Affirmed and Opinion filed July 20, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00564-CR

WILLIAM LEWIS REECE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 766,088

O P I N I O N

Convicted by a jury for aggravated kidnapping and sentenced to sixty years imprisonment in the Department of Criminal Justice–Institutional Division, Appellant William Lewis Reece challenges his conviction and sentence in thirteen points of error, covering a variety of issues. We affirm.

I. BACKGROUND

In the early morning of May 17, 1997, complainant, Sandra Sapaugh, stopped at a Stop-N-Go convenience store in Webster, Texas to call a friend. While using a pay phone outside the store, complainant observed appellant pouring water into the engine of a white pickup truck. Complainant also noticed that appellant was staring at her. After completing her phone call, she got in her van and headed to a nearby Waffle House restaurant, where she was to meet a friend. After driving a short distance, she heard a strange noise coming from her tire. She pulled into the parking lot of the Waffle House. Before she could get out of her van, appellant appeared at her window, explaining that he noticed that she had a flat tire. Complainant got out of the van and saw that the tire was flat. Appellant offered to help. He opened the hood of his truck and asked complainant to reach into his truck and hand him a rag from the passenger side of the truck. As complainant leaned into the truck, appellant came up behind her, placed a knife to her neck, pushed her into the truck, and ordered her to stay down. Appellant then drove to the parking lot of a Motel 6. He stopped the truck, reached into complainant's shirt, and ordered her to remove her pants. She refused.

They left the motel parking lot and appellant drove North on Interstate-45. Complainant's legs were on appellant's lap. Appellant again ordered complainant to remove her pants. She asked if she could take her shoes off first. Appellant said she could, but to "hurry up." As complainant moved over to the passenger side and bent down, she opened the passenger door and prepared to jump from the moving vehicle. When complainant started to jump, appellant grabbed her shirt. Complainant jumped from appellant's truck, hit the ground, and rolled. Hearing appellant's truck stop and start to back up, complainant ran toward oncoming traffic. A passing motorist, Minerva Torres, pulled over when she saw complainant in the road. Complainant pointed up the road to appellant's pickup truck, which was now moving in reverse toward the women. Torres helped complainant into her car and drove back to the Waffle House to call the police. The Webster Police Department responded and an ambulance transported complainant to an area hospital.

II. ISSUES PRESENTED

Appellant complains on appeal that: (1) the trial court erred in admitting his prior convictions during the guilt/innocence stage of the trial; (2) the trial court erred in admitting hearsay testimony; (3) the trial court erred in excluding photographs; (4) the trial court erred in not submitting a jury instruction regarding in-court and out-of-court identification; (5) the trial court erred in excluding expert testimony; (6) the trial court erred in refusing appellant's requested jury instruction on a lesser included offense; (7) the evidence is insufficient to support the finality of the convictions pled in the enhancement paragraphs of the indictment; (8) the trial court erred in restricting his cross-examination of a witness; (9) the trial court erred in failing to admit a statement against interest; (10) appellant's right to confront witnesses was violated because the trial court refused to restrict media coverage of the testimony of a defense witness; (11) the trial court erred in denying appellant's motion for a mistrial based on the state's improper jury argument during punishment; and (12) the evidence is factually insufficient to support appellant's conviction.

A. Prior Convictions

In his first point of error, appellant claims the trial court erred in admitting during the guilt/innocence stage of the trial his prior convictions from Oklahoma for kidnapping, rape, and oral sodomy. In May 1997, at the request of the Webster Police Department, Sue Dietrich, a detective with the Alvin Police Department, hypnotized complainant and another witness, Harriette James, who was working as a clerk at the Stop-N-Go store on the night complainant observed appellant in the parking lot. In October 1997, in an unrelated case, the Friendswood Police Department publicly named appellant as a prime suspect in the death of a young girl, Laura Smither, but no charges were filed against him in that case. Chief Jared Stout of the Friendswood Police Department discussed the Laura Smither case with Dietrich, who at that time was Chief of the Tiki Island Police Department. From the description of the suspect and the vehicle in the Laura Smither case, Dietrich made a connection between appellant and this case. Dietrich suggested to Stout that he contact the Webster Police Department about appellant.

Appellant's primary defensive theory at trial was that there was a conspiracy to arrest him for aggravated kidnapping in this case because there was no probable cause to arrest him in the Laura Smither case. In the following exchange, appellant's counsel questioned Dietrich about why she contacted Stout instead of the Webster police:

Q: Well, being a police chief, you know that if you as a police chief from another agency wants to reach a detective, all you need to do is contact the Webster Police Department and tell them that you have some information for detective so-and-so, could you please contact him at home, it's urgent, and call me. Don't you have that option available to you?

A: Yeah, I could.

Q: The truth of the matter is that you and Jared Stout needed to figure out a way, after he shot his mouth off to the public, okay, to the press, you had to figure out a way to assist him in having William Reece arrested.

A: That's not true.

Q: That's why you contacted Stout?

A: No, sir.

Q: Okay. Well, what is it, five and a half months later that you remembered that you couldn't remember the other day about the description of the person and the truck? Did you remember more back in October?

A: What I remember was the truck, the description of the truck, and the way that--the way that the suspect spoke.

The state claimed that appellant opened the door to his prior criminal history when he put forth his "conspiracy theory," thus giving the state the opportunity to respond to that defensive theory. Dietrich testified that appellant's prior convictions were a factor, in addition to his description and the description of his truck, in her decision to suggest to Stout that he call the Webster Police Department.

