Dissent; and Opinion Filed May 24, 2018

In The

Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01361-CR

MICHAEL KEVIN ADAMS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 366th Judicial District Court
Collin County, Texas
Trial Court Cause No. 366-81115-2014

DISSENTING OPINION

Before Justices Lang, Brown, and Whitehill
Opinion by Justice Whitehill

Appellant's former fiancée N.L. was murdered in her home on September 9, 2013. Appellant was convicted of capital murder and sentenced to life in prison for that crime.

It is not our job to second guess the jury or to act as a thirteenth juror. It is, however, our constitutional duty to detach from the case's emotions, review the totality of the evidence, and dispassionately determine whether a rational juror could have reasonably determined beyond a reasonable doubt—beyond strong suspicion and mere probability—that appellant was the one who actually pulled the trigger. This distinction is critical where, as here, DNA evidence that the State urges puts appellant at the crime scene also puts at least two and possibly more than a dozen other people there and there is no evidence of who actually committed the crime.

That said, it is easy to see how the jury convicted appellant on this record in this emotionally charged case. There was evidence that among other things he (i) previously threatened to kill N.L. for reporting to the police that he had brutally sexually abused her and indicated that he might kill her at that time, (ii) tracked her down after she moved to a different city, and (iii) tried to intimidate her by leaving a blue tarp and handcuffs on her front porch. And there is DNA evidence that viewed in the light most favorable to the verdict arguably placed him at the crime scene. But constitutional law requires the State to prove each element of the crime—including the conduct element—beyond a reasonable doubt. Given the unusual undisputed circumstances in this case, those facts alone are not legally sufficient to prove beyond strong suspicion or mere probability that appellant himself committed the act of murder as the State bore the burden to prove since it did not invoke the law of parties. Therefore, we should reverse the conviction and render a judgment of acquittal.

I. Background

The murder happened in N.L.'s house as she was lying on her bed. The State did not invoke the law of parties to support appellant's conviction. Thus, it had to prove beyond a reasonable doubt that appellant was at the crime scene when the murder occurred and personally committed the crime.

To prove those elements/facts, the State relies principally on the facts that appellant's skin cell DNA was found at the crime scene and that he once had a .22 pistol of a kind that could have been used to shoot N.L. For the following reasons, neither category of evidence is sufficient to carry the State's burden here if the court of criminal appeals' requirement that the State produce evidence that is more than "strong suspicion of guilt or mere probability of guilt" has meaning. *See Nowlin v. State*, 473 S.W.3d 312, 317 (Tex. Crim. App. 2015).

II. Burden of Proof and Standard of Review

We apply the *Jackson v. Virginia*, 443 U.S. 307 (1979), standards of review to appellant's legal sufficiency issue. *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (plurality op.). In *Jackson*, the United States Supreme Court held that constitutional due process requires that the government must prove each element of a crime by legally sufficient evidence. 443 U.S. at 313–16. In so doing, the Supreme Court re-affirmed that

> the Due Process clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of *every fact necessary to constitute the crim*e with which he is charged."

Id. at 315 (quoting *In re Winship*, 397 U.S. 358, 364 (1970)) (emphasis added). Moreover, "[t]he constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." *Id*. at 323. Following *Brooks*, the court of criminal appeals has described the beyond a reasonable doubt requirement variously.

According to our court of criminal appeals:

> The *Jackson v. Virginia* legal-sufficiency standard requires the reviewing court to view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime *beyond a reasonable doubt. Jackson*, 443 U.S. at 319, 99 S.Ct. 2781. * * * It is the obligation and responsibility of appellate courts "to ensure that the evidence presented actually supports a conclusion that the defendant committed the crime that was charged." *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Furthermore, "[i]f the evidence at trial raises only a suspicion of guilt, even a strong one, then that evidence is insufficient [to convict]." *Urbano v. State*, 837 S.W.2d 114, 116 (Tex. Crim. App. 1992), *superseded in part on other grounds, Herrin v. State,* 125 S.W.3d 436, 443 (Tex. Crim. App. 2002).

Richard Winfrey v. State, 323 S.W.3d 875, 882 (Tex. Crim. App. 2010) (emphasis in original).

