AFFIRMED as MODIFIED and Opinion Filed June 2, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00137-CR

FRANCISCO TAHAY-MARROQUIN, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 3
Dallas County, Texas
Trial Court Cause No. F-1900006-J

MEMORANDUM OPINION

Before Justices Bridges, Pedersen, III, and Evans
Opinion by Justice Bridges

A jury convicted appellant Francisco Tahay-Marroquin of sexual assault and sentenced him to eight years' confinement. On appeal, he argues the evidence is legally insufficient to support his conviction, and the judgment should be modified to reflect the correct statute and offense. As modified, we affirm the trial court's judgment.

Background

Complainant worked at a taqueria inside a gas station on Royal Lane. On the night of September 10, 2017, she went to help another woman close the business.

Her husband (R.F.) also went with her. After she closed the taqueria and returned to the car, she saw appellant and his wife (P.T.) talking to R.F. Complainant knew P.T. from working with her for a few days at the taqueria.

Complainant greeted them, and they continued talking and sharing some beers. P.T. did not drink because she was pregnant. R.F. suggested they continue drinking at their home, but appellant said his apartment was closer so the group went to appellant's apartment.

They continued drinking and around 2 a.m., R.F. fell asleep in the living room. Although complainant wanted to go home, she could not wake up R.F. Appellant told complainant she could stay and sleep in the bedroom with P.T. Complainant and P.T. went to the bedroom, and complainant quickly fell asleep.

She later woke up to appellant on top of her. He was shirtless. She screamed and immediately pushed him away. She was unaware of what was happening until she saw her "leg on this side and then on the other side" and her "underwear was not on this side but kind of like on this side." She also felt like her vagina "was sort of wet."

Complainant ran from the room, woke up R.F., and told him appellant raped her. They went back to the bedroom to confront appellant, but he blocked the door. They eventually got the door open. Appellant then ran out of the apartment.

Complainant and R.F. saw some men they knew, and she asked if they saw a man run by because the man had "violated" her. They saw appellant nearby, and the

men began hitting appellant. She told them to stop and call police. Appellant asked R.F. to "forgive [him] for what [he] had done."

Around 6:30 a.m., Officer Ilse Casas responded to a disturbance call from the apartment complex. Based on information from the call, officers were looking for a sexual assault victim.

A woman approached Officer Casas speaking Spanish and crying. She said she had been raped. A man, who appeared to be injured with blood on his face, approached and officers asked him what happened. The man, later identified as appellant, said his wife was pregnant, and he did not remember what happened. Complainant identified appellant as the person who raped her. She told officers she did not give anyone consent to have sex.

Officer Casas noticed a bulge in complainant's leggings. Complainant explained when she realized appellant was on top of her, she quickly pulled up her leggings and did not think about pulling her underwear all the way up, which caused a bulge on one side. Officer Casas clarified that she meant her underwear was around only one leg.

P.T. told Officer Casas she invited complainant to spend the night and sleep in her bed. P.T. said she woke up some time in the middle of the night and saw appellant, her husband, on top of complainant. She was upset and yelled at appellant before running from the room into the bathroom. She was "very upset and very confused about what was going on."

Officers then transported appellant and his wife to the police station for further questioning. Detective Abel Lopez, the lead detective, interviewed appellant. He denied any sexual contact with complainant and agreed to provide a DNA sample. When the crime scene detective asked appellant to pull down his pants for a penile swab, he observed a condom on appellant's penis. The condom was collected for evidence. Appellant explained he had on the condom because he was getting ready for sex with P.T. but the men barged into the apartment.

Appellant told Detective Lopez complainant fell asleep in the bed alone and he and P.T. slept on the floor. Appellant woke up when R.F knocked on the bedroom door. P.T. and appellant opened the door, and R.F. asked, "Why are you sleeping with my wife?" Appellant said, "No sir. If I - - here where my wife is . . . If my wife hadn't been there, then maybe so - - but no way that." He denied any sexual relations with complainant. He said there was no reason her DNA would be on his penis "because my wife was there."

