NO. 12-11-00026-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

STEVEN GERARD SLEDGE, APPELLANT	***§***	***APPEAL FROM THE 145TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***NACOGDOCHES COUNTY, TEXAS***

MEMORANDUM OPINION

Steven Gerard Sledge appeals his convictions for aggravated sexual assault and aggravated kidnapping. In five issues, Appellant[1] argues the evidence is insufficient to support his convictions, that the petit jury did not represent a cross section of the community, and that trial counsel was ineffective. Appellant raises five additional issues in a supplemental brief. We affirm.

BACKGROUND

Nacogdoches County sheriff's deputy Earl Garner was on routine patrol the morning of December 13, 2009, when he drove through a roadside park and came upon a pickup truck parked at the end of a scenic overlook. The vehicle did not have a permanent license plate and the motor was running. The windows were so darkly tinted that Garner could not see inside. Garner knocked on the window, and Appellant rolled the window down about two inches. Deputy

[1] The trial court appointed counsel for Appellant for purposes of bringing an appeal. After counsel had filed a brief on Appellant's behalf, Appellant requested to proceed pro se. We remanded this matter to the trial court to determine if Appellant wished to proceed pro se. Based on the trial court's findings, entered after a hearing, Appellant's counsel was permitted to withdraw, and Appellant was permitted to proceed pro se. Thereafter, Appellant filed his own brief raising the issues we consider in this opinion. We granted Appellant's motion to strike the brief previously filed on his behalf.

Garner was apprehensive because he could not see what was transpiring inside the truck, and he asked Appellant, who was in the driver's seat, and a woman, who was in the passenger seat, for their identification. Appellant said, "Well, let me put my clothes on." It was then that he noticed that the woman did not have clothing on the lower part of her body. The woman was mouthing words to Garner, but he could not make out what she was trying to communicate. After a few moments, Garner asked her to get out of the truck and motioned for her to come around the back of the truck. Garner met her at the back of the truck, and she told Garner that Appellant had raped her.

At about the same time, Appellant exited the driver's side of the truck. Garner drew his gun, told Appellant to put his hands on the truck, and then handcuffed Appellant. Garner summoned additional police officers and emergency medical professionals. The police recovered a large Bowie style knife from the truck. Garner recited ***Miranda***[2] warnings to Appellant and had a conversation with him on the way to the sheriff's office. Appellant told Garner that he and the woman had consensual sex that morning in the truck. In that conversation, Appellant denied knowledge of the knife, said he knew nothing about a knife, and denied owning knives. Garner asked if he owned a "hunting knife," to which Appellant replied that he did not. When the deputy asked Appellant if his fingerprints would be on a knife found in the truck, Appellant said he had moved the knife. He said he meant that he did not own the knife when he had said that he did not know anything about the knife. In his written statement, Appellant stated that there was a "hunting knife in the floor board" of the truck and that he "picked it up and placed it behind the seat of the arm rest."

Garner arrested Appellant, and a Nacogdoches County grand jury returned an indictment alleging that Appellant committed the felony offenses of aggravated kidnapping and aggravated sexual assault. Appellant pleaded not guilty at his trial. The jury found him guilty, and the trial court assessed a sentence of imprisonment for ninety years on each count. This appeal followed.

SUFFICIENCY OF THE EVIDENCE

In his first issue, Appellant argues that the evidence is insufficient to show that the knife was a deadly weapon. The indictment alleged that Appellant used a deadly weapon in the course of the offense. In his second and third issues, Appellant argues generally that the evidence is

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

insufficient to support his conviction.

Applicable Law

The due process guarantee of the Fourteenth Amendment requires that a conviction be supported by legally sufficient evidence. *See* ***Jackson v. Virginia***, 443 U.S. 307, 315–16, 99 S. Ct. 2781, 2786–87, 61 L. Ed. 2d 560 (1979); ***Brooks v. State***, 323 S.W.3d 893, 917 (Tex. Crim. App. 2010) (plurality opinion). Evidence is not legally sufficient if, when viewing the evidence in a light most favorable to the verdict, no rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See* ***Jackson***, 443 U.S. at 319, 99 S. Ct. at 2789; *see also* ***Rollerson v. State***, 227 S.W.3d 718, 724 (Tex. Crim. App. 2007). Under this standard, a reviewing court does not sit as a thirteenth juror and may not substitute its judgment for that of the fact finder by reevaluating the weight and credibility of the evidence. *See* ***Brooks***, 323 S.W.3d at 899; ***Dewberry v. State***, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999). Instead, a reviewing court defers to the fact finder's resolution of conflicting evidence unless that resolution is not rational in light of the burden of proof. *See* ***Brooks***, 323 S.W.3d at 899–900. The duty of a reviewing court is to ensure that the evidence presented actually supports a conclusion that the defendant committed the crime. *See* ***Williams v. State***, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007).

