



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 73,135

RODNEY REED, Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL
FROM BASTROP COUNTY

JOHNSON, J., delivered the opinion of the Court, in which MANSFIELD, PRICE and HOLLAND, JJ., joined. MEYERS, J., joined except as to point of error no. four, in which he concurred in the result. WOMACK and KEASLER, JJ., joined except as to point of error no. six, in which they concurred in the result. MCCORMICK, P.J., and KELLER, J., concurred in the result.

OPINION

Appellant was convicted of capital murder in May 1998. TEX. PEN. CODE §19.03(a).

Pursuant to the jury's answers to the special issues set forth in TEX. CODE CRIM. PROC. art.

37.071, §§2(b) and 2(e), the trial judge sentenced appellant to death. Art. 37.071 §2(g).¹ Direct appeal to this Court is automatic. Art. 37.071 §2(h). Appellant raises eight points of error including a challenge to the factual sufficiency of the evidence to support the verdict. We will affirm.

STATEMENT OF FACTS

Around 3:00 on the morning of April 23, 1996, Stacey Lee Stites left the upstairs apartment in Giddings that she shared with her fiancé, Jimmy Fennell, to go to her job at an H.E.B. store approximately thirty miles away in Bastrop. Stites frequently worked the early morning shift with Andrew Cardenas and was considered a punctual employee. Stites would typically arrive before or just about the same time as Cardenas, and their normal routine was to walk into the store together. If one arrived before the other, the early person would wait in his or her vehicle for the other.

Cardenas was surprised when Stites did not promptly arrive at work on this particular morning. Although he waited outside for a short time, Cardenas went inside in time to begin his shift. As the morning wore on, Cardenas became increasingly concerned about Stites. Finally, sometime between 4:30 a.m. and 6:45 a.m., Cardenas called Stites' mother who lived in an apartment downstairs and across from Stites' and Fennell's apartment. Mrs. Stites immediately called Fennell and told him that Stites had never made it to work; she then called the Bastrop County Sheriff's Department, the Giddings and Bastrop Police Departments, and the Department of Public Safety. Fennell came downstairs moments later and got the keys to Mrs.

¹Unless otherwise indicated, all future references to Articles refer to the Code of Criminal Procedure.

Stites' car so that he could begin looking for Stites.²

Meanwhile, Bastrop police officer Paul Alexander was driving his patrol through the parking lots of the Bastrop H.E.B. and Bastrop High School. Around 5:23 a.m., on another drive through the high school parking lot, Alexander noticed a red Chevrolet pickup truck parked in the lot that had not been there on two previous patrols during his shift. Alexander requested a check on the license plate. The return indicated that the truck was registered to a person with the last name of Fennell and that it had not been reported stolen. Alexander approached the truck and noticed a broken piece of woven belt laying outside the driver's door of the truck.³ He also looked inside the locked truck, but he saw nothing suspicious and resumed his patrol duties.

When Mrs. Stites called the Bastrop Sheriff's Department, the dispatcher apparently remembered Alexander's discovery of Fennell's truck and contacted Alexander, who returned to his office to write up a report. Bastrop police officers thereafter had the truck towed to a secure location and contacted Fennell, who met them to identify anything that he did not recognize as belonging there. When officers opened the truck, they found one of Stites' shoes and one of her earrings on the floorboard. They also found pieces of a plastic drinking glass, which Stites normally took with her to work, both in the door console and wedged in the seat. The driver's seat of the truck was reclined with the seatbelt still engaged, and the officers found what appeared to be bodily fluid on the transmission hump between the driver's and passenger's seats. Fennell told the officers that the piece of belt that Alexander had found outside the truck was part of a belt that Stites often wore.

² Stites did not own a car and drove Fennell's red S-10 Chevrolet pickup truck to work.

³ Alexander did not touch or otherwise move the piece of belt.

Around 2:45 that afternoon, Kenneth Osborn stopped along a dirt road near Highway 1441 in Bastrop County to pick wildflowers and discovered a body lying in a ditch. He notified the authorities. The body was identified as Stacey Stites. Personnel from several law enforcement agencies went out to secure the area, and the crime-scene team from the Texas Department of Public Safety Crime Laboratory in Austin was called to help process the scene.⁴

While processing the site, officers found another section of a woven belt. Subsequent comparison with the piece of belt that Alexander had found in the high school parking lot indicated that the two pieces were from the same belt. An abrasion around Stites' neck appeared to have been made by the belt. Suspecting from the condition of the body that Stites had been sexually assaulted, the leader of the crime-scene team, Karen Blakely, took vaginal and breast swabs. An immediate test of the vaginal swabs indicated that semen was present. Later testing in the laboratory confirmed the presence of intact spermatozoa.⁵

