COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00147-CR

KRYSTAL MONET NICHOLS — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM COUNTY CRIMINAL COURT NO. 9 OF TARRANT COUNTY
TRIAL COURT NO. 1476866

MEMORANDUM OPINION[1]

Appellant Krystal Monet Nichols appeals her conviction for prostitution.[2] In two points, she argues that the evidence is insufficient to support the conviction and that the trial court erred by refusing to include her requested instruction on

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

[2]*See* Tex. Penal Code Ann. § 43.02(a) (West Supp. 2017).

spoliation of evidence in the guilt-innocence jury charge. We reject both contentions and affirm the trial court's judgment.

Background

According to testimony by Fort Worth police officer Karla Garbelotto, one night in June 2016, she and other officers went undercover to Bucks Cabaret, a strip club. The club had a reputation for engendering criminal activity, and the officers had received a complaint that club employees were having sex for money. When the officers entered the club, they ordered bottle service; with no intent to drink alcohol, they paid $100 or more for a bottle of liquor along with nonalcoholic drinks such as juice and Sprite. By ordering bottle service, the officers intended to draw the attention of dancers who would "come and hang out at [the officers'] table to try to make some money."

While the officers were at the club, a woman who called herself Frenchy—a name that Officer Garbelotto assumed was an alias—came to their table and asked Officer Garbelotto whether she liked girls. Officer Garbelotto, who went by another name while undercover, said yes, and Frenchy then sat on her lap and began talking with her. Officer Garbelotto asked Frenchy for a private dance, and they went together to a VIP area. While there, Officer Garbelotto told Frenchy that it had been "a while since [she had] actually been with a girl," and she asked Frenchy whether she saw clients outside of the club. Frenchy said yes, and Officer Garbelotto asked, "How much would you charge for me to F you?" Frenchy replied, "Well, take a guess." Officer Garbelotto said, "$400," and

Frenchy said, "$500." Officer Garbelotto said, "Okay. . . . Let's go back to the table, and . . . [l]et me get your phone number so when you're done with your job after your shift at 2 o'clock in the morning, you can text me and we can either go to my place or your place or a motel room, whichever we decide."

Officer Garbelotto and Frenchy returned to the table. Frenchy gave Officer Garbelotto her phone number, and Officer Garbelotto entered that number into her phone. After leaving the club, Officer Garbelotto sent a text message to Frenchy asking for a "raincheck" on their agreement, and Frenchy responded that she could have one.

After Officer Garbelotto returned to her office, she used Real Time Crime Center (RTCC)[3] to find a match between the cell phone number that Frenchy had given and a real, identifiable person. RTCC matched the cell phone number to Nichols's Texas driver's license with a probability of over eighty percent. In other words, although names other than Nichols's name linked to that number, Nichols's name linked most commonly.

Officer Garbelotto identified the license that RTCC had sent to her as containing Frenchy's photo; Officer Garbelotto concluded that Nichols was the person who had agreed to engage in sex for money at the club. Officer Brent Ladd, who was with Officer Garbelotto at the club, likewise identified Nichols as the woman who had talked with Officer Garbelotto about engaging in prostitution.

[3]RTCC, a part of the Fort Worth Police Department, provides information to officers upon request.

The State charged Nichols with prostitution. At a jury trial, she pleaded not guilty. In her defense, she elicited testimony from Timothy Ledger, who works for Bucks Cabaret's owner. Ledger told the jury that after searching his records, he had found "no traces of [Nichols] in [Bucks Cabaret's] system either as an entertainer or as a traditional paid employee." Ledger testified that Bucks Cabaret strives to comply with legal requirements by keeping detailed records on its employees. He explained that contracted dancers use a fingerprinting system when performing at the club; he admitted, however, that it was possible that a club might contract with a dancer "off the books" without keeping records of her work at the club.

Nichols also presented evidence from several witnesses, including herself, that during June 2016, she was battling cervical cancer, that she was not able to work at a regular job, and that she was making money by selling plates of food that she had cooked. Nichols's mother testified that she had never known Nichols to be a topless dancer.[4] Nichols testified that, among other facts, she had never heard of Bucks Cabaret until she was arrested on the prostitution warrant in October 2016; she had never been a topless dancer; she was selling food on the night of the officers' visit to Bucks Cabaret; and the cell phone

[4]For impeachment, the State presented evidence that Nichols's mother had been convicted more than once for theft, including for a theft that she committed in 2016.

number that Officer Garbelotto had received from Frenchy was an old number of hers but was not active in June 2016.

After receiving all of the parties' evidence and arguments, the jury found Nichols guilty. The trial court assessed her punishment at thirty days' confinement, suspended the imposition of that sentence, and placed her on community supervision for nine months. She appealed.

