Opinion issued October 2, 2008

In The
Court of Appeals
For The
First District of Texas

NO. 01-06-01164-CR
NO. 01-06-01165-CR

SALVADOR MARTINEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause Nos. 1074916, 1074917

MEMORANDUM OPINION

Appellant, Salvador Martinez, appeals from convictions for evading arrest with

a motor vehicle and aggravated assault on a public servant with a deadly weapon.[1] *See* TEX. PEN. CODE ANN. § 38.04 (Vernon 2003) (evading arrest); *Id.* § 22.02 (Vernon Supp. 2008) (aggravated assault). The jury found appellant guilty of both charges, and the trial court assessed punishment at 18 years in prison for the aggravated assault and a concurrent 10 years in prison for the evading arrest. The trial court made an affirmative finding that appellant's motor vehicle was a deadly weapon used to commit the aggravated assault. In his fourth issue, appellant contends the evidence is factually insufficient to support the finding of use of a deadly weapon in the conviction for aggravated assault. In his remaining issues, which concern both convictions, appellant asserts the trial court abused its discretion by (1) allowing the State's attorney to make improper closing arguments; (2) admitting extraneous offenses; (3) allowing the State to pose an improper commitment question during voir dire; (4) admitting testimony from a witness who violated "the Rule"; and (5) limiting his right to call a witness and present testimony from a grand jury proceeding. We conclude the evidence is factually sufficient, the prosecutor's closing arguments were proper, the trial court properly admitted evidence of the extraneous offenses, the prosecutor's questions during voir dire did

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[1] The evading arrest is appellate number 01-06-1164-CR and trial number 1074917. The aggravated assault is appellate number 01-06-1165-CR and trial number 1074916.

not harm appellant's substantial rights, the trial court properly allowed the witness under "the Rule" to testify, and the trial court properly excluded the grand jury testimony. We affirm.

Background

During the evening of June 29, 2006, the Pasadena Police Department received a call concerning suspicious activity at the Lone Star Inn motel. The caller said two men were looking into vehicles in the parking lot around two o'clock in the morning. The police department sent Officer Hudson along with two other police officers to investigate the situation. When he arrived at the motel, Officer Hudson walked toward the front of the motel, where he saw a white car with two men sitting inside. The car turned and slowly approached him. Officer Hudson drew his weapon, as he repeatedly instructed the driver, who was later identified as appellant, to stop the car, but instead of stopping, appellant accelerated towards him.

Officer Hudson believed the car was going to hit him and cause him serious bodily injury or death. Officer Hudson jumped out of the way of the oncoming car. While doing so, he fired his weapon into the driver's side window, in an attempt to prevent serious injury to himself. Appellant, who was shot in the left arm, continued to drive, leaving the motel. Two officers chased the car for approximately ten miles. Appellant and his passenger, Ishmeal Naranjo, were arrested after they abandoned the

car by running on foot. When they were arrested after the chase, the officers saw that appellant had a gunshot injury in his left arm and Naranjo had a gunshot injury in his inner right thigh area.

At trial, Roy Draper, a defense witness, testified that he was at the motel to buy, sell, and consume crack cocaine. He went into the front office to use a vending machine, and, as he was coming out, observed a car passing him in the driveway area near two Pasadena police officers. He heard one of the officers say "put your hands up," so he did so believing they were directing the statement at him. Draper testified that he was absolutely sure the vehicle appellant was driving came to a complete stop. Another police officer came from the front parking lot area of the motel with his weapon drawn and approached the driver's side of the car. Draper testified that he was positive both the occupants of the car had their hands in the air at that time. Draper heard someone say "weapon" and then saw the officer with his weapon drawn fire it. After the shot was fired, the car started moving and left the premises of the motel. He stated that the officer who shot at the car was never on the passenger side of the vehicle, the car never accelerated toward the officer, and the officer was never in a position in front of the car.