While performing an autopsy on Stites' body, Dr. Robert Bayardo noted bruising on the top of her head that was consistent with having been struck by a fist. He also found what appeared to be a post-mortem burn on Stites' left forearm. By comparing the pieces of belt that were found at the two scenes and the ligature mark on Stites' neck, Dr. Bayardo determined that Stites had been strangled with the woven belt around 3:00 a.m. on April 23, 1996. During the autopsy, Dr. Bayardo took an additional set of vaginal swabs and found intact spermatozoa,

⁴This team had previously been called in to help process Fennell's truck, but temporarily stopped its efforts there and concentrated on the place where Stites' body was found.

⁵Intact sperm indicated to Blakely that they had been deposited very recently. Her testimony was later corroborated by Meghan Clement of LabCorp, who testified that in ten and a half years of serology work, she had never seen spermatozoa remain intact for more than 24 hours after a sexual assault.

indicating recent deposit. He also found several superficial lacerations around Stites' anus which were consistent with penile penetration and determined that these injuries were inflicted at or very near the time of death. On a rectal swab, Dr. Bayardo found what appeared to be heads of spermatozoa, again indicating recent penetration.⁶ Because of the determination that the anal penetration occurred at the time of Stites' death, law enforcement personnel concluded that whoever deposited the semen in Stites' body had murdered her.

Wilson Young, a DNA analyst with the Department of Public Safety (D.P.S.), performed DNA tests on the various bodily fluids collected. From his testing, Young determined that the semen from Stites' underwear and from the vaginal and rectal swabs and the saliva found on the breast swabs all came from the same person.

During the investigation of Stites' murder, law enforcement personnel talked with many people who knew Stites, including family, friends, co-workers, and anyone else they thought might have information about her murder. Because of the semen, investigators also asked Stites' male associates to give them a blood sample. Everyone who was asked to give samples did so, and the collected samples were forwarded to the D.P.S. laboratory for testing. During the year following Stites' murder, officers submitted blood samples from twenty-eight different individuals. Each potential suspect, including Stites' fiancé, was absolutely excluded from being the donor of the semen found in Stites' body. There was no indication throughout the investigation that Stites was in any way associated with appellant.

In late February or early March 1997, appellant became a suspect when he attempted to

⁶Dr. Bayardo testified that spermatozoa break down more rapidly in the anal cavity than in the vaginal cavity.

commit a similar crime against another victim.⁷ Officers were already aware of appellant, his habit of walking the streets of Bastrop in the middle of the night, and his frequent presence at Long's Star Mart during the early morning hours.⁸ Appellant also lived in the area and often walked along the railroad tracks through town.⁹

Once appellant became a suspect, D.P.S. searched its files and found that it already had a sample of appellant's DNA on file.¹⁰ D.P.S. analysts tested the sample and determined that appellant could not be excluded as the donor of the semen. Armed with this information, Sgt. David Board of the Bastrop Police Department talked with appellant, who told Sgt. Board that he did not know Stacey Stites and knew only what he had seen on the news about the murder.

Shortly thereafter, officers obtained samples of appellant's blood, hair, and saliva under a search warrant. After obtaining appellant's known samples, Wilson Young compared those samples to the evidence samples and determined that appellant's DNA was consistent with that of the semen recovered from Stites' body. Independent, and more discriminating, DNA testing also determined that appellant's DNA was consistent with the DNA of the evidence samples. Young calculated that 99.8% of the African-American and Caucasian populations and 99.92% of

⁷Approximately six months after Stites' murder, appellant tried to abduct another young woman during the same time of night and from the same area where Stites disappeared. This information was admitted as an extraneous offense at punishment, but was not presented at guilt/innocence.

⁸Long's Star Mart was located along the route Stites drove to go to work.

⁹Fennell's truck was found next to the same railroad tracks in an area located only six-tenths of a mile from appellant's residence.

¹⁰The database sample came from a previous allegation of appellant's rape of his mentally disabled girlfriend. This information was not presented during guilt/innocence phase of the trial in the instant case.

the Hispanic population would be excluded by comparison with that sample. Young also performed DNA tests upon blood samples obtained from appellant's father and three brothers, each of whom was excluded as being a possible donor.

The D.P.S. laboratory concluded its testing and sent appellant's known DNA, Stites' known DNA, a portion of the vaginal swabs, and a portion of the rectal swabs to LabCorp, a well-known North Carolina laboratory, for independent testing. LabCorp performed additional DNA tests and determined that the DNA recovered from Stites' body was consistent with appellant's DNA. Appellant's expert, who did her own independent testing, also could not exclude appellant as being the donor of the sperm found in Stites' body.

