In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-17-00096-CR

AARON LUCAS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 5th District Court
Bowie County, Texas
Trial Court No. 14F0217-005

Before Morriss, C.J., Moseley and Burgess, JJ.
Opinion by Justice Burgess

O P I N I O N

I. Facts and Procedural Background

On or about December 19, 2009, Aaron Lucas abducted seven-year-old Melinda[1] from the playground next to an apartment building in Texarkana where she was visiting relatives. Lucas transported Melinda to a warehouse and sexually assaulted her. Melinda testified that she was frightened, screaming, and banging on the car windows and that she could not open or unlock the car door. She also testified that Lucas threatened to kill her and struck her at least twice on the lip. After assaulting her, Lucas returned Melinda to the playground area and released her near a gate to the apartment complex. Melinda said she ran to the porch, where her brother found her. She told her brother what happened, who then told their mother, and her mother contacted police.

The State charged Lucas with three offenses in two indictments. All of the offenses charged arose from this same transaction. In the indictment under which Lucas was convicted in this case, the State charged Lucas with aggravated kidnapping. In a second indictment, the State charged Lucas with one count of aggravated sexual assault and one count of indecency with a child. All three charges were tried together. At trial, the trial court treated the indecency with a child charge as a lesser-included offense. The jury rejected the lesser-included offense and found Lucas guilty of aggravated sexual assault of a child. The trial court then dismissed the indecency count in response to the State's post-trial motion. The jury also found Lucas guilty of aggravated kidnapping as charged in the indictment in this case.

[1]We refer to the complainant by the pseudonym employed in the trial court. *See* TEX. R. APP. P. 9.10.

Lucas appealed his conviction for aggravated sexual assault of a child in a companion case, our cause number 06-17-00095-CR. In that opinion, we affirmed the conviction and sentence. In the present case, Lucas appeals his conviction for aggravated kidnapping.[2] He raises two points of error in this appeal. First, Lucas argues that the trial court erred in failing to dismiss the State's indictment as a result of the State's failure to comply with the terms of the Interstate Agreement on Detainers Act (IADA).[3] Second, he argues that the jury should have found in his favor on his affirmative defense that he released his victim in a safe place. We find no reversible error and affirm the trial court's judgment and sentence.

II. The IADA

In Lucas' companion case, Lucas argued that the trial court erred in granting the State's request for a continuance that resulted in his trial being held eight days after the expiration of the 180-window contemplated by the IADA. We addressed that question in our opinion in cause number 06-17-00095-CR, and concluded that the trial court's decision to grant the continuance was neither clearly erroneous nor an abuse of discretion. Lucas raises the same issue in this case, and for the same reasons explained in our opinion in cause number 06-17-00095-CR, we find that the trial court's continuance was reasonable in this case. Lucas' first point of error is overruled.

[2]*See* TEX. PENAL CODE ANN. § 20.04 (West 2011).

[3]*See* TEX. CODE CRIM. PROC. ANN. art. 51.14 (West 2006); *see* Interstate Agreement on Detainers Act, 18 U.S.C.A. App. 2, §§ 1–9 (West, Westlaw through P.L. 115-122. Also includes P.L. 115-125 to 115-129. Title 26 current through 115-131). The Agreement is sometimes referred to as the IADA.

III. Reasonable Jury Could Reject Affirmative Defense

Lucas next challenges the jury's rejection of his affirmative defense. At the punishment phase of trial, a person who has been convicted of aggravated kidnapping may assert that he "voluntarily released the victim in a safe place." TEX. PENAL CODE ANN. § 20.04(d). If the defendant proves this affirmative defense by a preponderance of the evidence, the offense is reduced from a first to a second degree felony. *Id*.; *see also Butcher v. State*, 454 S.W.3d 13, 14 (Tex. Crim. App. 2015). Lucas argues that the jury erred in rejecting his asserted affirmative defense because he conclusively proved that he left Melinda at a safe location. We disagree.

