

AFFIRM; and Opinion Filed January 27, 2016.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-15-00097-CR

**KETHAN ANDRE PEOPLES, Appellant
V.
THE STATE OF TEXAS, Appellee**

**On Appeal from the 380th Judicial District Court
Collin County, Texas
Trial Court Cause No. 380-81233-2014**

MEMORANDUM OPINION

Before Justices Fillmore, Myers, and Whitehill
Opinion by Justice Fillmore

A jury convicted appellant Kethan Andre Peoples of the aggravated kidnapping of Zuleka Edwards, found an enhancement allegation concerning Peoples's prior felony conviction true, and assessed punishment of forty years' confinement and a \$10,000 fine. In a single issue on appeal, Peoples asserts the trial court erred by failing to grant a motion for mistrial during the punishment phase of trial. We affirm the trial court's judgment.

Factual Background

On the morning of April 3, 2014, Edwards drove into the parking lot of her Plano, Texas, employer and parked her vehicle. She was speaking on her cellphone with her current boyfriend, Terry Roberson, when Peoples, her former boyfriend and father of her child, approached her vehicle. Peoples pushed Edwards to the passenger seat and wrapped her hands together and her feet together with duct tape. Peoples then drove Edwards's vehicle to another location in the

parking lot where he had parked the Chevrolet Impala he was driving. He forced Edwards into the back seat of the Impala, placed Edwards's purse and cellphone adjacent to him in the front seat, and drove the Impala from the parking lot.

Roberson testified regarding his telephone call with Edwards that morning. Roberson heard Edwards identify K.P., Edwards's nickname for Peoples, and ask what Peoples was doing at her workplace and how he had learned of her workplace location. Roberson heard arguing and "tussling"; he also heard Edwards say she could not move and that Peoples had tied her up. The call was then disconnected. Roberson believed Edwards was in danger, and he placed a 9-1-1 emergency call in which he conveyed to police what he had heard during the telephone call with Edwards. The recording of that 9-1-1 telephone call was introduced into evidence and played for the jury. Roberson testified he was aware Edwards changed her telephone number several times as a result of repeated calls from Peoples. Roberson was aware of a prior incident at a Wal-Mart store in which Peoples physically fought with Edwards, pulled her hair, drove away with their child, and Peoples was jailed as a result of the incident.¹

Peoples's cousin, Latoya Thomas, testified she learned at approximately 9:00 a.m. on April 3, 2014 that Edwards had been taken by Peoples. Thomas called Edwards's cellphone and, after several unsuccessful attempts, Edwards answered. Edwards sounded agitated and disturbed. Edwards said she was at work, but Thomas responded she knew that was incorrect because Thomas was at Edwards's workplace. At that point, the call was disconnected. Because she was worried about Edwards after speaking with her and Roberson, Thomas placed a 9-1-1 telephone call in which she stated Edwards had been taken from her workplace against her will by Peoples. That call was admitted into evidence and played for the jury. Thomas also

¹ Roberson's written statement provided to the Plano Police Department on April 3, 2014 was admitted in evidence. In that statement, Roberson indicated what he overheard during the April 3, 2014 telephone call with Edwards. Specifically, Roberson mentioned that he had heard Edwards say that Peoples had tied her legs. Roberson's written statement also referenced the prior incident at the Wal-Mart store in which Peoples took his daughter out of Edwards's car and drove away with her.

telephoned Peoples's mother and informed her that she believed Peoples had taken Edwards. Thomas testified Peoples had been sending threatening messages by text to her cellphone for approximately a week prior to this incident, telling her she "was going to get the same thing [Edwards] got" if she did not tell him what he wanted to know about Edwards's personal life. According to Thomas, Edwards had ended her relationship with Peoples because of his verbal and physical abuse, including a physical altercation with Edwards and Edwards's mother. Thomas testified Edwards had changed her telephone number regularly to avoid Peoples calling her.

