Opinion issued October 13, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00467-CR

DENIRO CROCKETT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 180th District Court
Harris County, Texas
Trial Court Case No. 1186256

MEMORANDUM OPINION

Deniro Crockett was convicted by a jury of aggravated robbery and the jury assessed punishment at 40 years' confinement and a $2,000 fine. In four points of error, Crockett contends that: (1) the evidence is legally insufficient to sustain the conviction; (2) the trial court erred by permitting the police officer to testify, over

defense objection, that appellant was guilty of extraneous offenses and that such testimony was hearsay; (3) the State committed reversible error during argument; and (4) the trial court erred by refusing to allow appellant to make a bill of exception regarding potential jury misconduct.

We affirm.

Background

In early October 2008, cashiers Tamara Grayson and Lataysha Hillsman were counting the money in their registers at a Houston convenience store/gas station prior to closing at 9:00 p.m. Grayson testified that appellant, Deniro Crockett, approached her, pulled a big silver handgun from his waistband, and demanded the cash from her register. Hillsman testified that Crockett laid the gun on the counter and pointed it at Grayson while he was robbing Grayson.

After Grayson gave him all the cash in her register, Crockett then turned to Hillsman, who had the money she was counting in her hands. Hillsman testified that Crockett again laid the gun on the counter, leaned on the counter with the gun pointed at her, and demanded the cash from her register, as well. She complied. Both Hillsman and Grayson closely observed Crockett during the robbery. Grayson, in fact, testified that she would never forget his face.

After getting the cash from both registers, Crockett left the store. Hillsman testified that Crockett drove off in a gray four-door car which she believed was a

Grand Am or a Grand Prix. Grayson or Hillsman then called the police. When Officers Richardson and Hadley arrived, both cashiers reported the robbery and described the suspect and vehicle.

The following day, Officer Terrell of the Houston Police Department was dispatched to another robbery at a Family Dollar store located in the same part of Houston. Keely Bryant, the assistant manager of the store, testified that while she was counting the cash, an armed man approached her and demanded it. She described how he laid the gun on the counter pointed towards her. When she refused to give him the cash, he fled in a gray Grand Am, the license plate number of which she noted, along with a description of the vehicle and the man who attempted to rob her. At trial, Bryant identified Crockett as that man.

Officer Terrell put out a general broadcast for the getaway vehicle, and later that day, Officer Lopez spotted the car and followed it. Crockett was apprehended and arrested when he stopped the car and ran. The following day, Grayson viewed a line-up of suspects, and after observing and hearing them speak, she immediately identified Crockett. Hillsman also identified Crockett in court.

Crockett's sister, Lynn Harris, testified that he picked her up from work at about 7:45 on the evening of the robbery and that she was with him until 4:00 the following morning. Harris also testified that she would lie for her brother, though she qualified that statement to claim that she would not lie in a criminal matter.

The jury found Crockett guilty as charged and assessed punishment at 40 years' confinement and a $2,000 fine.

Legal Sufficiency

In his first issue, appellant contends that the evidence is legally insufficient to sustain his conviction because (1) there was insufficient evidence of identification to convict, and (2) there was no evidence that appellant used or exhibited a deadly weapon.

A. Standard of Review

The Court of Criminal Appeals has determined that the test for factual sufficiency is indistinguishable from that of legal sufficiency. *See Brooks v. State*, 323 S.W.3d 893, 897 (Tex. Crim. App. 2010). *But see Ervin v. State*, 331 S.W.3d 49, 56–68 (Tex. App.—Houston [1st Dist.] 2010, pet ref'd) (Jennings, J., concurring). Our assessment reduces to a determination of whether, based on all of the record evidence viewed in the light most favorable to the verdict, a rational jury could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318–19, 99 S. Ct. 2781, 2788–89 (1979); *Swearingen v. State*, 101 S.W.3d 89, 95 (Tex. Crim. App. 2003).