The sufficiency of the evidence is measured against the offense as defined by a hypothetically correct jury charge. *See* ***Malik***, 953 at 240. A hypothetically correct jury charge "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant is tried." ***Id***.

As charged in count one of the indictment, the State had to show that Appellant did intentionally or knowingly cause the penetration of the complaining witness's sexual organ without her consent and that he used or exhibited a deadly weapon, a knife, in the course of the same criminal episode. *See* TEX. PENAL CODE ANN. § 22.021(a)(1)(A)(i) (West Supp. 2011).[3] To prove that Appellant committed the offense of aggravated kidnapping, the State had to show that Appellant intentionally or knowingly abducted the complaining witness and used or exhibited

[3] Because the victim was not under the age of fourteen, the use of a deadly weapon is not an element of the offense. *See* TEX. PENAL CODE ANN. § 22.021(f)(2) (providing for a minimum sentence for an aggravated sexual assault if a deadly weapon is used and the victim is under the age of fourteen). We assume that this was intended as notice of intent to seek a deadly weapon finding pursuant to Texas Code of Criminal Procedure Article 42.12, Section 3g(a)(2).

a deadly weapon, a knife, during the commission of the offense. *See* TEX. PENAL CODE ANN. § 20.04(b) (West 2011).

Analysis–Deadly Weapon

In his first issue, Appellant argues that the State failed to prove that he used a deadly weapon. Accordingly, he argues that the deadly weapon finding made by the trial court is not supported by the evidence. Specifically, Appellant argues that the video of the traffic stop shows that the knife was not used in the offense because it should have fallen out of the truck when the passenger side door was opened if it was found where the officer said he found it. He argues further that there was no testimony as to a threat of serious bodily injury or death in conjunction with the knife.

We have reviewed the video recording of the traffic stop. The video shows the view from the front of the police car capturing a rear three-quarters view of the driver's side of the truck. The passenger side of the truck, from where the knife was recovered, is not visible from the video, nor is the interior of the truck. The video tape does not contradict the testimony about the recovery of the knife. Furthermore, Appellant admitted to the police that the knife was present in the truck and that he touched it, lessening the importance of precisely where it was found.

We disagree with Appellant's argument that there was not proof that the knife was a deadly weapon. Appellant cites authority–***Rivera v. State***, 271 S.W.3d 301, 304 (Tex. App.–San Antonio 2008, no pet.), is representative–for the proposition that there must be evidence that a knife is, in fact, a deadly weapon. This is so because a knife, unlike a firearm, is not a deadly weapon per se. *See* TEX. PENAL CODE ANN. § 1.07(17)(A) (West Supp. 2011). A deadly weapon is defined as "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(17)(A), (B). In the case of a knife, the court of criminal appeals has held that there must be some evidence describing the physical characteristics of a knife or other evidence to allow the conclusion that the knife is a deadly weapon. *See* ***Blain v. State***, 647 S.W.2d 293, 294 (Tex. Crim. App. 1983). Most of the cases cited by Appellant involve instances where the knife is not recovered or was used or displayed in an ambiguous way and the description of the knife is incomplete.[4] When

[4] In ***Rivera***, for example, the knife was never recovered and the "evidence regarding the knife used" was "meager." ***Rivera***, 271 S.W.3d at 305. In ***McCain v. State***, 22 S.W.3d 497, 499 (Tex. Crim. App. 2000), the

there is no knife to show the jury, there must be evidence beyond a simple description of the object as a knife. ***Robertson v. State***, 163 S.W.3d 730, 732 (Tex. Crim. App. 2005) ("[D]escribing an object generically as a 'knife' does not by itself establish the object as a deadly weapon by 'design' because many types of knives have an obvious other purpose (e.g. butcher knives, kitchen knives, utility knives, straight razors, and eating utensils).").

