretrial identification procedure was impermissibly suggestive is a mixed question of law and fact that does not turn on an evaluation of credibility and demeanor; thus, we review the issue de novo. *Id.*

When faced with a challenge to an out-of-court identification, we first consider whether the identification procedure employed by law enforcement was impermissibly suggestive. *Barley*, 906 S.W.2d at 33. A pretrial identification procedure may be impermissibly suggestive based on the manner in which it was conducted or the content of the photographic array. *Id.*; *Burns v. State*, 923 S.W.2d 233, 237–38 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd).

If we determine that the identification was impermissibly suggestive, we then consider whether the suggestive procedure created a substantial likelihood of irreparable misidentification. *Barley*, 906 S.W.2d at 33–35. Factors affecting the likelihood of misidentification include: (1) the witness's opportunity to view the offender at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the offender; (4) the witness's level of certainty during the confrontation; and (5) the length of time between the offense and the confrontation. *Neil v. Biggers*, 409 U.S. 188, 199–200, 93 S. Ct. 375, 382 (1972); *Luna v. State*, 268 S.W.3d 594, 605 (Tex. Crim. App. 2008).

An analysis under these steps requires an examination of the "totality of the circumstances" surrounding the particular case and a determination of the reliability of the identification. *Barley*, 906 S.W.2d at 33. The defendant bears the burden to show both impermissible suggestion and a substantial likelihood of misidentification by clear and convincing evidence. *See id.* at 33–34. Appellate courts are not limited to reviewing only the evidence adduced at the admissibility hearing when considering the identification. *Webb v. State*, 760 S.W.2d 263, 272–73 n.13 (Tex. Crim. App. 1988). Instead, an appellate court may review both the hearing testimony and evidence adduced at trial when determining the admissibility of a pretrial identification. *Id.*

Appellant argues that the photographic array that the complainant viewed was "impermissibly suggestive" because he was "the only suspect . . . wearing a shirt with a design, while all of the other suspects were wearing plain white T-shirts."

To amount to the level of suggestiveness made impermissible, the photographic identification procedure must in some way be so defective as to indicate or suggest the photograph that the witness is to identify. *Ward v. State*, 474 S.W.2d 471, 475 (Tex. Crim. App. 1971). While every photographic array must contain photographs of individuals who fit the rough description of the suspect, it is not essential that all individuals be identical in appearance. *Buxton v.*

State, 699 S.W.2d 212, 216 (Tex. Crim. App. 1985); *Colgin v. State*, 132 S.W.3d 526, 532 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd). Neither due process nor common sense requires that the individuals in a photographic array exhibit features exactly matching the accused. *Buxton*, 699 S.W.2d at 216; *Colgin*, 132 S.W.3d at 532. Nor are such practices practical. *Ward*, 474 S.W.2d at 475–76.

Here, all of the men pictured in the photographic array were of similar age, race, and size,[3] and they fit the general description of the person that had sexually assaulted the complainant.[4] *See Williams v. State*, 675 S.W.2d 754, 757 (Tex. Crim. App. 1984); *Page v. State*, 125 S.W.3d 640, 647 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd). The fact that appellant's shirt was white with "a design," rather than "plain white," does not rise to the level of suggestiveness that is prohibited. *See Cienfuegos v. State*, 113 S.W.3d 481, 492 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) ("[T]he mere fact that appellant wore a red shirt did not render the lineup impermissibly suggestive."); *Bethune v. State*, 821 S.W.2d 222, 228–29 (Tex. App.—Houston [14th Dist.] 1991), *aff'd*, 828 S.W.2d 14 (Tex. Crim.

---

[3] At the hearing on appellant's suppression motion, Detective Cervantes testified that the photographic array consisted of six photographs of black males that had "generally the same size and build," the same hair color, and similar shaped lips, eyes, and faces. They had no facial hair and were all wearing civilian clothing consisting of a white t-shirt. *See Page v. State*, 125 S.W.3d 640, 647 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd).

[4] Officer Spencer testified that the complainant "described the suspect as a black male, approximately six foot tall, [who] was very skinny, completely bald, [and] appeared to be between the ages of 20 and 25."

App. 1992) (rejecting defendant's argument photographic array impermissibly suggestive where defendant "only subject with a particular shirt collar and the *only subject wearing a shirt with a design and lettering*" (emphasis added)). As we have previously stated, "a photographic array is not impermissibly suggestive merely because each photograph can be distinguished in some manner from the photograph of the accused." *Page*, 134 S.W.3d at 647. And our conclusion that the pretrial identification procedure was not in fact impermissibly suggestive obviates the need to determine whether it created a substantial likelihood of misidentification. *Williams*, 675 S.W.2d at 757.