Detective Lopez interviewed P.T., and she denied she was going to have sex with appellant. She described waking up in the bedroom, seeing appellant sitting on the bed, and beginning to touch complainant in a sexual manner. She slapped appellant and then ran to the bathroom.

Complainant went to Parkland Hospital for a sexual assault exam. Jennifer McClellan, a registered nurse, conducted the exam. Her report indicated complainant drank approximately twelve beers and some whiskey in the twenty-four

hours prior to the assault.[1] She took a vaginal swab for testing. She also obtained blood for a DNA profile. When McClellan asked complainant if she knew whether her assailant penetrated her, complainant said she did not know. Complainant did not report that her vagina was moist after the alleged attack. McClellan would have noted such a comment in her report because "that's significant," but she admitted it is not necessarily indicative of sexual activity.

Appellant was arrested for sexual assault. Complainant, Officer Casas, Officer Lopez, R.F., P.T., and McClellan testified at trial. A DNA analyst with the Southwest Institute of Forensic Science also testified and explained complainant was a DNA contributor on one sample from appellant's condom with a 1 in 6200 inclusion probability. A second sample from the condom showed complainant was a contributor with 1 in 1540. Complainant was excluded as a contributor to the penile swab. This was not surprising because the analyst explained appellant's penis would not have directly touched complainant's sexual organ resulting in DNA transfer because of the condom. Ultimately, the DNA analyst concluded complainant was a DNA contributor on two different places on appellant's condom.

Appellant, however, testified to a different version of events. He claimed he asked complainant and R.F. to leave the apartment because he and P.T. wanted to go to sleep. When they refused to leave, appellant and P.T. left them in the living

[1] Complainant's blood alcohol level at the time her blood was drawn was 0.03, less than half the legal limit. No drugs were present in her sample.

room and went to their bedroom. Complainant ran in front of them and "jumped into the room" and onto their bed. When appellant tried to get her up from the bed, she started screaming appellant raped her. Appellant explained complainant and R.F. still did not leave but stayed in the living room. Appellant claimed he returned to the bedroom with P.T., and she grabbed a condom because she wanted to have sex. Before they could have sex, other men barged into the room. He rushed to pull up his pants, and everyone left the apartment. When appellant went outside, the men continued beating him up and finally, someone called the police.

The jury found appellant guilty and sentenced him to eight years' imprisonment. This appeal followed.

Sufficiency of the Evidence

In his first issue, appellant alleges the evidence is legally insufficient because the State failed to prove beyond a reasonable doubt that appellant's sexual organ contacted complainant's sexual organ. The State responds the evidence, when viewed in the light most favorable to the verdict, is sufficient to support a guilty verdict.

When examining the legal sufficiency of the evidence, we consider the combined and cumulative force of all admitted evidence in the light most favorable to the conviction to determine whether, based on the evidence and reasonable inferences therefrom, a rational trier of fact could have found each element of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318–19,

(1979); *Ramsey v. State*, 473 S.W.3d 805, 808 (Tex. Crim. App. 2015). Direct evidence and circumstantial evidence are equally probative, and circumstantial evidence alone may be sufficient to uphold a conviction so long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *Id*. at 809; *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

The trier of fact is the exclusive judge of the credibility and weight of the evidence and is permitted to draw any reasonable inference from the evidence so long as it is supported by the record. *Ramsey*, 473 S.W.3d at 809. Inferences based on mere speculation, however, are insufficient to support a criminal conviction. *See Hooper*, 214 S.W.3d at 16–17.

To establish sexual assault, the State must prove a defendant intentionally and knowingly caused the sexual organ of another person, without her consent, to contact his sexual organ. TEX. PENAL CODE ANN. § 22.01(a)(1)(C). Appellant argues complainant never saw him without his jeans or underwear, never saw his penis, and never saw or felt him touching her vagina with his penis. Appellant emphasizes complainant testified she never felt any part of appellant touching her below the waist, and she did not know if his jeans were zipped. He contends that even assuming complainant's testimony was one hundred percent accurate and factual, the conclusion that appellant's sexual organ contacted hers is mere speculation. He dismisses the DNA evidence by arguing complainant's DNA "could have just as

plausibly come from [appellant's] penis touching [complainant's] thigh as from touching her sexual organ."

