# In The
# Court of Appeals
# Seventh District of Texas at Amarillo

No. 07-15-00179-CR

LARAY DONELL WILSON, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 47th District Court
Randall County, Texas
Trial Court No. 23,725-A, Honorable Dan L. Schaap, Presiding

March 11, 2016

## MEMORANDUM OPINION

Before QUINN, CJ., and CAMPBELL and HANCOCK, JJ.

Appellant, Laray Donell Wilson, was charged in a five count indictment with two counts of aggravated robbery,[1] one count of aggravated assault with a deadly weapon,[2] and two counts of aggravated sexual assault.[3] Prior to beginning trial, the State waived count III, the aggravated-assault-with-a-deadly-weapon count. After hearing the

[1] *See* TEX. PENAL CODE ANN. § 29.03(a)(2) (West 2011).

[2] *See id.* § 22.02(a)(2) (West 2011).

[3] *See id.* § 22.021(a)(1)(A)(i) & (iii) (West Supp. 2012).

evidence, the jury convicted appellant of each of the other four counts in the indictment. The same jury heard the evidence on punishment and, subsequently, returned a verdict assessing appellant's punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice (ID-TDCJ) at 55 years on each count and a fine of $5,000 on each count with the sentences ordered to be served concurrently.

Appellant has appealed his convictions and contends, via three issues, that (1) he has been subjected to punishment for the same offense twice, thereby, violating the double jeopardy clause of the United States Constitution; (2) the trial court committed reversible error in overruling his objection to the State's closing argument; and (3) the District Clerk cumulated the fines in contravention to the sentence by the trial court.[4] We will affirm.

## Factual and Procedural Background

Appellant does not contest the sufficiency of the evidence to support the jury's verdicts. Accordingly, only that part of the factual background necessary for our resolution of appellant's contentions will be recited.

On February 17, 2012, three black males with guns approached Kenneth Barnett as he was walking up to his front door. The men demanded money and took Barnett's keys. After entering Barnett's home, the three men encountered Amanda Andrews, Barnett's fiancée. One of the three men, later identified as appellant, forced her back into the master bedroom of the house. Appellant pushed Andrews on to the bed and pointed his gun to her face.

[4] The State conceded error on this issue and we shall reform the judgments accordingly.

Appellant then pulled Andrews' pajama pants and underwear down. After forcing her legs apart, appellant licked Andrews' vagina. Appellant then, while still holding his gun on Andrews, put his finger inside her vagina and asked if she had a condom. Andrews told him no, and he jerked her top down and licked her left breast. Appellant then took Andrews' money from her purse and left the scene.

After appellant and his two accomplices left the home, Andrews made a 911 emergency call, and the police came to the scene. Andrews was eventually taken to Northwest Texas Hospital for a sexual assault examination. During this examination, a nurse took swabs of Andrews' vagina, anus, labia, and breast. Eventually, the breast swab was found to have DNA linked to Andrews and an unknown male. Through the Texas Department of Public Safety crime laboratory, the DNA belonging to the unknown male was submitted to the CODIS[5] database and it was identified with appellant. Based upon this information, a search warrant was obtained to gather a new sample of appellant's DNA. This sample was tested on two occasions, and the results implicated appellant.

After hearing the evidence, the jury found appellant guilty of two counts of aggravated robbery and two counts of aggravated sexual assault. Appellant brings forth his issues for our consideration, claiming that his conviction on both counts of aggravated sexual assault violates the United States Constitution's prohibition against double jeopardy and that the trial court committed reversible error by overruling an objection to the State's closing argument. We will affirm.

[5] CODIS is an acronym standing for the FBI's Combined DNA Index System.

Double Jeopardy

Appellant contends that the two convictions for aggravated sexual assault violate the United States Constitution's prohibition against double jeopardy. *See* U.S. CONST. amend. V. This is so, according to appellant, because the gravamens of the offenses are the same, they were committed in the same encounter, and there was penetration of the same orifice. In arriving at this conclusion, appellant asserts that the sexual assault by contact count of the indictment was also a sexual assault by penetration by appellant's tongue.

