COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00445-CR
NO. 02-15-00446-CR

TERRY LYNN DOUGLAS — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 297TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NOS. 1396337R, 1396338R

MEMORANDUM OPINION[1]

A jury convicted Appellant Terry Lynn Douglas of attempted aggravated sexual assault and robbery as charged in one indictment and aggravated kidnapping as charged in a second indictment. After hearing the evidence at punishment, the jury found the habitual offender allegations true in both cases and assessed

[1]*See* Tex. R. App. P. 47.4.

Appellant's punishment at confinement for life on the convictions for attempted aggravated sexual assault and aggravated kidnapping and eighty years' confinement on the robbery conviction. The trial court sentenced him accordingly.

In four issues, Appellant challenges the sufficiency of the evidence to support his convictions for aggravated kidnapping and robbery and contends that the trial court reversibly erred by charging the jury on a theory of aggravated kidnapping not alleged in the indictment and by admitting certain evidence during the punishment phase. Because we hold that the evidence is sufficient to support Appellant's aggravated kidnapping and robbery convictions, the trial court did not abuse its discretion by admitting the complained-of evidence, and the trial court did not commit reversible charge error, we affirm the trial court's judgments.

I. Summary of Facts

During the guilt phase, the jury heard the testimony of D.K., the complainant in these cases; law enforcement personnel; Appellant; and another complainant who had accused him of similar offenses.

D.K. testified that on August 5, 2014, she left home in her daughter's boyfriend's car and stopped at a Texaco in Fort Worth to buy a beer. As she was driving away, she saw Appellant walking. She then drove to a game room less than a block away. She went inside and played one quick game. She saw Appellant inside the game room. As D.K. was leaving, she saw Appellant coming out of the game room. He came over to her car, asked her for a ride, opened the rear passenger door by putting his hand through the space between the car and the

open driver's door, and got in the back seat, ignoring her request to stop. D.K. decided that she would give him a ride "so he'd leave [her] alone." She saw him as pushy but not dangerous at that point. Somewhere along the way, however, D.K. began to get scared because although Appellant gave her instructions on where to drive next, he would not tell her their ultimate destination.

On the drive, Appellant began smoking a crack pipe. D.K. asked him not to, and Appellant reacted angrily, calling her names. At a stop sign, Appellant grabbed her by the hair and forced her to get into the passenger seat. At first D.K. refused, but Appellant told her that he had a gun. He then got into the driver's seat and drove her to an abandoned house about a mile or two from the game room. Appellant forced D.K. to undress. She testified that she complied with his demand because "[h]e kept threatening [her] with a gun." He never showed her a gun; she believed he had one because he told her so.

D.K. attempted to run away, but Appellant caught up to her and dragged her back to the car. She then began biting him to stop him from putting her back in the car. She was able to grab a knife she had in her pocket and used it to defend herself. In the struggle, she also accidentally stabbed herself. Eventually Appellant got in the car and drove off, leaving D.K. there in just her underwear. She ran to a nearby house looking for help and banged repeatedly on the front door. Someone saw her and called the police. D.K. told the officer who responded, "I think he raped me." She testified that nothing that happened that night was consensual.

Fort Worth Police Department analyst Farah Plopper testified that a profile from a swab of blood recovered from D.K.'s lip was identical to Appellant's known DNA profile.

Police recovered the car about a month after the incident. D.K.'s purse, the contents of the purse, and her bra were not in the car, but it did contain the other clothes that she had worn that night as well as blood. Plopper testified that Appellant could not be excluded as a contributor to the bloodstain in the car.

Appellant told the jury a different version of events. He testified that before August 5, 2014, he had met D.K. and had "[a] sexual encounter" with her. He saw D.K. at the game room that night, and they decided to go somewhere together to use methamphetamine that Appellant had with him. He suggested going to a friend's house. When they arrived there, a friend of D.K.'s was already there, sitting in a car. D.K. grabbed Appellant's wallet and jumped out of the car. Appellant tried to wrestle it away from her, and she stabbed him. Her friend got out of his car with a gun, so Appellant ran.

