In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00369-CR

CARL EDWARD FRANK, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 163rd District Court
Orange County, Texas
Trial Cause No. B-080200-R

MEMORANDUM OPINION

Carl Edward Frank appeals his conviction for aggravated kidnapping. *See* Tex. Penal Code Ann. § 20.04 (West 2003). In issue one, Frank complains the trial court erred by failing to instruct the jury on the lesser-included offense of unlawful restraint. In issue two, Frank argues that the trial court abused its discretion by failing to exclude evidence that Frank, after committing the charged offense and on the same day, had ordered two girls walking down a street to get in his van. We overrule Frank's issues and affirm the trial court's judgment.

Background

In March 2008, the State indicted Frank for the aggravated kidnapping of S.H.[1] The indictment includes an allegation that Frank intentionally and knowingly abducted S.H. with the intent to violate and abuse her sexually.

S.H. testified that in September 2007, while working as a prostitute, she was standing in the parking lot of a convenience store when Frank pulled up in a white van and offered her two hundred dollars to clean his house. Although S.H. first thought Frank had offered her money for sex, Frank told her "it was just for housecleaning." During the trip to Frank's house, S.H. noticed that the house was surrounded by a metal gate with barbed wire on top and a wooden fence. Frank unlocked the gates of both fences to access the house. After entering the house, S.H. started cleaning.

According to S.H., Frank left the room she was cleaning, but he then re-appeared wearing pink "[l]ittle girl panties." S.H. "got a little scared[]" because Frank "started getting real aggressive." When S.H. told Frank that she wanted to leave, Frank refused her request. As S.H. sat on the couch to put on her shoes, Frank attempted to put a padlocked chain around her throat. S.H. resisted, grabbed the chain, and asked Frank what he was doing. At that point, according to S.H., Frank said: "I'm kidnapping you." S.H. ran out of the house, but she could not leave Frank's property because the gate was

[1]To protect the victim's privacy, we identify her by using her initials. *See* Tex. Const. art. I, § 30(a)(1) (granting crime victims "the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process[.]").

locked. S.H. tried to climb the fence, but she could not because of the barbed wire. Frank came out of the house, told S.H. to calm down, and unlocked the gate.

Acacia King, Frank's neighbor, also testified at the trial. King testified that in September 2007, she heard a person yelling out in the middle of her street. S.H. approached her and said: "Mr. Frank had kidnapped her[.]" S.H. also asked whether she could use the phone. S.H. told King that Frank had asked her to clean his house, and he then tried chaining her up to prevent her from leaving. According to King, S.H. "was frantic, like someone had just kidnapped her. She was scared, shaking. She had blood marks all over her where she'd climbed the fence." King took S.H. to a gas station and later that day, King called the police.

Lieutenant Thomas Ray and Detective Holzap[f]el, employees of the Orange County Sheriff's Department, searched Frank's house and recovered a chain and pink panties. According to Lieutenant Ray, a privacy fence goes around Frank's house, and on the lot's outer perimeter, there is a ten foot cyclone fence with barbed wire across the top. A thick, "galvanized type chain[,]" about ten to twelve feet long, was recovered from Frank's living room. A padlock prevented the chain's removal from the wall. The chain's length would have been sufficient to allow a person chained to it to have access to Frank's bathroom, bedroom, and living room.

The jury also heard evidence that on the day S.H. was kidnapped, Frank stopped in the road beside two minor girls walking down the street and tried to make them get into

his van. Frank contends the trial court erred in allowing the jury to consider testimony regarding his encounter with the minor girls.

Based on the evidence admitted during the trial, the jury found Frank guilty of aggravated kidnapping. After a punishment hearing, the jury then assessed Frank's punishment at forty-five years in prison. Frank timely filed a motion for new trial and an appeal.

Lesser-Included Offense

In issue one, Frank argues that the trial court erred when it failed to include an instruction on the lesser-included offense of unlawful restraint. Determining whether an offense has lesser-included offenses is a two-step process. *See Hall v. State*, 225 S.W.3d 524, 535-36 (Tex. Crim. App. 2007). Step one generally requires the pleadings to be analyzed to compare the elements of the offense alleged in the indictment with the elements of the proposed lesser-included offense. *See id.*; *see also* Tex. Code Crim. Proc. Ann. art. 37.09(1) (West 2006).

Frank argues that unlawful restraint is a lesser-included offense of aggravated kidnapping, and he contends the evidence is sufficient to find only the lesser-included offense of unlawful restraint. The State concedes that unlawful restraint is a lesser-included offense of aggravated kidnapping, but it contends there is no evidence in the record permitting the jury to have rationally found that Frank was guilty only of the lesser-included offense.

