TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00598-CR

Donald Aekins, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 403RD JUDICIAL DISTRICT
NO. D-1-DC-12-904056, HONORABLE BRENDA KENNEDY, JUDGE PRESIDING

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

Donald Aekins was convicted of two counts of sexual assault and was sentenced to 55 years' imprisonment on each count. *See Aekins v. State*, 447 S.W.3d 270, 273, 283 (Tex. Crim. App. 2014) (setting out offense and punishment imposed and affirming appellate court's conclusion that one of defendant's three convictions was "barred under the Double Jeopardy Clause"); *see also* Tex. Penal Code § 22.011(a) (listing elements of offense), (f) (describing offense level). Aekins was alleged to have "inserted his fingers into" the vagina of "Jessica Parnell (a pseudonym) . . . and . . . perform[ed] oral sex on her." *See Aekins v. State*, No. 04-13-00064-CR, 2013 WL 5948188, at *1 (Tex. App.—San Antonio Nov. 6, 2013), *aff'd*, 447 S.W.3d 270 (Tex. Crim. App. 2014). Following his conviction, Aekins filed a motion for post-conviction DNA testing under chapter 64 of the Code of Criminal Procedure. *See* Tex. Code Crim. Proc. arts. 64.01-.05. The State opposed the motion. After reviewing the parties' arguments, the district court denied the motion. In three issues

on appeal, Aekins challenges the district court's ruling. We will affirm the district court's order denying Aekins's request for DNA testing.

BACKGROUND

Aekins was charged with sexually assaulting Parnell. During the trial, the State called the following witnesses to the stand: Parnell; Amanda Aekins,[1] who was Aekins's wife; Marchic Cummings, who was Aekins's neighbor; Officer Jennifer Mezei, who collected biological samples from Aekins; Jenny Black, who was a sexual-assault nurse examiner, who performed an examination on Parnell, and who collected samples from Parnell; and Elizabeth Morris, who analyzed some of the collected samples.[2]

In her testimony, Parnell testified that she was friends with Amanda and would regularly babysit for Amanda at the Aekinses's home. In addition, Parnell explained that prior to the assault Aekins often made inappropriate sexual comments to her and that she informed Amanda about the comments and told Amanda that she did not want to be alone with Aekins. When discussing one of the comments, Parnell testified that she texted Amanda and told Amanda that Aekins said that he wanted "to eat" Parnell, and Parnell explained that later the same day she received a text message from Aekins saying, "Sorry if I offended u. Will not do again." A picture of that text message was admitted into evidence during Parnell's testimony.

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[1] Because Amanda Aekins shares the same last name as the defendant in this case, we will refer to her by her first name.

[2] The State also called other law-enforcement personnel to the stand to discuss their roles in the investigation and to establish chain of custody for the evidence collected.

Regarding the day in question, Parnell related that Amanda asked her to babysit but did not inform her that Aekins would be at the house until Parnell arrived there. Further, Parnell recalled that after Amanda left to go to school, Aekins asked Parnell to come into the bedroom and feed his infant son. Next, she described how after she started feeding the baby, Aekins got on top of her, told her repeatedly that he "wanted to taste me," and pulled her pants down, and Parnell testified that she tried "to push him off" and told him to stop. In addition, Parnell described how Aekins inserted his fingers into her vagina and put his tongue on her vagina despite her repeatedly telling him to stop.

In her testimony, Parnell recalled that the incident was interrupted by one of the children knocking on the door and that after the interruption, she left the house; went to Cummings's home, which was next door to the Aekinses' home; started "freaking out"; called Amanda to tell her what had happened; and called the police. Further, Parnell related that Aekins walked to Cummings's home, banged on the door, and screamed "no one is going to believe you anyway."

When describing events that occurred after the assault, Parnell recalled that the police took her to the hospital for a forensic exam within a few hours of her calling the police and explained that she had urinated and wiped in the time leading up to the exam.

After Parnell finished testifying, the State called Cummings to the stand. In her testimony, Cummings related that Parnell came into her house looking "[p]ale white, like just a ghost, like she was just freaking out, like she was just pale and shaking," and appearing to be "scared out of her mind." Further, Cummings recalled that she had "never seen [Parnell] like that" and that she "could tell that something was wrong." In addition, Cummings testified that after Parnell went

inside the home, Aekins walked outside, acted rudely, and yelled repeatedly that "ain't nobody going to believe you anyway" and that Amanda is "not going to believe you anyway."

