TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00719-CR

Justin Panus, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF WILLIAMSON COUNTY, 368TH JUDICIAL DISTRICT NO. 16-2610-K368, HONORABLE RICK J. KENNON, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

A jury convicted Justin Panus of aggravated kidnapping and unlawful possession of a firearm by a felon. *See* Tex. Penal Code §§ 20.04, 46.04(a). The district court assessed punishment at life imprisonment for the aggravated-kidnapping offense and 10 years' imprisonment for the unlawful-possession-of-a-firearm offense, with the sentences to run concurrently, and rendered judgments consistent with the jury's verdict.

On appeal, Panus contends that: (1) the district court erred by admitting evidence of his extraneous offense; (2) the State relied twice on the same elemental fact, use of deadly weapon, to enhance the underlying offense; and (3) the district court erred by admitting a partial log of Panus's cell-phone usage near the time of his offenses, and later, by denying Panus's request to admit evidence under the rule of optional completeness. We will affirm the judgments of conviction.

BACKGROUND[1]

The events leading to Panus's convictions began in the early morning hours of September 25, 2016, when he used a gun to barge into the house where his ex-girlfriend Christina Cooper was staying with her fiancé Matthew Gauthier and his two young daughters. After threatening Gauthier at gunpoint, Panus dragged Cooper out of the house by her hair and forced her into his truck. He placed the gun on his lap, visible to Cooper, while he drove. Cooper testified that during the drive, Panus hit her face with the gun and threatened to kill her stating, "If we get out and you make a scene, I swear to God I'll kill you right here." When he parked the truck at his apartment complex and got out, Cooper escaped from the passenger side and ran away.

Gauthier testified that the gun Panus used to gain entry into the house was distinctive because it had a light and projected a red-laser dot onto its target. Gauthier further testified that Panus pointed the laser dot of the gun at one of Gauthier's daughters in the living room before pointing the gun at Gauthier's head and forcing him to kneel in a corner of the house.

Cooper testified that she met Panus through an online-dating site during a time when she and Gauthier had separated. She stated that she and Panus initially liked each other, that they saw each other and spoke by phone daily, and sent text messages to each other more than once a day. But when Panus began to text her with increasing frequency and leaving more of his belongings at her apartment, Cooper told him that she thought their relationship was moving too quickly. Panus disagreed. Cooper noticed that Panus became jealous after seeing her talking with a male neighbor. Cooper testified that two days before the offenses, she was still getting lots of phone calls and texts

[1] The facts are summarized from the testimony and exhibits admitted into evidence at trial.

from Panus. Records of data showing Panus's phone calls, texts, and Facebook messages to Cooper near the time of his offenses, without the content of those communications, were admitted into evidence as State's Exhibit 59. That exhibit also showed Panus's Google searches on his phone near the time of his offenses, without the results of those searches.

On the day before the offenses, Cooper told Panus that she would not see him that day because she had plans with a friend. Cooper testified that she met Gauthier, his daughters, and his aunt for lunch, and afterward, they went shopping for the girls' Halloween costumes and then to Gauthier's home. Cooper testified that during that time, Panus "texted over and over and over again . . . . . He called on [] Facebook over and over again." Cooper told him to stop or she would call the police. When Cooper blocked Panus on her phone, Cooper began receiving messages from Panus's roommate. Cooper then testified about the details of Panus's confrontation of her at Gauthier's house, his abduction of her, and her eventual escape from him at about 3:00 a.m.

The jury also heard from Woodson Blase, a Leander Police Department Detective and Special Deputy U.S. Marshal with the Lone Star Fugitive Task Force.[2] Detective Blase testified about his part of the investigation to locate and arrest Panus, including Panus's refusal to comply with police commands to show his hands and instead, reaching toward his waistband, where officers found a subcompact pistol.

[2] Detective Blase testified that the local agencies with members on the Lone Star Fugitive Task Force include the sheriff's offices of Travis County, Williamson County, and Hays County; the police departments of Leander, Cedar Park, and Austin; the U.S. Marshals Service; the Texas Attorney General's Office; and the Texas Department of Public Safety.

After trial, the jury found Panus guilty of aggravated kidnapping and unlawful possession of a firearm by a felon. The trial court assessed his punishment and rendered judgment in accordance with the jury's verdict. This appeal followed.

Issue One: No abuse of discretion in admission of extraneous-conduct evidence

In his first issue, Panus contends that the district court erred by admitting evidence of his extraneous offense involving the gun found in his waistband when he was arrested. Panus contends that this extraneous-offense evidence was irrelevant and unfairly prejudicial. However, as the State correctly notes, the only objection Panus preserved for appeal on this issue is on the ground of relevance.