An accused may not be tried for a collateral offense or for being a criminal generally. *See Couret v. State*, 792 S.W.2d 106, 107 (Tex. Crim. App. 1990). Evidence of an extraneous offense must have relevance apart from its tendency to prove the character of the defendant in order to show that he acted in conformity therewith. *See* TEX. R. EVID. 404(b). Therefore, extraneous matters are admissible if they are relevant to a material issue, unless the probative value is substantially outweighed by the danger of unfair prejudice to the defendant. *See Montgomery v. State*, 810 S.W.2d 372, 387-89 (Tex. Crim. App. 1990) (op. on reh'g.). It is within the trial court's discretion to admit evidence of extraneous offenses. *See Willis v. State*, 932 S.W.2d 690, 696 (Tex. App.–Houston [14th Dist.] 1996, no pet.) (citing

Montgomery, 810 S.W.2d at 391). Therefore, as long as the trial court's ruling is within the zone of reasonable disagreement, the appellate court will not disturb its ruling. *See id*.

Texas Rule of Evidence 107 permits the introduction of otherwise inadmissible evidence when that evidence is necessary to fully and fairly explain a matter "opened up" by the opposing party. *See* TEX. R. EVID. 107; *Credille v. State*, 925 S.W.2d 112, 116 (Tex. App.–Houston [14th Dist.] 1996, pet. ref'd). When defense counsel pursues a subject that ordinarily would be outside the realm of proper comment by the state, the defendant opens the door and creates a right of reply by the state. *See Credille*, 925 S.W.2d at 116. Moreover, an extraneous offense may be admitted to refute a defensive theory put forth by the defendant. *See Rubio v. State*, 607 S.W.2d 498, 500 (Tex. Crim. App. 1980). Here, appellant opened the door to the admission of his prior Oklahoma convictions by questioning Dietrich about her motive in suggesting to Stout that he contact the Webster Police Department. Therefore, appellant's convictions were not offered to show he acted in conformity with those past crimes.

Relevant evidence, however, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *See* TEX. R. EVID. 403. We do not find that the probative value of appellant's prior convictions was outweighed by the danger of unfair prejudice because without such evidence, appellant would have been allowed to present an incomplete picture of the circumstances surrounding his arrest in this case. Moreover, the trial court expressly instructed the jury that it was not to consider the extraneous offenses as evidence of appellant's guilt in this case, but that they were being admitted solely for the purpose of aiding the jury in "passing on the motive of Sue Dietrich." Therefore, the trial court did not err in admitting evidence regarding appellant's Oklahoma convictions for the limited purpose of allowing the State to respond to appellant's defensive theory. Appellant's first point of error is overruled.

In his second point of error, appellant complains that Dietrich's testimony regarding his prior convictions was inadmissible hearsay. Appellant's convictions, however, were not offered for the truth of the matter asserted. *See* TEX. R. EVID. 801(d). As discussed above, Dietrich's testimony concerning appellant's prior convictions was admitted solely for the purpose of establishing her reasons for contacting

Chief Stout, not to prove that appellant, in fact, had been convicted of such crimes. Appellant's second point of error is overruled.

B. Exclusion of Photographs

In his third point of error, appellant asserts the trial court erroneously excluded photographs of other pickup trucks taken by his investigator, John Everly. It is within the trial court's discretion to admit or exclude evidence. *See Webb v. State*, 991 S.W.2d 408, 418 (Tex. App.–Houston [14th Dist.] 1999, pet. ref'd). Subject to abuse of discretion, the trial court's decision will not be disturbed on appeal. *See id*. The exclusion of evidence does not result in reversible error unless it affects a substantial right of the accused. *See* TEX. R. APP. P. 44.2(b).

Appellant claims his pickup truck, a white Ford dually, was misidentified as the vehicle involved in the abduction of complainant. Specifically, appellant complains of the testimony of Harriette James (the clerk of the Stop-N-Go Store) that the rims on the wheels of appellant's pickup truck were unusual and helped her identify appellant's truck. James testified that the nuts on the rims of the front wheels of appellant's pickup truck were raised, while the nuts on the back rims were recessed. Appellant asserts that these types of rims are common to dually pickup trucks. In support of this assertion, appellant sought to introduce six photographs of other pickup trucks. These photographs all depicted trucks that were makes and colors different from appellant's truck, but which had similar rims. The trial court excluded the photographs on the basis of relevancy. However, the trial court permitted Everly to testify about the rims of similar pickup trucks in the Webster area.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." TEX. R. EVID. 401. In determining whether evidence is relevant, courts look at the purpose for offering the evidence, and whether there is a direct or logical connection between the offered evidence and the proposition to be proved. *See Butler v. State*, 936 S.W.2d 453, 458 (Tex. App.–Houston [14th Dist.] 1996, pet. ref'd). Here, not all of the photographs were of trucks of the same make and model as appellant's pickup truck. The photographs of these other vehicles do not make it any more or less likely that appellant's vehicle was involved in the kidnapping of complainant. Therefore, the photographs were not relevant.

Even if the photographs were relevant and trial court erred in excluding them, any error is harmless. The import of what appellant was trying to convey to the jury, i.e., that the rims on appellant's pickup truck are similar to those on other pickup trucks, was, in fact, conveyed to the jury. *See Easterling v. State*, 710 S.W.2d 569, 574 (Tex. Crim. App. 1986). Everly testified at length about the rims found on dually pickup trucks. *See Rodda v. State*, 926 S.W.2d 375, 376 (Tex. App.–Fort Worth 1996, pet. ref'd) (finding that error, if any, in excluding photographs was harmless because defendant testified to at length about the same matter. Appellant's third point of error is overruled.

C. Article 38.23 Instruction

In his fourth and fifth points of error, appellant claims the trial court erred in not instructing the jury that it could disregard any illegally obtained evidence with regard to the in-court identification of appellant by Harriette James and the out-of-court identification by complainant because factual disputes exist with regard to whether the identifications were tainted by the state's impermissible conduct. Article 38.23 of the Texas Code of Criminal Procedure states, in relevant part:

> (a) No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.
>
> In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon Supp. 2000).

