**Opinion issued February 24, 2011**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NOS. 01-09-00968-CR**
**01-09-00969-CR**

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**KEVIN GALLIEN, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 179th District Court**
**Harris County, Texas**
**Trial Court Case Nos. 1185675 & 1095867**

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## MEMORANDUM OPINION

A jury convicted appellant, Kevin Gallien, of aggravated sexual assault (trial court cause number 1185675 & appellate cause number 01-09-00968) and aggravated robbery (trial court cause number 1095867 & appellate cause number

01-09-00969-CR). Both indictments contained enhancements for two prior felony convictions. The jury assessed punishment at confinement for life on each charge to run concurrently. In three points of error, appellant contends that (1) the evidence is legally and factually insufficient and (2) the trial court erred by allowing the State to amend the second enhancement paragraph in each indictment. We affirm.

## BACKGROUND

On October 6, 2006, Delicia Soto stopped at a neighborhood drug store to pick up a prescription for her daughter and to purchase milk. As Soto left the store and approached her car, a man came up behind her, pointed a gun at her, and forced her into the front passenger seat of her own car. This man then got into the back seat and another man got into the driver's seat. The man in the back—who was the older of the two men—made Soto get into the back seat and forced her, at gunpoint, to perform oral sex on him; he did not ejaculate. The two men then exchanged places and the younger man forced Soto to have sexual intercourse, while the older man drove.

The two men then returned to the parking lot from which they had abducted Soto. The older man, now driving Soto's car, told the younger man to shoot Soto. After the men argued, the older man took the pistol and pointed it at Soto's head. The younger man took the pistol before the older man could shoot Soto, and Soto

was able to jump out of the car and escape. She ran to a nearby house and the residents called the police.

Soto's vehicle was recovered the same night near the scene of her abduction. The police lifted latent fingerprints from several items in the car and also took DNA samples from Soto's clothes and several locations in the car. Appellant's fingerprints were found on a plastic cup recovered from the backseat of Soto's car and on Soto's sunglasses, which she usually carried in her purse. Appellant's DNA was not found on Soto's clothes, but he could not be excluded[1] as a contributor to DNA found on the steering wheel, driver's side seat, and center console armrest of Soto's car. Soto, when presented with a photo array containing appellant's photograph, was not able to identify him as one of the perpetrators.

**SUFFICIENCY OF THE EVIDENCE**

In points of error one and two, appellant contends the evidence is legally and factually insufficient to support his convictions. In support, appellant points out that Soto was not able to identify him in a photo line-up or at trial, his DNA was not recovered from Soto's clothing, and the DNA samples of the steering wheel were inconclusive and identified him only as a "possible minor contributor."

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[1] The State's expert testified that the frequency of a randomly-selected individual who "could not be excluded" from the DNA mixture on the steering wheel would be 1 in 1000 for African-Americans. The suspects in this case were African-American. Soto testified that, other than the two suspects, no other African-American men had used her car.

Specifically, appellant claims that "given the lack of any identification by the sole witness and the inconclusive nature of the physical evidence, no rational trier of fact could have found all of the essential elements of the offenses of Aggravated Robbery and Aggravated Sexual Assault true beyond a reasonable doubt."

**A. Standard of Review**

This Court now reviews both legal and factual sufficiency challenges using the same standard of review. *Ervin v. State,* No. 01-10-00054-CR, 2010 WL 4619329, at *2-4 (Tex. App.—Houston [1st Dist.] Nov. 10, 2010, pet. filed) (construing majority holding of *Brooks v. State,* 323 S.W.3d 893, 912, 924-28 (Tex. Crim. App. 2010)). Under this standard, evidence is insufficient to support a conviction if, considering all the record evidence in the light most favorable to the verdict, no rational factfinder could have found that each essential element of the charged offense was proven beyond a reasonable doubt. *See Jackson v. Virginia,* 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *In re Winship,* 397 U.S. 358, 361, 90 S. Ct. 1068, 1071 (1970); *Laster v. State,* 275 S.W.3d 512, 517 (Tex. Crim. App. 2009); *Williams v. State,* 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Viewed in the light most favorable to the verdict, the evidence is insufficient under this standard in two circumstances: (1) the record contains no evidence, or merely a "modicum" of evidence, probative of an element of the offense; or (2) the evidence conclusively establishes a reasonable doubt. *See Jackson,* 443 U .S. at

314, 318 n. 11, 320, 99 S. Ct. at 2786, 2789 & n. 11; *Laster,* 275 S.W.3d at 518; *Williams,* 235 S.W.3d at 750. Additionally, the evidence is insufficient as a matter of law if the acts alleged do not constitute the criminal offense charged. *Williams,* 235 S.W.3d at 750.

