Affirmed and Opinion filed November 18, 1999.

In The

Fourteenth Court of Appeals

NO. 14-98-00112-CR

KAREEM JABBAR WILSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 750,879

O P I N I O N

Kareem Jabbar Wilson, appellant, was convicted by a jury for murder and sentenced to life imprisonment. He presents seven points of error complaining of insufficiency of the evidence, ineffectiveness of trial counsel, and judicial error by the trial judge. We affirm.

As legal and factual insufficiency of the evidence is raised by appellant's first and second points of error, a detailed discussion of the facts is necessary.

Raquel Lanette Crouch, the murder victim, had dated appellant briefly during the summer of 1993. Following their break-up, Ms Crouch became involved in a serious relationship with a gentleman who planned to marry her and adopt her three-year old daughter. Appellant, however, wanted to continue dating her, and in 1996, told a friend that Ms Crouch was his girlfriend and that if he couldn't have her, no one would. He located her whereabouts through mutual friends, and in March of 1997, visited her at her place of employment.

On the evening of March 25, 1997, the last day she was seen alive, Ms Crouch was seen with appellant at her friend Nicole's house. Appellant went upstairs with Ms. Crouch. Another person at the house, J.P. Outley, testified that late that night he heard loud noises and saw appellant and his brother carry a body wrapped in a multicolored sheet out to appellant's car trunk. They all then drove to a wooded area, where the body was dumped and covered with debris.

The next morning, Nicole noticed that Ms Crouch's purse was still in the livingroom, but that Ms Crouch and appellant had disappeared. The purse, too, disappeared a short while later. When Nicole questioned appellant about the purse and Ms Crouch's whereabouts, appellant said he had dropped her off somewhere, but was unable to give details. He also gave Nicole conflicting stories about the purse, first saying he did not have it, then later saying he had thrown it away and should use Ms Crouch's credit cards.

During a search party with police and family weeks later, J.P. Outley lead family members to an area where Ms Crouch's badly decomposed body was found, along with remnants of burned multicolored fabric. An autopsy revealed she had died from strangulation and blunt head trauma. Nicole later identified the multicolored fabric remnants as a sheet missing from one of the bedrooms at her house.

By his first and second points of error, appellant alleges that the evidence is legally

and factually insufficient to support the murder conviction. His specific complaint is that the testimony of the State's witness, J.P. Outley, had vacillated throughout the course of the case from total recall to total amnesia regarding the events of March 25, 1997. At one point, the court had found it necessary to call a recess, place Outley under a witness bond, admonish him as to the consequences of perjury, and appoint an attorney to counsel with him. Following the recess, Outley returned to the stand and said he wanted to tell the truth. At a later point, he testified that he had no personal knowledge of that evening and had originally spoken with the police out of fear. Outley's father testified that his son had a history of mental problems, and had been committed at least once. Appellant argues that as no rational trier of fact could have believed any portion of Outley's testimony, there is insufficient evidence to support the conviction beyond a reasonable doubt.

The standard of review for a challenge to the legal sufficiency of the evidence is whether, reviewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Mason v. State*, 905 S.W.2d 570, 574 (Tex. Crim. App. 1995), *cert. denied*, 516 U.S. 1051 (1996); *Thomas v. State*, 915 S.W.2d 597, 599 (Tex. App.–Houston [14th Dist.] 1996, pet. ref'd.).

If we determine that the evidence is legally sufficient, we then consider whether the evidence is factually sufficient. To conduct a factual sufficiency review, we do not review the evidence through the prism of "in the light most favorable to the prosecution." *Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997); *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). However, it is the province of the jury to judge the credibility of the witnesses and the weight to be given their testimony and it may resolve or reconcile conflicts in the testimony, accepting or rejecting such portions thereof as it sees fit. *See Bowden v. State*, 628 S.W.2d 782, 784 (Tex. Crim. App. 1982); *Banks v. State*, 510 S.W.2d

592 (Tex. Crim. App. 1974). The jury is the sole judge of the facts. TEX. CODE CRIM. PROC. ANN. Art. 36.13; *Cain*, 958 S.W.2d at 407.

