

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-10-00344-CR

TIMOTHY WAYNE WARE, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 260th District Court
Orange County, Texas
Trial Cause No. D-090592-R

MEMORANDUM OPINION

A jury convicted Timothy Wayne Ware, Jr. on two counts of aggravated sexual assault and assessed an eleven year sentence on each count. *See* Tex. Penal Code Ann. § 22.021(a) (West 2011).¹ The trial court sentenced Ware to eleven years in prison for each conviction and ordered that the sentences run consecutively. In four issues, Ware argues the evidence is insufficient to support his convictions, the trial court erred in cumulating

¹Although the Legislature amended section 22.021 of the Texas Penal Code after the date that Ware allegedly committed the offenses, the changes to section 22.021 are not pertinent to Ware's appeal. Therefore, we cite the current version.

his sentences, and the trial court erred when it allowed the State to amend Ware's indictment. We affirm the trial court's judgment.

Sufficiency Issues

In his first two issues, Ware argues that the evidence is legally and factually insufficient to support his convictions. In a sufficiency review, an appellate court considers the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). Under the *Jackson* standard, the reviewing court gives full deference to the jury's responsibility to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Id.* In *Brooks*, the Court of Criminal Appeals concluded that there is no meaningful distinction between a legal sufficiency review and a factual sufficiency review. *Brooks v. State*, 323 S.W.3d 893, 895, 902 (Tex. Crim. App. 2010) (overruling *Clewis v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1996)). The Court held that "the *Jackson v. Virginia* standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt." *Id.* at 912. The jury determines the weight to give the testimony of each witness, and its

determination may turn on an evaluation of the witness's credibility. *Cain v. State*, 958 S.W.2d 404, 408-09 (Tex. Crim. App. 1997).

During the trial, Ware testified that he did not sexually assault S.G., the daughter of his former girlfriend. S.G. was a minor when the offenses were alleged to have occurred. In connection with his issues alleging the evidence is insufficient to support the jury's verdict, Ware argues that S.G.'s testimony is insufficient to prove that he was guilty of penetrating S.G.'s sexual organ. However, the record includes S.G.'s testimony that Ware penetrated her sexual organ in a manner consistent with the counts in Ware's original and amended indictments. The testimony of S.G.'s mother, S.G.'s other family members, and the medical personnel who evaluated S.G. provide additional evidence that supports the State's claim that Ware sexually assaulted S.G.

While Ware points to several conflicts between the accounts of the various witnesses, it is up to the jury to determine the credibility of each witness and to believe or disbelieve any portion of a witness's testimony. *See Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999); *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). When the jury has returned a guilty verdict in face of conflicting testimony, we presume the jury resolved the conflicts in the testimony in favor of the prosecution. *Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993). Although there was conflicting evidence in this case, it was within the province of the jury to either believe the testimony of the State's witnesses regarding the alleged incidents or to believe the testimony of

Ware and his Mother. Based on the jury's verdict, we presume that the jury chose to believe the testimony of S.G. and the State's witnesses whose testimony supports Ware's convictions. *See* Tex. Code Crim. Proc. Ann. art. 38.07 (West 2005) (providing that a child's testimony alone is sufficient to support a conviction for aggravated sexual assault when the child is under the age of seventeen).

Ware also contends that the offenses could not have occurred on the dates alleged in the indictment. With respect to arguments that concern the date that an offense actually occurred, we note that the State is not required to prove the specific date an offense occurred when the indictment alleges an "on or about" date. *Sledge v. State*, 953 S.W.2d 253, 255-56 (Tex. Crim. App. 1997) (citing Tex. Code Crim. Proc. Ann. art. 21.02(6) (West 2009)). The evidence is sufficient with respect to proving that an offense occurred "on or about" a date if the State proves the offense occurred on a date before the presentment of the indictment and within the statutory limitation period that applies to the alleged offense. *Id.* at 256. Ware's amended indictment alleged that his offenses occurred on or about December 15, 2006, and the presentment of Ware's indictment occurred on August 26, 2009.

There is no statutory limitations period for the offense Ware is alleged to have committed, aggravated sexual assault of a child. Tex. Code Crim. Proc. Ann. art. 12.01(1)(B) (West Supp. 2010); *see also* Tex. Penal Code Ann. § 22.021(a)(1)(B). S.G. testified that the assaults occurred while she was living with Ware and her mother at a

white house located in Orange County. According to Ware, he lived with S.G. and her mother in the house that S.G. had described from January 2007 until June 2007. Based on the evidence, we conclude that the offenses occurred on a date before the presentment of the indictment.

