Affirmed and Opinion filed May 3, 2001.

In The

Fourteenth Court of Appeals

———————————

NO. 14-98-01368-CR

———————————

LAWRENCE WAYNE ATKINS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 23rd District Court
Brazoria County, Texas
Trial Court Cause No. 34,410

O P I N I O N

Lawrence Wayne Atkins appeals his jury conviction for aggravated sexual assault and prohibited sexual conduct. The jury assessed his punishment at life imprisonment, enhanced by two prior felony convictions. In three issues, appellant contends: (1) the trial court erred in admitting his confession into evidence; (2) the trial court erred in failing to suppress specimens of appellant's blood, hair, and pubic hair obtained without his voluntary consent; and (3) the evidence is legally insufficient to support his conviction. We affirm.

FACTS

On December 26, 1997, at about 2:00 a.m., appellant arrived in an intoxicated state at his mother's home. D.C., appellant's 67-year-old mother, went to the door, and appellant asked her to pay the cab driver because he had no money. D.C. talked to the cab driver and told him she had no money, and the cab driver told her he would keep appellant's billfold until he was paid. Appellant followed D.C. into her house, and D.C. fixed him something to eat. Appellant drank some milk, then went to the bathroom, took off his clothes, went to the living room, and sat on the couch by D.C. Appellant then told D.C., "that it was going to happen, and I guess I'm going to prison for the rest of my life." Appellant then sexually assaulted D.C. twice. After the second assault on D.C., appellant passed out. Appellant was later awakened and arrested by the police.

While appellant was still unconscious, D.C. called her neighbor, Pauline Hall, at 9:00 a.m. D.C. told Ms. Hall that Larry had raped her, and D.C. asked her to call 911. Everett Smith, the EMS ambulance driver, testified that he arrived at D.C.'s house at 9:23 a.m. D.C. told Smith that appellant had raped her twice.

D.C. was taken to the hospital for treatment and examination. Irene McLaughlin, a registered nurse, testified that a doctor conducted D.C.'s rape examination and secured evidence of semen, blood, and pubic hair for DNA testing. Ms. McLaughlin also examined D.C., and observed bruising on her inner thighs and back. D.C. also complained to Ms. McLaughlin that her lower abdomen was sore. D.C. also gave samples of her blood and hair for DNA and comparison tests.

Edith Emerick, a serology DNA analyst for the Texas Department of Public Safety, testified that she tested some stains on a blanket sent to her by the sheriff's department that was recovered from D.C.'s home. She stated she found semen on the blanket which was consistent with appellant's DNA. She also tested the swabs sent to her in the hospital rape kit, and she testified appellant "could not be excluded as a contributor of the DNA on those items." She also testified that a blood stain on the blanket was consistent with D.C.'s DNA.

THE CONFESSION & THE CONSENT FORM

In his first and second issues, appellant contends his confession to the crimes and subsequent consent to give blood were not voluntary because the officer did not give him adequate warnings of his rights and that he was coerced into signing them. Appellant filed his motion to suppress, and the trial court held a hearing out of the presence of the jury before the trial commenced.

At the hearing on appellant's motion to suppress, Officer Papa testified that he read appellant his rights on December 26, 1997, when he first met appellant at the scene, and after appellant had been detained by other officers. Papa stated he read appellant his rights in the back of the police car. Because appellant was "highly intoxicated," Papa did not attempt to take his statement. On December 29, 1997, Papa met with appellant in the jail interview room. He did not read appellant his rights before this oral interview. After talking to appellant about the case, appellant told Papa he would sign a confession. Papa then took appellant to his office, and he read appellant his rights before taking his confession. Appellant then told Papa what happened, and Papa typed appellant's statement on a special confession form used by his department. Appellant then initialed each of the rights warnings printed above the written confession portion, signed a waiver of the rights set out in those warnings, and signed the confession. The confession was notarized by Amye Cone, Notary Public, at 12:55 p.m., December 29, 1997.

On January 7, 1998, Papa stated that he and Officer Scott Brown again met with appellant in the jail interview room to ask him for his consent to obtain samples of blood, head hair, and pubic hair. The consent form had a printed warning which provided that the signer of the form had been "duly warned of my right to refuse under my 4th amendment right protecting me against unreasonable search and seizure." After the warning portion, the form continued with a printed statement that the signer did "freely and voluntarily give" his permission and consent to an agent of the sheriff to take the samples. Papa stated that they "read him the top of the form," and asked him if he wanted to give his specimen. He stated he would give the samples, signed the statement, and the two officers witnessed appellant's signature.

Officer Scott Brown testified that appellant did not request an attorney prior to signing the consent form, and that appellant consented to signing the form without any force or other forms of coercion on his or Papa's part.

At the suppression hearing, appellant testified that Papa talked to him at the jail about four days after he was arrested. He stated that he and Papa smoked cigarettes together, and Papa gave him a pair of glasses. Appellant testified that Papa told him that he talked to the district attorney, Dale Summa, about getting his conviction for assault against D.C. in 1996 "cleaned off" his record. Papa also told appellant he would get appellant a job. Appellant further stated Papa first typed the confession, and then had appellant sign it. He stated that neither Brown nor Papa told appellant he could have an attorney before he signed the confession. On cross-examination by the prosecutor, appellant further stated he did not read the statement before he signed it, and that Papa told him to sign it and initial the rights warnings.

