TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-14-00427-CR

Joshua Caleb Williams, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF HAYS COUNTY, 22ND JUDICIAL DISTRICT
NO. CR-13-577, HONORABLE JACK H. ROBISON, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

A jury convicted appellant Joshua Caleb Williams of the offense of aggravated sexual assault of a child and assessed punishment at 14 years' imprisonment.[1] The district court rendered judgment on the verdict. In two issues on appeal, Williams asserts that the evidence is insufficient to support his conviction and that the district court abused its discretion in failing to grant a mistrial after the State, according to Williams, commented on Williams's failure to testify during trial. We will affirm the district court's judgment.

BACKGROUND

The jury heard evidence that on the night of March 18, 2013, Williams, a twenty-year-old man, entered the bedroom window of H.W., a twelve-year-old girl whom he had met on

[1] *See* Tex. Penal Code § 22.021(a)(1)(B)(i), (2)(B).

Facebook, and proceeded to have sexual intercourse with her. Evidence considered by the jury included the testimony of H.W., who recounted her version of the events on the night in question; H.W.'s mother, E.H., who testified that she had found Williams naked in her daughter's bed the following morning and that he had identified himself to her; San Marcos Police Department Officer Richard Mizanin, who testified that, during his investigation of the incident, he had found a condom in a trash can next to H.W.'s bed; and Kimberly Clement, a DNA analyst who testified that Williams could not be excluded as a contributor of DNA that had been recovered from H.W.'s body and the condom. Based on this and other evidence, which we discuss in more detail below, the jury found Williams guilty of aggravated sexual assault of a child and assessed punishment as noted above. The district court rendered judgment on the jury's verdict, and this appeal followed.

ANALYSIS

Evidentiary sufficiency

In his first issue, Williams asserts that the evidence is insufficient to support his conviction. Specifically, Williams claims that the evidence is insufficient to prove that he was the perpetrator of the offense.

We review the sufficiency of the evidence under the standard set forth in *Jackson v. Virginia*.[2] Under this standard, "[w]e view the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the elements of the offense beyond

[2] 443 U.S. 307, 318-19 (1979).

a reasonable doubt."[3] "The jury is the sole judge of credibility and weight to be attached to the testimony of witnesses."[4] "When the record supports conflicting inferences, we presume that the jury resolved the conflicts in favor of the verdict, and we defer to that determination."[5] We further presume that "[c]ircumstantial evidence is as probative as direct evidence in establishing the guilt of the actor, and circumstantial evidence alone may be sufficient to establish guilt."[6] "Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction."[7]

A person commits the offense of aggravated sexual assault of a child if he intentionally or knowingly causes the penetration of the anus or sexual organ of a child younger than 14 years of age by any means.[8] In this case, the evidence supporting the jury's finding that Williams committed that offense included the testimony of H.W., the victim of the offense. During her testimony, H.W. described how she had first met Williams, which occurred through Facebook when she was in sixth grade. H.W. testified that her communication with Williams began with

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[3] *Blea v. State*, 483 S.W.3d 29, 33 (Tex. Crim. App. 2016) (citing *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex. Crim. App. 2014)).

[4] *Dobbs*, 434 S.W.3d at170 (citing *Jackson*, 443 U.S. at 319).

[5] *Id*. (citing *Jackson*, 443 U.S. at 319; *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007)).

[6] *Id*. (citing *Carrizales v. State*, 414 S.W.3d 737, 742 (Tex. Crim. App. 2013)).

[7] *Id*. (citing *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007)).

[8] *See* Tex. Penal Code § 22.021(a)(1)(B)(i), (2)(B).

Facebook messages but soon progressed to phone conversations and text messages that, according to H.W., eventually became sexual in nature.

On the night in question, H.W. recounted, Williams came to her house, entered her bedroom through the window, began a conversation with her, and eventually told her to take off her clothes. H.W. testified that she complied and that he took off his clothes as well. Then, H.W. explained, they got into bed together and Williams, after describing to H.W. the sexual acts that he intended to commit, proceeded to have sexual intercourse with her. H.W. testified that she initially "went with it" because she was afraid that Williams might hurt her if she refused. "But," H.W. added, "[A]t one point I said, 'No. Just stop.' And I tried to push him off me, but he kept going." H.W. added that she saw Williams put on a condom prior to the intercourse and saw him throw it away in the trash can next to her bed after he was done. H.W. testified that Williams remained in her bed after he was finished and spent the night there. H.W. identified Williams in court as the man who had assaulted her.