Following Cummings's testimony, the State called Amanda to the stand. While on the stand, Amanda stated that before the day at issue, Parnell texted her and said that Aekins told Parnell that he wanted "to eat" Parnell. Further, Amanda testified that she confronted Aekins about the text message but that Aekins denied that he said anything inappropriate. Moreover, Amanda related that after the text exchange, she asked Parnell to babysit on the day of the incident but believed that Aekins would leave quickly after Parnell arrived because he was supposed to be applying for jobs. In addition, Amanda testified that after she went to school, Parnell called Amanda, sounded "very upset," and told Amanda that Aekins had sexually assaulted Parnell. Furthermore, Amanda admitted that when she talked to the police, she told them that she had previously witnessed Aekins making sexual advances towards Parnell and that she and Parnell both told Aekins to stop that behavior.

In her testimony, Amanda also testified regarding events that occurred after Aekins had been arrested. Specifically, she explained that she had several phone conversations with him when he was in jail and that those conversations were recorded, and Amanda also related that during those conversations, Aekins asked her to get Parnell to drop the charges, asked her to offer to "pay [Parnell] off," and asked her to lie when she talked to the police. Moreover, Amanda related that in one of the calls, Aekins asked her to try and get Parnell kicked out of the homeless shelter that she was living at. Recordings of the phone calls were played for the jury during Amanda's testimony. On the tapes, Aekins told Amanda to "soften [Parnell] up" and stated that he "made a big mistake," that they should pay Parnell "$500 for the mistake," and that it was his fault.

After Amanda's testimony, the State called Officer Mezei and Black to the stand to discuss evidentiary samples that they collected. In particular, Officer Mezei testified that she collected fingernail scrapings from Aekins and took swabs from Aekins's hands, fingers, and mouth. Further, Black testified that she performed a sexual-assault exam on Parnell at a hospital and took swabs from the inside of Parnell's vagina, from her external genitalia, from her labia minora, from her perineum, from her fingernails, from her abdomen, from her palms, and from her fingers. Black also recalled that she obtained a urine sample from Parnell and that Parnell's underwear and other clothing items were collected for potential testing. In addition, Black related that Parnell had two blunt-force-trauma injuries on her perineum and vaginal opening that were consistent with a sexual assault and had a bruise on her thigh.

Finally, the State called Morris to the stand to discuss the DNA testing that was performed in the case. In her testimony, Morris explained that she is a DNA analyst for the Austin Police Department and was asked to test various samples collected during the investigation. Further, she related that it was her responsibility, "as the DNA analyst, to look at the information provided about the case as well as the request for evidence and determine what samples and what items are going to be best suited for DNA analysis, which will yield the most probative information from a DNA standpoint." In addition, she stated that when first examining evidence, she looks to see if there is any semen present in any of the samples because if semen is present, it affects how she performs DNA extraction, but she recalled that there was no semen present in the samples collected. When describing why the presence of semen mattered for DNA testing, Morris explained that semen, blood, and saliva provide better results for DNA testing than "[e]pithelial cells" from skin, which

"are not very good sources of DNA" and might not show up in DNA testing. Relatedly, Morris discussed how handwashing could render any deposited "vaginal DNA undetectable" and that urinating and wiping would decrease the possibility of detecting DNA from saliva deposited during oral sex. During her cross-examination, Morris described how humans exchange DNA all the time from activities ranging from simply being near another person to actively touching other people and how the amount of the deposited DNA that is retained depends on the degree of the contact and body chemistry as well as on how recently someone has washed his hands or showered.

When describing the testing in this case, Morris explained that she chose to test the samples taken from Aekins's fingers, the sample from Parnell's labia minora, and the sample of Parnell's external genitals. Moreover, she related that the test of Parnell's labia minora was "consistent with a mixture" of "DNA from more than one individual," that Parnell could not be excluded as "the major component in the profile," that Aekins could be "excluded as a contributor of that major component," and that "[t]here was just not enough DNA" from the minor component "to be able to say anything about who could or could not be included [in] that DNA profile." Further, Morris testified that Aekins could be excluded "as a contributor to" "[t]he DNA profile from [Parnell's] external genital swab" and that Parnell could be "excluded as a contributor" to "[t]he DNA profile from the" swabs of Aekins's fingers. During her cross-examinaiton, Morris described why she did not test some of the samples. Specifically, Morris stated that she did not test the samples from Parnell's fingers because it was known that Parnell and Aekins were in close proximity in the same room together and because a positive or negative result for Aekins's DNA "would not be relevant to the scenario" and would be not be surprising either way. Morris also testified that

saliva deposited during oral sex should be present for a reasonable amount of time in the absence of intervening circumstances.

In addition to the testimony from the witnesses summarized above, the State also introduced as exhibits medical reports concerning the sexual-assault examination. In one report prepared by Black, the report indicates that Parnell had not urinated or wiped before the exam and that Parnell's most recent sexual activity occurred the day before the assault.

At the end of the guilt-or-innocence phase, the jury found Aekins guilty of the charged offenses. During the punishment phase, Aekins pleaded true to two enhancement allegations. At the end of the punishment phase, the jury recommended that Aekins be sentenced to 55 years' imprisonment for each offense, and the district court rendered its judgments of conviction in accordance with the jury's verdicts.