On cross-examination, the State asked Appellant about three other complainants—Z.B., B.G., and D.R.—who in July and August 2014 had also contacted Fort Worth police and accused Appellant of forcing his way into their cars, directing them where to drive, robbing them, and sexually assaulting them.

On rebuttal, the State called Z.B. Z.B. testified that while he was stopped in a McDonald's parking lot with the windows down, Appellant got into his car, told him to drive, smoked marijuana in the car, said that he had a gun, made Z.B. withdraw

cash from an ATM and touch Appellant's penis, and indicated that he wanted Z.B. to perform oral sex on him. When they stopped at a convenience store, Z.B. was supposed to go inside for beer and cigarettes, but instead he called 911.

In the punishment phase, the State called law enforcement personnel, a forensic DNA analyst, two sexual assault nurses, B.G., D.R., and D.R.'s mother. B.G. and D.R. were two complainants of alleged extraneous offenses committed by Appellant. Judy Thompson, a sexual assault nurse, examined B.G. in August 2014. The State asked Thompson to tell the jury what B.G. had told her had happened that day. Appellant objected on hearsay and rule 403 grounds. The trial court overruled the objections. Thompson then read her notes in which she had recorded what B.G. had told her. B.G. told Thompson that Appellant stopped her on the street, told her he had a gun, made her get money from an ATM, forced her to give him oral sex, stole her jewelry, forced her to smoke crack, and made her have sex with him.

II. Sufficiency of the Evidence

In his first two issues, Appellant contends that the evidence is insufficient to support his convictions for aggravated kidnapping and robbery. He does not challenge the sufficiency of the evidence supporting his conviction of attempted aggravated sexual assault.

A. Standard of Review

In our due-process review of the sufficiency of the evidence to support a conviction, we view all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements

of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016). This standard gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Jenkins*, 493 S.W.3d at 599.

The trier of fact is the sole judge of the weight and credibility of the evidence. *See* Tex. Code Crim. Proc. Ann. art. 38.04 (West 1979); *Blea v. State*, 483 S.W.3d 29, 33 (Tex. Crim. App. 2016). Thus, when performing an evidentiary sufficiency review, we may not re-evaluate the weight and credibility of the evidence and substitute our judgment for that of the factfinder. *See Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). Instead, we determine whether the necessary inferences are reasonable based upon the cumulative force of the evidence when viewed in the light most favorable to the verdict. *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App.), *cert. denied*, 136 S. Ct. 198 (2015). We must presume that the factfinder resolved any conflicting inferences in favor of the verdict and defer to that resolution. *Id.* at 448–49; *see Blea*, 483 S.W.3d at 33.

To determine whether the State has met its burden under *Jackson* to prove a defendant's guilt beyond a reasonable doubt, we compare the elements of the crime as defined by the hypothetically correct jury charge to the evidence adduced at trial. *See Jenkins*, 493 S.W.3d at 599; *Crabtree v. State*, 389 S.W.3d 820, 824 (Tex. Crim. App. 2012) ("The essential elements of the crime are determined by state

law."). Such a charge is one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. *Jenkins*, 493 S.W.3d at 599. The law as authorized by the indictment means the statutory elements of the charged offense as modified by the factual details and legal theories contained in the charging instrument. *See id.*; *see also Rabb v. State*, 434 S.W.3d 613, 616 (Tex. Crim. App. 2014) ("When the State pleads a specific element of a penal offense that has statutory alternatives for that element, the sufficiency of the evidence will be measured by the element that was actually pleaded, and not any alternative statutory elements.").

The standard of review is the same for direct and circumstantial evidence cases; circumstantial evidence is as probative as direct evidence in establishing guilt. *Jenkins*, 493 S.W.3d at 599.