Article 38.23 mandates that the trial court instruct the jury to resolve factual disputes regarding whether evidence was illegally obtained and, if such evidence was illegally obtained, then the jury is to disregard such evidence. *See Thomas v. State*, 723 S.W.2d 696, 707 (Tex. Crim. App. 1986). By its own terms, however, article 38.23 applies only to illegally obtained evidence. *See Allen v. State*, 511 S.W.2d 53, 54 (Tex. Crim. App. 1974). Therefore, in-court identifications are not within the scope of article 38.23. *See Andujo v. State*, 755 S.W.2d 138, 143 (Tex. Crim. App. 1988); *Allen*, 511 S.W.2d

at 54; *Thomas v. State*, 788 S.W.2d 887, 889-90 (Tex. App.–Houston [14th Dist.] 1990, no pet.). For this reason, appellant was not entitled to an article 38.23 instruction regarding James's in-court identification. Appellant's fourth point of error is overruled.

Appellant also complains that the trial court failed to give an instruction as to complainant's identification of him at the line-up. *See Maldonado v. State*, 998 S.W.2d 239, 246 (Tex. Crim. App. 1999). The article 38.23 jury instruction requirement only applies when there is a fact issue regarding whether the evidence was obtained in violation of state or federal laws. Appellant has not shown that there is a fact issue concerning the legality of complainant's identification of him.

Ronald Bellnoski, a detective with the Webster Police Department, drove complainant from the apartment where she was staying in Katy to the Houston police station to view a line-up in which appellant was to be a participant. During the drive to the police station, Bellnoski and complainant discussed the Laura Smither case. When complaint testified before the jury that she had asked Bellnoski about the Smither case, appellant pointed out that she had testified at a pretrial hearing that Bellnoski had initiated conversation about the Smither case. At most, this evidence went to the weight and credibility of complainant's testimony regarding her identification of appellant, not to the legality of her identification of him. Therefore, appellant was not entitled to an article 38.23 instruction regarding complainant's out-of-court identification of him. Appellant's fifth point of error is overruled.

D. Exclusion of Expert Testimony

In his sixth point of error, appellant asserts the trial court erred in excluding expert rebuttal testimony. Under Texas Rule of Evidence 702, if the trial court finds that a witness has a specialized skill, training, or other knowledge, and further finds that his testimony will assist the trier of fact to understand the evidence or to determine a fact issue, then the testimony is admissible. *See* TEX. R. EVID. 702; *Banda v. State*, 890 S.W.2d 42, 58-59 (Tex. Crim. App. 1994); *Emerson v. State*, 880 S.W.2d 759, 763 (Tex. Crim. App. 1994). Expert testimony assists the trier of fact when the jury is not qualified to "the best possible degree" to determine intelligently the particular issue without the benefit of the expert witness's specialized knowledge. *See Schultz v. State*, 957 S.W.2d 52, 59 (Tex. Crim. App. 1997). Moreover, the purpose of expert testimony is to aid the jury in its decision, not to supplant its decision. *See id.*

Appellant claims he should have been allowed to rebut evidence presented by the state that his prior attorney was present at the line-up, thus creating the impression that he had competent representation, and that the line-up was not unduly suggestive. The state questioned a Webster police officer, Charles Propst, about appellant's prior attorney's participation in setting up the line-up:

> Q.: Do you know whether or not the defendant and his attorney were allowed to actively participate in the lineup?
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> * * *
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> A.: The defendant's attorney was allowed to view the prospective participants in the lineup.
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> * * *
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> A.: The defendant's attorney did not object to any of the participants at all.
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> * * *
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> A.: The defendant's attorney picked the order in which [sic] the lineup.
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> * * *
>
> A.: Yes, every participant was placed in the position as per the defendant's attorney's request.

Appellant wanted Robert Jones, an expert in the area of criminal procedure, to testify that the fact that appellant's prior attorney failed to object to the line-up had no bearing on the lawfulness of the line-up procedure. In his proffered examination of Jones, appellant questioned Jones about the degree to which the other line-up participants or "fillers" resembled appellant. The jury viewed the videotape of the line-up from which complainant picked out appellant. Appellant also thoroughly questioned Propst about the physical attributes taken into consideration when selecting other participants in a line-up, and the physical attributes of the fillers for this line-up as compared to appellant. To this end, Jones's testimony would not have aided the jury in comparing the likeness of the fillers in the lineup to appellant. *See Schultz*, 957 S.W.2d at 59.

Finally, the trial court instructed the jury that the defendant is not limited to making objections to a line-up only at the time of the line-up, but may make objections to the court at a later time. During closing argument, appellant's trial counsel reminded the jury of the court's instruction. Therefore, it was not necessary for Jones to testify that a defendant may object to the line-up in subsequent proceedings. Appellant's sixth point of error is overruled.

E. Lesser Included Offense

In his seventh point of error, appellant claims the trial court erred in refusing to submit the lesser included offense of unlawful restraint in the charge under Article 37.09 of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 37.09 (Vernon 1981). Texas courts employ a two-prong test in determining whether a defendant is entitled to an instruction on a lesser included offense. *See Moore v. State*, 999 S.W.2d 385, 403-04 (Tex. Crim. App. 1999), *cert. denied*, __ U.S. __, 120 S. Ct. 2220 (2000) (No. 99-8315). First, the court determines whether the lesser offense comes within article 37.09. *See Moore v. State*, 969 S.W.2d 4, 8 (Tex. Crim. App. 1998).[1] The lesser included offense must be included in the proof necessary to establish the charged offense. *See Rousseau v. State*, 855 S.W.2d 666, 673 (Tex. Crim. App. 1993).[2] Second, the court determines if there is some evidence

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[1] Article 37.09 provides for an instruction of a lesser included offense under the following circumstances:

> An offense is a lesser included offense if:
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> (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged;
>
> (2) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission;
>
> (3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or
>
> (4) it consists of an attempt to commit the offense charged or an otherwise included offense.

