AFFIRM; and Opinion Filed April 5, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-01549-CR

ALI R. ALAVIAN, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 219th Judicial District Court
Collin County, Texas
Trial Court Cause No. 219-82473-2014

MEMORANDUM OPINION

Before Justices Bridges, Evans, and Whitehill
Opinion by Justice Evans

Ali R. Alavian appeals his conviction for attempted sexual assault. A jury found appellant guilty of the offense and assessed punishment at ten years' imprisonment. On appeal, appellant contends that the evidence is insufficient to support the conviction; his right to due process was violated when the investigating detective testified that appellant was "slippery" and guilty of the offense; his right to due process was violated when a witness was allowed to testify regarding a prior extraneous act; appellant was denied the effective assistance of counsel; and the indictment failed to allege an offense. For the reasons that follow, we affirm the trial court's judgment.

BACKGROUND

S.W.[1] grew up in Saudi Arabia and Egypt. She was 29 years old at the time of trial. S.W. came to the United States when she was 18 years old to attend college and moved to Dallas when she became engaged. Throughout her teenage years, S.W. played a lot of sports, and when she was 13 or 14 years old, suffered a back injury while playing soccer. She has had back problems since the injury and has tried many different things to manage her pain, including massages. However, her experience with having massages was limited.

In December 2013, S.W.'s fiancé gave her a gift coupon for two massages from The Massage Company. She had the first massage in December, 2013; appellant was her therapist. At the beginning of the massage, S.W. told appellant that she just wanted him to work on her back, but also gave him permission to work on her glutes if he needed to in order to relax all of her back muscles. S.W. felt relief from pain after the massage. She felt comfortable during the massage as Appellant was very professional, making sure the sheet covered her at all times.

On January 3, 2014, S.W. went for her second massage at The Massage Company and requested that appellant be her therapist since he had done such a good job the first time. She began to feel uncomfortable when she had her hands by her side while appellant was working on her back and she could feel appellant's genitals in her hands through his scrubs. She moved her hand but appellant repositioned himself so that she felt his genitals in her hands again. S.W. moved her hand again and tucked it under her torso. Appellant continued massaging her back but this time did nothing to secure the sheet around S.W., eventually leaving her back and lower part of her body fully exposed. After massaging her back, appellant massaged her rear end and then put his hands between her buttocks in such a forceful manner as to stretch her anus. S.W.

[1] The complaining witness in this case elected to use a pseudonym. *See* TEX. CODE CRIM. PROC. ANN. art. 57A.02 (West Supp. 2016).

was terrified and "froze." After finishing his movements on her rear end, appellant requested that she turn over, causing the sheet to slip off of her body even more. S.W. tried to pull the sheet up but could not cover herself as appellant continued with the massage. At that point, appellant stood above her head and massaged her exposed breasts. S.W. was distressed, scared, and in shock. She felt trapped because she had no clothes on. Appellant was chatting, and kept saying, "Is this okay?" S.W. was "just frozen" and was not responding to appellant. After massaging her breasts, appellant started massaging her thighs, starting at the pelvic bone and moving downward. During the leg massage, appellant brushed his hand against her vagina several times, always trying to make it seem like an accident. Towards the end of the leg massage, appellant put one of his fingers in her vagina. S.W. was confused and shocked, and did not know what to do. After the massage ended and S.W. got dressed, appellant came back into the room, gave her his cell phone number, hugged her, and then tried to kiss her on the mouth. S.W. managed to turn her head so the kiss ended up on her cheek. As is common in Middle East culture, S.W. made smooching sounds back at appellant, then said thank you, pushed appellant away, and went home. A couple of days later, she told her fiancé about what appellant had done to her and they reported it to the police.

Detective Christine Weisskopf testified regarding her investigation. After interviewing the complainant, Detective Weisskopf determined that further investigation into the allegations was warranted. At the detective's request, appellant came in voluntarily for an interview. The video recording of Appellant's interview was admitted into evidence and played for the jury. When Detective Weisskopf told appellant about the complainant's allegations and asked if there was ever a reason he should have any contact with a client's vaginal or breast area, appellant told her "No." When Detective Weisskopf repeated the complainant's allegations, appellant could not recall an incident with any of his clients where his finger had slipped into the vaginal area.

