

Affirmed and Memorandum Opinion filed March 10, 2011.



In The

Fourteenth Court of Appeals

NO. 14-10-00034-CR

JUAN MANUEL TORRES, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 272nd District Court
Brazos County, Texas
Trial Court Cause No. 08-03025-CRF-272**

MEMORANDUM OPINION

Appellant Juan Manuel Torres was convicted on two counts of aggravated sexual assault with a deadly weapon. Punishment was assessed at forty-six years' imprisonment. On appeal, he challenges the factual sufficiency of the evidence and the propriety of the prosecutor's closing statement. We affirm.

FACTS

The complainant, a sixteen-year-old girl, testified that a masked man broke into her home at night and held a knife to her throat. Her attacker told her to be quiet and do as he instructed, or else her family would be harmed. According to the complainant, he then raped her and forced her to perform oral sex.

Police were called to the home after the attacker fled the scene. When they arrived, the complainant was found clutching three knives in her hands. She identified the knife used by her attacker by its distinctive green handle.

Police quickly named appellant as a likely suspect in the assault. They apprehended him after tracing his whereabouts to a nearby payphone. Appellant was taken to the complainant's house, where she recognized him as having the same scars as her attacker. Without the mask, she further identified appellant as her half-sister's paternal uncle.

The complainant was taken to the hospital later that evening for a sexual assault examination. Buccal and vaginal swabs were then tested for the presence of foreign DNA. The vaginal swab tested positive for a two-person profile. Appellant could not be excluded as the male donor in the collected sample. The analyst who conducted the testing stated that the chances were one in 1.646 billion that an unrelated Hispanic male contributed the DNA.

Appellant's DNA was not recovered on the buccal swab. His fingerprints and DNA were similarly absent from the green-handled knife.

At trial, appellant's defensive strategy was to attack the complainant's credibility. During his opening statement, defense counsel advised the jury to carefully observe the complainant when she takes the stand. He anticipated that the tenor of her testimony

would be “histrionic,” adding further that she is “excessively emotional and wants to be involved in a high drama.”

During the trial, defense counsel made several references to the complainant’s interest in television. He asked whether she frequently watched Lifetime Channel movies. The complainant testified that she was reminded of one movie similar to the facts of her own case where a rapist attacked a young girl “and they went to trial like I am today, and he got to go free.” In his closing statement, defense counsel suggested the complainant was fabricating her testimony in emulation of the stories she watched on television. Defense counsel alleged again that “this is a case of high drama, histrionics.”

In his closing statement, the prosecutor commented on the manner in which the complainant testified. He told the jury:

You have to imagine if any of you had to stand up in a room full of strangers and talk about the last or most recent or some sexual event in their life, let alone a rape that you first thought you were suffering at the hands of a stranger, and then find out you were suffering at the hands of a relative of yours; the last person who should have done that to you—even though no one should. On top of all that, when she comes into a room full of strangers, not only does she have to tell a room full of strangers about that—

Defense counsel objected to the propriety of this statement, arguing that it encouraged the jury to sympathize with the complainant for having to appear in court. The objection was overruled.

The prosecutor continued:

Not only has she got to come in and tell a room full of strangers about it, she has to talk about it, for the first time in over a year and a half seeing this man again who did these vile, disgusting, horrible things to her that night, in front of him. You saw not only what she said, but you watched her body language here when she had to do that; when [the assistant district attorney] had the defendant to stand up and show the scar.

Defense counsel renewed his objection to this statement as being improper argument. The objection was similarly overruled.

ISSUES PRESENTED

In his first issue, appellant contends the evidence is factually insufficient to show that he used a deadly weapon. In his second issue, he contends the evidence is factually insufficient to show that he forcibly made the complainant perform oral sex. In his third issue, he contends the trial court erred in overruling his objections to the prosecutor's closing statement.

SUFFICIENCY OF THE EVIDENCE

In his first two issues, appellant argues that the evidence is factually insufficient to show that he carried a deadly weapon and forced the complainant to have oral sex. He contends that he never brandished a deadly weapon, noting the absence of his fingerprints and DNA from the green-handled knife. He also contends that he never had oral sex with the complainant, noting the absence of his DNA from the buccal swab. In both issues, he wages several attacks to the complainant's credibility.

