Affirmed and Memorandum Opinion filed September 28, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00400-CR

BILFORD JUNIOUS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Cause No. 1207799

MEMORANDUM OPINION

Appellant, Bilford Junious, challenges his aggravated sexual assault conviction for which he was sentenced to forty years in prison. In two issues, he asserts that the trial court reversibly erred by (1) failing to grant his request for a lesser-included offense and (2) admitting his statement during the punishment phase of his trial.[1] We affirm.

[1] Even though appellant's first issue concerns the admission of his statement during punishment, in the interest of clarity, we first address his second issue, related to the guilt-innocence phase of his trial.

BACKGROUND

In the early morning hours of August 24, 2003, the complainant walked to a corner store to get a cup of ice and a pack of cigarettes. She had fallen asleep the night before at her deceased former mother-in-law's house. She had been cleaning the house to help the family reclaim it from squatters. As she was walking back from the store, a previous back injury caused her leg to fail her, and she fell to the ground. An individual, later identified by the complainant as appellant, drove up to her in a small truck, dressed in a pizza delivery uniform, and offered her a ride. She accepted the ride because the man appeared nice and was wearing a pizza delivery uniform.

After she got in his truck, he started to drive the correct route to take her home. He soon deviated from this route, however, and pulled out a gun and pointed it at the complainant. He drove her to a secluded area between two vacant houses and told her that he would not hurt her if she did as he said. He ordered her out of his truck and grabbed her neck after she got out. He pinned her to the truck and smashed her head into the truck door. He then sexually assaulted her. After the assault, he drove away. The complainant managed to find a nearby telephone and called 911. She was transported to the hospital, where a sexual assault nurse examiner ("SANE") collected evidence, including material containing DNA.

Six years later, in 2009, appellant was arrested for another offense. His DNA was matched to the DNA collected from the complainant, and he was indicted for the aggravated sexual assault of the complainant. In the indictment, the State alleged as follows:

> [T]the Defendant . . . did then and there unlawfully, intentionally and knowingly cause the penetration of the female sexual organ of . . . the Complainant, by placing his sexual organ in the female sexual organ of the Complainant, without the consent of the Complainant, namely, the Defendant compelled the Complainant to submit and participate by threatening to use force and violence against the Complainant, and the Complainant believed that the Defendant had the present ability to execute

> the threat, and by acts and words the Defendant placed the Complainant in fear that serious bodily injury would be imminently inflicted on the Complainant.
>
> It is further presented that at the time the Defendant committed the felony offense of Aggravated Sexual Assault . . . , as hereinabove alleged, he used and exhibited a deadly weapon, namely, a firearm during the commission of and during the immediate flight therefrom.

Appellant's trial began on April 20, 2009. Prior to his trial, in a related case, appellant sought to suppress an oral statement he had made to Houston Police Department officers. Although the trial court conducted a hearing on the motion, it did not rule on it. At the start of appellant's trial, both appellant and the State moved to consolidate all the motions from the various related cases; the trial court granted this joint motion.[2] The complainant testified to the facts described above. She further stated several times that she had feared for her life during the assault. She testified: "I was praying, God, just let me make it, let him not kill me. . . . He was so rough. He just had my head to that door, smashing, smashing it. . . ." On cross-examination, the complainant conceded that she had not mentioned appellant's gun when she made her first report to police shortly after the offense occurred; it was not until another statement before trial that she provided the details about the gun.

In addition to the complainant, several police officers testified, describing the complainant's identification of appellant through a video line-up and the statements she had made. A DNA expert testified that appellant's DNA matched the DNA collected from the complainant after the assault. Finally, the SANE who had examined the complainant after the offense testified regarding the examination. The State rested after her testimony.

The trial court conducted a charge hearing outside the presence of the jury. Appellant requested that the trial court include in its charge the lesser-included offense of

[2] The indictment in this case lists eight related cases.

sexual assault, but the trial court denied this request. After the charge conference, the defense rested. The trial court's charge to the jury included a special issue regarding the use or exhibition of a deadly weapon. After deliberating, the jury found appellant guilty as charged in the indictment, but did not find that the defendant used or exhibited a deadly weapon during the commission of the offense.

