

NO. 12-16-00139-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

***ROY EDWARD SMITH,
APPELLANT***

§ ***APPEAL FROM THE 114TH***

V.

§ ***JUDICIAL DISTRICT COURT***

***THE STATE OF TEXAS,
APPELLEE***

§ ***SMITH COUNTY, TEXAS***

MEMORANDUM OPINION

Appellant, Roy Edward Smith, appeals from his conviction for aggravated assault. In one issue, Appellant contends the evidence is insufficient to support his conviction. We affirm.

BACKGROUND

On the morning of June 29, 2012, Victoria Massey was loading items in her car located outside the Moore Grocery Lofts Apartments in Tyler. As she headed from her apartment to the car, a young man she did not know approached her in the stairwell. She said “excuse me” as she passed him. Without a word, the young man attacked Massey with a chunk of concrete tied in a sock. Her assailant then pushed her down and stabbed her repeatedly. Her assailant fled, leaving behind the sock and concrete that he had used in the assault.

Massey managed to reach her apartment where her daughter called 9-1-1. She was taken to East Texas Medical Center. Massey suffered multiple severe lacerations causing a life threatening injuries and significant loss of blood.

Massey was unable to provide much information about her assailant other than that he was a nice looking, clean cut black male, between five feet seven inches and six feet in height. While in the hospital, she collaborated with a forensic artist in developing a composite sketch of her assailant. In photographic lineups, she identified two men who she thought might have been

her assailant, but none proved to be responsible for the attack. The investigating officer sent several items, including the sock and piece of concrete, to the laboratory for DNA testing.

Unable to identify a suspect, the police suspended the investigation. In 2014, they resumed the investigation after forensic testing identified Appellant's DNA in a stain on the sock's knot. When contacted by Detective Craig Shine with the Tyler Police Department, Appellant denied having been near the Moore Grocery Lofts in 2012, and he claimed that he had not lived at the Salvation Army headquarters, which was located across the street from the Lofts, since 2010. He denied any knowledge of the assault.

However, Detective Shine's subsequent investigation showed that Appellant had lived at the Salvation Army in May of 2012 after his release from the Rusk State Hospital. Appellant was released from Rusk in April of 2012 to Mr. Kendric Milton, who told Detective Shine that Appellant telephoned him about the attack shortly after it occurred. According to Milton, Appellant not only knew about the attack on Massey, he claimed to have told the police that he saw someone running from the vicinity.

Forensic scientists conducted four analyses of the DNA sample developed from the knot on the sock used in the attack. In the first analysis, the laboratory did not have a sample from Appellant for comparison. Therefore, Appellant was neither included nor excluded as a contributor. In its second analysis, the lab used a buccal swab from Appellant for comparison. Forensic scientists successfully identified Appellant's DNA on the sock.

On August 10, 2015, the DNA lab instituted protocols that sometimes resulted in ninety percent of the available data going unanalyzed. Appellant was excluded as a contributor in the third report, because data that would have revealed Appellant's DNA fell in the dropout range.

On March 18, 2016, the laboratory adopted new protocols as a result of newly available STRmix software. The new software can reliably consider all the available data. In the fourth and final analysis, forensic scientists using the new software determined that Appellant's DNA was on the sock. The likelihood that the sock contained DNA from Massey, Appellant, and two unknown contributors was 151 octillion times more likely than the possibility that it could have come from four unrelated unknown contributors.

The jury convicted Appellant of aggravated assault and assessed his punishment at confinement for life in the Texas Department of Criminal Justice – Institutional Division and a \$10,000 fine. This appeal followed.

SUFFICIENCY OF THE EVIDENCE

In his first issue, Appellant challenges the legal sufficiency of the evidence on grounds that the State failed to prove that he is the person who committed the offense.

Standard of Review and Applicable Law

The standard for reviewing a challenge to the legal sufficiency of the evidence is whether, viewing 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. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979); *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). We give deference to the jury's responsibility to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). The standard of review remains the same for both circumstantial and direct evidence cases. *Id.* "Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt." *Id.*

Section 22.02 of the Texas Penal Code provides, in relevant part, that a person commits an offense if he knowingly or intentionally causes serious bodily injury to another. TEX. PENAL CODE ANN. § 22.02(a)(1) (West 2011). A defendant's false statements when asked about a crime can be evidence indicating a consciousness of guilt and are admissible to prove the commission of the offense. See *King v. State*, 29 S.W.3d 556, 565 (Tex. Crim. App. 2000). Moreover, inconsistencies or conflicts between witnesses' descriptions of a suspect do not render identity evidence insufficient to support a conviction. *Bowden v. State*, 628 S.W.2d 782, 784 (Tex. Crim. App. 1982); *Jasso v. State*, 112 S.W.3d 805, 812 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd). An appellate court affords almost complete deference to a jury's resolution of conflicts in the evidence or alternate theories of events. *Lancon v. State*, 253 S.W.3d 699, 704-05 (Tex. Crim. App. 2008).

