**Opinion issued November 10, 2011**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-08-00975-CR**

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**NKRUMAH LAMUMBA VALIER, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 183rd District Court**
**Harris County, Texas**
**Trial Court Case No. 1150625**

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## MEMORANDUM OPINION

A jury found appellant, Nkrumah Lamumba Valier, guilty of the offense of aggravated sexual assault[1] and assessed his punishment at confinement for forty

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[1] *See* TEX. PENAL CODE ANN. § 22.021 (Vernon 2010).

years and a $10,000 fine. In two issues, appellant contends that the evidence is legally and factually insufficient to support his conviction and the "trial court constructively denied [him] his right to testify in his own behalf by ruling that the State could impeach" him with another sexual assault conviction.

We affirm.

## Background

Tiffany Rogers, the complainant, testified that on the evening of May 15, 2005, after leaving a bar, she drove her car to a nearby gas station to use a pay telephone. While making her call, a young, "nice-looking black man" driving a four-door car pulled up to her and asked her if she was "working." The complainant said "no" and then asked the man if he was a police officer. She explained that she understood that the man was asking her if she was "prostituting," and the two engaged in a conversation for five minutes during which the complainant agreed to have sex with the man for $100. After driving her car back to the parking lot at the bar, the complainant got into the passenger seat of the man's car, and he drove the car away from the lot.

While driving, the man reached behind his seat, pulled out a gun, pointed it at the complainant's head, and told her that he was going to have sex with her. The complainant, who was afraid that the man was going to shoot her, told the man that she was married, had children, and did not "even do this." He drove his car to the

back of the driveway of an abandoned building, where he told the complainant to remove her pants. The complainant complied, and the man reclined her seat and got on top of her and engaged in sexual intercourse with her. The man continued to point the gun at the complainant during the assault, and she remained afraid for her life throughout the assault. After two or three minutes, the man was "done," and he told her to get out of his car. The complainant jumped out of the car and hid in some bushes. The man kept the complainant's purse, but he threw her keys to her. After five or ten minutes, the complainant walked to a nearby house and asked the homeowner to call for emergency assistance.

After an ambulance and police officers arrived, the complainant told the officers that she had been raped. She did not tell the officers that she had been "prostituting" or, prior to the assault, the man who had assaulted her had offered her money for sex. The complainant explained that she did not provide this information because she was embarrassed, she knew one of the officers, and she was concerned about getting into trouble. The complainant then went to a hospital for a sexual assault examination.

Approximately five or six months later, a police officer called the complainant and asked her to explain what had happened. In response to the officer's questioning, she agreed that it had been "an act of prostitution gone wrong." In January 2008, Houston Police Department ("HPD") Detective K.

McMurtry contacted the complainant to tell her that HPD "had a positive match on the DNA" obtained during her sexual assault examination, and he asked her to come to a police station to look at some photographs for a possible identification of the assailant. She looked at a photo spread containing six photographs of different men, but the complainant did not recognize any of the men as the assailant. The complainant noted that the lighting at both the gas station and the bar was "not good" and the man never got out of the car. She also explained that the area in which she was sexually assaulted was dark.

On cross-examination, the complainant initially denied that she went to the gas station as a prostitute, but, when she was asked to review a sworn statement that she had given in January 2008, she agreed that she had stated that she was at the gas station at around midnight "looking to make some money." When asked if she had previously engaged in prostitution, she agreed that she had previously "dated" a man who paid her $100 for meeting with him on two occasions. On the first occasion, she and the man "hung around," and, on the second occasion she performed oral sex on him. In regard to her review of the photo spread, the complainant agreed that she had not identified anyone in it as her assailant. She also agreed that although Detective McMurtry showed her a photograph of appellant "all by himself," she did not recognize him as her assailant. The complainant explained that after the assault, she had described the assailant as a

black man, between 30 and 40 years of age, and between five feet ten inches tall to six feet tall.