Under the *Jackson* standard, evidence is insufficient to support a conviction when, considering all the evidence admitted at trial in the light most favorable to the verdict, a fact finder could not have rationally found that each element of the

charged offense was proven beyond a reasonable doubt. *See Jackson*, 443 U. S. at 319, 99 S. Ct. at 2789; *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 1071 (1970); *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). This standard is met under two circumstances: (1) the record contains no evidence, or merely a "modicum" of evidence, probative of an element of the offense; or (2) the evidence, viewed in the light most favorable to the verdict, conclusively establishes a reasonable doubt. *See Jackson*, 443 U.S. at 314, 318 n.11, 320, 99 S. Ct. at 2319, 2789 n.11; *Williams*, 235 S.W.3d at 750; *Laster v. State*, 275 S.W.3d 512, 518 (Tex. Crim. App. 2009). In applying the *Jackson* standard of review, an appellate court must defer to the responsibility of the fact finder to fairly resolve conflicts in testimony, to weigh evidence, and to draw reasonable inferences from the facts. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Williams*, 235 S.W. 3d at 750. An appellate court presumes that the trier of fact resolved any conflicts in the evidence in favor of the verdict and defers to that resolution, provided that the resolution is rational. *See Jackson*, 443 U.S. at 326; 99 S. Ct at 2793. An appellate court may not re-evaluate the weight and credibility of the record evidence and thereby substitute its own judgment for that of the fact finder. *Williams*, 235 S.W.3d at 750.

B. Evidence of Identification

The identity of the person committing the offense is an element of the crime that must be proved. *See Greene v. State*, 124 S.W.3d 789, 792 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) (holding that identity is element of offense and may be proven by direct or circumstantial evidence). Courts have found voice identification alone to be legally and factually sufficient to establish identity. *McInturf v. State*, 544 S.W.2d 417, 418−19 (Tex. Crim. App. 1976) (holding that voice identification constituted direct evidence of identity when complainant had one 30-minute encounter with appellant); *Davis v. State*, 180 S.W.3d 277, 286 (Tex. App.—Texarkana 2005, no pet.) (holding that complainant's voice identification of appellant was legally and factually sufficient to support conviction when complainant had one 15-minute encounter with appellant). Likewise, sight identification may be both legally and factually sufficient to establish identity. *Johnson v. State*, 176 S.W.3d 74, 78 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd) (holding eye-witness identification was factually sufficient to support conviction when complainant saw appellant only on night that he robbed her, but complainant testified she recognized appellant by his eyes); *Walker v. State*, 180 S.W.3d 829, 832−33 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (holding identification by only one eye-witness was legally and factually sufficient to

support conviction when appellant robbed complainant at gunpoint and robbery lasted less than one minute).

Here, both Hillsman and Grayson were eye-witnesses to the robbery. Both women testified that they observed appellant for ten to fifteen minutes while the robbery took place. Additionally, each gave specific descriptions of appellant and each positively identified appellant in court as the robber. Grayson testified that she "will never forget his face." Hillsman testified that when "someone pulls a gun on you, you never going to forget that." Furthermore, at the line-up two days after the robbery, Grayson was able to hear appellant's voice as well as see him. Grayson immediately identified appellant from the lineup. We hold that Grayson's and Hillsman's identification of appellant as the robber is both legally and factually sufficient to support his conviction for aggravated robbery.

We overrule appellant's first issue on this point.

C. Evidence that Appellant Used or Exhibited a Deadly Weapon

Appellant argues there was insufficient evidence to show he used a deadly weapon, i.e., a firearm.

Aggravated robbery requires the use or exhibition of a deadly weapon during the commission of a robbery. *See* TEX. PENAL CODE ANN. § 29.03(a)(2) (West 2003). A deadly weapon is defined as a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury or

anything that, in the manner of its use or intended use, is capable of causing death or serious bodily injury. *See* TEX. PENAL CODE ANN. § 1.07(a)(17)(A) (West Supp. 2010).

