COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00419-CR
NO. 02-15-00420-CR

JAMUAL EDWARD PARKS — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM CRIMINAL DISTRICT COURT NO. 2 OF TARRANT COUNTY
TRIAL COURT NOS. 1350298D, 1350299D

MEMORANDUM OPINION[1]

I. INTRODUCTION

Appellant Jamual Edward Parks appeals the trial court's judgment that he serve concurrent six-year sentences predicated upon his open pleas of guilty to two counts of aggravated assault. In three issues, Parks argues that the trial court erred by allowing his motion for new trial to be overruled by operation of law

[1]*See* Tex. R. App. P. 47.4.

and that his due process rights were violated by what he deems materially false testimony introduced at the punishment hearing. We will affirm.

II. BACKGROUND

Parks entered open pleas of guilty on September 21, 2015, to the offenses of aggravated assault with a deadly weapon and aggravated assault of a public servant. Later, on November 2, 2015, the trial court conducted a punishment hearing.

Juan Angel testified at the punishment hearing that he met Parks, a mixed martial artist, while filming a documentary on one of Parks's teammates. The two men discovered that they had a mutual interest in smoking marijuana. According to Angel, on November 24, 2013, he brought marijuana and beer to Parks's apartment. Angel said that as he was preparing to smoke marijuana with Parks, Parks asked him if he was trying to "set [him] up." By Angel's account, without warning or provocation, Parks started punching Angel in the face. Angel said that when he tried to get up, Parks kneed him in the face and resumed punching him. These punches left Angel bloodied and bruised. From there, Parks climbed on top of Angel and placed a machete against his throat. After a prolonged struggle, Angel freed himself and escaped the apartment. As Angel fled, neighbors informed him that they had already contacted the Arlington Police Department.

Specifically regarding whether he had smoked marijuana on the night of the assault, Angel averred that even though he had brought marijuana to Parks's

apartment and was "getting the things prepared to smoke," Parks assaulted him before the two smoked any marijuana together. Angel did say that he had smoked marijuana "twenty minutes" prior to going to Parks's apartment but that he and Parks never smoked marijuana that evening and that he did not see Parks smoke any.

Arlington Police Department's Corporal Lynette Hoerig testified that she arrived shortly after neighbors had called the police. Hoerig said that when she arrived, she saw Angel talking with another officer, that Angel was "pretty mangled," that he exhibited "a lot of cuts," and that he was bleeding a lot. Hoerig said that she and a fellow officer, Sergeant Jared Ross, approached Parks's doorway and knocked. By Hoerig's account, Parks answered the door holding a machete and was in a highly agitated state. Hoerig said that after he dropped the machete, Parks began yelling profanities at the officers and threatening them. Hoerig said that she tried to get Parks's attention and that he responded by jumping on top of her and hitting her in the face with his fists. According to Hoerig, Ross eventually pulled Parks off of her after an unsuccessful attempt at subduing him with a Taser. Hoerig said that she then tried to handcuff Parks but that he spun her into a guardrail and she nearly fell from the second-floor balcony. Hoerig averred that Parks then ran down the apartment stairs with the officers in chase. Hoerig said that during their pursuit, Parks feigned surrendering multiple times but would continue to flee. Eventually, Hoerig

brought Parks down using her own Taser, but he continued fighting while being handcuffed.

Specifically testifying about the injuries Parks inflicted upon her, Hoerig said that she suffered a busted bursa on her elbow that required three stitches and that the elbow developed a staph infection "because of the particles" that remained in the elbow after the assault. Hoerig said that the infection and elbow pain caused her to remain in bed for days and that she had difficulty moving her arm. Hoerig further testified that Parks's assault caused her to have a "dislocated" jaw and a "broken" tooth. Hoerig said that these injuries caused her to be unable to open her mouth "very wide at all" and that she was confined to eating soup for a few days. Specifically about the tooth, Hoerig averred that she had to have "a root canal and a crown." At the close of the hearing, the trial court sentenced Parks to six years' incarceration for each count and rendered judgments accordingly.

