NUMBER 13-18-00450-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

SAMUEL EDWARD BENSON III, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 107th District Court of Cameron County, Texas.

MEMORANDUM OPINION

Before Justices Benavides, Perkes, and Tijerina
Memorandum Opinion by Justice Perkes

A jury convicted appellant Samuel Edward Benson III of two counts of sexual assault, a second-degree felony. *See* TEX. PENAL CODE ANN. § 22.011(a)(1)(A), (f). The jury sentenced Benson to ten years' imprisonment on each count, and based on the jury's recommendation, the trial court suspended the sentences and placed Benson on

community supervision for a term of ten years. *See* TEX. CODE CRIM. PRO. ANN. art. 42A.055(a) ("A judge shall suspend the imposition of the sentence and place the defendant on community supervision if the jury makes that recommendation in the verdict.").

By his first issue, Benson contends that the State willfully violated a pretrial discovery order by disclosing material DNA evidence midtrial; therefore, the trial court erred by failing to exclude the evidence. Alternatively, Benson argues the trial court should have granted his request for a continuance. By his second issue, Benson challenges the sufficiency of the evidence. We affirm.

I. BACKGROUND

Benson was charged by indictment with two counts of sexual assault for intentionally or knowingly causing the digital penetration of the complainant's sexual organ and anus without her permission. *See* TEX. PENAL CODE ANN. § 22.011(a)(1)(A). Benson filed a pretrial motion seeking disclosure of the State's DNA evidence, and the trial court ordered the State to disclose a laundry list of items, including notes, DNA worksheets, biological screening reports, and DNA analysis reports. The evidence was presented at trial.

The complainant was attending spring break festivities on South Padre Island when she fell on her head while crowd surfing at a concert. She was transported by ambulance to a temporary medical tent. The complainant alleges that Benson, a paramedic, sexually assaulted her during the transport by pulling down her shorts and digitally penetrating her anus and sexual organ. She also testified that he ejaculated

during the assault.

Upon arriving at the medical tent, medical personnel described the complainant as highly agitated. She emerged from the ambulance and immediately began accusing Benson of sexually assaulting her and repeated the accusations to several witnesses through the course of the evening and thereafter.

A blood draw conducted approximately four hours after the alleged incident showed that the complainant's blood alcohol concentration was .07 at the time of the draw. The driver of the ambulance testified that although he wasn't "too sure" how long the transport lasted, he was certain that "it was a very short trip," estimating it to be "about a two-minute trip."

There was conflicting evidence about whether or not: (1) the interior light in the back of the ambulance was on or off during the transport; (2) Benson prevented the complainant's boyfriend from riding with her during the transport; (3) Benson quickly left the medical tent without providing a report to the receiving nurse; and (4) Benson phoned his daughter during or after the transport.

Vanessa Nelson, a forensic scientist with the Texas Department of Public Safety's Crime Laboratory in Weslaco (DPS), testified that DNA forensic analysis is primarily concerned with identifying people through DNA evidence left behind at a crime scene. For example, bodily fluids contain cells, and the cells contain DNA inside. Each person has a unique DNA sequence. If an analyst can extract and create a DNA profile from the evidence, they can then compare it to a known sample from a suspect to determine whether "there [is] an exclusion, which means that they are dissimilar, or [whether] there

[is] an inclusion, which means that they will look similar to each other."

In this case, Nelson detected stains on the outer back panel of the complainant's bikini bottoms using an alternate light source.[1] In an October 31, 2014 biological screening report, Nelson noted that "[p]resumptive tests for the presence of semen [on the bikini bottoms] were positive; however, no spermatozoa were observed. Therefore, the presence of semen cannot be confirmed." Nelson explained at trial that although the presumptive tests were positive, "sperm cells are the only way to confirm the presence of semen" because other bodily fluids can also yield a positive result.