Appellant testified that Naranjo asked him for a ride to a motel to see Naranjo's girlfriend. Appellant drove to the motel entering through the driveway area to park

inside the main courtyard area. After Naranjo had a conversation outside with a friend of his girlfriend, appellant and Naranjo got back into the car and headed back towards the driveway. Appellant stated that as he was driving down the driveway, two uniformed police officers ran up to the driver's side of his car. At this point, appellant heard "stop the car, put your hands in the air." Appellant stated that he complied with the order. The police officer with his gun drawn approached appellant's car and then appellant was shot. Appellant sat for a few seconds and then drove off, in fear of being shot again. Appellant acknowledged that he did not stop his car for ten miles while officers chased him.

Factual Sufficiency of the Evidence

We begin with the fourth issue because it concerns only aggravated assault. In his fourth issue, appellant contends that the evidence is factually insufficient to establish that appellant's automobile was a "deadly weapon" in the manner of its use or intended use. *See* TEX. PENAL CODE ANN. § 1.07 (a)(17)(B) (Vernon Supp. 2008).

A. Standard of Review

When conducting a factual-sufficiency review, we view all of the evidence in a neutral light. *Ladd v. State*, 3 S.W.3d 547, 557 (Tex. Crim. App. 1999). We will set the verdict aside only if (1) the evidence is so weak that the verdict is clearly wrong and manifestly unjust or (2) the verdict is against the great weight and

preponderance of the evidence. *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). Under the first prong of *Johnson*, we cannot conclude that a conviction is "clearly wrong" or "manifestly unjust" simply because, on the quantum of evidence admitted, we would have voted to acquit had we been on the jury. *Watson v. State*, 204 S.W.3d 404, 417 (Tex. Crim. App. 2006). Under the second prong of *Johnson*, we cannot declare that a conflict in the evidence justifies a new trial simply because we disagree with the jury's resolution of that conflict. *Id.* Before finding that evidence is factually insufficient to support a verdict under the second prong of *Johnson*, we must be able to say, with some objective basis in the record, that the great weight and preponderance of the evidence contradicts the jury's verdict. *Id.* In conducting a factual-sufficiency review, we must also discuss the evidence that, according to the appellant, most undermines the jury's verdict. *See Sims v. State*, 99 S.W.3d 600, 603 (Tex. Crim. App. 2003).

"Appellate courts should afford almost complete deference to a jury's decision when that decision is based upon an evaluation of credibility." *Lancon v. State*, 253 S.W.3d 699, 705 (Tex. Crim. App. 2008). "The jury is in the best position to judge the credibility of a witness because it is present to hear the testimony, as opposed to an appellate court who relies on the cold record." *Id.* The jury may choose to believe some testimony and disbelieve other testimony. *Id.* at 707.

B. Applicable Law

A person commits aggravated assault on a public servant with a deadly weapon when: (1) he intentionally or knowingly threatens imminent bodily injury; (2) to a person whom he knows is a public servant; (3) while the public servant is lawfully discharging an official duty; and (4) uses a deadly weapon during the course of committing the assault. *See* TEX. PENAL CODE ANN. §§ 22.01(a)(2); 22.02(a)(2); 22.02(b)(2)(B) (Vernon Supp. 2008).

The Texas Penal Code defines "deadly weapon" as "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." *Id.* § 1.07 (a)(17)(B). To sustain a deadly weapon finding, there must be evidence that someone was endangered by the defendant's use of the vehicle and not merely a hypothetical potential for danger if others had been present. *Mann v. State*, 13 S.W.3d 89, 92 (Tex. App.—Austin 2000) (deadly weapon finding sustained when testimony showed on-coming driver was forced to take evasive action to avoid collision) *aff'd on other grounds*, 58 S.W.3d 152 (Tex. Crim. App. 2001); *Ochoa v. State*, 119 S.W.3d 825, 827 (Tex. App.—San Antonio 2003, no pet.) (deadly weapon finding sustained where testimony showed Ochoa came "real close to striking and hitting" another car); *Davis v. State*, 964 S.W.2d 352, 354 (Tex. App.—Fort Worth 1998, no pet.) (deadly weapon finding sustained where testimony showed Davis

drove car into on-coming lane and evasive action was necessary to avoid collision).