On November 30, 2015, Parks filed a motion for new trial. In his motion, Parks argued that his due process rights had been violated because the State had introduced "material[ly] false testimony" from both Hoerig and Angel. Specifically pertaining to Hoerig, Parks alleged that Hoerig "conveyed a false impression" when she testified that she suffered a dislocated jaw and broken tooth that caused her to be unable to eat for days. Parks also alleged that Angel "falsely testified that he did not smoke marijuana on the night of the incident."

The trial court held a hearing on Parks's new-trial motion. At the hearing, the State introduced numerous medical and dental records detailing injuries to Hoerig's jaw and tooth. In these reports, Hoerig reported that she had "jaw pain from [the assault]," that her "jaw ha[d] been locking up," and that "her jaw pain [was] not improving." She also reported to doctors that her jaw "feels as if it is coming out of the socket when she opens her mouth [and that she] experiences pain with clenching her teeth." The medical reports also indicate that Hoerig's jaw had been X-rayed, but the images were negative for a fracture. The reports contain a specific diagnosis of "Acute Contusion Right Jaw/Mandible" caused by her having been "struck in jaw by assailant."

These reports also indicate that Hoerig reported that Parks's assault had caused a cap to become "missing from one of her lower molars" and that she was experiencing "severe pain of [her] lower tooth since [the incident]." The records also indicated that she was scheduled to "have a root canal . . . to repair a cracked tooth."

The State further introduced multiple police reports wherein officers reported that Hoerig had suffered "a swollen jaw" on the night of the assault and that she could be seen "holding her jaw" because of the pain Parks had inflicted on her when he punched her in the face. Within the documents the State introduced, there are roughly forty references to Hoerig's jaw being injured during the assault.

The State also elicited testimony from Parks's trial counsel regarding what Angel had averred to during the punishment hearing. Parks's trial counsel re-read testimony from the punishment hearing indicating that Angel's testimony was not that he had not smoked marijuana the night of the assaults but that he had not smoked marijuana with Parks that night. At the close of the hearing, the trial court announced that it would take the matter "under advisement." The trial court never issued a ruling on Parks's new-trial motion. This appeal followed.

III. DISCUSSION

A. Parks's Motion for New Trial

In his first issue, Parks argues that the trial court erred by allowing his motion for new trial to be overruled by operation of law. Parks specifically objects that the trial court's decision to take his motion "under advisement" after a hearing on the motion, and with only one day of the court's power to grant the motion remaining, was reversible error. We disagree.

It is well established that granting or denying a motion for new trial lies within the trial court's discretion. *Lewis v. State*, 911 S.W.2d 1, 7 (Tex. Crim. App. 1995). Therefore, the standard of review for a trial court's ruling on a motion for new trial is abuse of discretion. *State v. Gonzalez*, 855 S.W.2d 692, 696 (Tex. Crim. App. 1993). An appellate court will reverse a trial court's ruling only when the decision to grant or deny the new trial was so clearly wrong that it was outside the zone within which reasonable persons might agree. *Id.* at 695 n.4. In the absence of contrary evidence, it is presumed that the trial court

properly exercised its discretion. *Beard v. State*, 385 S.W.2d 855, 856 (Tex. Crim. App. 1965). Moreover, Texas Rule of Appellate Procedure 21.8 "allocates seventy-five days following the imposition of the sentence in open court for the trial court to rule on the motion [for new trial]; if the motion is not timely ruled on within that period, the authority to grant the motion expires, and the motion is deemed denied by operation of law." *State v. Holloway*, 360 S.W.3d 480, 485 (Tex. Crim. App. 2012); *see also* Tex. R. App. P. 21.8(a), (c). When the time in which to rule on a motion for new trial has expired and the motion has been overruled by operation of law, the trial court lacks authority to grant a motion for new trial. *State ex rel. Cobb v. Godfrey*, 739 S.W.2d 47, 49 (Tex. Crim. App. 1987). The rule is intended to provide finality of judgments when a motion for new trial is filed. *Id.*