Edwards testified that during her dating relationship with Peoples, he was physically abusive. The violence began with Peoples shoving Edwards, but escalated to the point of Peoples hitting her in the face, choking her with a cord, and "pull[ing] a knife" on her. After one of the physical altercations, she was unable to leave the house for days due to the appearance of the injuries she sustained. On one occasion, Peoples poured a bottle of liquor over Edwards's head and threatened to set her on fire with a lighter. On another occasion, a neighbor called 9-1-1 regarding an altercation between Peoples and Edwards, resulting in Peoples being charged with bodily injury to a family member. Peoples was also jailed for the incident at the Wal-Mart store during which Peoples took their child and drove away. After she ended her relationship with Peoples, Edwards had to change her telephone number more than once because Peoples repeatedly called her, including an instance in which he called over one hundred times within the span of an hour.

During her testimony, Edwards described the events of the morning of April 3, 2014. She was speaking to Roberson on her cellphone as she arrived at work. After parking her car, Peoples surprised her at her vehicle. He pushed his way into her car, knocked her cellphone from her hand, duct taped her arms and legs so that she could not move, and threw her to the

front passenger seat of her vehicle. Peoples then drove Edwards's vehicle across the parking lot to the location of his parked Impala. He threw Edwards into the back seat of the Impala, and Peoples took Edwards's purse and cellphone from her vehicle. Peoples drove out of the parking lot, telling Edwards he was going to "show me better than he can tell me." Edwards was able to "pop" the duct tape, and she attempted to jump out of the vehicle. Peoples told her he knew she was "going to try something," and he had activated the child locks so that she could not open a rear door and escape. Peoples threatened to kill Edwards, and Edwards believed he would. Edwards pleaded with Peoples to release her, but he made known to Edwards that he was not going to do so. Peoples said to Edwards, "Told you I was going to kidnap you." While the incident remained underway, Peoples received telephone calls and text messages from his family members regarding what he had done, and he told Edwards, "So now I have to kill you because I'm not going to go to jail for kidnapping, and then I'll kill myself." After driving for some time, Peoples stopped the car at an apartment complex and dragged Edwards from his car. Edwards thought he was going to drag her to an adjacent wooded area and kill her. Edwards tried to run away, but Peoples tackled her. He struck her in the head and face and choked her. After dragging her back to his car and placing her in the back seat, Peoples drove to Lakeside Park in Duncanville, Texas. At the park, Peoples took Edwards to a set of bleachers. Edwards testified Peoples remained nearby to ensure she could not run away, and she believed he had no intention of letting her go. Police then arrived at the park and Peoples was taken into custody.

Plano Police Department officers Cliff Turrubiarde and Randall Strickland responded to Edwards's place of employment and located her vehicle in a parking lot. Turrubiarde noticed duct tape on a gearshift in the floorboard of Edwards's vehicle. Plano Police Department sergeant John Wade Daniel obtained approval from the watch commander on duty to track the location and movement of Edwards's cellphone in an effort to locate Edwards and Peoples. A

dispatcher in the Plano Public Safety Communications Department communicated the locations of Edwards's cellphone for the period from 9:20 a.m., at which time the cellphone was in Dallas, to 10:55 a.m., at which time the cellphone was in Duncanville.

Detective Matthew Chance Hill and Detective Berger² drove to an entrance of Lakeside Park and saw the parked and unoccupied Impala that Peoples had been driving. Hill saw Peoples and Edwards sitting on bleachers. Edwards's hands were clasped together between her knees and her head was hung; Peoples had his hands in the air and was yelling. A marked squad car arrived at the scene. Hill and Berger exited their vehicle, approached Peoples with guns drawn, and ordered Peoples to his knees. Edwards ran sobbing to Berger. Approximately two hours had elapsed from the time Peoples drove away from Edwards's workplace with Edwards in the back seat of his car to the time Peoples was taken into custody at the park. Duct tape was recovered from a trash bin and from the ground outside the passenger door of the Impala. An ambulance was summoned because Edwards had been beaten. Hill photographed Edwards's injuries, and photographs of Edwards's swollen and blackened eye, scratched neck, bleeding hands, and scraped knees were admitted into evidence and viewed by the jury. The photographs also depicted the duct tape residue on Edwards's ankles and ligature marks.