The indictment in this case alleges, in pertinent part, that appellant

> did then and there unlawfully, while in the course of committing theft of property owned by TAMARA GRAYSON and with intent to obtain and maintain control of the property, intentionally and knowingly threaten and place TAMARA GRAYSON in fear of imminent bodily injury and death, and that the Defendant then and there used and exhibit a deadly weapon, to-wit: A FIREARM.

Appellant contends that the proof at trial was that a "gun" was used, but there is no evidence in the record that the instrument used was a "firearm." According to appellant, since the State indicted him using the unnecessary descriptive term "firearm," the State had to prove the descriptive matters as alleged. *See Gomez v. State*, 685 S.W.2d 333, 336 (Tex. Crim. App. 1985). In other words, appellant argues that the victims' testimony that he used a "gun" is legally insufficient to prove "firearm" as alleged in the indictment.

We disagree. "Testimony using any of the terms 'gun,' 'pistol' or revolver' is sufficient to authorize the jury to find that a deadly weapon was used." *Wright v. State*, 591 S.W.2d 458, 459 (Tex. Crim. App. 1980). Specifically, testimony of a "gun" has been held sufficient to prove the use of a "firearm" as alleged in an indictment. *Gomez*, 685 S.W.2d at 336. In *Gomez* the indictment, as here, alleged

the defendant used a deadly weapon, "namely a firearm." *Id.* And in this case, there was no weapon produced at trial and the witness identified the instrument as a "gun" or "revolver." *Id*. The *Gomez* court concluded that the testimony as to a deadly weapon was sufficient to sustain the guilty verdict. *Id*. More recently, this Court has held that, "[a]bsent any specific indication to the contrary at trial, the jury should be able to make the reasonable inference, from the victim's testimony that the 'gun' [that] was used in the commission of a crime, was, in fact, a firearm." *Cruz v. State,* 238 S.W.3d 381, 388 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd).

Here, the victim cashiers Hillsman and Grayson both described the gun in question. From this evidence, the jury could have concluded beyond a reasonable doubt that the gun that appellant threatened them with was a firearm.

We overrule appellant's issue on this point.

Testimony Regarding Extraneous Offenses

In his second issue, appellant contends that the trial court erred by permitting a police officer to testify, over objection, that appellant was guilty of extraneous offenses and that such testimony was hearsay.

This issue is subdivided into two parts. The first involves a formal introduction of evidence concerning an extraneous aggravated robbery. The

second involves a comment made the officer in response to a question from appellant's counsel.

A. The Extraneous Offense

Appellant complains first of the State's introduction of evidence concerning an aggravated robbery at a Family Dollar store in Acres Homes that occurred the day after the robbery in question. Keely Bryant, the cashier of the Family Dollar, testified that appellant came into the store while she was counting the cash in her drawer, laid a gun pointed at her on the counter, and demanded cash. When she refused to give him the money, appellant fled in a gray Pontiac. When the police arrived, Bryant gave a description of appellant and the car, as well as the license plate number of the car. The police spotted the car the following day and appellant was arrested after he stopped the car and ran. Bryant identified him on the day of the offense as the perpetrator and later identified him in court as well.

1. The Law

We review a trial court's admission of extraneous offense evidence under an abuse of discretion standard. *Page v. State*, 137 S.W.3d 75, 78 (Tex. Crim. App. 2004); *Lane v. State*, 933 S.W.2d 504, 519 (Tex. Crim. App. 1996); *Blackwell v. State*, 193 S.W.3d 1, 8 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd). As long as the trial court's ruling was within the "zone of reasonable disagreement," there

is no abuse of discretion, and the ruling must be upheld. *Thomas v. State*, 126 S.W.3d 138, 143 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd).

