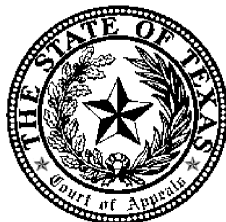
Affirmed and Opinion filed February 21, 2002.



In The

Fourteenth Court of Appeals

NO. 14-00-01489-CR

DERRICK MARK GAILES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 711445

O P I N I O N

This appeal follows a retrial on the issue of punishment for appellant's 1997 conviction for aggravated sexual assault of a child.[1] Appellant challenges the life sentence assessed by the second jury, arguing that by not allowing evidence regarding the relative strength of the DNA findings at punishment, the trial court abused its discretion. We affirm.

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[1] The Thirteenth Court of Appeals ordered a new trial on punishment in *Gailes v. State*, No. 13-97-393-CR (Tex. App.—Corpus Christi July 8, 1999, pet. ref'd) (not designated for publication), 1999 Tex. App. LEXIS 5028.

On retrial of punishment, the State's expert testified that DNA samples found on vaginal and rectal swabs taken from the ten-year-old complainant were consistent with appellant's DNA. On cross-examination, the expert stated appellant's DNA pattern occurs in one out of 97,000 people in his racial group. But when appellant attempted to elicit testimony that the same DNA technique had produced results in other cases narrowing the probability to one in several million, the court sustained the State's objection to relevancy. The appellant's bill of exceptions included the expert's testimony about results obtained in other DNA matches, but he also calculated that the results in this case (one out of 97,000 people in appellant's racial group) excluded 99.99% of the population. On appeal, the appellant argues evidence of the relative strength of the DNA evidence was admissible under Rule of Evidence 107 and would have been "helpful to the jury" in assessing punishment.[2] *Rogers v. State*, 991 S.W.2d 263, 265 (Tex. Crim. App. 1999).

The Code of Criminal Procedure provides that when an appellate court awards a new trial on punishment, either side may introduce evidence on matters "relevant" to sentencing. TEX. CODE CRIM. PROC. ANN. art. 37.07 § 3(a)(1), art. 44.29 (b) (Vernon Supp. 2002). But once a jury finds a defendant guilty, exonerating evidence is not relevant to an assessment of punishment. *Williamson v. State*, 990 S.W.2d 404, 406 (Tex. App.—Dallas 1999, no pet.) (concluding exonerating evidence inadmissible during retrial of punishment); *Bisby v. State*, 907 S.W.2d 949, 960 (Tex. App.—Fort Worth 1995, pet. ref'd). Here, the excluded testimony relates to the relative strength of the DNA evidence. This evidence bears solely on the identification of appellant as the perpetrator, a fact not at issue in the penalty phase.

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[2] The State argues appellant's complaint on appeal is different from that raised at trial. Appellant argued: "That the inability to cross examine the witnesses when the State is presenting evidence to a jury and *opening the door* to cross-examination based on the original trial in a case where I'm trying the– not the guilt and innocence but the punishment phase . . . [T]he State is bringing guilt testimony again before this jury, [and the exclusion of this evidence] limits my ability . . . to establish whether or not there is residual doubt that this jury can take into its consideration as to what would be a fair punishment." Although counsel never recited Rule 107, the content of his trial objection is the same. *See Fuentes v. State*, 991 S.W.2d 267, 279 (Tex. Crim. App. 1999) (recognizing the overlap between the rule of optional completeness and "opening the door").

Nor was the testimony relevant to the policies of deterrence, rehabilitation or the prevention of recidivism. *See* TEX. PEN. CODE ANN. § 1.02 (1) (Vernon 1994); *Rogers*, 991 S.W.2d at 265-66. Consequently, the testimony could not have been helpful to the jury in assessing punishment.[3] *See id.*

Appellant argues even if the evidence was irrelevant, it was admissible under Rule 107. Because appellant does not point to any act, declaration, conversation, writing, or recorded statement offered by the State that required explanation, Rule 107 is inapplicable. *See* TEX. R. EVID. 107. Nor do we see how the offered testimony was needed to allow the jury to fully understand the State's evidence (much less how it helped appellant) because the results excluded such a high percentage of the population. Consequently, the trial court acted well within its discretion in excluding the evidence. *See Green v. State*, 934 S.W.2d 92, 102 (Tex. Crim. App. 1996) (refusing to overrule evidentiary ruling "within the 'zone of reasonable disagreement'").

Having found the evidence was properly excluded, we overrule appellant's sole point of error and affirm the judgment.

/s/ Scott Brister
Chief Justice

Judgment rendered and Opinion filed February 21, 2002.

Panel consists of Chief Justice Brister and Justices Anderson and Frost.

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

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[3] We reject appellant's argument that the jury was entitled to consider this evidence because "[c]ommon experience teaches that the strength of the State's evidence against a defendant is a factor which a jury uses often in determining the appropriate sentence." *See Williamson*, 990 S.W.2d at 408 (holding appellant has no right to seek a compromise verdict).