Affirmed and Opinion filed June 15, 2000.

In The

Fourteenth Court of Appeals

———————————

NO. 14-98-00456-CR and 14-98-00457-CR

———————————

SCOTT ALAN WILDEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 208th District Court
Harris County, Texas
Trial Court Cause No. 770,859 & 770,860

O P I N I O N

Scott Alan Wildey, appellant, was convicted by a jury of aggravated sexual assault and sentenced to 62 years in prison. In two points of error he complains the weapon used in the assault was not "unknown" to the grand jury, and that the evidence was insufficient to support his conviction. We affirm.

Because Wildey's second point of error complains that the evidence was not sufficient to show that the complainant was placed in fear of death or serious bodily injury, we will first set forth the relevant evidence.

V. N., the victim, had mowed the lawn that day and was going down the hallway to change out of her clothes when a man jumped out of a utility closet and pinned her against the wall.

She caught a glimpse of her attacker's face as he forced her into the bedroom and managed to scratch his face as he dragged her onto the bed. After tying her hands behind her back, and covering her face with a shirt, she was taken into her bathroom, where he sliced open her shirt and bra with a sharp object. She was then sexually assaulted.

After the attack, and while her hands were still bound, her attacker asked her if she had any matches so he could smoke a cigarette. He then set her house on fire. At that point, V. N. tried to crash through a window in her bathroom. The window did not break, and her attacker caught her and slammed her head against the floor, stunning her. He left her on the floor of her bedroom in the burning house. After she regained her senses, V.N. worked her hands free, ran out of the house naked and got a neighbor to summon help. She said she bolted from the house because "I thought I was going to die." She also said the fire destroyed her house and killed her cat.

Appellant contends that the evidence was legally insufficient to show that V.N. was placed in fear of death or serious bodily injury, an element of the offense. *See* TEX. PEN. CODE ANN. § 22.021(a)(2)(A)(ii) (Vernon 1994). The standard for reviewing a legal sufficiency challenge is whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 320, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The evidence is examined in the light most favorable to the jury's verdict. *Jackson*, 443 U.S. at 320, 99 S.Ct. 2781; *Johnson*, 871 S.W.2d at 186. The sufficiency of the evidence is measured against the offense defined by a hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex.Crim.App.1997). Such a charge would include one that "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restricts the State's theories of liability, and adequately describes the particular offense for which the defendant is tried." *Id*. A successful legal sufficiency challenge will result in rendition of an acquittal by the reviewing court. *Tibbs v. Florida*, 457 U.S. 31, 41-42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982).

We find that a rational jury could have found from this evidence that V.N. was placed in fear of death or serious bodily injury by her assailant. Appellant's second point of error is overruled.

In his first point of error appellant contests the indictment's assertion that the weapon used during the assault was known, therefore the description as being "of the manner and means unknown to the grand jury" was deficient. When an indictment alleges that the manner or means of inflicting the injury is unknown, and the evidence at trial does not establish the type of weapon used, a prima facie showing is made that the weapon was unknown to the grand jury. *Matson v. State*, 819 S.W.2d 839, 847 (Tex. Crim. App. 1991). On the other hand, if the evidence at trial shows what object was used to inflict the injury, then the State must prove that the grand jury used due diligence in attempting to ascertain the weapon used. *Id*. If the evidence is inconclusive as to the instrumentality employed in the crime, the State need not prove the grand jury used due diligence in its investigation. *See Hicks v. State*, 860 S.W.2d 419, 425 (Tex. Crim. App. 1993).[1]

Here the only witness who testified was blindfolded at the time, and she did not know which weapon was used in slicing open her shirt and cutting off her bra. Because the evidence was inconclusive as to the weapon employed in the crime, the State did not have to prove diligence on the part of the grand jury. Appellant's first point of error is overruled and the judgment of the trial court is affirmed.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed June 15, 2000.

Panel consists of Justices Robertson, Sears, and Lee.[*]

Do Not Publish — TEX. R. APP. P. 47.3(b).

---

[1] We also note that the court of criminal appeals, in dicta, has questioned the continued viability of the *Matson-Hicks* line of cases. *See Rosales v. State*, 4 S.W.3d 228, 231 (Tex. Crim. App. 1999).

[*] Senior Justices Sam Robertson, Ross A. Sears, and Norman Lee sitting by assignment.