Affirmed and Opinion filed June 28, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-01077-CR

JACKIE WILSON, Appellant

V.

STATE OF TEXAS, Appellee

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Cause No. 97CR1838

O P I N I O N

Appellant, Jackie Wilson, was convicted by a jury of murder and sentenced 60 years' imprisonment. On appeal, he challenges the legal and factual sufficiency of the evidence and argues that he received ineffective assistance of counsel. We affirm.

I. Background

In the early morning hours of December 20, 1995, Officers Presley and Stewart were dispatched to Wood Hollow Place, an apartment complex in Texas City, in response to a call from one of its residents, Florence Burton. Burton claimed that she overheard screams coming from the apartment located directly above her, followed by a "thud" which sounded like

a body hitting the floor above her ceiling. When the officers arrived, they noticed that the front door to the apartment above Burton's was ajar, and they heard a stereo playing loudly. They looked inside and saw a small child sitting on a fold-out bed. They announced their presence and entered. Upon entering the apartment, they discovered the nude body of Cynthia Hughes, the victim of a brutal murder.[1] Next to Hughes's body was a broken, bloodied knife, believed by the officers to be the murder weapon. While Presley secured the scene, Stewart and his K-9 unit followed a trail of blood leading from Hughes's apartment to the parking lot, where it stopped at one of the parking spaces. Stewart concluded that the blood trail indicated the murderer left Hughes's apartment with an injury, walked to his vehicle, and drove off. He also believed that, because the blood trail followed closely behind a row of parked cars away from the victim's apartment, the suspect must have received an injury to his right side, and probably an injury to his hand.[2] Accordingly, the police believed they were looking for a suspect with a cut to his right hand.

After other officers arrived on the scene, Officer Stewart and Sergeant Goetschius took the young child, who turned out to be the decedent's daughter, to the hospital. Meanwhile, Galveston County Deputy Sheriff Mendenhall noticed appellant arrive at the hospital. Mendenhall overheard appellant explain to the registration nurse that he was the victim of an attempted robbery at a nearby gas station. Appellant had a swollen hairline, and, despite several lacerations to his hands, Mendenhall noticed appellant's clothes did not have any blood on them nor did they appear torn. He also observed that appellant was not wearing a jacket or socks, even though it was an unusually cold morning. Mendenhall decided to question appellant because it was the hospital's policy to notify the proper law enforcement agency of any crime victim who was treated by the hospital. According to Mendenhall, appellant said he stopped to use a pay phone at the Omni gas station when a man approached him begging for a

---

[1] An autopsy revealed that Hughes received in excess of 60 stab wounds.

[2] This conclusion was drawn from the fact that the apartment's doorknob had blood on it and, as another officer testified, it is not uncommon for a knife to cut the aggressor, particularly where, as here, the victim bleeds profusely and evidently fought hard with her attacker.

quarter. When appellant told the man he did not have a quarter, the beggar attacked appellant. According to Mendenhall's testimony, appellant's description of the event was vague, appellant having offered neither a description of what the attacker looked like nor whether the attacker had a weapon.[3] Mendenhall further testified appellant told him that, after the attacker fled, appellant went home to shower, but did not call the police about the attack. The registration nurse also testified that appellant told her that he went home after the attack to change clothes. Mendenhall testified appellant told him the attack occurred at approximately 6:30 that morning. Officer Stewart testified he was dispatched to Hughes's apartment between 6:00 a.m. and 6:12 a.m.

When Officer Stewart and Sergeant Goetschius arrived at the hospital, Mendenhall told them that there was a person at the hospital who claimed he was the victim of a robbery.[4] Stewart testified that appellant's story seemed unbelievable for several reasons. First, appellant gave a vague description of the robber. Second, no one had reported a robbery at the gas station, even though the pay phones are in close proximity to the store. Third, appellant's demeanor changed when Stewart asked whether appellant knew anyone who lived at the Wood Hollow apartments or knew someone named Cynthia Hughes. Appellant answered "no" to both questions.[5]

One of the State's witnesses, Darryl Fisher, testified that he spent the night with Hughes at her apartment smoking crack cocaine. Fisher testified that sometimes he would give Hughes cocaine in exchange for sexual favors, but he did not have sex with Hughes on this night. Fisher also testified that he arrived at Hughes's apartment that night around midnight, but left almost

---

[3] At trial, appellant testified he received his injury from punching his attacker, a point he never made in a written statement given to police shortly after the murder.

