Opinion issued December 1, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00030-CR

JOSE ANTONIO GARCIA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 9th District Court
Montgomery County, Texas
Trial Court Case No. 13-10-10886-CR

MEMORANDUM OPINION

A jury convicted appellant Jose Antonio Garcia of aggravated kidnapping. *See* TEX. PENAL CODE § 20.04. At sentencing, the jury found the allegations of three enhancement paragraphs to be true and sentenced him to life in prison. Garcia raises six issues on appeal: (1) the trial court erred by appointing him

counsel after he expressed his desire to represent himself; (2) the State presented legally insufficient evidence to support his conviction; (3) the trial court erred by refusing his request for a lesser-included offense instruction in the jury charge; (4) the trial court erred by admitting certain exhibits during the punishment stage of the trial; (5) the State presented legally insufficient evidence to support the jury's finding of true to the enhancement paragraphs; and (6) the trial court erred by requiring him to pay his court-appointed attorney's fees. We modify the judgment to delete the assessment of attorney's fees and a mistakenly included deadly-weapon finding, and we affirm the judgment as modified.

Background

Jose Antonio Garcia was charged with aggravated kidnapping in connection with an incident that occurred at a convenience store in Montgomery County, Texas. The complainant, M.J., testified that one night while she was working the graveyard shift, Garcia came into the store to buy a fountain drink. After he bought the drink and left, he returned to the store, walked up to M.J., and said, "if you want to survive this, come with me." He then grabbed M.J. by the hair and took her outside to his truck. Once at his truck, he forced M.J. into the truck and said that he wanted her to perform a sexual act on him. It was at this point that M.J. saw him holding a pocketknife.

Garcia began backing his truck out of the parking lot. Before they left the parking lot, M.J. jumped out, ran into the store, locked herself in the bathroom, and called the police. She identified Garcia as the man who grabbed her and forced her out of the store.

During their investigation into the incident, the police relied upon video surveillance footage from the convenience store. They used the footage to track down Garcia and the truck he drove that night. Additionally, police showed Garcia still images from the video while questioning him, and he admitted that he was the person shown in the video. The footage also corroborated M.J.'s trial testimony that Garcia grabbed her by the hair and took her outside the store.

A grand jury indicted Garcia for aggravated kidnapping. Following the indictment, but prior to trial, the court appointed defense counsel. After the appointment of counsel, Garcia indicated his desire to represent himself. The court held a *Faretta* hearing, gave him all of the required admonishments, and found that he had invoked his right to self-representation and dismissed counsel. Sometime after the hearing, however, the court appointed new defense counsel.

At the conclusion of the guilt-innocence phase, Garcia requested that the court include a lesser-included offense instruction on kidnapping in the jury charge. The court refused the request and only included an instruction on

aggravated kidnapping in the charge. The jury found Garcia guilty of aggravated kidnapping.

During the punishment phase, the State alleged three enhancements. These enhancements included allegations that Garcia had committed three previous offenses in California. To prove that Garcia had committed these offenses, the State offered exhibits that contained information regarding the offenses.

At sentencing, the jury found the allegations of the three enhancement paragraphs to be true and sentenced him to life in prison. The court accepted and entered judgment on the jury's findings. Within this judgment, the court assessed attorney's fees against Garcia and included an affirmative deadly-weapon finding.

Garcia appealed.

Analysis

Garcia contends that: (1) the trial court erred by appointing counsel despite his desire to represent himself; (2) legally insufficient evidence supported his conviction; (3) the trial court erred by refusing a lesser-included offense instruction; (4) the trial court erred by admitting certain exhibits during the punishment-phase of trial; (5) legally insufficient evidence supported the jury's findings of true to the State's alleged enhancements; and (6) the trial court erred by requiring him to pay his court-appointed attorney's fees.

I. Right to self-representation

In his first issue, Garcia argues that the trial court erred by appointing counsel to represent him after he had invoked his right to self-representation.

The federal constitution guarantees both the right to counsel and the corresponding right to self-representation. U.S. CONST. amends. VI & XIV; *Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 2533 (1975); *Hathorn v. State*, 848 S.W.2d 101, 122–23 (Tex. Crim. App. 1992); *see also* TEX. CODE CRIM. PROC. art. 1.05 (recognizing right of accused to be heard "by himself, or counsel, or both"). A trial court's determination whether a defendant has invoked his right to self-representation is reviewed for an abuse of discretion. *See Rodriguez v. State*, 491 S.W.3d 18, 28 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd).