In determining the sufficiency of the evidence to show an appellant's intent, and faced with a record that supports conflicting inferences, we "must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflict in favor of the prosecution, and must defer to that resolution." *Matson v. State*, 819 S.W.2d 839, 846 (Tex. Crim. App. 1991).

B. Aggravated Kidnapping

The indictment charged that Appellant,

> with the intent to inflict bodily injury on [D.K.] or violate or abuse [her] sexually or terrorize [her,] intentionally or knowingly abduct[ed her] by restraining [her] without consent by moving [her] from one place to

> another or confining [her] with the intent to prevent [her] liberation . . . by secreting or holding [her] in a place [where she] was not likely to be found or using or threatening to use deadly force, namely by threatening to use a gun[.]

Section 20.04 of the penal code provides in relevant part that a person commits aggravated kidnapping "if he intentionally or knowingly abducts another person with the intent to . . . inflict bodily injury on him or violate or abuse him sexually [or] . . . terrorize him." Tex. Penal Code Ann. § 20.04 (West 2011).

Appellant concedes that the jury could have rationally found that he abducted D.K. but contends that the evidence is insufficient to prove that he did so with an intent to cause her bodily injury, violate or abuse her sexually, or terrorize her. Appellant's specific intent to cause D.K. bodily injury, violate or abuse her sexually, or terrorize her may be inferred from his acts, words, and conduct. *See West v. State*, 406 S.W.3d 748, 761 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd) (complainant's testimony that West raped her; his sperm found in her vagina; and witnesses' observations that complainant was emotional, upset, and distraught at the scene were sufficient to support finding that West had abducted her with intent to sexually abuse or violate her); *Girdy v. State*, 175 S.W.3d 877, 880 (Tex. App.—Amarillo 2005, def. pet. ref'd) (holding evidence that Girdy held a knife on the complainant and others before forcing her into her car, that he poked her with the knife while she was getting into the car and later as he straddled her and told her that he would kill her, and that she believed that he was going to hurt her and that he was going to kill her was sufficient to show his intent to inflict bodily injury), *aff'd*,

213 S.W.3d 315, 319 (Tex. Crim. App. 2007); *White v. State*, 702 S.W.2d 293, 294 (Tex. App.—Amarillo 1985, no pet.) (concluding that evidence was sufficient to show intent to commit sexual abuse when White took complainant at gunpoint into a room containing only a mattress, ordered her to remove her pants, showed her bullets in the gun, and chased her when she ran from him); *see also Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004) (providing general rule that defendant's intent can be inferred from words, acts, or conduct). Further, this court has held that "terrorize," which is not defined in the penal code, means to place any person in fear of imminent bodily injury. *Ham v. State*, 855 S.W.2d 231, 232 (Tex. App.—Fort Worth 1993, no pet.). Additionally, a complainant's testimony that a defendant sexually abused her is sufficient alone to show his intent. *West*, 406 S.W.3d at 761 (relying on *Kemple v. State*, 725 S.W.2d 483, 485 (Tex. App.—Corpus Christi 1987, no pet.)).

The jury heard the following evidence:

- Appellant forced his way into D.K.'s car despite her request that he stop;
- Appellant refused to disclose their ultimate destination, increasing her fear;
- When she asked him to stop smoking, he cursed her and pulled her to him by the back of her hair;
- Appellant repeatedly threatened that he had a gun, and D.K. believed him;
- Appellant ordered her to remove her clothes and perform oral sex on him;

- After she tried to escape, Appellant dragged her back to the car using a sleeper hold on her neck and head;
- Appellant was hysterical and bloody when the police saw her, and she stated, "I think he raped me"; and
- Appellant's blood was found on D.K.'s lips.