[4] Mendenhall told the jury that, although he believed the Omni gas station was actually on the La Marque side of the county line, appellant insisted the attack occurred in Texas City; accordingly, Mendenhall turned the matter over to Stewart and Goetschius.

[5] Appellant testified that the reason he denied knowing Hughes was because he only knew her as "Cindy," and the reason he denied knowing anyone at the Wood Hollow apartments because he knew it by its former name, Memorial Apartments.

immediately to go to "Griff's" apartment, located on the other side of the complex. Appellant eventually showed up at Griff's apartment, and at some point after that, Fisher left to go see Hughes again. On his way back, Fisher testified that appellant and Griff stopped him and asked him to sell them cocaine. After doing so, Fisher went to Hughes's apartment. Fisher remembered that he slept on the floor near a hideaway bed to the right of the front door, and although he remembered seeing a pair of tennis shoes by his feet that night, when asked, he specifically remembered not seeing a Dallas Cowboys mug in the same vicinity. Tests later revealed that the mug had appellant's fingerprint on it.

As previously agreed, appellant arrived at Hughes's apartment around 5:30 a.m. to give Fisher a ride. Fisher testified that, although appellant entered the apartment, he remained by the kitchen table, immediately to the left of the front door, and did not stay long before they left in appellant's truck. Appellant drove Fisher to the apartment of "Mr. Winter," located about ten blocks from the murder scene. Fisher testified that during the drive, appellant asked him whether Hughes "fooled around," to which Fisher responded "no."

The State's expert witness, Lisa Marie Harmon, testified that at least seven critical pieces of evidence inculpated appellant, including the knife found next to the victim, DNA taken from vaginal and anal swabs of the victim, and DNA from under the victim's fingernails. At the close of evidence, and after hearing closing arguments, the jury returned a finding of guilty.

II. Legal and Factual Sufficiency

In his first point of error, appellant challenges the legal and factual sufficiency of the evidence. In reviewing a legal sufficiency challenge, this court views the evidence in the light most favorable to the verdict. *Narvaiz v. State*, 840 S.W.2d 415, 423 (Tex. Crim. App. 1992). The issue on appeal is not whether we, as a court, believe the State's evidence or believe that the defense's evidence outweighs the State's evidence. *Wicker v. State*, 667 S.W.2d 137, 143 (Tex. Crim. App. 1994); *Matson v. State*, 819 S.W.2d 839, 846 (Tex. Crim. App. 1991). Nor is it our duty to re-weigh the evidence from reading a cold record; rather, it is our duty to act

as a due process safeguard, ensuring only the rationality of the fact finder's decision. *Williams v. State*, 937 S.W.2d 479, 483 (Tex. Crim. App. 1996). The verdict may not be overturned unless it is irrational or unsupported by proof beyond a reasonable doubt. *Matson*, 819 S.W.2d at 846. Therefore, if *any* rational trier of fact could have found the essential elements of the crime, we must affirm. *McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997). The purpose behind this standard is to ensure the role of the jury in our system as trier of fact, whose duty it is to resolve conflicting testimony, weigh the evidence, and draw reasonable inferences therefrom. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

In contrast, in ruling on a challenge to the factual sufficiency of the evidence, the reviewing court "views all the evidence without the prism of 'in the light most favorable to the prosecution,' [i.e., views the evidence in a neutral light,] and sets aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000) (quoting *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996)). This concept embraces both "formulations utilized in civil jurisprudence, *i.e.*, that evidence can be factually insufficient if (1) it is so weak as to be clearly wrong and manifestly unjust or (2) the adverse finding is against the great weight and preponderance of the available evidence." *Id.* at 11. Under this second formulation, the court essentially compares the evidence which tends to prove the existence of a fact with the evidence that tends to disprove that fact. *Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996). "In conducting a factual sufficiency review, an appellate court reviews the fact finder's weighing of the evidence and is authorized to disagree with the fact finder's determination." *Clewis*, 922 S.W.2d at 133. This review, however, must employ appropriate deference to prevent an appellate court from substituting its judgment for that of the fact finder's, and any evaluation should not substantially intrude upon the fact finder's role as the sole judge of the weight and credibility given to any witness's testimony. *Jones*, 944 S.W.2d at 648.

