In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

06-20-00005-CR

BOBBY RAY MIMS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 6th District Court
Red River County, Texas
Trial Court No. CR02842

Before Morriss, C.J., Burgess and Stevens, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

Bobby Ray Mims appeals his conviction for failure to comply with sex-offender registration requirements.[1] The prosecution was based on a prior conviction for sexual assault in Colorado. The State argued that the Colorado conviction subjected Mims to Texas's registration requirements for sex offenders. Because we find the evidence was insufficient to support the trial court's judgment, we sustain this point of error and order a judgment of acquittal.[2]

"In evaluating legal sufficiency, we review all the evidence in the light most favorable to the trial court's judgment to determine whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt." *Williamson v. State*, 589 S.W.3d 292, 297 (Tex. App.—Texarkana 2019 pet. ref'd) (citing *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (plurality op.); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Hartsfield v. State*, 305 S.W.3d 859, 863 (Tex. App.—Texarkana 2010, pet. ref'd)). "We examine legal sufficiency under the direction of the *Brooks* opinion, while giving deference to the responsibility of the jury 'to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" *Id.* (quoting *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson*, 443 U.S. at 318–19); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007)).

[1]*See* TEX. CODE CRIM. PROC. ANN. art. 62.102(b)(2).

[2]Our decision on the sufficiency of the evidence is dispositive, so we need not address Mims's first point of error, which complains of the notice provided in the indictment. In a trial before the court, the trial court sentenced Mims to four years' confinement.

"Legal sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge." *Id.* (quoting *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)). "The 'hypothetically correct' jury charge is 'one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried.'" *Id.* (quoting *Malik*, 953 S.W.2d at 240).

To secure a conviction for the charged offense of failure to comply with registration requirements, the State had to prove the following elements: Mims had a reportable conviction as defined by the Texas Code of Criminal Procedure;[3] Mims was required to register as a sex offender;[4] and he failed to register as required.[5] To these requirements, the Texas Court of Criminal Appeals added an "essential element that defines" a defendant's "duty to register—that his extra-jurisdictional conviction was a 'reportable conviction or adjudication' because [the Department of Public Safety (DPS)] determined it was substantially similar to a Texas offense requiring registration." *Crabtree v. State*, 389 S.W.3d 820, 825 (Tex. Crim. App. 2012).

Crabtree is quite similar to the case at bar. The defendant was charged with failure to comply with the requirement to register as a sex offender. *Id.* at 822. The State relied on an extra-jurisdictional conviction[6] to allege a duty to register as a sex offender in Texas and charged

[3]*See* TEX. CODE CRIM. PROC. ANN. art. 62.001(5)(H) (Supp.).

[4]*See* TEX. CODE CRIM. PROC. ANN. art. 62.051.

[5]*See* TEX. CODE CRIM. PROC. ANN. art. 62.102.

[6]Actually, the State presented evidence of three convictions from Washington: "rape of a child in the first degree, child molestation in the first degree, and statutory rape in the first degree." *Crabtree*, 389 S.W.3d at 822.

Crabtree with failure to comply with the registration requirements. The State presented testimony from two law enforcement witnesses who opined that Crabtree's Washington conviction for rape "was substantially similar to the Texas offense of aggravated sexual assault of a child" and thus obligated him to register as a sex offender in Texas.[7] *Id.* at 823. However, the "State did not proffer any evidence at trial or notify the trial judge that DPS determined that Crabtree's Washington conviction was substantially similar to a Texas offense that required registration as either a 'reportable conviction or adjudication.'" *Id.* (quoting TEX. CODE CRIM. PROC. ANN. art. 62.051(a)). This, ultimately, was fatal to that prosecution. *See id.* at 833.

The Texas Court of Criminal Appeals, reviewing the plain language of the applicable Chapter 62 statutes, found that the Legislature had vested sole responsibility in the DPS to determine whether a non-Texas conviction was substantially similar to a Texas sexual offense, thereby obligating a defendant to comply with Chapter 62's registration requirements.

> Although the Texas sex offender registration program is generally complex, the plain language of articles 62.001 and 62.003 clearly demonstrates the Legislature's intent that whether an extra-jurisdictional conviction or adjudication triggers a person's duty to register is controlled by a DPS determination pursuant to article 62.003. And the language that makes this delegation effective is not ambiguous nor does it compel absurd results the Legislature could not have possibly intended.

[7]One witness compared fingerprints on the Washington judgments with Crabtree's (the opinion is silent as to whether the witness offered testimony as to his conclusion about that comparison) and told the jury "that the conduct described in the charging instrument for rape of a child in the first degree would be considered a first-degree felony aggravated assault of a child in Texas." *Id.* at 823. Another law enforcement officer said that, "in her opinion," Crabtree's Washington conviction for "rape of a child in the first degree was substantially similar to the Texas offense of aggravated sexual assault of a child and that child molestation in the first degree was substantially similar to a sexually violent offense, albeit without specifically identifying which sexually violent offense." *Id.*

Id. at 826; *see* TEX. CODE CRIM. PROC. ANN. arts. 62.001,[8] 62.003.[9] "Establishing that Crabtree had a reportable conviction . . . under the definition of article 62.001(5)(H)[10] is a condition precedent to proving he had a duty to register and failed to comply with that burden." *Crabtree*, 389 S.W.3d at 832. Absent evidence Crabtree had previously been convicted of an offense that qualified as a reportable conviction, "he could not have committed the charged offense [of failure to register] because he would not labor under an obligation to register." *Id.* "Based on the plain language of articles 62.001(5)(H) and 62.003," the Texas Court of Criminal Appeals held "that a DPS substantial-similarity determination is an essential element of the offense of failure to comply with registration requirements." *Id.* *Crabtree* dictates our resolution of Mims's appeal.