In support of his proposition, appellant analyzes two recent Texas Court of Criminal Appeals decisions. *See Jourdan v. State,* 428 S.W.3d 86 (Tex. Crim. App. 2014); *Aekins v. State,* 447 S.W.3d 270 (Tex. Crim. App. 2014). The upshot of appellant's analysis is his contention that *Jourdan* and *Aekins* conflict with each other and that we should adopt the analysis of *Jourdan*. Should we do so, according to appellant, we will then hold that the penetration of the victim's vagina by the tongue and finger of appellant can result in only one conviction.

The State submits that this case is clearly controlled by *Vick v. State,* 991 S.W.2d 830, 832–33 (Tex. Crim. App. 1999). According to the State, when the analysis of *Vick* is applied to appellant's contentions, the result is a finding of no double jeopardy violation.

We begin by examining appellant's contention. The problem with appellant's analysis is that it simply ignores the procedural background of this case. First, appellant was never charged with penetration of the victim's vagina by his tongue, Rather, the

two aggravated-sexual-assault counts allege contact with the victim's vagina by appellant's mouth and penetration of the vagina by appellant's finger. These are two separate offenses as defined by section 22.021(a)(1)(A) of the Texas Penal Code. *See* TEX. PENAL CODE ANN. § 22.021(a)(1)(A).[6]

Second, the evidence of the case does not support appellant's allegation that the offense actually committed was penetration of the victim's vagina by appellant's tongue. The record reflects that the victim testified that appellant licked the inside and outside of her vagina. What that means, in regard to the question of penetration, was never pursued with the victim. Does it mean simply that appellant licked the outside of the vaginal labia and the inside of the vaginal labia? The victim's testimony does not provide any answer. Kenneth Barnett, the victim's fiancé, also testified to the general nature of the sexual assault of the victim. Finally, the registered nurse who did the SANE[7] examination of the victim testified that the victim advised that appellant had licked her vagina and digitally penetrated her vagina. At best, this evidence might imply penetration of the victim's vagina by appellant's tongue. Yet, under appellant's analysis, these descriptions of the testimony are important because "the particular course of conduct," rather than the State's choice of provision with which to charge the violation, is paramount. *See Loving v. State,* 401 S.W.3d 642, 647 (Tex. Crim. App. 2013).

However, appellant's reliance on *Loving* is misplaced. The quote attributed to the *Loving* court was actually a quote from *Sanabria v. United States,* 437 U.S. 54, 70, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978), where the U. S. Supreme Court said, "Whether

[6] Further reference to the Texas Penal Code will be by reference to "section ____" or "§ ____."

[7] SANE is an acronym standing for Sexual Assault Nurse Examiner.

a particular course of conduct involves one or more distinct 'offenses' under the statute depends on [the legislature's] choice." The completed quote is used in describing the Texas Court of Criminal Appeals' analysis of the legislature's statutory scheme setting forth the allowable unit of prosecution. *See Loving,* 401 S.W.3d at 647. This is the method of ascertaining whether convictions at issue violate the double jeopardy prohibition. *See Vick,* 991 S.W.2d at 832–33.

As in the *Vick* case, we are dealing with two separate allegations of violations of two separate parts of section 22.021(a)(1)(A). The pertinent parts of section 22.021(a)(1)(A) are set forth below:

> (a) A person commits an offense:
>
> (1) if the person:
>
> (A) intentionally or knowingly:
>
> (i) causes the penetration of the anus or sexual organ of another person by any means, without that person's consent;
>
> (ii) causes the penetration of the mouth of another person by the sexual organ of the actor, without that person's consent; or
>
> (iii) causes the sexual organ of another person, without that person's consent, to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor[.]

§ 22.021(a)(1)(A). Again referring to the *Vick* case, we know that the offenses enumerated in section 22.021 are conduct-oriented offenses. *See id.* at 832. Again, we note that the offenses are separated, expressly and impliedly, by "or" which is some

indication that any one of the proscribed conduct provisions constitutes an offense. *See id.* at 833.