Discussion

Appellant argues that although the State proved a crime was committed, the State failed to prove that Appellant committed it. He argues that Appellant was never identified by anyone as the person who attacked Ms. Massey. Massey in fact identified several other people from photo lineups that she thought might be her assailant. The descriptions given by witnesses who saw the attacker fleeing, Appellant contends, varied too greatly to be reliable. Appellant also

insists the DNA evidence is not entitled to the weight usually given this type of evidence because of the variation between the results in the four analyses of the sock sample.

The third analysis, made before the adoption of the new STRmix software, excluded Appellant as a possible contributor of DNA found on the sock. However, this analysis excluded a large portion of the available data by design. The fourth analysis, on the other hand, was conducted using the new STRmix software and according to the new protocols in place. Because the resolution of conflicts in the evidence is the exclusive province of the factfinder, the jury was entitled to determine which evidence to credit and, in doing so, could reasonably find the results of the fourth analysis more convincing than the results of the third analysis. See *Lancon*, 253 S.W.3d at 704-05; see also *Hooper*, 214 S.W.3d at 13.

Moreover, the State established through the testimony of Milton and Detective Shine that Appellant lied repeatedly about his knowledge of and connection to the attack. For instance, Appellant claimed that the last time he stayed at the Salvation Army was in 2010. However, Detective Shine learned that Appellant had lived there for more than a week the month before Massey was attacked. The jury could reasonably interpret this falsehood as an effort by Appellant to conceal his recent proximity to the Moore Grocery Lofts and his familiarity with the area. See *King*, 29 S.W.3d at 565.

Appellant also told Detective Shine that he had never heard of the assault on Massey. But according to Milton, Appellant called him and told him that he was near the apartment complex at the time of the attack, that he saw the suspect running away, and that he reported what he saw to the police. The State points out that the crime was well publicized in news reports and in appeals to the public for information. There was no reason for an innocent person to feign ignorance of it. Thus, the jury could have justifiably interpreted Appellant's lies as indicating a consciousness of his own guilt. See *id.*

Additionally, witnesses gave contradictory descriptions of the person they saw fleeing with a knife from the Moore Grocery Lofts after Massey was attacked. However, “[r]econciliation of conflicts and contradictions in the evidence is within the province of the jury, and such conflicts will not call for reversal if there is enough credible testimony to support the conviction.” *Bowden*, 628 S.W.2d at 784. According to the record, Appellant closely resembles the composite sketch prepared within one week of the attack while Massey was still in the hospital recovering from her injuries and while her memory was fresh. Massey was evidently

able to describe her assailant in great detail to the forensic artist. The inconsistencies as to Massey's assailant's height and clothing were all before the jury, who were the judges of the facts, the credibility of the witnesses, and the weight to be given their testimony. *See id.*; *see also Jasso*, 112 S.W.3d at 812.

Accordingly, the evidence demonstrates that Appellant left his DNA on one of the weapons used to assault Massey. His proximity to and familiarity with the area of the attack demonstrates that he had the opportunity to commit the crime. Appellant gave conflicting stories about his awareness of the attack, indicating consciousness of his guilt. Finally, Appellant closely resembled the composite sketch created from the description Massey provided within one week of the assault. Viewing this evidence in the light most favorable to the verdict, we conclude that a rational jury could have found, beyond a reasonable doubt, that Appellant committed aggravated assault. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *see also Brooks*, 323 S.W.3d at 912. Because the evidence is legally sufficient to support Appellant's conviction, we overrule his sole issue.

DISPOSITION

Having overruled Appellant's sole issue, we *affirm* the trial court's judgment.

BILL BASS
Justice

Opinion delivered April 28, 2017.

Panel consisted of Worthen, C.J., Hoyle, J., and Bass, Retired J., Twelfth Court of Appeals, sitting by assignment.

(DO NOT PUBLISH)



COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

APRIL 28, 2017

NO. 12-16-00139-CR

ROY EDWARD SMITH,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 114th District Court
of Smith County, Texas (Tr.Ct.No. 114-0835-15)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Bill Bass, Justice.

Panel consisted of Worthen, C.J., Hoyle, J., and Bass, Retired J., Twelfth Court of Appeals, sitting by assignment.