However, Nelson later observed sperm cells while conducting DNA extractions from the same stain and recorded her observation on a DNA Extraction Worksheet. This worksheet was provided to Benson before trial under a pretrial discovery order and later admitted into evidence as State's Exhibit No. 63. Further, the lab's standard operating manual, a copy of which was provided to Benson, explained that such observations are recorded on these worksheets. Nelson clarified that when they initially screen for biological material, they use small sample sizes so that there will be enough material left for DNA testing. She added, "I believe that I did not see sperm [during the biological screening] because it was just a very small sample that I took."

Ultimately, Nelson found that the DNA profile extracted from the stain was consistent with Benson's DNA sample. According to the final DNA analysis report authored by Nelson, "[t]he probability of selecting an unrelated person at random who could be the source of this DNA profile is approximately 1 in 587.5 quintillion for

[1] DPS reports refer to the bikini bottoms as "panties" because, as Nelson explained on the witness stand, "they were represented to me as panties, so that's what it says in my report." However, the State and Benson both referred to them as bikini bottoms at trial; therefore, so will we.

Caucasians." The report concluded that "[t]o a reasonable degree of scientific certainty, Samuel Benson III is the source of this DNA profile (excluding identical twins)."[2]

On cross-examination, Nelson stated that although the lab's microscopes are equipped with digital cameras, it is not part of their normal practice to take photos of slides: "Sometimes I do photograph what I see if I only see a single sperm head, sometimes I have another analyst come and check after me. But if I see multiple sperm, then I don't usually do any photographing. It's not normal." Nelson agreed, however, that taking a photo of a slide is an easy process that can substantiate her observations that she otherwise only records in her notes or on a worksheet.

Contrary to Benson's suggestion, Nelson denied that the lab failed to follow guidelines regarding the proper sequence for testing evidence. She explained that it is important during the initial biological screening to process the evidence before the known samples to minimize the risk of contamination. However, the different steps during DNA analysis are separated by time and space, and therefore, the sequencing becomes less important. For example, the lab uses separate rooms to amplify the extractions from evidence and known samples and then stores the amplifications in separate rooms, all to prevent cross contamination. Additionally, the lab uses different rooms to conduct biology screenings and extractions. In Nelson's opinion, the validity of the results was not affected by the fact that Benson's DNA profile from his known sample was completed before the profiles from the evidence. When pressed about the absence of timestamps for the various steps taken in the analysis, Nelson explained that timestamps are stored on the

[2] The results were the same for both the epithelial and sperm cell fractions, and the complainant was excluded as a contributor from each profile.

instruments but “[t]hat’s not something that normally goes in the case file."

The court recessed for the day during Nelson’s cross-examination, and the following exchange occurred when the trial resumed the following afternoon:

THE COURT: All right. Y’all ready for the jury?

[BENSON]: No, Judge. Judge, a new issue has come up that I wanted to address to the Court.

THE COURT: You may be seated, I’m sorry.

[BENSON]: Judge, with regards to the State’s DNA expert, Vanessa Nelson, Doctor Nelson deviantly went and looked at—alleges to have looked at Mr. Benson’s DNA yesterday, at which time she took some photographs of what she claims that she saw regarding that sample. She also issued a new report in connection to whatever her alleged findings were from yesterday. And what was provided to us today were three photographs of what she allegedly viewed yesterday, and a new supplemental report that is actually dated on August the 9th of 2017. And in this particular scenario, Judge, this late in the ballgame with regards to an expert’s testimony, this is undeniably, unquestionably surprise to the defendant. To the defense, it did not provide us any kind of adequate notice pursuant to the 5th, 6th and 14th Amendment. This is trial surprise, Judge. We are asking that this information, this supposed evidence, be excluded, along with any testimony that Doctor Nelson anticipates to be elicited from the witness stand in connection to any of those supposed findings from yesterday. I don’t know why we were not a part of that transaction yesterday with regards to something so scientific that requires time in order to formulate a strategy, time in order to figure out how that was going to affect the overall presentation of our case. This totally violates Mr. Benson’s due process. For that reason, I’m asking the Court to exclude it wholly, and issue an order to the State directing them to refrain from even suggesting it, alluding to it, and I from here on out will also, so that in all abundance of caution to not open any doors, I won’t even cross-examine on it. But to surprise us like this in such a prejudicial way just renders this whole process unfair.