Therefore, when we apply the analysis of *Vick* to the facts of our case, we find that the State has alleged two types of conduct that are prohibited by the statute. That is, penetration of the victim's vagina by appellant's finger, section 22.021(a)(1)(A)(i), and, contact of the sexual organ of the victim with the mouth of appellant, section 22.021(a)(1)(A)(iii). *See* § 22.021(a)(1)(A). The conduct proscribed by these subsections of section 22.021(a)(1)(A) are separate and distinct conduct that the legislature has, by the passage of the legislation, indicated should be prohibited. *See id.* 832–33. The power of the legislature to establish and define criminal activity has few, if any, limitations imposed by the Double Jeopardy Clause. *Id.* at 831 (citing *Iglehart v. State,* 837 S.W.2d 122, 127 (Tex. Crim. App. 1992) (en banc)).

As a result of applying these analytical tools to the case before the Court, we conclude that appellant's convictions for counts III and IV do not violate the Double Jeopardy Clause of the U.S. Constitution. *See id.* at 833. Accordingly, appellant's first issue is overruled.

Jury Argument

By his second issue, appellant contends that the trial court committed reversible error when it overruled appellant's objection to a portion of the State's final argument. During the State's opening argument on punishment, the prosecutor, in reference to the testimony of Annttinaette Wilson, appellant's sister, made the following statement:

> So, Ms. Wilson just sat there and she quoted—when the Defense asked how close they are, she said, I quote, we aces. I'm going to assume that's something close to thick as thieves, which that's exactly what Laray Wilson is. He's a thief. He's a lot worse than that, but that's a starting point.
>
> She then says that he's very close to his sons; that he raises them; he's their influence; he teaches them right from wrong. How is that man going to teach children right from wrong when he doesn't see anything wrong with the four crimes that he committed[?] He's going to teach those little boys how to grow up and be men? They're going to grow up and be criminals, horrendous criminals, just like him.
>
> Appellant's Counsel: Objection, Your Honor; arguing facts not in the evidence.
>
> The Court: I'm going to overrule the objection.

Standard of Review and Applicable Law

We review a trial court's ruling on an objection to improper jury argument under an abuse of discretion standard of review. *See Garcia v. State,* 126 S.W.3d 921, 924 (Tex. Crim. App. 2004). Permissible jury argument falls into four distinct and limited categories: (1) summary of the evidence; (2) reasonable deductions from the evidence; (3) response to opposing counsel's argument; or (4) plea for law enforcement. *See Brown v. State,* 270 S.W.3d 564, 570 (Tex. Crim. App. 2008). In reviewing allegations of improper jury argument, we afford an attorney wide latitude in drawing reasonable inferences, so long as those inferences are reasonable, fair, legitimate, and offered in good faith. *Gaddis v. State,* 753 S.W.2d 396, 398 (Tex. Crim. App. 1988).

Putting the prosecutor's statement in the context of the trial leads to the following observations: (1) appellant had just been convicted of four serious felonies; (2) appellant's sister had testified during punishment to the effect that appellant was a good father and had a positive influence on his children; (3) specifically, she testified that

appellant taught them right from wrong; (4) yet, the sister admitted appellant had never expressed any remorse over the commission of the offenses or that he was sorry that it happened. The cumulative effect of Wilson's testimony was to put appellant's character in issue before the jury on the question of punishment. As a result of this testimony, we view the prosecutor's statement as a reasonable deduction from the evidence before the jury on the issue of punishment. *See Brown,* 270 S.W.3d at 570. Therefore, the trial court did not abuse its discretion in overruling appellant's objection. *See Garcia,* 126 S.W.3d at 924. Accordingly, we overrule appellant's second issue.

## Fines

By the third issue, appellant contends that the trial court ordered the incarceration and the fines in the four judgments to run concurrently. However, the bill of costs produced by the office of the District Clerk of Randall County reflects a total of $20,000 in fines. Such an amount of fines would be a cumulative assessment of fines. The State has conceded that the bill of costs is in error. Accordingly, we sustain appellant's third issue and order the bill of costs to be reformed to reflect a total fine of $5,000. *See Armstrong v. State,* 340 S.W.3d 759, 766 (Tex. Crim. App. 2011).

## Conclusion

Having overruled appellant's first two issues, we affirm the judgments of the trial court and order that the bill of costs be reformed to reflect $5,000 in fines.

Mackey K. Hancock
Justice

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