TEX. CODE CRIM. PROC. ANN. art. 37.09.

[2] This is a restatement of article 37.09(1), the most frequently encountered type of lesser included offense. *See Moore*, 969 S.W.2d at 8. The other types of lesser included offenses listed in 37.09 could apply in a given case. *See id.*

which would permit a rational jury to find that, if guilty, the defendant is guilty only of the lesser offense. *See Moore*, 969 S.W.2d at 8. In other words, there must be some evidence from which a rational jury could acquit the defendant of the greater offense while convicting him of the lesser offense. *See Bignall v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994).

In determining whether appellant is entitled to a charge on a lesser included offense, the reviewing court must consider all the evidence introduced at trial, whether produced by the state or the defendant. *See Penry v. State*, 903 S.W.2d 715, 755 (Tex. Crim. App. 1995). Anything more than a scintilla of evidence is sufficient to entitle a defendant to a lesser charge. *See Forest v. State*, 989 S.W.2d 365, 367 (Tex. Crim. App. 1999). The evidence must establish the lesser-included offense as a "'valid, rational alternative to the charged offense.'" *Id.* (quoting *Arevalo v. State*, 943 S.W.2d 887, 889 (Tex. Crim. App. 1997)).

There are two ways in which the evidence may indicate a defendant is guilty only of the lesser offense. *See Saunders v. State*, 840 S.W.2d 390, 391 (Tex. Crim. App. 1992). First, there may be evidence which refutes or negates other evidence establishing the greater offense. *See Schweinle v. State*, 915 S.W.2d 17, 19 (Tex. Crim. App. 1996) Second, a defendant may be shown to be guilty of the lesser offense if the evidence presented is subject to different interpretations. *See id.*

A person commits the offense of unlawful restraint if he intentionally or knowingly restrains another person. *See* TEX. PEN. CODE ANN. § 20.02 (Vernon Supp. 2000). To restrain a person means "to restrict a person's movements without consent, so as to interfere substantially with the person's liberty by moving the person from one place to another or by confining the person." TEX. PEN. CODE ANN. § 20.01(1) (Vernon Supp. 2000).

A person commits the offense of aggravated kidnapping "if he intentionally or knowingly abducts another person with the intent to . . . inflict bodily injury on him or abuse him sexually; . . ." or "intentionally or knowingly abducts another person and uses or exhibits a deadly weapon during the commission of the offense." TEX. PEN. CODE ANN. § 20.04(a)(4), (b) (Vernon Supp. 2000). "'Abduct' means to restrain a person with intent to prevent his liberation by . . . using or threatening to use deadly force." TEX. PENAL CODE ANN. § 20.01(2)(B).

Unlawful restraint is a lesser included offense of aggravated kidnapping. *See Schweinle,* 915 S.W.2d at 19. Therefore, the first prong of the test for determining whether appellant was entitled to an instruction on the lesser included offense has been satisfied. *See Harner v. State*, 997 S.W.2d 695, 702 (Tex. App.–Texarkana 1999, no pet.); *Blalock v. State*, 847 S.W.2d 461, 463 (Tex. App.–Houston [1st Dist.] 1993, pet. ref'd). We must now determine whether there is evidence that if appellant is guilty of an offense, he is guilty only of the offense of unlawful restraint.

Appellant claims the evidence shows that complainant was only restrained for a short period in the truck until she was released. First, appellant contends that complainant got into his vehicle willingly. Appellant points to the fact that complainant was employed as a topless dancer and asserts that complainant was prostituting herself that night. Appellant further claims the medical records indicate that complainant's injuries were work related. Appellant's reliance on the medical records is misplaced. Those records directly contradict appellant's factual contentions and specifically state that complainant's injuries were *not* work related. In any event, there is no evidence in the record to support the notion that complainant was a prostitute or that she was prostituting herself to appellant or to anyone else on the evening of question.

Appellant also puts forth the theory that at the time complainant jumped from his moving vehicle, he was slowing down in order to let her out. At some point, complainant claimed that the vehicle was traveling at seventy miles per hour when she jumped; however, she later recanted that statement and testified the vehicle was traveling slower, but that she did not know at what speed. Dr. Jorge Trujillo, the emergency room physician who treated complainant, testified that while her injuries were consistent with having jumped from a moving vehicle, they were not consistent with injuries that would have been sustained when jumping from a vehicle traveling at seventy miles per hour. The doctor, however, testified that it was not possible to tell from complainant's injuries if the truck was speeding up or slowing down at the time complainant jumped. The fact that the vehicle was not traveling at seventy miles per hour is irrelevant; complainant sustained injuries which were the result of having jumped from a moving vehicle. There is no indication that appellant was slowing down to release complainant.

Appellant also relies on the testimony of Minerva Torres, the motorist traveling on Interstate-45 who stopped to help complainant after she jumped from appellant's truck. Appellant's points to Torres' testimony that (1) she did not see the truck moving, except when it was in reverse and backing up, and (2) that she questioned complainant about what was happening because she thought that complainant had been fighting with her "boyfriend." Appellant, however, ignores Torres's other testimony. Torres testified that complainant, who appeared to be terrified, told her that a man had approached her at the Waffle House about her flat tire and, at knife point, forced her into his truck from which she had jumped while on the freeway.

In any event, even if appellant had slowed down to release complainant, as he claims, the offense of aggravated kidnapping had been completed before complainant jumped from appellant's truck. The First Court of Appeals, rejecting the argument that the lesser included offense of unlawful restraint had been raised in aggravating kidnapping case, observed:

> Proof of the completed offense of aggravated kidnapping had been shown *before* the events of the complainant's escape, followed by appellant's attempt to stop her and the complainant's injuries. The State had proved by uncontradicted evidence, before the events of complainant's escape, that appellant had intentionally and knowingly abducted the complainant from her automobile on the freeway to the secluded location by the dumpsters, and had used or threatened to use deadly force when he pulled the knife, pointed it at her, and forced her to the floor of his truck.