Last year, that court described the standards thusly:

> When reviewing the sufficiency of the evidence, we view the evidence "in the light most favorable to the verdict and determine whether, based on the evidence and reasonable inferences therefrom, a rational juror could have found *the essential elements of the crim*e beyond a reasonable doubt." *Anderson v. State*, 416 S.W.3d 884, 888 (Tex. Crim. App. 2013) (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979)). The jury is the sole judge of the

> credibility of witnesses and the weight to be given to their testimonies, and the reviewing court must not usurp this role by substituting its own judgment for that of the jury. *Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). The duty of the reviewing court is simply to ensure that the evidence presented supports the jury's verdict and that the State has presented a legally sufficient case of the offense charged. *Id.* When the reviewing court is faced with a record supporting contradicting inferences, the court must presume that the jury resolved any such conflicts in favor of the verdict, even if not explicitly stated in the record. *Id.* "Under this standard, evidence may be legally insufficient when the record contains either no evidence of an essential element, merely a modicum of evidence of one element, or if it conclusively establishes a reasonable doubt." *Britain v. State*, 412 S.W.3d 518, 520 (Tex. Crim. App. 2013) (citing *Jackson*, 443 U.S. at 320, 99 S. Ct. 2781).

Queeman v. State, 520 S.W.3d 616, 622 (Tex. Crim. App. 2017) (emphasis added) (evidence insufficient to convict).

Three years ago, the court of criminal appeals held that, "if the evidence is so weak that it creates only a suspicion that a fact exists, then it is no more than a scintilla" and is insufficient to prove a critical fact. *McKay v. State*, 474 S.W.3d 266, 270 (Tex. Crim. App. 2015) (evidence insufficient to prove critical fact).

Less than a week before *McKay*, the court of criminal appeals held that, although the State can prove its case with circumstantial evidence, a strong suspicion and mere probability of guilt are insufficient to prove *a fact* essential to establish guilt and juries are not permitted to guess at the meaning of a piece of evidence:

> Because factfinders are permitted to make reasonable inferences, both direct and circumstantial evidence are probative to a case and it is possible for circumstantial evidence alone to be enough to establish guilt. *Hooper v. State*, 214 S.W.3d 9, 14–15 (Tex. Crim. App. 2007); *Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004) (citing *Miles v. State*, 73 Tex. Crim. 493, 165 S.W. 567, 570 (Tex. Crim. App. 1914)). The standard of review for sufficiency of the evidence is the same whether the evidence is direct or circumstantial. *Wise v. State*, 364 S.W.3d 900, 903 (Tex. Crim. App. 2012). Not every fact presented must directly indicate the defendant is guilty, but the cumulative force of the evidence can be sufficient to support a finding of guilt. *Beardsley v. State*, 738 S.W.2d 681, 685 (Tex. Crim. App. 1987). A strong suspicion or mere probability of guilt are insufficient. *Id.* In examining the evidence, factfinders are not permitted to make conclusions based on unsupported inferences or to guess at the possible meaning of a piece of evidence. *Hooper*, 214 S.W.3d at 15–16. While such a guess may be a reasonable

> one, it is not sufficient to support a finding of an element beyond a reasonable doubt because it is not based on facts. *Id.* However, where the inferences made by the factfinder are reasonable in light of "the cumulative force of all the evidence when considered in the light most favorable to the verdict," the conviction will be upheld. *Wise*, 364 S.W.3d at 903.

Nowlin, 473 S.W.3d at 318 (evidence insufficient to support felony conviction).

In *Megan Winfrey v. State*, the court of criminal appeals reversed and vacated convictions for capital murder and conspiracy to commit capital murder based on insufficient evidence despite substantial incriminating circumstantial evidence of motive, opportunity, and consciousness of guilt.[1] 393 S.W.3d 763, 774 (Tex. Crim. App. 2013). In so doing, that court held that "a strong suspicion of guilt does not equate with legally sufficient evidence of guilt." *Id.* at 769. The court's analysis included a review of *all* of the evidence, including evidence inconsistent with the inferences the State argued could be drawn from the State's circumstantial evidence, *see id.* at 771–72, and held that the evidence viewed most favorably to the verdict "merely raises suspicion of appellant's guilt and is legally insufficient to support a conviction of capital murder beyond a reasonable doubt." *Id.* at 772–73. The court similarly held that the evidence was legally insufficient to support Megan's conspiracy to commit capital murder conviction. *Id.* at 773–74. Accordingly, the court reversed the conviction and rendered a judgment of acquittal on each count. *Id.* at 774.