Appellant attempted to refute the DNA evidence against him by asserting that either Jimmy Fennell, David Lawhon, another man who was initially suspected by the police of the murder, or one of three "mystery men" actually murdered Stites. However, the state countered each of appellant's theories and questioned the credibility of appellant's witnesses.¹¹

POINTS OF ERROR

In his first point of error, appellant asserts that the evidence is factually insufficient to support the verdict. In a factual sufficiency review, this Court views all the evidence and sets aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be

¹¹Appellant does not raise this matter in his brief or illustrate how it does or does not contribute to the factual sufficiency of the evidence in his case. However, we have reviewed all of the evidence and considered it in responding to appellant's point of error.

clearly wrong and unjust. *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996).¹²

In conducting such a review, we begin with the presumption that the evidence is legally sufficient under *Jackson v. Virginia*, 443 U.S. 307 (1979). *Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996), *cert. denied*, 522 U.S. 832, 118 S. Ct. 100, 139 L. Ed.2d 54 (1997). Next, we consider all of the evidence in the record, comparing the evidence which tends to prove the existence of the elemental fact in dispute with the evidence which tends to disprove it. *Jones, supra*. We are authorized to disagree with the jury's determination, even if probative evidence exists which supports the verdict, but we must avoid substituting our judgment for that of the fact-finder. *Jones*, 944 S.W.2d at 647-48. A clearly wrong and unjust verdict occurs where the jury's finding is "manifestly unjust," "shocks the conscience," or "clearly demonstrates bias." *Jones*, 944 S.W.2d at 648.

The thrust of appellant's argument under this point is that the evidence is factually insufficient because "other than the DNA evidence, there is no direct evidence which supports the verdict or ties [a]ppellant to the offense." Appellant argues that "when the only direct evidence in a case is expert scientific testimony, a conviction should not be permitted to stand when the evolution of the science is such that experts are still disagreeing about the fundamentals of interpreting data."

Expert scientific testimony that is unreliable is also inadmissible. See *Nenno, v. State*, 970 S.W.2d 549, 560 (Tex. Crim. App. 1998) (noting that in *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992), Court of Criminal Appeals held that Texas Rules of Evidence required

¹²The continued vitality of this standard was recently reaffirmed in *Johnson v. State*, 23 S.W.3d 1 (Tex. Crim. App. 2000).

satisfaction of three-part reliability test before novel scientific evidence would be admissible). On the other hand, reliable scientific testimony has its basis in sound scientific methodology and is admissible. *Griffith v. State*, 983 S.W.2d 282, 287-288 (Tex. Crim. App. 1998), *cert. denied*, ___ U.S. ___, 120 S. Ct. 77, 145 L. Ed.2d 65 (1999). Once admitted, such evidence can be sufficient to support a conviction. *See, e.g., Roberson v. State*, 16 S.W.3d 156 (Tex. App. – Austin 2000, *pet. ref'd*), and cases cited therein. To the extent that appellant is arguing against the reliability of DNA evidence, we have previously held that such evidence is admissible when it meets the standards of reliability set forth by our rules of evidence. *See, e.g., Massey v. State*, 933 S.W.2d 141, 152-53 (Tex. Crim. App. 1996); *Campbell v. State*, 910 S.W.2d 475, 479-79 (Tex. Crim. App. 1995), *cert. denied*, 517 U.S. 1140, 116 S. Ct. 1430, 134 L. Ed.2d 552 (1996); *Flores v. State*, 871 S.W.2d 714, 722 (Tex. Crim. App. 1993), *cert. denied*, 513 U.S. 926, 115 S. Ct. 313, 130 L. Ed.2d 276 (1994); *Hicks v. State*, 860 S.W.2d 419, 422-23 (Tex. Crim. App. 1993), *cert. denied*, 512 U.S. 1227, 114 S. Ct. 2725, 129 L. Ed.2d 848 (1994); *Kelly*, 824 S.W.2d at 569-74. Appellant does not point to any place in the record where he objected in the trial court on this basis.¹³ *See* TEX. R. APP. P. 38.1(h).

Given the strength of the DNA evidence connecting appellant to the sexual assault on Stites and the forensic evidence indicating that the person who sexually assaulted Stites was the person who killed her, a reasonable jury could find that appellant is guilty of the offense of capital murder. The verdict is not so against the great weight and preponderance of the evidence

¹³The citations in appellant's brief to our case law concerning the reliability of scientific evidence (*Hartman v. State*, 946 S.W.2d 60 (Tex. Crim. App. 1997); *Kelly, supra*) refer to other points of error.

as to be manifestly wrong and unjust.¹⁴ Point of error one is overruled.