A defendant who initially asserts his right to represent himself, but later abandons the right by inviting participation by counsel, waives his right of self-representation. *See McKaskle v. Wiggins*, 465 U.S. 168, 182, 104 S. Ct. 944, 953 (1984); *Funderburg v. State*, 717 S.W.2d 637, 642 (Tex. Crim. App. 1986); *see also* TEX. CODE CRIM. PROC. art. 1.14. The record must reflect adequately that a defendant waived his right to self-representation after asserting it, but proof of waiver of self-representation is not subject to as stringent a standard as proof of waiver of the right to counsel. *Funderburg*, 717 S.W.2d at 642 (citing *Brown v. Wainwright*, 665 F.2d 607, 611 (5th Cir. 1982) (en banc)). A record sufficiently

demonstrates that a defendant waived his right to proceed pro se if it reasonably appears to the court that the defendant abandoned his initial request to represent himself. *Id*. at 642.

In this case, the trial court initially appointed counsel to represent Garcia. Garcia then indicated his desire to represent himself, and the court held a *Faretta* hearing. At the hearing, the court gave Garcia the required admonishments, and he clearly and unequivocally invoked his right to self-representation. The court then released the court-appointed counsel. Garcia filed several pro se motions after his first attorney's release. After several months of allowing him to represent himself, the court again appointed counsel to represent Garcia. From that point on, all of Garcia's interaction with the court took place through his appointed counsel. The record includes a discovery order, signed after the second appointment of counsel, which stated that Garcia "requested and was appointed counsel in this matter" and ordered the jail to transfer previously disclosed discovery responses to the newly appointed counsel. The record is otherwise silent as to why the court appointed another lawyer. Nothing in the record indicates that Garcia objected to the appointment of new counsel. He did not object when the court later granted a motion to appoint co-counsel to assist in his defense.

Based on his actions as indicated by the record, the court reasonably could have concluded that Garcia had abandoned his initial request to represent himself.

Id. Therefore, the trial court did not abuse its discretion by appointing counsel. We overrule Garcia's first issue.

II. Legal sufficiency of evidence to support conviction

Garcia contends that the State presented legally insufficient evidence to support his conviction for aggravated kidnapping because there was no evidence to support the aggravating factors. He argues that no evidence was presented to prove that the knife used during the kidnapping was a deadly weapon. He also asserts that the offense of kidnapping was complete prior to any aggravating circumstances—either statements indicating an intent to inflict bodily injury on the complainant or to violate or abuse her sexually, and prior to the complainant seeing him holding a knife.

In reviewing the legal sufficiency of the evidence to support a criminal conviction, a court of appeals will determine whether, after viewing the evidence in the light most favorable to the verdict, the trier of fact was rationally justified in finding the essential elements of the crime beyond a reasonable doubt. *Brooks v. State*, 323 S.W.3d 893, 894–95 (Tex. Crim. App. 2010). We measure the evidence "by the elements of the offense as defined by the hypothetically correct jury charge for the case." *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). As the exclusive judge of the facts, the jury may believe or disbelieve all or any part of a witness's testimony. *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App.

1991). We presume that the factfinder resolved any conflicting inferences in favor of the verdict, and we defer to that resolution. *See Jackson*, 443 U.S. at 326, 99 S. Ct. at 2793. On appeal we may not re-evaluate the weight and credibility of the record evidence and thereby substitute our own judgment for that of the factfinder. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007).

Kidnapping is a continuous, ongoing event in which a person "abducts" another person. TEX. PENAL CODE § 20.03(a); *see Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000). An abduction for these purposes includes restraining a person with intent to prevent her liberation, by using or threatening to use deadly force. *See* TEX. PENAL CODE § 20.01(2); *Laster v. State*, 275 S.W.3d 512, 521 (Tex. Crim. App. 2009). A person commits the offense of aggravated kidnapping if he "intentionally or knowingly abducts another person" under aggravating circumstances, which include intending to "inflict bodily injury" on the kidnapped person or to "violate or abuse him sexually," TEX. PENAL CODE § 20.04(a)(4), or using or exhibiting a deadly weapon during the commission of the offense, *id.* § 20.04(b).

