IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1012-16

LANNY MARVIN BUSH, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE ELEVENTH COURT OF APPEALS COLEMAN COUNTY

KEEL, J., delivered the opinion of the Court in which KELLER, P.J., and KEASLER, HERVEY, RICHARDSON, NEWELL, and YEARY, JJ., joined. WALKER, J., filed a dissenting in which ALCALA, J., joined.

O P I N I O N

Appellant was charged with capital murder in the course of committing or attempting to commit kidnapping. A jury found him guilty, and the trial court sentenced him to life without parole. The Eleventh Court of Appeals held that the evidence was sufficient to show murder but insufficient to show that it was committed in the course of a kidnapping or attempted kidnapping. *Bush v. State*, No. 11-14-00129-CR, 2016 Tex.

App. LEXIS 8729, at *18 (Tex. App.—Eastland Aug. 11, 2016, pet. granted) (mem. op., not designated for publication). We granted the State's petition for discretionary review, which asked whether the court of appeals erred in its evaluation of the sufficiency of the evidence. We hold that it did because it substituted its judgment for the jury's about the weight of the evidence, ignored incriminating inferences supported by the evidence, speculated about evidence that was not presented and credited hypotheses that were inconsistent with Appellant's guilt. We reverse the judgment of the court of appeals.

STANDARD OF REVIEW

To evaluate the legal sufficiency of the evidence an appellate court must view the combined and cumulative evidence, including all reasonable inferences, in the light most favorable to the prosecution and ask whether any rational trier of fact could have found each element of the offense beyond a reasonable doubt. *Musacchio v. United States*, 136 S. Ct. 709, 715 (2016); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Ramsey v. State*, 473 S.W.3d 805, 808 (Tex. Crim. App. 2015). Appellate review "does not intrude on the jury's role 'to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" *Musacchio*, 136 S. Ct. at 715, quoting *Jackson*, 443 U.S. at 319. The appellate court must presume that the fact finder resolved any conflicting inferences in favor of the prosecution and defer to that resolution. *Cavazos v. Smith*, 565 U.S. 1, 7 (2011) (per curiam). Legally sufficient evidence need not exclude every conceivable alternative to the defendant's guilt, *Ramsey*,

473 S.W.3d at 811, and the law requires no particular type of evidence. Direct and circumstantial evidence are equally probative, and "circumstantial evidence alone can be sufficient to establish guilt." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

CAPITAL MURDER

The indictment charged Appellant with the intentional murder of Michele Reiter in the course of kidnapping or attempting to kidnap her. *See* TEX. PENAL CODE § 19.03(a)(2). In order to support a conviction for capital murder in the course of kidnapping or attempted kidnapping, the evidence must demonstrate that the defendant had the intent to kidnap at the time of or before the victim's death. *See Herrin v. State*, 125 S.W.3d 436, 440 (Tex. Crim. App. 2002); *Santellan v. State*, 939 S.W.2d 155, 162 (Tex. Crim. App. 1997).

Kidnapping

"Kidnapping" means intentionally or knowingly abducting another person. TEX. PENAL CODE § 20.03. "Abduct" means "to restrain a person with intent to prevent his liberation by: (A) secreting or holding him in a place where he is not likely to be found; or (B) using or threatening to use deadly force." *Id*. § 20.01(2). "Restrain" means "to restrict a person's movements without consent, so as to interfere substantially with the person's liberty, by moving the person from one place to another or by confining the person." *Id*. §20.01(1). Restraint is without consent if it is accomplished by force, intimidation, or deception. *Id*. § 20.01(1)(A).