In his second point of error, appellant asserts that the trial court erred in overruling his *Batson* challenge to the state's use of peremptory strikes on venire members Harvey Lee Scroggins and Byron Alvin Mitchell. *See Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed.2d 69 (1986). Under *Batson*, a defendant must make a *prima facie* showing of racial discrimination in the state's exercise of its peremptory strikes. *Id.* at 96-97, 106 S. Ct. at 1723. After such a showing, the burden shifts to the state to articulate race-neutral explanations for its questioned strikes. The defendant then has the opportunity to rebut those explanations. *Id.* at 97-98, 106 S. Ct. at 1723-24. The trial court must determine whether the defendant has carried his burden of proving racial discrimination. *Id.* at 98, 106 S. Ct. at 1724. The trial court's determination is accorded great deference and will not be overturned on appeal unless it is clearly erroneous. *Chamberlain v. State*, 998 S.W.2d 230, 236 (Tex. Crim. App. 1999), *cert. denied*, ___ U.S. ___, 120 S. Ct. 805, 145 L. Ed.2d 678 (2000).

In his argument, appellant asserts that he made a *prima facie* case of discrimination by showing that the state struck the only two African-Americans in the venire. He notes (with only general references to the record) that the prosecutor "testified as to her alleged reasons for cutting" the venire members and that the trial court then overruled appellant's *Batson* challenge.

According to the record, the prosecutor set out the state's goals for voir dire,¹⁵ and stated

¹⁴Appellant did present a defense at trial that some other person could have committed this crime, but he does not argue that evidence under this point. Our review of that evidence does not change our resolution of the issue.

¹⁵ The state's two stated goals were to select jurors who (1) felt comfortable working
(continued...)

the state's specific reasons for striking each of the complained-of venire members. With regard to Scroggins, she stated that he appeared to have some "pretty significant reservations" about participating in a jury where the death penalty was an option.¹⁶ The prosecutor also noted that Scroggins had indicated that he was estranged from his four children and had been jailed at least once for not paying child support. With regard to Mitchell, the prosecutor noted that he felt that capital punishment should be abolished, and stated that he could never personally return a verdict in which the death penalty would be assessed. Mitchell further noted that he did not believe that he or anyone else had the right to determine who lives and who dies. Appellant did not thereafter cross-examine the prosecutor as to the reasons given, made only minimal argument to the trial court, and did not address the reasons given by the prosecutor for striking the two men.

The state's explanations are race-neutral on their face and are reasonable. In the absence of rebuttal, we cannot hold that the trial court abused its discretion in finding that appellant failed to carry his burden. *See Chamberlain*, 998 S.W.2d at 236. Appellant's second point of error is overruled.

In his third point of error, appellant contends that the trial court erred when it permitted the state to introduce testimony from a D.P.S. criminalist about whether the crime scene reflected a "crime of passion." Specifically, appellant complains that the testimony of Karen Blakely was

¹⁵(...continued)
within the Texas system in which the death penalty is an option, and (2) had at least some rudimentary knowledge of the world around them, specifically regarding the realm of scientific evidence.

¹⁶During voir dire, Scroggins stated that he would vote against the death penalty if he were in the Texas Legislature. Scroggins also stated in his questionnaire that he did not feel that the death penalty served any legitimate purpose in society and that he professed no knowledge whatsoever of scientific evidence.

outside the scope of her expertise and, therefore, was lay testimony.¹⁷ The record reflects that appellant objected to this testimony on the grounds that it called for speculation, was not relevant, and the probativeness of the information was substantially outweighed by unfair prejudice. Because appellant's objection at trial does not comport with the complaint he now makes on appeal, he has not preserved anything for our review. TEX. R. APP. P. 33.1; *see also Trevino v. State*, 991 S.W.2d 849, 855 (Tex. Crim. App. 1999). Point of error three is overruled.

In his fourth point of error, appellant complains that the trial court erred in excluding evidence that Jimmy Fennell had been deceptive during two polygraph examinations. Appellant states that he repeatedly attempted to demonstrate at trial that the polygraph information was both reliable and relevant and that he proffered testimony that two different examiners tested Fennell, and both found that he gave deceptive answers.