To determine if Frank was entitled to have the jury instructed on the offense of unlawful restraint, we first compare the elements of the offense as alleged in the indictment with the elements of the potential lesser-included offense to determine if all of the elements of the lesser offense are proven by proving the greater offense. *Hall*, 225 S.W.3d at 535-36. Second, we must determine whether "'there is some evidence in the record that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser-included offense.'" *Id*. at 536 (quoting *Bignall v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994), which cites *Rousseau v. State*, 855 S.W.2d 666, 673 (Tex. Crim. App. 1993)).

A person commits the offense of unlawful restraint when he intentionally or knowingly restrains another person. Tex. Penal Code Ann. § 20.02(a) (West 2003). Aggravated kidnapping occurs when a person intentionally or knowingly abducts another person with the intent to inflict bodily injury on the other person or to violate or abuse the other person sexually. *Id*. § 20.04(a)(4). To abduct a person means to restrain him with the intent to prevent his liberation. *Id.* § 20.01(2) (West Supp. 2010). Chapter 20 of the Texas Penal Code defines the term "restrain" to mean "to restrict a person's movements without consent, so as to interfere substantially with the person's liberty, by moving the person from one place to another or by confining the person." *Id*. § 20.01(1). Restraint is without consent if it is accomplished by force, intimidation, or deception. *Id.* § 20.01(1)(A). Thus, proof of being restrained, which is the act required to prove unlawful

restraint, is an element that can also be used to prove kidnapping. Since all of the elements of the lesser offense, unlawful restraint, are included within the proof required to prove a claim of aggravated kidnapping, as that offense was alleged in Frank's indictment, and under the circumstances in Frank's case, we conclude that unlawful restraint is a lesser-included offense of aggravated kidnapping. *See Schweinle v. State*, 915 S.W.2d 17, 19 (Tex. Crim. App. 1996); *Jenkins v. State*, 248 S.W.3d 291, 298, n.9 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd) (citing *Anderson v. State*, 125 S.W.3d 729, 731 (Tex. App.—Texarkana 2003, no pet.)).

After establishing the first prong required by *Hall*, the issue narrows to whether the evidence establishes that unlawful restraint is "'a valid, rational alternative to the charged offense.'" 225 S.W.3d at 536 (quoting *Forest v. State*, 989 S.W.2d 365, 367 (Tex. Crim. App. 1999)). In other words, some evidence must permit a rational jury to acquit Frank on the greater offense while convicting him of the lesser-included offense. *Salinas v. State*, 163 S.W.3d 734, 741 (Tex. Crim. App. 2005). In evaluating that issue, we review all of the evidence admitted at Frank's trial. *See Bignall v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994). "[I]t is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense; there must be some evidence directly germane to a lesser included offense for the factfinder to consider before an instruction on a lesser included offense is warranted." *Id.* at 24.

Focusing on the period between the point that Frank told S.H. that she could not leave and the point that he opened the padlocked gate, Frank argues he is only guilty of unlawful restraint because there is evidence that shows he merely restricted S.H.'s movements during this period and then let her go. However, the kidnapping statute does not require that a defendant restrain his victim for any specific length of time before the defendant can be found guilty of kidnapping. *See Hines v. State*, 75 S.W.3d 444, 447-48 (Tex. Crim. App. 2002) (citing *Santellan v. State*, 939 S.W.2d 155, 163 (Tex. Crim. App. 1997)). Instead, the kidnapping statute, through its definition of the term abduct, requires that the defendant either secrete or hold a person in a place the victim is not likely to be found, or that the defendant restrain the person by threatening or using deadly force. *See* Tex. Penal Code Ann. § 20.01(2)(A)-(B); Tex. Penal Code Ann. § 20.03(a) (West 2003). In addition to the requirement of the victim being abducted, the aggravated kidnapping statute requires the State to prove facts regarding the defendant's intent that are separate from the kidnapping statute's abduction element. *Compare* Tex. Penal Code Ann. § 20.04(a)(1)-(6) *with* Tex. Penal Code Ann. § 20.03(a). In Frank's case, with respect to proving aggravated kidnapping, the State sought to prove that Frank abducted S.H. with the intent to abuse her sexually. *See* Tex. Penal Code Ann. § 20.04(a)(4).