When asked if there was a possibility of such an occurrence during a massage, appellant told the detective that it could happen in situations when things got "a little bit lax" and he was comfortable with what he was doing. He told the detective that he did not ever intend to go anywhere with his hand, but if he did, he would not know about it and did not recall such an incident recently. He explained that the area he would be massaging where his hand could slide and touch would be around the glutes. When questioned further about whether there was a position during a massage around the glutes in which his hand could slide and have full contact with a client's vaginal area, appellant stated, "It should never happen." When asked if it had ever happened, appellant responded "No." When pressed again about how it could happen, appellant told the detective it was possible "from time to time" when "massaging from the leg" or if there was "too much oil." As the interview winded down, Appellant repeatedly told Detective Weisskopf that fingers or hands should never contact the vaginal area during a massage because there is always a sheet, but acknowledged that it was possible that it did happen because of the "oil situation and so forth."

During the interview, appellant was also asked about a conversation Christy Maclennan, the general manager of The Massage Company, had with him about appropriate conduct. Appellant described an incident when he had given Maclennan a free massage and when he turned her over, "it appeared that my hand touched her nipple." When Maclennan confronted him about it, he apologized and said that he did not know what happened and that it was not intentional.

Christy Maclennan testified that appellant was her employee at The Massage Company. She stated that she received a massage from appellant in November 2013 that she believed was inappropriate and had a conversation with appellant about it. She admitted that she had another massage from appellant after the massage in November. She also testified that there was an

incident which took place in February 2014 where appellant was fired. She was not aware of any type of incident appellant had in January.

ANALYSIS

I. Sufficiency of the Evidence

In his first three issues, Appellant claims that the evidence is insufficient to prove beyond a reasonable doubt that appellant had the specific intent to sexually assault or to attempt to sexually assault S.W. because the evidence does not show lack of consent on the part of S.W. or that appellant knew that S.W. was unaware that the sexual assault was occurring.

In reviewing the sufficiency of the evidence, we view all the evidence in the light most favorable to the verdict, and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 313 (1979); *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010). We assume the fact-finder resolved conflicts in the testimony, weighed the evidence, and drew reasonable inferences in a manner that supports the verdict. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We defer to the trier of fact's determinations of witness credibility and the weight to be given their testimony. *Brooks*, 323 S.W.3d at 899.

A person commits sexual assault if the person intentionally or knowingly causes the penetration of another person's sexual organ without that person's consent. TEX. PENAL CODE ANN. § 22.011(a)(1)(A) (West 2011). A sexual assault under Subsection (a)(1) is without the consent of the other person if the other person has not consented and the actor knows the other person is unaware that the sexual assault is occurring. *Id*. at (b)(5). A person commits attempted sexual assault if, with the intent to commit sexual assault, he commits an act amounting to more than mere preparation that tends, but fails, to effect the commission of sexual assault. TEX. PENAL CODE ANN. § 15.01(a) (West 2011). Generally, a person's intent to commit an offense

must be established by circumstantial evidence and may be inferred from the person's acts, words, and conduct, as well as the surrounding circumstances. *See Hernandez v. State*, 819 S.W.2d 806, 810 (Tex. Crim. App. 1991); *Lindsey v. State*, 764 S.W.2d 376, 378 (Tex. App.—Texarkana 1989, no pet.). Knowledge, like intent, may also be inferred from the person's acts, words, conduct, and surrounding circumstances. *Parramore v. State*, 853 S.W.2d 741, 45 (Tex. App.—Corpus Christi 1993, pet. ref'd).

