Affirmed and Opinion filed December 23, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00158-CR

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NATHAN WILLINGHAM, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Cause No. 753,280

O P I N I O N

A jury found Nathan W. Willingham guilty of the offense of aggravated assault and assessed punishment at thirteen and one-half years confinement. Appellant asserts nine points of error: (1) that the evidence is legally insufficient to support appellant's conviction of the offense of aggravated assault; (2) that the evidence is factually insufficient to support appellant's conviction of the offense of aggravated assault; (3) and (4) that he was denied his right to effective assistance of counsel at trial as guaranteed by the U. S. and Texas Constitutions; (5) that the trial court erred in overruling appellant's motion for new trial; (6) and (8)that he was denied the right to due process by the failure of the state's attorney to

disclose exculpatory evidence to the defense as guaranteed by the U.S. and Texas Constitutions; (7) and (9) that he was denied the right to "due course course of law" by the failure of the state's attorney to disclose exculpatory evidence to the defense as guaranteed by the U.S. and Texas Constitutions. We affirm.

Facts

Since the appellant claims that the evidenced is legally and factually insufficient, it will be necessary for this court to perform an extensive and careful review of the record. Following is a detailed summary of the evidence and testimony of the respective witnesses as presented at trial:

Peter Alexander (Complainant) testified that he lives in Austin, Texas with his girlfriend Kimberly Cavarro (Kim). On the weekend of February 21, 1997, he and Kim were visiting his parents who live in Houston. On Friday evening, February 21, at 9 P.M., they decided to go the Fanny's Country and Western Dance Hall, (Fanny's), in Tomball, Texas. The complainant had picked up a twelve-pack on the way over to Fanny's. He did not drink any beer while in his truck but could not remember whether or not he drank a beer after he arrived at Fanny's, or whether he went "straight in".

On their arrival at Fanny's, as he and Kim started towards the door, they passed some people about five car-lengths over from where they had parked who started saying "some stuff". It was about him or his girl friend, so he started talking to Kim so she wouldn't hear what was said and get upset. They got inside Fanny's and talked to a few of his friends and then he and his friends went back outside for some air. While outside, he went to his truck and got a beer and started to drink it when the same group of people started saying "stuff" again. He went over to see who they were . He had never seen them before this date. He told one of them that they needed to show some respect for the lady and, about that time, some of the person's friends started walking up behind him, so he stuck his hand out toward the person he was talking with to shake hands and said "Okay, what's your name." in an attempt to smooth things out. The complainant turned his head to see what the people, who were coming toward him, were doing,

and it was "lights out". He remembered his friend, Chris Cresetto, helping him off the ground and back into Fanny's, washing his face, and going back to his parents' home with his girl friend. He got hit when his head was turned and he did not get a good enough look at the person who hit him to be able to identify him.

After he arrived home, he put ice on his face hoping the swelling would go down. The swelling did not go down so on Sunday he was sent by a doctor to the Hospital where he had surgery. Two plates were placed in his head, he lost his cheek bone, teeth, and had to have his jaw wired together . He experienced a lot of pain and still has pain.

Charles Webber (Charles) arrived at Fanny's on February 21, 1997, at about 9:30 P.M. He was introduced to the complainant by his friend Chris. The complainant asked them to go outside with him to his car because there were some people outside that were giving him a hard time. The went outside and saw some men standing around a car. The men started yelling, screaming, and cursing the complainant. He was standing about five feet from the complainant and could clearly see the man who hit the complainant. The man used his closed fist and knocked the complainant against the car. The complainant fell on his back and the man got on top of him and kept hitting him. Another man joined in and they both began kicking the complainant around the chest and head numerous times. The two men, then, jumped into a truck and took off.

Charles saw the man who first hit the complainant later that night in the parking lot at Fanny's. He was wearing a dark, black-colored, sweat shirt with a hood and a black baseball cap.