[THE STATE]: Your Honor, we believe it’s the same thing, and I believe she has the slide with her, so she is ready to give it to him to look.

They opened the door on that, and they were saying, why didn't you take a photograph of the slide that you were looking at with the sperm cells. Why didn't you do that? You could have brought the photograph here. Originally[,] she said she doesn't do that in her cases, but in this case, she went and she did it so that—for his benefit. They have the photograph that she took, and she had the slide right there that she can give to the defense for examination. There is nothing here that's changed. Plus, if she had looked and [sic] would have—it would have benefited Mr. Benson, we wouldn't even be here. So this is all because of the questioning, if we remember the previous officer was—was completely berated, why didn't you go back and go around and found [sic] out the time for this, or the time for that. So I believe through that instance, it was clear that if there is evidence in there, that should still be pursued. It should be done. If it can be more complete, it should be done. He asked her, wouldn't you agree with me that it would be better if we had the photographs? We got it. And he doesn't have to trust us, we have the slide that he can give to him to look at.

THE COURT: All right. Anything further?

[BENSON]: At this point, we are just asking to exclude it, Judge.

THE COURT: All right. It will be denied.

[BENSON]: Your Honor, I think that for the purposes of the record, while I mean, I did not anticipate this, I was ambushed with this, but for the purposes of the record, I feel like I would have to at least prepare and file with the Court a written Motion for Continuance, sworn written Motion for Continuance. Let the Court make a ruling on that, because this does constitute gross surprise on the defense. Get a ruling on that so we can go ahead and proceed from here on out. If the Court wants to deny it, that's up to the Court. But to preserve this particular issue, I feel that that is what is required of me. So if I could just have, I guess, maybe five minute[s], and if the Court would allow Ms. Carolina to notarize it, because I don't have anybody else to notarize it, we can go ahead and proceed.

THE COURT: All right. The motion will [be] denied.

[BENSON]: Can I go ahead and follow it up then subsequent with the written motion, Judge?

THE COURT: You can follow up. It's on the record already, so you can follow up with a written one.

[BENSON]: And the Court is going to go ahead and still deem it timely filed in connection to this objection?

THE COURT: Yes, for the record, it will be deemed.

[BENSON]: Okay. Now, the next thing is, Judge, then with regards to it's [sic] admissibility, I am going to go ahead and bring it in through my cross-examination then. But I want to bring it in with a specific finding by the Court that I am not waiving the objection related to it's [sic] admissibility. If I can get an express preservation of that particular objection on the record for appellate purposes, that would put me in the position to go ahead and introduce it through my cross-examination.

THE COURT: Your objection will be noted on this photograph and testimony regarding the photograph of this item, and you will not be waiving—

[BENSON]: Would that be the same also for the updates, supplemental report, that's the same thing.

THE COURT: Yes.

[BENSON]: Thank you.

THE COURT: Okay. And your objection will be for the record too.

[BENSON]: Yes, Judge, even when I introduce it, I'm going to say, subject to my objections, I'm going to go ahead and offer it into evidence.

THE COURT: Okay. All right. Bring in the jury.

When Nelson's cross-examination resumed, Benson introduced the photos and supplemental report, subject to his objections, and the following exchange occurred:

[BENSON]: Okay. Now, yesterday, as a result of the cross-examination, you went back to the lab, right?

[NELSON]: Yes, I did.

[BENSON]: Okay. You went back to the lab. And according to your actions as it relates to what is depicted in [Exhibits] 48 and 49, you are supposed to have pulled out Mr. Benson's samples, right?