Further, we note that the complainant testified that she selected appellant by "look[ing] at the faces," not because of the design on his shirt. *Cf. Burks v. State*, No. 01-10-00633-CR, 2012 WL 151463, at *4 (Tex. App.—Houston [1st Dist.] Jan. 19, 2012, no pet.) (mem. op., not designated for publication) (complainant identified defendant based on his recollection of gunman's facial features); *Bethune*, 821 S.W.2d at 228–29 (selection based solely on memory of attack). And she explained that she "knew" appellant's face because she was with him for "two hours" on May 28, 2012 and his face was "pretty close" to hers when "he was on top of [her]."

Because appellant failed to prove by clear and convincing evidence how the suggestiveness, if any, of the photographic identification procedure was

impermissible, we hold that the trial court did not err in denying his motion to suppress evidence regarding his pretrial identification.

We overrule appellant's second issue.

Closing Argument

In his third issue, appellant argues that the trial court erred in overruling his objections to certain portions of the State's closing argument and denying his motion for mistrial because "the State's closing argument improperly alleged facts not in evidence."

Proper jury argument is generally limited to: (1) summation of the evidence presented at trial; (2) reasonable deductions drawn from that evidence; (3) answers to opposing counsel's argument; and (4) pleas for law enforcement. *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000); *Acosta v. State*, 411 S.W.3d 76, 93 (Tex. App.—Houston [1st Dist.] 2013, no pet.). The trial court has broad discretion in controlling the scope of closing argument. *Lemos v. State*, 130 S.W.3d 888, 892 (Tex. App.—El Paso 2004, no pet.). The State is afforded wide latitude in its jury arguments, and it may draw all reasonable, fair, and legitimate inferences from the evidence. *Gaddis v. State*, 753 S.W.2d 396, 398 (Tex. Crim. App. 1988). However, a trial court has the duty to sustain objections to argument when the argument violates some rule or statute. *See Bray v. State*, 478 S.W.2d 89,

90 (Tex. Crim. App. 1972); *Eckert v. State*, 672 S.W.2d 600, 603 (Tex. App.—Austin 1984, pet. ref'd).

Appellant's complaint concerns the following three statements made by the State during its closing argument:

> Now, I know -- and we have talked about it in jury selection and several of you told me that you would want injuries. *And I knew going in and I know in all the sexual assault cases that I've prosecuted in Harris County, Texas* --
>
> . . . .
>
> Let's go back to Kenneth Campbell, the snitch from the Harris County Jail. *I never met Kenneth Campbell before.* He talked to two male prosecutors before me --
>
> . . . .
>
> If you want to go back there and write not guilty, I won't make you apologize to me. I won't make you tell me all the reasons and I'll take care of [the complainant] for you. *Here's what I'll do. I'll go down to my office and all the cases I've had where victims had no injuries, no* --

(Emphasis added.)

In regard to the first and third complained-of statements, appellant objected that the State's argument constituted "testifying outside the record," which the trial court overruled. On appeal, appellant argues that the statements "contained testimony outside the record because there was obviously no evidence in th[e] case as to how many sexual assault cases the District Attorney prosecuted in Harris County or how many cases she had in which the victim suffered no injuries."

We note, however, that the State made these statements in response to portions of appellant's own closing argument in which he argued that the complainant's lack of "injuries" or visible "trauma" raised a reasonable doubt as to whether appellant committed the offense of aggravated sexual assault. Specifically, appellant stated:

> Look at the physical evidence. Look at the hospital exam. You've got that report in evidence. No injuries whatsoever. No trauma whatsoever in any part of the female anatomy. You can see that in those medical records. There's no trauma in the hymen, the vulva. I mean, it goes on and on and on. No trauma whatsoever. No injuries whatsoever. It tells you that. They did a visual exam. No injuries. No injuries on the arms. No injuries on the legs. I mean, nothing that took place is consistent and that's what the medical report tells you.

Because the first and third complained-of statements were directed at rebutting appellant's assertion that a lack of injuries or trauma meant that no sexual assault had occurred in this case, they constituted permissible jury argument, and we hold that the trial court did not err in overruling appellant's objections to them. *See Wesbrook*, 29 S.W.3d at 115; *Kibble v. State*, 340 S.W.3d 14, 22–23 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd).