There was a security video at Fanny's which Charles viewed and identified the appellant as man who struck the complainant . He also viewed a photo spread but was unable to identify the appellant in the photo spread..

Beverly Chambers (Beverly), a friend of the complainant, met the appellant at Fanny's a week before the fight. She talked with him about six or seven hours. Later that evening she left Fanny's, with the appellant, and went to Nikki's where a party was going on.

On the night of February 21st, she saw the appellant at Fanny's while she was standing at the bar talking with her friends, Tommy and Christi. She also saw the complainant and joined him. Her friend Nikki came over and began talking with them. She left and went to the rest room. When she came back she saw the appellant approaching the complainant, acting tough, and heard him say, "You'd better leave my girlfriend alone." The complainant answered, "Whatever," and moved away. She did not consider Nikki to be the appellant's girl friend. She later saw the complainant walk outside and the appellant follow him. Beverly went outside and saw the appellant hit the complainant with his closed hand. She was about ten or fifteen steps away.

Beverly later viewed a security video and photo spread and identified the appellant as the person who hit the complainant.

Dr. Dennis Lynch, a plastic surgeon, treated the complainant, performed a CAT scan and determined that he suffered a fracture and displacement of the cheekbone, fracture of the lower jaw, in two places and the mandible. It had been 36 hours since his injury and he immediately took him to the operating room to repair the injuries together with Dr. Rogers who performed part of the jaw surgery involving the teeth. They applied metal bars to his teeth to bring the teeth back into alignment, extracted the wisdom teeth and the third molar on the left-side and repaired the gum area and then repaired his cheek bone, put in two metal plates and four screws. He stated that the injuries were consistent with being hit with a fist or a kick in the face.

The defense called Casey Jackson (Casey) to testify. Casey has known the appellant for about two years. He considers the appellant his best friend. Casey was with the appellant on the night of February 21st. At about 9:30 P.M. they decided to go to Fanny's . Appellant was wearing a pair of jeans, white long-sleeved shirt, and a pair of Nikes. Casey testified that he was driving a 1966 Mustang and did not drink because he had no money. He did not remember whether or not the appellant drank.

While they were at Fanny's, a "big dude" got jealous because "this girl" saw the appellant and started talking to him. The dude got mad and the appellant got cute with him, just

laughing, and talking. Casey tried to get between them and a police officer came over and told appellant to leave. Casey did not understand this because appellant hadn't done anything. However, the appellant agreed to leave and the cop walked the appellant out of the door . Casey followed them outside. They tried to talk to the police officer to let the appellant back into the club because the appellant wanted to talk to Mickey, the owner of Fanny's, but the officer would not let him in.

Casey gave the appellant his car keys and they sat in the car for a while and decided to leave. Before they left, Casey went back into Fanny's to tell the girl he was with that he was leaving. He returned to the car about five minutes later and the appellant was sitting in the exact same place in his car. They sat and waited for Nikki, Beverly, and Sharon who came out and started talking to them. They later took the girls home, and on the way got something to eat. Afterwards the y went to Nikki's apartment and he and Sharon messed around on the bed and the appellant was in the bed with Nikki.

The appellant testified that on February 21st., he and Casey went to Fanny's and probably got there about 10 P.M. He drank cokes and no alcohol. About two and one-half hours after they arrived, he was dancing with a girl and a large man came up to him and said "Hey man, you don't like the way I treat my girl, man, that ain't none of your business." Appellant did not reply and kept on dancing and said "Man, I don't know you. I don't care what you do with your girlfriend. Obviously you're doing something wrong if she's dancing with me." One of the sheriffs who work at Fanny's came and grabbed him and told him to leave so appellant tuned around and walked out the door with the sheriff. The sheriff went back inside. He and Casey sat in the car and smoked a cigarette. He asked the officer if he could go back inside because the guy he had the problem with had left.. He stated that he did not get into any physical assault with the complainant.