If an appellate court finds the evidence insufficient under this standard, it must reverse the judgment and enter an order of acquittal. *See Tibbs v. Florida*, 457 U.S. 31, 41, 102 S. Ct. 2211, 2218 (1982). An appellate court determines whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict. *See Clayton v. State,* 235 S.W.3d 772, 778 (Tex. Crim. App. 2007) (citing *Hooper v. State,* 214 S.W.3d 9, 13 (Tex. Crim. App. 2007)). In viewing the record, direct and circumstantial evidence are treated equally; 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. *Id.* (citing *Hooper,* 214 S.W.3d at 13). An appellate court presumes that the factfinder resolved any conflicting inferences in favor of the verdict and defers to that resolution. *See Jackson,* 443 U.S. at 326, 99 S. Ct. at 2793; *Clayton,* 235 S.W.3d at 778. An appellate court also defers to the factfinder's evaluation of the credibility of the evidence and weight to give the evidence. *See Williams,* 235 S.W.3d at 750.

**B. Analysis**

Here, appellant's fingerprints were found on a cup and sunglasses in Soto's car. The identity of one committing a criminal offense may be conclusively proved by fingerprint comparison alone if the evidence tends to show the fingerprints were made at the time of the offense. *Scott v. State*, 968 S.W.2d 574, 578 (Tex. App.—Austin 1998, pet ref'd) (citing *Grice v. State*, 151 S.W.2d 211, 222 (Tex. Crim. App. 1941)); *see Washington v. State*, 721 S.W.2d 502, 503 (Tex. App.—Houston [14th Dist.] 1986, pet. ref'd) (holding fingerprints alone are sufficient to sustain finding of guilt if evidence shows fingerprints must necessarily have been made at time of offense) (citing *Nelson v. State*, 505 S.W.2d 271, 273 (Tex. Crim. App. 1974) and *Wheat v. State*, 666 S.W.2d 594, 596 (Tex. App.—Houston [1st Dist.] 1984, pet. ref'd)). There was no evidence indicating that the fingerprints were placed on the cup or sunglasses at any time other than during the charged offense. The Jack-in-the-Box plastic cup had been in the car for only one day. Police checked the store at which it was purchased, and appellant was not employed there. Soto testified that no one had recently worked on her car and that only family had been in it during the days before the offense.

Additionally, there was DNA evidence linking appellant to the offense. The Court of Criminal Appeals has held that DNA evidence is admissible to prove identity. *Kelly v. State*, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992); *Glover v.*

*State*, 825 S.W.2d 127, 128 (Tex. Crim. App. 1992). In fact, DNA evidence alone, without additional circumstantial evidence, may be sufficient to establish identity. *See King v. State*, 91 S.W.3d 375, 380 (Tex. App.—Texarkana 2002, pet. ref'd); *Robertson v. State*, 16 S.W.3d 156, 17–72 (Tex. App.—Austin 2000, pet. ref'd). Here, there was testimony that appellant "could not be excluded" as a contributor to the DNA mixture found on the steering wheel of Soto's car and that the chance that an unrelated person selected at random could be such a contributor would be 1 in 1000. In addition, there was other evidence, such as appellant's fingerprints, linking him to the crime. The fact that appellant was excluded as a DNA contributor to the semen found on Soto's pants and panties is consistent with her testimony that only the younger of the two assailants vaginally penetrated her, and that the older assailant demanded only oral sex and did not ejaculate.

Regarding Soto's inability to identify appellant in court, the law does not require an in-court identification and it is merely one factor to consider in assessing the weight and credibility of a witness's testimony. *Conyers v. State*, 864 S.W.2d 739, 740 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd); *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986).

Soto testified that she was unable to see the perpetrators during most of the event because her shirt was over her head. She was able to generally describe the older assailant as an African-American male, 30-35 years old, 5'11" to 6' tall, and

170 to 190 pounds. This very general description matched appellant, except that he actually weighed 225 pounds. The State explained that Soto's inability to provide a more detailed description was likely caused by the stress and terror of the situation, and that many people in such stressful situations develop a sort of "tunnel vision."

Viewing the evidence in the light most favorable to the verdict as we must, we cannot conclude that (1) the record contains no evidence, or merely a "modicum" of evidence, probative of the element of identity; or (2) the evidence conclusively establishes a reasonable doubt as to identity. *See Jackson,* 443 U .S. at 314, 318 n.11, 320, 99 S. Ct. at 2786, 2789 & n.11; *Laster,* 275 S.W.3d at 518; *Williams,* 235 S.W.3d at 750. Accordingly, we overrule points of error one and two.

## AMENDMENT OF INDICTMENTS

In his third point of error, appellant contends that the trial court erred in allowing the State to amend the enhancement paragraphs in both indictments during the punishment phase of the trial.