Evidentiary Sufficiency

In her first point, Nichols argues that the evidence is insufficient to support her conviction. She contends that no "reasonable trier of fact, hearing all the evidence presented[,] . . . could have found beyond a reasonable doubt that [she] was guilty of prostitution."

In our due-process review of the sufficiency of the evidence to support a conviction, we view all of the evidence[5] in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016). This standard gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to

[5]In briefing, Nichols emphasizes that we must consider all of the evidence admitted at trial. We base our holding below on a consideration of all of the evidence that the jury could have considered in finding Nichols guilty.

draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Jenkins*, 493 S.W.3d at 599.

The trier of fact is the sole judge of the weight and credibility of the evidence. *See* Tex. Code Crim. Proc. Ann. art. 38.04 (West 1979); *Blea v. State*, 483 S.W.3d 29, 33 (Tex. Crim. App. 2016). Thus, when performing an evidentiary sufficiency review, we may not re-evaluate the weight and credibility of the evidence and substitute our judgment for that of the factfinder. *See Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). Instead, we determine whether the necessary inferences are reasonable based upon the cumulative force of the evidence when viewed in the light most favorable to the verdict. *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App.), *cert. denied*, 136 S. Ct. 198 (2015). We must presume that the factfinder resolved any conflicting inferences in favor of the verdict and defer to that resolution. *Id.* at 448–49; *see Blea*, 483 S.W.3d at 33. The factfinder is free to accept or reject any or all of the evidence of either party. *Hernandez v. State*, 161 S.W.3d 491, 500 (Tex. Crim. App. 2005); *Franklin v. State*, 193 S.W.3d 616, 620 (Tex. App.—Fort Worth 2006, no pet.); *see also Johnson v. State*, 571 S.W.2d 170, 173 (Tex. Crim. App. [Panel Op.] 1978) (explaining that a factfinder may reject uncontroverted defensive evidence).

Reversal on evidentiary sufficiency grounds is restricted to the "rare occurrence" when a factfinder does not act rationally. *Morgan v. State*, 501 S.W.3d 84, 89 (Tex. Crim. App. 2016); *see Thornton v. State*, 425 S.W.3d 289,

303 (Tex. Crim. App. 2014) (stating that a reviewing court should not act as a "thirteenth juror"). Evidence is not rendered insufficient "simply because [a defendant] presented a different version of the events." *Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993).

A person commits prostitution if the person knowingly offers or agrees to receive a fee to engage in sexual conduct. Tex. Penal Code Ann. § 43.02(a). In arguing that the evidence is insufficient to support her conviction, Nichols does not challenge the sufficiency of the evidence to show that "Frenchy" committed prostitution by agreeing to engage in sexual conduct for a fee; rather, she argues, in essence, that the evidence is insufficient to show that she is "Frenchy."

Nichols first challenges the inculpatory value of Officer Garbelotto's and Officer Ladd's identifications of her as the woman who agreed to engage in prostitution at the club. She argues that the officers' identifications were "so flawed as to constitute little probative value to a rational trier of fact." She asserts that the flaws include (1) the officers' failure to use a photo lineup procedure to identify her in the way that the police ask civilian eyewitnesses to make identifications, and (2) the officers' failures to recall that she had tattoos that she presented evidence of at trial.[6]

[6]During Nichols's mother's testimony, the jury received photographs of Nichols's tattoos of butterflies and flowers on her back.

Even if we were to agree with Nichols's argument that the procedure used by Officer Garbelotto and Officer Ladd to identify her was suggestive,[7] the suggestive nature of an identification procedure does not necessarily rob the identification of probative, inculpatory value. *See Perry v. State*, 703 S.W.2d 668, 673–74 (Tex. Crim. App. 1986); *Bickems v. State*, 708 S.W.2d 541, 544 (Tex. App.—Dallas 1986, no pet.). Officer Garbelotto testified that the club was "pretty bright" and that she had a "pretty good look" at Nichols in the club because Nichols had sat on her lap. She testified that she was "[a] hundred percent" confident that Frenchy and Nichols were the same person. Likewise, Officer Ladd testified that he was "confident" and had "no doubt" that Nichols was the woman whom he had seen Officer Garbelotto interact with at the strip club. The jury had the authority to rely on this evidence, and its guilty verdict indicates that it did so. *See Franklin*, 193 S.W.3d at 620.