In this case, by contrast, the knife was recovered and its method of use was unambiguous. The jury was able to see the knife; it is a large Bowie style knife with a serrated top edge. The complaining witness testified that Appellant grabbed her, put the knife to her back, and told her to "shut up and stand up." She did not know he had a knife at this point, but once they were in her truck, he tried to cut her tank top off with the knife. She testified that she was "terrified because the knife drug across [her] chest." She testified that he raped her while holding the knife over her head.

This court has held that there is sufficient evidence to show that a knife is a deadly weapon when the testimony shows that it was used "in such a manner as to convey a threat of serious bodily injury" if the victim does not comply with the instructions of the person wielding the knife. *See* ***In re D.L.***, 160 S.W.3d 155, 166 (Tex. App.–Tyler 2005, no pet.) (citing ***Billey v. State***, 895 S.W.2d 417, 422 (Tex. App.–Amarillo 1995, pet. ref'd)). In light of the evidence in this case, including the physical appearance of the knife and the fact that Appellant used it to force the complaining witness into a truck with him and then to have sexual intercourse with him, we hold that the evidence is sufficient to prove that this knife was a deadly weapon in the manner of its use. We overrule Appellant's first issue.

Analysis–Consent and Threat of Force

In his second and third issues, Appellant argues that the evidence is insufficient to show that the complaining witness did not consent to having sexual intercourse with him[5] and that there is insufficient evidence to show that the kidnapping was done with a threat of force.

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defendant kicked in the door to a dwelling and hit the occupant with his fist. He did so while he had a butcher knife in his back pocket.

[5] Appellant invokes factual sufficiency review of the evidence supporting a lack of consent. The Texas Court of Criminal Appeals has held that the ***Jackson v. Virginia***, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), legal sufficiency standard is the only standard a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the state is required to prove beyond a reasonable doubt. *See* ***Brooks v. State***, 323 S.W.3d 893, 894-95 (Tex. Crim. App. 2010) (plurality op.). We will review the evidence under the ***Jackson*** standard. *See*, *e.g.*, ***Harris v. State***, No. 12-10-00388-CR, 2011 Tex. App. LEXIS 9288, at *2-3 (Tex. App.–Tyler Nov. 23, 2011) (mem. op., not designated for publication).

With respect to the issue of consent, Appellant argues that the notes taken at a sexual assault examination of the complaining witness showed that she was in a calm state with normal vital signs at the time of the examination. He asserts that there was no evidence of bleeding or bruising and asserts, therefore, that there is no evidence that the complaining witness did not consent.

With respect to the issue of force, Appellant argues that the knife was too large for him to have concealed it on his person. Furthermore, he asserts that the door locks and windows on the truck were "regular locks" and that the witness could have exited the truck at anytime. He argues that he was the only person at risk of death or serious bodily injury–this is due to a bizarre series of events where Appellant threatened to kill himself with the knife in between acts of sexual assault on the complaining witness–and that the scenic overlook was not a "secret place."

It is accurate that the complaining witness was relatively calm at the time of the sexual assault examination. However, the nurse[6] who conducted the examination testified that the witness was in a state of emotional shock at that time. Furthermore, the examination was conducted some time after the assault when the witness was in a safe place and Appellant was under arrest.

A complaining witness's uncorroborated testimony is sufficient, if believed by the jury, to support a conviction for sexual assault. *See* TEX. CODE CRIM. PROC. ANN. art. 38.07(b)(1) (West Supp. 2011); ***Satterwhite v. State***, 499 S.W.2d 314, 315 (Tex. Crim. App. 1973); ***Jensen v. State***, 66 S.W.3d 528, 534 (Tex. App.–Houston [14th Dist.] 2002, pet. ref'd). The witness told the officer as soon as she got to the back of the truck that she had been raped by Appellant. She testified that Appellant grabbed her and she yelled "no, no, no." She said that she stopped yelling when he "pulled a knife out on me and put it to my back and told" her to "shut up and stand up." She testified that Appellant told her to take off her clothes and that he tried to cut off her tank top with the knife. She said she was terrified because the knife "drug across [her] chest." She said he made her lie down on the truck seat and then made her "turn around and put [her] head the other way." After that, she testified that Appellant "crawled on top of [her], and he raped [her] while holding the knife over [her] head." In response to a question by the prosecutor, the witness

[6] Appellant argues that his right to a fair trial was abrogated because the doctor who participated in the examination did not testify at the trial. We note, contrary to Appellant's implied assertion, that there is no evidence that the doctor's testimony would have supported his defense. We will address his argument more fully in his eighth issue.

testified that she was using the term "rape" to mean that Appellant "penetrated [her] vagina with his penis."