[1] The complainant worked at the high school the appellant attended. He was found dead in his home with numerous stab wounds and multiple sharp and blunt force injuries. The appellant was sixteen when the murder occurred. After an investigation that included dog-scent lineups, approximately three years later, appellant's father and brother were arrested and charged with capital murder. Appellant was charged with capital murder and conspiracy to commit capital murder. A jury convicted the appellant, and the trial court sentenced her to life imprisonment for the capital murder and forty-five years for the conspiracy count. The court of appeals affirmed, with one justice dissenting. The court of criminal appeals reversed the court of appeals' judgment and rendered acquittals on both counts. Investigators collected hair, blood and DNA samples, a bloody footprint, and fingerprints from various places in the house and a DNA swab from women's underwear that was found in the victim's bedroom. Hair samples recovered from the victim's body contained a partial female DNA profile. The investigators collected a pubic hair sample from appellant. The DNA profiles developed from the collected items either matched the victim or did not match any of at least nine individuals who were questioned regarding the murder. No physical evidence connected appellant or her family to the scene, nor were she or any member of her family connected to the property assumed to be missing from the home. The only evidence that purported to connect appellant directly to the crime scene was a "scent lineup." The State, however, developed evidence showing that appellant knew the victim had money and wanted him to spend it on her. Appellant's boyfriend when the murder happened testified that the appellant had shaved herself when she first learned that a search warrant was going to be issued for her pubic hair. The boyfriend also testified that he overheard her try to develop an alibi and that she told him that going into the victim's home "was an easy lick." Testimony from several of appellant's teachers recounted incriminating statements they overheard the appellant make. Other evidence showed that the appellant and her brother occasionally visited the victim in his home near theirs on their way to church.

The court of criminal appeals reached a similar result in the related case of *Richard Winfrey v. State*, 323 S.W.3d 875 (Tex. Crim. App. 2010). Richard is Megan's father and was convicted of the same murder as was Megan. There was no direct evidence placing Richard at the crime scene, and the case focused largely on whether evidence that a dog alerted to Richard's scent on the victim's clothes placed Richard at the crime scene and thus indicated that he participated in the murder. The court reviewed all of the evidence and found it legally insufficient to support the conviction. In so doing, the court rejected the dog-scent evidence as

> proof positive that appellant came in contact with the victim. Even when viewed in the light most favorable to the verdict, the dog-scent lineup proves only that appellant's scent was on the victim's clothes, not that appellant had been in direct contact with the victim, as the court of appeals decided.

Id. at 881. That result rested on the State's witness's cross-examination testimony that "an alert establishes relationship between the scent and objects and the scent detection does not necessarily indicate person-to-person contact." *See id*. at 877. That testimony rested on the witness's testimony that scents can be transferred from a person to an object and then to another object without the person ever contacting the object. *See id.* at 877–78 n.4, 881–82. When explaining that transference phenomenon, the witness analogized scent transference to skin DNA transference that can occur when a person touches someone and that person touches something else. *Id.* Accordingly, the court of criminal appeals concluded that there was legally insufficient evidence to support Richard's conviction because even a strong suspicion of guilt is insufficient to convict.[2] *Id*. at 882.

Stated summarily, constitutional due process requires the State to prove each element of a crime—including each fact necessary to prove that element—beyond a reasonable doubt. This standard requires that the State's evidence of that fact and element must amount to more than

[2] Significantly, however, the court in *Richard Winfrey* observed that, unlike the present case, Richard did not match the DNA profile obtained from the crime scene. *Id*. at 882. Nonetheless, the court did not say that finding Richard's DNA at the scene would have been sufficient to convict him of murder.

strong suspicion and mere probability that the fact is true and the element is proved. Thus, our task is to review all of the evidence in the light most favorable to the verdict and determine whether the State's evidence and proffered inferences from that evidence exceed strong suspicion and mere probability supporting that fact and element. If it doesn't, we have a constitutional duty to render a judgment of acquittal. Applying those principles, I proceed to analyze whether the State met that burden in this case.

III. Analysis

A. What did the State have to prove?

Fundamental to criminal law is that an actus reus is required for an offense to have been committed. *See Ramirez-Memije v. State*, 444 S.W.3d 624, 627 (Tex. Crim. App. 2014). The penal code codifies the actus reus requirement by providing, "A person commits an offense only if he voluntarily engages in conduct, including an act, an omission, or possession." TEX. PENAL CODE § 6.01; *see also* 444 S.W.3d at 627. Thus, to convict appellant the State had to prove beyond a reasonable doubt—beyond strong suspicion or mere probability—every fact necessary to show that he committed the conduct element required for capital murder.