Rule 404(b) prohibits the introduction of extraneous offenses to show character conformity. TEX. R. EVID. 404(b); *Page*, 137 S.W.3d at 78; *Moses v. State*, 105 S.W.3d 622, 626 (Tex. Crim. App. 2003); *Blackwell*, 193 S.W.3d at 9. Extraneous-offense evidence may be admissible, however, when relevant beyond character conformity, to show, for example, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Moses*, 105 S.W.3d at 626; *Blackwell*, 193 S.W.3d at 9. An extraneous offense may be admissible to prove identity only when the identity of the perpetrator is at issue in the case. *Page v. State*, 213 S.W.3d 332, 336 (Tex. Crim. App. 2006); *Lane*, 933 S.W.2d at 519. A defendant may raise the issue of identity by presenting an alibi defense. *Moore v. State*, 700 S.W.2d 193, 201 (Tex. Crim. App. 1985); *Hughes v. State*, 962 S.W.2d 89, 92 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd).

"Evidence of a defendant's particular modus operandi is a recognized exception to the general rule precluding extraneous offense evidence, if the modus operandi evidence tends to prove a material fact at issue, other than propensity." *Owens v. State*, 827 S.W.2d 911, 915 (Tex. Crim. App. 1992) (en banc); *Regan v. State*, 7 S.W.3d 813, 817 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). When extraneous offense evidence is introduced to prove identity by comparing

common characteristics, the evidence must be so similar to the charged offense that the offenses illustrate the defendant's "distinctive and idiosyncratic manner of committing criminal acts." *Page*, 213 S.W.3d at 336 (quoting *Martin v. State*, 173 S.W.3d 463, 468 (Tex. Crim. App. 2005); *Owens*, 827 S.W.2d at 915. The common characteristics of the offenses must be so similar as to act as the defendant's signature. *Page*, 213 S.W.3d at 336; *Taylor v. State*, 920 S.W.2d 319, 322 (Tex. Crim. App. 1996). Extraneous offense evidence that is admitted to show identity must demonstrate a much higher degree of similarity to the charged offense than extraneous offenses admitted for other purposes such as intent. *Bishop v. State*, 869 S.W.2d 342, 346 (Tex. Crim. App. 1993). Without such a high degree of similarity between the offenses, the probative value of the extraneous offense evidence would be outweighed by its prejudicial effect. *Id*. To determine if the characteristics of the offenses are similar and distinguishing enough to act as the defendant's signature, appellate courts should take into account both the specific characteristics of the offenses and the time interval between them. *Thomas*, 126 S.W.3d at 144.

2. Discussion

The record reveals that the two robberies occurred within twenty-four hours of one another and had the following similarities: (1) both robberies occurred in the same part of Houston; (2) witnesses from both robberies identified appellant as the

perpetrator of those robberies; (3) in both robberies, appellant fled the scene in a grey four-door Pontiac; (4) both robberies were of small convenience-store type businesses; (5) both robberies occurred when the cashiers were counting money from the register; and (6) in both robberies, appellant used a gun by laying it on the counter facing the cashier while demanding money.

As the robberies occurred within twenty-four hours of each other, the extraneous offense is sufficiently close in time to allow admission of the evidence as long as there are other sufficient characteristics. *See Page*, 213 S.W.3d at 337−38 (holding that "the facts of the charged offense and the extraneous offenses show a pattern of conduct sufficiently distinctive to constitute a 'signature'" when one incident occurred in spring 1997 and another incident occurred September 1997, and other similarities existed between incidents); *Thomas*, 126 S.W.3d at 146 (holding time period of eleven months between charged offense and extraneous offense was not "so remote in time to be inadmissable" when there were sufficient common distinguishing characteristics in charged offense and extraneous offense).

The geographical proximity of the two offenses, both occurring in the same part of Houston, is likewise sufficiently close as long as there are other common distinguishing characteristics. *See Chavez v. State*, 794 S.W.2d 910, 914 (Tex. App.—Houston [1st Dist.] 1990, pet. ref'd) (holding that evidence of extraneous

offenses was admissible when charged offense and extraneous offenses all occurred in Rosenberg, Texas, and there were other distinguishing characteristics common to charged offense and extraneous offenses).