With respect to Ware's sufficiency claims, we conclude that a jury could have rationally found Ware guilty of the elements of the offenses as charged in the indictment beyond a reasonable doubt. Because the evidence is sufficient to support the jury's verdicts, we overrule issues one and two.

Cumulation of Sentences

In issue three, Ware contends that the trial court improperly cumulated his sentences "in violation of Texas Penal Code § 3.03." The Code of Criminal Procedure generally defines the trial court's discretion to order sentences to run consecutively or concurrently. Tex. Code Crim. Proc. Ann. art. 42.08(a) (West Supp. 2010); *see also Nicholas v. State*, 56 S.W.3d 760, 764-65 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) (concluding that "so long as the law authorizes the imposition of cumulative sentences, a trial judge has absolute discretion to stack sentences"). Section 3.03 of the Texas Penal Code generally requires, with notable exceptions, that a trial court run a defendant's sentences concurrently when the defendant is found guilty of more than one offense arising from a criminal episode prosecuted in a single criminal action.² Notably,

²Section 3.03 of the Texas Penal Code provides:

the offense of aggravated sexual assault of a child is one of the offenses that is included in the exceptions from the general requirement that sentences are to run concurrently for offenses prosecuted in a single criminal action arising from the same criminal episode. Tex. Penal Code Ann. § 3.03(b)(2) (West 2011); *see also id.* § 22.021.

Because aggravated sexual assault of a child is an exception from the general concurrent sentencing requirement of section 3.03, the trial court was allowed to order Ware's sentences to run consecutively. *See id.* § 3.03(a), (b)(2). We conclude that the trial court did not abuse its discretion by cumulating Ware's sentences. *See id.*; *see also* Tex. Code Crim. Proc. Ann. art. 42.08(a); *Nicholas*, 56 S.W.3d at 764-65.

Relying on section 3.02(b) of the Texas Penal Code, Ware also argues that the State was required, before subjecting him to a cumulated sentence, to give him thirty days notice before trying him in a single criminal action on both of the counts alleged in his indictment. *See* Tex. Penal Code Ann. § 3.02(b) (West 2011). Subsection 3.02(b) requires notice when, for purposes of consolidation and joinder of prosecutions, "a single criminal action is based on more than one charging instrument within the jurisdiction of the trial court[.]" *Id.* In this case, Ware was indicted for both counts of aggravated sexual assault

When the accused is found guilty of more than one offense arising out of the same criminal episode prosecuted in a single criminal action, a sentence for each offense for which he has been found guilty shall be pronounced. Except as provided by Subsection (b), the sentences shall run concurrently.

Tex. Penal Code Ann. § 3.03(a) (West 2011).

under a single indictment. Because Ware's prosecution was not based on separate charging instruments, section 3.02(b) did not require the State to give Ware notice that it intended to prosecute him on both counts in a single criminal action. We overrule Ware's third issue.

Amendment to Indictment

In his fourth issue, Ware asserts that the trial court erred in allowing the State to amend the indictment before trial in violation of articles 1.051 and 28.10 of the Texas Code of Criminal Procedure. Generally, the State may amend an indictment in the absence of an objection by a defendant at any time before trial begins. *See* Tex. Code Crim. Proc. Ann. art. 28.10 (West 2006). Upon request, a defendant is allowed up to ten days to respond to an amended indictment. *See id.* art. 28.10(a). Furthermore, "appointed counsel is entitled to 10 days to prepare for a proceeding[.]" *Id.* art. 1.051(e) (West Supp. 2010). But, the ten days given to appointed counsel to prepare may be waived "with the consent of the defendant in writing or on the record in open court." *Id.*

Here, five days before trial, the State filed its motion to amend the indictment to change the date it alleged that Ware had committed count one to the same date that it alleged that Ware had committed the offense in count two. During a pretrial hearing on the day the trial began, the trial court asked if Ware objected to the State's request to amend the indictment. In response, Ware's counsel, in Ware's presence, stated: "We do not[.]" The record further reflects that Ware did not request additional time to prepare for

trial, nor did he ask for a continuance. Under the circumstances, we conclude that Ware waived his right to receive additional time to respond to the trial court's decision to amend Ware's indictment. *See* Tex. Code Crim. Proc. Ann. arts. 1.051(e), 28.10(a). Accordingly, we overrule Ware's fourth issue.

Having overruled all of Ware's issues, we affirm the trial court's judgment.

AFFIRMED.

HOLLIS HORTON
Justice

Submitted on May 27, 2011
Opinion Delivered August 10, 2011
Do Not Publish

Before McKeithen, C.J., Kreger and Horton, JJ.