Edwards was taken to the Plano Police Department where she made a written statement. In her statement, she indicated she was afraid Peoples was going to kill her because he made threats to her while they were in his vehicle. Plano Police Department detective James Phelan testified Edwards had injuries, her clothes were disheveled, and there was duct tape residue on her clothes. Based on what he learned from his investigation of the event, information obtained from family members, the fact Peoples had duct taped Edwards's hands and feet, the threats Edwards indicated Peoples made, and the physical injuries Edwards sustained that

² The record does not contain Detective Berger's first name.

included an eye that was swollen shut, it was Phelan's opinion Peoples had committed the offense of aggravated kidnapping. Phelan noted intent to inflict bodily harm and intent to terrorize a kidnapping victim are factors indicative of aggravated kidnapping, and Phelan believed those factors were present in this case.

A redacted videotape of Peoples's post-arrest interview at the Plano Police Department was admitted into evidence and played for the jury. According to Peoples, he went to Edwards's workplace. In the workplace parking lot, he approached Edwards's car and said, "Let's leave." When Edwards responded that she could not leave, they got into an argument and Peoples told her "she was about to go." He "put her in the backseat of [his] car," and they left in his car. Peoples stated he did not bind Edwards with duct tape but used it as a "scare tactic." A number of people were telephoning Edwards, and Peoples instructed her to tell them she was alright. A family member telephoned Peoples asserting Peoples had kidnapped Edwards, which made Peoples fearful because in the past he had "been physical with [Edwards]." He stated he did not know what to do, and he was not going to jail for kidnapping. At an apartment complex to which he had driven, he told Edwards to get out of the car, and she did. When she attempted to run away, he chased her, dragged her to the ground, and hit her in the eye. After he drove her to a park, police arrived.

The indictment charging Peoples with aggravated kidnapping alleges that, with the intent to inflict bodily injury on and terrorize Edwards, he intentionally and knowingly abducted Edwards by restricting her movements without her consent "so as to interfere substantially with her liberty, by moving her from one place to another and by confining her," with the intent to prevent her liberation "by secreting and holding her in a place where she was not likely to be

found.”³ A jury found Peoples guilty of the aggravated kidnapping of Edwards as charged in the indictment.

During the punishment phase of trial, Edwards testified without objection that while under arrest on the aggravated kidnapping charge and before trial, Peoples attempted to contact her. Edwards testified, “[E]ven after [Peoples] was incarcerated, he did try to contact me three times. . . . He wrote me a letter, and he was steadily calling my phone that I have no idea at this point where he got the number from.”

Peoples testified during the punishment phase of trial. In response to a question from his attorney about whether he intended to talk to Edwards again, Peoples stated, “I hope in time 20, maybe 20 years, 30 years from now, 40 years, we grow older, that she can forgive me.” On cross-examination, the State’s attorney asked Peoples if he would try to contact Edwards if released from prison. Peoples responded, “Personally, I’m going to go through the court system.” The State’s attorney asked Peoples, “Now, while you were in jail here awaiting trial, you contacted her?” Peoples’s attorney objected; outside the presence of the jury he specifically objected that the question violated Peoples’s constitutional right to a “fair trial and a non-prejudicial punishment.” Acknowledging Edwards had testified she was contacted by Peoples while he was in jail, Peoples’s attorney argued there was no evidence Peoples was in jail at the time of trial and moved for a mistrial. The State’s attorney responded that the question posed to

³ A person commits an offense of aggravated kidnapping if he intentionally or knowingly abducts a person 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.