[NELSON]: I pulled out the samples from the panty, from the bikini bottom.

[BESON]: And did you redo a whole test, a whole analysis on that?

[NELSON]: No. All I did was a water extraction to look for the presence of sperm and take the photo since it seemed like it was important yesterday that the photo be there.

. . . .

[BENSON]: Well, let me ask you this, so fast forward, back on November—back on October the 31st, 2014, we, collectively, the agency, three people say, no detection of sperm, okay? It's in the report. Then miraculously on August the 9th of 2017, you go back to the lab to pull out this cloth, you pour water on it, you reexamine it, and now you are seeing sperm, fair to say so far?

[NELSON]: It's not miraculous, they were there before and they are still there, but I mean, I didn't have a picture of it before. I did not actually do it before.

. . . .

[BENSON]: Okay. And this new report that is dated August the 9th, of 2017, which would have been yesterday, right?

[NELSON]: No, actually I believe it's today. I believe today is the 9th.

[BENSON]: So today is the 9th. At what time did you prepare this?

[NELSON]: I prepared it this morning, maybe around 10:00 this morning.

. . . .

[BENSON]: Okay. And here again, going back to your efforts, did you contact [the prosecutor] for the purposes of advising them that you were going to be doing this?

[NELSON]: Actually, I was asked by [the prosecutor] if it was possible. We brought up the scenario yesterday evening in response to the

questioning about would it be possible to have a picture, should I have done a picture.

[BENSON]: So [the prosecutor] is the one that actually asked you to go back and do this laboratory work when you get back to the office[?]

[NELSON]: I asked him if I should, and he said, yes, I should.

[BENSON]: Okay. And did you, because you're an agent of the State, right?

[NELSON]: Yes.

[BENSON]: Did you talk to [the prosecutor] about informing myself, defense counsel, so that I could turn around and advise Doctor Spence, so that he could be there?

[NELSON]: No, I'm not an attorney, I'm just a scientist.

[BENSON]: Okay. So that never crossed your mind. You take evidence classes, right? It's in the handbook, your training manuals, right?

[NELSON]: Yes.

[BENSON]: Okay. And you also take courtroom procedure as it relates to your training and education to become a scientist, right?

[NELSON]: Yes.

[BENSON]: So you're generally familiar with what the duties and obligations are as it relates to duty to disclose, right?

[NELSON]: Generally, yes.

[BENSON]: But in this particular scenario, you did not opt to advise, as a person who creates standard operating procedures, as a technical leader, as a person who has developed regulatory policies, you did not bother to tell [the prosecutor], you know what? Get the defense attorney on the line so we can make sure that when we go down to that lab and I pull out that swatch that belongs to [the complainant] and the bikini bottoms, that Doctor Spence could be right there watching so that when we come to court, there ain't going to be no controversy as to whether or not it was from the right sample,

wrong sample or anything like that. That's not something that you opted to do after having done this business for 17 years, right?

[NELSON]: I'm not an attorney, and it is my understanding that it's the prosecution's burden to disclose to the defense. I mean, ultimately, I'm a scientist. I'm not an attorney.

Nelson went on to explain that she is required to prepare a report any time she does testing, "so that's why I did the report today, because I did further testing."

On redirect with the State's attorney, the following exchange occurred:

[STATE]: For the record, do you remember when the conversation that has been brought up on cross that we had yesterday, how that began?

[NELSON]: Yes, I do.

[STATE]: Please tell us.

[NELSON]: I was asked by yourself to come up to your office after we broke yesterday for trial, and we were discussing that the defense had asked for some things that are not normally provided during our testing. And I asked you . . . if I should try to get those items available so that they could be presented today because they are available in the lab, it's just not something that we do as a normal part of testing, and it seemed like it was important yesterday to clarify points that were brought up. And so [you] did ask that I provide, if I could go back in and do another sperm search on that item, if I could also take a photo, and then he also asked me to provide timestamps, because that was in question yesterday for when certain items were placed on the robots, when the robots were run, when the instruments were run as well, so I did do those things.