Appellant asserts that “[p]olygraph evidence meets the criteria established by *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992)] and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed.2d 469 (1993)] and is admissible in a criminal case.”¹⁸ Appellant also notes that the federal courts have begun to re-examine the admissibility of polygraph evidence in light of *Daubert* and that several states have followed this example and re-examined their own laws, with many now allowing the admission of polygraph evidence under specified circumstances.

¹⁷ Karen Blakely was the D.P.S. chemist/criminalist who specialized in and testified about the DNA and serological evidence in the case.

¹⁸ *See also Hartman v. State*, 946 S.W.2d 60 (Tex. Crim. App. 1997) (*Daubert* standard is virtually identical to standard previously formulated by Texas Court of Criminal Appeals in *Kelly*).

As we have previously stated, to be considered reliable, evidence derived from a scientific theory must satisfy three criteria in any particular case: (a) the underlying scientific theory must be valid; (b) the technique applying the theory must be valid; and (c) the technique must have been properly applied on the occasion in question. *Hartman*, 946 S.W.2d at 62; *Kelly*, 824 S.W.2d at 573. The proponent of this evidence must prove by clear and convincing evidence that the scientific evidence is reliable. *Kelly*, 824 S.W.2d at 573. Absent an abuse of discretion, we will not disturb the trial court's decision regarding the admission of such evidence. *Griffith*, 983 S.W.2d at 287; see also *General Elec. Co. v. Joiner*, 522 U.S. 136, 141-42, 118 S. Ct. 512, 517, 139 L. Ed.2d 508 (1997).

Although appellant states that he repeatedly attempted to demonstrate at trial that the polygraph information was both reliable and relevant, we have examined the record and found little evidence of such demonstrations. The evidence proffered by appellant concerning the polygraph information goes to the issue of relevance, i.e., whether Fennell was telling the truth; however, we find scant evidence in the record indicating that appellant made a showing of the reliability of such evidence, based on the three *Kelly* criteria. Indeed, following his proffers, appellant argued to the trial court only that the Fifth Circuit has held that such a determination regarding admission of polygraph evidence should be made on a case-by-case basis.¹⁹ The defense called on Pat Carmack, a probation officer with a polygraph license, to testify to the reliability of polygraph evidence; yet, on cross-examination, Carmack admitted that there could be reliability problems with such evidence. Given all this, we cannot say either that appellant

¹⁹See *United States v. Posado*, 57 F.3d 428 (5th Cir. 1995) (holding that polygraph evidence is no longer *per se* inadmissible).

made a "clear and convincing" showing that such evidence was reliable, or that the trial court abused its discretion in excluding such evidence. Point of error four is overruled.

In his fifth point of error, appellant argues that the trial court erred in admitting several autopsy photographs, state's Exhibits 80 through 87 and 80a through 87a,²⁰ into evidence because their prejudicial effect outweighed their probative value. TEX. R. CRIM. EVID. 403.²¹

Rule 403 of the Texas Rules of Criminal Evidence states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

Rule 403 favors the admission of relevant evidence and carries a presumption that relevant evidence will be more probative than prejudicial. *Williams v. State*, 958 S.W.2d 186, 196 (Tex. Crim. App. 1997); *Montgomery v. State*, 810 S.W.2d 372, 389 (Tex. Crim. App. 1990); *Jones v. State*, 944 S.W.2d 642, 652 (Tex. Crim. App. 1996), *cert. denied*, 522 U.S. 832, 118 S. Ct. 100, 139 L. Ed.2d 54 (1997); *Long*, 823 S.W.2d at 271. The trial court's decision will not be disturbed on appeal unless there has been an abuse of discretion, that is, the decision falls outside the zone of reasonable disagreement. *Jones v. State*, 982 S.W.2d 386, 394 (Tex. Crim. App. 1998), *cert. denied*, ___ U.S. ___, 120 S. Ct. 444, 145 L. Ed.2d 362 (1999).

A court may consider several factors in determining whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice, including the number of

²⁰ Despite appellant's inclusion of state's exhibits 85 and 85a, the record does not reveal the existence of such exhibits.

²¹ The Texas Rules of Criminal Evidence and the Texas Rules of Civil Evidence were combined into the Texas Rules of Evidence, which became effective March 1, 1998.

exhibits offered, gruesomeness, detail and size, whether they are in color or black and white, close-up or distant, and whether the body depicted is clothed or naked. *Chamberlain*, 998 S.W.2d at 237.