H.W.'s mother, E.H., testified that she had found a man naked in her daughter's bed the following morning. E.H. identified Williams in court as the man who was in her daughter's bed. E.H. explained that she had discovered him in bed with her daughter, who was also naked, when she entered the bedroom to wake H.W. for school that day. E.H. recounted that her immediate reaction was to begin screaming. She recounted, "I'm screaming at him, What are you doing? Who are you? Get the—what are you doing here? Get the [expletive] out of my house." E.H. added that when she asked the man to identify himself, he responded, "Josh Williams," and then left the house. E.H. proceeded to call the police.

Officer Richard Mizanin of the San Marcos Police Department responded to the call. Mizanin testified that he interviewed both E.H. and H.W. and proceeded to search the house for evidence. Inside H.W.'s bedroom, Mizanin explained, he found a condom wrapper on the ground and a used condom in the trash can next to the bed.

Jenny Black, a sexual assault nurse examiner, had examined H.W. following the assault. Black testified that during the exam, swabs of DNA samples were taken from H.W.'s neck, breasts, and vagina. The swabs and the condom were submitted for DNA testing. Kimberly Clement, a forensic scientist at the DPS crime lab in Austin, performed the tests. Clement testified that a mixture of DNA was found on the swab that had been taken from H.W.'s breast and that Williams "could not be excluded as a contributor" to that mixture. Clement provided similar testimony regarding the DNA that was found on one side of the condom, although she added that the other side of the condom contained only H.W.'s DNA.

In summary, the evidence supporting the jury's verdict included: (1) H.W.'s testimony identifying Williams as her assailant and describing what he did to her; (2) E.H.'s testimony identifying Williams as the man who she had found naked in H.W.'s bed, including her testimony that Williams had identified himself to her prior to leaving the house; and (3) the DNA evidence tending to show that Williams's DNA was found on both H.W.'s body and on the used condom that was found in the trash can next to H.W.'s bed. In his brief, Williams attempts to refute the above evidence by claiming that the victim was "an emotionally disturbed child," that the mother "only saw the perpetrator for a short, chaotic time," and that the DNA analyst "did not affirmatively state that Appellant was the contributor to the DNA found on the condom collected." Williams also

points to the testimony of Amanda Robertson, Williams's cousin, who claimed that Williams was with her at her house on the night in question, helping her take care of her children, and that he was still at Robertson's house the following morning. Again, however, "[t]he jury is the sole judge of credibility and weight to be attached to the testimony of witnesses."[9] Here, the jury's verdict is consistent with a determination that H.W. and E.H. were credible witnesses, that Williams's cousin was not being truthful concerning Williams's purported alibi, and that the DNA evidence supported H.W.'s testimony identifying Williams as the perpetrator. Viewing the above and other evidence in the light most favorable to the verdict, we conclude that it is sufficient to support the jury's finding that Williams committed the offense of aggravated sexual assault of a child as charged.[10]

We overrule Williams's first issue.

Comment on Williams's failure to testify

During the State's closing argument at the punishment hearing, the prosecutor, while discussing the factors that the State believed should determine the jury's punishment decision, made the following comment: "Acceptance of responsibility. Well, we haven't—we don't have any evidence of that." Williams objected on the ground that this was an impermissible "comment

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[9] *Dobbs*, 434 S.W.3d at 170 (citing *Jackson*, 443 U.S. at 319).