C. Analysis

Appellant contends "the evidence only showed that appellant was using the vehicle to escape from the scene and not to try to run over the officer." Although appellant correctly notes that the only way out of the parking lot was through the passageway where the officer stood, that evidence does not refute other evidence that appellant accelerated towards the officer. Officer Hudson testified that he feared he was in danger of being run over by appellant when the vehicle sped towards him. He stated to the jury that he had seconds to jump out of the way to prevent serious bodily injury. His testimony supports a finding that appellant drove the vehicle in a manner capable of causing death or serious bodily injury to the officer.

We must defer to the jury's determination that implicitly found the officer's testimony credible. *See Lancon*, 253 S.W.3d at 705. Viewing the evidence in a neutral light, the evidence of the use of a deadly weapon is not so weak that the verdict is clearly wrong or manifestly unjust, nor is the finding against the great weight and preponderance of the evidence. *See Johnson*, 23 S.W.3d at 11. We hold the evidence is factually sufficient to uphold the deadly weapon finding.

We overrule appellant's fourth issue.

In his remaining seven issues, appellant challenges both convictions for

aggravated assault and evading arrest by attacking the trial court's rulings that affected both convictions.

Commitment Question

In his third issue, appellant contends that the trial court erred by allowing the State, over his objection, to pose an improper commitment question to the venire panel. Appellant complains that the prosecutor used a hypothetical that was factually specific to the case on trial.

Questions during voir dire are proper if they seek to discover a juror's views on an issue applicable to the case. *Barajas v. State*, 93 S.W.3d 36, 38 (Tex. Crim. App. 2002) (citing *Smith v. State*, 703 S.W.2d 641, 643 (Tex. Crim. App. 1985)). Voir dire examination permits the parties to assess the desirability of prospective jurors and to select a "competent, fair, impartial, and unprejudiced jury." *Staley v. State*, 887 S.W.2d 885, 896 (Tex. Crim. App. 1994). Because a trial court has broad discretion over the process of selecting a jury, an appellate court should not disturb a trial court's ruling on the propriety of a particular question during voir dire absent an abuse of discretion. *Barajas*, 93 S.W.3d at 38.

An attorney may not "attempt to bind or commit a venire member to a verdict based on a hypothetical set of facts." *Lydia v. State*, 109 S.W.3d 495, 497 (Tex. Crim. App. 2003). "Commitment questions are those that commit a prospective juror

to resolve, or to refrain from resolving, an issue a certain way after learning a particular fact." *Standefer v. State*, 59 S.W.3d 177, 179 (Tex. Crim. App. 2001). While these types of questions generally "elicit a 'yes' or 'no' answer, an open-ended question can be a commitment question if the question asks the prospective juror to set the hypothetical parameters for his decision-making." *Id.* at 180. Commitment questions that attempt to bind prospective jurors to a position, using a hypothetical or otherwise, are improper and "serve no purpose other than to commit the jury to a specific set of facts before the presentation of any evidence at trial." *Lydia*, 109 S.W.3d at 497.

Not all commitment questions, however, are improper. *Standefer*, 59 S.W.3d at 179–83; *Sanchez v. State*, 165 S.W.3d 707, 712 (Tex. Crim. App. 2005) (stating, "An improper commitment question attempts to create a bias or prejudice in the venireman before he has heard the evidence, whereas a proper voir dire question attempts to discover a venireman's preexisting bias or prejudice."). In *Standefer*, the Texas Court of Criminal Appeals articulated a three-prong test for determining whether a voir dire question calls for an improper commitment. *Standefer*, 59 S.W.3d at 179–83. The first prong requires the trial court to decide whether a particular question is a commitment question. *Id*. at 179–81. If the court determines that a particular question is a commitment question, the second prong requires the court to

consider whether the question leads to a valid challenge for cause. *Id*. at 181–82. If the question meets the "challenge for cause" requirement, the third prong requires the court to determine whether the question includes only those facts necessary to test whether a prospective juror is challengeable for cause. *Id*. at 182–83.