Before the punishment phase of appellant's trial, the court conducted a brief hearing on appellant's motion to suppress filed in a related case (cause number 1079415). Rather than hearing evidence, the trial court, which had already heard evidence on the motion in the related case, permitted the attorneys to argue the relevant issues. Appellant's counsel reminded the court that appellant had "invoked his Fifth Amendment rights" by asking for counsel during his first interview with the police The officers stopped the interview and left, but returned the next day to speak to appellant regarding several other cases. They recorded this interview. Several times during the interview, after the officers read appellant his statutory warnings, he waived his rights and agreed to talk with them. Following argument of counsel, the trial court denied appellant's motion to suppress.

During the punishment phase of appellant's trial, the complainant testified regarding the impact the aggravated sexual assault had had on her life. In addition, five other women, all admitted prostitutes and crack-cocaine users, testified that appellant had sexually assaulted them in a manner similar to the sexual assault of the complainant. Appellant's recorded interview was played over his objection. Appellant's younger brother testified regarding appellant's eligibility for probation. He described a strong family available to support appellant should the jury choose to probate appellant's sentence. After hearing the evidence and argument of counsel, the jury assessed punishment at forty years' confinement in the Texas Department of Criminal Justice, Institutional Division. The trial court rendered judgment accordingly, and this appeal timely ensued.

LESSER-INCLUDED OFFENSE

In his second issue, appellant contends that the trial court erred in failing to instruct the jury on the lesser-included offense of sexual assault. Whether one offense is a lesser-included offense of another is determined by application of article 37.09 of the Code of Criminal Procedure. Code Crim. Proc. art. 37.09. The Court of Criminal Appeals clarified the two-step analysis to be used in applying article 37.09. *Hall v. State*, 225 S.W.3d 524, 534–37 (Tex. Crim. App. 2007). In the first step, the elements of the offense as alleged in the indictment are compared to the statutory elements of the potential lesser-included offense. *Id.* at 535–36. If the elements of the lesser offense could be established by proof of the same or less than all of the facts required to establish the commission of the charged offense, then the analysis moves to the second step. *Id.* at 536-37.

As is relevant here, a person commits sexual assault if he intentionally or knowingly causes the penetration of the sexual organ of another by any means. *See* Tex. Penal Code § 22.011(a)(1)(A). In turn, a person commits aggravated sexual assault if he commits sexual assault and "by acts or words places the victim in fear that death, serious bodily injury, or kidnapping will be imminently inflicted on any person[.]" *Id.* § 22.021(a)(1)(A)(i), a(2)(A)(ii). Here, the parties agree that sexual assault is a lesser-included offense of aggravated sexual assault. *See Ghoulson v. State*, 5 S.W.3d 266, 274 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd) (concluding that sexual assault may be a lesser-included offense of aggravated sexual assault). We therefore move to consideration of the second analytical step.

In the second step, the evidence adduced at trial must be reviewed to determine if there is some evidence to support instructing the jury on the lesser-included offense. *Hall*, 225 S.W.3d at 536. To support submission of the lesser-included offense, the evidence must include proof of the lesser offense, and the evidence must show that if the defendant is guilty, he is guilty only of the lesser-included offense. *Id.* at 536–37 (citing

Bignall v. State, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994)). Submission of a lesser-included offense is not required simply because the jury may disbelieve crucial evidence pertaining to the greater offense; rather, there must be some evidence directly germane to the lesser-included offense before an instruction on a lesser-included offense is warranted. *Hampton v. State*, 109 S.W.3d 437, 441 (Tex. Crim. App. 2003).

Appellant relies on the fact that the complainant did not initially mention that appellant used a gun during the sexual assault: "Given the significant amount of testimony that the complainant did not mention a weapon for six years until she was interviewed approximately one month before trial, there was evidence that he was guilty only of sexual assault." This argument is similar to that considered and rejected by both this court and the Court of Criminal Appeals. *See id.* (reaffirming that a defendant is not entitled to a lesser-included offense instruction simply because the jury could disbelieve some crucial piece of evidence relating to the greater offense);[3] *Ghoulson*, 5 S.W.3d at 274 (rejecting the appellant's contention he was entitled to lesser-included offense instruction because the appellant could not point to any evidence that he did not place the victim in fear of death or serious bodily injury during the attack). Further, as noted above, the complainant testified that appellant threatened her, grabbed her neck, slammed her head against the truck door, and caused her to fear for her life. Finally, we note that the aggravating element of this offense was alleged to be placing the complainant in fear that serious bodily injury would be imminently inflicted upon her, not that appellant threatened her with a deadly weapon.

