NUMBER 13-16-00230-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

ANDREW McCLENDON, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 117th District Court of Nueces County, Texas.

MEMORANDUM OPINION

Before Justices Contreras, Benavides, and Longoria
Memorandum Opinion by Justice Longoria

Appellant Andrew McClendon challenges his convictions for aggravated kidnapping and aggravated assault. *See* TEX. PENAL CODE ANN. §§ 20.04, 22.02 (West, Westlaw through 2017 R.S.). Appellant asserts in two consolidated issues that (1) his conviction violated the constitutional protection against double jeopardy and (2) the court

reversibly erred by admitting testimony and evidence from the first trial in violation of an order of expunction. We affirm.

I. BACKGROUND

The State alleged that appellant abducted the complainant at knifepoint as she left her job in downtown Corpus Christi at 2:00 a.m. According to the State, appellant forced her to drive him in her own car to the Corpus Christi marina. Once there, appellant had sexual contact with her in the backseat of the vehicle. Afterwards, appellant forced her to let him off in the parking lot of a Stripes convenience store.

The State charged appellant in trial court cause number 14-CR-2634-B with four counts of aggravated sexual assault.[1] *See id.* § 22.021 (West, Westlaw through 2017 R.S.). The case was tried to the court, which acquitted appellant of all charges. Appellant later obtained an order expunging the records of his arrest for aggravated sexual assault. *See* TEX. CODE CRIM. PROC. ANN. art. 55.01(a)(1)(A) (West, Westlaw through 2017 R.S.).

The State subsequently indicted appellant in trial court cause number 15-CR-4391-B for aggravated assault and aggravated kidnapping of the same complainant. At the beginning of voir dire, appellant filed a motion in limine covering the sexual assault charge. The trial court replied that the State could not retry the sexual assault charge but that it could offer evidence of the sexual contact between appellant and the complainant "for the jury to have the full picture" of events. During the trial on the merits,

[1] We take the following description of the sequence of events before the trial in this case from appellant's brief. As we explain below, neither the reporter's record of the trial in cause number 14-CR-2634-B nor the expunction order are part of the record before us.

the State called Carol McLaughlin, a sexual assault nurse examiner, to testify regarding her examination of the complainant. Appellant objected that her testimony "would potentially violate the order of expunction." The trial court overruled his objection. Appellant unsuccessfully repeated the same objection in the context of the State's plan to read appellant's testimony from cause number 14-CR-2634-B to the jury and its stated intention to call Brenda Olson, a professional counselor, who treated the complainant after the alleged attack.

The jury convicted appellant of both charges. The trial court assessed punishment on each count at imprisonment for thirty years, to run concurrently. This appeal followed.

II. DOUBLE JEOPARDY

Appellant argues in his first issue that prosecuting him in this case violated the constitutional protection against double jeopardy.

A. Applicable Law

The Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." *See* U.S. CONST. amend. V. This constitutional guarantee protects a defendant against: (1) a second prosecution for the same offense after an acquittal; (2) a second prosecution for the same offense after a conviction; (3) multiple punishments for the same offense. *Brown v. Ohio*, 432 U.S. 161, 165 (1977); *Ex parte Amador*, 326 S.W.3d 202, 205 (Tex. Crim. App. 2010). Appellant's issue implicates the protection against a second prosecution following an acquittal.

To prevail on a successive-prosecution claim, the defendant must show, among

other things, that the offenses charged in the two trials are the same in law and fact. *Ex parte Castillo*, 469 S.W.3d 165, 169 (Tex. Crim. App. 2015); *see State v. Maldonado*, No. 13-16-00317-CR, ___ S.W.3d ___, ___, 2017 WL 1281323, at *2 (Tex. App.—Corpus Christi Apr. 6, 2017, no pet.). When two distinct statutory provisions are involved, courts determine whether two offenses are legally the same by applying the *Blockburger* same-elements tests to ascertain whether "each provision requires proof of a fact which the other does not." *Ex parte Castillo*, 469 S.W.3d at 168; *see Blockburger v. United States*, 284 U.S. 299, 304 (1932). Under the Texas version of the *Blockburger* test, courts compare the elements of the offenses as alleged in the charging instrument. *Bigon v. State*, 252 S.W.3d 360, 370 (Tex. Crim. App. 2008); *Parrish v. State*, 869 S.W.2d 352, 354 (Tex. Crim. App. 1994).