Regarding the photographs complained of in the instant case, we first note that exhibits numbered 80-a through 84-a, 86-a, and 87-a are all 4"x 6" in size and exhibits numbered 80 through 84, 86, and 87 are enlarged duplicates of the smaller photographs.²² Exhibits 80/80a through 84/84a and 87/87a all show the manner and means of the victim's death or other injuries which occurred in the course of the attack. Because the photographs show no more than the crime scene and the nature of the victim's injuries, the trial court could have reasonably concluded that the probative value of the photographs was not substantially outweighed by the danger of unfair prejudice. *Ladd v. State*, 3 S.W.3d 547, 568 (Tex. Crim. App. 1999), *cert. denied*, ___ U.S. ___, 120 S. Ct. 1680, 146 L. Ed.2d 487 (2000). We cannot say that the trial court abused its discretion in admitting them.

Exhibits 86 and 86a, on the other hand, require additional analysis. We have previously stated that autopsy photographs are generally admissible unless they depict mutilation of the victim caused by the autopsy itself. *Rojas v. State*, 986 S.W.2d 241, 249 (Tex. Crim. App. 1998). These photographs depict the victim's skull after the scalp has been cut and "reflected"

²²None of the original photographs were included in the appellate record sent to this Court, but the black-and-white xerox copies of the smaller exhibits appear to sufficiently represent the actual photographs for purposes of this appeal. Neither appellant's brief nor the record reveals the size of the larger exhibits, but the state asserts in its brief that the larger photographs are 16" x 20". We will presume for the sake of analysis that 16" x 20" is the correct size. We will also assume that all are in color. Furthermore, because appellant does not argue that the enlarged photos are more prejudicial than their smaller counterparts due to their size, we will address the photographs in their relative pairs, as does appellant.

back. Although this type of photograph is particularly gruesome, medical examiner Dr. Roberto Bayardo testified that, looking at the outside of the head, he did not notice any injuries to the head. However, once he “reflected” the skull to look at the inside, he saw multiple bruises, leading him to conclude that the victim had been struck on the head with a fist. Because this “reflected” view was apparently the only way to visually depict these injuries, and because the testimony and presentation of the photographs were brief and to the point, we cannot say that, in this case, the trial judge was outside the zone of reasonable disagreement in allowing these exhibits. Appellant’s fifth point of error is overruled.

In his sixth point of error, appellant complains that the trial court erred when it permitted the state to strike at appellant over his counsel’s shoulders. In attacking the credibility of the evidence the defense had presented, the prosecutor noted that appellant had initially given the police a statement that he did not know Stacey Stites. However, upon being confronted with the DNA evidence, the state asserted that defense counsel had concocted a defensive theory that Stites and appellant were having a secret affair. In support of this theory, appellant put on various witnesses to testify that they had seen appellant and Stites together at some point in time. It was in reference to one of these witnesses that the complained-of argument arose. Specifically, appellant complained of the following state’s argument regarding the testimony of defense witness Iris Lindley:

So you hear from Ms. Lindley, Iris Lindley. And usually when I talk to jurors I have to talk to you and say, you know, it’s not like it is on TV, you don’t usually get to cross-examine people like on TV. Well, I can’t [say] that here because Ms. Lindley is a witness who I must say is utterly devoid of credibility. Utterly devoid. And your job is to judge the credibility of the witnesses, and you have the right to believe all, none or some of what they say. How much of what Ms. Lindley said are you going to believe? She comes in here and she tells you,

"Yeah, I saw a girl come up and talk to [appellant]."

"What was her name?"

"Stephanie."

"Stephanie?"

You saw [defense counsel] go, "What did you say?" And [the witness] said, "Stephanie." And then you could kind of see her go, uh-oh, I got my script wrong.

[BY DEFENSE COUNSEL:] Objection, striking at the defendant through counsel. I'm going to object to that, Judge.

THE COURT: It's overruled. Go ahead.

[BY THE PROSECUTOR:] She got her script wrong, so then she says, "No, no, Stacey, Stacey. Yeah, that's it, Stacey." Okay, sure.

And then [the witness] says that this girl drove up in a gray truck. I saw her in a gray truck. Well, we know Stacey didn't drive a gray truck. She got that part of the script wrong, too. Then this is when it gets classic. [Defense counsel] shows [the witness] [Stites'] driver's license picture. "Is this the girl?" "No." So then we take this picture. "Is this the girl?" Well, gee, what do you think she's going to say now? "Yeah, that's her." Gheez.