Following his conviction, Aekins filed a motion requesting post-conviction DNA testing. In his motion, Aekins requested testing of items that were "secured in relation to the offense" but "not previously subjected to DNA testing" and of items that were previously tested but could now "be subjected to testing with newer testing techniques." Regarding items that should be tested for the first time, Aekins requested the testing of urine and wipes collected from Parnell; of Parnell's underwear; of swabs taken of Parnell's abdomen, hands, and fingernails; and of swabs taken from Aekins's mouth. Regarding the need for retesting, Aekins requested that the swabs taken of Parnell's labia minora should be tested again using a "Y-STR PCR" method. Aekins attached various exhibits to his motion, including an affidavit from Dr. Harry Bonnell, who stated that the items listed above that were collected but not tested should be tested and that the sample taken from the victim's "labia minora . . . should be re-tested using Y-STR PCR technique to eliminate the 'too minimal

for comparison' result." In addition, Aekins asserted in his motion that his trial counsel provided ineffective assistance of counsel. In response, the State filed a motion opposing Aekins's request for DNA testing and urging that the requirements for post-conviction DNA testing had not been met.

After considering the arguments by the parties, the district court denied the request for DNA testing and issued the following findings of fact and conclusions of law:

> **Findings of Fact**
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> 1. Applicant fails to establish that identity is an issue in this case.
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> 2. Applicant's motion for post-conviction DNA testing fails to show that any additional testing would produce exculpatory results that demonstrate that he would not have been convicted if these results had been presented at trial.
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> 3. Applicant's biological evidence has already been tested and his motion for post-conviction DNA testing fails to show that newer testing methods are available that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous test.
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> 4. Applicant has not established that a reasonable ground exists for the filing of a motion for post-conviction DNA testing.
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> **Conclusions of Law**
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> 1. With regard to Applicant's motion for post-conviction DNA testing, the requirements of Article 64.03 of the Texas Code of Criminal Procedure have not been satisfied. *See* TEX. CODE CRIM. PROC. art. 64.03(a)(l)(C), (a)(2)(A). As a consequence, this Court does not have the authority to order post-conviction DNA testing. *See* TEX. CODE CRIM. PROC. art. 64.03(a).
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> 2. The requirements of Article 64.01(c) of the Texas Code of Criminal Procedure have not been satisfied. *See* TEX. CODE CRIM. PROC. art. 64.01(c). As a consequence, this Court is not required to appoint counsel. *See id.*

After the district court made its ruling, Aekins filed this appeal.

GOVERNING LAW AND STANDARD OF REVIEW

Post-conviction DNA testing is governed by chapter 64 of the Code of Criminal Procedure. *See* Tex. Code Crim. Proc. arts. 64.01-.05. Chapter 64 "is simply a procedural vehicle for *obtaining evidence*" to be used in a later habeas proceeding, *In re Garcia*, 363 S.W.3d 819, 822 (Tex. App.—Austin 2012, no pet.) (emphasis added), "authorizes *DNA testing* in cases in which the applicant meets the requirements enumerated," *id.* at 821-22 (emphasis added) (citing Tex. Code Crim. Proc. art. 64.03), and allows appellate courts to review a trial court's order denying DNA testing, Tex. Code Crim. Proc. art. 64.05. "However, chapter 64 is not an invitation to review every potential error in the underlying trial proceedings" and does not "confer jurisdiction on appellate courts to consider 'collateral attacks on the trial court's judgment or to review, under the guise of a DNA testing appeal, anything beyond the scope of those articles.'" *In re Garcia*, 363 S.W.3d at 822 (quoting *Reger v. State*, 222 S.W.3d 510, 513 (Tex. App.—Fort Worth 2007, pet. ref'd)); *see also Board of Pardons & Paroles ex rel. Keene v. Court of Appeals for Eighth Dist.*, 910 S.W.2d 481, 483 (Tex. Crim. App. 1995) (explaining that court of criminal appeals has complete jurisdiction over post-conviction relief from final felony convictions under article 11.07 of Code of Criminal Procedure); *In re Briscoe*, 230 S.W.3d 196, 196-97 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding) (per curiam) (stating that intermediate appellate courts have no jurisdiction over "post-conviction writs of habeas corpus in felony cases" under article 11.07).

A convicted person "may request forensic DNA testing only of evidence . . . that was secured in relation to the offense that is the basis of the challenged conviction and was in the possession of the state during the trial of the offense" but "was not previously subjected to DNA

testing" or was previously subjected to testing but can now "be subjected to testing with newer testing techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous test." Tex. Code Crim. Proc. art. 64.01(b). Article 64.03 of the Code of Criminal Procedure outlines the requirements that must be satisfied before DNA testing may be ordered. *Id.* art. 64.03. In particular, the court must find that the evidence "still exists and is in a condition making DNA testing possible" and "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," that "there is a reasonable likelihood that the evidence contains biological material suitable for DNA testing," and that "identity was or is an issue in the case." *See id.* art. 64.03(a)(1).