In this case, the State alleged two different theories of aggravated kidnapping: that Garcia intended to inflict bodily injury on M.J. or "violate or abuse" her sexually and that he exhibited a deadly weapon. The trial court submitted these theories as alleged in the indictment. If alternative theories of the

same offense are submitted, the jury may return a general verdict as long as the evidence is sufficient to support a finding under any of the theories submitted. *See Martinez v. State*, 129 S.W.3d 101, 103 (Tex. Crim. App. 2004); *Holford v. State*, 177 S.W.3d 454, 462 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd). Therefore, the State only had to produce legally sufficient evidence of one of its theories to support the jury's general verdict that Garcia committed aggravated kidnapping. *See Holford*, 177 S.W.3d at 462.

Because kidnapping is a continuous, ongoing event, if the actor develops the specific intent to commit any of the aggravating factors during the course of restraining the person, the actor can be found guilty of aggravated kidnapping. *See Curry*, 30 S.W.3d at 406; *Weaver v. State*, 657 S.W.2d 148, 150 (Tex. Crim. App. 1983).

At trial, M.J. testified that Garcia came into the store, grabbed her by the hair, and forced her outside to his truck. When he grabbed her, he said, "if you want to survive this, come with me." Once at his truck, he told her that he wanted her to perform a sex act. At this point, M.J. saw that Garcia had a knife in his hand. The State corroborated portions of M.J.'s testimony with video from the store.

The jury reasonably could have found that Garcia intended to abduct M.J. Abduction includes restraining a person with intent to prevent her liberation by using or threatening to use deadly force. *See* TEX. PENAL CODE § 20.01(2)(B).

"Restrain" 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." *Id.* § 20.01(1). The evidence demonstrated that Garcia restrained M.J. by moving her from the store into his truck, and that he did so by threatening her life if she did not comply with his commands. *See id.* §§ 20.01, 20.04; *see also Laster*, 275 S.W.3d at 523–24. A person's intent can be inferred from his acts, words, and conduct. *Kibble v. State*, 340 S.W.3d 14, 18 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd). The jury could infer from the statements Garcia made while restraining M.J. and the fact that he grabbed her by the hair that he had the specific intent to inflict bodily injury on her or violate or abuse her sexually. *See Laster*, 275 S.W.3d at 523–24 (noting that bodily injury encompasses even relatively minor physical contact); *Phillips v. State*, 597 S.W.2d 929, 936–37 (Tex. Crim. App. [Panel Op.] 1980) (finding that intent to abuse sexually means intent to commit a non-consensual sex act).

Viewing this evidence in the light most favorable to the prosecution, a rational jury could have found that the State proved that Garcia abducted M.J. and did so with the intent to inflict bodily injury or violate or abuse her sexually. *See Laster*, 275 S.W.3d at 522–24. Therefore, the State presented legally sufficient evidence to support this theory of aggravated kidnapping. We overrule Garcia's fifth issue.

III. Lesser-included offense instruction

Garcia contends in his fourth issue that the trial court erred by denying his request for a jury instruction on the lesser-included offense of kidnapping.

"In a prosecution for an offense with lesser included offenses, the jury may find the defendant not guilty of the greater offense, but guilty of any lesser included offense." TEX. CODE CRIM. PROC. art. 37.08. An offense is a lesser-included offense if:

> (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.

Id. art. 37.09.

We use a two-pronged test to determine whether a defendant is entitled to an instruction on a lesser-included offense. *Cavazos v. State*, 382 S.W.3d 377, 382 (Tex. Crim. App. 2012); *Sweed v. State*, 351 S.W.3d 63, 67 (Tex. Crim. App. 2011); *Hall v. State*, 225 S.W.3d 524, 535–36 (Tex. Crim. App. 2007). The first step is a question of law, in which the court compares the elements alleged in the indictment with the elements of the lesser offense to determine "if the proof

necessary to establish the charged offense also includes the lesser offense." *Cavazos*, 382 S.W.3d at 382.

"The second step of the lesser-included-offense analysis is to determine if there is some evidence from which a rational jury could acquit the defendant of the greater offense while convicting him of the lesser-included offense." *Sweed*, 351 S.W.3d at 68. Because this fact question depends on the evidence presented at trial, we review the entire record in making this determination on appeal. *See id*.; *Hayward v. State*, 158 S.W.3d 476, 478–79 (Tex. Crim. App. 2005). Anything more than a scintilla of evidence may be sufficient to entitle a defendant to a jury instruction on a lesser-included offense. *Hall*, 225 S.W.3d at 536. "Although this threshold showing is low, 'it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense, but rather, there must be some evidence directly germane to the lesser-included offense for the finder of fact to consider before an instruction on a lesser-included offense is warranted.'" *Sweed*, 351 S.W.3d at 67–68 (quoting *Skinner v. State*, 956 S.W.2d 532, 543 (Tex. Crim. App. 1997)). "[T]he standard may be satisfied if some evidence refutes or negates other evidence establishing the greater offense or if the evidence presented is subject to different interpretations." *Id*. at 68.