Appellant's argument about a "secret place" addresses the definition of the word "abduct." "Abduct" is defined by the penal code to mean to restrain a person with intent to prevent her liberation by secreting or holding her in a place where she is not likely to be found; or using or threatening to use deadly force. *See* TEX. PENAL CODE ANN. § 20.01(2)(A), (B) (West 2011). The act of secreting the victim, or holding her in a place where she is not likely to be found, can be established when the defendant forces a victim into a car and moves the victim from one place to another. *See* ***Megas v. State***, 68 S.W.3d 234, 240 (Tex. App.–Houston [1st Dist.] 2002, pet. ref'd) (citing ***Fann v. State***, 696 S.W.2d 575, 576 (Tex. Crim. App. 1985) (holding that victims in car driven in shifting path through city streets was sufficient evidence of keeping victims isolated from being found or receiving assistance); ***Sanders v. State***, 605 S.W.2d 612, 614 (Tex. Crim. App. 1980) (holding that driving victim around in car on city streets for an hour was sufficient evidence of secreting and holding victim in place not likely to be found). The complaining witness testified that Appellant forced her into a car while holding a knife to her back and took her from place to place, including an isolated scenic overlook. The jury could reasonably conclude Appellant used a deadly weapon in support of his efforts to restrain the witness, to keep her isolated, and to keep her from being found.

As to Appellant's other arguments, specifically that he could not have concealed the knife or that the witness could have escaped, it was for the jury to weigh the evidence presented to them and make a rational determination based on that evidence. Appellant told the police that the knife was not his and was already in the truck, though he said he handled it, and the witness voluntarily engaged in sexual intercourse with him. The jury chose to believe the complaining witness and not the statement Appellant offered to the police. This was a rational conclusion based our review of the evidence. The evidence is sufficient to support the verdict, and we overrule Appellant's second and third issues.

THE JURY

In his fourth and fifth issues, and in part of his sixth issue,[7] Appellant argues that his trial

[7] We will treat the five issues in Appellant's supplemental brief as issues six through ten.

was unfair because of pretrial media attention, the racial makeup of the prospective jurors and the petit jurors violated his due process rights, and potential jurors made inflammatory statements during jury selection, which impacted his right to a fair trial.[8]

A change of venue is proper and consistent with principles of due process when a defendant demonstrates his inability to obtain an impartial jury or a fair trial at the place of venue. *See* ***Groppi v. Wisconsin***, 400 U.S. 505, 510-11, 91 S. Ct. 490, 493-94, 27 L. Ed. 2d 571 (1971). There is no evidence in the record about the pretrial publicity, and it does not appear that Appellant filed a motion for change of venue. This court has held that a defendant must obtain a ruling on a motion for change of venue to preserve that issue for appellate review. *See* ***Grimes v. State***, No. 12-02-00058-CR, 2003 Tex. App. LEXIS 9866, at *15-16 (Tex. App.–Tyler Nov. 19, 2003, pet. ref'd) (mem. op., not designated for publication). Accordingly, because Appellant did not move for a change of venue and the trial court did not rule on the question of whether pretrial publicity required a change of venue, this issue is not preserved for our review.[9]

There is no evidence in the appellate record about the racial characteristics of those summoned for jury duty and about those who served. Appellant claims that approximately nine percent of the jurors who were summoned were minorities, that four of the five minority venire persons were removed for personal reasons, and that the State peremptorily challenged the remaining minority venire person. Appellant also asserts that between forty-six and forty-eight percent of Nacogdoches County residents are minorities. There is no evidence in the record to support these claims, in part because trial counsel did not object to the jury array or to the petit jury that was seated.

