COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00202-CR

PAUL JOSEPH LAIR JR. — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 213TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1152604D

MEMORANDUM OPINION[1]

In one issue, Appellant Paul Joseph Lair Jr. appeals from the trial court's denial of his motion for postconviction forensic DNA testing. We affirm.

I. BACKGROUND FACTS

In February 2012, Appellant was convicted of aggravated sexual assault of a child (penile-mouth contact) and indecency with a child by contact (touching the

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

child's genitals). The complainant, B.M., was Appellant's nephew by marriage and was five years old at the time of the offenses. This court upheld Appellant's convictions. *Lair v. State*, No. 02-12-00068-CR, 2013 WL 4033618, at *1, *9 (Tex. App.—Fort Worth Aug. 8, 2013, pet. ref'd).

In March 2017, Appellant filed a motion for postconviction forensic DNA testing. In his motion, Appellant asserted that:

- B.M. had "stated that [Appellant] would place his privates in [B.M.]'s mouth and would 'pee in his mouth,'" after which B.M. would "spit it out and brush his teeth";
- The police collected toothbrushes under the theory that Appellant's DNA would be found on B.M.'s toothbrush but then did not conduct DNA testing on the toothbrushes or on other items of physical evidence collected during the investigation.

Appellant requested DNA testing on the toothbrushes and also requested that the State identify other items the police had in their possession so that the trial court could determine which items were suitable for DNA testing.

The trial court denied Appellant's motion for postconviction DNA testing, adopting the State's proposed findings of fact and conclusions of law, including findings that:

- Appellant and his wife babysat B.M. most Friday nights and Saturdays at Appellant's home while B.M.'s mother worked;
- B.M. typically slept in Appellant's bedroom while his wife slept on the couch;
- In November 2008, B.M. told his mother that Appellant had been "making him touch his privates"; "putting his private[] in B.M.'s mouth and wiggling it around," and "touching B.M.'s privates and wiggling them around in his hand";

- "B.M. also told his mother that [Appellant] would 'pee' in his mouth and that the pee was 'sticky'";
- B.M. made similar reports to the forensic investigator and sexual assault nurse examiner and similarly testified at trial;
- When police searched Appellant's house, they seized toothbrushes, a glass cup, and the contents of the trash can in Appellant's bathroom;
- "The Texas Department of Public Safety . . . conducted pre-trial DNA screening on the toothbrushes and the glass cup seized from [Appellant's] bathroom, but the analyst did not find any presence of semen or spermatozoa on the toothbrushes or the glass cup";
- "The Tarrant County Medical Examiner's Office . . . conducted pre-trial DNA screening on the contents of the trash can seized from [appellant's] bathroom, but the analyst did not detect any semen or seminal fluids on any of the trash can's contents";
- Appellant "had not had access to B.M. for more than a week when the police executed [the] search warrant on November 26, 2008"; and
- "Obtaining any DNA samples from toothbrushes can be problematic since toothpaste can damage the sample and the acts of washing the toothbrush and tapping it on the sink can degrade or eliminate any sample."

The trial court further found that (1) Appellant could not demonstrate "by a preponderance of the evidence that DNA testing of evidence collected from his bathroom would establish his innocence[,] given the problems with obtaining a relevant DNA sample from the toothbrushes and other seized items [and] the non-biological evidence showing that he had sexual relations with B.M." and (2) Appellant had "failed to meet the requirements of [Texas Code of Criminal Procedure] article 64.03 for post-conviction forensic DNA testing."

The trial court concluded that Appellant:

- "[C]annot show that any potential absence of his DNA from the toothbrushes in question or other evidence collected by the police would exonerate him";
- "[C]annot demonstrate by a preponderance of the evidence that 'exculpatory' forensic DNA testing would establish his innocence," "[g]iven the significant non[]biological evidence establishing his guilt"; and
- "[D]oes not meet the requirements of article 64.03 for post[]conviction forensic DNA testing."