A kidnapping has been committed when restraint is accomplished with intent to prevent liberation by either secreting the victim or using or threatening deadly force. *Mason v. State*, 905 S.W.2d 570, 575 (Tex. Crim. App. 1995). A kidnapping is complete "when the defendant, at any time during the restraint, forms the intent to prevent liberation by secreting or holding another in a place unlikely to be found." *Laster v. State*, 275 S.W.3d 512, 521 (Tex. Crim. App. 2009). Restraint is the *actuas reus* of kidnapping; the intent to secrete or threaten deadly force is the *mens rea*. *Mason*, 905 S.W.2d at 575; *Brimage v. State*, 918 S.W.2d 466, 475-476 (Tex. Crim. App.1994). The restraint need not last a certain amount of time or span a certain distance. *Hines v. State*, 75 S.W.3d 444, 447 (Tex. Crim. App. 2002); *Clark v. State*, 24 S.W.3d 473, 477 (Tex. Crim. App. 2000).

Attempted Kidnapping

A person attempts a crime "if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended." TEX. PENAL CODE § 15.01(a). Criminal attempt involves an imaginary line that separates mere preparatory conduct from "an act which tends to effect the commission of the offense." *Flournoy v. State*, 668 S.W.2d 380, 383 (Tex. Crim. App. 1984). Section 15.01 does not draw the line at the last proximate act before the commission of the intended offense. *McCravy v. State*, 642 S.W.2d 450, 460 (Tex. Crim. App. 1982) (op. on reh'g). The State's burden in an attempted kidnapping

case is to prove that the perpetrator committed an act beyond mere preparation with intent to secrete or hold the victim. *See Laster*, 275 S.W.3d at 522.

THE EVIDENCE

The prosecution's case was based on circumstantial evidence that highlighted the relationship between Appellant and Michele Reiter, the circumstances surrounding her disappearance on September 10[1], and Appellant's behavior before and after her disappearance. The sufficiency issue hinges on the reasonableness of inferring that Appellant kidnapped or attempted to kidnap Reiter before he murdered her. The evidence is summarized below.

The Relationship

Appellant and Reiter dated for about five years and lived together in Brownwood. Throughout the relationship, Appellant was jealous and controlling. He always wanted to know where Reiter was, and he was suspicious of her answers. He would regularly accuse her of cheating on him, he tried to monitor her through other people, and he harassed her at work. His possessiveness and jealousy were even more pronounced in the last week-and-a-half of the relationship.

On August 24 Reiter left Appellant and moved in with a friend. Reiter tried to cut off communication with Appellant, but he continued to pester her with calls and text messages. He harassed her in other ways, too. On August 28 he falsely accused her of

[1] All dates throughout this opinion reference 2012.

domestic violence and had her arrested, causing her to spend a night in jail. The next day he hacked her phone, email and Facebook accounts; she had to buy a new phone and set up new accounts. On September 3 he falsely complained to Reiter's employer, Home Depot, that she had thrown a pipe at him while on the job. On September 8 he left her a message warning her against going out, saying that bad people were watching her and that they would put drugs in her drink and hurt her. On the same night he left this message he drove by the house on the little-traveled cul-de-sac where Reiter was staying with her friend, Denise Worrell.

Reiter was afraid of Appellant, and she and her friends agreed that she should never get into a car with him. Reiter promised Worrell that she would not meet Appellant alone, and Worrell agreed to call the police if she did not hear from Reiter after a certain period of time.

September 9 and 10

After Reiter went to live with Worrell, Appellant created a fake profile on Facebook under the name of Rocky Switzer and "friended" Reiter. From September 9 to September 10, "Rocky" and Reiter chatted via Facebook, a ruse Appellant used to quiz Reiter about her relationship with her new boyfriend, Kemper Croft. Reiter admitted that she and Croft were sexually intimate.

In the early afternoon on September 10, Appellant went to the Croft home and reported the affair to Mrs. Croft. He goaded her into confronting Reiter on the phone

while he stood by. The phone call shocked and upset Reiter, but she cheered up in anticipation of a dinner date with Rocky that was scheduled for 8:00 that night at a restaurant in nearby Santa Anna.