We hold that this evidence is sufficient to prove all the elements of aggravated kidnapping beyond a reasonable doubt, including Appellant's intent at the time of the abduction to cause D.K. bodily injury, violate or abuse her sexually, or terrorize her. See *White*, 702 S.W.2d at 294; *see also Guevara*, 152 S.W.3d at 50. We overrule Appellant's first issue.

C. Robbery

The indictment charged that Appellant "intentionally or knowingly, while in the course of committing theft of property and with intent to obtain or maintain control of said property, threaten[ed] or place[d D.K.] . . . in fear of imminent bodily injury or death." Section 29.02 of the penal code provides that "[a] person commits [robbery] if, in the course of committing theft . . . and with intent to obtain or maintain control of the property, he . . . intentionally or knowingly threatens or places another in fear of imminent bodily injury or death." Tex. Penal Code Ann. § 29.02(a)(2) (West 2011). A person commits theft "if he unlawfully appropriates property with intent to deprive the owner of property." *Id.* § 31.03 (West Supp. 2016).

Appellant contends that the evidence is insufficient to support his robbery conviction because there is insufficient evidence of theft; alternatively, there is insufficient evidence that he intentionally or knowingly threatened D.K. with or

placed her in fear of imminent bodily injury or death; and finally, even if there is sufficient evidence of theft and of his intentional or knowing threat or placing D.K. in fear of imminent bodily injury or death, there is no evidence that he threatened her or placed her in fear while in the course of committing the theft or with intent to get or keep control of the stolen property.

The jury heard that Appellant entered the car against D.K.'s wishes; took control of the car by physically overpowering her, grabbing her keys, and forcibly moving her from the driver's seat; told D.K. that he had a gun; kept threatening her with the unseen gun; and drove the car containing D.K.'s clothes and purse away from her. The car was found weeks later behind a vacant house, and it no longer contained D.K.'s purse or its contents. It did, however, contain Appellant's blood stain.

Appellant argues that there is no evidence of his intent to deprive. To prove the element of intent to deprive, the State was not required to prove actual deprivation. *Rowland v. Stat*e, 744 S.W.2d 610, 612 (Tex. Crim. App. 1988); *Easter v. State*, No. 01-14-00450-CR, 2016 WL 6648812, at *11 (Tex. App.—Houston [1st Dist.] Nov. 10, 2016, no pet.) (mem. op. on reh'g, not designated for publication). Evidence of Appellant's intent to deprive includes his taking the car without permission and not returning it. The jury could have inferred that he hid it behind the vacant house to prevent or delay its discovery. *See* Tex. Penal Code Ann. § 31.01(2)(C) (West Supp. 2016) (providing that one meaning of "deprive" is "to dispose of property in a manner that makes recovery of the property by the owner

unlikely"). Further, the jury could have inferred that Appellant also stole D.K.'s purse and its contents because the purse and its contents were in the car when Appellant took it but not in the car when the police found it, and the three extraneous offenses that the jury was allowed to consider in the State's case in chief in determining Appellant's intent also involved accusations that he had robbed those complainants.

As to Appellant's argument that the evidence is insufficient to show that he intentionally or knowingly threatened D.K. with or placed her in fear of imminent bodily injury or death, she testified that he told her that he had a gun, that she believed him, that he threatened her with it repeatedly, and that she was scared. She also testified that she was fighting for her life when Appellant tried to force her back in the car after her escape. Applying the appropriate standard of review, we hold that the evidence is sufficient to show that Appellant intentionally or knowingly threatened D.K. with or placed her in fear of imminent bodily injury or death.

Finally, Appellant argues that there is no nexus between the evidence of theft and the evidence of his threatening D.K. with or placing her in fear of imminent bodily injury or death. That is, he argues that there is no evidence that he threatened D.K. or placed her in fear while he was in the course of committing the theft or with intent to get or keep control of the stolen property.