A double jeopardy issue may be raised for the first time on appeal if: (1) the undisputed facts show that the double-jeopardy violation is clearly apparent on the face of the record; and (2) applying the usual rules of procedural default serves no legitimate state interest. *Langs v. State*, 183 S.W.3d 680, 687 (Tex. Crim. App. 2006). "A double-jeopardy claim is apparent on the face of the trial record if resolution of the claim does not require further proceedings for the purpose of introducing additional evidence in support of the double-jeopardy claim." *Ex parte Denton*, 399 S.W.3d 540, 544 (Tex. Crim. App. 2013).

B. Discussion

Appellant asserts that he meets both requirements to raise a double-jeopardy issue for the first time on appeal. The State replies that error is not apparent on the face

of the record because the trial record does not contain the necessary information to decide this issue.

We agree with the State. Resolving a multiple-prosecution claim requires comparing the elements of the charged offenses as pled in the charging instruments. *See Ex parte Castillo*, 469 S.W.3d at 168. The indictment of appellant in cause number 14-CR-2634-B, however, is not part of the record. Appellant filed a motion with this Court seeking to supplement the appellate record with the reporter's record of the first case, which includes a transcription of the reading of the indictment. *See* TEX. R. APP. P. 34.6(d) (governing supplementation of the reporter's record). The Court granted appellant's motion, but we now conclude that we may not consider the reporter's record of the first trial. The supplementation rules "exist to allow appellate courts to supplement the appellate record with matters that were part of the trial record but, for whatever reason, have not been forwarded to the appellate court." *LaPointe v. State*, 225 S.W.3d 513, 522 (Tex. Crim. App. 2007). These rules "cannot be used to create a new record." *Id*. Appellant did not introduce the reporter's record of cause number 14-CR-2634-B into evidence, ask the trial court to take judicial notice of the record, or otherwise bring the record to the trial court's attention. *See id.* The supplemental reporter's record is not part of the trial record and, therefore, we may not consider it. *See id.*; *see also Whitehead v. State*, 130 S.W.3d 866, 872 (Tex. Crim. App. 2004) (setting out the general rule that appellate courts cannot consider factual assertions outside of the trial record). We have no other information regarding how the sexual-assault offense was pled in the charging instrument. Without that information, we cannot determine if

appellant has been subjected to multiple prosecutions for the same offense.[2] *See Ex parte Castillo*, 469 S.W.3d at 168. Because resolution of this issue would necessarily require further proceedings to introduce evidence from the first trial in support of appellant's claim, we conclude that a double jeopardy violation is not apparent on the face of the record.[3] *See Ex parte Denton*, 399 S.W.3d at 544. We overrule appellant's first issue.

III. Admissibility of Expunged Records and Files

Appellant asserts in his second issue that the trial court erred in admitting evidence and testimony that was covered by an order of expunction.

A. Standard of Review and Applicable Law

We review a trial court's decision to admit or exclude evidence for a clear abuse of discretion. *Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016). An abuse of discretion occurs when the trial court's decision falls outside the zone of reasonable

[2] Appellant asserts in a section of his brief that the multiple-punishments component of the Double Jeopardy Clause is also applicable to this case. Generally, a multiple punishments claim arises in two contexts: (1) the lesser-included offense context; and (2) "[p]unishing the same criminal act twice under two distinct statutes when the legislature intended the conduct to be punished only once." *Bigon v. State*, 252 S.W.3d 360, 370 (Tex. Crim. App. 2008). Thus, a multiple punishments claim in this case would analyze whether the aggravated assault and aggravated kidnapping convictions were the same offense. Appellant, however, compares the aggravated assault and aggravated kidnapping statutes with the aggravated sexual assault statute. A multiple punishments analysis is not applicable here because there is no conviction and hence no punishment in the sexual assault case.

