Affirmed and Opinion filed August 9, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-01136-CR

RICHARD ANTHONY SALAZAR, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 209th District Court
Harris County, Texas
Trial Court Cause No. 774,926

O P I N I O N

A jury convicted appellant, Richard Anthony Salazar, Jr., of aggravated sexual assault and sentenced him to serve 40 years in the Texas Department of Corrections, Institutional Division. In two points of error, he argues that his conviction must be reversed because (1) the trial court erred in refusing to grant a mistrial when an expert for the State offered a legal conclusion; and (2) the trial court abused its discretion in not instructing a verdict of acquittal where the evidence at trial varied fatally from the indictment. We affirm.

I. Factual Background

Early on the morning of February 7, 1998, after she had taken her husband to work, Esperanza Quinonez Alvarado was attacked in the parking lot of the apartment complex where she lived. According to her testimony, as she tried to exit her van, appellant—whom she knew as a friend of her husband's—put a knife to her throat, ordered her back into the vehicle, and drove her to another apartment complex. Once there, he forced her into the back of the van, where he raped her. As he removed his penis from her vagina, he noticed blood and asked her about it. She explained that she was menstruating. Appellant then inserted his knife into her vagina and asked if the blood was "fresh." Appellant then demanded money, but she said her money was at home. Appellant allowed her to call her daughter, who met him with $50.00. Appellant then pushed her out of the van and drove off.

A pelvic examination revealed a recent puncture wound near the cervix consistent with a knife injury. Inside the van, which police later recovered, was a steak knife, and the victim testified that it was the same knife used by appellant. The State also offered a DNA expert, who testified about the statistical likelihood anyone other than appellant was the donor of the DNA found on swabs taken from the victim's vagina and her sanitary napkin. Appellant, who lived with his parents in the same complex as the victim, testified that he left his parents' house that morning between 5:30 and 6:00 to go to some friends' house to "party," but he could not remember his friends' names.

II. Motion for Mistrial

In his first point of error, appellant complains that the trial court erred by failing to grant a mistrial when the State's DNA expert testified that the DNA evidence showed "beyond any reasonable doubt" that appellant was the source of the DNA found on swabs taken from the victim immediately after the assault.

There is an appellate presumption that a judge's instruction to the jury to disregard will be obeyed. *Gardner v. State*, 730 S.W.2d 675, 696 (Tex. Crim. App. 1987). If they do,

the error has been cured. *Id*. A mistrial, therefore, should be granted only if the improper statement was "clearly calculated to inflame the minds of the jury and is of such a character as to suggest the impossibility of withdrawing the impression produced on their minds." *Id.* Each case has its own characteristics, and this Court will look at the entire record with the attendant circumstances, the nature of the evidence sought, and its possible relationship to other testimony in order to determine the probability or possibility of injury. *Guzmon v. State*, 697 S.W.2d 404, 408 (Tex. Crim. App. 1985) (citing *Sensabaugh v. State*, 426 S.W.2d 224, 227 (Tex. Crim. App. 1968)).

The State's expert, Dr. Joseph Matthew of the Harris County Medical Examiner's Office, testified that he performed several different types of DNA tests in connection with this case. Dr. Matthew testified that he tested the vaginal swabs for the presence of appellant's DNA using three different DNA tests. The results of two of these tests were "inconclusive" because appellant's DNA was not found in enough of the samples, although both of the tests showed the presence of appellant's DNA on at least one of the samples. The third test he performed was of a sanitary napkin the victim was wearing at the time of the rape. The following testimony took place in connection with the testing of this evidence.

> THE STATE: Okay. So you did the PCR on the sanitary napkin. What were your findings on those tests?
>
> THE WITNESS: The DNA pattern of the sanitary napkin indicated that in addition to the DNA pattern of the complainant, it contained DNA pattern of a second individual, the suspect because the lesser cannot be excluded as a source of the DNA, detector on the sanitary napkin.
>
> THE STATE: Could you tell the members of the jury what that means?
>
> THE WITNESS: It means there was a pattern of DNA on the sanitary napkin which was consistent with that of the suspect.