Blalock, 847 S.W.2d at 464 (emphasis in the original).

Here, complainant testified that appellant had placed a knife at her throat, forced her into his truck, and attempted to force her to undress before her escape from his moving vehicle. Appellant did not present any evidence refuting complainant's version of those events. We find there is no evidence that appellant would be guilty only of the lesser included offense unlawful restraint. Appellant's seventh point of error is overruled.

F. Conviction Pled in Enhancement Paragraph

In his eighth point of error, appellant challenges the legal sufficiency of the evidence supporting the finality of his Oklahoma conviction for forcible oral sodomy, as pled in the enhancement paragraph of the

indictment, because the general certification in the pen packet does not properly authenticate the judgment and sentence. Appellant relies on *Scott v. State*, in which the Court of Criminal Appeals held that the defendant's Louisiana sentences contained in a pen packet were not admissible because there was no certification as to their authenticity, even though the packet contained a general certification by the record clerk for the Louisiana State Penitentiary. *See Scott v. State*, 553 S.W.2d 361, 363-64 (Tex. Crim. App. 1977). In *Dingler v. State*, the court, although not citing *Scott*, applied the same rule, i.e., that the judgment and sentence were required to be certified. *See Dingler v. State*, 768 S.W.2d 305, 306 (Tex. Crim. App. 1989), *overruled by Reed v. State*, 811 S.W.2d 582 (Tex. Crim. App. 1991). The *Dingler* court predicated its decision on former Article 3731a of the Texas Revised Civil Statutes, which was legislatively repealed when the Court of Criminal Appeals adopted the Texas Rules of Criminal Evidence. *See Reed*, 811 S.W.2d at 583-84 & n.4.

Expressly overruling *Dingler*, the Court of Criminal Appeals found that it was no longer valid in light of Texas Rules of Criminal Evidence 901 and 902. *See id*. at 584. Instead, certification of the pen packet copies of the judgment and sentence by the records clerk for the the Texas Department of Corrections constitutes proper authentication in accordance with Rule 902(4) of the Texas Rules of Criminal Evidence (now Texas Rules of Evidence). *See id*. at 586; *see also State v. Handsbur*, 816 S.W.2d 749, 750 (Tex. Crim. App. 1991). Although *Reed* does not expressly overrule *Scott* as it does *Dingler*, it clearly overturns the rule upon which appellant relies, as stated in *Scott*. Moreover, there is no distinction between Texas convictions and out-of-state convictions.

The pen packet contains a certification by Richard E. Green, stating:

> I, Richard E. Green, hereby certify: That I am the Offender Records Manager, Oklahoma Department of Corrections, the agency having jurisdiction over all adult correctional facilities of the state of Oklahoma; that in my legal custody as such officer are the original files and records of persons heretofore committed to the Department of Corrections; that the 1) photograph, 2) fingerprint card, and 3) commitment document(s) attached are copies of the original records of persons heretofore committed to said Department of Corrections and who serve a term of incarceration/supervision therein; that I have compared the foregoing and attached copies with their respective originals now on file in my office and each thereof contains and is a full, true, and correct copy from its said original.

Also contained in the packet is a certificate of the Oklahoma Secretary of State as to the official capacity of Richard E. Green. This evidence is sufficient to support the finality of appellant's conviction for forcible oral sodomy, as pled in the enhancement paragraph of his indictment. Appellant's eighth point of error is overruled.

G. Restriction of Cross-Examination

In his ninth point of error, appellant asserts the trial court erred in not allowing him to cross-examine John Tollett, a detective with the Friendswood Police Department, about the results of a polygraph examination to which appellant had voluntarily submitted in the investigation of the Laura Smither case. Appellant asserts the Friendswood Police Department intentionally and deliberately withheld from the Webster Police Department the results of the polygraph test, which he claims exonerated him in the Laura Smither case. Appellant contends the Friendswood Police Department acted only out of ill-will, improper motive, and bias and that he should have been allowed to question Tollett about the results of the polygraph test in order to establish the ill-will, improper motive, and bias upon which his arrest in this case was allegedly based.

Under well-established Texas law, the results of a polygraph examination are not admissible for any purpose. *See Tennard v. State*, 802 S.W.2d 678, 683 (Tex. Crim. App. 1990); *Ex parte Renfro*, 999 S.W.2d 557, 561 (Tex. App.–Houston [14th Dist.] 1999, pet. ref'd). The rule is the same whether the state or the defendant is the party offering the results into evidence. *See Castillo v. State*, 739 S.W.2d 280, 293 (Tex. Crim. App. 1987). Therefore, the results of appellant's polygraph test from the Laura Smither investigation were not admissible in this case for any reason. Appellant's ninth point of error is overruled.

H. Statement Against Interest

In his tenth point of error, appellant claims the trial court erred in failing to admit a statement against the interest of James Sapaugh, the complainant's husband. Appellant asserts that the night before complainant was abducted, she told her husband that she was "going to make some money." James Sapaugh gave this information to Ronald Sillavan, a detective with the Webster Police Department, during a videotaped interview. Appellant contends, without any supporting evidence, that James Sapaugh was "in effect saying that his wife was a prostitute," which, he claims, was a statement against James Sapaugh's interest. Because Sapaugh was not available to testify at trial, appellant sought to introduce this statement through Sillavan.