The indictment in this case alleged that Garcia unlawfully, intentionally, and knowingly abducted M.J., by "grabbing" her with his hands and "threatening to use

deadly force," with the intent to inflict bodily injury on her and violate and abuse her sexually. Alternatively, the indictment also alleged that Garcia unlawfully, intentionally, and knowingly abducted M.J. by grabbing her with his hands, threatening to use deadly force, and using and exhibiting "a deadly weapon, to-wit: a knife, during the commission of the offense."

A person commits the offense of kidnapping if he "intentionally or knowingly abducts another person." *See* TEX. PENAL CODE § 20.03. Because kidnapping is "established by proof of the same or less than all the facts" necessary to prove aggravated kidnapping, see TEX. CODE CRIM. PROC. art. 37.09(1), and "the proof necessary to establish the charged offense also includes the lesser offense," *Cavazos*, 382 S.W.3d at 382, kidnapping is a lesser-included offense of aggravated kidnapping. *Compare* TEX. PENAL CODE § 20.03 (kidnapping), *with id*. § 20.04 (aggravated kidnapping). Accordingly, we hold that the first step of our inquiry into whether a jury instruction was warranted is satisfied. *See* TEX. CODE CRIM. PROC. art. 37.08; *Cavazos*, 382 S.W.3d at 382.

We next consider whether there was a scintilla of evidence that Garcia is guilty, if at all, of only kidnapping and not aggravated kidnapping. *See Sweed*, 351 S.W.3d at 67-68. As with his legal sufficiency challenge, Garcia argues that he had completed the offense of kidnapping prior to any evidence arising that would support a finding that he had the intent to inflict bodily injury on M.J. or to violate

or abuse her sexually. He points to this as one reason why he was entitled to a lesser-included offense instruction. He also argues that the State presented no evidence that he used or exhibited a deadly weapon during the kidnapping.

In *Sweed v. State*, the Court of Criminal Appeals reversed a conviction for aggravated robbery finding that the appellant had been entitled to a lesser-included offense instruction on theft. *Id*. at 69–70. In that case, the evidence indicated that the appellant stole a nail gun and fled the scene of the theft into a nearby apartment. *Id*. at 69. He remained in the apartment for five to twenty minutes and changed clothes. *Id*. He then left the building and talked to a group of people in a nearby complex for another five to ten minutes. *Id*. The appellant then spotted another man and pulled a knife on him. *Id*. Due to the passage of time between the theft of the nail gun and the use of the knife, the Court found that there was a fact question about whether the appellant used the knife in the course of committing the theft, an element necessary for a finding of aggravated robbery. *Id*. Because of this fact question, the Court concluded that the jury rationally could have found that the appellant no longer was fleeing from the theft when he pulled a knife, and therefore committed only theft and not aggravated robbery. *Id*. The issue was not simply a case of the jury disbelieving certain evidence admitted at trial. *Id*.

In this case, to be entitled to a lesser-included offense instruction, Garcia had to point to evidence that created an issue about whether only kidnapping may have

occurred, and not aggravated kidnapping. *See id*. But the nature of the evidence presented in this case was such that the only way Garcia could have been guilty of only kidnapping was if the jury simply disbelieved the evidence establishing aggravating circumstances. If there had been evidence that negated, refuted, or called into question M.J.'s testimony, Garcia may have been entitled to an instruction on kidnapping. *See Sweed*, 351 S.W.3d at 68–69. But, unlike in *Sweed*, the only way that the jury rationally could have found that Garcia committed only the lesser offense is if they did not believe parts of M.J.'s testimony. It is not sufficient that the jury may have disbelieved crucial evidence pertaining to the greater offense. *Id*. at 68. Therefore, Garcia was not entitled to a lesser-included offense instruction.