The penal code defines "in the course of committing theft" as "conduct that occurs in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of theft." *Id.* § 29.01(1) (West 2011). The jury could have reasonably and properly inferred that Appellant intentionally or knowingly

threatened D.K. with imminent bodily injury at least in part to gain and maintain control of the vehicle (and her purse and its contents) that he stole. Accordingly, we hold that the evidence is sufficient to satisfy all the elements of robbery beyond a reasonable doubt. We overrule Appellant's second issue.

III. Jury Charge

In his third issue, Appellant contends that the trial court committed fundamental error by charging the jury on a theory of aggravated kidnapping not alleged in the indictment—using or exhibiting a deadly weapon during the commission of the offense. Appellant did not object to the charge on that ground in the trial court. "[A]ll alleged jury-charge error must be considered on appellate review regardless of preservation in the trial court." *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012). In our review of a jury charge, we first determine whether error occurred; if error did not occur, our analysis ends. *Id.* If error occurred, whether it was preserved determines the degree of harm required for reversal. *Id.* Unpreserved charge error warrants reversal only when the error resulted in egregious harm. *Nava v. State*, 415 S.W.3d 289, 298 (Tex. Crim. App. 2013); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g); *see* Tex. Code Crim. Proc. Ann. art. 36.19 (West 2006). The appropriate inquiry for egregious harm is fact specific and must be performed on a case-by-case basis. *Gelinas v. State*, 398 S.W.3d 703, 710 (Tex. Crim. App. 2013); *Taylor v. State*, 332 S.W.3d 483, 489 (Tex. Crim. App. 2011).

In making an egregious harm determination, "the actual degree of harm must be assayed in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole." *Almanza*, 686 S.W.2d at 171. *See generally Gelinas*, 398 S.W.3d at 708–10 (applying *Almanza*). Errors that result in egregious harm are those "that affect the very basis of the case, deprive the defendant of a valuable right, vitally affect the defensive theory, or make a case for conviction clearly and significantly more persuasive." *Taylor*, 332 S.W.3d at 490 (citing *Almanza*, 686 S.W.2d at 172). The purpose of this review is to illuminate the actual, not just theoretical, harm to the accused. *Almanza*, 686 S.W.2d at 174.

Generally, when the application paragraph correctly instructs the jury, an error in the abstract instruction is not reversible error. *Medina v. State*, 7 S.W.3d 633, 640 (Tex. Crim. App. 1999), *cert. denied*, 529 U.S. 1102 (2000); *Bazanes v. State*, 310 S.W.3d 32, 39 (Tex. App.—Fort Worth 2010, pet. ref'd). Reversible error occurs in an abstract instruction only when the instruction is an incorrect or misleading statement of law that the jury must understand to implement the application paragraph's commands. *Plata v. State*, 926 S.W.2d 300, 302 (Tex. Crim. App. 1996), *overruled on other grounds by Malik v. State*, 953 S.W.2d 234 (Tex. Crim. App. 1997); *see also Riley v. State*, 830 S.W.2d 584, 586–87 (Tex. Crim. App. 1992) (holding that the confusing conflict between the abstract and application paragraphs on the burden of proof concerning insanity was reversible error).

The trial court here did include law not applicable to the case in the abstract portion of the charge, but Appellant concedes that the language accurately tracks the statute. *See* Tex. Penal Code Ann. § 20.04(a)–(b). We note that the application paragraph of the charge did not allow the jury to convict Appellant if it found that he "intentionally or knowingly abduct[ed] another person . . . [and] use[d] or exhibit[ed] a deadly weapon during the commission of the offense." That language was found only in the abstract portion of the charge. The application paragraph tracked the indictment:

> Now, if you find from the evidence beyond a reasonable doubt that on or about the 6th day of August 2014, in Tarrant County, Texas, [Appellant] did with the intent to inflict bodily injury on [D.K.], or violate or abuse [her] sexually or terrorize [her] intentionally or knowingly abduct [her] by restraining [her] without consent by moving [her] from one place to another or confining [her] with the intent to prevent the liberation of [her] by secreting or holding [her] in a place [she] was not likely to be found or using or threatening to use deadly force, namely, by threatening to use a gun, then you will find [Appellant] guilty of the offense of aggravated kidnapping as charged in the indictment.