[STATE]: So it would be fair to say, this isn't just about the lab report or the pictures, I brought to you the additional concern about not having the timestamps at the other stages, isn't that right?

[NELSON]: Yes, [you] did.

[STATE]: And did you guarantee that you would be able to do all those things for me? Or did you say I'll try?

[NELSON]: I said I would try, because it was going take some time.

[STATE]: And did you notice any malicious intent on my part in doing that?

[NELSON]: No, I did not.

[STATE]: You understand that it would be my ethical duty if you had come back and told me there is no sperm here, I was wrong, for me to dismiss this—

[NELSON]: Your Honor, I'm going to object to the relevance.

THE COURT: Overruled.

[STATE]: Thank you.

[STATE]: Do you understand that? If you had looked at the slides again and you issued your report as you have to do it, and you told me, ["][Y]ou know what? I am completely wrong here, there were no sperm cells here, and I have the pictures and the new report to prove it.["] You would have had to disclose that to me, right[?]

[NELSON]: Yes, I would have.

[STATE]: And you understand that would make me doubt your testimony and a lot of the other evidence here, and it would be my ethical duty to dismiss this case and end it today, you understand that?

[NELSON]: Yes, and if I had seen no sperm this morning, my report would have reflected that, and that is always a possibility.

Nelson also clarified the seeming contradiction between her October 31 biological screening report, which noted that the presence of semen could not be confirmed because she did not observe any sperm cells, and her October 17 worksheet, which noted her observation of sperm cells during the DNA extraction process. Although the biology report was "issued" on October 31, the testing occurred on an earlier date. As Nelson explained, the entire biological screening "can take several weeks to get through" the

review process, which requires other analysts in the lab to verify the results. Meanwhile, considering the positive preemptive tests, she began the "DNA phase," which necessarily follows the biological screening. It was during DNA extraction, "the very beginning of the DNA phase," that she observed the sperm cells and recorded it on the worksheet, which was dated October 17.

Also during redirect, the State sought to introduce timestamp records from the "DNA phase" that Nelson also generated during the recess. Benson objected again, reiterating, in detail, his due process concerns. He further complained that the State waited until after his cross-examination was complete to disclose these records instead of disclosing them with the photos and supplemental report at the beginning of the day. After a lengthy exchange, the trial court declined to admit the records at that time. Instead, the court ordered the State to provide a copy when the trial recessed for the day so that Benson would have an opportunity to review them with his DNA expert over the break.

When the trial resumed the following morning, Benson reurged his objections to the introduction of the timestamp records, asking the trial court to either exclude the records or grant him a continuance. The State represented to the court that it provided a copy of the records when the trial recessed the previous day, and Benson did not dispute this fact. Benson also clarified, at the State's request, that he was only seeking a continuance at that point to review the timestamp records. The trial court overruled Benson's objections, and the records were subsequently admitted. After the State passed the witness, Benson cross-examined Nelson again, choosing to focus primarily on the August 9th report instead of the timestamp records.

Benson's DNA expert later opined that Nelson and other members of the crime lab committed errors that rendered the DNA analysis unreliable. Chiefly, he criticized the sequencing of the analysis, which he believed may have caused cross contamination between Benson's known sample and the evidence.

At the conclusion of the trial, the jury convicted Benson on both counts, and this appeal ensued.

II. UNTIMELY DISCLOSURE

By his first issue, Benson complains that the prosecutor willfully violated the pretrial discovery order such that the trial court should have excluded evidence of the additional testing and timestamp records. Even if the prosecutor's actions were not willful, Benson contends that he was nonetheless surprised and prejudiced by the late disclosure in violation of his due process rights. Thus, Benson argues in the alternative that the trial court should have at least granted him the lesser remedy of a continuance so that he could review the evidence with his DNA expert and adjust his defensive strategy accordingly.

