In The

Court of Appeals

Ninth District of Texas at Beaumont

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NO. 09-14-00463-CR

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VINCENT LAMAR WILLIAMS, Appellant

V.

STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court
Jefferson County, Texas
Trial Cause No. 11-11689

MEMORANDUM OPINION

Vincent Lamar Williams was indicted for aggravated sexual assault, a first degree felony, for the use of physical force and violence or the threat of force and violence, and the use and exhibition of a deadly weapon—a firearm. *See* Tex. Penal Code § 22.021 (West Supp. 2016). Williams pleaded not guilty during a trial by jury. The jury found Williams guilty and sentenced him to twenty years imprisonment. In three issues, Williams complains that the evidence is legally and factually insufficient to support the jury's verdict, that the trial court erred in allowing

improper jury argument, and that the trial court erred in denying his motion to suppress DNA evidence. While we find error for improper jury argument, we find such error harmless. We affirm the judgment of the trial court.

Background

The complainant testified she was asleep at her residence in Port Arthur, Texas, when a noise in her bedroom awakened her. In the darkness of the early morning, she saw a black male standing in her bedroom rummaging through items on her nightstand and taking money and jewelry. The man told her not to look at him and that he had a pistol. Wearing gloves, the man reached into his pocket and pulled out a gun. The complainant feared for her safety and that of her daughter, who was asleep on the bed beside her. The daughter was awakened by her mother's crying and testified that the man pointed the gun in her face and told her not to look at him. She immediately complied and put her face back down into the bedding.

The assailant then blindfolded the complainant, tied her hands behind her back, stuffed a sock in her mouth, and removed her pants and underwear. He pulled her up from the bed and made her walk to the laundry room. At that time, the assailant reminded the complainant that he still had the weapon. He sat her on the dryer and sexually assaulted her by force, both digitally and with his sexual organ to ejaculation. The complainant was never able to get a clear look at the assailant's face

and could not otherwise identify him. The assailant escaped through the back door of the residence.

Immediately following the assault, the complainant was able to free herself and called her sister, who called the police. A police officer transported the complainant to a sexual assault nurse examiner. The sexual assault nurse testified that she collected and preserved fluid samples during complaint's examination, using a sexual assault evidence collection kit. Those specimens were forwarded to the crime lab for DNA testing.

No suspect was arrested for the assault for several years. Due to an error by the DPS crime lab, the results of the DNA testing were never entered into the Combined DNA Index System (CODIS)[1] database. During an internal audit of the Department of Public Safety (DPS) crime lab, the mistake was discovered and the DNA results were eventually entered into the database. Soon thereafter, a hit was found which led to Williams being identified as a possible suspect. Buccal swabs were obtained from Williams for testing and compared against the DNA samples taken on the day of the assault. The DNA results from the semen taken from the

[1] The State describes CODIS as the combined DNA electronic database system that houses DNA profiles from different sources that operates at both the state and national level. It is part of an effort to create investigative leads in criminal cases.

complainant were consistent with the DNA results from the buccal swabs of Williams, and therefore, Williams could not be excluded as a suspect. The State's witness, a forensic scientist for the DPS, testified that, from the tests, the probability of selecting an unrelated person at random who could be the contributor, if it was not Williams, was estimated at one in 9.891 million for Caucasians, one in 7.289 million for blacks, and one in 3.384 million for Hispanics.

The State also called the detective assigned to investigate the case, who determined that Williams was physically located in Port Arthur three days before the assault and during the month following the assault.

Motion to Suppress

Because the Court's determination of the trial court's ruling on the motion to suppress necessarily affects the consideration of evidence that supports the jury's verdict, the Court considers this issue first. As his third issue on appeal, Williams contends that the trial court abused its discretion in overruling the motion to suppress the DNA evidence. Williams' complains that the DNA evidence was "severely tainted and therefore inadmissible." Williams cites to nothing in the record of which he specifically complains nor does he cite to any authority to support his claim. The Rules of Appellate Procedure require the parties' briefs to contain clear and concise arguments with appropriate citations to authorities. *See* Tex. R. App. P. 38.1(i).