TEX. PENAL CODE ANN. § 20.04(a) (West 2011).

“Abduct” means to restrain a person with intent to prevent his liberation by secreting or holding him in a place where he is not likely to be found or using or threatening to use deadly force. *Id.* § 20.01(2) (West 2011). “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). Restraint is “without consent” if it is accomplished by force, intimidation, or deception.” *Id.* § 20.01(1)(A).

Peoples was the same question answered by Edwards without objection, and there had been no violation of Peoples's constitutional rights.

The trial court denied Peoples's motion for mistrial. Although noting Edwards's testimony regarding Peoples contacting her from jail, the trial court admonished the State's attorney not to ask "any additional questions about [Peoples] being incarcerated prior to trial, or during the trial, or to make any insinuation of such." The trial court sustained Peoples's objection and stated that instructing the jury to disregard the State's question to Peoples "should settle the matter." The jury was returned to the courtroom, and the trial court instructed the jury to disregard the question asked by the State's attorney and "any insinuation from the question." The trial court further instructed the jury that any juror who could not follow that instruction should raise his or her hand; the trial court noted on the record that no juror indicated an inability to follow that instruction. The State's attorney then indicated she had no further questions of Peoples.

Peoples pleaded "not true" to an enhancement allegation of a prior felony conviction of obstruction or retaliation, *see* TEX. PENAL CODE ANN. § 36.06(a) (West Supp. 2015);⁴ however, he testified he had been imprisoned as a result of that conviction. Peoples also testified he had been convicted of resisting arrest and criminal mischief and twice of assault-family violence.

⁴ A person commits an offense of obstruction or retaliation if he intentionally or knowingly harms or threatens to harm another by an unlawful act:

- (1) in retaliation for or on account of the service or status of another as a:
 - (A) public servant, witness, prospective witness, or informant; or
 - (B) person who has reported or who the actor knows intends to report the occurrence of a crime; or
- (2) to prevent or delay the service of another as a:
 - (A) public servant, witness, prospective witness, or informant; or
 - (B) person who has reported or who the actor knows intends to report the occurrence of a crime.

TEX. PENAL CODE ANN. § 36.06(a).

The jury found the enhancement allegation of a prior felony conviction for obstruction or retaliation true. The jury also found Peoples did not prove he voluntarily released Edwards in a safe place. *See* TEX. PENAL CODE ANN. § 20.04(d) (“At the punishment stage of a trial, the defendant may raise the issue as to whether he voluntarily released the victim in a safe place. If the defendant proves the issue in the affirmative by a preponderance of the evidence, the offense is a felony of the second degree.”). The punishment jury charge instructed the jury that, having found the enhancement allegation of a prior felony conviction true and that Peoples did not prove he released Edwards in a safe place, the range of punishment was a term of imprisonment not less than fifteen years and not more than ninety-nine years or life and a fine not to exceed \$10,000. *See* TEX. PENAL CODE ANN. § 12.42(c)(1) (West Supp. 2015). The jury assessed punishment of forty-years’ confinement and a fine of \$10,000, and Peoples filed this appeal.

Motion for Mistrial

In his sole issue on appeal, Peoples contends the trial court erred by denying his motion for mistrial during the punishment phase of trial because the allegedly objectionable question by the State’s attorney, which Peoples characterizes as “evidence of an extraneous offense,” violated Peoples’s right to a fair trial under the Sixth Amendment of the United States Constitution. Peoples argues the question was calculated to inform the jury that Peoples has been in custody awaiting trial since the offense occurred and that the impression created was more prejudicial than probative and violated rules of evidence 403 and 404(b). Further, Peoples argues the trial court’s instruction to the jury to disregard the question did not cure the error. The State responds that the question was not improper because: (1) the fact Peoples was in jail was not evidence of, and did not establish, an extraneous offense because he was jailed on the instant offense, not another offense; (2) Peoples contacting Edwards while in jail awaiting trial is relevant because it demonstrates his continued harassment of, and danger to, Edwards; and (3)

Peoples “opened the door to the issue” by testifying he would leave Edwards alone and not try to contact her. The State further argues that, even if the question was improper, the trial court’s instruction to disregard cured any error because the question was not clearly prejudicial to Peoples, and there was a strong likelihood of the same punishment being assessed absent the complained-of question.