In response to Frank's argument concerning the trial court's failure to include a question on the lesser-included offense of unlawful restraint, the State argues that there is no evidence that Frank was guilty only of unlawful restraint. We agree that under the

circumstances proven by the State, a rational jury could not have acquitted Frank on the charge of aggravated kidnapping and found him guilty on the lesser charge of unlawful restraint. "A person commits the offense of aggravated kidnapping if 'he intentionally or knowingly abducts another person' and commits an aggravating element." *Laster v. State*, 275 S.W.3d 512, 521(Tex. Crim. App. 2009) (quoting Tex. Penal Code Ann. § 20.04). A kidnapping is aggravated, as alleged in this case, when a defendant intentionally and knowingly abducts another with the further intent to violate or sexually abuse the victim. Tex. Penal Code Ann. § 20.04(a)(4).

Frank's behavior after entering his house established that he intended to sexually abuse S.H. After she began cleaning, Frank came into the room wearing pink panties and told S.H. that it turned him on to watch her clean and that she was his "bitch." When S.H. got ready to leave, Frank told her she could not leave, and then attempted to put a chain around her neck. Frank also said, when asked what he was doing, "I'm kidnapping you." Based on this evidence, a rational jury could not have concluded that Frank was guilty only of unlawful restraint. In addition, Frank took S.H. to his house, a place where no others knew she had gone. Frank's house is surrounded by two fences, and Frank padlocked the exterior gate after entering his property. Thus, we further conclude that Frank took S.H. to a place that she was unlikely to be found, which is required to prove kidnapping, but is not required to prove the offense of unlawful restraint. *Compare* Tex. Penal Code Ann. § 20.01(2) *and* Tex. Penal Code Ann. 20.01(1). After reviewing the

entire record in this case, we conclude there was no evidence that affirmatively raised the lesser-included offense of unlawful restraint. There was no evidence presented that showed Frank had merely restricted S.H.'s movements. The evidence showed that Frank made sexual statements to S.H. and attempted to chain her up, indicating his intent to sexually assault her, and he took her to a place where she was unlikely to be found. The evidence did not raise the possibility that Frank, if guilty at all, was guilty only of unlawful restraint. We conclude that based on the evidence before the jury, Frank was not entitled to a lesser-included offense charge on unlawful restraint, and we overrule Frank's first issue.

Extraneous Offenses

In his second issue, Frank argues the trial court abused its discretion by failing to exclude evidence concerning Frank's attempt to make two girls walking down the street get into his van. Misty Watson testified that on September 22, 2007, she was behind a white van when she saw two teenage girls walking down the street on the passenger side of her truck. The van stopped, and at first Watson thought the person in the van knew the girls. However, when the girls began to come toward her truck, the van's driver got out and yelled at the girls, "[g]et into my van." The girls came to Watson's truck and asked for help, so Watson told them to run, and then she turned around and picked them up. Watson took the girls to their home, and she then reported the incident to the police.

Watson later identified Frank as the van's driver from a photo lineup. Watson also identified Frank as being the van's driver at Frank's trial.

Both of the minor girls testified at Frank's trial. According to the girls, on the afternoon of September 22, 2007, they were approached by a white van that stopped beside them. At that point, the van's driver got out and said, "'[h]ey, come here. Come get in my van.'"

The jury also heard testimony concerning a police chase involving Frank that occurred following a traffic stop on the same date as the kidnapping of S.H. Officer Emilio Romero of the Beaumont Police Department testified that he attempted to make a traffic stop of a white van on September 22, 2007. Although the van initially stopped, the driver then sped away. Officer Romero pursued the van, which wrecked in Orange County. At that point, Officer Romero arrested Frank, the van's driver, for evading arrest. According to Officer Romero, the van's front license place was obscured because it was behind a windshield-wiper on the van's dash. Additionally, the rear windows of the van were blacked out, a mesh screen obstructed the view through the passenger's front door, and the windows to both the driver's and passenger's side panel had been spray painted white. Inside the van, a metal partition with a locking mechanism separated the front cab from the rear of the van. In the rear of the van, police found a child's beanbag, a television, an air mattress, duct tape, and a "replica handgun" that Officer Romero further described as a "BB gun."

The incident involving the minor girls occurred on the same day as the offense against S.H., and the State argued at trial that the extraneous offense showed a common plan, motive and intent. Frank objected to the admission of the extraneous offense evidence, and he argued it was not a common plan and was highly prejudicial. The trial court, noting that the intent aspects of Frank's indictment were live issues for the jury, overruled Frank's objection. The trial court also gave the jury a limiting instruction about the extraneous offense evidence.