In short, appellant has not directed us to any evidence that, if he is guilty, he is only guilty of the lesser-included offense. *Hall*, 225 S.W.3d at 536–37. We thus

[3] The Court of Criminal Appeals has recently concluded that the *State* does not need to satisfy the "guilty only" of the lesser-offense prong to be entitled to a lesser-included offense instruction. *Grey v. State*, 298 S.W.3d 644, 650–51 (Tex. Crim. App. 2009). However, this determination does not impact our analysis because it is appellant, not the State, who requested the lesser-included offense instruction in this case.

conclude that he was not entitled to a lesser-included offense instruction. We overrule his second issue.

ADMISSION OF STATEMENT DURING PUNISHMENT

In his first issue, appellant contends that the trial court erroneously permitted the introduction of his recorded statement during the punishment phase of his trial because officers reinitiated contact with appellant after he had invoked his Fifth Amendment right to counsel. We review a trial court's ruling on a motion to suppress evidence under an abuse of discretion standard. *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996). At a suppression hearing, the trial judge is the sole fact finder. *Arnold v. State*, 873 S.W.2d 27, 34 (Tex.Crim.App.1993). We give almost total deference to the trial court's determination of historical facts when supported by the record, particularly if the findings turn on witness credibility and demeanor. *State v. Ross*, 32 S.W.3d 853, 856 (Tex. Crim. App. 2000); *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000). The same deference is accorded to determinations of mixed questions of law and fact if their resolution depends upon witness credibility and demeanor. *Ross*, 32 S.W.3d at 856. Issues that present purely legal questions are considered under a *de novo* standard. *Id.* We will sustain the trial court's ruling if it is reasonably supported by the record and is correct on any theory of law applicable to the case. *Villarreal*, 935 S.W.2d at 138.

Here, the trial court made findings of fact and conclusions of law regarding appellant's statement. In its findings, the trial court stated: "Bilford Junious did not cite to or urge suppression based upon either the Fifth or Sixth Amendment, though the State argued that neither the Fifth nor Sixth Amendment required suppression." Apparently concluding that appellant did not raise this issue, the trial court did not address appellant's claimed Fifth Amendment violation in its conclusions of law.

As noted above, appellant was charged with aggravated sexual assault in several different cases. In one of the other cases, trial court cause number 1079415, appellant's

counsel moved to suppress his statement. At the suppression hearing, his counsel argued that appellant was in custody at the time he made his statement, he invoked his right to counsel, and police re-initiated contact with him the next day to talk about a different case. His counsel initially argued that his statement was taken in violation of the Fourth, Sixth, and Fourteenth Amendments of the United States Constitution, but later interjected a Fifth Amendment complaint. The trial court took the matter under advisement.

At the start of trial in this case (cause number 1207799), the trial court granted the joint motion of the State and appellant to consolidate all motions in the other cause numbers, including cause number 1079415. Prior to the punishment phase of appellant's trial and outside the presence of the jury, appellant's counsel re-urged the motion to suppress filed in cause number 1079415. The trial court determined that it would rely on the evidence presented at the hearing in the other case, but permitted the attorneys for both parties to make arguments. Appellant's counsel argued that appellant had invoked his Fifth Amendment right to counsel, but police officers returned to interview him the next day even though he had not been taken before a magistrate. The prosecution responded by arguing that neither appellant's Fifth nor Sixth Amendment rights to counsel were violated. The trial court denied the motion to suppress and admitted the audio-taped statement over appellant's renewed objection.

Although appellant's argument in this case was focused primarily upon the officers' delay in taking appellant before a magistrate, we disagree with the trial court's implicit conclusion that the issue of violation of appellant's Fifth Amendment right to counsel was not raised. "When the correct ground for exclusion of evidence was obvious to the judge and opposing counsel, no forfeiture results from a general or imprecise objection." *Resendez v. State*, 306 S.W.3d 308, 313 (Tex. Crim. App. 2009). Appellant specifically noted that he had invoked his Fifth Amendment right to counsel, and the State responded to this issue in its arguments. We believe that the correct ground for exclusion of appellant's statement was obvious to both the trial court and opposing counsel. *Id.* We thus turn to the merits of appellant's issue.