For purposes of this case, capital murder is murder under penal code § 19.02(b)(1) intentionally committed in the course of committing certain other crimes. PENAL § 19.03(a)(2). Retaliation is the relevant underlying crime here, and evidence of it is not at issue.

A person commits murder if he "intentionally or knowingly *causes the death* of an individual." *Id*. § 19.02(b)(1) (emphasis added). The critical element at issue here is whether there is legally sufficient evidence of the required conduct element, that is, that appellant caused N.L.'s death.

Here, it was the State's strategy not to pursue a law of parties theory. According to the original and amended indictments and the jury charge, the State accepted the burden to prove

beyond a reasonable doubt that it was appellant and not another who caused N.L.'s death by shooting her with a firearm.[3] That is, it is not enough that the State proved beyond strong suspicion or mere probability (if it did) that appellant was present when the murder happened; the State had to prove that it was appellant and no one else who pulled the trigger.

B. What is the evidence that appellant shot N.L.?

There is evidence of appellant's motive to commit the crime and that he had the opportunity to do so because he knew where she lived. That evidence is included in the mix of evidence constituting the totality of the circumstances available for the jury to consider. TEX. CODE CRIM. PROC. art. 38.36(a). But motive and opportunity are not elements of the crime, *see* PENAL § 19.02(b)(1), and are not alone sufficient to prove that appellant shot and killed N.L., *see Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). What then is the evidence that appellant himself shot N.L.? That is, is there non-speculative evidence showing that he in fact committed the murder?

1. DNA Evidence

Based on forensic evidence at the crime scene, the State's witness Texas Ranger Rueben Mankin testified that the shooter's hand was in close proximity to N.L. when the shots were fired. Logic suggests that appellant therefore had to be present at the crime scene to have personally shot N.L.

The evidence the State primarily relies on to place appellant at the crime scene when the shooting occurred is that his skin cell DNA was found in N.L.'s bathroom on the outside of an unused green condom at the top of a trashcan with fresh trash in it.[4] But several undisputed facts

[3] The indictment charged that appellant "did then and there intentionally cause the death of an individual, namely, [N.L.], by shooting [N.L.] with a firearm, and the defendant was then and there in the course of committing or attempting to commit the offense of retaliation against [N.L.] . . . ."

[4] There is evidence that the green condom was or may have been turned inside out when it was found.

highlight this evidence's speculative nature regarding whether appellant was present when the murder happened let alone indicating that he was the one who shot N.L.

For example, the State's DNA witness Kimberlee Mack, like the State's witness in *Richard Winfrey*, testified on cross examination that finding a person's DNA at a location proves only that his DNA was there without proving that he was necessarily there and does not prove how or when the DNA got there.[5] And the facts that N.L.'s son's DNA was found on N.L.'s shorts at the foot of the bed and under her fingernail, and that the evidence was inconclusive as to whether his DNA was also found inside the green condom, illustrate how DNA can be transferred from one source or location to another source or location. This is notable given the undisputed fact that N.L. had previously lived with appellant in his house and had moved her belongings from there to the house where she was shot.[6]

Assuming, however, that DNA evidence placed appellant at the crime scene when the murder occurred, no DNA, fingerprint, hair sample, blood sample or other evidence shows that he shot N.L.

More importantly, the DNA also placed at least two unknown persons' DNA at the crime scene. Furthermore, additional evidence from the green condom's outside shows that as many as two or three other unknown individuals' skin DNA was also found there. And evidence extracted from inside that condom indicated that two unidentified persons' skin DNA was found inside that condom. Any of these unknown persons could have shot N.L. (Dx. 53).

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[5] "Q. That doesn't mean that person was there, right? It just means their DNA is there? A. Yes. Q. But DNA doesn't tell us how it got there, does it? A. No. Q. It doesn't tell us when it got there, does it? A. No. Q. And you can find DNA at the place years and years after it was left there, right? A. It depends. Q. It depends on the source or it depends on what it is? A. It depends on the source, where did the DNA come from, the temperature of the environment that was there, how much DNA was deposited at that point in time. Q. Just a lot of unknowns? A. Yes."

