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

WALKER, J., filed a dissenting opinion in which ALCALA, J., joined.

DISSENTING OPINION

A jury convicted Appellant Lanny Marvin Bush of capital murder, for intentionally causing the death of Michele Reiter while in the course of kidnapping or attempting to kidnap her. The court of appeals reversed the capital murder conviction, finding that the evidence was insufficient to support kidnapping. However, the court of appeals found the evidence sufficient to support a conviction on the lesser-included offense of murder, reformed the judgment accordingly, and remanded to the trial court for punishment. The State argues that kidnapping was supported by

sufficient evidence, and the Court today rules in the State's favor. Because I believe the court of appeals ultimately got it right–that there is insufficient evidence to support kidnapping or attempted kidnapping–I respectfully dissent.

Sufficiency of the Evidence, Inferences, and Speculation

When reviewing the sufficiency of the evidence to support a criminal conviction, reviewing courts view the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational juror could have found the essential elements of the crime beyond a reasonable doubt. *Queeman v. State*, 520 S.W.3d 616, 622 (Tex. Crim. App. 2017); *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). Reviewing courts must give deference "to the responsibility of the trier of fact to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Villa v. State*, 514 S.W.3d 227, 232 (Tex. Crim. App. 2017) (quoting *Jackson*, 443 U.S. at 319). Each fact need not point directly and independently to the guilt of the defendant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *Balderas v. State*, 517 S.W.3d 756, 766 (Tex. Crim. App. 2016); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016); *Hooper*, 214 S.W.3d at 13. On appeal, the same standard of review is used for both circumstantial and direct evidence cases. *Jenkins*, 493 S.W.3d at 599; *Hooper*, 214 S.W.3d at 13.

However, although we give significant deference to the jury's conclusions, even in circumstantial evidence cases, that deference is not unlimited. As we explained in *Hooper*:

> Under the *Jackson* test, we permit juries to draw multiple reasonable inferences as long as each inference is supported by the evidence presented at trial. However, juries are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions. To correctly apply the *Jackson* standard, it is vital that courts of appeals understand the difference between a reasonable inference supported by evidence at trial, speculation, and a presumption. A presumption is a legal inference that a fact exists if the facts giving rise to the presumption are proven beyond a reasonable doubt. For example, the Penal Code states that a person who purchases or receives a used or secondhand motor vehicle is presumed to know on receipt that the vehicle has been previously stolen, if certain basic facts are established regarding his conduct after receiving the vehicle. A jury may find that the element of the offense sought to be presumed exists, but it is not bound to find so. In contrast, an inference is a conclusion reached by considering other facts and deducing a logical consequence from them. Speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented. A conclusion reached by speculation may not be completely unreasonable, but it is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt.

Hooper, 214 S.W.3d at 15-16 (citations omitted). Accordingly, we have found the evidence insufficient in cases where a necessary element of the offense could not be found without resorting to speculation. *See, e.g.*, *Williams v. State*, 235 S.W.3d 742, 760-61 (Tex. Crim. App. 2007) (conclusion that defendant was reckless in leaving her children in the care of her boyfriend was based on speculation, where there was no evidence that her boyfriend was an incompetent caretaker or did not know what to do with a burning candle); *Gross v. State*, 380 S.W.3d 181, 188 (Tex. Crim. App. 2012) (conclusion that defendant and his brother-in-law decided to kill the victim while driving was based on no evidence and was speculative); *Rabb v. State*, 434 S.W.3d 613, 617 (Tex. Crim. App. 2014) (conclusion that defendant destroyed evidence by swallowing it was based on speculation, where there was no evidence on the status of the bag after he swallowed it); *Queeman*, 520 S.W.3d at 625 (conclusion that defendant was excessively speeding was speculative, where trooper did not quantify defendant's speed).

Sufficiency of Kidnapping

To sustain the jury's verdict that Appellant is guilty of capital murder, we must first determine whether the State proved kidnapping–the aggravating element of capital murder as charged in this case. "A person commits the offense of kidnapping by intentionally or knowingly restricting a person's movements, by either moving the person from one place to another or confining the person, without consent." *Swearingen v. State*, 101 S.W.3d 89, 95 (Tex. Crim. App. 2003). This restriction of movement can be accomplished by force, intimidation, or coercion, so as to substantially interfere with the person's liberty. *Id.* The act or acts must be done with the intent to prevent the person's liberation by either secreting or holding her in a place where she is not likely to be found or using or threatening to use deadly force. *Id.* Deadly force is "force intended or known by the person acting to cause, or in the manner of its use or intended use is capable of causing death or serious bodily injury." *Id.* "The offense of kidnapping is complete when the restraint is accomplished and there is evidence that the defendant intended to restrain the victim by either secretion or the use or threat to use deadly force." *Id.*