To accept appellant's invitation to re-evaluate the probative value and credibility of Outley and his testimony would be to encroach upon the fact finder's responsibility, egregiously and erroneously. *Fernandez v. State*, 805 S.W.2d 451, 455 (Tex. Crim. App. 1991). We are not to sit in judgment as a thirteenth juror reweighing the evidence or deciding whether we believe the evidence established the offense beyond a reasonable doubt. *Id*. Rather, we are to test the evidence to see if it is at least conclusive enough for a reasonable factfinder to believe based on all of the evidence that the offense was established beyond a reasonable doubt. *Id*.

While it is true that Outley's testimony was significantly contradictory, both at trial and during the police investigation, it was up to the jury to sift through these inconsistencies, and to weigh the weight and credibility of *all* the various witnesses, including Outley, and reach a verdict. Although the jury was free to accept or reject any or all of Outley's testimony, witnesses other than Outley placed appellant and Ms Crouch together at Nicole's house that evening, after which Ms Crouch was never again seen alive. Nicole herself had questioned appellant as to "what he had done with that girl," and was never given a satisfactory answer by appellant. We find the evidence, when viewed in the light most favorable to the verdict, is legally sufficient to support appellant's conviction beyond a reasonable doubt. Further, we find that when viewed without the prism of "in the light most favorable to the prosecution," the evidence is factually sufficient, supports appellant's conviction, and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Clewis*, 922 S.W.2d at 129.

Appellant's first and second points of error are overruled.

By his third and fourth points of error, appellants complains that at the punishment phase of trial, the court read to the jury the definition of the offense of indecency with a child, which was appellant's enhancement offense. This, he argues, was an improper comment on the weight of the evidence, which clearly harmed appellant inasmuch as the jury sentenced him to life imprisonment.

We disagree with appellant's argument that this was a comment on the weight of the evidence, and find that the cases he cites are inapplicable and do not support his argument. We also disagree with the State's position that the court did nothing more than take judicial notice of certain facts under TEX. R. EVID. 201(b); to the contrary, the court orally instructed the jury as to the elements of the enhancement offense, without reference to any facts whatsoever.

As additional support for his argument, appellant cites cases holding it reversible error to introduce details and facts of prior convictions and enhancements during punishment. These cases are no longer the law in Texas. Revisions to the Code of Criminal Procedure allow introduction of evidence regarding "any matter the court deems relevant to sentencing, including but not limited to the prior criminal record of the defendant." TEX. CODE CRIM. PROC. ANN. Art. 37.07 § 3(a) (Vernon 1996). *See Standerford v. State*, 928 S.W.2d 688, 692 (Texas. App.-- Fort Worth 1996, no pet.); *Yates v. State*, 917 S.W.2d 915, 921 (Tex. App.–Corpus Christi 1996, pet. ref'd).

Appellant fails to show it was error for the court to orally instruct the jury as to the legal elements of the enhancement offense. Even assuming it was error, it did not affect a substantial right. A criminal conviction should not be overturned for non-constitutional error if the appellate court, after examining the record as a whole, has a fair assurance that the error did not influence the jury, or had but a slight effect. *King v. State*, 967 S.W.2d 417, 417 (Tex. Crim. App. 1998). While Appellant contends that the harm is obvious from the

fact that the jury sentenced him to life imprisonment, our review of the record reveals ample other reasons for the jury's action. Appellant had strangled, bludgeoned and apparently sexually assaulted Ms Crouch for reasons known only to him, then hid her body in a vacant wooded area. The State presented testimony from another witness that in 1992 appellant had offered the witness a ride home from the store, but instead of taking her home, took her somewhere else and sexually assaulted her while choking her with his hands. The jury also found "true" the enhancement offense of indecency with a child. Given the record as a whole, we have a fair assurance that the oral jury instruction as to the elements of the enhancement offense did not influence the jury, or had but a slight effect.

Appellant's third and fourth points of error are overruled.

Appellant's fifth and sixth points of error allege ineffective assistance of counsel at the guilt-innocence and punishment phases of trial. As each phase has its own different standard of review, we will address them separately.