Texas Rule of Evidence 803(24) provides that statements made against one's interest are admissible as an exception to the hearsay rule. *See* TEX. R. EVID. 803(24). Even if the statement could be interpretted as appellant suggests, and even if appellant could establish that James Sapaugh's statement to Sillivan is a statement against interest, he has not shown that the original statement complainant allegedly made to her husband is admissible as an exception to the hearsay rule. Hearsay within hearsay is admissible only if each part of the combined statements falls within an exception to the hearsay rule. *See* TEX. R. EVID. 805; *Crane v. State*, 786 S.W.2d 338, 354 (Tex. Crim. App. 1990); *Easley v. State*, 986 S.W.2d 264, 269 (Tex. App.–San Antonio 1998, no pet.). Because appellant failed to establish an exception to both levels of hearsay, the trial court did not err in excluding the statement. Appellant's tenth point of error is overruled.

I. Media Coverage

In his eleventh point of error, appellant contends the trial court violated his right to a fair trial, to confront witnesses, and to due process by refusing to restrict media coverage during the testimony of James Sapaugh. Appellant filed a motion to exclude cameras during James Sapaugh's testimony because James Sapaugh feared the publicity would "ruin" him. The trial court stated that it would have a hearing on the motion outside the presence of the television cameras and rule on the motion if James Sapaugh would appear before the court to explain his reasons for not wanting to testify at trial before the media. Appellant, however, could not locate James Sapaugh and was unable to serve him with a subpoena thereby securing his attendance for the hearing.

To preserve error for appellate review, the complaining party must obtain an adverse ruling from the trial court. *See Dixon v. State*, 2 S.W.3d 263, 265 (Tex. Crim. App. 1998). If the trial court refuses to rule after a request, an objection to this refusal preserves the complaint for appeal. *See* TEX. R. APP. P. 33.1(a)(2)(B); *Davis v. State*, 955 S.W.2d 340, 353 (Tex. App.–Fort Worth 1997, pet. ref'd). The trial court never ruled on appellant's motion to exclude media coverage, and appellant never objected to the trial court's failure to rule on his motion. Therefore, appellant did not preserve this complaint for appellate review. Appellant's eleventh point of error is overruled.

J. Improper Jury Argument

In his twelfth point of error, appellant asserts the trial court erred in denying his motion for a mistrial based on the state's improper argument during the punishment phase of the trial. The four permissible areas of jury argument are: (1) summation of the evidence, (2) reasonable deductions from the evidence, (3) answer to the argument of opposing counsel, and (4) plea for law enforcement. *See Guidry v. State*, 9 S.W.3d 133, 154 (Tex. Crim. App. 1999), *petition for cert. filed*, (U.S. May 9, 2000) (No. 99-9593); *Wilson v. State*, 7 S.W.3d 136, 147 (Tex. Crim. App. 1999). Not every inappropriate remark made during closing argument mandates the reversal of a conviction. *See Lagrone v. State*, 942 S.W.2d 602, 619 (Tex. Crim. App. 1997). On review, we disregard improper jury argument unless it affects the appellant's substantial rights. *See* TEX. R. APP. P. 44.2(b). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *See King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997) (citing *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). We analyze the statements at issue in the context of the entire jury argument, rather than in isolated sentences. *See Castillo v. State*, 939 S.W.2d 754, 761 (Tex. App.–Houston [14th Dist.] 1997, pet. ref'd); *Williams v. State*, 826 S.W.2d 783, 785-86 (Tex. App.–Houston [14th Dist. 1992, pet. ref'd).

The state made seven arguments about which appellant now complains on appeal. In the first argument, the prosecutor stated:

> He [Appellant] sits there, has a lawyer, and wants to try to defend himself.

Appellant objected to the state's commenting about his employing defense counsel. The court sustained appellant's objection and instructed the jury to disregard the comment, but overruled appellant's motion for a mistrial. Appellant argues this error cannot be cured with an instruction to disregard. We disagree. We do not find that this argument had a substantial and injurious effect or influence in the jury's determination of appellant's sentence.

In the second argument about which appellant complains, the prosecutor stated:

> So he gets a 10 -- Excuse me, 15-year sentence and 5-year sentence and an 8-year sentence for all that he did to those ladies. Of course, they get a life sentence. *And then after he serves his time, you see, a warden comes by with a key and lets him out.*

(emphasis added). Appellant objected to the italicized statement on the basis that it was an improper reference to parole. The trial court overruled the objection, but admonished the state to "be careful here." We do not find that the prosecutor's remark was a reference to parole. The comment was permissible as a plea for law enforcement. The prosecutor was merely drawing a comparison between the victims having to live the rest of their lives with the trauma of having been assaulted with the fact that appellant does not remain incarcerated for the rest of his life, regardless of whether he is paroled. Furthermore, we do not find the comment had a substantial and injurious effect or influence on the sentencing.

In the third argument made the subject of appellant's complaint, the prosecutor stated:

> They never get released, but he gets released and he comes to Houston. Too bad we didn't have some vote on that. Too bad there might not have been some trial to decide for the people of Harris County if they wanted him to be here. We don't have any say in that. He shows up --.

The trial court sustained appellant's objection. Appellant moved for a mistrial, which the trial court overruled. Appellant, however, did not request the court to instruct the jury to disregard the prosecutor's statement. Because appellant did not request an instruction to disregard, he did not preserve error with regard to this complaint. *See Campos v. State*, 946 S.W.2d 414, 417-18 (Tex. App.–Houston [14th Dist.] 1997, no pet.) (holding that error was waived when appellant failed to obtain a ruling on request for instruction to disregard even though trial court had denied the motion for a mistrial).

In the fourth argument at issue, the prosecutor stated:

> Well, anyway -- So [complainant] becomes his latest victim. And then she comes to court and has to put up with two days of cross-examination, fine, but [it] seems to me --.

Appellant objected on the basis that this was an improper comment on the appellant's right to confront witnesses. The trial court overruled appellant's objection. While this reference to appellant's cross-examination of complainant may have been improper, after reviewing the record of the state's entire jury argument, we do not find that it affected appellant's substantial rights.

In the fifth argument about which appellant complains, the prosecutor stated:

> I have a few things to say, and I will try to say this, and one thing I want you to understand, what you've seen here --.