Regarding Nichols's tattoos, while Officer Garbelotto and Officer Ladd each testified that they did not recall seeing the tattoos at the club, Officer Garbelotto explained, "[I]t's a little bit harder to identify tattoos on somebody's skin color that's darker because tattoos' ink [is] dark. So [it is] kind of hard to visualize and be able to identify what kind of tattoo that person has." Even if the

[7]We note that at trial, Nichols did not object to Officer Garbelotto's and Officer Ladd's in-court identifications of her as the person who had agreed to engage in prostitution.

officers' failure to notice Nichols's tattoos raises an exculpatory inference,[8] we must defer to the jury's implicit finding that the inculpatory evidence, including the officers' confident in-court identifications, sufficiently proved Nichols's guilt. *See Blea*, 483 S.W.3d at 33; *see also Ledezma v. State*, No. 14-09-00483-CR, 2010 WL 4514386, at *3 (Tex. App.—Houston [14th Dist.] Nov. 9, 2010, pet. ref'd) (mem. op., not designated for publication) ("Appellant argues the evidence tending to show that he was the assailant is greatly outweighed by [the victim's] failure to mention his tattoos. . . . We defer to the jury's conclusions as to the relative importance, if any, to be given to that evidence.").

Next, Nichols argues that RTCC's linking of Frenchy's cell phone number to her was flawed. She contends that the "police used an old phone number, put it into a possibly outdated database, and came up with a driver's license." Austin Davis, a Fort Worth police officer who works with RTCC, testified that he entered the number that Frenchy had given to Officer Garbelotto into a credit-report database, that the database produced a list of names that had possible associations with that number, and that the most common associated name was Nichols's. During her testimony, Nichols admitted that she had previously used the number that Frenchy had given to Officer Garbelotto, but she testified that she was using a different number in June 2016. Nichols elicited testimony from a

[8]The evidence in the record does not conclusively negate the possibility that Nichols got the tattoos sometime between when the officers visited the club in June 2016 and the May 2017 trial.

private investigator, Keith Madison, that Frenchy's number linked to a Grand Prairie apartment complex to which Nichols had no apparent connection. Madison conceded, however, that in his experience, he had seen several occasions in which a cell phone number did not correctly match with an address.

We conclude that nothing within the testimonies of Officer Davis, Madison, or Nichols (which the jury had authority to discount) negated the jury's prerogative to rely on Officer Garbelotto's and Officer Ladd's assured identifications of Nichols as the person who agreed to engage in prostitution. *See Blea*, 483 S.W.3d at 33.

Finally, Nichols asserts that in light of Ledger's testimony that she did not have any history with Bucks Cabaret as a dancer and in light of other witnesses' testimony concerning her medical problems in June 2016, the jury's finding of her guilt was irrational. As explained above, Ledger testified that Bucks Cabaret had no record of Nichols working there. But he admitted that it was possible (although, by his opinion, unlikely) that a club might contract with a dancer without keeping records of her work. Furthermore, Officer Ladd testified that Bucks Cabaret has a "horrible" reputation for recordkeeping. He explained,

> [E]very employee has to . . . have their driver's license and a picture ID, and it has to be given to the police department. And there is a file that part of our unit has. There is a file. That file is sent to us so we can try to identify any of the people that we have cases on. And I would say 98 percent of the time I cannot find the person that I'm looking for in the files that they sent.

Based on Ledger's concession of the possibility of an off-the-books arrangement between the club and a dancer and on Officer Ladd's testimony about the club's poor reputation for keeping accurate records, we conclude that Ledger's testimony does not support a conclusion that the jury's finding of Nichols's guilt was irrational. Similarly, we cannot conclude that the evidence of Nichols's medical problems foreclosed a rational finding of guilt. The evidence establishes that despite Nichols's health problems, in June 2016, she was well enough to make money by cooking and selling food.[9]

In sum, although some evidence in the record raises inferences opposing the jury's finding of Nichols's guilt, we hold that viewing all of the evidence, including the officers' confident identifications of her, in the light most favorable to the verdict, and deferring to the jury's resolution of conflicting inferences, the jury could have rationally found that she committed prostitution beyond a reasonable doubt. *See* Tex. Penal Code Ann. § 43.02(a); *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Jenkins*, 493 S.W.3d at 599; *Blea*, 483 S.W.3d at 33. We therefore conclude that the evidence is sufficient to sustain Nichols's conviction, and we overrule her first point.

[9]The jury could have reasoned that Nichols's selling food was consistent with her guilt because she conceded that in 2014, she wrote a post on Facebook offering to sell food "at the clubs."

Request for Spoliation Instruction

In her second point, Nichols contends that the trial court erred by refusing her request for the inclusion of a spoliation instruction in the guilt-innocence jury charge. Upon cross-examination, Officer Garbelotto testified that she did not remember taking screenshots of the text-message exchange between her and Nichols following their prostitution agreement. She then testified that she had deleted the text messages even though she had the technological capability to preserve them. She testified that the text-message exchange did not contain noteworthy information other than her and Nichols's agreement to delay the execution of their prostitution agreement.