### A. Background

The indictment for aggravated robbery contained the following two enhancement paragraphs:

> Before the commission of the offense alleged above (hereinafter styled the primary offense), on June 12, 1990 in **Cause No. 0566560**

> in the 174th District Court of Harris County, Texas, the defendant was convicted of the felony of POSSESSION OF A CONTROLLED SUBSTANCE.
>
> Before the Commission of the primary offense, and after the conviction in **Cause Numbber [sic] 10566560** was final, the Defendant committed the felony of POSSESSION OF A CONTROLLED SUBSTANCE and was convicted on June 30, 1994 in Cause Number 9413746 in the 262nd District Court of Harris County, Texas.

It is undisputed that the first enhancement paragraph was correct, but that the second enhancement, which referenced the same conviction as that alleged in the first enhancement, added the number "1" before the cause number 0566560.

The indictment for aggravated sexual assault contained the following two enhancement paragraphs:

> Before the commission of the offense alleged above (hereinafter styled the primary offense), on June 12, 1990 in Cause No. 0566560 in the 174th District Court of Harris County, Texas, the defendant was convicted of the felony of POSSESSION OF A CONTROLLED SUBSTANCE.
>
> Before the Commission of the primary offense, and after the conviction in Cause Number 0566560 was final, the Defendant committed the felony of POSSESSION OF A CONTROLLED SUBSTANCE and was convicted on **December 30, 1994** in Cause Number 9413746 in the 262nd District Court of Harris County, Texas.

It is undisputed that the first enhancement paragraph was correct, but that the second enhancement paragraph included the wrong date of conviction. Appellant was convicted of the second offense on June 30, 1994, not December 30, 1994.

At the close of the State's evidence at the punishment phase of the trial, appellant moved for an instructed verdict on the second enhancement paragraph in each case on the grounds that the State had not proved the allegations as they were pleaded in the indictment. The State then moved to amend the indictments. Appellant objected that the amendments were untimely. The trial court overruled appellant's objections. The charges were changed to reflect the amendments requested by the State. The indictment in the aggravated robbery shows that the extra "1" before the cause number was struck through. The indictment in the aggravated sexual assault was not changed.

**C. Analysis**

On appeal, appellant contends that either (1) the amendments were untimely under article 28.10(b) of the Code of Criminal Procedure,[2] or (2) the indictments

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[2] Texas Code of Criminal Procedure article 28.10 prescribes the following procedure for amending an indictment:

> (a) After notice to the defendant, a matter of form or substance in an indictment or information may be amended at any time before the date of the trial on the merits commences. On the request of the defendant, the court shall allow the defendant not less than 10 days, or a shorter period if requested by the defendant, to respond to the amended indictment or information.
>
> (b) A matter of form or substance in an indictment or information may also be amended after the trial on the merits commences if the defendant does not object.
>
> (c) An indictment or information may not be amended over the defendant's objection as to form or substance if the amended indictment or information

were never properly amended at all.[3] Appellant contends that the amendments were harmful because "the State's evidence was insufficient to prove the second enhancement in each paragraph as it was pled in the indictments because each enhancement contained either an incorrect cause number or incorrect date of conviction." Essentially, appellant argues that, but for the amendments, there would have been a fatal variance between the indictments and the proof.

However, variances between an indictment and the proof of cause numbers, courts, and dates of conviction in enhancement paragraphs have been held not to be material. *See Freda v. State*, 704 S.W.2d 41, 42-43 (Tex. Crim. App. 1986). It logically follows that, had the date and cause number of appellant's prior convictions not been corrected in the indictments, the variances would have been immaterial. A variance in dates of conviction is not fatal when there is no surprise or prejudice to the defendant. *Benton v. State*, 770 S.W.2d 946, 947 (Tex. App.—Houston [1st Dist.] 1989, pet. ref'd).

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charges the defendant with an additional or different offense or if the substantial rights of the defendant are prejudiced.

TEX. CODE CRIM. P. ANN. art. 28.10 (a)-(c) (Vernon 2006).

[3] *See Ward v. State*, 829 S.W.2d 787, 794-95 (Tex. Crim. App. 1992) (holding that when indictment is not physically amended on its face, amendment is not effective and original indictment language prevails), *overruled by Riney v. State*, 28 S.W.3d 561, 566 (Tex. Crim. App. 2009 (holding physical interlineation of indictment is acceptable, but nonexclusive means of effectuating amendment).

In *Simmons v. State*, 288 S.W.3d 72, 79-80 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd), the defendant argued that the trial court erred by allowing the State to amend an enhancement paragraph after trial began. This Court held that, error, if any, was harmless because, absent surprise, any variance between the date of conviction alleged in the indictment and date proved at trial was not a material variance. *Id.* at 80.

In this case, there is nothing to show that appellant was surprised or prejudiced by the change of the cause number or date of his prior convictions. Thus, following the reasoning of *Simmons*, we conclude that error, if any, in failing to amend or in untimely amending the enhancement paragraphs, was harmless.

We overrule point of error three.

**CONCLUSION**

We affirm the judgments of the trial court.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Higley and Bland.

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