The prosecutor posed a scenario to the jury using a hypothetical regarding a police officer who shoots a suspect. The defense objected that it was an improper commitment question. The trial court agreed, sustained the objection, and instructed the prosecutor to rephrase the line of questioning. The prosecutor rephrased the question as follows: "If a police officer uses force in response to a person committing a crime, do you feel that no crime has been committed?" Defense counsel once again objected, stating that the prosecutor was attempting to commit the jurors to a particular set of facts, and the trial court overruled the objection.

We conclude the question was not an improper commitment question because it did not commit the prospective jurors to resolve or refrain from resolving an issue a certain way after learning a particular fact. *See Standefer*, 59 S.W.3d at 179. The State's question asked whether the jury felt no crime was committed if the police officer used force against the person he saw committing a crime, but the phrasing of the question made it unclear whether the jury would find that no crime was committed by the appellant or that no crime was committed by the officer. Because the question

was unintelligible concerning what an affirmative or negative answer would indicate, the question could not commit the jury to resolve or refrain from resolving an issue in a certain way. *See id.*

We overrule appellant's third issue.

State's Closing Arguments

In his sixth and seventh issues, appellant complains that the trial court erred by allowing the prosecutor to present two improper closing arguments constituting reversible error.

A. Applicable Law

Proper jury argument generally falls within one of the following categories: (1) summation of the evidence; (2) reasonable deductions from the evidence; (3) answers to arguments by opposing counsel; and (4) pleas for law enforcement. *York v. State*, No. PD 1753-06, 2008 WL 2677368, at *5 (Tex. Crim. App. July 2, 2008); *Palermo v. State*, 992 S.W.2d 691, 696 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (citing *Wilson v. State*, 938 S.W.2d 57, 59 (Tex. Crim. App. 1996)).

In drawing inferences from the evidence, attorneys have wide latitude as long as the inferences drawn are reasonable, fair, legitimate, and offered in good faith. *Gaddis v. State*, 753 S.W.2d 396, 398 (Tex. Crim. App. 1988). The jury is free to accept or reject the conclusions and inferences suggested by the attorney in closing

argument. *See id.* at 400. The attorney may state an opinion based on the evidence in the record, as long as the opinion does not constitute unsworn testimony. *Bui v. State*, 964 S.W.2d 335, 345 (Tex. App.—Texarkana 1998, pet. ref'd).

B. Expression of Opinion About Credibility of Officer

Appellant, in issue six, contends the prosecution argued his own personal opinion in the closing argument to the jury regarding the credibility of Officer Hudson. The argument was as follows:

> . . . And something changed. And he told you after that day he didn't mean gung ho in the way the defense counsel portrayed it. He wasn't sure he could be a cop anymore. He wasn't sure he could do his job anymore. And he stood up there and as he thought about it and he got choked up and he got emotional, did he look like this gung ho officer that walks out with pistols blazing? Did he appear to be that to you? *Because he didn't to me.*

(Emphasis added.) Defense counsel objected to the prosecutor improperly injecting his personal opinion; the trial court sustained the objection, but denied the request to instruct the jury to disregard.

Appellant is incorrect in representing that the trial court allowed the argument because the record shows that the trial court sustained the objection. The trial court, however, did not instruct the jury to disregard the statement. We must therefore determine whether it was error not to instruct the jury to disregard the prosecutor's statement. We conclude that the trial court did not err by failing to instruct the jury

to disregard the statement.

The prosecutor's expression of opinion occurred while asking the jury whether it viewed the officer's demeanor the same way the prosecutor did. The prosecutor was referencing what occurred in court in the jury's presence. The State's comment did not constitute unsworn testimony because it was based on evidence in the record, and the jury was free to accept or reject the conclusion suggested by the attorney. We hold the trial court did not err by refusing to instruct the jury to disregard the State's comment. *See Gaddis*, 753 S.W.2d at 400; *see also Bui v. State*, 964 S.W.2d 335 at 345 (holding that, in context, prosecutor's comment that defendant was dangerous was not improper argument because prosecutor immediately followed statement with discussion of evidence to support statement).

We overrule appellant's sixth issue.

C. Comment About Witness's Hallucinations

In his seventh issue, appellant contends that the State argued outside the record by suggesting that defense witness Roy Draper suffered from visual hallucinations. The State argued that "Roy Draper's a schizophrenic who has hallucinations, hears things, sees things . . . ." Appellant objected that it was outside the record that Draper sees things and that the evidence showed "auditory hallucinations only."