An accused in custody who has expressed his desire to deal with police officers only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused initiates further communication with the police officers. *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981); *Cross v. State*, 144 S.W.3d 521, 526 (Tex. Crim. App. 2004). "[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Edwards*, 451 U.S. 484; *see also Arizona v. Roberson*, 486 U.S. 675, 685–88 (1988) (concluding that *Edwards* rule applies to situations in which a suspect invokes Fifth Amendment right to counsel regarding one crime and is then interrogated about another crime).

As discussed above, appellant invoked his Fifth Amendment right to counsel when police first interrogated him about a sexual assault involving a different complainant. The officers terminated that interview. The next day, however, with no contact from appellant indicating his wish to speak to the officers, two officers (one of whom who had been present during the first interview) returned to discuss several other sexual assault cases with appellant. Even though appellant agreed to talk to the officers about these other offenses, the record reflects that police re-initiated contact with appellant after he had invoked his Fifth Amendment right to counsel in violation of *Edwards*. *See* 451 U.S. 484. Moreover, the State concedes that the trial court erroneously admitted appellant's statement. We conclude that the trial court abused its discretion in admitting appellant's statement. This conclusion, however, does not end our analysis.

We must next consider whether this violation of appellant's constitutional rights was harmless beyond a reasonable doubt. *See* Tex. R. App. P. 44.2(a); *Jones* v. *State*, 119 S.W.3d 766, 777 (Tex. Crim. App. 2003). In considering this issue, we must calculate as nearly as possible the impact of the error on the jury in assessing appellant's sentence in light of the other evidence presented during the punishment phase. *Jones*, 119 S.W.3d at 777 (quoting *McCarthy v. State*, 65 S.W.3d 47, 55 (Tex. Crim. App.

2001)). The fact that appellant's statement was introduced at punishment changes our analysis because the issue is not whether appellant committed the extraneous offenses, but rather the appropriate punishment to be assessed. *Cf. id.* (explaining that issues differ when a statement is erroneously admitted during punishment phase of capital murder trial than during guilt-innocence phase).

In his statement, appellant admitted to picking up prostitutes in the Acres Homes area of Houston. He also stated that he "might have" short-changed some prostitutes that he had picked up for sex. He explained that a prostitute might have made up stories about him because he had short-changed her, which might have caused her to be angry with him and try to get him into trouble. During the interview, various names of alleged victims of aggravated sexual assault were mentioned, and appellant was apparently shown pictures of several different women. Appellant stated that he could not really remember any of the specific women, although he admitted that several of their stories were consistent, they described him and his truck, and he may have "taken sex" from several prostitutes when he did not have enough money to pay. He further admitted that he had used a knife as a "scare tactic" and also stated that, on one occasion, the gun he carried in his truck might have slipped out and been visible to one of the prostitutes he was with, which might have scared her. He denied actually "using" a knife or gun. Finally, there is no mention of the complainant in this case in appellant's recorded statement.

During punishment, one of the women mentioned in appellant's statement testified. Additionally, four other women testified that appellant had raped them using either a knife or gun. These five women all described a remarkably similar sequence of events: they were all prostitutes addicted to crack cocaine; appellant picked them up in the same general area in his red truck; he was initially cordial, but then he drove them to secluded locations; he used a knife or a gun to force them to have oral or vaginal sex with him. Two of these women testified that they were raped in locations in close proximity to the location appellant sexually assaulted the complainant in this case. One of the

women stated that appellant was wearing a pizza delivery uniform. Another wrote down appellant's license plate number on the hotel wall where she was staying immediately after the assault. DNA evidence linked appellant to another of the women.

The aggravated sexual assaults described by these women during punishment were generally consistent with appellant's aggravated sexual assault of the complainant, with the exception that the complainant had no criminal history of prostitution or drug use. Even without appellant's statement, simply based upon the testimony of the five women during punishment, the jury could have concluded that appellant was a sexual predator. We emphasize that, in general, a defendant's confession is likely to have a profound effect on a jury, especially at the guilt stage of trial. But here, appellant's statement was admitted during punishment, was vague and partially exculpatory, was cumulative of the other evidence, and was not focused on by the State during closing. *Cf. id.* Finally, we note that the State argued that appellant should be sentenced to life, but the jury assessed punishment at forty years.

Given the evidence and circumstances of this case, we conclude that admission of appellant's statement during punishment was harmless beyond a reasonable doubt. We thus overrule his first issue. Having overruled all of appellant's issues, we affirm the trial court's judgment.

/s/ Adele Hedges
Chief Justice

Panel consists of Chief Justice Hedges and Justices Yates and Boyce.
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