A motion to quash the jury array must be made in writing and must include an affidavit if the challenge is made by a defendant in a criminal matter. *See* TEX. CODE CRIM. PROC. ANN. art. 35.07 (West 2006); ***Lacy v. State***, 899 S.W.2d 284, 288 (Tex. App.–Tyler 1995, no pet.). Without a supporting affidavit as required, nothing is preserved for appellate review. *See* ***Stephenson v. State***, 494 S.W.2d 900, 905 (Tex. Crim. App. 1973). Because he did not file an affidavit or make a motion to quash the jury array, this issue is not preserved for our review.

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[8] As part of his argument, Appellant asserts that his trial counsel should have moved for a change of venue and that counsel should have raised a ***Batson*** challenge to the jury. We will address those arguments together with Appellant's other ineffective assistance of counsel arguments.

[9] Appellant asserts in his brief that his attorney requested a change of venue prior to trial. The record before us does not disclose such a request.

We reach the same conclusion as to Appellant's claims about the petit jury. Proportionate representation of races on jury panels is not constitutionally required, although the selection of the panel must be done without discrimination as to race. *See* ***May v. State***, 738 S.W.2d 261, 269 (Tex. Crim. App. 1987). A challenge to the peremptory challenges by the state in a criminal case must be made before the jury is impaneled. *See* TEX. CODE CRIM. PROC. ANN. art. 35.261(a) (West 2006). A jury is considered "impaneled" when the members of the jury have been both selected and sworn. *See* ***Hill v. State***, 827 S.W.2d 860, 864 (Tex. Crim. App. 1992). In this case, no challenge was made at all. Accordingly, this issue is not preserved for our review.

Finally, Appellant has failed to preserve a complaint about the comments made by jurors. In part of his fourth and sixth issues, Appellant argues that the trial court should have dismissed the jury panel due to the comments made by prospective jurors. Most of the comments simply betray an awareness of the allegations against Appellant. Appellant was accused of abducting and raping a young college student, and several of the jurors were aware of the allegations. One has a daughter who attended the college. That juror stated that "[he did not] know if he's guilty or not, but I want him hung [sic] for," before the juror was interrupted. The prosecutor interrupted the juror with the statement, "[i]f he's guilty." The juror agreed, and the prosecutor stated that they were "looking for someone who will, no matter how they feel, will add the words, 'if he's guilty.'"[10]

Appellant argues that the trial court should have dismissed the panel after the comments by the juror and that the comments show that jurors were biased against him. Certainly the juror highlighted above was biased against Appellant—he proposed the death penalty for a noncapital offense irrespective of whether Appellant committed the offense. But this does not show that the entire panel was similarly disposed. The Fourteenth Amendment incorporates the essence of the Sixth Amendment right to trial by impartial, indifferent jurors whose verdict is based upon the evidence developed at trial. *See* ***Howard v. State***, 941 S.W.2d 102, 117 (Tex. Crim. App. 1996) (citing ***Holbrook v. Flynn***, 475 U.S. 560, 567, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986), and ***Irvin v. Dowd***, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961)). When potentially prejudicial statements are made by a prospective juror in front of the entire panel, the court of criminal appeals has held that to show error in overruling a motion to quash the panel, the appellant must show harm

[10] The prosecutor stated she had no objection when Appellant's attorney asked the trial court to excuse that juror for cause.

by demonstrating that other members of the panel heard the remark, potential jurors who heard the remark were influenced to the prejudice of the appellant, and the juror in question or some other juror who may have had a similar opinion was forced upon the appellant. *See* ***Callins v. State***, 780 S.W.2d 176, 188 (Tex. Crim. App. 1989) (citing ***Johnson v. State***, 151 Tex. Crim. 110, 205 S.W.2d 773, 775 (Tex. Crim. App. 1947)). The record does not formally show that other jurors heard the remark. Since the prosecutor addressed it, we think it is fair to conclude that other jurors did hear the remark. But Appellant has failed to show others were influenced by the remark or that he was forced to accept a juror with a similar opinion. Appellant cites ***United States v. Davis***, 583 F.2d 190 (5th Cir. 1978), for the proposition that the trial court should have questioned the jurors individually about the remark. This case is from the federal system where, in that case, it appears that the trial court conducted the voir dire examination. ***Id***. at 196. In addition, the trial court denied the defendant's request to examine potential jurors individually. ***Id***. By contrast, in this case, Appellant's attorney had ample opportunity to seek a mistrial, to request individual examination, and to question jurors about the remark. Accordingly, and because there is no showing that the comment prejudiced Appellant, we overrule this portion of Appellant's fourth, fifth, and sixth issues.