As for the state of the evidence, while this is a he-said/she-said case, we have already held the evidence sufficient to prove all the elements of aggravated kidnapping beyond a reasonable doubt, including Appellant's intent at the time of the abduction to cause D.K. bodily injury, violate or abuse her sexually, or terrorize her. Thus, the jury would have had no need to resort to the unindicted theory based on the use or exhibition of a deadly weapon to reach a guilty verdict.

Regarding the State's use of the improper charge in closing argument, Appellant first references a part of the State's argument dealing with the attempted

aggravated sexual assault. The abstract portion of that charge references the use or exhibition of a deadly weapon, and Appellant does not complain about that charge on appeal.

In the State's initial closing argument on the aggravated kidnapping, the prosecutor stated,

> The aggravated kidnapping charge has a lot of language here, and [the other prosecutor] went over that with you. There were a lot of definitions. There were a lot of different ways to do it. In this case this defendant did everything. Every single thing that the law anticipates or says constitutes aggravated kidnapping, this defendant did it. It tells you that with the intent to inflict bodily injury or violate or abuse [D.K.] sexually—you know that's what he intended to do. He tried to force her to perform oral sex. He tried to harm her by restraining [her] without her consent. There was nothing consensual about this at all.
>
> . . . .
>
> By moving [D.K.] from one place to another or confining [her] with the intent to prevent liberation, he did all those things. He told her he had a gun. He made her drive, then he drove himself in that car. The law tells you an automobile on the city streets is a place where she's not likely to be found.
>
> . . . .
>
> It tells you that it's with the intent to prevent the liberation of [D.K.] by secretly holding her or using or threatening to use deadly force. The minute—the very second this defendant tells her that he has a gun, he takes control of the situation. She's not free to leave. She's not consenting to anything. That's what the kidnapping is. That's what the aggravated kidnapping is.

Nothing in that argument specifically addresses the use or exhibition of a gun. It is true that on closing final argument, the prosecutor argued, "Even if they waved him down and said, 'Please, let me give you a ride somewhere,' *the second the defendant pulls a gun and takes control of that car*, that is aggravated kidnapping,

ultimately attempted aggravated sexual assault and robbery." [Emphasis added.] But the prosecutor also soon conceded that there was no evidence of Appellant's exhibition of a gun to D.K. when arguing about her credibility, "Because, ladies and gentlemen, if [D.K.] was going to make this up, go big. Go big. I saw a gun and it was so scary." The evidence shows that D.K. testified that she never saw a gun; she believed Appellant had a gun because he told her so repeatedly.

Because the abstract instruction correctly states the law, the application paragraph does not enlarge upon the indictment, and the state of the evidence, closing argument, and record as a whole do not show that the abstract paragraph's tracking of the statute instead of the narrower indictment harmed Appellant, we hold that error, if any, is not reversible. *See Crenshaw v. State*, 378 S.W.3d 460, 466–67 (Tex. Crim. App. 2012). We overrule Appellant's third issue.

IV. Evidence at Punishment

In his fourth issue, Appellant contends that the trial court reversibly erred during the punishment phase by admitting hearsay evidence violating rule 403 over his objections. We review the trial court's admission of evidence for an abuse of discretion. *Kirk v. State*, 421 S.W.3d 772, 781 (Tex. App.—Fort Worth 2014, pet. ref'd); *see Montgomery v. State*, 810 S.W.2d 372, 390–91 (Tex. Crim. App. 1991) (op. on reh'g). We will uphold the ruling as long as it lies within the "zone of reasonable disagreement" and is correct under any applicable theory of law. *Kirk*, 421 S.W.3d at 782; *Alami v. State*, 333 S.W.3d 881, 889 (Tex. App.—Fort Worth 2011, no pet.). A court of appeals can affirm a trial court's decision on a legal theory

not presented to the trial court. *Vennus v. State*, 282 S.W.3d 70, 74 (Tex. Crim. App. 2009).

