Affirmed and Opinion filed July 19, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-00635-CR

DANIEL JOSEPH KEEGAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 796,597

O P I N I O N

Appellant, Daniel Joseph Keegan, was convicted by a jury of unlawful restraint and sentenced to six months in the Harris County Jail and a $2,000.00 fine. In four points of error, he complains that (1) the evidence is insufficient to support the verdict, (2) the trial court erred in allowing the State to introduce evidence of other bad acts without giving notice, (3) the trial court erred in quashing a subpoena for a defense witness, and (4) the trial court erred in allowing the State to comment on appellant's right to remain silent. We affirm.

I. Introduction

Appellant and Nicole Wagner were married in August of 1998. Shortly after the marriage, and the day after a violent fight with her new husband, Wagner filed for divorce and sought a restraining order.[1] While the couple was separated, Wagner sought counseling, and appellant accompanied her to some of these sessions. By the end of October, however, Wagner decided to end her efforts at reconciliation. On October 27, 1998, appellant called Wagner and told her that he needed to borrow her truck because his car battery was dead. Wagner agreed to accompany appellant to his house in far Northwest Houston, but only on the condition that she would leave by 8:00 p.m.

When the time came, Wagner testified that she opened the door and proceeded to walk quickly towards her truck, fearing appellant would try to prevent her from leaving as he had done before.[2] She got inside the truck, but appellant put his hands over the open window and told her that she would have to close it on his fingers. He also had his feet under the truck and told her she would have to drive over his feet to leave. Appellant then forced Wagner out of her truck and took away her keys, dragged her by the hair across the gravel driveway into the house, and threw her on the couch. Wagner stated that, for more than two hours, appellant was screaming and shaking. He refused to allow her to use the phone and told her he was going to kill himself. After taking her to the garage to find a rope, appellant settled on an extension cord and began dragging Wagner away from the house towards a tree. Wagner was screaming the entire time, and, at some point, appellant punched the ground next to her face in order to quiet her. Wagner was finally able to escape when appellant went to her truck for a cigarette. She ran inside, locked the door, and called 9-1-1. Appellant broke the door down, accused her of calling the police, and

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[1] During this particular fight, appellant allegedly threw Wagner against a dresser in the couple's home, took her into the bathroom, blocked her exit, cut himself with a razor, and threatened to kill himself while she watched. This is one of the extraneous offenses which appellant complains about in his second point of error.

[2] This is the second extraneous offense about which appellant complains.

threw the phone across the room, stating, "Now, you've really done it." Wagner thought appellant was going to kill her. Appellant carried her over his shoulder to the very back of the property. At some point after the 9-1-1 call, Wagner's blouse came off; she had already lost her shoes. When appellant heard police sirens, he forced Wagner into some bushes, laid on top of her, and told her to tell the police that they were there to pray or to have sex.

Meanwhile, Harris County Deputy Constable Michael Young received a call of an attempted suicide at appellant's house and responded. When he arrived, he found Wagner's truck with its door open and her purse with its contents spilled over the seat, the back door to the house open and another door kicked in. Unable to see due to the darkness, Young called for a K-9 unit. The dog arrived and eventually located appellant and Wagner in the brush, a little more than 50 yards from house. After appellant refused the police's order to release Wagner, Young and the other deputies charged appellant and physically subdued him.

II. Sufficiency of the Evidence

In his first point of error, appellant complains that the evidence is insufficient[3] to show he unlawfully restrained Wagner because her trial testimony was that she had previously told him, "If I ever try to leave you, don't let me."

A person is guilty of unlawful restraint if he intentionally or knowingly restrains another person. TEX. PEN. CODE ANN. § 20.02(a) (Vernon Supp. 2000). Restrain is defined, in pertinent part, as "restrict[ing] a person's movement 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.* at § 20.01(1). "Restraint is 'without consent' if it is accomplished by force, intimidation, or deception . . . ." *Id.* at § 20.01(1)(A).