The trial court sustained appellant's objection. Thus, we review whether the

trial court erred by refusing to instruct the jury to disregard the statement. We conclude that the trial court did not err by refusing to instruct the jury to disregard the statement. We conclude the prosecutor's reference to the visual hallucinations was a reasonable deduction from evidence that showed the witness suffered from auditory hallucinations; the witness had been consuming illegal narcotics that night; and the witness saw things that the officer said never happened. *See Bui*, 964 S.W.2d at 345. We hold the trial court did not err by refusing to instruct the jury to disregard the statement.

We overrule appellant's seventh issue.

Evidentiary Rulings

In his first, second, fifth, and eighth issues, appellant challenges evidentiary rulings made by the trial court.

A. Standard of Review for Evidentiary Rulings

A trial court's ruling on the admissibility of evidence is reviewed under an abuse-of-discretion standard. *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003). If the trial court's ruling was within the zone of reasonable disagreement, there is no abuse of discretion. *Id.* Further, a trial court's decision regarding admissibility of evidence will be sustained if correct on any theory of law applicable to the case, even when the court's underlying reason for the decision is wrong.

Romero v. State, 800 S.W.2d 539, 543–44 (Tex. Crim. App. 1990) (citing *Spann v. State*, 448 S.W.2d 128 (Tex. Crim. App. 1969)).

B. Extraneous Offense Testimony

In his first and second issues, appellant contends the trial court abused its discretion by allowing the State to cross-examine appellant regarding details of his prior convictions for evading arrest and aggravated assault. Appellant contends the admission of the evidence violated rules 403 and 609 of the rules of evidence. *See* TEX. R. EVID. 403, 609. Although the court initially sustained appellant's Motion in Limine, the trial court allowed evidence of extraneous offenses after conducting a hearing outside of the presence of the jury. The State sought to admit the evidence of the extraneous offenses to rebut appellant's defensive theory that appellant lacked the requisite intent to commit the offense. The State's rebuttal evidence was in response to appellant's testimony on direct examination that claimed he was not trying to evade officers, but he was trying to escape to prevent himself from being shot again. The State also noted that the details of the extraneous offenses were very similar to this particular case. The trial court permitted the extraneous-offense testimony, concluding that the probative value outweighed any unfair prejudicial effect. During cross-examination, appellant discussed the extraneous offenses in response to the State's questions. Appellant's prior convictions for evading arrest

were the result of purposely evading police in a vehicle and on foot. Appellant's prior conviction for aggravated assault resulted from his use of a vehicle as a deadly weapon when he hit another person who was sitting on a car.

1. Rule 609

Rule 609 states "for the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record but only if the crime was a felony or involved moral turpitude, regardless of punishment, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party." TEX. R. EVID. 609. Under rule 609, the State is permitted to introduce evidence of prior convictions, but not the details of the prior offenses. *See Jones v. State*, 38 S.W.3d 793, 799 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) (citing *Mays v. State*, 726 S.W.2d 937, 953 (Tex. Crim. App. 1986)). We conclude it would not have been proper for the trial court to admit the details of the prior offense under rule 609. *See id.* It appears the evidence was admitted under rule 404(b) and appellant does not challenge the admission of the evidence under that rule. *See* TEX. R. EVID. 404(b).[2]

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[2] Pursuant to rule 404(b), evidence of extraneous offenses is not admissible during the guilt-innocence phase of a trial to prove a defendant acted in conformity with his bad character. TEX. R. EVID. 404(b). However, extraneous-offense evidence may be "admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" when it has

We therefore must address whether the details of the prior offenses were admissible under rule 403. *See* TEX. R. EVID. 403.