The State's indictment alleged Mims, "on or about the 18th of July, 2018,"

> while being a person with a conviction or deferred adjudication for Sexual Assault, and while knowing that he was required to register under the Sex Offender Registration Program, Chapter 62 of the Texas Code of Criminal Procedure, and while having a duty to report once each year not earlier than the 30th day before and not later than the 30th day after the anniversary of [Mims's] date of birth"

"failed to report to register as required by Texas Code of Criminal Procedure Art. 62.058."

Mims's purported obligation to register as a sex offender in Texas resulted from a conviction from Colorado. The State had to prove that the Colorado offense of first-degree sexual

[8]"'Department' means the Department of Public Safety." TEX. CODE CRIM. PROC. ANN. art. 62.001(1) (Supp.).

[9]"For the purpose of this chapter, the department is responsible for determining whether an offense under the laws of another state . . . contains elements that are substantially similar to the elements of an offense under the laws of this state." TEX. CODE CRIM. PROC. ANN. art. 62.003(a).

[10]A "reportable conviction or adjudication" includes an out of state conviction for "an offense containing elements that are substantially similar to the elements of" continuous sexual assault of a young child or children, indecency with a child, sexual assault, or aggravated sexual assault. TEX. CODE CRIM. PROC. ANN. art. 62.001(5)(A), (H).

assault was substantially similar to a Texas offense that would constitute a reportable conviction. And pursuant to the Texas Code of Criminal Procedure and *Crabtree*, the State had to produce evidence that DPS had made such a determination.

Mims waived his right to a jury, and his case was tried to the court. One State witness, Priscilla Salinas, was the secretary to the Red River County Sheriff. Salinas testified[11] that she supervised the sex offender registrants and that, before her job as the secretary, she worked in the jail and "knew [Mims] was a registered sex offender" because of "an out-of-state charge in Colorado" for first-degree sexual assault. The State offered no documentary evidence regarding the Colorado conviction; nothing was presented regarding any determination by DPS and any similarity between that offense and a Texas offense.[12] Citing *Crabtree*, Mims argues that the evidence was legally insufficient. We agree.

In answer, the State does not address *Crabtree*. Rather, it argues that the substantial similarity between Mims's Colorado conviction and an applicable Texas sexual offense were matters of law for the trial court. Alternatively, the State asks this Court to review the elements of the Colorado offense of sexual assault and similar Texas offenses. In support, the State directs us to *Fisk v. State*, 574 S.W.3d 917 (Tex. Crim. App. 2019); *Jacobs v. State*, 594 S.W.3d 453 (Tex.

[11]Salinas further testified that Mims, whose date of birth was February 11, had registered January 11, 2017, and on July 24, 2018; he did not, however, register within thirty days before or after his birthday in 2018. Mims also registered in February 2019, after the indictment was returned December 20, 2018.

[12]The State did not proffer the Colorado judgment in the guilt phase of trial; only at the beginning of punishment was that document offered and admitted.

Crim. App. 2019); and *Hardy v. State*, 187 S.W.3d 232 (Tex. App.—Texarkana 2006, pet. ref'd). We find that this misses the issue, as those cases are not applicable to the situation at bar.[13]

In each case cited by the State, the defendant had a prior, extra-jurisdictional conviction for a sexual offense. In those cases, the State proved the foreign convictions in pursuit of mandatory life sentences under the Penal Code. *See* TEX. PENAL CODE ANN. § 12.42(c)(2)(B)(v).[14] The State's cases did not involve prosecutions for failure to comply with registration requirements. Fisk was convicted of three counts of sexual assault of a child under seventeen years of age,[15] Jacobs of aggravated sexual assault of a child,[16] and Hardy of aggravated sexual assault.[17] A DPS substantial-similarity determination was not necessary in those cases, since it was not an element of the accusations being tried.

Mims, like Crabtree, was accused of failing to comply with the registration requirements of a sex offender. A DPS determination that Mims's Colorado conviction was for a substantially similar Texas offense was an element of the State's accusation. Failing to prove it rendered the

[13]The State also argues that Mims waived his complaint, because he made no objection to admission of the Colorado judgment when the court took up the sentencing phase of trial. The issue here is sufficiency of the evidence. "[A] claim regarding sufficiency of the evidence need not be preserved for appellate review at the trial level, and it is not forfeited by the failure to do so." *Moff v. State*, 131 S.W.3d 485, 489 (Tex. Crim. App. 2004). The State also invites us to take judicial notice of the similar elements in the Colorado conviction to the Texas offense of sexual assault. *See* TEX. PEN. CODE ANN. § 22.011 (Supp.). We decline, as such action is not necessary for our resolution of this appeal.

[14]A life sentence is mandatory for a defendant convicted of enumerated sexual offenses if it is shown that he or she has previously been convicted in another state of an offense with "elements that are substantially similar" to one of the listed Texas offenses. TEX. PENAL CODE ANN. § 12.42(c)(2)(B)(v).

[15]*See Fisk*, 574 S.W.3d 917.

[16]*See Jacobs*, 594 S.W.3d at 455.

[17]*See Hardy*, 187 S.W.3d at 233.

evidence against Mims legally insufficient. We reverse the trial court's judgment and render a judgment of acquittal.

Josh R. Morriss, III
Chief Justice

Date Submitted: July 2, 2020
Date Decided: July 29, 2020

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