In addition, because the State alleged and submitted alternative theories, it only had to prove one of these theories. *See Martinez*, 129 S.W.3d at 103; *Kitchens*, 823 S.W.2d at 258. Therefore, even if Garcia were correct that there was no evidence he used or exhibited a deadly weapon, which would have entitled him to an instruction on kidnapping, he is not entitled to such an instruction in this case because the State proved he intended to inflict bodily injury on M.J. or violate or abuse her sexually, and no evidence negates or refutes this theory. Therefore, the trial court did not err by refusing to include a jury instruction on the lesser-included offense of kidnapping. We overrule Garcia's fourth issue.

IV. Admissibility and legal sufficiency of habitual-offender evidence

In his second and third issues, Garcia challenges the jury's findings regarding habitual-offender enhancements. *See* TEX. PENAL CODE § 12.42. The State alleged three enhancements based on felony convictions in California that included: (1) a 1981 conviction for assault with intent to commit rape; (2) a 1983 conviction for robbery with a firearm; and (3) a 1983 conviction for assault with a deadly weapon.

Garcia argues in his second issue that the trial court erred by admitting certain exhibits that the State offered during the punishment phase of the trial. He objected to the admission of these exhibits under Rule 403, asserting that the jury is "not going to know what this is and take them as being something they are not."

In his third issue, Garcia contends that the State presented insufficient evidence to allow the jury to find beyond a reasonable doubt that he had previous convictions or that he was the person convicted.

A. Admission of exhibits

We review a trial court's decision to admit evidence during the punishment phase of an extraneous offense or bad act under an abuse-of-discretion standard. *Lamb v. State*, 186 S.W.3d 136, 141 (Tex. App.—Houston [1st Dist.] 2005, no pet.). We will not reverse the trial court's ruling unless it falls outside the zone of reasonable disagreement. *Id*.

Code of Criminal Procedure article 37.07 governs the admissibility of evidence at the punishment phase of a trial. *Henderson v. State*, 29 S.W.3d 616, 626 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd). As relevant to this appeal, it provides:

> . . . evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing, including but not limited to the prior criminal record of the defendant, his general reputation, his character, an opinion regarding his character, the circumstances of the offense for which he is being tried, and, notwithstanding Rules 404 and 405, Texas Rules of Evidence, any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act.

TEX. CODE CRIM. PROC. art. 37.07, § 3(a)(1). The trial court has wide discretion in determining the admissibility of evidence presented at the punishment phase. *Lamb*, 186 S.W.3d at 141. "[R]elevance during the punishment phase of a noncapital trial is determined by what is helpful to the jury." *Erazo v. State*, 144 S.W.3d 487, 491 (Tex. Crim. App. 2004); *Garcia v. State*, 239 S.W.3d 862, 865 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (relevance during the punishment phase "is more a matter of policy than an application of Rule of Evidence 401; it fundamentally consists of what would be helpful to the jury in determining the appropriate punishment").

Although the trial court has wide latitude in determining the admissibility of punishment-phase evidence, the evidence must still satisfy Texas Rule of Evidence 403. *Lamb*, 186 S.W.3d at 143. Evidence may be excluded pursuant to Rule 403 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." TEX. R. EVID. 403; *Lamb*, 186 S.W.3d at 143. Thus, relevant evidence that is otherwise admissible under article 37.07 is inadmissible if it does not satisfy Rule 403. *Lamb*, 186 S.W.3d at 144. When a party objects under Rule 403, a reviewing court looks at several factors including: "(1) the probative value of the evidence; (2) the potential to impress the jury in some irrational, yet indelible way; (3) the time needed to develop the evidence; and (4) the proponent's need for the evidence." *Erazo*, 144 S.W.3d at 489.

In this case, the probative value of the challenged exhibits was high. *See id*. During punishment, the State attempted to prove that Garcia previously had been convicted of offenses in California, and it offered the exhibits for this purpose. "To establish that a defendant has been convicted of a prior offense, the State must prove beyond a reasonable doubt that (1) a prior conviction exists, and (2) the defendant is linked to that conviction." *Flowers v. State*, 220 S.W.3d 919, 921–22 (Tex. Crim. App. 2007). Although, as Garcia contends, the general method of

establishing a prior conviction is through the use of a certified judgment, no particular manner of proof or specific words are required to establish either element. *Id*. at 922.