In regard to the second complained-of statement about Kenneth Campbell, appellant objected that the State's argument constituted "the DA talking outside the record," and the trial court sustained appellant's objection. However, the trial court then denied appellant's subsequent request for "the jury [to] be instructed to disregard" the statement and his motion for mistrial. On appeal, appellant argues

that although "the trial court [properly] sustained [his] objection," it erred in denying his "request that the jury be instructed to disregard the comment and [his] motion for a mistrial" because the State's argument "contained testimony outside the record" and was "manifestly improper and harmful."

We review a trial court's ruling on a motion for mistrial for an abuse of discretion. *Hawkins v. State*, 135 S.W.3d 72, 76–77 (Tex. Crim. App. 2004); *Williams v. State*, 417 S.W.3d 162, 175 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd). When the refusal to grant a mistrial follows an objection for improper jury argument, we evaluate the trial court's decision using the following factors: (1) the severity of the misconduct; (2) the measures adopted to cure the misconduct; and (3) the certainty of conviction absent the misconduct. *Archie v. State*, 340 S.W.3d 734, 738–39 (Tex. Crim. App. 2011). "Only in extreme circumstances, where the prejudice is incurable, will a mistrial be required." *Hawkins*, 135 S.W.3d at 77; *see also Williams*, 417 S.W.3d at 175 ("A mistrial is an extreme remedy and should be exceedingly uncommon.").

When assessing the first factor—the severity of the misconduct—our primary focus is on the prejudicial effect of the improper jury argument. *Hawkins*, 135 S.W.3d at 77–78. In deciding whether prejudice was incited, we examine the statement "in light of the facts adduced at trial and in the context of the entire argument." *See McGee v. State*, 774 S.W.2d 229, 239 (Tex. Crim. App. 1989);

Gaddis v. State, 753 S.W.2d 396, 398 (Tex. Crim. App. 1988). Here, the State's comment during closing argument that the prosecutor had "never met Kenneth Campbell before" was merely a single and brief statement that was not emphasized or reiterated by the State. Further, the substance of the State's comment itself was innocuous and lessens the severity of any misconduct. *See Archie v. State*, 221 S.W.3d 695, 700 (Tex. Crim. App. 2007) (prosecutor's statement "brief" and only related to one witness); *Hawkins*, 135 S.W.3d at 83–84 (error "isolated" and not "part of a pattern").

In regard to the second factor—the measures adopted to cure the misconduct—we note that although the trial court did not instruct the jury to disregard the State's comment, the court did instruct the jury in its charge:

> During your deliberations in this case, you must not consider, discuss, nor relate any matters not in evidence before you. You should not consider nor mention any personal knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence.

See Hawkins, 135 S.W.3d at 84 ("Court of appeals . . . erred in failing to consider the jury charge," when analyzing "[c]urative measures"); *Williams*, 417 S.W.3d at 179–80 (trial court's "written jury instructions . . . advised the jury that it should not 'consider, discuss, nor relate any matters not in evidence'"). We presume that the jury understood and followed the trial court's charge absent evidence to the contrary. *Taylor v. State*, 332 S.W.3d 483, 492 (Tex. Crim. App. 2011); *Gamboa*

v. State, 296 S.W.3d 574, 580 (Tex. Crim. App. 2009). And although the trial court denied appellant's request to disregard the State's comment, this is not determinative. *See, e.g.*, *Qalawi v. State*, No. 14-13-00033-CR, 2015 WL 3637818, at *9–10 (Tex. App.—Corpus Christi June 11, 2015, no pet.) (mem. op., not designated for publication) (trial court did not abuse its discretion in denying motion for mistrial even though it "did not provide a curative instruction to the jury at the time the [prosecutor's] statement was made"); *Williams v. State*, No. 01-11-00662-CR, 2013 WL 1804730, at *10 (Tex. App.—Houston [1st Dist.] Apr. 30, 2013, no pet.) (mem. op., not designated for publication) (trial court did not err in denying defendant's request for instruction to disregard even though "no curative measures were taken").

The third factor—the certainty of the conviction absent the misconduct—also weighs in favor of the trial court's ruling. Contrary to appellant's assertion, the evidence "against" him was not "thin." Here, the evidence supporting appellant's conviction was strong. And, appellant's conviction was sufficiently certain regardless of the second complained-of statement by the State during its closing argument. *See Newby v. State*, 252 S.W.3d 431, 439 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd) (denial of mistrial in sexual assault conviction not abuse of discretion where appellant's conviction "fairly certain" given unambiguous testimony of complainant).

Balancing these factors, we hold that the trial court did not abuse its discretion in denying appellant's motion for mistrial based on the second complained-of statement regarding Kenneth Campbell.

We overrule appellant's third issue.

Conclusion

We affirm the judgment of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Massengale, and Huddle.

Do not publish. TEX. R. APP. P. 47.2(b).