INEFFECTIVE ASSISTANCE OF COUNSEL

In parts of his fourth, fifth, and sixth issues and in his ninth issue, Appellant argues that he received ineffective assistance of counsel.

Applicable Law

Claims of ineffective assistance of counsel are evaluated under the two step analysis articulated in ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 674 (1984). The first step requires an appellant to demonstrate that trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *See* ***Strickland***, 466 U.S. at 688, 104 S. Ct. at 2065; ***McFarland v. State***, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). Counsel's representation is not reviewed for isolated or incidental deviations from professional norms, but on the basis of the totality of the representation. *See* ***Strickland***, 466 U.S. at 695, 104 S. Ct. at 2069.

The second step requires the appellant to show prejudice from the deficient performance of his attorney. *See* ***Hernandez v. State***, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999). To

establish prejudice, an appellant must show that there is a reasonable probability that the result of the proceeding would have been different but for counsel's deficient performance. *See* ***Strickland***, 466 U.S. at 694, 104 S. Ct. at 2068.

We begin with the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *See* ***Jackson v. State***, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). As part of this presumption, we presume counsel's actions and decisions were reasonable and were motivated by sound trial strategy. *See* ***id***. Appellant has the burden of proving ineffective assistance of counsel. *See* ***id***.

Analysis

As Appellant acknowledges and as the court of criminal appeals has observed, ineffective assistance of counsel claims are rarely successful on direct appeal because the record has not been sufficiently developed for such claims to be raised or to be evaluated. *See, e.g.*, ***Bone v. State***, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002) ("Under normal circumstances, the record on direct appeal will not be sufficient to show that counsel's representation was so deficient and so lacking in tactical or strategic decision making as to overcome the presumption that counsel's conduct was reasonable and professional."); *see also* ***Mata v. State***, 226 S.W.3d 425, 430 (Tex. Crim. App. 2007) ("As we have said on more than one occasion, a reviewing court on direct appeal will rarely be able to fairly evaluate the merits of an ineffective-assistance claim, because the record on direct appeal is usually undeveloped and inadequately reflective of the reasons for defense counsel's actions at trial.").

Appellant argues that his trial counsel was ineffective because he did not move for a change of venue, did not raise a ***Batson*** challenge during jury selection, did not meet with him in jail and sent a surrogate to the pretrial hearing, failed to make an independent investigation of the case, failed to request a competency hearing, and failed to object to the testimony of the nurse who conducted the examination of the complaining witness. The appellate record does not show that counsel's representation was ineffective or unprofessional or that Appellant suffered prejudice from the perceived inadequacies of counsel's representation.

With respect to the change of venue, there is no showing of counsel's strategic reasons for not seeking a change of venue. While some jurors indicated that they had heard about the case, there is no evidence of pervasive and prejudicial pretrial publicity. To justify a change of venue due to pretrial publicity, a defendant must show the publicity was pervasive, prejudicial, and

inflammatory. *See* ***Gonzalez v. State***, 222 S.W.3d 446, 449 (Tex. Crim. App. 2007); ***Renteria v. State***, 206 S.W.3d 689, 709 (Tex. Crim. App. 2006). There is no direct representation of newspaper articles or television stories in the record, and two newspaper articles Appellant attached to his supplemental brief[11] are short, nonsensational summaries of the allegations in this case. Accordingly, Appellant has not shown that counsel would have been successful in moving for a change of venue or that his decision not to do so was unprofessional.

Similarly, there is no evidence in the appellate record as to why counsel did not pursue a ***Batson***[12] challenge, no evidence suggesting that a ***Batson*** challenge could reasonably have been made, and no evidence that seeking a competency hearing would have been a reasonable course of action. As to counsel's investigation and issues about his communication with Appellant, the record does not show that counsel's actions were inadequate or what prejudice could have accrued to Appellant. Counsel was absent from a pretrial hearing, but another attorney, counsel's brother, substituted in his place. The prosecutor was also absent from that hearing—she was sick—and the hearing was very brief. The hearing took two pages to transcribe and consisted primarily of confirming the date of the trial. Appellant was not denied his appointed counsel, did not object to the brief representation by another attorney, and does not suggest that he suffered prejudice from having another attorney represent him for a short hearing. *Cf*. ***Brown v. State***, 182 S.W.3d 427, 430 (Tex. App.–Texarkana 2005, no pet.) (reversible error for trial court to force defendant to accept new counsel where harm is shown).