When a party provides no argument or legal authority to support his appellate position, the issue is inadequately briefed. *See Russeau v. State*, 171 S.W.3d 871, 881 (Tex. Crim. App. 2005), *cert. denied*, 548 U.S. 926 (2006). Therefore, we overrule this issue for being inadequately briefed.

Assuming, *arguendo*, that the argument contained appropriate citation to authority and was therefore adequately briefed, we would remain obligated to overrule it. "We review a trial court's denial of a motion to suppress under a bifurcated standard of review. We review the trial court's factual findings for an abuse of discretion, but review the trial court's application of law to the facts *de novo*." *Turrubiate v. State*, 399 S.W.3d 147, 150 (Tex. Crim. App. 2013) (citation omitted). When the trial court does not issue findings of fact, as here, findings that support the trial court's ruling are implied if the evidence, viewed in a light most favorable to the ruling, supports those findings. *See State v. Kelly*, 204 S.W.3d 808, 818–19 (Tex. Crim. App. 2006). Almost total deference is given to the trial court's implied findings, especially those based on an evaluation of witness credibility and demeanor. *See Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010). "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.'" *Id*. at 447–48 (quoting *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006).

The trial court conducted a hearing outside the presence of the jury to perform its gatekeeping function. At the hearing, the State presented testimony from two witnesses: the forensic scientist employed by the DPS crime lab, who conducted the DNA testing from specimens obtained from the victim immediately following the sexual assault, and the director of the DNA section of the DPS crime lab. The testimony of these witnesses revealed that although the crime lab made mistakes handling and documenting the results of the DNA tests, these errors did not affect the data or the veracity of the results of the tests. Specifically, it was shown that because a technical reviewer failed to review the data entry sheet prepared by the analyst, the data was not entered into the CODIS database for seven years following the testing. After the data was uploaded into the CODIS database, two transcription errors were discovered and corrected. Soon after these errors were corrected, a hit was obtained from the CODIS database. Neither the delay in entering the data, nor the transcription errors affected the validity of the data or results of the initial DNA testing.

At the conclusion of the hearing on the motion to suppress, the trial court recited its findings on the record. The trial court acknowledged that the crime lab made mistakes in handling and transcribing the DNA data. However, the court found that the crime lab made corrections after discovering the errors and the DNA profile

evidence was accurate, reliable, and relevant. Therefore, the trial court denied the motion to suppress.

Williams did not produce any expert testimony at the suppression hearing or during the trial challenging the principles, procedures, or technology of forensic DNA profile testing generally, nor did he produce any expert testimony challenging the particular tests performed in this case. Once the State introduced the DNA evidence at trial, Williams cross-examined the State's expert witnesses but only with regard to transcription errors testified to by the lab's forensic analysts and the lab's failure to timely enter the results of the DNA analysis into the CODIS database.

The Court finds no error by the trial court in denying the motion to suppress. Williams' complaints go to the weight to be given the DNA evidence and not to the admissibility of such evidence. Williams' third issue is overruled.

Sufficiency of the Evidence

In his first issue on appeal, Williams complains that the evidence is legally and factually insufficient to support the jury's verdict. Specifically, Williams complains there is insufficient evidence to identify him as the assailant. In *Brooks v. State*, the Court of Criminal Appeals concluded that there is no meaningful distinction between legal sufficiency review and factual sufficiency review. 323 S.W.3d 893, 902 (Tex. Crim. App. 2010). 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. Therefore, to determine the sufficiency of the evidence, we must review all 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 charged offenses beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979); *see also Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). The jury is the sole judge of the credibility of the witnesses at trial. *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000). Evidence is legally sufficient as long as it provides the requisite proof needed to satisfy the elements of the offense charged. *Bousquet v. State*, 47 S.W.3d 131, 137 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd).