Registered Nurse T. Dusang, a certified sexual assault examiner, testified that she examined the complainant on May 16, 2005. Although she did not find any evidence of trauma during her physical exam of the complainant, she did find evidence of a "tear" during her genital exam. Dusang explained that she took oral, vaginal, anal, saliva, and fingernail swabs from the complainant, and she also combed the complainant's hair and obtained pubic hair. On cross-examination, Dusang stated that she did not recall the complainant telling her that she had met the assailant while acting as a prostitute. In regard to the genital tear that she observed on the complainant, Dusang stated that superficial genital tears normally heal within 24 to 72 hours.

Detective McMurtry testified that he was assigned to the complainant's case and sent the "rape kit" to the crime lab to be processed in July 2005. After processing, McMurtry learned that appellant was "the donor of the forensic evidence" in the rape kit. McMurtry contacted the complainant and asked her to come to a police station for an interview and to review a photo spread. Although McMurtry included a photograph of appellant in the photo spread, the complainant did not identify any of the men included in the photo spread as her assailant. The complainant also did not identify appellant when McMurtry showed her a

photograph of him individually. The complainant did provide McMurtry with a sworn statement in which she admitted that she was acting as a prostitute at the time she got into appellant's car.

McMurty subsequently arrested appellant, who, pursuant to McMurtry's request, voluntarily provided a DNA sample from a swab in his mouth in order to compare it with the sample of forensic evidence obtained from the complainant and the rape kit. McMurtry agreed that, prior to his assignment to the case, another officer had attempted to make contact with the complainant by telephone, and he did not believe that the complainant had returned this officer's telephone call.

HPD Crime Lab Supervisor L. Gahn testified that she had reviewed the testing records from the rape kit performed on the complainant. Gahn stated that, in early 2008, a private lab to which the rape kit was sent had tested the vaginal swabs, anal swabs, a pair of panties, and oral swabs. Gahn noted that both the vaginal swabs and the anal swabs tested positive for semen, and the lab identified DNA profiles on the tested items. The lab obtained a female DNA profile that was "consistent" with the complainant. In testing the "sperm cell fractions" from the vaginal swabs, the lab obtained "a mixture of male and female DNA," which included the complainant's DNA and a "larger portion of the DNA" from a "male contributor." At this time, the contributor was unknown because the lab did not have any male sample references with which to compare it. In March 2008, HPD

submitted a reference sample from appellant in order to compare it to the DNA profiles that the lab had obtained from the complainant's rape kit. The lab determined that the DNA profile obtained from the sample provided by appellant and the DNA profile obtained from the rape kit "were, in fact, the same." The lab then performed a statistical analysis to determine how many people might also match that profile. Ghan stated that the frequency of the profile "would be less than one in 570 quadrillion." Ghan explained that "it would be very unlikely" to find "a single other individual that would also match" the profile.

**Sufficiency**

In his second issue, appellant argues that the evidence is legally and factually insufficient to support his conviction because although appellant "did engage in sexual intercourse" with the complainant "at some time," there is no evidence that he was the assailant that committed the sexual assault. Appellant also asserts that the evidence demonstrates that the complainant consented to engage in sexual intercourse with the assailant.

We review the legal sufficiency of the evidence "by considering all of the evidence in the light most favorable to the prosecution" to determine whether any "rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318–19, 99 S. Ct. 2781, 2788–89 (1979). Evidence is legally insufficient when the "only proper verdict" is

acquittal. *Tibbs v. Florida*, 457 U.S. 31, 41–42, 102 S. Ct. 2211, 2218 (1982). Our role is that of a due process safeguard, ensuring only the rationality of the trier of fact's finding of the essential elements of the offense beyond a reasonable doubt. *See Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988). We give deference to the responsibility of the fact finder to fairly resolve conflicts in testimony, to weigh evidence, and to draw reasonable inferences from the facts. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). However, our duty requires us to "ensure that the evidence presented actually supports a conclusion that the defendant committed" the criminal offense of which he is accused. *Id*. We now review the factual sufficiency of the evidence under the same appellate standard of review as that for legal sufficiency. *Ervin v. State*, 331 S.W.3d 49, 52–56 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (citing *Brooks v. State*, 323 S.W.3d 893, 894–913 (Tex. Crim. App. 2010)).