Permissible areas of jury argument include: (1) summation of the evidence; (2) reasonable deductions from the evidence; (3) an answer to the argument of opposing counsel; or (4) a plea for law enforcement. *Wilson v. State*, 938 S.W.2d 57, 59 (Tex. Crim. App. 1996). Prosecution argument that the witnesses for the defense are not worthy of belief may fall under summation of or deduction from the evidence or answer to defense argument. *Satterwhite v. State*, 858 S.W.2d 412, 425 (Tex. Crim. App.), *cert. denied*, 510 U.S. 970, 114 S. Ct. 455, 126 L. Ed.2d 387 (1993). However, final arguments that result in uninvited and unsubstantiated accusation of improper conduct directed at a defendant's attorney are manifestly improper and serve only to inflame the

minds of the jury to the accused's prejudice. *Mosley v. State*, 983 S.W.2d 249, 258 (Tex. Crim. App. 1998), *cert. denied*, 526 U.S. 1070, 119 S. Ct. 1466, 143 L. Ed.2d 550 (1999); *Wilson*, 938 S.W.2d at 59. Indeed, trial judges should assume responsibility for preventing this type of argument. *Mosley*, 983 S.W.2d at 258.

While the argument in the present case does not directly refer to defense counsel, the statement that the witness had gotten her "script" wrong necessarily implied that counsel had a hand in coaching the witness. This is a necessary implication because only counsel would have had a grasp both of the facts of the case and of the information needed to support the defensive theory. Furthermore, no evidence appears in the record that any kind of "script" even existed. Therefore, the argument potentially injected a new fact into the case which was outside the record. *See Wilson, supra*. Because the argument, albeit impliedly, attacked defense counsel's honesty and integrity as an attorney, we hold that the argument was improper and that the trial judge erred in over-ruling appellant's objection. Hence, we must determine whether this error warrants reversal.

As we noted in *Mosley*, 983 S.W.2d at 259, improper comments on defense counsel's honesty do not rise to the level of a constitutional violation. Rather, we have characterized such comments as falling outside the areas of permissible argument. *See also Wilson*, 938 S.W.2d at 59. Our harm analysis is thus governed by TEX. R. APP. P. 44.2(b), which provides that: "Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Because this harmless error rule was taken directly from Federal Rule of Criminal Procedure 52(a) without substantive change, we have looked to federal caselaw for guidance in construing the rule. *See Mosley*, 983 S.W.2d at 259-261. In applying the federal rule to

improper argument cases, federal courts generally look to three factors: (1) severity of the misconduct (the magnitude of the prejudicial effect of the prosecutor's remarks); (2) measures adopted to cure the misconduct (the efficacy of any cautionary instruction by the judge); and (3) the certainty of conviction absent the misconduct (the strength of the evidence supporting the conviction). *Id.* (citing to *United States v. Millar*, 79 F.3d 338, 343 (2nd Cir. 1996) and *United States v. Palmer*, 37 F.3d 1080, 1085 (5th Cir. 1994), *cert. denied*, 514 U.S. 1087, 115 S. Ct. 1804, 131 L. Ed.2d 730 (1995)).

Applying this three-factor test, we first note that, while the comments were inappropriate, they did not directly accuse the defense attorneys of lying or of manufacturing evidence. *Cf. Dinkins v. State*, 894 S.W.2d 330, 357 (Tex. Crim. App. 1995) (comment by prosecution to jury that defense counsel "wants to mislead you a little bit" not as egregious as accusation that defense counsel was paid to "manufacture evidence" and "get this defendant off the hook"), *cert. denied*, 516 U.S. 832, 116 S. Ct. 106, 133 L. Ed.2d 59 (1995). Furthermore, the comments ultimately went to the issue of the truthfulness and credibility of a witness, an issue which it is ultimately the jury's duty to evaluate. Hence, the first factor of the harm test weighs only slightly in appellant's favor.

As for the second factor, no curative action was taken. In addition, the prosecutor reemphasized the statements after the trial court overruled appellant's objection. Thus, the second factor weighs heavily in favor of appellant.

The third factor, certainty of conviction, weighs heavily in favor of the state. Although appellant initially told the police that he was not acquainted with Stites, he asserted a defense based on a consensual sexual relationship with her. Appellant frequented the area where the

crime occurred, and the police saw him there at about around the time of the murder. According to testimony about the DNA evidence from both state and defense experts, appellant could not be excluded as the donor of the semen recovered from Stites' body, while all of appellant's close male relatives and male colleagues of Stites were excluded. The pathologist indicated that the donor of the semen was likely also the murderer, because the condition of Stites' body indicated that the sexual assault occurred at the time of death. Balancing all these factors, we find the error harmless. Point of error six is overruled.