[3] Appellant further asserts in a single sentence of his brief that the prosecution was barred by collateral estoppel because the State was attempting to relitigate the same facts that were decided against it in the first trial. *See generally Murphy v. State*, 239 S.W.3d 791, 794–95 (Tex. Crim. App. 2007) (discussing the doctrine of collateral estoppel). To the extent appellant means to raise collateral estoppel as a separate issue, we overrule it. Deciding a collateral estoppel claim requires us to review "the entire testimonial record in the first proceeding to determine precisely what specific facts were actually decided and whether the resolution of those facts necessarily forecloses further proceedings." *Guajardo v. State*, 109 S.W.3d 456, 461 (Tex. Crim. App. 2003). Without a record of the first proceeding, which is not available to us here and which was not before the trial court in the second proceeding, we may not decide this issue. *See id.* at 462.

disagreement. *Id.* We will uphold the trial court's ruling if it is correct on any applicable theory of law. *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009).

A person who was placed under arrest for a felony or misdemeanor and who meets certain other conditions "is entitled to have all records and files relating to the arrest expunged" from the government's records. TEX. CODE CRIM. PROC. ANN. art. 55.01(a) (West, Westlaw through 2017 R.S.). Even though the expunction statute is codified in the Texas Code of Criminal Procedure, "an expunction proceeding is civil in nature." *Ex parte Vega*, 510 S.W.3d 544, 548 (Tex. App.—Corpus Christi 2016, no pet.). Once the expunction order becomes final, the "release, maintenance, dissemination or use of the expunged records and files for any purpose is prohibited." TEX. CODE CRIM. PROC. ANN. art. 55.03(1) (West, Westlaw through 2017 R.S.).

B. Analysis

Appellant asserts that the trial court violated the order expunging his arrest for aggravated sexual assault by admitting evidence and testimony that mentioned the sexual contact between appellant and the complainant. The State replies: (1) the record is insufficient because the expunction order is not in the record; and (2) there is no authority that records and files subject to expunction are inadmissible at trial in any event.

We agree that the record is insufficient for us to resolve this issue. As a general rule, the appealing party carries the burden to present a record on appeal showing reversible error. *Word v. State*, 206 S.W.3d 646, 651–52 (Tex. Crim. App. 2006). The failure to provide a sufficient appellate record precludes appellate review of a claim. *London v. State*, 490 S.W.3d 503, 508 (Tex. Crim. App. 2016). Each of appellant's

objections cited the expunction order as preventing admission of evidence, but the text of the order itself was never admitted into evidence. Furthermore, appellant did not ask the trial court to take judicial notice of its contents, and the trial court gave no indication that it was taking judicial notice of the order *sua sponte*. *See In re Graves*, 217 S.W.3d 744, 751 (Tex. App.—Waco 2007) (orig. proceeding). Appellant attached a copy of the order to his appellate brief, but we may not consider documents attached to a brief that are not part of the appellate record.[4] *See Viscaino v. State*, 513 S.W.3d 802, 814 (Tex. App.—El Paso 2017, no pet.); *see also Perez v. State*, No. 13-08-433-CR, 2010 WL 2697292, at *1 n.5 (Tex. App.—Corpus Christi July 8, 2010, pet. ref'd) (mem. op., not designated for publication). Without knowing the exact terms of the expunction order, we cannot begin to ascertain whether a particular piece of evidence offered by the State is subject to the order.

We conclude that appellant has not carried his burden of producing an appellate record sufficient to allow us to review this issue. *See Word*, 206 S.W.3d at 651–52. We overrule appellant's second issue.[5]

[4] We note that even if we could consider the copy of the order attached to appellant's brief, it appears to be only one version of the order. Appellant's trial counsel stated in one of his objections that "I understand the court modified an expunction order, but nonetheless, an expunction order was granted." There is no further information in the record regarding what changes, if any, the trial court made to the expunction order.

[5] We express no opinion on the merits of appellant's second issue. *See London v. State*, 490 S.W.3d 503, 508 (Tex. Crim. App. 2016) (holding that the failure to produce a sufficient record precludes appellate review of the merits of a claim); *see also* TEX. R. APP. P. 47.1

IV. CONCLUSION

We affirm the trial court's judgment.

NORA LONGORIA
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
19th day of October, 2017.