AFFIRM; and Opinion Filed November 16, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00125-CR

FRANCIS EWERE, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 291st Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-9722264

MEMORANDUM OPINION

Before Justices Lang, Evans, and Schenck
Opinion by Justice Schenck

Francis Ewere was convicted in 1998 of sexual assault of a child and sentenced to eighteen years' imprisonment. This Court affirmed his conviction. *See Ewere v. State*, No. 05-98-00409-CR, 2000 WL 19857 (Tex. App.—Dallas January 13, 2000, pet. ref'd) (not designated for publication). Subsequently, appellant filed two applications for forensic DNA testing under Chapter 64 of the Texas Code of Criminal Procedure. TEX. CODE CRIM. PROC. ANN. art. 64.01 et seq. (West 2006 & Supp. 2016). This Court affirmed the trial court's order denying appellant's first application. *See Ewere v. State*, No. 05-02-01568-CR, 2003 WL 21731307 (Tex. App.—Dallas July 28, 2003, pet. dism'd) (not designated for publication). The State agreed to appellant's second application and the trial court ordered DNA testing on (1) evidence gathered during the complainant's sexual-assault examination at Parkland Hospital, (2) underpants, pants, and two bed sheets belonging to the complainant, and (3) buccal swabs from appellant. After

reviewing the results of the testing, the trial court found it was not reasonably probable that appellant would not have been convicted had the results been available during the trial of the offense. Appellant now contends that the trial court erred in finding against him on the post-conviction DNA test results. We affirm the trial court's decision. Because all issues are settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

BACKGROUND

S.W., the complainant, was sixteen years old at the time of the incident and lived with her grandparents. S.W. is hearing impaired and testified to the following at trial through a sign language interpreter. She was acquainted with appellant because he was married to her grandmother's foster daughter. On the evening of Sunday, January 26, 1997, appellant appeared at her home while she was doing homework. Appellant entered her bedroom and raped her. The only other person at home at the time was her grandfather, who was asleep in his bedroom with the television on and the door locked. Later that evening, she tried to tell her grandmother what had happened, but her grandmother told her not to bother her because she was not feeling well. On Wednesday, January 29, 1997, she went to a youth group function at her church. With the help of an interpreter, she told lay minister Bruno Coon what had happened. Coon advised her to tell her grandmother, which she did. Her grandmother called the police and took her to Parkland Hospital.

At Parkland, S.W. was examined by Dr. Karen Bradshaw. Dr. Bradshaw noted a vaginal laceration in the upper wall of the vagina. Dr. Bradshaw testified that the laceration indicates a forceful vaginal penetration. Her exam did not reveal any spermatozoa, which Dr. Bradshaw indicated is not unusual given the gap in time. She collected several samples from S.W., including pubic-hair combings, vaginal swabs, and vaginal smears. These samples were then submitted to the Southwestern Institute of Forensic Sciences for analysis.

While at the hospital, S.W. also gave a statement to Garland police officer W.H. Brown. Officer Brown then went to the house and collected the bed sheets and the clothes S.W. was wearing at the time of the assault. The evidence collected was sent to the Southwest Institute of Forensic Sciences for testing.

Katherine Long, a forensic serologist at the Southwest Institute of Forensic Sciences examined the evidence. Traces of blood were found on the fitted sheet and on S.W.'s underwear. She indicated that there is no way to determine whether the blood detected on S.W.'s panties came from her menstrual period or from some other source. She did not find any acid phosphatase, a major component of seminal fluid. Long testified that the absence of acid phosphatase was not unusual. She further testified that the absence of seminal fluid on the swab and smear from the sexual-assault examination meant that "[b]asically we have no physical evidence that a sexual assault took place," and she confirmed that there was "[n]othing to connect the sexual assault with a particular individual."

Appellant testified in his own defense. He testified that he was at his brother's house on January 26th. Appellant and his wife had been separated for a couple of weeks. He recounted the events of that day in much more detail at trial than in his statement to the police. Appellant had worked the night shift at a gas station on Saturday night. He woke up at his brother's house around 2:00 p.m. on January 26th. His brother left for his job around 2:30 p.m. Appellant babysat his two-year-old niece. While his niece napped, appellant watched the movie Basic Instinct. He then awoke his niece around 5:00 p.m. He let her watch a children's video. That video ended around 6:00 p.m. At that time, appellant's brother called and reminded him that the Super Bowl was on. Appellant claimed he watched a television program called Viper at 6:00 p.m. He recalled the particular episode in great detail. During commercial breaks, he turned to the Super Bowl to check the score. According to appellant, both Viper and the Super Bowl were

over at 7:00 p.m. At 7:00 p.m. appellant let his niece watch another video. This video lasted two and one-half hours. After that, appellant played with his niece until her parents arrived home at 11:00 p.m. Appellant then went to bed. Appellant denied having had any sexual contact with S.W. He also maintained that he had not been to S.W.'s house for about a year.

Appellant's wife testified that she had known S.W. for many years. S.W. had lived with her and appellant off and on before. In her opinion, S.W. had a bad reputation for truthfulness.

On March 4, 1998, a jury convicted appellant of the charged offense. On July 17, 2013, appellant filed his second request for post-conviction DNA testing under Chapter 64 of the Texas Code of Criminal Procedure. The State responded by agreeing that appellant's motion should be granted. Consequently, the trial court granted appellant's request and directed that DNA testing be conducted on evidence secured in relation to the sexual assault for which appellant was convicted. After receiving the DNA test results, the trial court held a hearing, and found that had these results been available during appellant's trial, "it is NOT reasonably probable that [appellant] would not have been convicted." This appeal followed.

