Affirmed and Memorandum Opinion filed April 29, 2010

In The

Fourteenth Court of Appeals

NO. 14-09-00014-CR

ERNEST FONTENOT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 1017374

MEMORANDUM OPINION

Appellant Ernest Fontenot was convicted of aggravated robbery and sentenced to life imprisonment. This court affirmed his conviction. *Fontenot v. State*, No. 14-05-01140-CR, 2007 WL 1216537 (Tex. App.—Houston [14th Dist.] Apr. 26, 2007, pet. ref'd). In the sole issue now before the court, appellant appeals the trial court's denial of his motion for post-conviction DNA testing. We affirm.

Around 11:00 p.m. on January 27, 2005, appellant accosted the complainant, a male student, at gunpoint outside his apartment. Appellant followed complainant into his apartment and ordered him to remove his clothes. Appellant bound complainant's hands and feet and gathered several items he would eventually steal. At some point, appellant

returned to complainant and ordered him to sexually assault himself with various items in his apartment, including "a CD spindle" and "pens."

After conviction, appellant requested DNA testing on several items, including "one ski mask," "one [c]ompact [d]isk [t]ower," "one Crest brand toothpaste tube," "one 11.25-ounce bottle of Dial hand soap," "two belts," "one ballpoint pen," and "one kitchen knife." The trial court denied appellant's request for post-conviction DNA testing, finding in part that (1) appellant failed to establish by a preponderance of the evidence that he would not have been convicted if DNA testing of the existing biological evidence yielded exculpatory results and (2) the manner and means by which appellant sexually assaulted complainant—forcing complainant to perform sexual acts upon himself with substances and objects in complainant's home—would not reasonably be expected to produce biological evidence connecting appellant to the offense. This appeal followed.

We review a trial court's denial of a request for post-conviction DNA testing under a bifurcated standard. *See Esparza v. State*, 282 S.W.3d 913, 921 (Tex. Crim. App. 2009). We defer to a trial judge's findings of fact when they are supported by the record. *Id.* We also defer to a trial judge's application of law to fact questions that turn on credibility and demeanor. *Id.* However, we review pure legal issues de novo. *Id.*

Under article 64.03(a)(2)(A) of the Texas Code of Criminal Procedure, a convicted person seeking DNA testing must show, among other things, that by a preponderance of the evidence "the person would not have been convicted if exculpatory results had been obtained through DNA testing." TEX. CODE CRIM. PROC. ANN. art. 64.03(a)(2)(A) (Vernon Supp. 2008). That standard is not met where exculpatory results would "merely muddy the waters." *Rivera v. State*, 89 S.W.3d 55, 59 (Tex. Crim. App. 2002). Nor is the standard met where the presence of defendant's DNA would indicate guilt but the absence of appellant's DNA would not indicate innocence. *Id.* at 60. Instead, exculpatory results must tend to prove defendant's innocence. *Id.* at 59.

In the case at hand, the crime took place in complainant's apartment. Therefore, it is likely that any DNA present on the items to be tested, which were all possessions of the complainant, belongs to complainant and any of his guests. The presence of a third party's DNA would merely "muddy the waters" and raise questions of whether the third party was involved in the crime or was merely one of complainant's guests. *See Jacobs v. State*, 115 S.W.3d 108, 113 (Tex. App.—Texarkana 2003, pet. ref'd) (holding that even if DNA testing revealed that hair samples came from a third party, such evidence would "merely muddy the waters by demonstrating that a third party had, at some point in time . . . been inside" the defendant's vehicle). This is particularly true here because appellant did not use his own body to sexually assault complainant, making it less likely that appellant's DNA would be present.

Appellant has failed to show by a preponderance of the evidence that he would not have been convicted if DNA testing showed the presence of another person at the crime scene. Therefore, the trial court did not err in denying appellant's request for DNA testing. We overrule appellant's sole issue.

Having overruled appellant's sole issue, we affirm the trial court's order.

/s/ Leslie B. Yates
Justice

Panel consists of Justices Yates, Frost, and Brown.
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