Viewing the evidence in a light most favorable to the prosecution, we find that the evidence in this case supports the jury's verdict. The State's expert, Harmon, testified that she

performed two DNA analyses in her investigation of this case. One—known as the D.Q. Alpha—confirmed the presence of appellant's DNA on the knife blade found next to the body, on the front door knob, and in vaginal and anal swabs taken from the victim. Harmon testified she performed the D.Q. Alpha test in 1996. Because the lab she worked for in 1996 did not have the ability to perform a more reliable form of DNA testing, known as S.T.R. typing, Harmon conducted a second DNA analysis in 1998 using this better technique. Comparing the samples from the crime scene to the samples of possible suspects, including appellant, S.T.R. typing showed the presence of appellant's and the victim's DNA (1) on blood taken from the railing to the stairwell outside Hughes's apartment; (2) in a blood sample taken from the mattress; (3) on the blood taken from the knife blade; and (4) on fingernail clippings taken from the decedent. S.T.R. typing further showed appellant's DNA was in the blood on the doorknob assembly, and that the sperm cell fraction from the vaginal and anal swabs was that of appellant's. Harmon testified that the frequency of these seven different pieces of evidence is one in six billion.[6]

In addition to the scientific evidence detailed above, the State offered circumstantial evidence supporting a finding of guilt, such as (1) appellant's different versions of how he received his injuries,[7] (2) the fact that the "robbery" was uncorroborated,[8] (3) the closeness in time between the alleged robbery and Burton's call, (4) whether appellant changed clothes

---

[6] It is the policy of the laboratory where Harmon works not to have statistical values greater than the world's population, which at trial was estimated at six billion persons. Therefore, the likelihood that anyone other than appellant donated the DNA analyzed by Harmon is one in 6,000,000,000. However, Harmon testified on cross-examination that the chance the samples belonged to anyone other than appellant is a much smaller number and that the actual frequency was somewhere around one in 63.3 quadrillion (63,300,000,000,000,000). Further, because appellant's DNA was found on seven separate pieces of evidence, the actual probability that the murderer was anyone other than appellant is one in 633 sextillion (633,000,000,000,000,000,000,000).

[7] Appellant told one officer his attacker was over 60 years old; he told others the attacker was younger.

[8] Not only could no one else testify that they saw the robbery, Texas City police officers dusted the phone appellant said he was using at the time he sustained his injuries and found no fingerprints belonging to appellant. Additionally, although appellant told officers he was using the phone to page his girlfriend, the pay phones had signs prominently displayed indicating they could not receive calls.

or not, (5) the conversation appellant had with Fisher about Hughes's sex life moments before the murder, and (6) appellant's fingerprint on a Dallas Cowboys mug found at the scene. In light of the direct and circumstantial evidence supporting the jury's verdict, we find the evidence legally sufficient.

In support of his argument that the evidence is factually insufficient, appellant contends (1) the results of the DNA tests do no more than place the Defendant at the crime scene, in the company of "Squeaky" Harris and "Fish" Fisher, within a half-hour or less of the crime, (2) there was no evidence of motive, (3) the only eyewitness, Burton from downstairs, told the officers that the man she saw leaving the apartment ten minutes after the murder was shorter than appellant and Burton was unable to pick appellant out of a line-up, (4) blood found outside of *Griff*'s apartment did not match appellant's, (5) there were six unidentified fingerprints lifted from the crime scene, and (6) head hair found clasped in the victim's fingers did not match appellant's hair.

Appellant asserts that "substantially stronger evidence" was found insufficient to support a jury's finding of guilt in *Johnson v. State*, 978 S.W.2d 703 (Tex. Crim. App. 1998). We disagree. In *Johnson*, the only direct evidence of the defendant's guilt was *conflicting* DNA evidence, placing defendant in a group of anywhere from eight and a half percent of the black population to approximately twenty-six percent. *Id.* at 706–07. Further, the victim, who had been kidnaped and raped, and who had spent a considerable amount of time with her attacker, could not unequivocally identify the defendant in court. *Id.* at 707.