The defendant bears the burden of proof when asserting an affirmative defense. *Wheat v. State*, 165 S.W.3d 802, 807 n.6 (Tex. App.—Texarkana 2005, pet. ref'd, untimely filed). Although the Court of Criminal Appeals has eliminated factual sufficiency review of convictions in criminal cases,[4] the failure of a jury to find an affirmative defense is still reviewed for both legal and factual sufficiency. *Butcher*, 454 S.W.3d at 20. Thus,

> [w]hen an appellant asserts that there is no evidence to support an adverse finding on which she had the burden of proof, we construe the issue as an assertion that the contrary was established as a matter of law. We first search the record for evidence favorable to the finding, disregarding all contrary evidence *unless a reasonable fact[-]finder could not*. If we find no evidence supporting the finding, we then determine whether the contrary was established as a matter of law.

See Matlock, 392 S.W.3d 662, 669 (Tex. Crim. App. 2013) (quoting *One Ford Mustang VIN 1FAFP40471F207859 v. State*, 231 S.W.3d 445, 449 (Tex. App.—Waco 2007, no pet.)).

[4]*See Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010) (plurality op.).

In making that determination, a reviewing court looks for "more than a mere scintilla" of evidence supporting the jury's implied finding that the defendant failed to meet his burden of proof. *Id.* (citing *In re Estate of Campbell*, 343 S.W.3d 899, 904 n.6 (Tex. App.—Amarillo 2011, no pet.) (quoting *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004))). A reviewing court may reverse for legal insufficiency a jury's rejection of an asserted affirmative defense "[o]nly if the appealing party establishes that the evidence conclusively proves his affirmative defense and 'that no reasonable jury was free to think otherwise.'" *Id.* at 670 (quoting *Tanner v. Nationwide Mut. Fire Ins. Co.*, 289 S.W.3d 828, 830 (Tex. 2009)).

When reviewing the factual sufficiency of a rejected affirmative defense, we review all the evidence in a neutral light. This Court "may not usurp the function of the jury by substituting its judgment in place of the jury's assessment of the weight and credibility of the witnesses' testimony." *Id.* at 671. Rather, we analyze "whether after considering all the evidence relevant to the issue at hand, the judgment is so against the great weight and preponderance of the evidence so as to be manifestly unjust." *Meraz v. State*, 785 S.W.2d 146, 155 (Tex. Crim. App. 1990).

Whether a location is a safe place under Section 20.04(d) is determined on a case-by-case basis, considering the totality of the circumstances. In *Butcher v. State*, the Corpus Christi Court of Appeals considered this issue in a similar case. *Butcher v. State*, No. 11-11-00288-CR, 2013 WL 5891603 (Tex. App.—Corpus Christi Oct. 13, 2013), *aff'd* 454 S.W.3d at 13. In that case, Butcher kidnapped a nine-year-old child from a driveway at her condominium complex as she walked to her school bus stop. *Id*. at *1. Later that day, Butcher returned the girl to the same area

and released her. *Id*. On appeal, he argued that he had released the victim in a safe place and was entitled to an affirmative finding on the Section 20.04(d) defense. *Id*. at *7.

In reviewing the jury's verdict, the Corpus Christi court relied on seven factors which are useful in making this determination: "(1) the remoteness of the location, (2) the proximity of help, (3) the time of day, (4) the climate, (5) the condition of the complainant, (6) the character of the location and surrounding neighborhood, and (7) the complainant's familiarity with the location or neighborhood." *Butcher*, 454 S.W.3d at 19. The Texas Court of Criminal Appeals granted discretionary review and affirmed the Corpus Christi court. *Id.* at 20. The Court of Criminal Appeals approved of the factors relied upon by the court of appeals, but "caution[ed] reviewing courts that the factors . . . are merely nonexclusive aids that may be considered to guide its determination under the totality of the circumstances of each case whether the place at which the complainant was released was 'safe.'" *Id*. at 19 (footnote omitted). The Court of Criminal Appeals concluded,

> Because we hold that the determination of a "safe place" should be made considering the unique facts of each case, factors other than the seven identified by the courts of appeals may also be considered when reviewing a determination of whether a place is "safe" for purposes of Section 20.04(d) of the Texas Penal Code. For example, the court of appeals in this case determined that the age of the complainant in this case was significant. In another case, other factors may be important such as the competency of the complainant or whether the complainant has a physical disability.