It is a fundamental rule of criminal law that one cannot be convicted of a crime unless it is shown beyond a reasonable doubt that the defendant committed each element of the alleged offense. U.S. CONST. amend. XIV; Tex. Code Crim. Proc. Ann. art. 38.03 (West Supp. 2016); Tex. Penal Code Ann. § 2.01 (West 2011). In reviewing the sufficiency of the evidence, the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge for the case. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). The essential elements of

aggravated sexual assault, as applicable to appellant's case, require that a person: (1) intentionally; (2) cause the penetration of the sexual organ of another person by any means; (3) without that person's consent; and the defendant (4) by acts or words places the victim in fear that death will be imminently inflicted on any person, or uses or exhibits a deadly weapon in the course of the same criminal episode. Tex. Pen. Code Ann. § 22.021(a)(1)(A), (a)(2)(A)(ii), (a)(2)(A)(iv) (West Supp. 2016).

Testimony from the complainant and the complainant's daughter at trial established the elements of aggravated sexual assault. Williams does not challenge the evidence supporting the aggravated sexual assault finding, but rather challenges the sufficiency of the evidence identifying him as the assailant.

The laboratory positively detected semen from a specimen taken during the complainant's sexual assault examination. In addition to the specimens retrieved from the complainant, buccal swabs were obtained from Williams. The State elicited testimony that the DNA tests from Williams' buccal swabs were consistent with the DNA found in the sperm specimens. Specifically, the State introduced testimony that the DNA profile found in both the buccal swab specimens and the sperm specimens existed in approximately one in 9.891 million for Caucasians, one in 7.289 million for blacks, and one in 3.384 million for Hispanics. Further, the State's expert testified that Williams could not be eliminated as the source of the semen on

any of the tested samples. Finally, a police detective testified that from his investigation, he discovered that Williams was in close proximity to the scene of the crime shortly before and after the date of sexual assault.

Generally, "'[t]he testimony of a victim, standing alone, . . . is sufficient to support a conviction for sexual assault.'" *Jensen v. State*, 66 S.W.3d 528, 534 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) (quoting *Ruiz v. State*, 891 S.W.2d 302, 304 (Tex. App.—San Antonio 1994, pet. ref'd)). Here, the victim was able to provide testimony to establish most of the statutory elements. However, neither the victim nor her daughter—the only two eyewitnesses to the criminal episode—were able to identify the assailant. Williams contends that there was insufficient evidence to prove identity in this case.

The Texas Court of Criminal Appeals has held DNA evidence is admissible to prove identity. *Kelly v. State*, 824 S.W.2d 568, 574 (Tex. Crim. App. 1992). In an unrelated case styled *Williams v. State*, the Texarkana Court of Appeals held that DNA evidence was legally sufficient to establish identity of the defendant in a sexual assault case. 848 S.W.2d 915, 916–17 (Tex. App.—Texarkana 1993, no pet.) In that case, the victim could not identify her attacker. *Id.* at 916. However, the police performed a DNA comparison between the seminal fluid taken from the victim and blood and saliva samples taken from the defendant. *Id.* The State presented evidence

that, based on the DNA testing, there was a one in 12,500,000 chance that the blood found in the seminal fluid taken from the victim's vaginal area was not that of the defendant in that case. *Id.* at 917. On the other hand, the defendant produced testimony that the victim had sexual intercourse with another individual on the day of the assault and that the defendant was out of state with his wife on the day of the offense. *Id*. However, the court held that the jury "was entitled to disbelieve any or all of the witnesses." *Id*. The court held that, viewing the evidence in the light most favorable to the jury's verdict, a rational trier of fact could have found the existence of the essential elements of the crime beyond a reasonable doubt. *Id*. Similarly, here, the DNA evidence was strong evidence of Williams' participation in the crime. Taken in the light most favorable to the jury's verdict, the Court concludes that, given this evidence, any rational trier of fact could have found all the elements of aggravated sexual assault in this case against Williams. Accordingly, the Court holds that the evidence is sufficient to sustain appellant's conviction for the offense of aggravated sexual assault. The Court overrules the first issue on appeal.