In his seventh point of error, appellant asserts that the trial court erred when it permitted the state to comment on his failure to testify. Specifically, appellant complains about the following closing argument by the state:

And isn't it interesting that we talked a lot about the fact that Jimmy [Fennell] didn't have an alibi. Jimmy didn't have an alibi for that night. Jimmy didn't have anybody accounting for his whereabouts because Stacey was the only one who could have accounted for his whereabouts. It's important to note that nobody could ever find anything inconsistent with what he told you. Nobody. They canvassed his apartment, they looked everywhere, and nobody could find anything inconsistent. But it's true, Jimmy didn't have an alibi. But ask yourselves, is there anyone else here who didn't have an alibi? Is there anyone else who we've heard evidence about that didn't have an alibi? Yes, there is, the defendant.

Appellant submits that this argument was a comment on his failure to testify in that it could only have been interpreted by the jury as a statement that it had never heard from him. We disagree.

Appellant correctly notes that the Fifth Amendment, Article I, §10, of the Texas Constitution, and Article 38.08 of the Code of Criminal Procedure all prohibit the state from commenting on a defendant's failure to testify in a manner that invites the jury to construe the defendant's silence as evidence of guilt. However, pointing out to the jury that a defendant has failed to present evidence other than his own testimony is not necessarily a comment on his

failure to testify. *See, e.g., Ladd*, 3 S.W.3d at 569; *Wolfe v. State*, 917 S.W.2d 270, 279-80 (Tex. Crim. App. 1996). By the plain language of the argument itself, read in context, the above comment is a reference to appellant's failure to present witnesses other than himself. Indeed, after appellant's objection was overruled, the prosecutor said:

Don't you know that if somebody, anybody, would have been able to come her [sic] and tell you, yeah, [appellant] was asleep in bed at my house at three o'clock in the morning the night of April 23rd. If anyone, family member, friend, girlfriend, anyone on this earth could have come here and told you [appellant] was at home in bed with them, and alibied him, you would have heard from them.

Because the prosecutor did not err in commenting on appellant's failure to call defense witnesses other than himself, appellant's seventh point of error is overruled.

In his eighth point of error, appellant asserts that the "trial court erred in admitting [at punishment] evidence of a 1987 extraneous act offense for which appellant had been acquitted." In his brief, appellant appears to argue that the admission of this extraneous offense violated the doctrines of double jeopardy and collateral estoppel under *Ashe v. Swenson*, 397 U.S. 436, 443 (1970).²³ For purposes of analysis, we assume, without deciding, that the 1987 extraneous offense was improperly admitted.

In the extraneous offense of which appellant complains, appellant was tried and acquitted

²³At trial, appellant objected, simply stating, "It's our position that such evidence should be inadmissible." After further discussion, appellant stated, "You are allowing the jury to consider information that will be prejudicial to the defendant in this particular case, and violative of his Eight Amendment [sic] as well as the corollary of the Texas Constitution." Arguably, neither of these statements provides a sufficiently specific objection to preserve error on appellant's claims on appeal. However, because the state utilized our decision in *Powell v. State*, 898 S.W.2d 821, 830 (Tex. Crim. App. 1994), *cert. denied*, 516 U.S. 991, 116 S. Ct. 524, 133 L. Ed.2d 431 (1995), *overruled on other grounds, Prystash v. State*, 3 S.W.3d 522 (Tex. Crim. App. 1999), *cert. denied*, ___ U.S. ___, 120 S. Ct. 1840, 146 L. Ed.2d 782 (2000), at trial to show admissibility, and *Powell* addresses admission on double jeopardy grounds, we address appellant's point of error. *See* TEX. R. APP. P. 33.1(a)(1)(A).

of sexually assaulting Connie York in her Wichita Falls apartment. York testified, in the instant case, that she did not consent to sex with appellant. However, appellant was acquitted in York's case, apparently on the basis that the sex was consensual.

The state also put on evidence that appellant: broke into twelve-year-old Angela Hamby's home and beat, bit, raped, sodomized, and threatened to kill her; frequently beat and raped the mother of his two children while they were dating and, after she had broken off their relationship, broke into her home and raped her while their two children watched; raped Vivian Harbottle on the railroad tracks in the middle of the night and laughed at her when she asked him not to kill her; anally raped and physically abused his mentally disabled girlfriend, Caroline Rivas; abducted, assaulted, and attempted to rape Linda Schlueter six months after the abduction, rape, and murder of Stacey Stites.

Given the evidence presented, and that the majority of the evidence of extraneous offenses presented, including the instant case, was substantially similar to the complained-of evidence, we determine beyond a reasonable doubt that the admission of the evidence did not contribute to appellant's punishment. *See* TEX. R. APP. P. 44.2. Point of error eight is overruled.

Finding no reversible error, we affirm the judgment of the trial court.

Johnson, J.

Date Delivered: December 6, 2000

En banc

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