After visiting Mrs. Croft, Appellant purchased .32 caliber ammunition at a Brownwood sporting goods store. At that point his shirt was missing its embroidered name tag, though it had been in place when he was at the Croft home, and he wore his sunglasses and kept his hat pulled low while in the store. He bought the ammunition with the credit card of Cindy Barrow, his new girlfriend, and later lied to her about the nature of the purchase. Sometime before this date Appellant had asked his nephew about the .32 caliber pistol that had belonged to another relative.

At around 6:15 p.m. on September 10 Reiter left Worrell's house. She was going to the pharmacy, and she had a tentative plan to meet Appellant to retrieve some of her property; after that she was going on her date with Rocky. Minutes later Appellant called Reiter and offered to return her property to her if she met with him. At 6:33 p.m. both Appellant's and Reiter's phones were at the Bert Massey sports complex in Brownwood, and by 6:40 p.m. both phones were traveling south from Brown County toward Santa Anna.

At 7:56 p.m. Appellant texted Worrell from Reiter's phone pretending to be Reiter. The message read, "Rockie called and is here early going to meet him will be home late[.]" Worrell found the message suspect because Reiter had already told her of her

plans with Rocky, the text style differed from Reiter's, and the timing of the message did not sync with its claim that Rocky was early because the date was scheduled for only four minutes later.

Appellant's and Reiter's phones eventually reached the rural location that turned out to be Reiter's burial site. They stayed there until Reiter's phone stopped communicating with cell towers at 8:55 p.m., and Appellant's phone began traveling to San Angelo where he was then living with Barrow.

At about 11 p.m. Appellant called his daughter, who was a friend of Reiter's, and told her that Reiter had been reported missing, her car had been found abandoned at the sports complex, and he thought he was a suspect in her disappearance. He told his daughter to tell Reiter that if she "fucked around" with the wrong married man, she would "wind up in a ditch."

September 11-19

On September 11 Appellant's phone traveled from San Angelo to the vicinity of Reiter's burial site and stopped pinging; at the same time, Reiter's phone pinged briefly. After an extended period in the area of the burial site, Appellant's phone headed back to San Angelo.

Worrell called the police that morning and reported Reiter missing. She also called Appellant to see if he had any information about Reiter. He claimed that he had not seen Reiter and knew nothing of her whereabouts. Over the next eight days, Worrell

cultivated Appellant's trust in an effort to keep him talking to her. In the course of those communications, Appellant asked Worrell if the police believed Reiter had been abducted; he claimed he could find her if the police would leave him alone; and he admitted that he had wanted to hurt Reiter as badly as she had hurt him.

The Investigation

Investigators searched Appellant's truck on September 26 and found refrigerant, a receipt for its purchase three days before Reiter's disappearance, a bathrobe belt and a shovel. According to Barrow, Appellant had never carried a shovel in his truck before Reiter's disappearance.

A forensic examination of Appellant's computer showed that before September 10 he had researched the following topics on the internet: how to make homemade knockout drops, missing person protocol, Brownwood police blotter, Brown County jail records, and Kemper "Cross." He researched the locations of the heart and lungs in the human body on September 10 and/or 11.[2]

When police searched Appellant's cell phone they found that he had erased its contents from before September 11. Reiter's phone was never recovered.

Reiter's badly decomposed, nude body was found buried in a shallow grave under a bridge in a rural area on September 24. The site was not visible from the roadway or from the air. Her autopsy revealed no natural disease, strangulation, or injury. The cause

[2] The timing of this particular search was unclear. The exhibit documenting it displayed both September 10 and 11.

of death was undetermined, but the medical examiner could not rule out death by asphyxiation. Foul play was suspected.

COURT OF APPEALS' OPINION

The court of appeals held that the evidence was insufficient to show murder in the course of either kidnapping or attempted kidnapping.