"The identity requirement in Chapter 64 relates to the issue of identity as it pertains to the DNA evidence." *Prible v. State*, 245 S.W.3d 466, 470 (Tex. Crim. App. 2008). Accordingly, an incarcerated person "can make identity an issue by showing DNA tests would prove his innocence" regardless of "the strength of identification evidence at trial." *Cloud v. State*, Nos. 05-13-01235-CR, -01237-CR, 2014 WL 1413818, at *2 (Tex. App.—Dallas Mar. 26, 2014, pet. ref'd) (mem. op., not designated for publication). "However, if DNA testing would not determine the identity of the person who committed the offense or would not exculpate the person convicted, then the requirements for DNA testing under Chapter 64 are not met." *Sims v. State*, No. 03-14-00201-CR, 2014 WL 7475235, at *3 (Tex. App.—Austin Dec. 17, 2014, no pet.) (mem. op., not designated for publication). If identity is not or was not an issue, a trial court cannot order DNA testing. *Reger*, 222 S.W.3d at 514.

In addition, the "convicted person" must establish "by a preponderance of the evidence that" he "would not have been convicted if exculpatory results had been obtained through

DNA testing" and that "the request for the proposed DNA testing is not made to unreasonably delay the execution of sentence or administration of justice." Tex. Code Crim. Proc. art. 64.03(a)(2); *see also Dinkins v. State*, 84 S.W.3d 639, 643 (Tex. Crim. App. 2002) (explaining that "[a] trial court is never required to grant a convicted person's request for testing absent" showing that "there is a reasonable probability that the person would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing"). In other words, the convicted person must show "that there is 'greater than a 50% chance that he would not have been convicted if DNA testing provided exculpatory results.'" *Ex parte Gutierrez*, 337 S.W.3d 883, 889 (Tex. Crim. App. 2011) (quoting *Prible*, 245 S.W.3d at 467-68). "Texas courts have consistently held that a movant does not satisfy his burden under Article 64.03 if the record contains other substantial evidence of guilt independent of that for which the movant seeks DNA testing." *Swearingen v. State*, 303 S.W.3d 728, 736 (Tex. Crim. App. 2010). For retesting, "the convicted person must show that although previously subjected to DNA testing, the evidence can be subjected to testing with newer techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous test." *See Padilla v. State*, Nos. 03-12-00299—00301-CR, 2013 WL 3185896, at *5 (Tex. App.—Austin June 20, 2013, pet. ref'd) (mem. op., not designated for publication). "To meet this burden, the convicted person must provide statements of fact in support of his claims; general, conclusory statements are insufficient." *Id.*

When reviewing a trial court's decision regarding DNA testing, appellate courts "defer to the trial court's determination of historical facts, and its application of law to the facts if it turns on credibility and demeanor, and review de novo applications of law to the undisputed facts." *Caddie v. State*, 176 S.W.3d 286, 289 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd). However,

when the trial record and the convicted person's affidavit are the only sources of information supporting the motion, the trial court is in no better position than an appellate court in making the determination, and accordingly, appellate courts review the issues de novo. *See Smith v. State*, 165 S.W.3d 361, 363 (Tex. Crim. App. 2005) (explaining that because no witnesses were called during hearing on request for DNA testing, appellate court should conduct review de novo); *see also Flores v. State*, 150 S.W.3d 750, 752 (Tex. App.—San Antonio 2004, no pet.) (explaining that "[t]he scope of evidence that an appellate court may review on appeal from the denial of a post-conviction motion for DNA testing is not limited to evidence relating to the motion and/or hearing on the motion for DNA testing").

DISCUSSION

In three issues on appeal, Aekins challenges the district court's ruling. In his first issue, Aekins contends that the district court erred by denying his "Motion For DNA Testing . . . when he presented sufficient evidence to establish that identity is an issue in his case and there is a reasonable probability that additional DNA testing would prove his innocence." In his second issue, Aekins asserts that the district court violated his due-process rights "by failing to allow retesting of the labia minora sample and failing to allow testing of other relevant items identified as having probative value." In his final issue on appeal, Aekins contends that the district court erred by not finding his trial counsel's representation ineffective.