A person commits the offense of aggravated sexual assault if he intentionally or knowingly causes the penetration of the anus or sexual organ of another person by any means, without that person's consent and if he uses or exhibits a deadly weapon in the course of the same criminal episode. TEX. PENAL CODE ANN. § 22.021 (Vernon 2011).

Appellant's primary argument is that, even if the evidence demonstrated that he had had sexual intercourse with the complainant, it did not establish that he was

the man that assaulted the complainant. Appellant notes that the complainant could not identify him as the assailant, there was no testimony as to whether the assailant ejaculated or wore a condom, the complainant was "admittedly sexually active," and nothing in the record established whether the complainant "engaged in other sexual acts" before she was assaulted.

We recognize that the complainant did not identify appellant as the assailant. However, the jury was able to consider the evidence demonstrating that appellant's DNA matched the DNA profile of the only "male contributor" identified in the samples of the rape kit, which was collected shortly after the assault. HPD Crime Lab supervisor L. Gahn testified that the samples taken shortly after the assault contained two DNA profiles, one belonging to the complainant and the other belonging to an unknown male. This unknown male was identified as appellant after appellant voluntarily provided a DNA sample. Gahn also did not indicate that there was any DNA evidence suggesting a third contributor in the samples taken from the rape kit. Significantly, when asked about the possibility of other individuals matching the profile of appellant, Gahn stated that the frequency of this profile "would be less than one in 570 quadrillion" and "it would be very unlikely" that any other individual "would also match" this profile. The jury was entitled to rely upon the DNA evidence in finding that appellant assaulted the complainant. *See Glover v. State*, 825 S.W.2d 127, 127 (Tex. Crim. App. 1992); *see also King v.*

*State*, 91 S.W.3d 375, 380 (Tex. App.—Texarkana 2002, pet. ref'd) (stating that DNA evidence is admissible to prove identity); *Oliver v. State*, No. 14-09-00690-CR, 2010 WL 3307391, at *2 (Tex. App.—Houston [14th Dist.] Aug. 24, 2010, no pet.) (mem. op., not designated for pub.) (noting that defendant was major contributor to DNA mixture, and stating that DNA evidence is admissible to prove identity).

The complainant did not testify as to whether the assailant used a condom or ejaculated, but she did state that the assailant inserted his penis into her vagina and engaged in intercourse for approximately two to three minutes. Additionally, although the complainant admitted to "prostituting," the jury could have reasonably concluded from her testimony that she had engaged in the act of prostitution in limited circumstances. When asked if she had previously engaged in prostitution, the complainant testified that she had engaged in oral sex with another man on only one other occasion. There is no other evidence that the complainant engaged in prostitution or sexual activity with other men around the time of her assault.

In regard to appellant's argument regarding consent, although the complainant stated that she had initially agreed to engage in sexual intercourse with the assailant while at the gas station, she testified that after getting into the assailant's car, he pointed a gun at her head and forced her to engage in sexual

intercourse against her consent. She also noted that the assailant kept her purse. We hold that the evidence is sufficient to support appellant's conviction for aggravated sexual assault.

We overrule appellant's second issue.

**Impeachment with Prior Conviction**

In his first issue, appellant argues that the "trial court constructively denied [him] his right to testify in his own behalf by ruling that the State could impeach [him] with his [prior] sexual assault conviction" because the State failed to demonstrate that the probative value of this prior conviction outweighed its prejudicial effect.