Evidence that victims in both robberies identified appellant as the perpetrator in the two robberies, respectively, is also a factor that weighs in favor of admission of the extraneous offense evidence. *See id*. (holding that identification of appellant as attacker by complainant and two victims of sexual abuse was one distinguishing characteristic that weighed in favor of admission of extraneous offense evidence).

The use of the same or similar getaway vehicles is also a factor that weighs in favor of admission of the extraneous offense, as is the fact that both robberies were of small convenience-store type businesses and occurred when the cashiers were counting money from the register. Most telling, however, is the use of the gun in both robberies. Appellant did not flourish a pistol or hold it up in his hand and point it at the cashier. Instead, in both robberies appellant displayed a gun by laying it on the counter facing the cashier while demanding money.

The dissimilarities between the two robberies include differences in how appellant was dressed and whether he wore a removable "grill"; the time of day of each robbery; different descriptions of the gun used; minor discrepancies in the

description of the car; and the fact that appellant walked away from the first robbery with cash while he was unsuccessful in the second robbery.

We conclude that the trial court did not abuse its discretion by admitting evidence of the Family Dollar robbery because it was sufficiently similar to the charged offense to be probative evidence of appellant's identity, apart from merely showing character conformity. *See Thomas*, 126 S.W.3d at 144, 146 (holding that sufficient similarity was established between charged offense and extraneous offense "by a common mode of committing the offenses." (citing *Roberts v. State*, 29 S.W.3d 596, 600 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd); *Lane*, 933 S.W.2d at 519)). We hold that the trial court did not abuse its discretion by overruling appellant's objection under Rule 404(b). *See id.*

We overrule appellant's second issue on this point.

B. The "Narcotics Transaction"

Appellant also claims that the trial court erred in permitting an officer to testify about a "narcotics transaction" in which appellant was allegedly involved. This testimony occurred when counsel for appellant was cross-examining Officer Nealy concerning the car appellant used to get away after the robberies. Officer Nealy testified that he discovered that the vehicle was owned by Kamesha Waller. Appellant's counsel inquired if the police had done any investigation other than

trying to call Waller. Officer Nealy said he had done so and further commented as follows:

> (Officer Nealy): Also, when I continued to do my search on that vehicle, I saw an offense report from the previous month where some patrol officers — actually was during the hurricane, where some patrol officers got dispatched out to an illegal narcotics transaction. The defendant and another individual were arrested for possession of marijuana —
>
> Mr. Martin: Objection. Objection. This is —
>
> The Court: Excuse me. One at a time, please.
>
> Mr. Martin: First off, it is nonresponsive. I was talking specifically about Ms. Waller. Secondly, he is going far afield on anything regarding an extraneous offense as identified by the State.
>
> The Court: Listen to the question you are asked, please. Respond to the question that you were asked.
>
> (Officer Nealy): I'm sorry, counsel. You asked me did I do any type of investigation on the license plate and I am just indicating that license plate led me to another offense report that happened two weeks —
>
> Mr. Martin: Excuse me, sir. I don't have a question.
>
> The Court: Sir. Stop.
>
> Q. (by Mr. Martin) I don't have a question before you on that right now. My question to you is simple: The car came back to somebody other than Mr. Crocket, correct?
>
> A. Yes, sir.
>
> Q. Thank you.

Mr. Martin: Pass.

Appellant argues that this testimony was hearsay, was not inadvertent and was harmful. According to appellant, "[t]he jurors were left with the impression that Appellant was an all-round punk criminal."

Appellant failed, however, to preserve error on this point. Although he objected, he failed to obtain a ruling on his objection. Nothing is preserved for our review. *See* TEX. R. APP. P. 33.1(a); *Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002) (to preserve error for appellate review, complaining party must make specific objection and obtain ruling on objection).

We overrule appellant's second issue on this point.