A. Standard of Review & Applicable Law

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Zuliani v. State*, 97 S.W.3d 589, 595 (Tex. Crim. App. 2003). An abuse of discretion occurs "only when the trial judge's decision was so clearly wrong as to lie outside that zone within which reasonable persons might disagree." *Id*. (quoting *Cantu v. State*, 842 S.W.2d 667, 682 (Tex. Crim. App. 1992)).

However, "evidence willfully withheld from disclosure under a discovery order should be excluded from evidence." *Francis v. State*, 428 S.W.3d 850, 854–55 (Tex. Crim.

App. 2014) (quoting *Hollowell v. State*, 571 S.W.2d 179, 180 (Tex. Crim. App. 1978)). "Extreme negligence or even recklessness on the prosecutor's part in failing to comply with a discovery order will not, standing alone, justify the sanction of excluding relevant evidence." *Id.* at 855 (citing *State v. LaRue*, 152 S.W.3d 95, 97 (Tex. Crim. App. 2004)). And because exclusion in this context constitutes a court-fashioned sanction for prosecutorial misconduct that hinges on the prosecutor's intent, we must defer to the trial court's credibility determinations, whether expressly made on the record or implied by its ruling. *Id.* (citing *Oprean v. State*, 201 S.W.3d 724, 726–27 (Tex. Crim. App. 2006)). Further, in the absence of express findings, "a reviewing court must assume that the trial court resolved all fact issues in a way that is consistent with its ultimate ruling, so long as those presumed findings of fact are supported by the record." *Id.* (citing *Oprean*, 201 S.W.3d at 726).

Even if a late disclosure was not willful, as an alternative to exclusion, the notice requirements of due process may compel a trial court to grant a brief continuance to allow the defendant to inspect the evidence and prepare for the State's offer. *Oprean*, 201 S.W.3d at 730 (Cochran, J., concurring). In a series of cases before the Texas Court of Criminal Appeals, Judge Cochran has expressed concern that focusing on the conduct of the prosecutor fails to adequately address the harm, if any, to the defendant caused by the late disclosure. *LaRue*, 152 S.W.3d at 100 (Cochran, J., concurring) ("Had the defendant shown that he was unable to prepare a defense to this scientific evidence in the time remaining before trial, I would be less concerned about the 'willfulness' of the prosecutor and more concerned about the due process rights of the defendant."); *Oprean*, 201 S.W.3d at 729 (Cochran, J., concurring) (same); *Francis*, 428 S.W.3d at 859–60

(analyzing the admission of untimely disclosed evidence for a due process violation, but concluding that "even under Judge Cochran's view that due process would oblige a trial court to exclude evidence that was not timely revealed under a pre-trial discovery order," there was no reversible error because the trial court granted a continuance and the appellant confirmed on the record that the delay was sufficient to allow him to inspect the evidence prior to its admission).

We share Judge Cochran's concern and have previously suggested that a continuance may be an appropriate alternative remedy for an untimely disclosure. *Zule v. State*, 802 S.W.2d 28, 33 (Tex. App.—Corpus Christi–Edinburg 1990, pet ref'd) ("While appellant moved for a mistrial after the prosecutor disclosed the evidence, appellant did not move for a continuance. By not requesting a continuance, appellant made the tactical decision to proceed with the trial, aware of the previously undisclosed evidence. Hence, appellant cannot credibly complain that the State's late disclosure forced him to defend the indictment without knowing that potentially favorable evidence existed.").

