

**NO. 12-11-00040-CR**

**IN THE COURT OF APPEALS**

**TWELFTH COURT OF APPEALS DISTRICT**

**TYLER, TEXAS**

*ELASKO THOMAS,  
APPELLANT*

§

*APPEAL FROM THE 241ST*

*V.*

§

*JUDICIAL DISTRICT COURT*

*THE STATE OF TEXAS,  
APPELLEE*

§

*SMITH COUNTY, TEXAS*

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***MEMORANDUM OPINION***

Elasko Thomas appeals his conviction for aggravated kidnapping. In two issues, Appellant challenges the legal sufficiency of the evidence to support his conviction. We affirm.

**BACKGROUND**

Appellant had dated the victim for a relatively short period of time. After the passage of several months, Appellant began making threats of violence against her. In response to one of Appellant's calls, under the guise of resolving their issues, the victim reluctantly agreed to meet Appellant at his aunt's house, so long as other members of Appellant's family were present. In light of Appellant's threats, the victim asked two friends, Shasta Sweat and Westin Cotton, to accompany her. The victim had told the two that if anything happened, they should drive away. When they arrived, no one was at the house except Appellant. When the victim went to the door, he pulled her inside and began to attack her, beating and choking her as he dragged her through the house. According to the victim, Appellant hit her on the head with a pistol. She attempted to escape, but he insisted, "You're not fixing to go nowhere." Then he escorted her, with her hands behind her back, out to her car where her two companions had remained. Sweat, who was in the driver's seat of the car, said the victim "kept telling me to go." At the last second, the two

attempted to escape, but Appellant leaped into the car, slammed the transmission into park, and as the car lurched to a stop, hit Sweat in the head. She opened the door and fell out of the car. Cotton, who was in the rear seat, jumped out of the car to aid Sweat. Appellant called Sweat vile names, and threatened to kill her if he saw her again or if she called the police. Appellant pulled the screaming victim, who “was making noises of like, ‘Please help,’” into the car and fled with his captive. As he drove away, Appellant continued hitting her in the face, chest, and arms.

The victim’s two companions were stranded at the house. One had seen two guns in Appellant’s waistband, but the other saw only lumps under his shirt that could have been guns. The two walked to a nearby tire shop to borrow a telephone to call for help. The people at the business had watched the entire attack and kidnapping and would not let them use the telephone, saying they did not want to get involved. Sweat saw a policeman patrolling the streets, flagged him down, and reported the kidnapping. Immediately the police began to investigate where Appellant might have taken his victim, tracing leads and contacting his family.<sup>1</sup>

Soon thereafter, Appellant drove the victim to the home of Malcolm Specks, who had once been married to Appellant’s sister. Specks witnessed Appellant striking the victim in the face with his fists, but the victim did not defend herself. Specks told Appellant to stop hitting the victim and to let her go. The victim, at times, lost consciousness. While Appellant was speaking with Specks, the victim thought of attempting to run away but was terrified. Appellant cursed Specks and drove away with the victim. Specks, too, said he did not want to get involved, so he did not report the assault and kidnapping.

After leaving Specks’s home, Appellant drove to his grandmother’s house east of Tyler near Chapel Hill in rural Smith County. Although the victim drifted in and out of consciousness, she recognized that she was being driven to Appellant’s grandmother’s house. While she was there, she heard Appellant speaking to someone—perhaps his uncle. The uncle seemed unconcerned for the safety of the victim and did not intervene. Then Appellant drove into the woods, dragged the victim from the car, and continued the assault. Appellant later forced her back into the car and sexually assaulted her twice. Appellant got in the driver’s seat and began to drive away from the woods. Appellant told her that he was going to kill her and that she would not be going home. She feared she would never see her children again.

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<sup>1</sup> The police officers conducted the search by looking through cell phones and text messages to find various contacts. From those contacts, they obtained suggestions of where Appellant might have taken the victim.

In the meantime, Specks was contacted by the police in the course of their search for Appellant and the victim. Specks told the investigators the location of Appellant's grandmother's house.<sup>2</sup> Police officers happened to see Appellant driving the vehicle away from the woods at his grandmother's house as they interviewed someone else at the home. The officers immediately detained the vehicle containing Appellant and the victim. The officers then arrested Appellant.