Identity and Probability that Aekins would Not have been Convicted

In his first issue on appeal, Aekins presents several sets of arguments challenging the district court's determinations that Aekins failed to show that identity was an issue and that he would

not have been convicted if the testing had been performed. Regarding identity, Aekins contends "that he has met the 'Identity Is An Issue' requirement" because "the DNA evidence originally tested fail[ed] to identify him as the perpetrator—making identity an issue as it pertains to DNA evidence." Specifically, Aekins notes that the testing that was performed on samples from Parnell failed to identify Aekins as a contributor and that the testing performed on samples from Aekins failed to show that any of Parnell's DNA was present. Further, Aekins argues "that exculpatory results obtained from testing the items . . . would prove his innocence and satisfy the identity requirement."

As support for his arguments, Aekins principally relies on *Blacklock v. State*, 235 S.W.3d 231 (Tex. Crim. App. 2007). In that case, "[t]he victim knew appellant and identified him . . . as the one who robbed and sexually assaulted her," and the evidence regarding "DNA testing . . . was inconclusive on the issue of identity." *Id.* at 232. Several years after his conviction, Blacklock filed a motion seeking post-conviction DNA testing "of semen left by the victim's attacker on the victim's pants and panties" and retesting of the semen sample collected "from the victim's vaginal smears." *Id.* When making this request, Blacklock showed "by a preponderance of the evidence, that the victim's lone attacker is the donor of the material for which appellant seeks DNA testing." *Id.* Accordingly, the court of criminal appeals determined that "on this record, exculpatory DNA test results, excluding appellant as the donor of this material, would establish appellant's innocence" even though "the victim testified that she knew appellant and identified him as her attacker." *Id.* at 232, 233.

As an initial matter, we note that it is not entirely clear that the analysis from *Blacklock* would apply to the circumstances in this case. Unlike in that case, there was no allegation

that Aekins ejaculated during the assault, and no semen was found on any of the samples collected. Accordingly, no biological sample identified by the victim as coming from the offender was tested in this case. Plus, the sexual-assault-examination report indicated that Parnell had had sexual intercourse on the day before the assault. *Cf. Smith*, 165 S.W.3d at 364, 365 (determining that evidence that defendant's DNA "does not match the seminal fluid" collected from victim "would be exculpatory" where "there is no testimony in the record indicating that the victim had intercourse with anyone other than her attacker within 24 hours of the rape exam" and where victim testified "that seminal fluid was left by the attacker"). For these reasons, even if the additional testing and retesting of samples collected from Parnell excluded Aekins as a contributor and if additional testing of samples taken from Aekins excluded Parnell as a contributor, it is not entirely clear, under the circumstances of this case, that those results could help establish Aekins's innocence. *Cf. Glover v. State*, 445 S.W.3d 858, 862 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd) (explaining that "[i]n certain circumstances, excluding a defendant as a contributor to DNA evidence can be considered exculpatory" but determining that case did not involve those types of circumstances).

Even assuming for the sake of argument that Aekins has made identity an issue in this case in regards to DNA testing, Aekins would still have to establish "by a preponderance of the evidence that" he "would not have been convicted if exculpatory results had been obtained through DNA testing." *See* Tex. Code Crim. Proc. art. 64.03(a)(2). When asserting that this element is met in this case, Aekins refers to the affidavit from Dr. Bonnell that he attached to his motion for DNA testing. In his affidavit, Dr. Bonnell stated that based on his review of the case and based on his experience and education, he believes that the "labia minora sample should be re-tested using

Y-STR PCR technique to eliminate the 'too minimal for comparison' result." Further, he explained that he believed that the other samples collected that were not tested should have been subjected to DNA testing.[3] In addition, Aekins refers to the DNA evidence presented during the trial that found no DNA from him in the sample taken from Parnell's external genital sample, that found no DNA from Parnell in the sample taken from Aekins's fingers, and that excluded Aekins as the major contributor of DNA in the sample taken from Parnell's labia minora, and Aekins argues that there is a reasonable probability that he would not have been convicted if the additional testing and retesting that he is requesting now had been done prior to trial and produced favorable results because the trial evidence establishing his guilt was weak. *See In re Morton*, 326 S.W.3d 634, 641 (Tex. App.—Austin 2010, no pet.) (explaining that "[f]or purposes of this inquiry," reviewing courts "assume that the results of the DNA testing would prove favorable to appellant").

Retesting of Sample from Parnell's Labia Minora

At the outset, we note that there is a procedural hurdle to Aekins's request to retest the sample collected from Parnell's labia minora. Chapter 64 does allow for requests to retest evidence that was previously subjected to DNA testing but only in circumstances where the evidence "can be subjected to testing with newer testing techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous test." Tex. Code

[3] In addition to urging that various samples should be subjected to DNA testing, Dr. Bonnell stated that he would be willing to testify "that the 'blunt force trauma' seen around [Parnell's] genital area simply represents a superficial scrape" and that the injuries were present in "the two most common areas affected during consensual sex." Similar statements were contained in another affidavit attached to the motion for DNA testing from nurse Diana Faugno. Aekins relied on these statements in his motion when seeking post-conviction DNA testing, but those statements exceed the scope of the inquiry under chapter 64. *See* Tex. Code Crim. Proc. arts. 64.01-.05.