Appellant filed a pretrial "Motion to Testify Free from Impeachment," in which he argued that the probative value of any prior convictions for purposes of determining his credibility was "vastly outweighed" by the prejudicial effect of this impeachment evidence. At a pretrial proceeding, appellant's counsel disclosed that appellant's criminal history included a sexual assault conviction from 2006 and a misdemeanor assault from 1988. Appellant's counsel notified the trial court that he would be filing on the following morning a motion to permit appellant to testify free from impeachment, "especially to the sexual assault that he got convicted of a couple years ago," because it was "too closely associated" with the instant case. The trial court stated that it would make a ruling on the motion when counsel

presented it. The record reflects that the trial court denied appellant's motion to testify free from impeachment. Appellant subsequently decided not to testify during the guilt phase of the trial.

Evidence of a witness's prior conviction shall be admitted for purposes of impeachment if the crime was a felony or a crime of moral turpitude and the court determines that the probative value of admitting the evidence of the conviction outweighs its prejudicial effect. TEX. R. EVID. 609(a). The Texas Court of Criminal Appeals has set out a non-exclusive list of factors courts should use to weigh the probative value of a conviction against its prejudicial effect. *Theus v. State*, 845 S.W.2d 874, 880–81 (Tex. Crim. App. 1992). Such factors include (1) the impeachment value of the prior crime, (2) the temporal proximity of the past crime relative to the charged offense and the witness's subsequent criminal history, (3) the similarity between the past crime and the charged offense, (4) the importance of the witness's testimony, and (5) the importance of the witness's credibility. *Id*. The proponent seeking to introduce evidence pursuant to rule 609 has the burden of demonstrating that the probative value of a conviction outweighs its prejudicial effect. *See id*. at 880.

To preserve error from a trial court's pretrial ruling to allow impeachment of a defendant's testimony with prior convictions, a defendant must testify, because without the testimony, a harm analysis cannot be conducted. *Long v. State*, 245

S.W.3d 563, 572–73 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *Morgan v. State*, 891 S.W.2d 733, 735 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd); *see also Luce v. United States*, 469 U.S. 38, 43, 105 S. Ct. 460, 464 (1984). Because appellant did not testify during the guilt phase of the trial, we hold that he failed to preserve any error regarding the trial court's ruling on his pretrial motion to testify free from impeachment during this phase of trial.[2] *Long*, 245 S.W.3d at 572–73.

We overrule appellant's first issue.

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[2] Additionally, a defendant does not have the right to testify free from impeachment. *Grant v. State*, 247 S.W.3d 360, 367 (Tex. App.—Austin 2008, pet. ref'd); *Brent v. State*, 916 S.W.2d 34, 40 (Tex. App.—Houston [1st Dist.] 1995, pet ref'd). Thus, even if appellant had preserved his error, there is no legal authority to support appellant's assertion that, by denying his motion, the trial court "constructively denied" him his right to testify. Finally, we note that, during the punishment phase of trial, appellant testified that he had elected not to testify during the guilt phase of trial based upon his lawyer's advice. Appellant also asserts in his brief that, had he testified during the guilt phase, he would have testified (consistent with his testimony during the punishment phase) that he engaged in consensual intercourse with the complainant. To the extent that appellant asks us to consider his punishment-phase testimony as some type of proffer as to what he would have testified to during the guilt phase of trial, we conclude that his punishment-phase testimony does not preserve his complaint. *See Luce v. United States*, 469 U.S. 38, 41 n.5, 105 S. Ct. 460, 463 n.5 (1984) (noting that "a proffer of testimony is no answer" to the preservation problem because a defendant's "testimony could, for any number of reasons, differ from the proffer"). In sum, appellant's punishment phase testimony does not preserve his complaint that he was denied his right to testify free from impeachment.

## Conclusion

We affirm the judgment of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Sharp, and Brown.

Do not publish. TEX. R. APP. P. 47.2(b).