The officers observed that the victim's eyes were almost swollen shut, and they called an ambulance. The victim spent the night in the hospital and was released the next day, with her arm in a sling and a badly swollen face. At the trial, photos of her face and body were admitted to show the massive bruising and swelling resulting from the beating Appellant inflicted on her. She testified about going to the East Texas Crisis Center for counseling, and continued to have many problems from the kidnapping and assault, including insomnia, depression, loss of appetite, shortness of breath, and migraine headaches almost daily.

The jury ultimately found Appellant guilty of aggravated kidnapping, made an affirmative finding that Appellant used or exhibited a deadly weapon during the commission of the offense or in immediate flight from the offense, and sentenced him to life in prison.

### **SUFFICIENCY OF THE EVIDENCE**

In two issues, Appellant challenges the legal sufficiency of the evidence. In his first issue, he argues that the evidence is legally insufficient to support a jury finding that he acted with intent to secret or hold the victim where she was not likely to be found. In his second issue, he argues that the evidence is legally insufficient to support the finding that he used or threatened to use deadly force.

#### **Standard of Review**

The Texas Court of Criminal Appeals recently held that the *Jackson v. Virginia* legal sufficiency standard is the only standard a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the state is required to prove beyond a reasonable doubt. See *Brooks v. State*, 323 S.W.3d 893, 894 (Tex. Crim. App. 2010) (plurality op.).

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<sup>2</sup> Specks also met the police at Appellant's grandmother's house, and was there when Appellant was arrested and the victim rescued.

When reviewing the sufficiency of the evidence, we view all the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *Jackson v. Virginia*, 443 U.S. 307, 315-16, 99 S. Ct. 2781, 2786-87, 61 L. Ed. 2d 560 (1979); *Brooks*, 323 S.W.3d at 899. Under this standard, a reviewing court does not sit as a thirteenth juror and may not substitute its judgment for that of the fact finder by reevaluating the weight and credibility of the evidence. See *Brooks*, 323 S.W.3d at 899; *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999). Instead, a reviewing court defers to the fact finder's resolution of conflicting evidence unless that resolution is not rational in light of the burden of proof. See *Brooks*, 323 S.W.3d at 899-900. The duty of a reviewing court is to ensure that the evidence presented actually supports a conclusion that the defendant committed the crime. See *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007).

### **Applicable Law**

A person commits the offense of aggravated kidnapping if the person “intentionally or knowingly abducts another person with the intent to . . . inflict bodily injury on [her] or violate or abuse [her] sexually. . . .” TEX. PENAL CODE ANN. § 20.04(a)(4) (West 2011). A person also commits the offense of 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” is defined as restraining a person “with intent to prevent [her] liberation by (1) secreting or holding [her] in a place where [she] is not likely to be found; or (2) using or threatening to use deadly force.” *Id.* § 20.01(2)(A),(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 State was required to prove that “(1) restraint was made (2) with a specific intent to prevent liberation by either of two particular means.” *Brimage v. State*, 918 S.W.2d 466, 475-76 (Tex. Crim. App. 1994); see also *Laster v. State*, 275 S.W.3d 512, 521 (Tex. Crim. App. 2009). “Thus, secretion and the use or threatened use of deadly force are merely two alternative components of the specific intent element. . . [, and] the [s]tate must prove that a restraint was completed and that the actor evidenced a specific intent to prevent liberation by either secretion or deadly force.” *Brimage*, 918 S.W.2d at 476. A jury can infer a defendant’s intent based on evidence of the defendant’s actions of luring a victim to a location, subduing and restraining her by

force, and concealing her to prevent her liberation for the purpose of sexually assaulting her. *Id.* at 476. Where there is sufficient evidence upon which a rational jury could have so found that to be the defendant's intent beyond a reasonable doubt, the verdict will be affirmed. *Id.* (citing *Jackson*, 443 U.S. at 309, 99 S. Ct. at 2784).

### **Discussion**

The indictment in this case alleged that Appellant committed aggravated kidnapping in the following ways:

with the intent to inflict bodily injury on [the victim] and violate or abuse sexually [the victim] and terrorize [the victim did] intentionally or knowingly abduct [the victim] by restricting the movements of [the victim] without her consent so as to interfere substantially with her liberty, by moving her from one place to another and confining her, with the intent to prevent her liberation, by secreting or holding her in a place where she was not likely to be found;

...

with the intent to inflict bodily injury on [the victim] and violate or abuse sexually [the victim] and terrorize [the victim did] intentionally or knowingly abduct [the victim] by restricting the movements of [the victim] without her consent so as to interfere substantially with her liberty, by moving her from one place to another and confine her, with the intent to prevent her liberation, by using or threatening to use deadly force, namely, firearm;

...