Crim. Proc. art. 64.01(b)(2). Although Dr. Bonnell stated in his affidavit that Y-STR PCR testing should be used on the sample this time and attached to his affidavit a letter and report from the Texas Forensic Science Commission illustrating problems with DNA testing procedures used for samples that have multiple DNA contributors, Dr. Bonnell did not specify how or why that test would provide better results. In his motion for post-conviction DNA testing, Aekins stated that Y-STR PCR is a "newer" and "more accurate" test, but a convicted person must provide statements of fact supporting his claim that the evidence can be subjected to testing with newer techniques that will provide a reasonable likelihood of more accurate and probative results, and the convicted person may not simply rely on general and conclusory statements. *See Padilla*, 2013 WL 3185896, at *5; *see also Medearis v. State*, No. 03-12-00698-CR, 2013 WL 4822944, at *3 (Tex. App.—Austin Aug. 30, 2013, no pet.) (mem. op., not designated for publication) (noting that fact that samples had already been tested presents "procedural problem" to request for testing because chapter 64 applies to evidence that has not been previously tested or that can be subjected to new testing techniques providing more accurate and probative results and because motion seeking testing acknowledged that testing had already occurred but did not "present any argument about newer testing techniques"). Accordingly, Aekins did not lay the proper foundation for requesting the retesting of the sample taken from Parnell's labia minora.[4]

[4] In his brief on appeal but not in his motion for DNA testing, Aekins refers to an article discussing the use of Y STR testing. *See* Committee on Identifying the Needs of Forensic Sciences Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward*, at 131 (2009). That article does discuss the use of that type of testing in "sexual assaults for which only small amounts of male nuclear DNA are available," but the article also discusses how that type of testing "is not as definitive with respect to identifying a single person." *Id.* Moreover, it would also seem that Aekins has not referred to a new DNA testing technique given that the article was written in 2009, which is years before the assault and testing at issue in this case.

Additional Testing of Other Samples

As discussed above, Aekins also requested that additional DNA testing be performed on Parnell's underwear; on Parnell's urine sample; on samples from Parnell's hands, fingernails, and abdomen; and on samples from Aekins's mouth that were taken but not tested as part of the investigation by the police and urges that exculpatory results from that additional testing would have resulted in his acquittal because the State's evidence was so weak. When discussing the alleged weakness of the evidence of his guilt presented at trial, Aekins argues that the State relied on a text message purportedly from him as proof that he apologized for attempting to initiate sexual activity with Parnell before the incident in question, but Aekins contends that the text was "outdated" and simply chronicled an apology by him for yelling at Parnell because she threatened to tell his wife that they were having an affair.[5] Further, he contends that the various recordings of conversations between him and his wife that were admitted into evidence showed his "desperation rather than guilt." Moreover, Aekins asserts that the State recognized the weakness of its case and attempted to undermine the lack of DNA evidence by questioning Parnell about whether she had urinated and wiped before the sexual-assault exam and that Parnell's testimony that she urinated and wiped before submitting to a sexual-assault examination was inconsistent with the information listed in the sexual-assault-forensic-examination report that was prepared by Black and admitted into evidence as an exhibit during the trial.

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[5]Although we need not further address the issue, we note that when he challenged his conviction on direct appeal, Aekins argued that the district court abused its discretion by admitting the text message into evidence and that our sister court of appeals ultimately concluded that "the trial court did not abuse its discretion in admitting the text message into evidence." *Aekins v. State*, No. 04-13-00064-CR, 2013 WL 5948188, at *6 (Tex. App.—San Antonio Nov. 6, 2013), *aff'd*, 447 S.W.3d 270 (Tex. Crim. App. 2014).

At trial, as set out in more detail above, various types of evidence were presented regarding the incident in question. In particular, evidence was presented establishing that Parnell was friends with Amanda, that Amanda "contacted Parnell to ask if she would be willing to babysit the Aekins[es]' children," and that Parnell agreed. *Aekins*, 2013 WL 5948188, at *1. Further, Parnell testified that while she was babysitting, Aekins "called her into his bedroom to feed his infant son, and as she laid on [Aekins]'s bed feeding his son, [Aekins] 'got on top of her' and pulled down her pants and underwear." *Id.* at *8. In addition, Parnell related that she felt Aekins's "fingers and tongue inside her vagina." *Id.* Moreover, she discussed how after Aekins stopped assaulting her when he was interrupted by one of the children in the home, Parnell left Aekins's house, went next door to Cummings's home, and later heard Aekins yelling that nobody would believe her. *See id.*