Standard of Review

When, as here, the trial court sustains a defense objection and instructs the jury to disregard, but denies a defendant’s motion for mistrial, the issue is whether the trial court abused its discretion by denying the mistrial. *Hawkins v. State*, 135 S.W.3d 72, 76–77 (Tex. Crim. App. 2004); *see also Coble v. State*, 330 S.W.3d 253, 292 (Tex. Crim. App. 2010). We uphold the trial court’s ruling if it was within the zone of reasonable disagreement. *Coble*, 330 S.W.3d at 292. “Only in extreme circumstances, where the prejudice is incurable, will a mistrial be required.” *Hawkins*, 135 S.W.3d at 77; *see also Ocon v. State*, 284 S.W.3d 880, 884–85 (Tex. Crim. App. 2009) (mistrial is extreme remedy and should be granted “only when residual prejudice remains’ after less drastic alternatives are explored” (quoting *Barnett v. State*, 161 S.W.3d 128, 134 (Tex. App.—Fort Worth 2005), *aff’d*, 189 S.W.3d 272 (Tex. Crim. App. 2006))). Granting a mistrial is appropriate when error is “so prejudicial that expenditure of further time and expense would be wasteful and futile.” *Hawkins*, 135 S.W.3d at 77 (quoting *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999)).

“The asking of an improper question will seldom call for a mistrial, because, in most cases, any harm can be cured by an instruction to disregard.” *Wood v. State*, 18 S.W.3d 642, 648 (Tex. Crim. App. 2000) (quoting *Ladd*, 3 S.W.3d at 567). “On appeal, we generally presume the jury follows the trial court’s instructions in the manner presented. The presumption is refutable, but the appellant must rebut the presumption by pointing to evidence that the jury failed to

follow the trial court's instructions." *Thrift v. State*, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005); *see also Wood*, 18 S.W.3d at 648 ("A mistrial is required only when the improper question is clearly prejudicial to the defendant and is of such character as to suggest the impossibility of withdrawing the impression produced on the minds of the jurors.") (quoting *Ladd*, 3 S.W.3d at 567); *Ovalle v. State*, 13 S.W.3d 774, 783 (Tex. Crim. App. 2000) (prompt instruction to disregard will ordinarily cure any prejudice associated with improper question and answer, even one regarding extraneous offenses).

Analysis

Although our review of the denial of a mistrial involves determining whether error occurred, our consideration involves most, if not all, of the same factors that attend a harm analysis. *See Archie v. State*, 221 S.W.3d 695, 699–700 (Tex. Crim. App. 2007) (citing *Hawkins*, 135 S.W.3d at 77). To determine whether a trial court abused its discretion by denying a mistrial, we apply the test articulated in *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998), which requires balancing of three factors: (1) severity of the misconduct (magnitude of the prejudicial effect of the prosecutor's remarks); (2) measures adopted to cure any harm from the misconduct (efficacy of any cautionary instruction by the trial court); and (3) certainty of conviction absent the misconduct (strength of the evidence supporting the conviction). *See Archie*, 221 S.W.3d at 700. In this case, the factors weigh in favor of the trial court's ruling.