II. DISCUSSION

In his sole issue, Appellant contends that the trial court erred by denying the motion because the motion alleged that:

- Evidence containing biological material was retrieved during the investigation;
- The evidence was in the State's possession during the trial;
- It was not submitted for any type of DNA analysis or testing;
- He was innocent; and
- Identity was an issue.

A. We Employ a Bifurcated Standard for Reviewing a Trial Court's Ruling on a Motion for Postconviction DNA Testing.

We review the trial court's ruling on a Chapter 64 issue under a bifurcated standard of review. *Rivera v. State*, 89 S.W.3d 55, 59 (Tex. Crim. App. 2002). We afford the trial court almost total deference in the determination of historical facts and in the application of law to those facts when they turn on credibility and demeanor. *Id.* We review de novo all other application-of-law-to-fact questions. *Id.*

B. Appellant Does Not Meet the Requirements for Postconviction Testing.

Article 64.03 of the Texas Code of Criminal Procedure authorizes the trial court to order postconviction DNA testing in Appellant's case only if:

(1) the trial court finds that:

  (A) the evidence to be tested:

    (i) exists "in a condition making DNA testing possible"; and

    (ii) "has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect";

  (B) it is reasonably likely "that the evidence contains biological material suitable for DNA testing"; and

  (C) identity is or was an issue in the case; and

(2) Appellant "establishes by a preponderance of the evidence that:"

  (A) he would not have been convicted if DNA testing had exculpated him; and

  (B) his request for "DNA testing is not made to unreasonably delay" justice or the execution of his sentence.

See Tex. Code Crim. Proc. Ann. art. 64.03(a) (West 2018). Appellant cannot establish by a preponderance of the evidence that he would not have been convicted if DNA testing of the toothbrushes and of other unidentified evidence (the glass cup, the trash can, and the garbage seized from his bathroom) had exculpated him.

Although Appellant argues that "if the toothbrush was subjected to DNA testing and [his own] DNA was not found, it was proven that the child's story was

not true and that [Appellant] was innocent," that conclusion ignores a wealth of other evidence before the jury who determined his guilt:

- When B.M. slept at Appellant's house, he slept in Appellant's bedroom;
- Appellant's wife slept in a different room;
- B.M. told his mother, the forensic investigator, and the sexual assault nurse examiner that Appellant had put his penis in B.M.'s mouth and had touched B.M.'s sexual organ;
- B.M. told his mother that the substance Appellant released into the child's mouth was "sticky";
- B.M. testified that Appellant had put "his wiener" in B.M.'s mouth and would "pee" in B.M.'s mouth;
- B.M. and Appellant had been apart more than a week when the police seized the toothbrushes, a glass cup, and the trash can and its contents from Appellant's bathroom;
- In pretrial DNA screenings, no semen or spermatozoa were detected on the toothbrushes, glass cup, trash can, or trash seized from Appellant's bathroom; and
- Getting a DNA sample from a toothbrush can be difficult because toothpaste, washing the toothbrush, or tapping it on the sink can damage or remove a sample.

The jury found Appellant guilty without having DNA evidence but with undisputed evidence that the tested toothbrushes showed no signs of semen or sperm. Given that evidence and the nonbiological evidence of sexual abuse, we hold that Appellant cannot meet his burden of proving by a preponderance of the evidence that he would not have been convicted if DNA testing of the toothbrushes, glass cup, trash, or trash can had exculpated him. *See, e.g., Hughes v. State*, No. 05-06-00577-CR, 2007 WL 2069626, at *2 (Tex. App.—

Dallas July 20, 2007, pet. ref'd) (mem. op., not designated for publication) ("Neither the absence of Hughes's DNA nor the presence of a third party's DNA on the ring or other items would be exculpatory because the testimony implicating Hughes as a party to the incident and the evidence connecting him to the stolen property are not refutable by DNA testing."). We overrule Appellant's sole issue.

III. CONCLUSION

Having overruled Appellant's sole issue, we affirm the trial court's order.

/s/ Mark T. Pittman
MARK T. PITTMAN
JUSTICE

PANEL: GABRIEL, PITTMAN, and BIRDWELL, JJ.

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

DELIVERED: May 31, 2018