When describing her observations of the events in question, Cummings testified that Parnell was "'pale white' and 'freaking out' when she ran into" the house. *Id.* In addition, Cummings related that she saw Aekins outside and heard him yelling the following: "'Ain't nobody going to believe you anyway. She's not going to believe you anyway.'" *Id.*

In addition, the jury heard the contents of the recordings made of conversations between Aekins and Amanda in which Aekins is recorded asking his wife to pay Parnell to drop the charges, to get Parnell kicked out of her housing program to "'fight fire with fire,'" and to lie about previous events involving Parnell. *Id.* Furthermore, on the recordings, Aekins admitted to making a big mistake and stated that he was to blame. Regarding the text message, Parnell testified that before she received the text at issue from Aekins, she sent Amanda a text saying that "[y]our husband wants to eat me," and Amanda testified that she confronted Aekins about the allegation.

Id. at *6. In addition, Parnell testified that later on the same day that she sent the text message to Amanda, she received the text from Aekins saying that he was sorry if he "'offended u'" and would "'not do again.'" *Id.*

When addressing the sufficiency of this evidence, one of our sister courts of appeals determined that the evidence was legally sufficient to support Aekins's conviction. *Id.* at *8. Similarly, we recognize that the jury was tasked with the duty to weigh the evidence presented at trial and resolved the alleged conflicts in the evidence in favor of conviction, *see Jackson v. Virginia*, 443 U.S. 307, 319 (1979), and we believe that the non-DNA evidence presented during the trial establishes his guilt, *see Swearingen*, 303 S.W.3d at 738 (overruling issue alleging that trial court erred by denying motion for DNA testing, in part, "[b]ecause of the overwhelming evidence of guilt independent of any potentially exculpatory DNA testing"). Accordingly, even if the additional testing excluded Aekins "as a contributor, it cannot be said that such a result 'establishes by a preponderance of the evidence that the person would not have been convicted.'" *See Leal v. State*, 303 S.W.3d 292, 300-01 (Tex. Crim. App. 2009) (quoting Tex. Code Crim. Proc. art. 64.03(a)(2)(A)); *cf. Rivera v. State*, 89 S.W.3d 55, 60 & n.20 (Tex. Crim. App. 2002) (explaining, under circumstances of case, that "[w]hile the presence of the child's DNA under appellant's fingernails could indicate guilt, the absence of such DNA would not indicate innocence"; that "[t]he absence of appellant's DNA from any anal samples . . . would also be unhelpful in establishing appellant's innocence, as the incriminating evidence could have been washed away" or could not have been deposited to begin with; and that defendant "failed to show a reasonable probability that exculpatory results would prove his innocence"). This seems particularly true in this case where DNA evidence presented

during the trial already affirmatively excluded Aekins as a contributor to samples taken from Parnell and affirmatively excluded Parnell as a contributor to samples taken from Aekins. Although Morris testified that one of the tests performed on a sample from Parnell's labia minora could not exclude Aekins as a contributor, Morris also explained the test was inconclusive because there was insufficient DNA evidence present in the sample to properly perform the test and include or exclude anyone as a contributor.

For all of these reasons, we cannot conclude that the district court erred by determining that Aekins did not show "by a preponderance of the evidence" that he would not have been convicted if additional exculpatory results had been obtained through DNA testing. *See* Tex. Code Crim. Proc. art. 64.03(a)(2)(A); *see also Leal*, 303 S.W.3d at 301 (concluding that "further testing" would not "establish by a preponderance of the evidence that appellant would not have been convicted" "[g]iven the extensive original testing done, the results obtained, and other evidence of sexual assault").

Accordingly, we overrule Aekins's first issue on appeal.

Due Process

In his second issue on appeal, Aekins contends that his due-process rights have been violated by the district court's denial of his motion because he has been unable to present evidence of his innocence. As support for this argument, Aekins argues that although Morris testified during the trial that it was her responsibility to look at the evidence and determine "what items are going to be best suited for DNA analysis" and would "yield the most probative information from a DNA standpoint," Morris failed to test the items that Dr. Bonnell indicated should have been tested and

failed to retest the sample from Parnell's labia minora using the Y-STR PCR test as recommended by Dr. Bonnell and that Aekins contends is commonly used in sexual-assault cases. Moreover, Aekins asserts that had the additional testing been performed, the "results would [have] exclude[d] him as the donor." Further, Aekins disagrees with the State's assertion and the assertion from Morris during the trial that some of the samples collected were not tested because it was unlikely that those samples would produce a probative result given the allegations in the case. On the contrary, Aekins insists that any contact between individuals will result in DNA transfer and particularly asserts that Parnell's underwear should have been tested because during Black's testimony, she read a portion of a report that she prepared as part of the sexual-assault examination in which she wrote that Parnell claimed that Aekins performed oral sex on her for an extended period of time and because, therefore, his DNA should have been present in her underwear. In addition, Aekins contends that Morris should have tested samples taken from Parnell's hands and fingernails because Parnell claimed that she tried to push him away during the encounter. Finally, Aekins urges that Morris's failure to objectively determine the items to be tested and her reliance on Parnell's version of events "prejudiced Aekins['s] defense" and prevented him from having "a fair opportunity to prove his innocence by excluding his DNA from all the complainant's relevant DNA extractions and excluding her DNA from his DNA extractions—a due process violation."