Preservation of error requires an objection each time inadmissible evidence is offered. *Haley v. State*, 173 S.W.3d 510, 516–17 (Tex. Crim. App. 2005) ("We have held that an objection must be timely, specific, pursued to an adverse ruling, and must be made each time inadmissible evidence is offered."). Here, before Detective Blase testified about the gun found in Panus's waistband when he was arrested, Detective Blase testified about the investigation to locate Panus. Defense counsel objected—this time only—that Detective Blase's testimony was not probative of the kidnapping and "extremely prejudicial":

[Prosecutor:]	How many buildings over would that be from his building?
[Detective Blase:]	The complex was situated in somewhat of a horseshoe, and it was in the next horseshoe over. So it was approximately three to four buildings over.
[Prosecutor:]	Okay.

[Defense counsel 1]: Judge, can we approach?

THE COURT: Sure.

(Bench conference on the record)

[Defense counsel 1]: Okay. I hate to sound like a broken record,[3] but what does this have to do with whether or not he committed a kidnapping? Who cares where he parked? Who cares what happened when they took him down[?] None of it's probative of the fact that he did it. I mean, it had to be properly testified that he did it. None of this is probative, and it's extremely prejudicial in comparison to that. It adds nothing to the State's case. We've got people who have identified the victim. This is overkill and way over the top, Judge.

[Prosecutor]: Judge, our response would be, once again, it goes to the state of mind and consciousness of guilt. It's not going to drag out that much longer.

[Defense counsel 2]: Judge, I think it doesn't matter what it goes to.

[Defense counsel 1]: We've reached the tipping point, Judge. We're way past where we need to be. I mean, there comes a point in time when you're just stockpiling on, because it becomes overly cumulative.

THE COURT: I'm going to overrule your objection.

(Bench conference ends)

Detective Blase proceeded to testify about how police approached Panus and commanded him to show his hands, and Panus looked back at them and dropped the mail he was holding. Defense counsel then obtained a running objection as to relevance but not as to his prior objection that the evidence was also "extremely prejudicial":

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[3] This was the first objection to any of Detective Blase's testimony.

[Prosecutor]: Does the defendant do anything with what he's holding in his hands?

[Detective Blase:] Yes. He drops the mail with his left—

[Defense counsel 1]: Your Honor, we're going to continue with our objections. We'd ask for a running objection on this because we don't think it's relevant to what's going on.

THE COURT: Okay. That's overruled, and I'll allow the running objection.

Detective Blase continues, testifying about Panus reaching for his waistband, but before Detective Blase states what police found, defense counsel interjects, renewing his objection as to relevance but not renewing his initial objection that it was also "extremely prejudicial":

[Prosecutor]: Okay. Was something recovered from his waistband?

[Detective Blase:] Yes. We rolled the defendant to his left side so we could do a sweep of his person and his waistline and recovered a—

[Defense counsel 1]: Your Honor, can we approach?

THE COURT: I'm sorry?

[Defense counsel 1]: Can we approach?

THE COURT: Yes.

(Bench conference on the record)

[Defense counsel 1]: Judge, this takedown occurred in Travis County. We've already identified the weapon that was used in this event. We don't need to go into whether or not anything was found on him.

[Prosecutor]: Judge, we addressed this in the motion in limine, and the motion in limine was denied.

[Defense counsel 1]: Judge, I still have to make my objection.

THE COURT: I understand.

[Defense counsel 1]: This is not relevant to anything involved in the indictment. It doesn't go to whether or not he used a deadly weapon in the kidnapping. They've identified that weapon. It doesn't go to a felon in possession. In fact, all of this occurred in Travis County, none of it occurred in Williamson County. So it does not relate to what we're dealing with here.

THE COURT: I'm going to overrule your objection.

[Defense counsel 1]: We'd ask for a continued objection.

THE COURT: That's fine.

(Bench conference ends)

Defense counsel continued to reference their "running" or "continuing" objection when the gun, its holster, and photographs of the gun and its magazines were offered into evidence. But counsel's initial objection to the evidence as "extremely prejudicial" was abandoned. The record reflects that Panus's only preserved objection to the extraneous-offense evidence was as to its relevance. *See* Tex. R. App. P. 33.1(a); *Haley*, 173 S.W.3d at 516–17. Accordingly, in addressing Panus's first issue, we consider only the relevance of the extraneous-offense evidence.