Improper Argument

In Williams' second issue, he complains the trial court erred by allowing improper closing argument by the State before the jury. During the closing argument of the State, the prosecutor argued that the defense had the right to call an expert

witness to refute the DNA evidence if they desired. Williams objected that such argument was improper and was an attempt to shift the burden of proof to the defense. The trial court overruled the objection but *sua sponte* instructed the jury as follows:

> The instructions from the beginning of this trial through the end have been clear to this jury that the State of Texas always has the burden of proof and the burden of proof they must show proof of the elements of the offense beyond a reasonable doubt. That does not shift. That's been clear. The defense knows that. The State knows that. The jury knows that, and it's in the jury instructions and the jury shall follow those instructions.

We review a trial court's ruling on an objection to a jury argument under an abuse of discretion standard. *See York v. State*, 258 S.W.3d 712, 717 (Tex. App.—Waco 2008, pet. ref'd). Proper jury argument must fall within one of the following four categories: (1) summation of the evidence presented at trial; (2) reasonable deduction drawn from the evidence; (3) answer to opposing counsel's arguments; or (4) a plea for law enforcement. *Albiar v. State*, 739 S.W.2d 360, 362 (Tex. Crim. App. 1987); *Hernandez v. State*, 171 S.W.3d 347, 357 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd). During its jury argument, the prosecution may comment on the defense's failure to call a competent and material witness who was available to testify and whose existence is reflected in the record. *Albiar*, 739 S.W.2d at 362–63; *see also Jackson v. State*, 17 S.W.3d 664, 674 (Tex. Crim. App. 2000) (holding the

prosecutor may comment on the defendant's failure to produce witnesses and evidence so long as the remark does not fault the defendant for exercising his right not to testify); *Gemoets v. State*, 116 S.W.3d 59, 71 (Tex. App.—Houston [14th Dist.] 2001, no pet.); *Jarnigan v. State*, 57 S.W.3d 76, 94 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). The prosecution may even argue the defense failed to call the witness because the witness's testimony would have been unfavorable to the defense. *Albiar*, 739 S.W.2d at 363; *see also Gemoets*, 116 S.W.3d at 71; *Jarnigan*, 57 S.W.3d at 94.

During the State's final concluding remarks, Williams objected to the State's comments regarding Williams' failure to call an expert witness to contest the DNA evidence. The trial court immediately instructed the jury that the State, at all times during the trial, maintains the burden of proof and the defense has no burden of proof. The record shows that the trial court signed an order authorizing the appointment of a forensic expert for the defense and the payment of reasonable expert fees. However, there is no further mention of any expert witness retained by the defense. After examining the entire record, it is clear that the existence of an appointed DNA expert was never mentioned to the jury. *See Lemon v. State*, 298 S.W.3d 705, 709 (Tex. App.—San Antonio 2009, pet. ref'd) (citing *Garrett v. Texas*, 632 S.W.2d 350, 352–53 (Tex. Crim. App. 1982)). Because "it is improper to invite

the jury to speculate on the existence of evidence not presented," we hold the State improperly commented on the failure of the defense to call an expert DNA witness. *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000); *see also Lemon*, 298 S.W.3d at 709 (finding that it is improper to comment to jury during concluding remarks that defendant failed to call appointed DNA expert when the record did not show his existence); *Albiar*, 739 S.W.2d at 362–63 (noting the rule permits comments on the defendant's failure to call witnesses if those witnesses' existence is reflected in the record and the comment could support a defensive theory); *Garrett*, 632 S.W.2d at 352–53 (highlighting the reason the prosecution could not comment on the defendant's failure to call additional witnesses was because nothing in the record reflected the existence of other witnesses who could have testified on the defendant's behalf).