A pretrial discovery order creates a reasonable expectation on the part of the defendant that the State will comply with the order and thus provide notice and an opportunity to inspect the evidence subject to the order. A finding that a prosecutor's untimely disclosure was merely accidental does not ameliorate any prejudice to the defendant who has relied on the State's full disclosure in crafting his defense. *See LaRue*, 152 S.W.3d at 100 (Cochran, J., concurring); *Oprean*, 201 S.W.3d at 729 (Cochran, J., concurring). Granting a brief continuance strikes the appropriate balance between the jury's interest in considering relevant evidence, the trial court's interest in the orderly administration of justice, and the defendant's right to due process. *LaRue*, 152 S.W.3d at

100 (Cochran, J., concurring); *Oprean*, 201 S.W.3d at 730 (Cochran, J., concurring). However, not every late disclosure will require a continuance; each case must be evaluated on its own merits. *Oprean*, 201 S.W.3d at 729 (Cochran, J., concurring). Of course, the defendant must show on appeal that the late disclosure, coupled with the trial court's failure to grant a continuance, resulted in harmful error. *Id.* at 730 (Cochran, J., concurring).

B. Analysis

It is evident from the record that Benson, in consultation with his expert, crafted a detailed strategy to cast doubt on Nelson's credibility, and thus the reliability of her conclusions. He formulated his strategy based on the evidence disclosed to him before trial. It is equally evident from the record that the complained-of evidence was produced in direct response to Benson's line of questioning. As Nelson explained, it is not her normal practice to take photos of sperm cells or generate timestamp records of runtimes. In other words, the State's apparent need for this evidence did not arise until Benson's cross-examination of Nelson. Thus, there is no evidence in the record that the prosecutor "withheld" this evidence until midtrial, and even if there was conflicting evidence as to the prosecutor's intent, we would defer to the trial court's implied finding that the prosecutor did not act willfully. *See Francis*, 428 S.W.3d at 855 (citing *Oprean*, 201 S.W.3d at 726). We overrule Benson's first sub-issue.

Even if we assume that a brief continuance to review the photos and supplemental report was appropriate, Benson cannot demonstrate reversible error. Contrary to Benson's representations on appeal, Nelson did not alter her conclusions as a result of this additional testing. Instead, the photos and supplemental report merely corroborated

her previous testimony that she observed sperm cells during the DNA extraction process and contemporaneously recorded her observations on a worksheet. *See Estrada v. State*, 313 S.W.3d 274, 302 n.29 (Tex. Crim. App. 2010) (explaining that a trial court's improper admission of evidence is not reversible error when the trial court admits the same or similar evidence without objection at another point in the trial). Moreover, that worksheet was disclosed to Benson prior to trial in compliance with the trial court's order and admitted into evidence during the State's direct examination of Nelson. Indeed, Benson questioned Nelson at length about her failure to photograph her observation of the sperm cells, which, in turn, prompted the additional testing.

And although Benson was initially denied the benefit of a continuance, he did have the opportunity to review the photos and supplemental report with his expert over the evening recess before proceeding with Nelson's re-cross the following day. We also note that Benson's DNA expert, who was present in the courtroom during Nelson's testimony, testified after Nelson. Therefore, Benson has not demonstrated that his ability to investigate the supplemental testing and prepare his defense was substantially impaired. *See Francis*, 428 S.W.3d at 860 (Cochran, J., concurring); *LaRue*, 152 S.W.3d at 100 (Cochran, J., concurring).

Finally, regarding the timestamp records, the trial court effectively granted a continuance by denying the admission of this evidence until Benson had the opportunity to review it over the evening recess. *See Oprean*, 201 S.W.3d at 730 (Cochran, J., concurring) (suggesting that "a short delay of an hour or two" would satisfy due process where the State failed to timely disclose video evidence of a prior arrest). This evidence was also cumulative, as Nelson had already testified at length about the sequencing of

the DNA analysis, providing the specific order and dates for each step of the process, if not the exact times. *See Estrada*, 313 S.W.3d at 302 n.29. Thus, we specifically find that no error occurred in admitting this evidence. We overrule Benson's second sub-issue.