The admission of evidence during the punishment phase is controlled by article 37.07, section 3(a) of the Texas Code of Criminal Procedure. Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a) (West Supp. 2016); *Sims v. State*, 273 S.W.3d 291, 295 (Tex. Crim. App. 2008). That section provides that evidence may be offered by either party

> as to any matter the court deems relevant to sentencing, including but not limited to the prior criminal record of the defendant, his general reputation, his character, an opinion regarding his character, the circumstances of the offense for which he is being tried, and . . . any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act.

Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1). But evidence otherwise admissible under article 37.07 is subject to exclusion if its probative value is substantially outweighed by a danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or the needless presentation of cumulative evidence. Tex. R. Evid. 403; *Rogers v. State*, 991 S.W.2d 263, 266–67 (Tex. Crim. App. 1999). Rule 403 favors the admission of relevant evidence and presumes that relevant evidence is more probative than prejudicial. *Martinez v. State*, 327 S.W.3d 727, 737 (Tex. Crim. App. 2010), *cert. denied*, 563 U.S. 1037 (2011). A rule 403 analysis should include consideration of the probative value of the evidence; its potential to impress the jury in some irrational, indelible way or to suggest a decision on an improper

basis; the time the proponent needs to develop the evidence; and the proponent's need for the evidence. *Reese v. State*, 33 S.W.3d 238, 240–41 (Tex. Crim. App. 2000); *see Gigliobianco v. State*, 210 S.W.3d 637, 641 (Tex. Crim. App. 2006).

B.G. testified on direct examination that she was driving around to calm down on the night of August 18, 2014, when she found herself in an unfamiliar part of Fort Worth. She stopped at a stoplight and was about to turn around to go back to Arlington when a stranger she identified at trial as Appellant approached her. Her window was down because she was smoking. He asked her for money, and she offered to go to the ATM at the nearby gas station and get him some money. He got in her car, and she pulled into the gas station, got out of the car, withdrew $10, and gave it to him. He stayed in the car, though, and told her that he needed a ride to his truck "up the road" because his son was in the truck. She agreed to give him a ride. As she was driving, he suddenly told her to pull into a motel, and he began talking about drugs and sex. He went in the motel, came back out, got back in her car, and told her to drive up the road. She did and stopped. He then started smoking crack and asked her to join him. She refused. He then asked her to take off her pants. She refused and began to get out of the car. He told her, "Don't be stupid, I have a gun." She then did what he said. She took off her pants, he asked her to give him oral sex, and she did so. He asked her to stop, got in the driver's seat, and drove to find more drugs. He sold her phone for money at the house of someone he knew. He got more drugs and then drove back to the same spot on the road. He smoked again, asked for and received oral sex again, and blew smoke in

her mouth and told her to hold it after she refused to smoke. Then he drove back to the motel, she believed that he bought more drugs, he returned to the car, he drove to an abandoned house, and they had sexual intercourse. Afterward, he took her back to the house where he sold her phone and told her to have sex with the purchaser to get money. She and that man drove off; she told him that she was not a prostitute, and he gave her money and her cell phone and told her to leave. She did. B.G. testified that she had a rape kit done at the hospital that night.

On cross-examination, defense counsel asked,

Q. This isn't the first story that you told about this night, is it?

A. No, sir.

Q. In fact, you—you lied about a lot of things—

A. Yes, sir.

Q. —that night.

A. Uh-huh.

Q. And then over the course of time, your story changed?

A. Yes, sir.

Q. In fact, you met with a[nother prosecutor] here in the district attorney's office back in December?

A. I did.

Q. And she actually confronted you with . . . the discrepancies in your story?

A. She did.

Q. About the lies that you had told?

A. Uh-huh. Yes, sir.

. . . .