Here, not only was the State's DNA evidence uncontroverted, it was considerably more exclusive than the DNA evidence in *Johnson*. Additionally, the inability of Burton to identify appellant is less compelling than in *Johnson* in view of the fact that she saw him (1) through a peephole (2) from a distance (3) for a few seconds.

As to the other "evidence" appellant points to, we note that while the State's expert did testify that the hair found in the victim's hand was not microscopically similar to appellant's, it was similar to *the victim*'s. Finally, while there may have been some circumstantial evidence

that did not inculpate appellant, it also was not exculpatory and, as mentioned above, there was considerable circumstantial evidence of guilt. Accordingly, we find the evidence factually sufficient and we overrule appellant's first issue.

III. Ineffective Assistance of Counsel

In his second point of error, appellant argues that he is entitled to a new trial because he received ineffective assistance of counsel at trial. He bases this claim on the fact that his lawyers did not seek a *Kelly* hearing[9] prior to Harmon testifying before the jury.

The standard under which we review a claim of ineffective assistance of counsel was established in *Strickland v. Washington*, 466 U.S. 668, 684 (1984). Under this standard, the reviewing court must first decide whether trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. If counsel's performance fell below this standard, the reviewing court must decide whether there is a "reasonable probability" the result of the trial would have been different but for counsel's deficient performance. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. A defendant is entitled to reasonably effective counsel, not perfect counsel judged by hindsight; therefore, more than isolated errors and omissions will be needed to demonstrate ineffective assistance of counsel. *Lanum v. State*, 952 S.W.2d 36, 40 (Tex. App.—San Antonio 1997, no pet.).

In any case analyzing the effectiveness of counsel, we begin with a strong presumption that counsel was competent. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999); *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). We presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *Jackson*, 877 S.W.2d at 771. The defendant has the burden of rebutting this presumption by presenting evidence illustrating why trial counsel did what he did. *Id*. The defendant cannot meet this burden if the record does not specifically focus on the reasons for the conduct of

[9] *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992).

trial counsel. *Stults v. State,* 23 S.W.3d 198, 208 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd).

When the record is silent as to counsel's reasons for his conduct, finding counsel ineffective would call for speculation by the appellate court. *Gamble v. State,* 916 S.W.2d 92, 93 (Tex. App.—Houston [1st Dist.] 1996, no pet.). An appellate court will not speculate about the reasons underlying defense counsel's decisions. For this reason, it is critical for an accused, relying on a claim of ineffective assistance of counsel, to make the necessary record in the trial court. *Thompson,* 9 S.W.3d at 814.

At the post-trial hearing, one of appellant's two trial lawyers testified. That lawyer, Jeff Kemp, testified that he and David Ward, appellant's other attorney at trial, divided their work, and it was Ward's responsibility to prepare for and to cross-examine Harmon. Appellant brought forward no evidence in support of his argument that the failure to request a *Kelly* hearing was not part of Ward's reasoned trial strategy.[10] Thus, appellant has failed to overcome the strong presumption that counsel's actions were motivated by sound trial strategy. Appellant's second point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Leslie Brock Yates
Justice

[10] There are a variety of reasons why Ward may have chosen not to seek a *Kelly* hearing. For instance, at appellant's post-trial evidentiary hearing on his motion for new trial, it was uncontroverted that Harmon met the legal threshold for testifying as a DNA expert. Therefore, Ward may have thought it more beneficial to subject Harmon to a rigorous cross-examination in front of the jury in an effort to damage her credibility than to tip his hand at a hearing outside of their presence. Indeed, Ward successfully impeached Harmon's credibility before the jury concerning the source of two DNA samples. According to one log, the samples had come from an unknown walkway and the bottom of a door, but according to another document they came from Fischer, a person appellant's lawyers attempted to paint as a crack dealer who often received sexual favors from Hughes in exchange for supplying her with drugs.

Judgment rendered and Opinion filed June 28, 2001.

Panel consists of Justices Yates, Wittig, and Frost

Do Not Publish — TEX. R. APP. P. 47.3(b).