2. Rule 403

Rule 403 states "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." TEX. R. EVID. 403. The Court should consider several factors in determining whether the prejudicial effect of evidence substantially outweighs its probative value. *Wheeler v. State*, 67 S.W.3d 879, 888 (Tex. Crim. App. 2002). These factors include: (1) how compellingly evidence of the extraneous offense serves to make a fact of consequence more or less probable; (2) the extraneous offense's potential to impress the jury in some irrational but indelible way; (3) the trial time that the proponent will require to develop evidence of the extraneous misconduct; and (4) the proponent's need for the extraneous transaction evidence. *Id.*

Concerning the first factor under *Wheeler*, we note that the admission of

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relevance beyond character conformity. *Id.*; *Moses v. State*, 105 S.W.3d 622, 626 (Tex. Crim. App. 2003) Rebuttal of a defensive theory is also one of the permissible purposes for which evidence may be admitted under rule 404(b). *Moses*, 105 S.W.3d at 626.

appellant's extraneous offenses introduced compelling evidence to indicate he would intentionally attempt to run over Officer Hudson in an effort to escape police custody. This would be a reasonable belief because the evidence showed appellant previously acted similarly in committing the same offenses of evading arrest and aggravated assault with a deadly weapon. The extraneous offense evidence showed that in 2001, appellant fled from a Houston police officer who tried to stop him, fleeing in a stolen van and then on foot. Again in 2002, appellant fled from a Houston police officer who was driving behind appellant with his lights and siren activated. Appellant did not stop, but fled in his vehicle and then on foot. The extraneous offense evidence also showed that in 1996 appellant committed aggravated assault by attempting to strike a person who was sitting on a car with his vehicle. The evidence of the extraneous offenses thus serves to make a fact of consequence more probable in this case.

The second factor asks whether the extraneous offense has the potential to impress the jury in some irrational but indelible way. The details of the prior offenses were not gruesome and did not contain information that might impress the jury in some irrational or indelible way. *See Wheeler*, 67 S.W.3d at 888.

The third factor concerns the time to develop the evidence. The evidence of all three extraneous offenses covers just eight pages of a record consisting of over

1100 pages. The State did not elicit detailed accounts of the offenses, but only a few circumstances to show the similarity to the charged offenses. Although the State did mention appellant's prior convictions in closing arguments, the State told the jury that it could use the convictions to help determine appellant's credibility and intent "if it aids you in that."[3] Regarding the fourth factor, the State displayed a need for the evidence to counter appellant's defensive theory that he did not possess the required intent to commit the crimes charged against him. Other than the details and circumstances of the charged offenses, the State had no other evidence to rebut appellant's defensive theory. *See Trejos v. State*, 243 S.W.3d 30, 55 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (holding prejudicial effect of evidence

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[3] In argument, the State told the jury,

> So you have some tools and you have three different sections about what you can do with the priors, okay? They say different things, but there's two I want you to focus on. The first one being you can use it to determine his credibility. You can use it to determine whether you believe him or not. That's something that can aid you if it does.
>
> The other thing is you can use it to determine things like the intent. In other words, was he really intending to flee from Officer Sorrell when Officer Sorrell told him to stop?
>
> Well, you have that evidence before you if it aids you in that. And also was he truly trying to threaten him with a deadly weapon? You have that evidence of a prior aggravated assault case where he tried to run someone over with his car. You have that before you to make that determination as well.

regarding alert of cadaver dogs did not substantially outweigh probative value because presentation of evidence did not consume too much time and State had need of evidence).

We hold the trial court did not abuse its discretion by determining that the prejudicial effect of the evidence did not substantially outweigh its probative value under rule 403. *See Blackwell v. State*, 193 S.W.3d 1, 8 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (holding extraneous offense evidence properly admitted to rebut defensive theory).

We overrule appellant's first and second issues.

C. Violation of "The Rule"

In his fifth issue, appellant contends that the trial court erred by allowing Virginia Draper, mother of Roy Draper, to testify because the rule had been invoked. Virginia testified about her son's health condition, drug use, and character.

When the trial court invokes "the rule," it excludes witnesses from the courtroom pursuant to rule 614, which provides in relevant part: "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion." TEX. R. EVID. 614. The purpose of the rule is to prevent the testimony of one witness from influencing the testimony of another. *Martinez v. State*, 867 S.W.2d 30, 40 (Tex. Crim. App.

1993).