Evidence is not rendered legally insufficient because an unconscious or asleep victim does not feel an assailant's sexual organ contact her sexual organ. *See, e.g., In re E.I.G.*, 346 S.W.3d 644 645–46 (Tex. App.—El Paso 2009, no pet.) (evidence legally sufficient to support sexual assault when witness walked in bedroom, appellant quickly jumped off unconscious victim, who was naked from waist down, and victim said vagina hurt afterward). Here, complainant testified she did not give consent to have sex with appellant, and she woke up to find him shirtless and on top of her, her pants and underwear around her legs, and her vagina "sort of wet." R.F. testified he woke up to complainant screaming she was being raped. Appellant later asked R.F. for forgiveness for what he had done. P.T. told officers she woke up, saw appellant sitting on the bed, and saw him beginning to touch complainant in a sexual manner. She was so confused by the situation, she ran to the bathroom crying.

Although none of these witnesses saw appellant's sexual organ touch complainant's sexual organ, the jury would reasonably infer from their testimony and the physical evidence that the sexual assault occurred. Appellant was still wearing a condom when he consented to a penial swab. Complainant's DNA was found in two places on the condom. The jury could reasonably infer complainant's DNA got on the condom from appellant's penis touching her "wet" vagina and not some other body part. The jury could also reasonably infer appellant wore the

condom to have sex with complainant rather than his pregnant wife, who denied having interest in sex with appellant on the night in question.

Appellant's reliance on a "normal" SANE examination does not establish that penetration or contact did not occur. McClennan testified the female sexual organ is resilient with a great deal of elasticity; therefore, it is common to not see any injuries from a sexual assault.

A jury is not allowed to draw conclusions based on speculation or guessing about the possible meaning of facts; however, a jury may make reasonable inferences after considering facts and deducing a logical consequence from them. *Hooper*, 214 S.W.3d at 16–17. Here, the jury did not speculate on the meaning of facts, but instead considered the evidence and reached a reasonable inference from them. The jury was able to assess the credibility and demeanor of the testifying witnesses. We presume the factfinder resolved the conflicting evidence in favor of the State. *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). As such, the evidence is legally sufficient to support the jury's guilty verdict. Appellant's first issue is overruled.

Reformation of Judgment

In his second issue, appellant requests modification of the judgment to reflect the correct charge and applicable penal code statute at issue. The State agrees modification is appropriate.

The judgment states appellant was convicted of "SEX A-V" under "22.01 Penal Code"; however, appellant was convicted of sexual assault under section 22.011(a)(1)(C).

This Court may reform a judgment "to speak the truth" when it has the necessary information to do so. TEX. R. APP. P. 43.2(b); *Asberry v. State*, 813 S.W.2d 526, 529–30 (Tex. App.—Dallas 1991, pet. ref'd). The indictment and evidence at trial indicate appellant was charged with sexual assault under section 22.011(a)(1)(C). As such, we modify the judgment to reflect the following: "Offense for which Defendant Convicted: Sexual Assault" and "Statute for Offense: 22.011(a)(1)(C) Penal Code."

Conclusion

As modified, the judgment of the trial court is affirmed.

/David L. Bridges/
DAVID L. BRIDGES
JUSTICE

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TEX. R. APP. P. 47.2(b)
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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

FRANCISCO TAHAY-MARROQUIN, Appellant	On Appeal from the Criminal District Court No. 3, Dallas County, Texas Trial Court Cause No. F-1900006-J.
No. 05-19-00137-CR V.	Opinion delivered by Justice Bridges. Justices Pedersen, III and Evans participating.
THE STATE OF TEXAS, Appellee	

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

Offense for which Defendant Convicted: Sexual Assault

Statute for Offense: 22.011(a)(1)(C) Penal Code

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered June 2, 2020