A trial court's ruling on the admissibility of extraneous offenses is reviewed under an abuse of discretion standard. *De La Paz v. State*, 279 S.W.3d 336, 343 (Tex. Crim. App. 2009). "As long as the trial court's ruling is within the 'zone of reasonable disagreement,' there is no abuse of discretion, and the trial court's ruling will be upheld." *Id.* at 343-44 (quoting *Montgomery v. State*, 810 S.W.2d 372, 394 (Tex. Crim. App. 1991) (op. on reh'g)). Generally, a trial court's ruling is within the zone of reasonable disagreement if the evidence shows that an extraneous offense is relevant to a material issue and the probative value of that evidence is not substantially outweighed by the danger of unfair prejudice. *Id.* at 344.

"Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." Tex. R. Evid. 404(b).

A trial court may admit evidence of extraneous offenses committed by the accused where intent is an essential element of the State's case and the defendant's intent cannot be inferred from the act itself. *Williams v. State*, 662 S.W.2d 344, 346 (Tex. Crim. App. 1983). Here, Frank's intentions when he kidnapped S.H. were essential elements of the State's case. Frank's encounter with the minor girls, which occurred on the same day, together with the evidence concerning the contents and configuration of his van and house, all tend to show that Frank's plans that day were to abduct a female for the purpose of satisfying his sexual desires. Thus, the trial court could have reasonably concluded that the evidence regarding Frank's encounter with the minor girls was relevant and admissible because that evidence reveals Frank's true plans about his encounter with S.H. on the day he committed the offense. *See* Tex. R. Evid. 401, 402. We conclude the trial court did not abuse its discretion in determining that the evidence concerning Frank's encounter with the minor girls was relevant.

Frank also objected to the extraneous offense evidence as being prejudicial. "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.

> [A] trial court must balance (1) the inherent probative force of the proffered item of evidence along with (2) the proponent's need for that evidence against (3) any tendency of the evidence to suggest decision on an improper basis, (4) any tendency of the evidence to confuse or distract the jury from the main issues, (5) any tendency of the

evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or repeat evidence already admitted.

Casey v. State, 215 S.W.3d 870, 880 (Tex. Crim. App. 2007) (citing *Gigliobianco v. State*, 210 S.W.3d 637, 641-42 (Tex. Crim. App. 2006)). "In reviewing the trial court's balancing test determination, a reviewing court is to reverse the trial court's judgment 'rarely and only after a clear abuse of discretion.'" *Mozon v. State*, 991 S.W.2d 841, 847 (Tex. Crim. App. 1999) (quoting *Montgomery*, 810 S.W.2d at 389-90).

The trial court heard arguments from both parties and it considered the testimony of Watson outside the presence of the jury before ruling on the admissibility of the State's extraneous offense evidence. The State argued that it needed evidence to prove Frank's intent in this case. Although Frank objected to the evidence as being prejudicial, the trial judge overruled Frank's objections and allowed the evidence to be admitted to assist the jury in determining Frank's intent. During Watson's testimony, the trial court instructed the jury that the evidence was not admissible to prove that the defendant had acted in conformity with the conduct, and to use the evidence to determine whether Frank had the intent required to be proven as alleged in Frank's indictment. The trial court's instruction was designed to mitigate the prejudicial effect that might have been caused by the jury hearing the evidence concerning Frank's encounter with the minor girls. *See Lane v. State*, 933 S.W.2d 504, 520 (Tex. Crim. App. 1996) (recognizing that the impermissible inference of character conformity can be minimized through a limiting

instruction). The trial judge further instructed the jury that they could not consider the evidence of any other acts testified to, unless they found beyond a reasonable doubt that Frank committed those acts. We hold the trial judge could have reasonably concluded that the inherent probative force of the evidence, along with the State's need for the evidence, substantially outweighed the danger of any unfair prejudice to Frank.

Further, the presentation of the extraneous offense evidence did not consume an inordinate amount of time. The record contains 170 total pages of testimony, and only thirty-five of those pages contain testimony regarding Frank's encounter with the minor girls.

After reviewing the record, we conclude the trial court, after balancing the required Rule 403 factors, could have reasonably concluded that the probative value of the extraneous offense evidence was not substantially outweighed by the danger of unfair prejudice. We hold the record before us does not demonstrate that the trial court abused its discretion in admitting the extraneous offense evidence. We overrule issue two.

Having overruled both of Frank's issues, we affirm the trial court's judgment.

AFFIRMED.

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HOLLIS HORTON
Justice

Submitted on November 8, 2010
Opinion Delivered February 2, 2011
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Before Gaultney, Kreger, and Horton, JJ.