> THE STATE: And this test, was it or was it not inconclusive as the first test [sic] was?
>
> THE WITNESS: This was conclusive, unlike the other one.
>
> THE STATE: And by conclusive, what do you mean?
>
> THE WITNESS: Beyond any reasonable doubt.
>
> THE DEFENSE: Excuse me, Judge. I would object to that. That's a decision that the jury will make. It's invading the province of the jury, beyond a reasonable doubt.
>
> THE COURT: That will be sustained.
>
> THE DEFENSE: And I'd ask the jury be instructed to disregard the last statement by the doctor.
>
> THE COURT: That is not a medical term. That is a term to be used in legal [sic]. For that reason, Ladies and Gentlemen, the last proof by the doctor will not be considered by you at all, that phrase, beyond a reasonable doubt. That's for you to consider and you, alone.

The trial court, however, overruled appellant's motion for mistrial. We note initially that the State seems to concede that Dr. Matthew's testimony was improper,[1] although it argues that the trial court's instruction cured the error. We agree. This testimony fits squarely within the rule established in *Gardner*. Dr. Matthew previously testified that one of the DNA tests he performed, known as RFLP, showed only one in four probes had a band of DNA "consistent" with appellant's. Asked by the State to define consistent, Dr. Matthew testified "almost identical." Nevertheless, Dr. Matthew further testified that he was not able to use RFLP because a suspect's DNA must be in at least three of four probes. Accordingly, Dr. Matthew did not include the results of RFLP in the calculations about which he subsequently testified. Dr. Matthew also testified about another test, known as PCR, which was also "inconclusive," because "out of seven different items, six of them there was nothing definitely [sic] about it."

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[1] *See, e.g., Hopkins v. State*, 480 S.W.2d 212, 219 (Tex. Crim. App. 1972) (holding that expert may not state a legal conclusion, even if he may testify on an ultimate issue of fact).

Even assuming the testimony was improper, as we do here, we hold that this testimony was not of the sort designed to "inflame the minds of the jury," as condemned by *Gardner*, but rather was intended to explain the difference between the results of this test and the results from the other tests. Therefore, the trial court's prompt and unequivocal instruction to the jury that they disregard the testimony—because it touched upon a matter only they could consider—was sufficient to cure any error. *Guidry v. State*, 9 S.W.3d 133, 154 (Tex. Crim. App. 2000); *see also Branch v. State*, 932 S.W.2d 577, 583–84 (Tex. App.—Tyler 1995, no pet.) (holding officer's testimony that he would not have videotaped DWI suspect's answers to questions had the defendant submitted to a breath test because "I know he would have failed it" was cured by instruction); *Anguiano v. State*, 774 S.W.2d 344, 346–47 (Tex. App.—Houston [14th Dist.] 1989, no pet.) (holding officer's testimony that defendants were agreeing to have sex in exchange for money in case charging defendants with prostitution, even if improper, was cured by court's instruction); *Agbogun v. State*, 756 S.W.2d 1, 4–5 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd) (finding error, if any, in allowing State's expert witness to testify as to "pharmacy law" in case of mislabeled prescriptions was cured by instruction to disregard).

As we noted in *Anguiano*, the witness was not asked whether appellant was guilty of the crime, nor did Dr. Matthew's response indicate as such. *See* 774 S.W.2d at 346–47. Rather, at worst, Dr. Matthew's testimony identified appellant. In *Anguiano*, we noted that the jury heard the officer's testimony of his dialogue with the defendant about how much she charged for certain sexual services, including a suggestion that she and the officer go to a nearby motel. *Id.* at 346. And "there was other testimony properly in evidence upon which the jury could reach its own determination whether appellants committed prostitution." *Id.* at 347. Here, in addition to Dr. Matthew's presumptively improper testimony, the jury also heard Dr. Matthew testify about the statistical analysis he conducted which showed the chance the DNA donor was anyone other than appellant was either one in 5.08 million or one in 2.8 million. Thus, the jury could make its own determination as to whether the DNA results were conclusive. Under these circumstances,

we cannot say that the doctor's testimony was so inflammatory as to render it incurable by the court's instruction. Appellant's first point of error is overruled.

III. Fatal Variance

In his second point of error, appellant complains that his conviction must be reversed due to a fatal variance between the evidence and the indictment. Specifically, he complains that the indictment alleged that he sexually assaulted Esperanza Quinonez, but the proof at trial showed that the complaining witness's name was really Esperanza Quinonez Alvarado.