Finally, Appellant has not shown that trial counsel was ineffective for failing to object to the nurse's testimony. *See* ***Ex parte Martinez***, 330 S.W.3d 891, 901 (Tex. Crim. App. 2011) ("To successfully assert that trial counsel's failure to object amounted to ineffective assistance, the applicant must show that the trial judge would have committed error in overruling such an objection."). Both a nurse and a doctor participated in a medical examination of the complaining witness. Appellant argues that the doctor should have testified, and that counsel should have objected to the testimony of the nurse. He asserts that his "only viable defense was one of consensual sex" and that "the evidence was there," by which it appears he means the doctor's

[11] We may not consider material outside the appellate record. *See* TEX. R. APP. P. 34.1 (appellate record consists of the clerk's record and, if necessary, reporter's record); ***Whitehead v. State***, 130 S.W.3d 866, 872 (Tex. Crim. App. 2004) ("An appellate court may not consider factual assertions that are outside the record, and a party cannot circumvent this prohibition by submitting an affidavit for the first time on appeal.") (citations omitted).

[12] *See* ***Batson v. Kentucky***, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

testimony would have supported his defense. The record does not show what the doctor's testimony would have been. The nurse was not able to testify that a forcible rape occurred. Even if the doctor's testimony would have been different from the nurse's testimony, an objection to her testimony would not have been sustained on that ground.

We overrule Appellant's fourth, fifth, and sixth issues as they relate to ineffective assistance of counsel and his ninth issue.

RECUSAL OF THE TRIAL COURT JUDGE

In his seventh issue, Appellant argues that the trial court judge should have voluntarily recused himself.

According to the docket sheet, Appellant's first appointed counsel moved to withdraw as counsel in December 2009. The motion was granted. The motion does not appear in the clerk's record, but Appellant asserts that the reason given for the withdrawal was "due to [counsel's] association with Stephen F. Austin State University." Appellant assumes that counsel's association with the university is the fact that he was a "one time student" at the university. Appellant further postulates that counsel "possibly attained his law degree there." Appellant states that the trial court judge was a business law professor at the university from 1987 to 1988 and asserts, in a roundabout way, that the judge also attended the university. Appellant then reasons that since his attorney had to withdraw because he had been a student at the university, the trial court judge was required to recuse himself for the same reason.

Rule 18a of the Texas Rules of Civil Procedure sets forth the procedural requirements for seeking recusal of a trial court judge. *See* ***Barron v. Attorney Gen.***, 108 S.W.3d 379, 382 (Tex. App.–Tyler 2003, no pet.). This rule applies in criminal cases. *See* ***Ex parte Sinegar***, 324 S.W.3d 578, 581 (Tex. Crim. App. 2010) (citing ***Arnold v. State***, 853 S.W.2d 543, 544 (Tex. Crim. App. 1993) (en banc)); ***DeLeon v. Aguilar***, 127 S.W.3d 1, 5 n.3 (Tex. Crim. App. 2004) (orig. proceeding). Rule 18b sets out the grounds for disqualification and recusal, which include when the judge has served as a lawyer in the matter in controversy, when his impartiality might reasonably be questioned, or when the judge has a personal bias or prejudice concerning the subject matter or a party.

The record does not support Appellant's assertions that his first attorney attended the university, that counsel sought to withdraw because he attended the university, that the judge

attended the university, or that the judge was employed by the university more than twenty years ago. Furthermore, it is not reasonable to suggest that a judge who attended and worked at a university could not preside impartially over a criminal trial in which a defendant is alleged to have committed a crime on the campus of that university. Appellant argues that his crime was "exposed by the media as a crime aimed towards the dignity of the university" and the "victim was also a student of [the university.]" The second point is shown by the record, but the first is not and is not a reasonable suggestion that the trial court judge could not be impartial. We overrule Appellant's seventh issue.