STANDARD OF REVIEW

If the convicting court orders DNA testing under Chapter 64, article 64.04 requires the court, after examining the results of testing, to "hold a hearing and make a finding as to whether, had the results been available during the trial of the offense, it is reasonably probable that the person would not have been convicted." TEX. CODE CRIM. PROC. ANN. art. 64.04 (West Supp. 2016). A trial court's findings under article 64.04 are reviewed under a bifurcated standard. *See Flores v. State*, 491 S.W.3d 6, 10 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). We afford almost total deference to the trial court's determination of issues of historical fact and application-of-law-to-fact issues that turn on an evaluation of credibility and demeanor while reviewing de novo other application-of-law-to-fact issues. *Id.* (citing *Rivera v. State*, 89 S.W.3d

55, 59 (Tex. Crim. App. 2002)). The ultimate question of whether a reasonable probability exists that the DNA test results would have led to a different outcome at trial is an application-of-law-to-fact question that does not turn on evaluations of witness credibility and demeanor and is therefore reviewed de novo. *See Booker v. State*, 155 S.W.3d 259, 266 (Tex. App.—Dallas 2004, no pet.) (citing *Rivera*, 89 S.W.3d at 59).

DISCUSSION

In reviewing the trial court's article 64.04 finding de novo, we review the entire record to determine whether it is reasonably probable that appellant would not have been convicted in light of the new DNA test results. *See Asberry v. State*, 507 S.W.3d 227, 228–29 (Tex. Crim. App. 2016); *Frank v. State*, 190 S.W.3d 136, 138 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd). A "reasonable probability" exists when there is a probability sufficient to undermine confidence in the outcome of the trial. *See Baggett v. State*, 110 S.W.3d 704, 706 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd). A "favorable" DNA test result under Chapter 64 "must be the sort of evidence that would affirmatively cast doubt upon the validity of the inmate's conviction; otherwise, DNA testing would simply 'muddy the waters.'" *Ex parte Gutierrez*, 337 S.W.3d 883, 892 (Tex. Crim. App. 2011) (quoting *Rivera*, 89 S.W.3d at 59).

Here, the DNA test results returned mostly positive identification only of the victim's DNA. Of the approximate 100 samples that were subjected to DNA testing in this case, only 18—the unlabeled swab, three hairs from the pubic-hair combings, the complainant's pubic-hair standard, 11 samples from the underwear, one sample from the fitted sheet, and one sample from the flat sheet—had yielded full or partial DNA profiles. Of those 18, either the victim or "Unknown Female" was found to be a possible source of or contributor to the DNA profiles obtained from all but one. That one sample—a sample from the back-center of the underwear—yielded a DNA profile in which, the report stated, additional genetic markers were detected that

could not be attributed to either the "Unknown Female" or appellant. The test result on this sample was inconclusive as to whether the DNA profile belonged to a male or a female and was thus gender-inconclusive. No test established the presence of a male's DNA that did not match appellant's DNA. Thus, while the test results did not add any further corroboration for appellant's guilt, they also did not affirmatively link someone else to the crime or conclusively exclude appellant's commission of it.

The evidence at trial established that no seminal fluid was present on the vaginal swab, vaginal smear, underwear, pants, fitted sheet, or flat sheet. Thus, the jury knew that there was no physical evidence connecting appellant to the crime scene or to the sexual assault. In light of this evidence, the DNA test results did not make it any more probable that the sexual assault described by S.W. did not take place or that appellant was not the perpetrator of that sexual assault. *See Solomon v. State*, No. 02-13-00593-CR, 2015 WL 601877, at *5 (Tex. App.—Fort Worth Feb. 12, 2015, no pet.) (mem. op., not designated for publication) (holding that the absence of the defendant's DNA from the victim's sexual-assault kit, bedding, and clothing did not warrant a favorable finding under article 64.04 where evidence was presented at trial that the perpetrator did not ejaculate and where the test results did not establish the presence of DNA belonging to an unknown male). All that the testing did in this case, to the extent that it revealed only female DNA, was to confirm that the perpetrator left behind no identifiable biological material. In this sense, it merely confirmed that this case was about credibility, not identity. And to the extent that the DNA testing uncovered genetic markers belonging to an unknown, gender-undetermined individual in one sample out of the approximately 100 tested, it merely "muddied the waters." *See Gutierrez*, 337 S.W.3d at 892; *see also Glover v. State*, 445 S.W.3d 858, 862 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd) (holding that DNA test results excluding the defendant as a contributor to blood stains found on a towel did not affirmatively

cast doubt on the defendant's conviction where the blood could have been deposited on the towel before the date of the offense). Therefore, we conclude that the trial court did not err by finding that the test results were not favorable to appellant. Accordingly, we overrule appellant's sole issue.

Conclusion

Having overruled appellant's sole issue, we affirm the trial court's January 10, 2017 finding on the results of the post-conviction DNA testing.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

FRANCIS EWERE, Appellant	On Appeal from the 291st Judicial District Court, Dallas County, Texas
No. 05-17-00125-CR V.	Trial Court Cause No. F-9722264.
	Opinion delivered by Justice Schenck.
THE STATE OF TEXAS, Appellee	Justices Lang and Evans participating.

Based on the Court's opinion of this date, the finding of the trial court concerning the results of post-conviction DNA testing is **AFFIRMED**.

Judgment entered this 16th day of November, 2017.