Relevant evidence is evidence which has any tendency to make the existence of any fact of consequence more or less probable than it would be without such evidence. *Gonzalez v. State*, 544 S.W.3d 363, 370 (Tex. Crim. App. 2018). Evidence need not prove or disprove a particular fact by itself to be relevant; rather, "it is sufficient if the evidence provides a small nudge toward proving or disproving a fact of consequence." *Id*. We review a trial court's decision to admit

or exclude evidence under an abuse-of-discretion standard. *Id*. The trial court does not abuse its discretion unless its determination lies outside the zone of reasonable disagreement. *Id*.

Extraneous-offense evidence, while inadmissible generally, is admissible under Texas Rule of Evidence 404(b) for purposes such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Tex. R. Evid. 404(b). Additionally, extraneous-offense evidence is admissible to show a defendant's consciousness of guilt. *Ransom v. State*, 920 S.W.2d 288, 299 (Tex. Crim. App.1996) (op. on reh'g); *Torres v. State*, 794 S.W.2d 596, 598–99 (Tex. App.—Austin 1990, no pet.) ("A defendant's 'consciousness of guilt' has been held to be one of the strongest evidences of guilt which may be received as a circumstance tending to prove that the defendant committed the act with which he is charged."). Consciousness-of-guilt evidence may include evidence of a person's conduct that occurs after the commission of the offense. *Torres*, 794 S.W.2d at 598. Criminal acts that are designed to reduce the likelihood of prosecution, conviction, or incarceration for the offense on trial are admissible under Rule 404(b) as showing consciousness of guilt. *Ransom*, 920 S.W.2d at 299.

Detective Blase testified that as he and three officers approached Panus to arrest him, they commanded Panus multiple times to show his hands, but instead, Panus reached toward his waistband, and the officers "believed him to be reaching for a weapon." A struggle ensued, during which Panus "was struggling to keep his hands in front of his waistline" and police were "pulling on his hands to get them away." Ultimately, police removed Panus's hands from his waistline, handcuffed him, and recovered a 9-mm subcompact pistol from Panus's waistband. Detective Blase testified that the pistol was loaded to full capacity with a "hollow-point round in the chamber, and

then seven additional rounds in a magazine inserted in the firearm." Police also found "an additional magazine with full-metal-jacket ammunition" in Panus's pocket.

The district court could have reasonably determined that Panus's reaching for a loaded weapon in his waistband while struggling with the officers trying to arrest him—after being commanded multiple times to show his hands—was criminal conduct designed to reduce the likelihood of his prosecution, conviction, or incarceration. *See id*. Thus, the court could have reasonably determined that such evidence showed Panus's consciousness of guilt and was relevant. *See Gonzalez*, 544 S.W.3d at 370; *Meredith v. State*, No. 10-05-00434-CR, 2007 Tex. App. LEXIS 2866, at *7 (Tex. App.—Waco Apr. 11, 2007, pet. ref'd) (mem. op., not designated for publication) (holding that evidence that defendant resisted arrest may be probative of defendant's consciousness of guilt and admissible under Rule 404(b)); *see also Vanegas v. State*, No. 02-08-00356-CR, 2009 Tex. App. LEXIS 7907, at *11 (Tex. App.—Fort Worth Oct. 8, 2009, no pet.) (mem. op., not designated for publication) (concluding that defendant's conduct of reaching into truck with his closed hand and immediately bringing his hand back out after police commanded him to put his hands up indicated defendant's consciousness of guilt). We overrule Panus's first issue.

Issue Two: Element of "use of deadly force or a deadly weapon" was not used twice to enhance offense

In his second issue, Panus contends that State relied twice on the same elemental fact—use of deadly force or a deadly weapon—to enhance the underlying offense from an unlawful restraint to a third-degree kidnapping, and then to enhance that third-degree kidnapping to a first-degree aggravated kidnapping. *See* Tex. Penal Code §§ 20.02–.04. Panus further contends that

because "deadly force" and "deadly weapon" are the same elemental fact, his aggravated-kidnapping conviction is invalid.

The jury convicted Panus by general verdict. We uphold a general verdict if it is legally supportable on any of the grounds submitted to the jury. *Gonzalez v. State*, 8 S.W.3d 640, 641–42 (Tex. Crim. App. 2000); *Cummings v. State*, No. 03-09-00269-CR, 2010 Tex. App. LEXIS 6367, at *5 (Tex. App.—Austin Aug. 3, 2010, pet. ref'd) (mem. op., not designated for publication). The State contends that the jury's aggravated-kidnapping verdict is supportable without relying twice on the elemental fact of "use of deadly force or a deadly weapon" because, as set forth in the charge, the offense may be committed by the *threat*—and not just the *use*—of deadly force. We agree.