Christopher Calvin Cresetto (Christopher) had been friends with the complainant since they were children. He was at Fanny's when the complainant arrived with his girlfriend, Kim, on February 21st. During the evening they went outside into the parking area to talk. While he

and the complainant were talking, he made a smart remark out loud. He heard someone say "Hey, don't say that," At that point Kim came out looking for the complainant and they all headed back in when the complainant heard something, turned around, seeing nothing, they all went into Fanny's, sat, talking and dancing. Later on, Christopher, the complainant, Charles Webber and Jackson went back outside by the trees. The complainant went over to a group of men who had made a remark about his girlfriend and he was asking them why they had said that. The talk got a little heated and the complainant told them to cool down. A little later he heard the complainant say "Okay, forget it." The next thing he knew was that he felt a jolt and saw the appellant standing over the complainant, back off, turn and head towards the truck next to his car. The appellant and another person, got into the truck, and took off. Christopher ran around the side of the car and saw the complainant lying on the ground, his head up against the hubcap. He helped him up and back into Fanny's. A short time later the complainant and Kim left.

Christopher stated that he saw the security video and identified appellant as the person who was standing over the complainant.

Beverly, recalled by the state, said she received a phone call from the appellant after she received a subpoena to testify. That he said "This is Nathan. If you testify I'll kill you." The appellant was recalled by the defense and testified that he did not call Beverly Chambers but stated that anybody could have called her.

Discussion

Appellant asserts in his first and second points of error that the evidence is legally and factually insufficient to support the appellant's conviction for aggravated assault .

The standard of review for 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 crime beyond a reasonable doubt." *Thomas v State*, 9l5 S. W. 2d. 597, 599 (Tex. App.–Houston [14th Dist.] pet ref'd).

To conduct a factually sufficiency review, we do not view the evidence through the prism of "in the light most favorable to the prosecution." *Cain v State*, 958 S.W.2d 404, 407 (Tex. Crim. App. App.1997); *Clewis v State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996); *Borrego*, 966 S.W.2d at 789. The jury is the judge of the facts. TEX. CODE CRIM. PROC. ANN. Art. 36.13 (Vernon 1981); *Cain*, 958 S.W. 2d at 407. We must defer to the jury findings and may find the evidence factually insufficient only where necessary to prevent manifest injustice. *Cain*, 958 S. W.2d at 407.

As the exclusive judge of the credibility of the witnesses and the weight to be given their testimony, the jury is free to reject appellant's version of the facts whether contradicted or not. *Wilkerson v. State*, 881 S.W.2d. 321, 324 (Tex. Crim. App. 1994). It was within the province of the jury to reconcile the conflicts and contradictions in the evidence. *See Bowden v State*, 628 S.W.2d 700 (Tex. App.-Houston [1st Dist.] 1992, pet ref'd).

Texas Penal Code, Sec. 22.01, Assault, provides that a person commits an offense if the person: (1) intentionally, knowingly, or recklessly causes bodily injury to another. *Texas Penal Code*, Sec. 22.02 , entitled Aggravated Assault, provides that a person commits an offense if the person commits assault as defined in Section 22.01 and the person: (1) causes serious bodily injury to another....." .

Appellant was charged and convicted of Aggravated Assault. A review of the record set out herein-above supports the fact that appellant intentionally, knowingly and recklessly caused serious bodily harm to the complainant. He was identified as the person inflicting the injuries on the complainant by Beverly Chambers. Beverly testified that she saw the appellant hitting the complainant with his fist while she stood about 10 feet away. Also, she identified the appellant on a security video, as well as a photo spread, as the person who assaulted and seriously injured the appellant. Appellant was identified by Charles Webber as the man he saw hitting and kicking the complainant as he lay on the ground in the parking lot . Charles Webber

confirmed his identification of the appellant by viewing a security video. In addition, Christopher Cresetto saw the Appellant standing over the body of the complainant and as Christopher approached the scene, the appellant was starting to back off leaving the complainant lying on the ground. Christopher also identified the appellant as the person standing over the complainant after viewing a security video at Fanny's . Dr Lynch testified as to the extensive and serious injuries caused to the complainant by the appellant hitting him with his closed fist and kicking him in the body, face, and head.