During the pendency of this appeal, the Texas Court of Criminal Appeals decided that only one standard should be used to evaluate the sufficiency of the evidence in a criminal case: legal sufficiency. *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (plurality opinion). Accordingly, we review appellant's first two issues under the standard announced in *Jackson v. Virginia*, 433 U.S. 307 (1979), asking only whether the evidence against him was legally sufficient to sustain a verdict beyond a reasonable doubt. *See Pomier v. State*, 326 S.W.3d 373, 378 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

When reviewing the legal sufficiency of the evidence, we examine all of the evidence in the light most favorable to the verdict and determine whether a rational trier

of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 433 U.S. 307, 319 (1979). Although we consider everything presented at trial, we do not reevaluate the weight and credibility of the evidence and substitute our judgment for that of the fact finder. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Because the jury is the sole judge of the credibility of witnesses and of the weight given to their testimony, any conflicts or inconsistencies in the evidence are resolved in favor of the verdict. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). Our review includes both properly and improperly admitted evidence. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We also consider both direct and circumstantial evidence, as well as any reasonable inferences that may be drawn from the evidence. *Id.*

A conviction of aggravated sexual assault is supportable on the uncorroborated testimony of the victim if she was seventeen years of age or younger at the time of the offense. Tex. Code Crim. Proc. Ann. art. 38.07 (West 2010). In this case, the complainant, who was sixteen at the time of the assault, testified that appellant exhibited a deadly weapon and forced her to perform oral sex. Viewing the evidence in the light most favorable to the verdict, we conclude a rational juror could have found every element of aggravated sexual assault beyond a reasonable doubt. Appellant's first two issues are overruled.

STATE'S CLOSING STATEMENT

In his third issue, appellant argues that the trial court erred in overruling his objection to the prosecutor's closing statement.

We review a trial court's ruling on objections to improper closing statements for an abuse of discretion. *York v. State*, 258 S.W.3d 712, 717 (Tex. App.—Waco 2008, pet. ref'd). We analyze the closing statement in light of the entire record, and not upon the

argument's isolated occurrence. *DeLarue v. State*, 102 S.W.3d 388, 405 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd).

Proper closing statements consist of arguments that (1) summarize the evidence; (2) make reasonable deductions from the evidence; (3) respond to arguments of opposing counsel; or (4) plead for law enforcement. *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000). Appellant argues that the prosecutor's statement was improper because rather than referring to the substance of the complainant's testimony, it encouraged the jury to convict him simply because the complainant appeared in court. We disagree.

From the outset, appellant's defensive strategy was to attack the credibility of the complainant. Defense counsel suggested in his opening statement that the complainant was prone to exaggeration and histrionics. During the trial, defense counsel elicited testimony regarding the complainant's preferred television shows in an effort to connect her accusations with fiction and high drama.

Viewing the statements in the context of appellant's defensive strategy, we cannot say that the prosecutor exceeded the bounds of permissible jury argument. The prosecutor referenced the complainant's body language and willingness to testify not in an effort to earn the jury's sympathy, but in response to opposing counsel's suggestion that her testimony was not reliable. *See Wylie v. State*, 908 S.W.2d 307, 310 (Tex. App.—San Antonio 1995, pet. ref'd); *Richards v. State*, 912 S.W.2d 374, 379–80 (Tex. App.—Houston [14th Dist.] 1995, pet. ref'd); *Smith v. State*, 842 S.W.2d 401, 406–07 (Tex. App.—Fort Worth 1992, pet. ref'd). Because the prosecutor may respond to opposing counsel's attack on a witness's credibility, the trial court did not err in overruling appellant's objection.

Having found that the trial court did not commit reversible error, we need not reach the merits of appellant's argument regarding harm. Appellant's third issue is overruled.

CONCLUSION

The judgment of the trial court is affirmed.

/s/ Tracy Christopher
Justice

Panel consists of Chief Justice Hedges and Justices Frost and Christopher.

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