Importantly, we have indicated that a dead body cannot be kidnapped. *Gribble v. State*, 808 S.W.2d 65, 72 n.16 (Tex. Crim. App. 1990). Under Penal Code section 20.03(a), kidnapping is defined as the knowing or intentional abduction of a "person." *Id.*; Tex. Penal Code Ann. § 20.03(a) (West 2011). A "person," if not an association or corporation, must be an "individual." *Gribble*, 808 S.W.2d at 72 n.16; Tex. Penal Code Ann. § 1.07(a)(38) (West 2011 & Supp. 2017). An "individual," in turn, is "a human being who . . . *is alive*." *Gribble*, 808 S.W.2d at 72 n.16; Tex. Penal Code Ann. § 1.07(a) (26) (West 2011 & Supp. 2017). It follows that only corporations, associations and living humans can be kidnapped in violation of section 20.03(a). *Gribble*, 808 S.W.2d at 72 n.16. Since a

dead body is none of these things, moving it from place to place does not under any circumstances constitute the offense of kidnapping. *Id.*

In many cases, whether the victim of the kidnapping was alive is shown by direct evidence such as eyewitness testimony. *See, for example*, *Rayford v. State*, 125 S.W.3d 521, 527 (Tex. Crim. App. 2003) (witness testified that he saw defendant carry away the victim, who was struggling, screaming, and fighting for her life).

In some cases, the defendant's statement or confession showed that the victim was alive. *See, for example*, *Swearingen*, 101 S.W.3d at 96-97 (defendant, attempting to implicate another for the crime, fabricated a letter detailing the events including that the victim said she needed to go home, that the victim was then hit and taken into the woods where she was killed, and the letter was consistent with the physical evidence and provided the timeline of the kidnapping and murder).

In cases where the evidence was much more circumstantial, evidence of life included evidence showing the victim was murdered where the victim's body was discovered, or that the victim was restrained in some way, or that the victim's body showed injuries that were consistent with being alive when the fatal injuries were inflicted. *See Rayford*, 125 S.W.3d at 526 (medical examiner testified that victim, who was found inside of a culvert pipe, suffered head injuries consistent with striking or slamming against concrete; had no cuts or injuries to her feet, suggesting that she was carried; that she was alive when strangled; and that the victim died in the culvert because the culvert was the most likely surface to have caused the head injuries and no blood was found until some 150 feet inside the culvert).[1]

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[1] *See also Reyes v. State*, 84 S.W.3d 633, 635-37 (Tex. Crim. App. 2002) (blood on the ground and some loose change nearby suggested that victim was initially assaulted in restaurant parking lot, medical examiner testified that, because blood was not enough to suggest that she died there and that victim was assaulted three different ways, two of

This Case

To sustain the jury's verdict, there must be some evidence in the record from which a rational jury can infer that Reiter was alive when both her phone and Appellant's phone began traveling west from the sports complex in south Brownwood. Worrell testified that Reiter complained of a headache and left home around 6:15 p.m. to get headache medicine. The phone records reflect that Reiter left the area near her home and went to a pharmacy. The phone records indicate that around the same time, Reiter's phone made an outgoing call to Appellant's phone. The phone records show that Reiter's phone took a course that brought her south to the sports complex where Appellant's phone was also located.

From Worrell's testimony, Reiter was alive when she left the home. From the phone records, the jury could rationally infer that Reiter, who was alive at the start of the trip, remained alive while her phone traveled to the pharmacy, which is a reasonable inference given that phones do not move by themselves and Reiter left the home by herself. Similarly, the jury could further infer that Reiter