[3] Because appellant requests an acquittal, we treat this point of error as a claim that the evidence was legally insufficient. *See, e.g., Cardenas v. State*, 30 S.W.3d 384, 386 n.2 (Tex. Crim. App. 2000).

Appellant argues that Wagner's statement absolves him of any wrongdoing because it negates an element the State was required to prove—that the restriction of movement was without consent. However, Wagner explained to jurors the context in which this statement was made, *viz.*, she only meant they should seek counseling, not that she wanted him to drag her through the woods by her hair and prevent her from leaving. She further testified that, after 8:00 p.m., she was not there consensually. Appellant on the other hand, gave a different account of the facts, denying on the stand that he (1) grabbed her hair, (2) picked her up by the waist, (3) dragged her down some stairs by her legs, or (4) kicked down the door. He also told jurors Wagner never voiced her objection to going to the pasture behind the house, and he did not prevent her from leaving. Further, although appellant did testify that Wagner once told him not to let her leave him, he did not testify that he relied on her statement.

Reconciliation of conflicts in the evidence is within the exclusive province of the jury. *Margraves v. State*, 34 S.W.3d 912, 919 (Tex. Crim. App. 2000). Whether the restraint was with Wagner's consent was an issue of fact properly resolved by the jury. In a legal sufficiency review, our duty is to ensure only the rationality of the jury's verdict. *King v. State,* 29 S.W.3d 556, 562 (Tex. Crim. App. 2000) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The jury obviously chose to believe Wagner's explanation of her statement, as well as her account of the events, and there is credible testimony to support the verdict. Appellant's first point of error is overruled.

III. 404(b) Evidence

Appellant next complains that the trial court erred in admitting evidence of other bad acts because the State failed to provide him notice after a proper request. We disagree. Appellant filed a document entitled "Defendant's Request for Notice Under Rule 404(b)." The document was addressed, "To the Honorable Judge of Said Court," and concluded, "Wherefore, premises considered, Defendant prays that the State be ORDERED to provide reasonable notice to Defendant . . . ." (Emphasis in original.) Attached to this document

was a proposed order, which was not signed. The record does not reflect that the court ever ruled on appellant's motion.

In *Espinosa v. State*, the Court of Criminal Appeals, in addressing an identical issue, held that, "when a defendant relies on a motion for discovery to request notice pursuant to Rule 404(b), it is incumbent upon him to secure a ruling on his motion in order to trigger the notice requirements of that rule." 853 S.W.2d 36, 39 (Tex. Crim. App. 1993). The court distinguished a request from a motion, stating that a request is directed to the State, while a motion "requests that the trial court order the State to produce evidence." *Id.* at 38. A discovery motion is not otherwise productive until the trial court rules on it. *Id*. (citing *Kinnamon v. State*, 791 S.W.2d 84, 92 (Tex. Crim. App. 1990)). Recently, the court reaffirmed this principle. *Simpson v. State*, 991 S.W.2d 798, 801 (Tex. Crim. App. 1998) (stating that a motion is not a self-executing request for notice). Although the rule from *Espinosa* may seem highly technical, we are bound to follow it. *Mitchell v. State*, 982 S.W.2d 425 (Tex. Crim. App. 1998) (holding that when a document seeks trial court action, it cannot also serve as a request to the State); *see also Harmon v. State*, 889 S.W.2d 521 (Tex. App.—Houston [14th Dist.] 1994, pet ref'd) (following *Espinosa*). Accordingly, we find appellant's motion failed to trigger the notice requirement on rule 404(b). Point of error two is overruled.

IV. Motion to Quash

In his third point of error, appellant claims that the trial court erred in quashing his subpoena for the judge who presided over their divorce. The judge, through his attorney, filed a motion to quash, which the trial court granted. The record includes neither appellant's subpoena nor the motion to quash. In any event, appellant's counsel explained at the hearing on the motion to quash why he needed the judge's testimony.