Without an objection from appellant, the trial court instructed the state that the defense has the right to object and it would not allow the state to comment on the right to object. Appellant, however, did not ask for an instruction to disregard nor did he move for a mistrial. Before a defendant will be allowed to complain on appeal about an erroneous jury argument, he must show that he objected and that he pursued the objection to an adverse ruling. *See McFarland v. State*, 989 S.W.2d 749, 751 (Tex. Crim. App. 1999). Here, appellant did not pursue an objection to an adverse ruling. Therefore, he has waived this complaint for appellate review.

In the sixth of argument in issue, the prosecutor stated:

> Now [Defense Counsel] is right, one of the things that sends to you, it does send out a message. I mean, right now, you're in a situation where you have the opportunity to let people know at least in this time, in this county, what happens to people that do the things that [appellant] did. Not just the people in the community, but talk about the community he is going to. *You see, because one thing that happens when people go to the penitentiary is they start talking out in the yard. You know, what one of the three common questions everybody gets asked? What did you get convicted of; how much time did you get and what --.*"

(emphasis added). Appellant objected to the emphasized statements on the basis that the remarks concerned matters that were outside the record. The court sustained appellant's objection, but overruled his request for an instruction to disregard and his motion for a mistrial. Analyzing the comments at issue in the context of the entire jury argument, we find the prosecutor's remarks were acceptable as a plea for law enforcement. In any event, we do not find that the state's comment affected appellant's substantial rights.

In the seventh argument at issue, the prosecutor stated:

> He is a predator. Well, [co-counsel] and I, I don't know how -- we don't have the person that we might be representing here, but you see, we talked about not being able to represent victims before the fact. It's always after the fact. Well, today, right here, right now, we're also representing the next victim because his background tells you in no uncertain terms that if he ever gets out again, there will be--.

Without an objection from appellant, the trial court instructed the jury to disregard the prosecutor's comment, but overruled appellant's motion for a mistrial. An argument that appellant cannot be rehabilitated is a proper plea for law enforcement. Furthermore, this argument did not affect appellant's substantial rights.

In sum, reviewing the state's closing argument in its entirety, we cannot conclude that any of the above comments had an injurious effect or influence on the punishment assessed by the jury. *See* TEX. R. APP. P. 44.2(b); *King*, 953 S.W.2d at 271. Appellant's twelfth point of error is overruled.

K. Factual Sufficiency

In his thirteenth and final point of error, appellant challenges the factual sufficiency of the evidence to support his conviction for aggravated kidnapping. Because appellant did not have the burden of proof at trial, he must demonstrate that there is insufficient evidence to support the jury's verdict. *See Johnson v. State*, No. 1915-98, 2000 WL 140257, at *7 (Tex. Crim. App. Feb. 9, 2000). In conducting a factual sufficiency review, we consider all the evidence without the prism of "in the light most favorable to the prosecution." *See Brooks v. State*, 990 S.W.2d 278, 284 (Tex. Crim. App.), *cert. denied*, __U.S. __, 120 S. Ct. 384 (1999). We consider all of the evidence, both that which tends to prove a vital fact in evidence, as well as that which tends to disprove its existence. *See Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App.), *cert. denied*, __ U.S. __, 120 S. Ct. 541 (1999). We may set aside the verdict only if the evidence standing alone is so weak as to render it clearly wrong and manifestly unjust. *See Johnson*, 2000 WL 140257, at *7. We review the fact finder's weighing of the evidence and are authorized to disagree with the fact finder's determination. *See Clewis v. State*, 922 S.W.2d 126, 133 (Tex. 1996). Unless the record reflects that a different result is warranted, we defer to the jury's determination concerning weight given to, and the credibility of, the evidence. *See Johnson*, 2000 WL 140257, at *6. Appellant claims that complainant's and Harriette James's identification of him are "questionable at best." In support of this contention, appellant points to the conversation between complainant and Bellnoski (the police detective) regarding the Laura Smither case just prior to complainant's viewing the line-up. We infer from this assertion that appellant believes complainant had seen him in the local news when the Friendswood Police Chief Stout publicly announced that appellant was a suspect in the Laura Smither case. Complainant, however, testified that she had not seen appellant in the news or otherwise from the time he abducted her until she saw him at the line-up. Complainant testified that she recognized appellant as soon as she saw him in the line-up because she had seen him close-up on the night he abducted her.

The night after the incident, complainant gave a detailed description of the suspect to the police, describing him as a white male, five-feet nine inches tall, in his early thirties, having brown hair, a beard, and a mustache, and wearing a black cowboy hat, a short-sleeved shirt, and blue jeans.

Appellant points to certain problems with complaint's identification of him. First, appellant claims there is nothing in the verbal description accompanying the computer-generated description regarding a beard. Complainant, however testified that when she initially told the police that the suspect had a beard, she meant stubble. She told the detective who was generating the composite sketch that the man had stubble. Also, the composite sketch shows some shading on the face, indicating there is some facial hair.

Appellant claims that if he had been wearing a short-sleeved shirt, as complainant described, should have seen his tattoos, but has never mentioned seeing any tattoos. Appellant also points out that complainant initially told the police that the suspect's teeth were "normal," but that his teeth are crooked. Complainant also told the police that the suspect was holding the knife in his left hand; appellant is right handed.

Harriette James (the witness at the convenience store) testified that she saw a man looking under the hood of a pickup truck. When James walked by the man, he asked how she was doing. James asked the man if he needed to use the phone to call someone for help with his truck. The man replied that he did not. James testified that she could see his face during this brief exchange. When the police interviewed her later that night, she described the man as a white male, five feet, nine inches tall, having facial hair–a mustache, but no beard, and wearing a western hat, a long-sleeved shirt, blue jeans, cowboy boots, round gold-rimmed glasses, and a gold nugget pinkie ring.