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which occurred while she was alive and one of which occurred at or near the time of death, and medical examiner concluded that victim was still alive and bleeding in the car where her body was found); *King v. State*, 29 S.W.3d 556, 563 (Tex. Crim. App. 2000) (victim who had been chained to back of defendant's truck and dragged behind the moving vehicle was alive from evidence that he attempted to hold up his head and relieve the pain of the asphalt scraping and tearing his skin); *Ovalle v. State*, 13 S.W.3d 774, 777 (Tex. Crim. App. 2000) (evidence suggested that victim was still alive after defendant beat him and put him into a truck and drove away, when medical examiner testified that the victim was stabbed with an instrument consistent with a knife, that the victim was alive at the time the stab wounds were inflicted, and the stab wounds were lethal); *McDuff v. State*, 939 S.W.2d 607, 615 (Tex. Crim. App. 1997) (victim's unoccupied and soap-sudded car was found abandoned at a car wash with her keys and purse and some perishable groceries inside shortly after witnesses heard a woman's scream and the sound of a car door or trunk slamming coming from the car wash, and witnesses saw a man subsequently identified as the defendant driving out of the car wash); *Santellan v. State*, 939 S.W.2d 155, 163 (Tex. Crim. App. 1993) (medical examiner testified that victim's heart might have still been beating for three to five minutes after the victim had been shot and lifted into the defendant's car and that her other injuries would not cause immediate death); *Earhart v. State*, 823 S.W.2d 607, 618 (Tex. Crim. App. 1991) (victim was discovered in secluded wooded area, shot in head, with her hands bound behind her back); *Boyle v. State*, 820 S.W.2d 122, 138 (Tex. Crim. App. 1989) (although witnesses testified that victim voluntarily entered defendant's truck, evidence suggested that at some time during the course of the journey the victim was abducted when her bound and gagged body was secreted in a rural area and her hair and blood were found in both the cab and sleeper portions of defendant's truck).

was alive when her phone went south from the pharmacy and arrived at the sports complex.

We thus have an inference that Reiter was alive when she arrived at the sports complex. Simple enough. Based on the fact that Reiter's body was discovered in a shallow grave on FM 1026 in Coleman County, it is fairly self-evident that Reiter was dead at that location. What happened in between?

At the sports complex, the evidence only showed that Reiter's car was left parked there. There was no sign of a struggle, and other evidence found at the location (a small speck that reacted to Blue Star Reagent that may have been blood, and a piece of chewing gum on the parking lot near to the car) was deemed to be of little to no value to the case. At the location of Reiter's body, there were some tire tracks on nearby rocks, indicating that a vehicle had been parked there underneath the bridge and out of view of road traffic while the body was being buried. There was also a piece of toilet paper a short distance away that was tested and ultimately considered not related to the case, given that Reiter's body had already been buried for nearly two weeks at the time the body and the piece of toilet paper were found. All of these pieces of evidence give no indication whether or not Reiter was alive or dead when both Reiter's phone and Appellant's phone traveled to and ultimately arrived at the location where her body was found.

The only evidence of what actually occurred during the crucial moments are the phone records. But the phone records in this case do not indicate that Reiter was alive or dead. All they indicate is that both phones moved and that Reiter's phone did not communicate with others until Appellant used it himself to send a message to Worrell. Reiter being dead throughout the entire drive to the burial site is consistent with this evidence. On the other hand, Reiter being alive is also consistent with this. Reiter could have been kidnapped: she could have been unable to use her phone

because either Appellant took possession of the phone, Appellant threatened Reiter to not use the phone, or Reiter was somehow incapacitated. However, to choose between any of these possibilities requires speculation and conjecture–there is no evidence in the record that indicates which scenario actually occurred.[2]

Apart from the phone records, there is evidence in the record that Appellant harassed Reiter, that he made a threat against Reiter that someone would put something in her drink, and that Appellant searched the internet for ways to create homemade knockout drugs. Worrell testified that Appellant left a voice message for Reiter warning her that someone could harm her by putting drugs in her drink. Worrell described this message as "crazy." Investigator Benefield testified that he examined Appellant's computer and found various internet searches for homemade knockout drugs. A rational jury could infer from the searches and the "crazy" message that Appellant was planning on creating knockout drugs and using them on Reiter. The State argues that a rational jury could make the further inference that not only did Appellant plan to kidnap Reiter, but that he actually acted upon the plan. I have to disagree. There is no indication that Appellant actually acted upon that plan and kidnapped her before he killed her. There was no evidence that Appellant attempted to concoct any homemade knockout drugs, that Appellant possessed knockout drugs–homemade or otherwise–or that Appellant administered such drugs to Reiter. A conclusion that Appellant, from his research and voice message, actually acted and drugged Reiter would not be an inference based on evidence. It would be speculation: mere theorizing and guessing about the possible meaning of

[2] Reiter willingly going with Appellant to the burial site is also consistent with the phone records, and, thus, in this scenario, Reiter would not be kidnapped, at least insofar as the beginning of the journey. However, given Worrell's testimony that Reiter would not have willingly entered a car with Appellant, this particular scenario is easily excluded.

his research and voice message.