Although the appellants testimony was, in many instances, in conflict with the testimony of other witnesses, it is within the province of the jury to judge the credibility of the witnesses and reconcile the conflicts and contradictions in the evidence. Further, the jury is free to reject appellant's version of the facts whether contradicted or not. *Wilkerson v State*, 881 S.W.2d 321, 324, (Tex Crim. App. 1994); *see Bowden v. State*, 628 S. W. 2d. 782, 784 (Tex. Crim. App. 1982); *Moody v State*, 830 S. W. 2d. 698, 700 (Tex. App.–Houston [1st Dist.] 1992 pet. ref'd).

We find that the evidence in this record is sufficient, legally and factually, to establish that the appellant intentionally, knowingly, or recklessly caused serious bodily injury to the complainant. The verdict is not so contrary to the great weight of the evidence as to render it manifestly unjust. *See Cain*, 958 S. W. 2d at 407.

Appellant's first and second points of error are overruled.

Appellant contends in his third and fourth points of error that he was denied his right to effective assistance of counsel at trial as guaranteed by the U. S. and Texas Constitutions. More specifically he contends that he was denied effective assistance of counsel throughout his trial as follows:

> (1) failure of counsel to timely and properly object to introduction of inadmissible evidence, i.e. an extraneous offense - making a phone call from Harris County jail to a state witness threatening to kill her if she testified;

(2) counsel failed to object to the admission of the evidence describe in item (1) because the state failed to provide any pretrial notice that this evidence would be introduced;

(3) failure of counsel to request a hearing outside the jury's presence as to states ability to prove, beyond a reasonable doubt, appellant's commission of the extraneous office described in (1);

(4) counsel acted as an advocate of the state when he guided the state as to the necessary; predicate needed to admit the aforementioned extraneous offense;

(5) counsel acted an as advocate of the state when he conceded to the admissibility of the extraneous offense referred to herein-above

(6) counsel failed to request the state assert its purpose for seeking admission of the extraneous offense referred to herein-above;

(7) counsel failed to request the state to weight the probative value of the extraneous offense referred to herein-above;

(8) failed to request a limiting instruction to the jury to the jury regarding its ability to consider the evidence of the extraneous offense set out above;

(9) failed to request limiting instruction to jury regarding purpose for which it may consider the extraneous offense;

(10) counsels failure to publish to the jury the security videotape of Fanny's club, Feb. 21, 1997, when it contained exculpatory evidence;

(11) counsels failure to cross examining the veracity of the witnesses' testimony at trial regarding their actions, as depicted and controverted on the tape.

(12) counsels failure to cross-exam the witnesses' testimony regarding their own prior identifications of appellant on the videotape as the assailant, dressed in a dark hooded sweatshirt and black baseball camp;

(13) the cumulative effect of counsel's inept trial performance undermined the integrity of appellant's trial.

The standard of review for evaluating claims of ineffective assistance of counsel is set fourth in *Strickland v Washington*, 466 U.S. 668, 104 S. Ct. 2052, 20654, 80 L. Ed. 2dl 674 (1984). *See Hernandez v State*, 726 S. W. 2d. 53 (Tex. Crim. App. 1986). Appellant must show both (1) that counsel's performance was so deficient that he was not functioning as acceptable counsel under the sixth amendment, and (2).that but for the counsel's error, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064.

It is the defendants burden to prove ineffective assistance of counsel. *Strickland*, 466 U.S. at 687, 104 S. Ct at 2064. Defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 687. 104 S. Ct 2064.

The record is silent as to why appellant's trial counsel acted and/or failed to object in the complained of circumstances. Assertions of ineffective assistance of counsel must be firmly founded in the record. *Harrison v State*, 552 S.W. 2d. 151, 152 (Tex (Tex. Crim. App. App. 1977). This court will not engage in speculation. *See Jackson v State*, 877 S.W.2d. 768, 771 (Tex. Crim. App. 1994)

Appellant's third and fourth points of error are overruled.