[and that Appellant] used or exhibited a deadly weapon, to-wit: a firearm, during the commission of or immediate flight from said offense.

The trial court's charge instructed the jury that it could find Appellant guilty of the charged offense in any of those ways. *See* TEX. PENAL CODE ANN. §§ 20.01(2)(A), 20.04(a)(4) (restraining victim with intent to prevent liberation by secreting or holding victim in place not likely to be found plus intent to inflict bodily injury or violate or abuse victim sexually); TEX. PENAL CODE ANN. §§ 20.01(2)(B), 20.04(a)(4) (restraining victim with intent to prevent liberation through use or threat of deadly force plus intent to inflict bodily injury or violate or abuse victim sexually); TEX. PENAL CODE ANN. §§ 20.01(2)(A),(B), 20.04(b) (restraining victim with intent to prevent liberation through either secreting or holding victim in place not likely to be found or use or threat of deadly force plus use or exhibit deadly weapon during the commission of the offense).

#### **1. Use of deadly force**

In his second issue, Appellant argues that there is insufficient evidence that Appellant used or threatened deadly force. The crux of Appellant's argument is that, since no weapon was found

when Appellant was arrested, there is insufficient evidence on which to base a finding of the use of a deadly weapon.

A firearm is a deadly weapon per se. TEX. PENAL CODE § 1.07(a)(17)(A) (West 2011); *see also Gomez v. State*, 685 S.W.2d 333, 336 (Tex. Crim. App. 1985). The victim's testimony alone is sufficient to support a finding that the defendant used or exhibited a deadly weapon. *See Carter v. State*, 946 S.W.2d 507, 510-11 (Tex. App.—Houston [14th Dist.] 1997, pet. ref'd) (upholding aggravated kidnapping conviction on ground that victim testimony alone was sufficient evidence to show that defendant used or exhibited a firearm even though gun not recovered); *see also Wright v. State*, 591 S.W.2d 458, 459 (Tex. Crim. App. 1979).

In the present case, it is true that no gun was found when Appellant was arrested. The victim testified that she occasionally lapsed into unconsciousness due to the beating Appellant inflicted on her. So it is unknown when Appellant disposed of the guns that the victim and one of her friends testified he had at the beginning of the kidnapping. Nevertheless, the victim testified that she saw Appellant with a gun in his hand. She described it as “a little, small gun.” It is not required that the victim give a detailed description of the gun to establish that it was a firearm. *Id.* She also testified Appellant struck her on her head with the gun, and that he threatened to kill her. This is sufficient evidence upon which the jury could have based its finding that Appellant used or exhibited a deadly weapon, and consequently, that Appellant used or threatened the use of deadly force when he abducted the victim.

As part of his argument, Appellant also contends that the testimony varied as to how many guns Appellant had. However, any conflict in the testimony was for the jury to resolve. *Jackson*, 443 U.S. at 319, 99 S. Ct at 2789; *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

Appellant's second issue is overruled.

## **2. Secreting the victim where she was not likely to be found**

Appellant's first issue is that there is legally insufficient evidence to support a finding that Appellant intended to secret or hold the victim where she was not likely to be found. His argument is that he drove along public streets, took her to his former brother-in-law's house, and then to his grandmother's house. He concluded that “[t]hese actions, taking [the victim] into public, populated areas, conversing with persons in front of her, and making no attempt to hide the fact that she was in his vehicle hardly [demonstrate] an intent to secret [the victim].” Also, as part

of his argument, Appellant appears to contend that the police's discovery of him and the victim exiting the woods behind his grandmother's house establishes that the victim was not somewhere where she was not likely to be found.

However, we need not address this issue because we have already held that the evidence is legally sufficient to support his conviction on the ground that Appellant threatened the use of deadly force by using or exhibiting a deadly weapon when he restrained and abducted the victim. Since the jury could have reasonably concluded that Appellant committed the offense on that basis, we need not consider the alternative bases alleged in the indictment and in the court's charge upon which the jury could have concluded that Appellant committed the offense. *See* TEX. R. APP. P. 47.1.

#### **DISPOSITION**

Having overruled Appellant's second issue, and having determined that we need not address his remaining issue, the judgment of the trial court is *affirmed*.

**SAM GRIFFITH**

Justice

Opinion delivered August 31, 2011.  
*Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.*

(DO NOT PUBLISH)