The challenged exhibits included certified public records from the California Department of Corrections, a certified sex offender registration form, and a certified inmate identification sheet. Exhibit 57 consisted of California Department of Corrections "movement history" information sheets and "commitment data" printouts. Exhibits 58 and 59, the sex offender registration form and inmate identification sheet, included fingerprint records and information regarding a 1981 conviction for assault. Exhibit 59 also contained a unique inmate identification number that matched the identification number found in the movement history and commitment data.

Exhibit 62 included an indictment and abstract of judgment from a California conviction for robbery and assault with a deadly weapon. Exhibits 62A and 62B accompanied exhibit 62 and included fingerprint records of the person described in exhibit 62. A fingerprint expert testified that he compared the fingerprints included with the California records to the fingerprints of Garcia taken immediately prior to trial, and he concluded that they matched. He also compared the cause numbers from the movement history and commitment data printouts to the fingerprint records and concluded that they also matched.

These exhibits were highly probative in proving that the allegations of the enhancements were true because they tended to prove that a person with the same name and fingerprints as Garcia was convicted in California for the offenses alleged in the enhancements.

It took minimal time for the State to authenticate and present the exhibits. The exhibits were certified public records, and the fingerprint expert spent little time discussing his opinions.

With respect to the potential prejudice of the exhibits, Garcia argues that portions of the documents should have been redacted to conceal discussion of other irrelevant extraneous offenses. Any potential prejudice caused by irrelevant extraneous offenses mentioned in the documents was mitigated by the judge's instruction that the jury had to find that the State proved beyond a reasonable doubt that Garcia had committed the offenses before they could consider them. We generally presume the jury follows the trial court's instruction. *Rios v. State*, 263 S.W.3d 1, 11 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd, untimely filed).

Garcia also argues that the documents were illegible and that they would likely confuse the jury. The potential for jury confusion was limited as the State introduced the exhibits with the assistance of an expert. Further, all of the documents were titled and a jury could clearly determine what they were. Thus,

any potential prejudice to Garcia as a result of the court's admission of the exhibits was minimal.

We hold that the trial court reasonably could have concluded that the exhibits were more probative than prejudicial, and the trial court acted within its discretion by admitting them into evidence. *See Erazo*, 144 S.W.3d at 489; *Sauceda v. State*, 129 S.W.3d 116, 120 (Tex. Crim. App. 2004). We overrule Garcia's second issue.

B. Sufficiency of enhancement evidence

Garcia contends that the State presented legally insufficient evidence to prove the enhancements alleged in the indictment. To establish that he had been convicted of the alleged prior offenses, the State had to prove beyond a reasonable doubt that the prior convictions existed, and that Garcia was linked to those convictions. *See Flowers*, 220 S.W.3d at 921–22.

When reviewing the legal sufficiency of the punishment-phase evidence, we view the evidence in the light most favorable to the outcome and determine whether any rational trier of fact could have believed beyond a reasonable doubt that Garcia was the person who was convicted of the three prior offenses alleged in the indictment. *See Barnes v. State*, 876 S.W.2d 316, 322 (Tex. Crim. App. 1994); *see also Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789. The trier of fact is the sole judge of the weight and credibility of the evidence. *See Lancon v. State*, 253

S.W.3d 699, 707 (Tex. Crim. App. 2008). "We do not resolve any conflict of fact, weigh any evidence, or evaluate the credibility of any witnesses, as this is the function of the trier of fact." *Wiley v. State*, 388 S.W.3d 807, 813 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd); *see Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999).

The State offered exhibits 57, 58, 59, 62, 62A, and 62B, as well as testimony from a fingerprint expert and a recorded prison phone call, in order to prove the alleged enhancements. The State used exhibits 57, 58, and 59 to prove the enhancement alleging a 1981 California conviction for assault with intent to commit rape, while using the remaining exhibits to prove the other enhancements alleging two 1983 California convictions.

With respect to the 1981 assault conviction, Garcia argues that the documents contained in exhibit 57 were analogous to those offered in *Blank v. State*, 172 S.W.3d 673 (Tex. App.—San Antonio 2005, no pet.), which were found insufficient to support an enhancement alleging a previous DWI conviction. In *Blank*, the State relied upon a computer printout entitled "Case Synopsis," which it contended was a judgment. *Blank*, 172 S.W.3d at 675. The document indicated that the defendant was charged with the offense of driving while intoxicated, but it did not indicate whether he was convicted of the offense. *Id*. Further, there was no evidence that the synopsis was "a writing authorized by law to be recorded or

filed." *Id*. Thus, the court found that the case synopsis did not represent a judgment of conviction as the State contended, and since no other evidence was admitted to support the enhancement, the evidence was insufficient to support the finding of true to the enhancement. *Id*.