RIGHT TO CONFRONT WITNESSES

In his eighth issue, Appellant argues that his right to confront witnesses against him was denied because he was not permitted to confront and cross examine the doctor who participated in the examination of the complaining witness.

Appellant miscomprehends the right to confrontation. Appellant's counsel stated that he had no objection to the admission of the sexual assault examination report. Therefore, any complaint about the admission of the report is not preserved for appellate review. *See* ***Reyna v. State***, 168 S.W.3d 173, 179-80 (Tex. Crim. App. 2005). And Appellant's right to confront his accusers was not abrogated. The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Confrontation Clause "applies to 'witnesses' against the accused--in other words, those who 'bear testimony.'" ***Crawford v. Washington***, 541 U.S. 36, 51, 124 S. Ct. 1354, 1364, 158 L. Ed. 2d 177 (2004). This means that an accused must be permitted to cross examine those who testify against him and also that the testimonial statements of a witness may not be admitted if the witness is unavailable for cross examination. ***Id.***, 541 U.S. at 59, 124 S. Ct. at 1369 ("Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.").

Appellant supposes that the doctor's testimony would assist his defense. He points out that the report notes the complaining witness had "no active bleeding, no bruising, and no scarring." He concedes that the nurse testified to these facts, but he posits that the doctor's testimony would somehow establish that a sexual assault did not occur. In short, all of the

evidence Appellant supposes would be helpful to his defense was admitted. The doctor was not an accuser under Appellant's formulation of the evidence, and Appellant did not object to the admission of the evidence. Furthermore, there is no reasonable suggestion that Appellant could not have called the doctor as a witness if he thought it would have been helpful to his defense. Appellant was not denied the right to confront an accuser and failed to preserve any complaint about the admission of a report. We overrule Appellant's eighth issue.

IDENTITY OF THE COMPLAINING WITNESS

In his tenth issue, Appellant argues that the indictment is void because it identified the complaining witness using a pseudonym and the State failed to follow the proper procedure for using a pseudonym.

The indictment in this case identifies the complaining witness using a pseudonym instead of her actual name. The arresting officer explained that this was done to protect the privacy of the complaining witness. She was identified at trial by her true name both by witnesses and when she testified herself.

Appellant argues that the State did not comply with Article 57.02(e), Texas Code of Criminal Procedure, which sets out the procedure for using a pseudonym in sexual assault cases and allows a complaining witness to complete a form to protect his or her identity. Furthermore, he argues that there is a variance between the allegation of the complaining witness's name in the indictment and the proof at trial.

With respect to the variance argument, the court of criminal appeals has held that there is not a variance when a pseudonym is used so long as the defendant's "due process right to notice is satisfied." *See* ***Stevens v. State***, 891 S.W.2d 649, 651 (Tex. Crim. App. 1995). Appellant makes no argument that his right to notice was abrogated, and it appears that he was aware of the identity of the complaining witness prior to trial.

As to whether the complaining witness filed a form as contemplated by Article 57.02(e), there is no requirement that such a form be filed in a criminal case or that a pseudonym only be used if such a form is completed. In fact, the form is not to be disclosed to any person other than the defendant or the defendant's attorney in the absence of a court order, *see* TEX. CODE CRIM. PROC. ANN. art. 57.02(d) (West Supp. 2011), and so we would not expect to find it in the record of the trial court. As the court in the ***Stevens*** opinion made clear, there is a possibility that using a

pseudonym could fail to give a defendant adequate notice of the identity of the complaining witness. *See* ***Stevens***, 891 S.W.2d at 651. Article 57.02 is not the mechanism intended to provide such notice.

In conclusion, Appellant did not lack notice of the identity of the complaining witness. The fact that a form is not in the appellate record does not establish that Article 57.02 was not followed nor is compliance with Article 57.02 a necessary precondition to the use of a pseudonym in a criminal case. We overrule Appellant's tenth issue.

DISPOSITION

Having overruled Appellants ten issues, we ***affirm*** the judgment of the trial court.

SAM GRIFFITH
Justice

Opinion delivered July 31, 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(DO NOT PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

JULY 31, 2012

NO. 12-11-00026-CR

STEVEN GERARD SLEDGE,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 145th Judicial District Court
of Nacogdoches County, Texas. (Tr.Ct.No. F0917290)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Sam Griffith, Justice.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.