Here, without citing any authority for his proposition, Parks argues that the trial court's pronouncement that it would take his new-trial motion under advisement a day before the motion was deemed denied by operation of law is "contrary to an intention for [the motion] to be overruled by operation of law." But the general rule is that a trial court does not abuse its discretion by allowing a motion for new trial to be overruled by operation of law—even after holding a hearing and announcing that it would take the motion under advisement. *See Hamilton v. Williams*, 298 S.W.3d 334, 337 (Tex. App.—Fort Worth 2009, pet. denied) ("A trial court, however, does not abuse its discretion by not ruling on a motion and by allowing the motion to be overruled by operation of law."); *see*

generally Osborne v. State, No. 07-13-00156-CR, 2015 WL 3463047, at *6 (Tex. App.—Amarillo May 29, 2015, pet ref'd) (mem. op., not designated for publication) ("The trial court took the matter under advisement. Appellant's motion for new trial was later overruled by operation of law."). We hold that the trial court did not abuse its discretion by allowing Parks's motion for new trial to be overruled by operation of law. Thus, we overrule his first issue.

B. Parks's Due Process Claims

In his second and third issues, Parks argues that the State violated his constitutional right to due process by introducing what he deems false and misleading material evidence at his punishment hearing. Specifically, Parks argues that both complainants, Hoerig and Angel, falsely testified. We disagree.

1. Law Regarding False Testimony

The State's procurement of a conviction or punishment by the use of false material testimony violates a defendant's constitutional right to due process. *Ex parte Ghahremani*, 332 S.W.3d 470, 477 (Tex. Crim. App. 2011). When a defendant asserts this violation on appeal, a reviewing court looks to the record to determine (1) whether false evidence was presented at trial and (2) whether the testimony was material. *Yates v. State*, 171 S.W.3d 215, 220–22 (Tex. App.—Houston [1st Dist.] 2005, pets. ref'd). A defendant must prove these two prongs by a preponderance of the evidence. *Ex parte Weinstein*, 421 S.W.3d 656, 664–65 (Tex. Crim. App. 2014).

Testimony is false if it is untrue; the falsehood need not be intentional, result from the witness's bad faith, or constitute perjury. *Id.* at 665–66; *Ex parte Chavez*, 371 S.W.3d 200, 208 (Tex. Crim. App. 2012). Thus, testimony may be false even when its falsity is unintentional. *E.g.*, *Estrada v. State*, 313 S.W.3d 274, 287–88 (Tex. Crim. App. 2010), *cert. denied*, 562 U.S. 1142 (2011). But mere inconsistencies or conflicts in the evidence do not establish falsity. *Ex parte De La Cruz*, 466 S.W.3d 855, 870–71 (Tex. Crim. App. 2015), *cert. denied*, 136 S. Ct. 1175 (2016); *Alexander v. State*, 282 S.W.3d 701, 711 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd). And moderate differences between the evidence suggesting falsity and the complained-of testimony is insufficient to establish falsity. *Ex parte De La Cruz*, 466 S.W.3d at 870–71. The salient question is whether the particular testimony at issue provides a misleading impression of the facts to the factfinder when taken as a whole. *Ex parte Weinstein*, 421 S.W.3d at 666; *Ex parte Chavez*, 371 S.W.3d at 208.

False testimony is material if there is a reasonable likelihood that it affected the factfinder's guilty verdict or its assessment of punishment. *Ex parte Weinstein*, 421 S.W.3d at 665; *Ex parte Chavez*, 371 S.W.3d at 208. This reasonable likelihood standard is the equivalent of the standard for constitutional error, which requires the State to prove beyond a reasonable doubt that the error did not contribute to the conviction or punishment. *Ex parte Ghahremani*, 332 S.W.3d at 478. We consider the entire record in assessing the materiality of false testimony. *Ex parte Chavez*, 371 S.W.3d at 209–10.

2. Hoerig's Testimony

In his second issue, Parks argues that Hoerig "falsely testified on multiple occasions to material representations regarding the severity of the injuries she sustained as a result of the assault by Parks." Specifically, Parks argues that Hoerig falsely testified "that she suffered a dislocated jaw when her medical records do not show a diagnosis or treatment plan for a dislocated jaw" and that Hoerig falsely testified that she suffered an injury to her tooth that made it difficult for her to eat. Parks furthers his argument by stating that Hoerig had never been "diagnosed with any jaw injury caused by the assault at issue." And yet, in a seeming contradiction, Parks admits that Hoerig "was assessed to have suffered an acute contusion to her lower right jaw" on the night Parks assaulted her.