Id. n.10.

In holding that the evidence was both legally and factually sufficient to support the jury's implied rejection of Butcher's affirmative defense, the Court of Criminal Appeals noted that

> the fact that Appellant released the complainant during the day is not dispositive of whether a place is "safe"; many places that are dangerous at night remain dangerous during the light of the day. In addition, other relevant facts in this case included that the complainant was a nine-year-old girl; she had lived at that condominium complex for only three months; Appellant released JG without her mobile phone, thus preventing her from seeking immediate help; and after being released, JG returned home to an empty home and had to leave it—after being kidnapped that morning near her home at knife point—to seek help . . . . Finally, although JG testified that she went to the home of a neighbor whom she knew and was comfortable with, she also did not ask for the neighbor's help despite their familiarity. Instead, she asked to use the phone to call her mother. Thus, while it was possible to infer that JG may have felt safe once she came upon the mailman because she did not ask for help, it is equally possible to infer that JG did not want to ask a stranger, or even a neighbor she was comfortable with, for help after being kidnapped by a stranger that morning so near her home. Moreover, a fact[-]finder could infer that even an independent nine-year-old girl would be afraid to ask a passerby for help after suffering severe trauma by being kidnapped, having a knife held to her throat, and held, bound, for eight hours against her will.

Id. at 17.

Similar evidence was presented in this case which supports the jury's rejection of Lucas' safe place affirmative defense. For example, two law enforcement witnesses testified that the area was not safe for an unattended seven-year-old and that the area was the site of frequent criminal events, including violent crimes such as shootings and assaults. One witness described the area as a "high crime neighborhood." Additionally, Melinda testified that Lucas threatened to kill Melinda if she did not stop screaming and that he hit her in the mouth twice. This evidence, together with the fact that Lucas sexually assaulted her, supports a reasonable inference that Melinda was afraid and probably traumatized.[5]

[5]Arguably, the fact that the area was one where Lucas felt comfortable abducting a child from a playground where other children were playing is further indication that it was not a safe place.

While there is little specific evidence regarding some of the seven factors delineated in *Butcher*,[6] our review is not constrained by those factors. The jury was entitled to assess the credibility of the witnesses and, based on the evidence presented, to disbelieve Lucas' asserted defense. Considering the totality of the circumstances, we cannot say Lucas established, as a matter of law, that he released Melinda in a safe place.

We also find, considering all the evidence in a neutral light, that the jury's rejection of the affirmative defense was supported by factually sufficient evidence. Even "the fact that some facts in the record *could* support [Lucas'] affirmative defense does not render the factual sufficiency of the jury's decision manifestly unjust, conscience-shocking, or clearly biased." *Id.* at 20. Moreover, this Court may not subvert the jury's conclusion, even if "we may have reached a different result under the same facts." *Id*. As summarized above, even though Melinda was released in essentially the same area as that from which she had been abducted, that area had a history of violent criminal episodes. There was no suggestion that any adults were present upon her release. She had just been raped, threatened, and assaulted. A rational jury could easily have rejected Lucas' claim of releasing the young girl in a safe place. Accordingly, we overrule Lucas' second point of error.

[6]For example, there was no evidence of the climate or the proximity of help or of Melinda's specific condition.

IV. Conclusion

For all of the foregoing reasons, we affirm the trial court's judgment and sentence.

Ralph K. Burgess
Justice

Date Submitted: January 17, 2018
Date Decided: April 2, 2018

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