> MR. ZAKES: I was going to ask him a question he could answer based on that knowledge and based on reading the Family Code, the Texas Family Code.
>
> THE COURT: What is the question you want to ask him

as an attorney?

> MR. ZAKES: Regarding the issuance of an *ex parte* protective order and the length and duration of same. As such, it would not be in effect on the date in question as was testified to this morning. I was going to ask him additionally to identify his initials on various documents, including the docket sheet and the *ex parte* protective order issued in the underlying divorce case in question, as well as the usual temporary restraining order and the final decree of divorce in this case.

Appellant's counsel told the court that "other court personnel" with whom he had spoken had no recollection of these matters, but he also admitted that he had not spoken with the court reporter and had not subpoenaed her. At the close of the hearing, the trial court found that the testimony sought from the judge was not relevant to any issue in the case. We agree. A claim that the trial court improperly quashed a subpoena is reviewed for an abuse of discretion. *Muennink v. State*, 933 S.W.2d 677, 684 (Tex. App.—San Antonio 1996, pet. ref'd). The gravamen of the State's case was appellant's specific conduct on the night of October 27, 1998, which had nothing to do with whether a protective order was or was not violated.[4]

Although a defendant has the right to secure the attendance of witnesses whose testimony would be both material and favorable to the defense, before this right may be exercised, the defendant must make a plausible showing to the trial court, by sworn evidence or agreed facts, that a witness's testimony would be both material and favorable to the defense. *Coleman v. State*, 966 S.W.2d 525, 527–28 (Tex. Crim. App. 1998). Even though we may construe counsel's statements as sworn evidence within the meaning of the foregoing rule,[5] there was no demonstration that the judge's testimony was material. As

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[4] In fact, appellant's counsel successfully impeached Wagner's recollection on whether the protective order was in effect by having her admit that she called her divorce lawyer a few days before the motion for protection was scheduled to be heard and told him she was trying to work things out and, thus, would not appear for in court for the hearing.

[5] *See, e.g., Knie v. Piskun*, 23 S.W.3d 455, 463 (Tex. App.—Amarillo 2000, pet. denied) (holding that, although statements by an attorney at a hearing are not ordinarily considered "evidence,"

we have pointed out, appellant does not state how the judge's initials on court documents would be material to his case or why it matters whether appellant was in violation of a protective order, particularly given Wagner's testimony that he was not. Accordingly, we do not find that the trial court abused its discretion in quashing the subpoena. Appellant's third point of error is overruled.

V. Right Against Self Incrimination

In his final point of error, appellant argues that he is entitled to a new trial because the State, when it began its cross-examination of him, asked, "Good morning, Mr. Keegan. We have never met before, have we?" Appellant objected, claiming this was a comment on his failure to "deal." His objection was overruled. "In order to violate the right against self-incrimination . . . the offending language, when viewed from the jury's standpoint, must be manifestly intended or be of such character that the jury would necessarily and naturally take it as a comment on the accused's failure to testify." *Montoya v. State*, 744 S.W.2d 15, 35 (Tex. Crim. App. 1987), *overruled on other grounds*, *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996). It is not enough that the jury might construe the language as an implied or indirect allusion to the defendant's failure to testify. *Id.* Even if we were to assume the jury could have taken the prosecutor's comment to mean appellant had refused to "deal," this inference would amount to no more than an indirect allusion to appellant's failure to testify. Appellant's final point of error is overruled.

The judgment is affirmed.

PER CURIAM

Judgment rendered and Opinion filed July 19, 2001.

Panel consists of Justices Yates, Fowler, and Sears.[6]

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the oath requirement can be waived by the opposing party's failure to object to the fact that the attorney has not been sworn); *see also Banda v. Garcia*, 955 S.W.2d 270, 272 (Tex. 1997).

[6] Senior Justice Ross A. Sears sitting by assignment.