As to the consent to give the blood and hair, appellant testified that Officer Brown indicated to appellant that he did not "feel [appellant] did it." According to appellant, Brown also said he would like to get "that Class A assault charge taken off [appellant's] record." Appellant also said that neither Papa nor Brown told him he should consult with an attorney before signing the consent form. Appellant said he signed the consent form.

The trial court overruled appellant's motion to suppress the confession and the consent form.

Standard of Review

A trial court's ruling on a motion to suppress lies within the sound discretion of that court. At the hearing on the motion, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Villarreal v. State,* 935 S.W.2d 134, 138 (Tex.Crim.App.1996). We must view the evidence and all reasonable inferences therefrom in the light most favorable to the trial court's ruling. *Id*. We should afford almost total deference to a trial court's determination of the historical facts that the record supports, especially when

the trial court's fact findings are based on an evaluation of credibility and demeanor. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex.Crim.App.1997). We must sustain the trial court's ruling if it is reasonably supported by the record and is correct on any theory of law applicable to the case. *See also Blanks v. State*, 968 S.W.2d 414, 419 (Tex.App.-Texarkana 1998, pet. ref'd)

Discussion

According to his testimony, appellant did not: (1) exercise his right to remain silent during the oral interview with Papa; (2) terminate the interview with Papa; or (3) tell Papa he wanted an attorney before talking about his case anymore. At the hearing, he did not dispute his understanding of the first rights warning given to him when he was arrested by Papa.

Article 38.22, section 2(a), Texas Code of Criminal Procedure, provides, in pertinent part:

> Sec. 2. No written statement made by an accused as a result of custodial interrogation is admissible as evidence against him in any criminal proceeding unless it is shown on the face of the statement that:
>
> (a) the accused, prior to making the statement, either received from a magistrate the warning provided in Article 15.17 of this code or received from the person to whom the statement is made a warning . . . .

TEX. CODE CRIM. PROC. ANN. art. 38.22, § 2(a) (Vernon 1979 & Supp. 2000)

In this case, Papa read appellant his rights warning when he first arrested appellant at the scene. Papa read the warnings again before he took appellant's written statement. Papa did not read appellant his rights before interviewing him. The court of criminal appeals has held that the language in Article 38.22, § 2(a), requiring warnings to be given by the person "to whom the statement is made," does not apply to oral statements but applies only to written statements. *Dowthitt v. State*, 931 S.W.2d 244, 258-259 (Tex.Crim.App. 1996). As was the case in *Dowthitt*, appellant here contends that Papa should have given him his rights warnings before conducting the oral interview leading to the written statement. *Id.* Because a written statement is not "obtained" (because it is not admissible) until it is signed, giving the required

warnings before the accused signs the statement meets the statutory requirements. *Dowthitt*, 931 S.W.2d at 259 (citing *Allridge v. State*, 762 S.W.2d 146, 157-158 (Tex.Crim.App.1988), *cert. denied*, 489 U.S. 1040, 109 S.Ct. 1176, 103 L.Ed.2d 238 (1989)). Therefore, appellant, "prior to making the statement," received the required warnings from Papa, "the person to whom the statement" was made. *Id.*

Because the resolution of the "application of law to fact questions" turns on an evaluation of credibility and demeanor of the witnesses in this case, we will defer to the trial court's rulings. *Guzman*, 955 S.W.2d at 89. We must sustain the trial court's ruling if it is reasonably supported by the record and is correct on any theory of law applicable to the case. *Villareal*, 935 S.W.2d at 138. We find the warnings given in the present case were both constitutionally and statutorily adequate. The conflicts in the testimony between the officers and appellant were decided by the trial court in favor of the officers. The trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Villarreal*, 935 S.W.2d at 138. We hold the trial court did not abuse its discretion in admitting appellant's confession into evidence. We overrule appellant's contention in his first issue that his rights warnings were inadequate.

In issue two, appellant asserts that his consent to taking specimens of blood and hair was not voluntary. Considering the totality of the circumstances, the contact initiated by Papa in obtaining the confession and obtaining the consent to take blood with no other warnings given, appellant argues that he was not "aware of and appreciated the implications of signing the consent" to give the blood and hair.

The taking of a blood specimen is considered a search and seizure within the meaning of the Fourth Amendment to the United States Constitution. *Schmerber v. California*, 384 U.S. 757, 769, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966); *Aliff v. State*, 627 S.W.2d 166, 168 (Tex.Crim.App.1982). Both federal and state constitutions prohibit unreasonable searches and seizures. *Juarez v. State*, 758 S.W.2d 772, 775 (Tex.Crim.App.1988). Consent for a search is an exception to the requirement for a warrant and probable cause. *Schneckloth v.*

Bustamonte, 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *Combest v. State*, 981 S.W.2d 958, 960-961 (Tex.App.-Austin 1998, pet. ref'd).