Q. That was after you met with Detective Maldonado and told her a story?

A. Uh-huh.

Q. Is that a yes?

A. Oh, sorry. Yes, sir.

Q. And that was after you met with Arlington police officers?

A. Yes, sir.

Q. And told them a story?

A. Yes, sir.

Q. And now you're here telling the jury the story?

A. Yes, sir.

Q. How many different versions of this story have you told?

A. Probably three.

Q. Probably?

A. Yes, sir, probably. I'm not completely sure.

Q. All right.

On redirect, the prosecutor asked B.G. if everything she testified to was true and if she had left out details before because she did not think anyone would believe her. B.G. answered both questions affirmatively.

The State later called Nurse Judy C. Thompson, the sexual assault nurse examiner who had conducted B.G.'s sexual assault exam. When the prosecutor asked what B.G. had told Thompson had happened that day, Appellant objected "under both hearsay and under 403. [B.G.] has already testified about what

happened to her." Without requiring the prosecutor to respond, the trial court overruled the objections, performed a balancing test, and found that "the prejudicial effect [was] outweighed by the probative value." Thompson read from the patient history she had taken from B.G.:

> Okay. Patient states "I was walking down the street. He asked if I have any money. I said no. He threatened to shoot me. I got in my car and said that I would go to an ATM. I gave him money out of the ATM. He made me drive to a house and then I think he brought crack. He had me drive again. He made me pull over and began to kiss me. I asked what he was doing. He again threatened to shoot me. He made me give him oral sex. He took over my car and began driving. He took my phone. He stole all my jewelry and my Xanax. He began asking people and eventually traded my Xanax for more crack. He pulled over. He made me do oral sex again. He forced me to smoke crack with him, then he made me have sex with him."
>
> . . . .
>
> "We drove around, and he sold my phone for more crack. We went to another house. He made me do oral sex while he smoked crack. He made me smoke. He had sex with me again and ejaculated. He took me back to the guy that bought my phone and tried to pimp me. That guy asked if I was okay. I said that I had been raped. He gave me back my phone. He gave me some money, and he let me get in my car and leave.["]

Appellant argues that because the statements "were clearly hearsay and the State failed to articulate an exception or other theory of admissibility, the trial court abused its discretion in overruling" his hearsay objection. As the State points out in its brief, however, statements made for medical diagnosis or treatment are exceptions to the hearsay rule. Tex. R. Evid. 803(4); *Reed v. State*, 497 S.W.3d 633, 638 (Tex. App.—Fort Worth 2016, no pet.). Because the trial court could have properly overruled Appellant's hearsay objections on this ground without first

allowing the State to raise it, *see Vennus*, 282 S.W.3d at 74, we overrule Appellant's hearsay complaint.

As to the trial court's rule 403 decision, Appellant had successfully challenged B.G.'s credibility when she testified about what he allegedly did to her, and she admitted on cross-examination that she had told at least three different stories about what had happened. The State needed and relied on Thompson's evidence to rehabilitate B.G. as a witness and add credence to her story; Thompson's recitation of her medical notes did not encourage the jury to render its punishment decision on an improper basis, and the challenged testimony took little more than a page of the 149 pages of testimony at sentencing. We therefore hold that the trial court did not abuse its discretion by overruling Appellant's rule 403 objection. *See Powell v. State*, 189 S.W.3d 285, 289–90 (Tex. Crim. App. 2006). We overrule Appellant's fourth issue.

V. Conclusion

Having overruled Appellant's four issues, we affirm the trial court's judgments.

/s/ Charles Bleil
CHARLES BLEIL
JUSTICE

PANEL: LIVINGSTON, C.J.; WALKER, J.; and CHARLES BLEIL (Senior Justice, Retired, Sitting by Assignment).

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: February 2, 2017