State's Closing Argument

In his third issue, appellant claims that the State committed reversible error during closing argument. Specifically, appellant points to the following statement as error: "When this happens again, and you know what? Next time he may not leave any witnesses. There may not be any witnesses . . . Next time he might just shoot somebody." Counsel objected to this statement as "far outside the record as to speculation as to any future crimes" and the trial court overruled this objection.

A. The Law

The four general areas for proper jury argument are (1) summation of the evidence, (2) reasonable deduction from the evidence, (3) answer to argument of

opposing counsel, and (4) plea for law enforcement. *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000). The prosecutor may draw all reasonable inferences from the facts in evidence that are reasonable, fair, and legitimate. *Allridge v. State*, 762 S.W.2d 146, 156 (Tex. Crim. App. 1988) (en banc). Error exists when facts that are not supported by the record are interjected in the argument, but such error is not reversible unless, in light of the record as a whole, the argument is extreme or manifestly improper. *Id.* at 155; *Wright v. State*, 178 S.W.3d 905, 929 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd).

B. Discussion

Appellant argues that the prosecutor's comments that, "[n]ext time he may not leave any witnesses. There may not be any witnesses . . . Next time he might just shoot somebody" is outside the record and thus is improper jury argument. In essence, appellant complains that the prosecutor went beyond the evidence when he argued that the next time appellant commits such a crime he might shoot and kill someone.

The prosecutor's argument concerning the likelihood of another robbery was supported by the evidence that appellant committed two such robberies in 24 hours. While the argument may have invited speculation about what might happen in a future robbery, such speculation is not necessarily improper if the argument is a reasonable deduction from the evidence. *See Gonzales v. State*, 831 S.W.2d 491,

494 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd) (holding it was proper for prosecutor to query what would have happened if defendant, who slashed witness's hand with knife, had been two steps closer to witness); *Hudson v. State*, 675 S.W.2d 507, 511 (Tex. Crim. App. 1984) (holding it was permissible in criminal mischief case to ask jury to speculate that defendant would have returned to house if police had not arrived); *Porter v. State*, 601 S.W.2d 721, 723 (Tex. Crim. App. 1980) (holding it was proper for prosecutor to argue that, "people can be killed in armed robberies" even though no one was killed in offense). We conclude that, in light of the two armed robberies appellant committed in two days, the prosecutor's comments were reasonable deductions from the evidence.

Furthermore, the prosecutor's comments were part of her plea for law enforcement. Defense counsel asked for the minimum sentence of 15 years; the prosecutor asked the jury to start its deliberation at 50 years. Her comment that, "next time, he might just shoot somebody" is part of her argument asking the jury to assess a longer sentence than it otherwise would have because appellant had committed the crime at least once before and a long sentence was needed to protect society from appellant. *See, e.g., Miles v. State*, 312 S.W.3d 909, 911−12 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (prosecutor's statement that "when he gets out, based on [past criminal history], he's going to be right back in here somewhere" held proper as plea for law enforcement); *Pittman v. State*, 9 S.W.3d

432, 434 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (finding, in DWI trial, prosecutor's multiple statements that jury should sentence defendant to 20 years because defendant would drive drunk again and kill someone were proper pleas for law enforcement); *Long v. State*, 820 S.W.2d 888, 894–95 (Tex. App.—Houston [1st Dist.] 1991, pet. ref'd) (prosecutor's plea that jury incarcerate accused for extended time to prevent appellant from doing same thing again was proper plea for law enforcement).

We overrule appellant's third issue.

Trial Court's Refusal to Allow Bill of Exceptions Regarding Potential Jury Misconduct

In his fourth issue, appellant claims that the trial court erred in refusing to allow appellant's counsel to make a bill of exception regarding potential jury misconduct. Counsel for appellant informed the trial court that appellant's mother told him that, while she was in the hall restroom of the courthouse, she overheard Hillsman talking on her cellphone about the case. Appellant's mother also reported that a couple of other women were in the bathroom at the time, but that she did not pay any attention to who they might be. Appellant's counsel asked the court to have the jurors state on record whether they were in the ladies' restroom at the time and if they heard the conversation.