Attempted sexual assault is a lesser-included offense of sexual assault. TEX. PENAL CODE ANN. § 22.011(a)(1)(A) (West 2011); TEX. CODE CRIM. PROC. ANN. art. 37.09(4) (West 2006); *Jones v. State*, 225 S.W.3d 772, 776 (Tex. App.—Houston [14th Dist.] 2007, no pet.). Proof sufficient to support conviction of the greater offense will necessarily sustain a conviction for the lesser-included offense. *See Daniels v. State*, 464 S.W.2d 368, 369-70 (Tex. Crim. App. 1971); *see also* 43 George E. Dix & Robert O. Dawson, *Texas Practice: Criminal Practice and Procedure* § 31.96 (2d ed. West 2001); *Nguyen v. State*, No. 03-07-00017-CR, 2009 WL 2900739, at *6 (Tex. App.—Austin September 10, 2009, pet. ref'd) (mem. op. not designated for publication). The uncorroborated testimony of a complainant is sufficient alone to support a conviction for attempted sexual assault if she informed any person, other than the defendant, of the alleged offense within one year after the offense. *See* TEX. CODE CRIM. PROC. ANN. art. 38.07(a) (West Supp. 2017).

S.W. testified that she did not consent to any sexual act with appellant. To support his claim, appellant relies on the following evidence: (1) S.W.'s admission that she complied with appellant's request to roll onto her back, thereby exposing her entire upper torso, even though she told appellant that she wanted him to work on her back and she had remained on her stomach during the entire first massage she received from appellant; (2) S.W.'s testimony that throughout the massage and all the preliminary sexual conduct by appellant prior to the final digital

penetration, S.W. never objected even though appellant was constantly asking her if this is "okay;" and (3) S.W.'s admission that when appellant was massaging her breasts she thought about getting up and leaving, but rejected the idea because she did not have any clothes on and did not believe the sheet was big enough to cover her body. This evidence is of little import when placed in context. By the time S.W. became aware of what appellant was doing, the sexual assault had already occurred. S.W. testified that due to her inexperience with massages, when appellant touched the various sexual parts of her body, she wondered whether this was what happened during a massage, whether it was just an accident, or whether appellant was just being unprofessional. She testified that each time appellant inappropriately touched her body, she was distressed, scared, and in shock, and was unable to respond to anything appellant was asking. S.W. testified that when appellant inserted his finger in her vagina, she was "mortified" and "just froze;" she "just did not want to believe that what was happening to [her] was happening."[2] S.W. testified that after she went home and thought about what had happened and the fact that appellant tried to kiss her, it put everything that had happened in a different light and she could no longer give appellant the benefit of the doubt as to whether his inappropriate sexual touching and vaginal penetration was merely an accident.

The jury also heard appellant's interview with Detective Weisskopf in which he repeatedly stated that there should never be contact with a client's breast or vaginal area. Appellant told the detective that he had no recollection of such an incident having occurred

[2] Even if it could be argued that this testimony somehow indicates that S.W. became aware that a sexual assault was occurring at the moment appellant penetrated her vagina with his finger, the fact that a sexual assault victim becomes aware that an assault is occurring does not defeat the defendant's guilt because the assault has already occurred. *See In re D.G.*, No. 03-12-00455-CV, 2014 WL 3732930, *2 (Tex. App.—July 23, 2014, no pet.) (mem. op. not designated for publication); *Mauldin v. State*, No. 05-09-0051-CR, 2010 WL 936695, *4 (Tex. App.—Dallas March 17, 2010, pet. ref'd) (not designated for publication); *Jennings v. State*, No. 07-09-00047-CR, 2010 WL 5392684, *4 (Tex. App.—Amarillo December 29, 2010, pet. ref'd) (mem. op. not designated for publication); *Espinoza v. State*, No. 07-04-0550-CR, 2005 WL 1047115 (Tex. App.—Amarillo May 5, 2005, no pet.) (mem. op. not designated for publication).

recently and later denied that such an incident had ever occurred during one of his massages. While appellant explained how a hand could slip into the vaginal area during a massage, he told the detective that he did not ever intend to go anywhere with his hand, but if he did, he would not know about it.

The jury as fact-finder was entitled to believe S.W.'s testimony that she was unaware that the sexual assault was occurring and did not consent to penetration of her vagina. Based on S.W.'s testimony and appellant's statements during his interview with Detective Weisskopf regarding inappropriate sexual contact during massages, the jury could reasonably infer that appellant attempted to have non-consensual sex with S.W. induced by making her believe it was part of the normal massage process or merely an accident. Viewing the evidence in a light most favorable to the verdict, we conclude that a rational jury could find beyond a reasonable doubt that S.W. did not consent to the sexual activity with appellant and was unaware the sexual assault was occurring.