When James originally viewed a videotape of the line-up at the Webster Police Department, she stated appellant "favored" the man she had described, but she would not positively identify appellant because she thought that the individual in the line-up might have been taller than the person she saw at the store that night. James had a second opportunity to view the lineup when the prosecutor showed James the videotape at her home. This time, James positively identified appellant. At trial, James testified that the prosecutor explained to her how to determine the heights of the lineup participants by the lines on the wall behind the participants.

Appellant's investigator testified that James told him she was unable to identify the suspect at the lineup because she did not get a good enough look at him and because of the amount of time that had

lapsed since she had seen him. Also, like complainant, James initially described the person she had seen as having straight teeth.

In sum, appellant points to either minor omissions or minor discrepancies between the descriptions given to the police immediately following the assault and appellant's actual appearance. Complaint's and James's descriptions of the suspect, however, were nearly identical. Moreover, both complainant and James positively identified appellant in a line-up. Additional evidence also supports their identification of appellant. A black cowboy hat similar to the one the complainant described was found in appellant's apartment; appellant owned gold-rimmed glasses similar to ones James had seen the suspect wearing; and at the time appellant was arrested, he was wearing a gold nugget pinkie ring similar to one James mentioned in her description of the suspect.

Appellant further contends that complainant and James misidentified his pickup truck–a white Ford dually, with an extended cab and a diesel engine. Immediately following the incident, complainant described the vehicle to the police as an older model white Ford dually pickup truck with an extended cab, diesel engine, automatic transmission, blue or black bench seats, tinted windows, and no power locks or windows, and having a mounted cellular phone and a tool box in the back. She testified that she was able to identify the truck as a Ford because she had seen the back of it at the Waffle House.

During cross-examination, however, complainant stated that she was not certain of the make of the truck. In June 1997, complainant saw a white, extended-cab truck on a freeway and wrote down the license number. The truck was not the same make as appellant's truck. Appellant asserts that this supports his contention that complainant cannot tell the difference between different makes of trucks and misidentified his truck. Complainant, however, stated that the truck she saw on the freeway was the same color as appellant's truck and it had an extended cab, but that was all that she was able to observe. Nonetheless, complainant was able to correctly identify the make of appellant's truck immediately after the incident, while it was fresh in her mind.

With regard to the color of the interior of the truck, appellant makes much out of the fact that complainant described the interior as possibly having been black. A photograph of appellant's truck shows that the interior is blue, with bench seats. Complainant initially described the interior to the police as either

blue, the same as appellant's truck, or black. To the extent that she thought the interior of the truck was black, she testified that it was difficult to see because it was dark.

Appellant also cross-examined complainant about the mounted cellular phone. A photograph of appellant's truck shows that there is no mounted cellular phone. Complainant testified that she thought there was a mounted cellular phone in the truck because she saw a cord and that she believes that some cellular phones have cords such as the one she saw. The photograph shows there is a black cord in appellant's truck. John Tollett of the Friendswood Police Department testified that there was not a mounted cellular phone in appellant's truck in April 1997, prior to complainant's abduction, but that the truck had one in October 1997. A cellular phone could have been mounted by May 17, 1997, the date of the abduction.

The photograph of appellant's truck shows that it has a standard transmission. Complainant told the police the truck had an automatic transmission because she thought it sounded like an automatic. She testified that appellant did not have to shift gears when he drove the truck. Complainant, however, testified that when she moved over to the passenger side of the truck, she hit a stick, which turned out to be the shift stick, in the middle of the floor of the truck.

Complainant initially told the police the truck did not have power locks or windows. After being shown a photograph of appellant's truck, which shows that is has power locks and windows, complainant testified that she was not sure whether the truck had power locks or windows.

James testified that the truck she saw was a white Ford dually. Appellant points out that in May 1997, James told the police that the truck she saw was either a Ford or a Chevrolet. Shortly thereafter, James decided that it was a Ford. Appellant also contends that James's identification of his truck is mistaken because she based her identification on her belief that the raised nuts on the rims of the front wheels and recessed nuts on the rims of the back is unusual on dually pickup trucks. Appellant presented the testimony of his investigator that such rims are not unusual on the wheels of dually pickup trucks.

Appellant points out that neither complainant nor James recalls seeing two large red antennas on the truck that night. Tollett testified that there were two large red antennas on appellant's truck in April 1997. Appellant contends that because the antennas were a conspicuous component of his truck,

complainant and James could not have seen his truck without having noticed them. The presence of antennas on the truck is only one detail omitted in the descriptions given by complainant and James. Moreover, there was testimony regarding changes in the appearance of appellant's truck between April and October 1997.

In any event, James's description of the truck was identical to that given by complainant, i.e., a white Ford dually pickup truck. Furthermore, Minerva Torres, the motorist who assisted complainant on the freeway, described the truck she saw as an older model Ford with flared sides.

Appellant further claims there is no physical or scientific evidence to indicate that complainant was ever in his truck or that he abducted her. The employees with the Texas Department of Public Safety Crime Lab who examined appellant's truck testified that there were no matches for hair, fingerprints, and fibers to place complainant in appellant's truck. Appellant, however, was arrested in October 1997, five months after the complainant's abduction. Moreover, complainant was only in appellant's truck for a few minutes.

Complainant and James identified both appellant and his pickup truck. The jury heard all the testimony regarding the identification of appellant and his pickup truck, including any discrepancies, and the fact that there was no physical evidence to place complainant in appellant's truck. Because we do not find that a different result is warranted, we will defer to the jury's determination regarding the weight given to, and the credibility of, the testimony. *See Johnson*, 2000 WL 140257, at *6. We find the evidence is factually sufficient to support the jury's verdict. Appellant's thirteenth point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed July 20, 2000.

Panel consists of Justices Anderson, Frost, and Lee.[3]

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

[3] Senior Justice Norman Lee sitting by assignment.