[10] *See Jackson*, 443 U.S. at 326; *Clayton*, 235 S.W.3d at 778; *Hooper*, 214 S.W.3d at 16-17; *Garcia v. State*, 563 S.W.2d 925, 928 (Tex. Crim. App. 1978); *see also Villarreal v. State*, 470 S.W.3d 168, 170-72 (Tex. App.—Austin 2015, no pet.); *IslasMartinez v. State*, 452 S.W.3d 874, 879-80 (Tex. App.—Dallas 2014, pet. ref'd); *Martines v. State*, 371 S.W.3d 232, 240 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *Shaw v. State*, 329 S.W.3d 645, 657 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd); *Couchman v. State*, 3 S.W.3d 155, 163 (Tex. App.—Fort Worth 1999, pet. ref'd).

on the failure of the defendant to testify." The district court sustained the objection and instructed the jury to disregard. Williams then moved for a mistrial, which the district court denied. In his second issue, Williams asserts that the district court should have granted a mistrial based on the prosecutor's comment.

We review a trial court's ruling on a motion for mistrial for an abuse of discretion.[11] We will uphold the trial court's ruling if it is within the zone of reasonable disagreement.[12] "Only in extreme circumstances, where prejudice is incurable, will mistrial be required."[13] "[W]hether a mistrial should have been granted involves most, if not all, of the same considerations that attend a harm analysis."[14] In determining whether an improper jury argument warrants a mistrial, courts are to apply the following factors: (1) the severity of the misconduct (the magnitude of the prejudicial effect of the prosecutor's comments); (2) the measures adopted to cure the misconduct (the efficacy of any cautionary instruction by the judge); and (3) the certainty of the punishment assessed absent the misconduct (the strength of the State's evidence).[15]

In this case, the improper argument was the prosecutor's statement that "we don't have any evidence" of Williams's "acceptance of responsibility." Although this comment could be construed as a comment on Williams's failure to testify, as the State observes, it could also be

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[11] *Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007).

[12] *Id*.

[13] *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004).

[14] *Id*.

[15] *See Archie*, 221 S.W.3d at 700 (citing *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998)).

construed as a reference to the alibi evidence presented by the defense, in which Williams's cousin claimed that Williams was with her on the night in question.[16] Accordingly, it would not be outside the zone of reasonable disagreement for the district court to conclude that the comment was, at most, an indirect and ambiguous reference to Williams's failure to testify and thus that the severity of the comment was low.

Additionally, the district court sustained Williams's objection to the comment and immediately instructed the jury to disregard it. Ordinarily, a prompt instruction by the trial court to disregard will cure any prejudice associated with an improper question, answer, or argument because the jury is presumed to have followed the instruction.[17] Additionally, the court's charge to the jury on punishment included a paragraph instructing the jury "not [to] consider the fact that the defendant did not testify as a circumstance against him" and that it was not to "comment on, or in any manner refer to the fact that the defendant has not testified" during its deliberations. It would not be outside the zone of reasonable disagreement for the district court to conclude that these instructions cured any prejudice resulting from the prosecutor's comment.

Finally, the district court could have reasonably concluded that the State's evidence in this case was strong. The victim identified her assailant as Williams and testified in detail concerning Williams's acts with her; the victim's mother found Williams naked in bed with

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[16] *See Randolph v. State*, 353 S.W.3d 887, 895-96 (Tex. Crim. App. 2011) (explaining that alibi defense is "an express denial of criminal responsibility" and that comment referring to defendant's failure to "take responsibility," even if it "could be construed as alluding to appellant's failure to testify . . . was not a direct and necessary comment on appellant's right to silence").

[17] *See Ovalle v. State*, 13 S.W.3d 774, 783 (Tex. Crim. App. 2000); *Michaelwicz v. State*, 186 S.W.3d 601, 620 (Tex. App.—Austin 2006, pet. ref'd).

her daughter, who was also naked, and Williams identified himself to the mother; and Williams could not be excluded as a contributor to the DNA that was found on the victim's body and on a used condom that was found in the trash can next to the victim's bed. Given the strength of the State's evidence, and the other factors discussed above tending to show that Williams was not prejudiced by the prosecutor's comment, we cannot conclude on this record that the district court abused its discretion in denying the motion for mistrial.

We overrule Williams's second issue.

CONCLUSION

We affirm the judgment of conviction.

Bob Pemberton, Justice

Before Justices Puryear, Pemberton, and Bourland

Affirmed

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