Aside from the knockout drug evidence, there was also evidence that Appellant asked his son about the location of a particular gun and that Appellant bought matching ammunition on the day that Reiter disappeared. The prosecution suggested in closing argument that Appellant may have put the gun in Reiter's ear and at gun point commanded her to get in Appellant's vehicle. If there was evidence in the record supporting that this is what happened, then I agree that kidnapping would be supported by sufficient evidence. However, there was no evidence regarding the gun other than: (1) Appellant asked about the gun; and (2) Appellant bought ammunition for the gun. From this evidence, the jury could certainly rationally infer that Appellant had the ammunition with him when he met with Reiter. The jury could even infer that Appellant found the gun, because the jury could find it unreasonable for Appellant to buy ammunition for a missing gun. However, I do not think a rational jury can make the next inference that not only did Appellant have ammunition and the gun, but that he used it to hold Reiter at gun point, commanded her to get in his vehicle, and consequently kidnapped her. There is no evidence in the record indicating that this happened.

The State in its brief reasonably suggests that the jury could believe that, because Appellant lied about his purchase of ammunition to police, the ammunition purchase was for an illegitimate purpose. The State further argues from this that the fact that the autopsy did not indicate that Reiter had been shot, Appellant used the gun for a different purpose than shooting Reiter. Frankly, I must disagree. While I do agree that Appellant did not use the gun to shoot Reiter, there is no evidence that Appellant used the gun for any purpose whatsoever. Also, if Appellant intended to use the gun to threaten Reiter and with no intent to kill her, why would he buy ammunition for the gun? The purchase of the ammunition would support a reasonable inference of an intent to shoot something

using the gun. Purchasing ammunition for the purpose of using a gun with no intention to shoot it does not appear to be logical, and a would-be kidnapper who only intends to use a gun to threaten someone and not to shoot them would not need ammunition to achieve his goal. Only the kidnapper would know that the gun is unloaded, and the victim would not know that the paper tiger is made of paper. Therefore, a conclusion that Appellant used the gun to kidnap Reiter is speculation. It would be based on mere theorizing and guessing about the possible meaning of his asking about the gun and his purchase of ammunition for the gun.

Next, there is the blue robe belt. The evidence at trial showed that a blue robe belt was found during a search of Appellant's truck, but the belt was not tested for biological material such as DNA. This is the totality of the evidence regarding the belt. The State, in its brief, does not mention the belt, even though during closing argument the prosecution suggested that the soft robe belt could be used easily to tie somebody without necessarily creating ligature marks because of its texture and light weight. Regardless, the majority's opinion lists the belt's presence in Appellant's truck as part of the evidence supporting kidnapping in this case. The prosecution's closing argument theory may not be completely unreasonable, but there was no evidence offered by any witness about the significance of the belt. There was no evidence that Reiter was tied. There was no evidence that the belt was used in any way. The only evidence about the belt was that it was in Appellant's truck on September 26, when the truck was searched. There was no evidence about how long the belt had been in his truck. There was no evidence that the belt was in his truck sixteen days earlier on September 10, when Reiter disappeared. Any conclusion that a belt, which was simply there in Appellant's truck on the day it was searched, was used to tie Reiter and specifically chosen for that purpose because of its soft nature, is entirely speculative and not based on any evidence in the record.

Similarly, a can of refrigerant with an attached hose was found in Appellant's truck during the same search in which the belt was discovered, sixteen days after Reiter disappeared. Like the belt, the State in its brief does not mention the refrigerant, but the majority's opinion also lists the item in its analysis. Ranger Hanna testified that a can of refrigerant with a hose hooked up to it was found in the back seat area of Appellant's truck. Additionally, and perhaps unsurprisingly, a receipt for the purchase of the can of refrigerant was found inside the truck. Ranger Hanna testified that there was a potential for refrigerant to be used for nefarious purposes other than its intended use and that it could cause unconsciousness and death by asphyxiation. However, he did not testify that the refrigerant was used in such a way. On cross-examination, he admitted that there was a common, normal, regular use for the refrigerant, and the hose being attached was required to replenish air conditioner refrigerant. The medical examiner testified, in response to questions by the prosecution, about what refrigerant and canned air could do to the human body, generally, when misused. However, he also stated that there was no evidence that refrigerant or canned air were used in this case. Finally, during closing argument the prosecution suggested that Appellant did not want officers to search his truck because, among other things, he "[s]till had a can of refrigerant in the truck with an apparatus hose for dispensing it . . . Things in there to be worried about . . . Had lots of things in that truck . . . Interesting stuff in there. And he's obviously concerned and worried about the officers looking at those things." From this evidence, I do not agree that a rational jury could infer that from the mere presence of refrigerant, which *could* be used to harm somebody and *could* be used to kidnap somebody, that Appellant actually used said refrigerant on Reiter to render her unconscious and then kidnap her. That the refrigerant could be misused, without any evidence indicating that it indeed was misused, is the very essence of speculation, and the prosecution's closing argument, suggesting that

the can of refrigerant was "interesting stuff" and something to worry about was an invitation to the jury to theorize and guess about the refrigerant.