Because due process concerns require that a defendant have notice of the charges against him, a material variance between the indictment and the evidence may be fatal to a conviction. *Rojas v. State*, 986 S.W.2d 241, 246 (Tex. Crim. App. 1998). "A variance between the wording of an indictment and the evidence presented at trial is fatal only if 'it is material and prejudices [the defendant's] substantial rights.'" *Gollihar v. State*, 46 S.W.3d 243, 257 (Tex. Crim. App. 2001). A variance is material only if it operates to surprise or prejudice the rights of the defendant. *Rojas*, 986 S.W.2d at 246. A defendant's substantial rights are threatened if the variance either failed to sufficiently inform him of the charges in order to allow him an opportunity to prepare a defense or would allow a second prosecution for the same crime. *Gollihar*, 46 S.W.3d at 257. Only a material variance will render the evidence insufficient. *Id.*

An indictment must state the name of the alleged victim. *Williams v. State*, 975 S.W.2d 375, 377 (Tex. App.—Waco 1998, pet. ref'd) (citing *Blankenship v. State*, 785 S.W.2d 158, 159 (Tex. Crim. App. 1990)). When a person is known by more than one name, however, article 21.07 of the Code of Criminal Procedure permits the State to use either in its charging instrument. TEX. CODE CRIM. PROC. ANN. art. 21.07 (Vernon Supp. 2000). Article 21.07 does not require, however, that the person be "commonly" known by more than one name. *Blankenship*, 785 S.W.2d at 160 (quoting *Johnson v. State*, 126 Tex. Crim. 356, 71 S.W.2d 280, 281–82 (1934)).

Here, the evidence at trial showed the victim was known by both names. First, although she testified that her name is Esperanza Quinonez Alvarado, she also testified that she told the doctor who treated her following the sexual assault that her name was Esperanza Quinonez. Her medical records list her name as Esperanza Quinonez. And her daughter testified that her mother's name is Esperanza Quinonez. Accordingly, the State was permitted to identify her by either name in the indictment, and the evidence at trial on this point was legally sufficient to support appellant's conviction. *See Grant v. State*, 970 S.W.2d 22, 24 (Tex. Crim. App. 1998) (Baird, J., concurring) (finding variance not fatal where charging instrument identified complainant as "Officer Lawson" but proof at trial showed defendant evaded arrest from "Lieutenant Craig Lawson"); *see also Maldonado v. State*, 998 S.W.2d 239, 248 (Tex. Crim. App. 1999) (holding variance not fatal where indictment charged defendant with capital murder of Cruz C. Saucedo but evidence at trial showed victim was known as Primo Correa Saucedo, where evidence also showed victim was known by name as charged in indictment); *Green v. State*, No. 12-99-00152-CR, 2001 WL 170787, at *11 (Tex. App.—Tyler Feb. 21, 2001, pet. filed) (finding no variance where indictment showed murder victim's name was Phyllis Lynn Webb Critz but daughter testified her mother's name was Phyllis Lynn Webb).

Appellant concludes he "was misled over whom the complainant was because the surnames are entirely different," but does not show how. And the record shows unequivocally that appellant was not misled about the identity of the complainant. Appellant's sister testified that appellant and the complainant's husband were "good friends." Both appellant and his father testified that, at the time of this offense, they knew the complainant as Esperanza Quinonez. Appellant in no way explains how he was misled into believing Esperanza Quinonez—the name of the complainant as charged in the indictment—was someone different than Esperanza Quinonez Alvarado. Thus, there is no showing that, in this case, appellant was surprised or mislead as required under Texas law. *See Plessinger v. State*, 536 S.W.2d 380, 381 (Tex. Crim. App. 1976); *see also Human v. State*, 749 S.W.2d 832, 836–37 (Tex. Crim. App. 1988); *Fortson v. State*, 948 S.W.2d 511,

515 (Tex. App.—Amarillo 1997, pet. ref'd) (both stating appellant bears burden of demonstrating harm on claim of fatal variance). Likewise, the record does not support the conclusion that, because of the discrepancy in the victim's name, appellant was unable to defend against the charges. *See Gollihar*, 46 S.W.3d at 257. Finally, appellant was not subjected to the possibility of twice being charged for the same crime. *See United States v. Apodaca*, 843 F.2d 421, 430 n.3 (10th Cir. 1988) (stating entire record, not just indictment, may be consulted in protecting against double jeopardy). Appellant's second point of error is overruled.

The judgment of the trial court is affirmed.

Leslie Brock Yates
Justice

Judgment rendered and Opinion filed August 9, 2001.

Panel consists of Justices Yates, Fowler, and Wittig.

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