The judge refused. Instead, he instructed the bailiff to ask the female jurors whether they had used the ladies' restroom in the hall. The bailiff informed the judge that all the female jurors denied being in the restroom. Appellant's counsel re-iterated his request that the court "make inquiry of the individual female jurors to determine the veracity of the allegations of improper conduct during the break." The court denied the motion. Appellant's counsel asked for a mistrial, which the court also denied.

Appellant has, however, waived this complaint by failing to make a formal bill of exception. *See* TEX. R. APP. P. 33.2. This rule provides that "[t]o complain on appeal about a matter that would not otherwise appear in the record, a party must file a formal bill of exception." TEX. R. APP. P. 33.2. The trial judge must sign the bill and file it with the trial court. TEX. R. APP. P. 33.2 (c). In a criminal case, the bill must be filed not later than 60 or 90 days after the trial court pronounces or suspends sentence in open court, depending on if a timely motion for new trial has been filed. TEX. R. APP. P. 33.2 (e)(2)(A), (B). Appellant failed to file a formal bill of exception and thus has failed to preserve this complaint for review. *See Bobbora v. Unitrin Ins. Servs*, 255 S.W.3d 331, 335 (Tex. App.—Dallas 2008, no pet.); *Clifton v. State*, No. 05-09-00006-CR, 2009 WL 3401980, at *6 (Tex. App.—Dallas 2009, no pet.) ("Assuming without deciding, the trial court erred [in denying appellant opportunity to make an offer of proof], the issue is not

properly preserved for appeal because [appellant] did not file a formal bill of exception. As such, he is precluded from complaining on appeal 'about any matter that would not otherwise appear in the record.'" (citing TEX. R. APP. P. 33.2)).[1]

Even had this issue been preserved, however, appellant has not met his burden to show that the trial court's refusal to make a bill of exception constituted reversible error. A trial court's improper refusal to prepare a bill of exception does not constitute reversible error unless the refusal denied appellant's rights to the extent the error was reasonably calculated to cause, and probably did cause, the trial court to render an improper judgment. *Houston Lighting & Power Co. v. Russo Props., Inc*., 710 S.W.2d 711, 717 (Tex. App.—Houston [1st Dist.] 1986, no writ) (citing *State v. Biggers*, 360 S.W.2d 516, 517 (Tex. 1962)). Here, appellant has failed to present any evidence that any juror was actually in the hall restroom at the time the conversation took place. Appellant could have presented such evidence in the form of juror affidavits attached to a motion for new trial, but did not. *See Trout v. State*, 702 S.W.2d 618, 620 (Tex. Crim. App. 1985) ("A motion

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[1] Appellant seeks to avert the force of this argument by his observation that, "as a practical matter, in criminal cases, the trial records are rarely ready within 60 days." We cannot, however, ignore the plain language of a statute in favor of a general statement concerning the "practicality" of its enforcement. Instead, we must leave such matters to the legislature for amendment, if necessary. *See State v. Mancuso*, 919 S.W.2d 86, 87 (Tex. Crim. App. 1996) (en banc) ("It is the duty of the Legislature to make laws, and it is the function of the Judiciary to interpret those laws.").

for new trial is the proper course to be taken in preserving alleged jury misconduct error for appeal."). Nor does he allege that the error, if any, in refusing to allow him to make a bill of exception was reasonably calculated to cause, and probably did cause, the trial court to render an improper judgment. Accordingly, for this reason as well, we conclude that the trial court did not commit reversible error in refusing to allow counsel to make a bill of exception.

We overrule appellant's fourth issue.

Conclusion

We affirm the judgment of the trial court.

Jim Sharp
Justice

Panel consists of Chief Justice Radack and Justices Sharp and Brown.

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