There is an equally if not more logical inference that Appellant used the can to recharge the air conditioning refrigerant in the vehicle, and *not* that he used it to incapacitate Reiter. Attaching a hose to a can of refrigerant is necessary to recharge the refrigerant on the air conditioning in a vehicle, while attaching a hose for the purpose of incapacitating a person would actually be detrimental to that purpose. A flexible rubber hose attached to the can would require the actor to hold the can with one hand and hold the end of the hose with the other hand, while also restraining the victim in some manner. The hose would make the task of incapacitating someone much more difficult. Again, a conclusion that Appellant used the refrigerant for the purpose of incapacitating Reiter is pure speculation.

In sum, the evidence in the record about the internet searches, the threatening voice message, the gun and ammunition, the belt, and the refrigerant is not sufficient to support a finding that Appellant kidnapped Reiter when he murdered her or was attempting to kidnap Reiter when he murdered her. The jury could only reach such a finding by theorizing and guessing about their possible meaning. This is not enough.

While the evidence is insufficient to support a jury conclusion that Appellant murdered Reiter while in the course of kidnapping her, he was charged with capital murder on an "in the course of kidnapping *or attempting to kidnap*" theory, and if the evidence is sufficient to support his conviction on an attempting to kidnap basis, then his capital murder conviction should stand. However, the record is equally devoid of evidence to support an attempt-based conviction.

To support an attempt-based theory of guilt, there must be evidence that Appellant

intentionally caused Reiter's death while attempting to kidnap her. Worrell's testimony informed the jury that Reiter would not have willingly entered Appellant's vehicle and left with him. Thus, if Reiter was in the vehicle and also alive, she would already be kidnapped at that point in time. An intentional murder in the course of *attempting to kidnap* Reiter would have to occur before she entered Appellant's vehicle, when they initially met at the sports complex. Appellant in this scenario would have tried to kidnap her, intentionally caused her death in the process, put her body in his vehicle, and then transported her dead body. However, as discussed above, there is no evidence of a struggle at the sports complex where the two met. There is neither evidence to support an inference that Appellant tried to kidnap her at that location nor evidence that he intentionally caused her death there while attempting to do so.

Of course, the jury is not required to credit witness testimony, and it could have disbelieved Worrell's testimony that Reiter would not have willingly entered Appellant's vehicle. *See Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986) ("The jury, being the judges of the facts and credibility of the witnesses, could choose to believe or not believe the witnesses, or any portion of their testimony.") (citing *Esquivel v. State*, 506 S.W.2d 613, 615 (Tex. Crim. App. 1974)). Suppose Reiter entered Appellant's vehicle willingly, and, during the journey, Appellant attempted to kidnap her and intentionally murdered her in the course of the attempt. However, just as before, there is no evidence to support this scenario. There is no evidence that Reiter willingly entered the vehicle. There was no sign of a struggle in Appellant's vehicle that would indicate that Appellant tried to kidnap Reiter while in the vehicle. Similarly, there is no evidence that he intentionally killed her in the vehicle while attempting to kidnap her.

Let us assume, for the sake of argument, that there was an attempt to kidnap Reiter that did

not occur either in Appellant's vehicle or at the sports complex. Appellant left a threatening voice message and conducted internet research on homemade knockout drugs. Even if this evidence shows more than mere planning and preparation and constitutes an attempt, the attempt to kidnap Reiter by his voice message and research occurred well before the murder. Appellant's causing the death of Reiter would not be *in the course of* attempting to kidnap her.

Thus, not only is there no evidence to support an inference that Reiter's death was in the course of kidnapping her, there is also no evidence to support an inference that her death was in the course of an attempt to kidnap her.

Conclusion

In conclusion, under *Jackson*, the test is whether all of the evidence, viewed in the light most favorable to the prosecution, supports a finding that the defendant is guilty beyond a reasonable doubt. This finding must be supported by evidence and cannot be the product of speculation. In this case, there is no evidence that supports an inference that Appellant kidnapped Reiter. There was no evidence indicating whether she was alive or dead during the drive from Brownwood to FM 1026 in Coleman County. There are numerous possible scenarios which occurred that evening, and although the State need not disprove those alternate scenarios in which Reiter was dead, there must be some evidence to support an inference that she was alive. Without such supporting evidence, the jury's choice of a kidnapping scenario in this case is based purely on speculation. Similarly, the same lack of evidence to support a kidnapping scenario also fails to support an inference that Appellant caused Reiter's death while in the course of attempting to kidnap her.

The court of appeals reached the right decision. I respectfully dissent.

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