Severity of the Conduct

On this record, the complained-of question raised no prejudicial information not already in the record and before the jury. The jury was aware Peoples had been arrested and placed in custody in connection with the instant offense; his interview from jail was admitted into evidence. And, as indicated above, Edwards testified without objection during the punishment phase of the trial that Peoples attempted to contact her "even after he was incarcerated." The

State's question did not suggest Peoples had been in jail the entire time he was awaiting trial or that he was presently incarcerated. Further, the record establishes Peoples "opened the door" to the question asked by the State. In response to a question from his attorney about whether he intended to talk to Edwards again, Peoples stated, "I hope in time 20, maybe 20 years, 30 years from now, 40 years, we grow older, that she can forgive me." On cross-examination, the State's attorney asked Peoples if he was going to try to contact Edwards if released from prison. Peoples responded, "Personally, I'm going to go through the court system." To impeach Peoples's testimony that he did not intend to contact Edwards personally, at least for twenty to forty years, the State's attorney asked whether, in fact, Peoples contacted Edwards while in jail awaiting trial. A party who "opens the door" to otherwise inadmissible evidence risks the adverse effect of having that evidence admitted. *See Bowley v. State*, 310 S.W.3d 431, 435 (Tex. Crim. App. 2010).⁵ Finally, it is clear from the context that the question posed by the State was intended to solicit impeachment evidence and not to imply appellant must have committed the charged offense or he would not have been in custody.

For these reasons, the State's question is not clearly prejudicial and of such a character as to suggest the impossibility of withdrawing the impression produced on the minds of the jurors. *See Thrift*, 176 S.W.3d at 224. This factor weighs in favor of the trial court's ruling.

Curative Measures

The trial court sustained Peoples's objection to the State's question and promptly instructed the jury to disregard the question and "any insinuation from the question." The trial court's curative instruction to the jury was clear and direct. On appeal, we presume the jury followed the trial court's instruction, and Peoples has not rebutted the presumption by pointing to

⁵ *See also Peinado v. State*, Nos. 05-14-00418-CR & 05-14-00419-CR, 2015 WL 4931492, at *14 (Tex. App.—Dallas Aug. 18, 2015, no pet.) (mem. op., not designated for publication).

evidence that the jury failed to follow the court's instruction. *See Thrift*, 176 S.W.3d at 224. And here, the record supports more than a mere presumption the jury followed the trial court's instruction. The trial court specifically instructed that any juror who could not follow the curative instruction should provide notification by raising his or her hand, and the record contains the trial court's observance that no juror indicated an inability to follow the curative instruction. This factor weighs in favor of the trial court's ruling.

Certainty of Outcome

On this record, there is a strong likelihood of the same sentence being imposed in the absence of the State's question. First, after the trial court sustained Peoples's objection and instructed the jury, the State did not return to the subject of the question and, in fact, asked no further questions of Peoples. Second, Peoples was convicted of a first-degree felony and was an habitual offender. The jury assessed a sentence of forty years' confinement, well within the punishment range and substantially less than the statutory maximum ninety-nine years or life sentence. The record contains evidence not only of the instant offense, including Peoples's threats to kill Edwards, the physical injuries he inflicted on Edwards, and prior physical altercations with Edwards, but also of Peoples's prior assault convictions. Due to the strength of the evidence, it is very likely the same punishment would have been assessed regardless of the purportedly improper question posed by the State. *See Archie*, 221 S.W.3d at 700. This factor weighs in favor of the trial court's ruling.

Conclusion

The nature of the State's conduct in this case was not severe because the complained-of question raised no prejudicial information not already on the record and before the jury and the appellant himself "opened the door" to the State's question. Curative measures employed by the trial court were effective. And, in any event, there was a strong likelihood of the same

punishment outcome in the absence of the State's question. The trial court did not abuse its discretion in denying Peoples's motion for mistrial. We resolve Peoples's sole issue against him. Accordingly, we affirm the trial court's judgment.

/Robert M. Fillmore/
ROBERT M. FILLMORE
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

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THE STATE OF TEXAS, Appellee

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Trial Court Cause No. 380-81233-2014.

Opinion delivered by Justice Fillmore,

Justices Myers and Whitehill participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 27th day of January, 2016.