Parks does not, however, point to any evidence, nor did he at the hearing on his motion for new trial, that Hoerig's testimony that she had suffered a "dislocated jaw" and injury to her tooth that made it difficult for her to eat was false. There is no evidence in the record that any medical personnel definitively diagnosed Hoerig with not having a dislocated jaw or tooth injury. And although X-rays that were taken of Hoerig's jaw after Parks assaulted her revealed that she had not suffered a fracture in her jawbone, the State is correct in its position that the record is replete with evidence that Parks injured Hoerig's jaw and tooth when he assaulted her. Indeed, at the hearing on Parks's motion for new trial, the State introduced evidence that multiple officers reported that Parks had struck Hoerig in the jaw and that after the assault she was in pain and holding

her jaw. Medical responders reported that Hoerig had jaw pain and swelling and that she had difficulty speaking because of the facial injury she received from Parks's assault. Hoerig reported multiple times in her worker's compensation filings that she had jaw pain and that she needed dental work. And the State's file, which was introduced at the motion-for-new-trial hearing, indicates roughly forty times that Hoerig's jaw was swollen, that she had persistent pain in her jaw, or that her jaw popped out of place when she would eat or speak.

It strains credulity to conclude—given the volume of evidence regarding the severity, persistence, and location of the injuries to Hoerig's jaw and tooth—that Parks would argue that Hoerig's statements that her jaw had been dislocated or that her tooth was injured to an extent that made it difficult for her to eat were somehow materially false. Viewing the record in whole, Parks has failed to prove by a preponderance of the evidence that Hoerig's testimony that she sustained a dislocated jaw and a tooth injury provided a misleading impression of the facts to the trial court. In fact, the record demonstrates that Hoerig's testimony was consistent with the evidence. We overrule Parks's second issue.

3. Angel's Testimony

In his third issue, Parks argues that Angel "falsely testified that he did not smoke marijuana on the night of the incident." Specifically, Parks argues that because Angel told investigators that he had smoked marijuana on the night of the assaults and because in part of his testimony Angel testified that Parks

assaulted him prior to the two of them smoking marijuana, Angel made "a misleading representation of material fact to" the trial court.

First we note that a thorough review of Angel's testimony reveals that he did not testify that he had not smoked marijuana on the night of the assault; rather, Angel's testimony was that he had smoked marijuana prior to having arrived at Parks's apartment but that the two of them had not smoked marijuana together that night. But even if Angel's testimony about when and whether he smoked marijuana the night of the assault is inconsistent with statements that he made to investigators prior to trial, this type of mere inconsistency falls short of leaving a misleading impression of the facts to the factfinder. *Ex parte Weinstein*, 421 S.W.3d at 666; *Ex parte Chavez*, 371 S.W.3d at 208. It was the factfinder's province to resolve any inconsistencies in Angel's testimony, and we are to give deference to the factfinder's role with respect to the weight and credibility of the evidence presented. *See Ex parte De La Cruz*, 466 S.W.3d at 870–71 ("[I]nconsistencies do not, without more, support [a] fact finding that . . . testimony is false."); *see also United States v. Croft*, 124 F.3d 1109, 1119 (9th Cir. 1997) (reasoning that fact that witnesses have given inconsistent or conflicting testimony does not establish that such testimony was false); *Koch v. Puckett*, 907 F.2d 524, 531 (5th Cir. 1990) (reasoning that conflicting trial testimony between witnesses "merely establishes a credibility question" for the factfinder and does not suffice to demonstrate that the evidence was false). We overrule Parks's third issue.

IV. CONCLUSION

Having overruled all three of Parks's issues, we affirm the trial court's judgments.

/s/ Bill Meier
BILL MEIER
JUSTICE

PANEL: WALKER, MEIER, and SUDDERTH, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: February 2, 2017