Appellant contends in his fifth point of error that the trial court erred in overruling the his Motion for New Trial.

Appellant filed a Motion for New Trial, as amended, asserting that the evidence is legally and factually insufficient to support the verdict, and is contrary to the law and evidence, and that there was newly discovered evidence from a witness who was prevented from attending the court by her mother. That the witness would testify that the appellant is innocent of the crime of aggravated assault because he had spent the evening of February 21, 1997, with her.

The granting or denying of a Motion for New Trial lies within the discretion of the trial court. *Lewis v State*, 911 S.W.2dd 1,7 (Tex. Crim. App. 1995). An appellate court does not substitute its judgment for that of the trial court but rather decides whether the court acted without reference to any guiding rules and principles. *Montgomery v State*, 810 S.W.2d. 372, 380 (Tex. Crim. App. 1990).

Appellant argues the motion for new trial should have been granted because a material defense witness, Nikki Ragon, who had exculpatory evidence, was kept from testifying by fraud. The defendant must be granted a new trial when a material defense witness has been kept from court by force, threats, or fraud. *See* TEX. R APP. P. 21.3(e) (*formerly* TEX. R. APP. P. 30(b)(5), which was formerly TEX. CODE CRIM. PROC. ANN. art. 40.03(5) (Vernon 1979)). To determine whether the trial court abused its discretion, we examine the evidence to determine:

> (1) force, threats, or fraud that prevented a witness from being discovered or making an appearance; despite
>
> (2) diligence on the part of counsel in discovering the absent witness and what his testimony would be or in attempting to have a known witness appear in court;
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> (3) materiality of the witness' testimony;
>
> (4) competency of the testimony and that it is not merely cumulative, corroborative, collateral or impeaching.

Washington v State, 642 S.W. 2d 194, 196 (Tex. App.-Houston [14th Dist.] 1982, no pet.) (citations omitted) (applying former Art. 40.03(5), *Texas Code of Criminal Procedure*, which was later codified as *former* Appellate Rule 30(b)(5).). Additionally, new evidence must be shown to be probably true and of such weight as to probably produce a different result at another trial. *See Washington*, 642 S.W.2d at 196.

First, we determine, whether force, threats or fraud prevented Nikki from testifying. Nikki was subpoenaed by the state, using post cards sent to her parent's address, to testify at

the trial. At the motion for new trial hearing, Nikki's mother testified she destroyed the district attorney's post cards and never told her daughter about the upcoming trial because she feared for her daughter's safety in testifying against appellant. Nikki did not see appellant after February 21, 1997, and did not know that his trial had occurred. Nikki admitted she probably would not come to court to testify even if she had received a subpoena. She also stated that even though appellant had never threatened her, she was afraid that appellant and his friends were going to hurt her if she testified. Even with this evidence, appellant has not shown through fraud that Nikki was prevented from testifying at appellant's trial.

Appellant's trial attorney testified at the motion for new trial, he was aware of a person named Mikki Ragon when he represented the appellant but had not been able to contact her even with the help of his investigation, Ronald Kelly who he had hired to find her. He did not subpoena Nikki because he relied on the police offense report and decided her "testimony would be adverse to the defense position." Had he known Nikki disputed appellant's videotape identification, however, he would have tried to subpoena her himself. The attorney filed a *Brady* motion seeking all exculpatory evidence, but the State allegedly never told him about the substance of Nikki's testimony. Based on this evidence, we find the attorney did exercise diligent in trying to locate Nikki.