[6] Ranger Mankin, however, declined to consider the possibility that this DNA was transferred from contact with appellant or some object with his DNA on it while she lived in his house, because of the time since she moved out and the distance between the two houses (one in Frisco and the other in Melissa).

Moreover, because the State's DNA report did not analyze whether the unknown DNA contributors at the various spots where DNA was found on N.L. or on her tank top or shorts were from the same person or different persons, it is possible that DNA from more than a dozen possible shooters was found at the crime scene. And no evidence excludes any one of these multiple unknown persons as the shooter.

In sum, the DNA evidence in this case is speculative at best regarding whether appellant shot N.L. and is thus legally insufficient to prove beyond a reasonable doubt that he did so.

2. Gun Evidence

Next, no murder weapon was ever found and the State's firearms expert testified that he could not identify a particular manufacturer's firearm used to fire the two recovered bullets. Although there is evidence that (i) N.L. was shot with a .22 of some sort; (ii) appellant once had a .22 pistol; (iii) the police found an empty gun case in appellant's ex-wife's storage unit that "appeared" like a case appellant had a picture of in his home, and Ranger Mankin "believed" it was the same case in the picture; and (iv) the police found in appellant's truck a screw that looked like it came from a pistol grip, there is no affirmative evidence linking appellant to the murder weapon, and this evidence adds only more speculation to the mix.

Furthermore, it is undisputed that appellant was required to give up his guns after his sexual assault arrest and the gun case was found locked up in his ex-wife's off-site storage unit.

Moreover, there is no evidence that the .22 was removed from its case before the case was placed in the storage unit or that appellant had access to that storage unit.

Finally, the State's firearms expert testified that although the groove patterns on the recovered .22 bullets matched the groove pattern for the .22 gun manufacturer whose case was shown in the picture, he also said that the bullets' groove patterns matched at least seventeen other manufacturers' groove patterns. That is, at least eighteen different manufacturers could have

manufactured the barrel that produced the groove patterns on the recovered bullets. The State's expert also concluded that gun's manufacturer was unknown and could not be identified.

It is mere speculation that appellant's .22 was used to kill N.L. and by inference that appellant did so.

3. Other Evidence

The red and white pickup truck a neighbor saw outside N.L.'s house the morning of the murder did not match the color of appellant's white truck. And that neighbor did not identify appellant as the person he saw sitting in the red and white truck. Thus, testimony about this truck does not render the State's DNA and gun evidence any less speculative regarding whether appellant shot N.L.

Similarly, the State's cell phone usage evidence does not make its DNA and gun evidence less speculative. Although there was evidence that appellant used his cell phone only nine times in the eleven days before the murder and not at all on the Saturday and Sunday before he began using it again at 11:13 a.m. on the Monday N.L. was murdered, his cell phone records showed that this usage pattern was not unusual for him. Specifically, for the time period beginning April 1, 2013, when the records began, through September 9, 2013, when the murder happened, there were either no phone calls made or there were no calls made before 11:00 a.m. on 72 out of those 162 days (or 44% of those days). Thus, the cell phone records do not reasonably suggest unusual or incriminating conduct by appellant.

III. Conclusion

Taken together, the speculative DNA evidence and suspicion about whether appellant's .22 was the murder weapon create, at best, nothing more than strong suspicion that appellant shot N.L. *See Rodriguez v. State*, 454 S.W.3d 503, 508 (Tex. Crim. App. 2014) ("While the jury is allowed to draw reasonable inferences, it cannot simply speculate or theorize about the possible meaning

of the evidence.”). But they are not enough to support a finding beyond a reasonable doubt that he did so, even in light of the evidence concerning his motive and knowledge of N.L.’s location.

It is a basic tenet of our criminal justice system that a defendant cannot be convicted because he is a bad person rather than because he committed the specific act for which he is tried. *Smith v. State*, 12 S.W.3d 149, 152 (Tex. App.—El Paso 2000, pet. ref’d). Despite the strong suspicion that appellant was the shooter, the evidence in this case is legally insufficient to convict him of capital murder beyond a reasonable doubt because the evidence produces no more than speculation or strong suspicion that he in fact committed the crime.

Accordingly, we should sustain appellant’s first issue, reverse appellant’s conviction, and enter a judgment of acquittal as we are constitutionally required to do.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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