Panus references three offenses in this issue: unlawful restraint, kidnapping, and aggravated kidnapping. Unlawful restraint is the intentional or knowing restraint of another person. Tex. Penal Code § 20.02. Kidnapping is the intentional or knowing abduction of another person. *Id*. § 20.03. Aggravated kidnapping is the intentional or knowing abduction of another, along with the intent to:

(1) hold him for ransom or reward;

(2) use him as a shield or hostage;

(3) facilitate the commission of a felony or the flight after the attempt or commission of a felony;

(4) inflict bodily injury on him or violate or abuse him sexually;

(5) terrorize him or a third person; or

(6) interfere with the performance of any governmental or political function.

Id. § 20.04(a). Alternatively, the statute provides that a person commits aggravated kidnapping "if the person intentionally or knowingly abducts another person and uses or exhibits a deadly weapon during the commission of the offense." *Id*. § 20.04(b). "Abduct," as used in the aggravated kidnapping statute and as charged in this case, means restraint of person with intent to prevent the person's liberation by "using *or threatening to use* deadly force." *Id*. § 20.01(2)(B) (emphases added); *see Mason v. State*, 905 S.W.2d 570, 575 (Tex. Crim. App. 1995) (noting that intent to prevent person's liberation by use or threatened use of deadly force is mens rea for kidnapping).

Here, Panus was charged with aggravated kidnapping based on the allegation that he abducted Cooper with the intent to prevent her liberation by either using—or threatening to use—deadly force and Panus used a deadly weapon, namely a firearm. *See* Tex. Penal Code §§ 20.01(2)(B), 20.04(b). Based on the evidence at trial—including Cooper's testimony that Panus hit her in the face with his gun and threatened to kill her if she made a scene—the jury could have reasonably determined that Panus prevented Cooper's liberation by threatening to use deadly force. *See Ramirez v. State*, 692 S.W.2d 729, 731 (Tex. App.—Waco 1985, no pet.) (concluding that threat of deadly force "can be communicated by words alone, separate and apart from exhibiting a deadly weapon"); *see also Lawson v. State*, Nos. 02-13-00493-CR, 02-13-00494-CR, 02-13-00495-CR, 02-13-00496-CR & 02-13-00497-CR, 2015 Tex. App. LEXIS 814, at *20–21 (Tex. App.—Fort Worth Jan. 29, 2015, no pet.) (mem. op., not designated for publication) (concluding that abduction was committed by threat of deadly force where evidence showed that defendant told victim who did not want to go with him that he would kill her); *Geer v. State*, No. 03-09-00627-CR, 2010 Tex. App. LEXIS 7058, at *5 (Tex. App.—Austin Aug. 26, 2010, no pet.) (mem. op., not designated for

publication) (noting that threat of deadly force may involve threat to use force in future). Separate and apart from Panus's death threat to Cooper, the jury could have reasonably determined from the evidence at trial—including Cooper's testimony that Panus drove with the gun on his lap and visible to her—that Panus exhibited a deadly weapon during the commission of the kidnapping.

Under this theory, the element of "use of deadly force or a deadly weapon" would have been used only once—to elevate the offense of kidnapping to aggravated kidnapping. *See* Tex. Penal Code §§ 20.03–.04. This theory also supports the jury's verdict on grounds submitted to them in the charge. *See Gonzalez*, 8 S.W.3d at 641–42; *Cummings*, 2010 Tex. App. LEXIS 6367, at *5 (affirming aggravated-kidnapping conviction based on alternative theory of offense that was not challenged by defendant). Accordingly, we overrule Panus's second issue.

Issue Three: No abuse of discretion in admission of cell-phone-usage analysis

In his third issue, Panus contends that the district court erred by admitting into evidence State's Exhibit 59, a partial log of his cell-phone usage from September 23, 2016, to September 26, 2016, and by denying his request under the rule of optional completeness to admit evidence of all the text messages sent between Panus and Cooper. *See* Tex. R. Evid. 107. Panus complains that the data from his phone, showing the date and time of his calls and messages and his Google searches, was irrelevant and unfairly prejudicial because it was not probative of the elements of any offense in this case. In his view, Exhibit 59 shows only that he "was allegedly harassing Cooper" and that he was contemplating the commission of an offense that he was not charged with committing. Panus further complains that without the complete set of messages, the jury was left with the false impression that he was harassing Cooper. We review a trial court's decision to admit

or exclude evidence under an abuse of discretion standard. *Gonzalez*, 544 S.W.3d at 370. The trial court does not abuse its discretion unless its determination lies outside the zone of reasonable disagreement. *Id*.