The Court of Criminal Appeals discussed the *Blank* holding in *Flowers v. State*, 220 S.W.3d 919 (Tex. Crim. App. 2007). It held that the fact of a prior conviction need not be established in any particular manner or with any specific document. *Flowers*, 220 S.W.3d at 922. In distinguishing its holding from *Blank*, the Court explained that the important issue is not whether the evidence offered to prove an enhancement "represents a judgment of conviction or its functional equivalent" under Texas Code of Criminal Procedure article 42.01, but "whether a reasonable trier of fact could view" the evidence "and find beyond a reasonable doubt that" the conviction existed and the appellant is linked to the conviction. *Id*. at 924. The Court thus held that a certified computer printout from the Dallas County clerk setting out a conviction for DWI and the appellant's driver's license record with matching information concerning the DWI conviction was sufficient to support a jury finding of true to an enhancement alleging a previous DWI conviction. *Id*. at 924–25.

In this case, exhibit 57 was a certified public record from the California Department of Corrections that consisted of an inmate movement history and

commitment data printouts. Exhibit 58 was a certified copy of a sex offender registration form that discussed the 1981 conviction alleged in the enhancement. Exhibit 59 was a certified copy of a prison identification sheet that also discussed the 1981 conviction. Both exhibits 58 and 59 included the name Jose Antonio Garcia and Garcia's birthdate. Exhibit 59 also contained a unique prison identification number that matched the number assigned to the inmate in exhibit 57. Further, exhibits 58 and 59 included fingerprint cards that the State's fingerprint expert matched to each other and to fingerprints taken from Garcia immediately prior to trial. Based on these exhibits and the testimony of the fingerprint expert, a rational jury could have found that the State proved beyond a reasonable doubt that the 1981 conviction for assault with intent to commit rape existed, and that Garcia was linked to that conviction. *See Flowers*, 220 S.W.3d at 925.

The exhibits offered to prove the other alleged enhancements were certified public records from the California Department of Corrections that included a set of pleadings and abstracts of judgment related to the two 1983 California convictions. These exhibits included identifying information that matched Garcia and fingerprint cards. The State's fingerprint expert again matched these fingerprints to the fingerprints taken from Garcia immediately prior to trial.

In addition to all of these records, the State played a recording of a phone call that Garcia made while he was in jail. Throughout this recording, Garcia talked about attempting to get a pardon from the Governor of California for the convictions he had in California during the 1980s.

The documents and audio recording constituted evidence that the convictions alleged in the enhancements existed. Further, the fingerprint expert linked Garcia to the convictions by comparing the fingerprints found in the California records to his fingerprints taken immediately prior to trial.

Viewing the evidence in the light most favorable to the outcome, a rational jury could have found beyond a reasonable doubt that the all of the California convictions existed and that Garcia was linked to those convictions. *Id.* We overrule Garcia's third issue.

V. Attorney's fees

In his sixth issue, Garcia contends that the trial court erred by assessing attorney's fees against him for his court-appointed counsel because he was indigent at the outset of the case and the State presented no evidence that his financial circumstances had changed. The State concedes that the trial court's judgment should be modified to delete the imposition of attorney's fees because the trial court failed to make the requisite determination regarding Garcia's financial capabilities.

Counsel appointed to represent a defendant in a criminal proceeding shall be paid a reasonable attorney's fee for performing certain services. TEX. CODE CRIM. PROC. art. 26.05(a). The Code of Criminal Procedure provides:

> If the court determines that a defendant has financial resources that enable him to offset in part or in whole the costs of the legal services provided, including any expenses and costs, the court shall order the defendant to pay during the pendency of the charges, or, if convicted, as court costs the amount that it finds the defendant is able to pay.