The facts in this case are similar to the facts in *Nicodemus v. State*, Nos. 05-05-00207-CR & 05-05-00208-CR. 2005 WL 3163752 (Tex. App.—Dallas May 24, 2006, pet. ref'd) (not designated for publication). In *Nicodemus*, appellant argued the evidence was insufficient to show penetration occurred because the testimony of the victims was irrational and inconsistent, and neither victim said anything when appellant allegedly sexually assaulted them, made an outcry to the receptionist who was on the premises, or attempted to terminate the massage session or leave the room. *Id*. at *3. The first victim testified that she was shocked and afraid, but did not get up and leave because she was naked. *Id*. at *1. The second victim was sexually assaulted both digitally and orally during the massage. She testified that she did not object or try to leave because she was shocked and fearful of appellant. *Id*. at *2. Both victims testified that they were too humiliated to tell the receptionist. *Id*. at *1-2. We concluded that the evidence

was sufficient to support the convictions, holding that it was the jury's function to determine the credibility of the witnesses and resolve any conflicts in the evidence. *Id*. at *4.

We resolve appellant's sufficiency issues against him.

II. Due Process

In appellant's fourth and fifth issues, appellant claims that his due process rights were violated when Detective Weisskopf was allowed to testify that based upon her investigation, she determined that appellant was guilty of the offense.[3] Appellant also complains about the detective's testimony expressing an opinion on appellant's truth or veracity when she was allowed to testify that appellant was "slippery" and that he used words that she had heard guilty people use in the past, including, words used by child sex offenders. In addition, appellant claims that his due process rights were violated when Christy Maclennan was allowed to testify that appellant had given her a massage that she deemed "inappropriate" because such testimony amounted to "pure innuendo, leading the jurors to speculate that something perverted occurred when [appellant] gave her a massage." Appellant acknowledges that his trial counsel failed to

[3] As directly solicited by the prosecutor's questions, the detective expressed her opinion about appellant's guilt:

> Q. Okay. And after conducting your investigation on this case, did you make a determination about whether or not you believed that this defendant had the specific intent to commit the offense of sexual assault on [S.W.]?
>
> A. I did.
>
> Q. And during your investigation of this case after speaking with [S.W.] and the defendant, did you find that the actions that he took amounted to more than mere preparation?
>
> A. Yes.
>
> Q. And based on our laws, did you find that this was an attempt at a sexual assault, if not a complete sexual assault?
>
> A. Correct, yes.
>
> Q. At the very least an attempt.
>
> A. Yes.

It is improper for a prosecutor to explicitly ask a law enforcement officer to give her opinion regarding the defendant's guilt. "[T]he expression of guilt or innocence . . . [i]s a conclusion to be reached by the jury based upon the instruction given them in the court's charge, coupled with the evidence admitted by the judge through the course of trial. Thus, no witness [i]s competent to voice an opinion as to guilt or innocence." *Boyde v. State*, 513 S.W.2d 588, 590 (Tex. Crim. App. 1974).

object to the testimony of either of these witnesses but argues that the admission of this evidence constituted fundamental error.

"Preservation of error is a systemic requirement on appeal." *Ford v. State*, 305 S.W.3d 530, 532 (Tex. Crim. App. 2009) (footnote omitted). If an issue has not been preserved for appeal, we should not address it. *Id*. Rule 33.1(a) of the Texas Rules of Appellate Procedure provides that a complaint is not preserved for appeal unless it was made to the trial court "by a timely request, objection or motion" that "stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context." TEX. R. APP. P. 33.1. "The two main purposes of requiring a specific objection are to inform the trial judge of the basis of the objection so that he has an opportunity to rule on it and to allow opposing counsel to remedy the error." *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012). In addition, the record must show that the trial court ruled on the complaint or refused a complaining party's request for a ruling. *See* TEX. R. APP. P. 33.1.

In *Anderson v. State*, the Court of Criminal Appeals held that there is no "due process" exception to a rule of procedural default stating, "Indeed, our prior decisions make clear that numerous constitutional rights, including those that implicate a defendant's due process rights, may be forfeited for purposes of appellate review unless properly preserved." *See Anderson v. State*, 301 S.W.3d 276, 279-80 (Tex. Crim. App. 2009) (*and cases cited therein*).