However, our analysis does not end here. To decide whether the error warrants reversal, we must determine whether Williams' substantial rights were affected. *See* Tex. R. App. P. 44.2(b); *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998) (holding that improper jury arguments are nonconstitutional violations governed by Rule 44.2(b) of the Texas Rules of Appellate Procedure). We look to the following three factors to determine whether an appellant's substantial rights were affected: (1) the severity of the misconduct; (2) any curative measures adopted;

and (3) the certainty of the conviction absent the misconduct. *Brown v. State*, 270 S.W.3d 564, 572–73 (Tex. Crim. App. 2008); *Mosley*, 983 S.W.2d at 259.

> [I]n evaluating the severity of the misconduct, we must assess "whether [the] jury argument is extreme or manifestly improper [by] look[ing] at the entire record of final arguments to determine if there was a willful and calculated effort on the part of the State to deprive [Williams] of a fair and impartial trial."

Brown, 270 S.W.3d at 573 (quoting *Cantu v. State*, 939 S.W.2d 627, 633 (Tex. Crim. App. 1997)).

In examining the severity of the misconduct, we note that the State's comment was in response to comments made during Williams' closing argument attacking the State's DNA evidence. Because identity was hotly contested in the trial, and because neither the complainant nor the complainant's daughter could positively identify Williams as the assailant, the State relied heavily on the DNA evidence. Admittedly, the DPS crime lab made serious errors mishandling the paperwork of the forensic examiners. Arguing that the jury should place little reliance upon the DNA evidence, Williams reiterated this point during his closing remarks and indicated there was reasonable doubt as to the reliability of the DNA test results. The State then responded by pointing out that the State readily admitted to the mistakes made by the DPS crime lab but that any such mistakes never affected the underlying DNA evidence. The State stressed the quality controls in place at the lab that caught the

mistakes and corrected them, but consistently asserted that the test results were never affected. The State then further responded to Williams' criticism by pointing out that Williams could have called an expert witness to refute the reliability of the DNA tests. After reviewing the final arguments as a whole, we conclude that the State's comments, although severe, were not extremely or manifestly improper and were not made in a willful or calculated effort to deprive Williams of a fair and impartial trial. *See Brown*, 270 S.W.3d at 572–73; *Mosley*, 983 S.W.2d at 260.

Further, the trial court immediately instituted curative measures, an instruction to disregard and to remind the jury that the State always has the burden of proof in the case. "An instruction to disregard the argument generally cures any error." *Caron v. State*, 162 S.W.3d 614, 618 (Houston [14th Dist.] 2005, no pet.) Williams did not request further or different instructions nor did he move for a mistrial. We presume the jury followed the court's instructions. *Holland v. State*, 249 S.W.3d 705, 707 (Tex. App.—Beaumont 2008, no pet.). Finally, absent the misconduct, we note that the certainty of the conviction was high. *See Mosley*, 983 S.W.2d at 260. The State presented DNA evidence from the forensic examiner. The examiner testified that after isolating the DNA from fluid found in the vagina of the complainant, he found a mixture of Williams' and the victim's DNA profiles. There was no evidence that the tested samples were ever contaminated or otherwise

compromised by the transcription and reporting errors made by the DPS lab. The lab explained the mistakes which led to a delay in uploading the results of the DNA tests to the CODIS database, thus delaying the hit that identified Williams as the person responsible for the assault. Once Williams was identified by his DNA profile previously entered into the CODIS database, buccal swabs were obtained from Williams and compared with the DNA profile obtained from the samples taken from the complainant. At the end of the testimony, the DPS lab supervisor explained that the reporting error by the lab did not in any way affect the testing, analysis, or results. Given the State's evidence, we conclude Williams' identity and conviction were very certain.

After reviewing the record and final arguments as a whole, we hold that the error is not reversible because the State's comment did not affect Williams' substantial rights. *See Brown*, 270 S.W.3d at 572–73; *Mosley*, 983 S.W.2d at 259–260.

Having found no harmful error in the trial court, we affirm its judgment.

AFFIRMED.

CHARLES KREGER
Justice

Submitted on July 31, 2015
Opinion Delivered April 19, 2017
Do Not Publish

Before Kreger, Horton, and Johnson, JJ.