III. LEGAL SUFFICIENCY

By his second issue, Benson contends that the evidence was legally insufficient to support his conviction.

A. Standard of Review & Applicable Law

When reviewing claims of legal insufficiency, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Whatley v. State*, 445 S.W.3d 159, 166 (Tex. Crim. App. 2014); *Martinez v. State*, 527 S.W.3d 310, 320 (Tex. App.—Corpus Christi–Edinburg 2017, pet. ref'd). The fact finder is the exclusive judge of the facts, the credibility of the witnesses, and the weight to be given to the testimony and is presumed to have resolved any conflicts in the evidence in favor of the verdict. *See Bartlett v. State*, 270 S.W.3d 147, 150 (Tex. Crim. App. 2008); *see also Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (giving deference to the fact-finder "to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.").

"Circumstantial evidence is as probative as direct evidence in establishing guilt, and circumstantial evidence alone can be sufficient to establish guilt." *Winfrey v. State*, 393 S.W.3d 763, 771 (Tex. Crim App. 2013) (citing *Hooper*, 214 S.W.3d at 13). Juries are permitted "to draw reasonable inferences as long as each inference is supported by the

evidence presented at trial. However, juries are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions." *Hooper*, 214 S.W.3d at 15.

Sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge. *Braughton v. State*, 569 S.W.3d 592, 608 (Tex. Crim. App. 2018) (citing *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)). In this case, a hypothetically correct charge would instruct the jury to find Benson guilty of sexual assault if he intentionally or knowingly caused the digital penetration of the complainant's anus or sexual organ without her consent. *See* TEX. PENAL CODE ANN. § 22.011(a)(1)(A).

B. Analysis

Benson primarily complains about the credibility of the State's evidence, calling the complainant's version of events "highly improbable" and describing the State's evidence as "inconsistent" and "undependable." As the State correctly points out, these "are all great arguments to be made in trial and to be brought up in closing arguments," but they are not the basis for a successful sufficiency challenge. We defer to the jury as the final arbiter of the facts, and they, having already considered those arguments, weighed the evidence and resolved any inconsistencies in favor of the State. *See Bartlett*, 270 S.W.3d at 150; *Hooper*, 214 S.W.3d at 13.

In particular, the complainant unequivocally testified that Benson digitally penetrated her anus and sexual organ without her consent. Nurse Stowell testified that immediately upon arriving at the medical tent, the complainant reported to her that Benson "put his fingers in me." The testimony of these two witnesses alone is sufficient

to support Benson's conviction. *See* TEX. CODE CRIM. PRO. ANN. art 38.07(a) ("A conviction under . . . Section 22.011 . . . is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within one year after the date on which the offense is alleged to have occurred."); *Garcia v. State*, 563 S.W.2d 925, 928 (Tex. Crim. App. 1978) (holding complainant's testimony, standing alone, was sufficient to establish elements of aggravated rape beyond a reasonable doubt): *Jensen v. State*, 66 S.W.3d 528, 534 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) (same); *see also Rayavarapu v. State*, No. 13-16-00521-CR, 2018 WL 3470595, at *2 (Tex. App.—Corpus Christi–Edinburg Aug. 23, 2018, pet ref'd) (mem. op., not designated for publication) (same). Nevertheless, through DNA analysis, the State corroborated the complainant's testimony that Benson ejaculated during the assault. *Cf. King v. State*, 91 S.W.3d 375, 381 (Tex. App.—Texarkana 2002, pet ref'd) (concluding DNA evidence, standing alone, is sufficient to prove perpetrator's identity in sexual assault case); *Roberson v. State*, 16 S.W.3d 156, 168 (Tex. App.—Austin 2000, pet ref'd) (same). Accordingly, we overrule Benson's second issue.

IV. CONCLUSION

We affirm the trial court's judgment.

GREGORY T. PERKES
Justice

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

Delivered and filed the
13th day of August, 2020.