We conclude that appellant's claim that his due process rights were violated by the admission of Detective Weisskopf's opinion testimony and Maclennan's extraneous act testimony was not preserved for appellate review. As a result, we resolve appellant's fourth and fifth issues against him.

III. Ineffective Assistance of Counsel

In his sixth issue, appellant claims that he was denied the effective assistance of counsel when trial counsel failed to object when: (1) the prosecutor elicited inadmissible testimony from Detective Weisskopf regarding her opinion of appellant's guilt and truthfulness; (2) extraneous offense evidence was admitted during the testimonies of Detective Weisskopf and Christi Maclennan, and appellant's unredacted recorded video statement; (3) counsel failed to request a limiting instruction on the extraneous offense evidence; and (4) the prosecutor improperly suggested during closing argument that the jury could convict appellant even if the complainant had consented to appellant's sexual assault.

To prevail on an ineffective assistance of counsel claim, appellant must establish both that his trial counsel performed deficiently and that the deficiency prejudiced him. *State v. Morales*, 253 S.W.3d 686, 696 (Tex. Crim. App. 2008) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). With respect to the first prong, the record on appeal must be sufficiently developed to overcome the strong presumption of reasonable assistance. *See Thompson v. State*, 9 S.W.3d 808, 813–14 (Tex. Crim. App. 1999). Absent an opportunity for trial counsel to explain his actions, we will not conclude his representation was deficient "unless the challenged conduct was so outrageous that no competent attorney would have engaged in it." *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001). Texas procedure makes it "'virtually impossible' " for appellate counsel to present an adequate ineffective assistance claim on direct review. *See Trevino v. Thaler*, 133 S. Ct. 1911, 1918 (2013) (quoting *Robinson v. State*, 16 S.W.3d 808, 810–11 (Tex. Crim. App. 2000)). This is because the inherent nature of most ineffective assistance claims means that the trial court record "will often fail to 'contai[n] the information necessary to substantiate' the claim." *Id.* (quoting *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997) (en banc)). As a result, the better procedural mechanism for

pursuing a claim of ineffective assistance is almost always through writ of habeas corpus proceedings. *Freeman v. State*, 125 S.W.3d 505, 506 (Tex. Crim. App. 2003).

In this case, appellant filed a motion for new trial. However, he did not raise a claim of ineffective assistance of counsel in the motion. Thus, the record is silent as to whether there was a strategic reason for counsel's conduct or what the particular strategy was. Appellant's assertion that there was no reasonable defense strategy to explain counsels' conduct is mere speculation. *See Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011) ("[C]ounsel's deficiency must be affirmatively demonstrated in the trial record; the court must not engage in retrospective speculation.").

On the record in this case, we cannot determine why counsel chose not to object to the detective's opinion testimony. It is possible counsel may have determined that an objection would only bring further attention to the detective's testimony. Further, an argument can be made that counsel did not object in order to demonstrate Detective Weisskopf's bias. For example, the questions propounded to the detective on cross-examination arguably attempted to highlight the detective's assumption that appellant was guilty after her first and only interview with S.W. *See Ex part Saenz*, 491 S.W.3d 819, 828 (Tex. Crim. App. 2016) ("'[I]n the absence of evidence of counsel's reasons for the challenged conduct, an appellate court 'commonly will assume a strategic motivation if any can possibly be imagined,' . . . and will not conclude the challenged conduct constituted deficient performance unless the conduct was so outrageous that no competent attorney would have engaged in it.'") (quoting *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001) (quoting 3 W. LaFave et al., *Criminal Procedure* § 11.10(c) (2d. ed. 1999))). Likewise, it is possible that counsel's failure to object to extraneous conduct evidence or request a limiting instruction may have been trial strategy to avoid drawing unwanted attention to the testimony and evidence. *See Delgado v. State*, 235 S.W.3d 244, 254 (Tex. Crim.