As to his guilt-innocence phase complaints, appellant alleges his trial counsel failed to inform the jury that one of the State's witnesses was currently in prison and that the State had agreed to write a letter on behalf of the witness in exchange for his trial testimony. The standard for review for evaluating claims of ineffective assistance of counsel during the guilt-innocence phase is set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). Appellant must show both that counsel's performance was so deficient that he was not functioning as acceptable counsel under the sixth amendment, and that but for counsel's error, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 687. Moreover, appellant bears the burden of proving ineffective assistance of counsel, and allegations of ineffective assistance must be firmly grounded in the record. *Mercado v. State*, 615 S.W.2d 225, 228 (Tex. Crim. App. 1981). Lastly, appellant must overcome the presumption that, under the circumstances, the challenged action might be

considered sound trial strategy. Consistent with *Strickland,* we must presume that appellant's counsel was better positioned than we are to judge the pragmatism of the case and that he "made all significant decisions in the exercise of reasonable professional judgment.". *Delrio v. State,* 840 S.W.2d 443,447 (Tex. Crim. App. 1992).

Here, there is nothing in the record to substantiate appellant's claims that the State's witness was in prison at the time or that he had agreed to testify against appellant in exchange for favorable parole board letters from the State. What does appear of record is a "bill" read into the record by appellant's counsel, complaining that he was unable to effectively cross-examine the witness because to do so might have jeopardized appellant's rights and prejudiced his defense due to circumstances surrounding the witness. This stands as evidence that trial counsel's decision not to rigorously cross-examine the witness was sound trial strategy, and no ineffectiveness of counsel is shown.

During the punishment phase of trial, the State presented testimony from a witness that appellant had abducted and sexually assaulted her while choking her with his hands. Appellant complains that his trial counsel failed to object to this testimony and failed to properly investigate the incident.

Allegations of ineffective assistance at the punishment phase of a non-capital offense are controlled by the "reasonably effective assistance standard." *Vaughn v. State,* 931 S.W.2d 564, 566 (Tex. Crim. App. 1996). Counsel's assistance must be assessed in light of the totality of the representation of the accused. *Ex Parte Cruz,* 739 S.W.2d 53, 58 (Tex. Crim. App. 1987). As stated earlier, appellant bears the burden of proving ineffective assistance of counsel, and allegations of ineffective assistance must be firmly grounded in the record. *Mercado*, 615 S.W.2d at 228. Appellant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 687. *Delrio*, 840 S.W.2d at 447.

Whether the court would have sustained or overruled counsel's objections to the testimony is a matter of speculation, which we will not do. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1984). Contrary to appellant's position, our review of trial counsel's cross-examination of the witness shows he was familiar with the incident and had some degree of preparation, and had the witness admit to the jury that appellant had been no-billed following her presentation to the grand jury. There is nothing in the record to substantiate appellant's claims, and appellant's claims must be rejected. *See Laurant v. State*, 926 S.W.2d 782, 783 (Tex. App. – Houston [1st Dist.] 1996, pet. ref'd).

Appellant's fifth and sixth points of error are overruled.

In his seventh and final point of error, appellant also argues that the evidence of this unadjudicated extraneous offense is legally insufficient to prove the offense beyond a reasonable doubt, due to the fact that the only evidence of the offense was the complaining witness. We disagree. The testimony of a single witness can be sufficient to prove an offense beyond a reasonable doubt. *Aguilar v. State*, 468 S.W.2d 75, 77 (Tex. Crim. App. 1971). Applying the "legal sufficiency" standard of review, we have reviewed all of the evidence in the light most favorable to the verdict, and find that a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Fernandez*, 805 S.W.2d at 455.

Appellant's seventh point of error is overruled.

While it was not raised as a point of error, Appellant urged during oral argument that the trial court erred in placing Outley under a witness bond, admonishing him as to perjury and appointing an attorney to counsel with him. We have reviewed the record and note that these actions were taken outside the presence of the jury. We find no error by the trial court, and, even assuming error, find it was harmless.

The judgment is affirmed.

/s/ Bill Cannon
Justice

Judgment rendered and Opinion filed November 18, 1999.

Panel consists of Justices Sears, Cannon, and Draughn.[*]

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

[*] Senior Justices Ross A. Sears, Bill Cannon, and Joe L. Draughn sitting by assignment.