After the parties concluded their presentations of evidence but before they presented closing arguments, Nichols asked for a jury instruction on spoliation. Her counsel stated,

> It's Defense's [request] for a spoliation charge[.] . . . [T]he reason why Defense would ask for it is that Officer Garbelotto testified . . . in here, Judge, that she intentionally or knowingly destroyed the text messages that were part of this case. And the messages themselves, this is the identity and the time and the link to this name which gets us an arrest several months later. Having that in electronic form where we can look at it either in an image itself or having the stuff preserved on the phone would allow us to track down whose phone it was tied to . . . and to be able to examine the veracity of it. That's why we're asking for the charge.

Nichols submitted the following language for the proposed instruction:

> The [S]tate has a duty to gather, preserve, and produce at trial evidence which may possess exculpatory value. Such evidence must be of a nature that the defendant would be unable to obtain comparable evidence through reasonably available means. The

> [S]tate has no duty to gather or indefinitely preserve evidence considered by a qualified person to have no exculpatory value, so that an as yet unknown defendant may later examine that evidence.
>
> If, after considering all the proof, you find that the [S]tate failed to gather or preserve evidence to-wit: the text messages sent and received on Officer Garbelotto's City of Fort Worth Police Department issued iPhone between Officer Garbelotto and the phone number . . . , the contents or qualities of which are in issue and the production of which would more probably than not be of benefit to the defendant, you may infer that the absent evidence would be favorable to the defendant.

The trial court overruled Nichols's request for such an instruction. Nichols argues that the trial court erred by denying the request.

"Spoliation of evidence concerns the loss or destruction of evidence. When the spoliation concerns potentially useful evidence, the defendant bears the burden of establishing the State lost or destroyed the evidence in bad faith." *Torres v. State*, 371 S.W.3d 317, 319 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd) (citation omitted); *see Moody v. State*, No. 02-15-00267-CR, 2017 WL 117309, at *4 (Tex. App.—Fort Worth Jan. 12, 2017, no pet.) ("There must be a showing of bad faith on the part of the State to warrant a spoliation instruction."). The court of criminal appeals has explained that bad faith is

> more than simply being aware that one's action or inaction could result in the loss of something that is recognized to be evidence. . . . [B]ad faith entails some sort of improper motive, such as personal animus against the defendant or a desire to prevent the defendant from obtaining evidence that might be useful. Bad faith cannot be established by showing simply that the analyst destroyed the evidence without thought, or did so because that was the common practice, or did so because the analyst believed unreasonably that he was following the proper procedure.

Ex parte Napper, 322 S.W.3d 202, 238 (Tex. Crim. App. 2010); *see Guzman v. State*, 539 S.W.3d 394, 402 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd) (citing *Napper* and explaining that when "conduct can, at worst, be described as negligent, the failure to preserve evidence does not rise to the level of a due process violation").

The record does not support a conclusion that Officer Garbelotto acted in bad faith or knew that the text-message exchange had exculpatory value when she deleted the exchange. The record also does not support Nichols's assertion that Officer Garbelotto deleted the exchange while "knowing the weaknesses of her investigation." Instead, Officer Garbelotto testified that she commonly deletes data from her phone related to her investigations because

> there are text messages about work -- you know, calling sergeant and things of a police nature -- that when we do undercover operation I don't want anybody else to read that I have police stuff on my undercover phone. So I have to delete everything. You know, the prior text messages and everything.

As the State contends, Nichols did not produce any evidence that the deletion of data from undercover officers' phones is not a standard practice or that Officer Garbelotto harbored any personal animus toward her. We hold that because the record does not establish Officer Garbelotto's bad faith in failing to preserve the text-message exchange, the trial court did not err by refusing to include a spoliation instruction in the jury charge. *See Napper*, 322 S.W.3d at 238; *Moody*, 2017 WL 117309, at *4; *see also Gutierrez v. State*, No. 11-10-00276-CR, 2011 WL 4135743, at *1 (Tex. App.—Eastland Sept. 15, 2011, no

pet.) (mem. op., not designated for publication) (concluding that the "routine destruction of a video, without more, [did] not constitute sufficient evidence of bad faith so as to require a spoliation instruction"). We overrule Nichols's second point.

Conclusion

Having overruled both of Nichols's points, we affirm the trial court's judgment.

/s/ Wade Birdwell
WADE BIRDWELL
JUSTICE

PANEL: WALKER, MEIER, and BIRDWELL, JJ.

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

DELIVERED: April 19, 2018