The trial court must invoke the rule if requested to do so. TEX. R. EVID. 614. After the rule has been invoked, enforcement of the rule is within the trial court's discretion. *Guerra v. State*, 771 S.W.2d 453, 474–75 (Tex. Crim. App. 1988); *Walker v. State*, 2 S.W.3d 655, 658 (Tex. App.—Houston [14th Dist.] 1999, no pet.). A violation of the rule may not be relied upon for reversal of the case unless it is shown that the trial court abused its discretion by allowing the violative testimony. *Guerra*, 771 S.W.2d at 474–75; *Walker*, 2 S.W.3d at 658.

Roy testified that appellant and his passenger were shot while the car was stopped, and both occupants had their hands in the air. He also admitted that he had been smoking crack that day and suffered from auditory hallucinations.

During a recess outside the presence of the jury, it was discovered Virginia had been sitting in the courtroom on the first day of the trial for about an hour during the testimony of Officer Sorrell. The record shows that Virginia had no personal knowledge of appellant's offense and there was no reason to believe she would be a witness at the time the rule was invoked. Rather, Virginia became a witness during the trial after the State learned of her identity and wanted to use her testimony in order to rebut testimony presented by Roy.

She testified to the jury that Roy had been diagnosed as a paranoid

schizophrenic and his hallucinations worsened after the death of his father in 2006. She stated Roy could be convinced to do anything and that he could be steered in any direction.

When, as here, the witness was one who had no connection with the case-in-chief of the State or the defense and was not likely to be called as a witness because of a lack of personal knowledge regarding the offense, the trial court does not abuse its discretion by allowing the testimony. *See Guerra*, 771 S.W.2d at 476. We hold the trial court did not abuse its discretion by allowing Virginia to testify.

We overrule appellant's third issue.

D. Grand Jury Testimony

In issue eight, appellant contends that the trial court erred by overruling his motion to present evidence from the grand jury proceeding.

The Texas Code of Criminal Procedure provides: "(a) The proceedings of the grand jury shall be secret" and "(d) The defendant may petition a court to order the disclosure of information otherwise made secret by this article . . . [upon] a showing by the defendant of a particularized need." TEX. CODE CRIM. PROC. ANN. art. 20.02 (Vernon Supp. 2008); *see Bynum v. State*, 767 S.W.2d 769, 782 (Tex. Crim. App. 1989). The totality of the circumstances must be examined when determining whether a particularized need exists. *Bynum*, 767 S.W.2d at 781. A particularized need is not

shown simply because the requested testimony pertains to a key prosecution witness, or that there is a "need" to locate inconsistencies in the witness's testimony. *Id.* at 783.

Appellant filed a written petition to obtain a court order granting him permission to call as a defense witness the Assistant District Attorney (ADA) who presented the case to the grand jury. The defense sought testimony from the ADA to establish there was no witness testimony presented before the Harris County Grand Jury that investigated whether the police shooting by Officer Hudson was justified. The motion to obtain evidence about the grand jury proceeding was in response to testimony from Officer Hudson that the grand jury cleared him of any wrongdoing. Therefore, the basis for the request was to further attack the credibility of Officer Hudson.

Appellant has not demonstrated a particularized need for the ADA's testimony. *See Bynum*, 767 S.W. 2d at 783. The grand jury testimony would not impeach the officer's statement. *See id.* The officer only said he was cleared by the grand jury, which he was. The officer did not comment about how or why the grand jury reached the decision. Evidence from the ADA about whether witnesses were presented to the grand jury would not impeach the officer's statement. Moreover, the officer was cross-examined about his credibility. *See Legate v. State*, 52 S.W.3d 797, 804 (Tex.

App.—San Antonio 2001, pet. ref'd) (defendant wanted grand jury testimony to question witness's credibility, but failed to demonstrate particularized need for information because defense counsel fully cross-examined witness, effectively questioning credibility). We hold the trial court did not abuse its discretion by refusing to disclose grand jury information.

We overrule appellant's eighth issue.

Conclusion

We affirm the judgment of the trial court.

Elsa Alcala
Justice

Panel consists of Taft, Keyes, and Alcala.

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