Whether consent to a search is in fact voluntary and not the product of duress and coercion, express or implied, is a question of fact to be determined from the totality of the circumstances. *Combest*, 981 S.W.2d at 960-961. The Supreme Court has held that the prosecution's burden of proof in a suppression hearing to determine voluntariness of consent to search is by a preponderance of the evidence. *United States v. Matlock*, 415 U.S. 164, 177, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). However, the standard of proof which Texas courts have applied in determining whether consent is voluntary is proof by clear and convincing evidence. *See, e.g., Allridge v. State*, 850 S.W.2d 471, 493 (Tex.Crim.App.1991); *Combest*, 981 S.W.2d at 960-961.

Appellant gave written consent to the search. Therefore, the pivotal issue before the trial court at the suppression hearing was whether appellant's written consent to give a specimen of his blood and hair was voluntary.

The trial court heard the testimony of the officers that they informed appellant that he did not have to consent to giving the specimens, and that they read the printed part of the form to appellant advising him of his right to refuse consent. The officers testified that appellant freely and voluntarily signed the consent form. Appellant suggested to the trial court that Brown "felt that [appellant] didn't do it," and talked about clearing his record of the assault charge. However, appellant did not testify that he was coerced into signing the form, or that he signed the form on the strength of Brown's alleged promises.

Because the resolution of the "application of law to fact questions" turns on an evaluation of credibility and demeanor of the witnesses in this case, we will defer to the trial court's rulings. *Guzman*, 955 S.W.2d at 89. The trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Villarreal*, 935 S.W.2d at 138. In this case, the trial court decided in favor of the officers. We hold the trial court did not abuse its discretion in finding the appellant freely and voluntarily gave his consent to the taking

of specimens of his blood and hair. We overrule appellant's contentions in issue two that his consent was not freely and voluntarily given.

SUFFICIENCY OF THE EVIDENCE

In his third issue, appellant contends that absent the confession and the blood and hair specimens, the only evidence the State has was the unsworn statement of the victim, D.C. Because D.C. repudiated her statement in court, appellant asserts that the evidence is legally insufficient to sustain his conviction.

Appellant's argument assumes that his confession and consent to take blood and hair were invalid. We have found that they are valid and were properly admitted into evidence. Furthermore, appellant cites *Chambers v. State*, 755 S.W.2d 907 (Tex.App.–Houston[1st Dist] 1988] as authority for his proposition that when the *only* evidence the State had was an out-of-court hearsay statement by the victim, the evidence is insufficient. *Chambers* was reversed by the court of criminal appeals and remanded to the First Court of Appeals. *See Chambers v. State*, 805 S.W.2d 459 (Tex.Crim.App.1992). The First Court affirmed the judgment of conviction on remand in an unpublished opinion. *See Chambers v. State*, No. 01-86-0520-CR (Tex.App.–Houston [1st Dist.] January 16, 1992, no pet.)(not designated for publication), 1992 WL 5573. *Chambers* is not authority for appellant's contention.

In reviewing the legal sufficiency of the evidence, we consider all the evidence, both State and defense, in the light most favorable to the verdict. *Houston v. State*, 663 S.W.2d 455, 456 (Tex.Crim.App.1984); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex.Crim.App.1993). In reviewing the sufficiency of the evidence in the light most favorable to the verdict or judgment, the appellate court is to determine whether 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, 318-19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Ransom v. State*, 789 S.W.2d 572, 577 (Tex.Crim.App.1989), cert. denied, > 497 U.S. 1010, 110 S.Ct. 3255, 111 L.Ed.2d 765 (1990). This standard is applied to both direct and circumstantial evidence cases. *Chambers v. State*, 711 S.W.2d 240, 245 (Tex.Crim.App.1986). The jury is the exclusive

judge of the facts, credibility of the witnesses, and the weight to be given to the evidence. *Chambers v. State*, 805 S.W.2d 459, 462 (Tex.Crim.App.1991). In conducting this review, the appellate court is not to re-evaluate the weight and credibility of the evidence, but acts only to ensure the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex.Crim.App.1993); *Moreno v. State*, 755 S.W.2d 866, 867 (Tex.Crim.App.1988). In making this determination, the jury can infer knowledge and intent from the acts, words, and conduct of the accused. *Dues v. State*, 634 S.W.2d 304, 305 (Tex.Crim.App.1982).

Appellant does not claim the evidence is factually insufficient, and we will only consider his claim that the evidence is legally insufficient. We have reviewed all the evidence in this case as set forth above in this opinion. We find that a rational trier of fact could find appellant committed the offenses of aggravated sexual assault and prohibited sexual conduct. We hold the evidence is legally sufficient to sustain appellant's conviction. We overrule appellant's contentions in issue three contending the evidence is legally insufficient to sustain his conviction.

We affirm the judgment of the trial court.

/s/ Bill Cannon
Justice

Judgment rendered and Opinion filed May 3, 2001.
Panel consists of Justices Sears, Cannon, and Andell.*
Do Not Publish — TEX. R. APP. P. 47.3(b).

---

*Senior Justices Ross A. Sears and Bill Cannon, and Former Justice Eric Andell sitting by assignment.