Exhibit 59 shows that in the twelve hours before the kidnapping, from about 2:00 p.m. on September 24th to 2:40 a.m. on September 25th, Panus made 55 phone calls to Cooper, sent her 63 text messages, and sent 14 Facebook chat messages or calls to her. The exhibit does not include the content of any of those communications. Even if we were to conclude that admission of the cell-phone data showing the date, time, and number of Panus's calls and messages to Cooper in Exhibit 59 was improper, such admission of evidence was harmless and will not cause reversal when other such evidence was received without objection, either before or after the complained-of ruling. *See Coble v. State*, 330 S.W.3d 253, 282 (Tex. Crim. App. 2010); *Mack v. State*, 928 S.W.2d 219, 225 (Tex. App.—Austin 1996, pet. ref'd) (no reversible error if other evidence at trial is admitted without objection proving same fact or facts that allegedly inadmissible evidence sought to prove); *see also Walters v. State*, 247 S.W.3d 204, 221–22 (Tex. Crim. App. 2007) (concluding that exclusion of evidence defendant sought to admit under rule of optional completeness was harmless); *Zukevich v. State*, No. 04-16-00702-CR, 2018 Tex. App. LEXIS 3015, at *18 (Tex. App.—San Antonio Apr. 30, 2018, no pet.) (mem. op., not designated for publication) (concluding that trial court did not err in refusing to admit evidence under rule of optional completeness where such evidence was cumulative of other properly admitted evidence). Here, Panus is not entitled to reversal of his conviction and there is no harm shown based on admission of the cell-phone data showing the date and time of his calls and text messages to Cooper because

Panus first allowed her to testify without objection about his increasing frequency of attempts to contact her, particularly in the last couple of days before her kidnapping. Cooper testified that the day before that offense, Panus "texted over and over and over again," and he "called on [] Facebook over and over again." Cooper also testified that she told Panus to stop or she would call the police, and that she blocked him on her phone, but she then began receiving messages from Panus's roommate. This testimony from Cooper could have had essentially the same effect of which Panus complains—showing that he "was allegedly harassing" her—such that admission of the precise date, time, and number of his calls and messages reflected in Exhibit 59 did not influence the jury, or did so only slightly, in determining his guilt. *See Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002); *see also Coble*, 330 S.W.3d at 282; *Mack*, 928 S.W.2d at 225.

Exhibit 59 also shows that on the day before the kidnapping, Panus used his phone to search Google for: "If a cell phone is off will it ring," "If a cell phone is off will it ring when you call it from a landline but go [to] voicemail if you call from a cell," "Facebook, listen to phone calls," "Lock pick for lost keys," and similar searches for locksmiths for apartments. The exhibit does not include the results of these searches. Panus also downloaded a police-radio-scanner application. On the day of the kidnapping and the day afterward, Panus searched Google for his own name and news sites covering Travis County, and the cities of Austin, Round Rock, and Cedar Park.

As to this evidence in Exhibit 59, even if we were to assume without deciding that there were an abuse of discretion, we are satisfied that the admission of this evidence did not affect Panus's substantial rights. *See* Tex. R. App. P. 44.2(b) (providing that any error that does not affect substantial rights must be disregarded). "A substantial right is affected when the error had a

substantial and injurious effect or influence in determining the jury's verdict." *Schmutz v. State*, 440 S.W.3d 29, 39 (Tex. Crim. App. 2014). A defendant's substantial rights are not affected by the erroneous admission of evidence if the appellate court, after considering the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight effect. *Motilla*, 78 S.W.3d at 355. In light of the overwhelming evidence of Panus's guilt, we are satisfied that the admission of this evidence in Exhibit 59 did not have a substantial and injurious influence in determining the jury's guilty verdict. *See Hernandez v. State*, 176 S.W.3d 821, 824 (Tex. Crim. App. 2005); *Motilla*, 78 S.W.3d at 358 (concluding that evidence of defendant's guilt is factor to be considered in any thorough harm analysis). The evidence at trial supporting the jury's verdict was strong. The jury heard a firsthand account of the offense from Cooper, establishing the elements of her kidnapping by Panus. Her account was supported in part by Gauthier's testimony and by law-enforcement officers' testimony about their investigation. Thus, we overrule Panus's third issue.

CONCLUSION

We affirm the district court's judgments of conviction.

Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Goodwin and Field

Affirmed

Filed: August 30, 2018

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