Regarding *Washington*'s third factor, materiality of the witnesses' testimony, Nikki testified she arrived at Fanny's on Feb. 21, 1997, between 9:30 and 10:00 P.M. Nikki stated that she noticed appellant was "wearing a pair of blue jeans, a long-sleeve white button up shirt with a white tank top beneath it, and a pair of tennis shoes." Nikki remained at Fanny's until 1:30 a.m., when she returned to her apartment with appellant, Shannon, Jackson and Chambers. She did not witness any assault. Additionally, she stated appellant could not have assaulted the complainant because he was with her at all times that night until about 4:00 a.m. A week after the assault, Nikki and Chambers viewed Fanny's security videotape, at the request of complainant's parents, and saw a man in a black sweatshirt. Nikki said she had never seen the man on the tape. She did not know when the tape was made. However when Beverly saw the tape she said "he looks like Nathan (appellant)." Nikki testified that until they met

complainant's parents, Beverly Chambers had never mentioned meeting or knowing complainant or witnessing an assault at Fanny's one week earlier.

This evidence does not satisfy *Washington*'s fourth factor because Nikki's tesitmony was cumulative of appelant's other defense evidence at trial. Appellant's trial attorney stated Nikki's testimony "would not have altered the defense presented. It would have altered the *strength* of the defense in my evaluation of the case." Additionally, Nikki's recitation of events is cumulative of Casey Jackson's testimony. Thus, the trial court's decision to overrule the motion for new trial was not "so clearly wrong as to lie outside that zone within which reasonable persons might disagree." *Cantu v. State*, 842 S.W.2d 667, 682 (Tex. Crim. App. 1992).

Accordingly, the trial court did not abuse its discretion in overruling the motion for new trial. Appellant's fifth point of error is overruled.

Appellant contends in his sixth, seventh, eighth and ninth points of error that he was denied his federal and state constitutional right to due process and due course of law by failure to disclose exculpatory evidence. More specifically he contends that the state failed to disclose the following statements made to them by Nikki Ragon: (1) that the appellant did not appear on a videotape dressed in a dark hooded sweatshirt and a dark baseball cap; (2) that the appellant did not assault the complainant.

A prosecutor has an affirmative duty to turn over material, favorable evidence to the defense. *See McFarland v. State*, 928 S.W.2d 482, 511 (Tex. Crim. App. 1996) (citing *Brady v. Maryland*, 373 U.S. 83 (1963)). The three-part test used to determine whether a prosecutor's actions have violated this duty is "whether the prosecutor (1) failed to disclose evidence (2) favorable to the accused and (3) the evidence is material, meaning there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Little v. State*, 991 S.W.2d 864, 866 (Tex. Crim. App. 1999); *see U.S. v. Bagley*, 473 U.S. 667, 682 (1985); *Siegel v. State*, 814 S.W.2d 404, 407-08 (Tex. App.–Houston [14th Dist.] 1991, pet. ref'd).

We find appellant did not prove the State failed to disclose the substance of Nikki's testimony to him. There is no evidence that Nikki informed the State prior to trial that she would testify appellant did not commit the assault and was not on Fanny's videotape. Accordingly, the state did not fail to disclose any exculpatory evidence.

Furthermore, appellant did not show Nikki's testimony would have been material. *See Frank v. State*, 558 S.W.2d 12, 14 (Tex. Crim. App. 1977). Testimony is material if it "created a probability sufficient to undermine the confidence in the outcome of the proceeding." *See Thomas v. State*, 841 S.W.2d 399, 404 (Tex. Crim. App. 1992). To make this determination, we must examine the entire record. *See id*. In this case, Nikki's testimony is cumulative of other testimony that denied appellant committed the offense. *See Frank*, 558 S.W.2d at 14.

Appellant's sixth, seventh, eighth and ninth points of error are overruled.

The judgment of the court is affirmed.

/s/ D. Camille Hutson-Dunn
Justice

Judgment rendered and Opinion filed December 23, 1999.
Panel consists of Justices Ross A. Sears, Bill Cannon and D. Camille Hutson-Dunn.*
Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Ross A. Sears, Bill Cannon, and D. Camille Hutson-Dunn sitting by assignment.