Although Aekins presents this due-process challenge in this appeal, he did not present a due-process claim in his motion for DNA testing or otherwise present the argument to the district court. Accordingly, Aekins did not preserve this complaint for appellate review. *See* Tex. R. App. P. 33.1 (stating that to preserve error for appeal, record must show that complaint was made to

trial court and that trial court ruled on request or refused to rule and that "complaining party objected to the refusal"); *see also Yazdchi v. State*, 428 S.W.3d 831, 844 (Tex. Crim. App. 2014) (stating that "the point of error on appeal must comport with the objection made at trial"); *Curry v. State*, 186 S.W.3d 39, 42 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (concluding that due-process challenge to provision of chapter 64 was waived and explaining that, with exception of facial challenges to statutes or attacks on constitutionality of statute that serves as basis for conviction, "[c]onstitutional rights, including the rights of due process and due course of law, may be waived if the proper request, objection, or motion is not asserted in the trial court"); *Solis v. State*, 945 S.W.2d 300, 301 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd) (observing "that almost every right, constitutional and statutory, may be waived by failing to object").

Even assuming that Aekins's claim has been preserved, we note that Aekins seems to be arguing that his due-process rights were violated during the trial, which is a claim beyond the limited scope of chapter 64. *Cf. Nelson v. State*, No. 03-12-00187-CR, 2014 WL 902497, at *1 (Tex. App.—Austin Mar. 5, 2014, no pet.) (mem. op., not designated for publication) (noting that appellant argued in request for DNA testing that his trial attorney provided ineffective assistance of counsel, that trial judge was not impartial, and that State presented improper argument, determining that this Court did not have jurisdiction over those claims in chapter 64 proceeding, and explaining that "we may not consider any claims that fall outside the scope of chapter 64"). Moreover, as discussed in the previous issue, we do not believe, by a preponderance of the evidence, that the introduction into evidence of additional exculpatory test results would have, as suggested by Aekins, resulted in his acquittal. To the extent that Aekins is arguing that the district court's denial of his

motion for DNA testing violated his due-process rights and to the extent that Aekins may pursue this type of claim, we observe that "[t]here is no free-standing due-process right to DNA testing, and the task of fashioning rules to 'harness DNA's power to prove innocence without unnecessarily overthrowing the established system of criminal justice' belongs 'primarily to the legislature.'" *See Ex parte Gutierrez*, 337 S.W.3d at 889 (quoting *District Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 62 (2009)). As set out above, the district court correctly determined that the requirements established by the legislature for post-conviction DNA testing were not met in this case, and we can see no due-process violation from that ruling. *Cf. Bell v. State*, 90 S.W.3d 301, 305-06 (Tex. Crim. App. 2002) (rejecting challenge that denial of request for DNA testing violated his due-process rights).

For all of these reasons, we overrule Aekins's second issue on appeal.

Effective Assistance of Counsel

In his third issue on appeal, Aekins contends that his trial attorney provided ineffective assistance of counsel "by failing to conduct an adequate pre-trial investigation into critical DNA evidence, failing to have the DNA evidence evaluated by an independent expert before trial, failing to consult with or call a DNA expert to testify at trial, and failing to discover and present potentially exculpatory DNA evidence." *Cf. Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984) (setting out standard of review for ineffectiveness claims).

None of the arguments listed above pertain to the requisites that must be satisfied before a trial court may order DNA testing or fall within the scope of chapter 64, and we do not have jurisdiction to consider those types of claims in a chapter 64 appeal because we may not address

issues that exceed the scope of chapter 64. *See In re Garcia*, 363 S.W.3d at 822; *see also Smith v. State*, No. 03-15-00549-CR, 2016 WL 3361208, at *3 (Tex. App.—Austin June 10, 2016, no pet.) (mem. op., not designated for publication) (determining that defendant's arguments that his trial attorney provided ineffective assistance of counsel were beyond scope of chapter 64); *Nelson*, 2014 WL 902497, at *1 (same).

For these reasons, we overrule Aekins's final issue on appeal.

CONCLUSION

Having overruled all of Aekins's issues on appeal, we affirm the district court's order denying Aekins's request for DNA testing.

David Puryear, Justice

Before Justices Puryear, Pemberton, and Goodwin

Affirmed

Filed: May 25, 2017

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