Kidnapping

In addressing the sufficiency of the evidence to support a finding of kidnapping, the court of appeals made several observations about what the evidence did not show: The time and location of Reiter's death, whether she was alive when she left the sports complex, whether the meeting at the sports complex was held against her will and whether she left the sports complex against her will. *Bush*, 2016 Tex. App. LEXIS 8729 at *17. These observations led the court astray by diverting its attention from the evidence that was presented and causing it to entertain hypotheses inconsistent with guilt. *See Musacchio*, 136 S. Ct. at 715 (appellate court must view the evidence in the light most favorable to the prosecution and ask whether any rational trier of fact could have found each element of the offense beyond a reasonable doubt); *Jackson*, 443 U.S. at 319 (same); *Ramsey*, 473 S.W.3d at 808 (legally sufficient evidence need not exclude every alternative to defendant's guilt).

These observations were also erroneous because they raised the State's burden of proof. The State did not have to prove that the meeting at the sports complex was held

against Reiter's will or that Appellant kidnapped her from the sports complex; its burden was to show that Appellant abducted Reiter at any point before he killed her. TEX. PENAL CODE §§ 19.03(a)(2), 20.03; *Laster*, 275 S.W.3d at 521; *Mason*, 905 S.W.2d at 575.

The court of appeals rejected the inference urged by the State that, given the state of their relationship and Reiter's fear of Appellant, she would not have accompanied him willingly to a rural location like her grave site. *Bush*, Tex. App. LEXIS 8729 at *16-17. The court reasoned that because Reiter met Appellant at the sports complex, a location that it deemed remote, it would be irrational to infer that she would not willingly have traveled with appellant to the place where she was later found buried. *Id*. at *17. But remoteness is relative. Compared to the lonely country leading to and surrounding Reiter's shallow grave, the sports complex located in Brownwood was not remote. Comparing the remoteness of the two places is a classic example of weighing the evidence, a job that belongs exclusively to the jury, and the court of appeals erred by invading the jury's province. *See Musacchio*, 136 S.Ct. at 715, quoting *Jackson*, 443 U.S. at 319 (appellate review does not intrude on jury's job of weighing evidence and drawing reasonable inferences therefrom); *Hooper*, 214 S.W.3d at 13 (jury can draw inferences from the combined and cumulative force of the evidence).

The court of appeals dismissed Reiter's departure from the sports complex as evidence of kidnapping because "the record does not indicate whether Reiter left the sports complex willingly . . . or whether she was even still alive when she left the sports

complex." *Bush*, 2016 Tex. App. LEXIS 8729 at *17. That argument is misplaced because the State's evidence need not exclude every reasonable hypothesis save for guilt. *See Ramsey*, 473 S.W.3d at 808. It is enough that the evidence, viewed in the light most favorable to the State's case, supports the incriminating inference that Reiter was forced, intimidated, or deceived into either leaving with Appellant or remaining with him as they traveled to her remote grave site. *See Jackson*, 443 U.S. at 319 (evidence is legally sufficient if a rational trier of fact could have found each element of the offense beyond a reasonable doubt).

Attempted Kidnapping

In concluding that the evidence was insufficient to show attempted kidnapping, the court of appeals discounted as mere preparation each of defendant's actions preceding Reiter's disappearance, considered evidence that was not presented, and re-weighed the evidence: Appellant researched knockout drops, but that was two months before the killing, and there was no evidence he obtained any such drugs. *Bush*, 2016 Tex. App. LEXIS 8729 at *19. He bought ammunition, but there was no evidence he had a gun. *Id*. He set up Reiter for a date with Rocky, but it never happened. *Id*. He enticed Reiter to meet him at the sports complex with the promise of returning her property to her, but he did not deceive her because, according to his statement to investigators, he had most of her property with him. *Id*. at *20.