Id. art. 26.05(g). A defendant who is determined by the trial court to be indigent is presumed to remain indigent for the remainder of the proceedings unless a material change in the defendant's financial circumstances occurs. *Id*. art. 26.04(p). "[T]he defendant's financial resources and ability to pay are explicit critical elements in the trial court's determination of the propriety of ordering reimbursement of costs and fees." *Mayer v. State*, 309 S.W.3d 552, 556 (Tex. Crim. App. 2010). Thus, in the absence of any indication in the record that the defendant's financial status has in fact changed, the evidence will not support the imposition of attorney's fees. *Wiley v. State*, 410 S.W.3d 313, 317 (Tex. Crim. App. 2013). When a trial court fails to find that the defendant's financial circumstances changed after initially finding the defendant to be indigent, the record is insufficient to support the order to pay attorney's fees. *See id*.; *Johnson v. State*, 405 S.W.3d 350, 354 (Tex. App.—Tyler 2013, no pet.).

Here, there is no evidence in the record indicating that Garcia's financial circumstances materially changed after the trial court initially determined that he was indigent and appointed counsel to represent him. *See* TEX. CODE CRIM. PROC. art. 26.04(p); *Johnson*, 405 S.W.3d at 355. After the trial court entered judgment, the trial court appointed Garcia counsel for an appeal and granted his motion for a free reporter's record. The trial court did not make a finding in the judgment that appellant had financial resources enabling him to offset, in whole or in part, the costs of the legal services provided to him. *See* TEX. CODE CRIM. PROC. art. 26.05(g); *Johnson*, 405 S.W.3d at 355; *see also Wiley*, 410 S.W.3d at 317; *Cates v. State*, 402 S.W.3d 250, 251–52 (Tex. Crim. App. 2013).

We conclude that the evidence is insufficient to support the order requiring Garcia to pay the attorney's fees for his court-appointed defense counsel. *See Cates*, 402 S.W.3d at 251–52; *Johnson*, 405 S.W.3d at 355. We therefore modify the judgment of the trial court to delete the assessment of attorney's fees against him. *See* TEX. R. APP. P. 43.2(b) (allowing appellate court to modify trial court judgment and affirm as modified); *see also French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992).

VI. Deadly-weapon finding

Although not argued by Garcia, the State's brief suggested an error on the face of the judgment related to the trial court's affirmative deadly-weapon finding.

The State asserts that the trial court could not make a determination regarding Garcia's alleged use of a deadly weapon based on the jury's general guilty verdict, and therefore the judgment should be modified.

When the jury is the trier of fact, an affirmative finding of a deadly weapon properly is made by the trial court when the record shows the jury has: (1) found the defendant guilty of the offense as alleged in the indictment and the deadly weapon has been specifically pleaded as such in the indictment; (2) found the defendant guilty of the offense as alleged in the indictment and the weapon pleaded is per se a deadly weapon; or (3) affirmatively answered a special issue on deadly-weapon use. *See Lafleur v. State*, 106 S.W.3d 91, 99 (Tex. Crim. App. 2003); *see also Polk v. State*, 693 S.W.2d 391, 396 (Tex. Crim. App. 1985); *Johnson v. State*, 6 S.W.3d 709, 713–14 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd).

The indictment in this case alleged two alternative theories upon which Garcia could have been found guilty of aggravated kidnapping. One theory alleged that he used or exhibited a deadly weapon, and the other did not. The jury returned a verdict that found Garcia guilty of aggravated kidnapping "as charged in the indictment." Based on this general verdict, the trial court could not determine upon which theory the jury returned a guilty verdict. Therefore, the trial court erred by entering an affirmative finding regarding Garcia's use of a deadly weapon.

An appellate court has the authority to reform a judgment to make the record speak the truth when the matter has been called to its attention by any source. *French*, 830 S.W.2d at 609 (holding that appellate court could reform judgment to reflect jury's affirmative deadly-weapon finding); *see also* TEX. R. APP. P. 43.2(b) (allowing appellate court to modify trial court judgment and affirm as modified). "This power [to modify] includes adding a deadly-weapon finding to a judgment that erroneously omitted a factfinder's deadly-weapon finding and deleting a deadly-weapon finding that was erroneously entered in the judgment without a factfinder's first having made the finding." *Cobb v. State*, 95 S.W.3d 664, 668 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *see* TEX. CODE CRIM. PROC. art. 42.12, § 3g(a)(2).

Because the trial court erred by entering an affirmative finding as to Garcia's use of a deadly weapon, the trial court's judgment should be modified to reflect that no finding was made as to whether a deadly weapon was used during the commission of this offense.

Conclusion

The judgment of the trial court is affirmed as modified.

Michael Massengale
Justice

Panel consists of Justices Bland, Massengale, and Lloyd.

Do not publish. TEX. R. APP. P. 47.2(b).