App. 2007) ("Regardless of whether trial counsel actually agreed that the evidence was admissible . . . he may well have decided, as a matter of trial strategy, not to object to its admission or request a limiting instruction."); *Garcia v. State*, 887 S.W.2d 862, 881 (Tex. Crim. App. 1994) (trial counsel's decision not to request a limiting instruction to avoid reminding jury of incriminating evidence was reasonable trial strategy), *overruled on other grounds by Hammock v. State*, 46 S.W.3d 889 (Tex. Crim. App. 2001). It is also possible that counsel allowed the jury to view the entire video statement because counsel wanted the jury to see for themselves that appellant had nothing to hide with regard to his experiences as a massage therapist in order to undermine the credibility of the complainant, demonstrate the detective's bias, and support the defensive theory that appellant did not have the specific intent to sexually assault the complainant, if such an assault even occurred. The record shows that counsel used the evidence contained in the video during jury argument and during cross-examination of Detective Weisskopf to attack the detective's credibility regarding the conclusions she reached based on her interview with both the complainant and appellant. As for the prosecutor's comments during jury argument, "The decision to object to a particular [jury] argument almost always involves trial-strategy considerations." *Bollinger v. State*, 224 S.W.3d 768, 71 (Tex. App.—Eastland 2007, pet. ref'd).

Appellant has failed to rebut the strong presumption of reasonable assistance because without explanation for trial counsel's decisions, the complained-of conduct does not compel a conclusion that counsel's performance was deficient. Based on this record, we cannot say that "no reasonable trial strategy could justify" counsel's decision to engage in the complained-of conduct. *See Lopez*, 343 S.W.3d at 143. Nor can we conclude that counsel's conduct was "so outrageous that no competent attorney would have engaged in it." *See Ex parte Jimenez*, 364 S.W.3d 866, 883 (Tex. Crim. App. 2012) ("The mere fact that another attorney might have

pursued a different tactic at trial does not suffice to prove a claim of ineffective assistance of counsel."). Since appellant has failed to rebut the presumption of counsel's competence under the first prong, we need not consider the requirements of the second prong. We resolve appellant's sixth issue against him.

IV. Indictment

In his seventh issue, appellant claims that the indictment failed to allege an offense because it fails to distinguish between the offenses of sexual assault of a child and sexual assault of an adult. Appellant points to the fact that the indictment contains no mention of lack of consent or identification of S.W. as either a child or an adult woman, thus contending that "[N]othing in the indictment put [appellant] on notice as to which of these two offenses he was charged with attempting to commit." The State argues that an indictment for criminal attempt which fails to allege an element of the intended offense is not deficient because the indictment need only allege the elements of criminal attempt under Section 15.01 of the Penal Code. We agree with the State.

A person commits the criminal offense of attempt if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends, but fails, to effect the commission of the offense intended. TEX. PENAL CODE ANN. § 15.01(a) (West 2011). An indictment alleging an attempt is sufficient if it alleges each element of the offense of criminal attempt. *McCay v. State*, 476 S.W.3d 640, 644–45 (Tex. App.—Dallas 2015, pet. ref'd); *Epps v. State*, 811 S.W.2d 237, 242 (Tex. App.—Dallas 1991, no pet.). An indictment for criminal attempt is not fundamentally defective for failure to allege the constituent elements of the offense attempted. *Young v. State*, 675 S.W.2d 770, 771 (Tex. Crim. App. 1984). Thus, appellant's indictment charging attempted sexual assault was not required to allege all constituent elements of the offense of sexual assault. If appellant believed the indictment did not afford him sufficient

notice of whether the intended victim of the sexual assault was a child or an adult, he was required to object to the form or substance of the indictment before trial. *See* TEX. CODE CRIM. PROC. ANN. art. 1.14(b) (West 2005). Having failed to object to the indictment as to this alleged defect, appellant has waived his complaint. *See Studer v. State*, 799 S.W.2d 263, 273 (Tex. Crim. App.1990). We resolve appellant's seventh issue against him.

CONCLUSION

Having resolved appellant's issues against him, we affirm the trial court's judgment.

/David W. Evans/
DAVID EVANS
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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Opinion delivered by Justice Evans, Justices Bridges and Whitehill participating.

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

Judgment entered this 5th day of April, 2017.