Instead of discounting each piece of evidence, the court of appeals should have

asked whether a rational jury could find that researching knockout drops, buying ammunition, arranging the date with Rocky, and enticing Reiter to meet him were more than mere preparation that tended to effect the commission of kidnapping. *See Musacchio*, 136 S.Ct. at 715; *Jackson*, 443 U.S. at 319. But the court accorded no incriminating significance to any of these acts, and concluded, without authority or rationale, that they did not amount to more than mere preparation. *Bush*, 2016 Tex. App. LEXIS 8729 at *19.

The court discounted the incriminating significance of Appellant's ammunition purchase because the record did not show that he had a gun. *Id*. at *19. But that is a backwards approach to the evidence: The appropriate question was whether a rational fact finder could infer the possession of the weapon from the purchase of the ammunition. The court gave no weight to Appellant's furtive approach to the purchase (removing his name tag, wearing sunglasses and hat indoors, using his girlfriend's credit card and lying to her about what he had bought), and failed to mention those circumstances in its evaluation of the sufficiency of the evidence.

The court rejected the State's argument that Appellant lured Reiter to the sports complex by deceiving her about his intent to return her property to her. It noted that in his interview with investigators Appellant claimed to have had some, though not all, of Reiter's property with him on September 10, and there was no evidence to show that this was a lie. But Appellant's purported possession of Reiter's property would not prevent a

rational fact finder from inferring deception on his part about his intent. He could intend to kidnap her but tell her something else regardless of his possession of her property.

SUFFICIENCY OF THE EVIDENCE

By its verdict, the jury believed that Reiter had been restrained in some manner prior to her death. We must uphold the conviction unless no rational trier of fact could agree with this verdict. Viewed in the light most favorable to the prosecution, the evidence and the inferences from it support the jury's finding that Appellant killed Reiter while in the course of kidnapping or attempting to kidnap her.

Evidence indicated that Reiter was scared of Appellant and wanted nothing to do with him. She had told her friends that she would not get into a car with him or meet him alone, and had asked friends to call the police if they did not hear from her for a certain period of time. A rational jury could infer that she would not have willingly gotten into his truck and traveled with him to a remote location like her burial site. This is also supported by the evidence that Appellant created the Rocky ruse to trick Reiter into meeting him on the night of her disappearance.

Before meeting Reiter at the sports complex, Appellant laid the groundwork for kidnapping her. He researched how to make knock-out drops, purchased refrigerant and ammunition, and had a belt in his truck. Cell phone data indicated that Appellant and Reiter were together for over two hours before Appellant left the area where Reiter's body was eventually found. It also showed that both phones were at the burial site the

following day. While there is no way of knowing at what point during this time frame Reiter was killed, a rational jury could infer from the evidence that she was alive during part of this time and that she was restrained without her consent.

Appellant urges us to follow *Herrin v. State* and hold that the evidence is insufficient because the State failed to prove the time of Reiter's death, leaving open the possibility that he killed Reiter before abducting her. *Herrin* is distinguishable from this case. According to the majority opinion, the sequence of events in *Herrin* – a deadly shooting followed by moving of the body – was undisputed. 125 S.W.3d at 440. But in this case there was no evidence that Appellant killed Reiter before she got into his truck. On the contrary, the lack of any traumatic injury to Reiter suggests that Appellant did not kill her immediately upon encountering her at the sports complex. *Herrin*'s fact-specific result does not apply here.

Appellant also argues that because Reiter's cell phone was transmitting a signal during her ride with him from the sports complex to her burial site, she must have willingly accompanied him because she did not contact anyone for help. This argument ignores the fact that Appellant had control over Reiter's phone – and inferentially over her – as proven by his fraudulent text message to Worrell at 7:56 p.m.

CONCLUSION

The court of appeals erred in its evaluation of the sufficiency of the evidence. Viewed in the light most favorable to the prosecution, a rational jury could conclude that Appellant

murdered Reiter in the course of kidnapping or attempting to kidnap her. Consequently, we reverse the decision of the court of appeals.

Delivered: May 2, 2018

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