Affirmed and Opinion filed June 22, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00560-CR & 14-98-01088-CR

TIMOTHY ANTHONY REDIC, Appellant

V.

STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause No. 759,656 & 755,973

O P I N I O N

This is a consolidated appeal from separate convictions for aggravated sexual assault and attempted aggravated sexual assault. In each case, a jury found appellant guilty as charged and assessed punishment at confinement for life in the Texas Department of Criminal Justice – Institutional Division. For the reasons set out below, we affirm.

Background and Procedural History

On May 17, 1997, appellant was arrested and subsequently charged by indictment with the offense of attempted aggravated sexual assault against Lisa Scott (Cause No. 759,656).[1] The indictment also alleged two prior felony convictions for the purpose of enhancing the range of punishment. In July of 1997, appellant was charged by indictment with the offense of aggravated sexual assault against Mary Roberts (Cause No. 755,973). That indictment also alleged two prior felony convictions for the purpose of enhancing the range of punishment. Two additional indictments were filed against appellant; each alleged the offense of aggravated sexual assault (Cause Nos. 753,184 and 753,185). All four of these cases were assigned to the 351st District Court in Harris County, Texas, and, later, were transferred to the 177th Criminal District Court, the Honorable Carol Davies, presiding.

Appellant waived his right to court-appointed counsel in each of his cases, insisting that he represent himself during all pre-trial proceedings and at trial. After extensive hearings on the matter, the trial court relented and allowed appellant to proceed pro se. Stand-by counsel was appointed to assist him, as was a court-appointed investigator.

A jury trial of Cause No. 759,656, involving appellant's alleged attempt to sexually assault Lisa Scott, commenced on May 5, 1998. On May 11, 1998, the jury found appellant guilty as charged in the indictment. After finding that the enhancement allegations were true, the jury assessed punishment at confinement for life in the Texas Department of Criminal Justice – Institutional Division.

A jury trial in Cause No. 755,973, involving appellant's alleged aggravated sexual assault on Mary Roberts, commenced on August 11, 1998. On August 19, 1998, the jury found appellant guilty as charged in the indictment. After finding that the enhancement allegations were true, the jury assessed punishment at confinement for life in the Texas Department of Criminal Justice – Institutional Division. Appellant filed a timely notice of appeal from both of his convictions, and counsel was appointed to assist him in that effort.

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[1] It is the author's policy not to refer to complainants by name. However, because of the factual circumstances of these cases that policy cannot be followed.

Issues Presented in the Scott Case (Cause No. 759,656):

Appellant argues that his conviction in the Scott case should be reversed, and he raises fifteen points of error. In his first and second points of error, appellant claims the evidence was both legally and factually insufficient to support his conviction for attempted aggravated sexual assault. The third point of error asserts that a new trial is warranted because "newly discovered evidence" shows that prosecutorial misconduct and a "conspiracy by corrupt police officers" tainted the State's case against appellant. The fourth point of error contends the trial court committed reversible error by admitting extraneous offense evidence of two other aggravated sexual assaults. The fifth through tenth points of error, raise several complaints of error alleged to have occurred in the jury selection process. The eleventh point of error alleges error in refusing to grant appellant's motion to recuse Judge Davies. The twelfth point of error contends the trial court erred by refusing to admit certain impeachment evidence. The thirteenth point of error claims the trial court erred in denying appellant's motion for continuance based on inadequate trial preparation. The fourteenth point of error contends the trial court committed reversible error by ordering appellant restrained in leg irons in front of the jury. Finally, the fifteenth point of error contends the trial court erred in limiting appellant's cross-examination of the complainant. We will address each point seriatim.

Legal Sufficiency

The first point contends the evidence was legally insufficient to support appellant's conviction for attempted aggravated sexual assault. In reviewing the legal sufficiency of the evidence, we view the evidence in the "light most favorable to the verdict" and determine only "whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Johnson v. State*, No. 1915-98, 2000 WL 140257, at *5 (Tex. Crim. App. Feb. 9, 2000) (citing *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979)); *see also Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996). We accord great deference "to the responsibility of the trier of fact [to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Clewis*, 922 S.W.2d at 133. We further presume that any conflicting inferences from

the evidence were resolved by the jury "in favor of the prosecution," and we must defer to that resolution. *See id*. at 133, n.13 (quoting *Jackson*, 443 U.S. at 326, 99 S.Ct. at 2793).

Specifically, appellant complains the evidence was legally insufficient because the complaining witness, Lisa Scott, had been convicted of prostitution and delivery of a controlled substance and was therefore "entirely unworthy of belief." Of course, the jury, as trier of fact, is the exclusive authority on the credibility of witnesses and the weight to be given to their testimony. *See* TEX. CODE CRIM. PROC. ANN. art. 38.04 (Vernon 1979); *Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. [Panel Op.] 1981). Therefore, it is for the jury to resolve any conflicts and inconsistencies in the evidence. *See Bowden v. State*, 628 S.W.2d 782, 784 (Tex. Crim. App. 1982). Even where there is no conflict, the jury may give no weight to some evidence, and thereby reject part or all of a witness's testimony. *See Beardsley v. State*, 738 S.W.2d 681, 684 (Tex. Crim. App. 1987); *see also Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991) (holding that the jury, as judge of credibility, may "believe all, some, or none of the testimony"). Because it is the province of the jury to determine the facts, any inconsistencies in the testimony should be resolved in favor of the jury's verdict in a legal sufficiency review. *See Johnson v. State*, 815 S.W.2d 707, 712 (Tex. Crim. App. 1991) (quoting *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988)).

Legal sufficiency of the evidence should be measured by the elements of the offense as defined by the hypothetically correct jury charge for the case. *See Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997).

> Such a charge would be one that 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 was tried . . . . [This standard] ensures that a judgment of acquittal is reserved for those situations in which there is an actual failure in the State's proof of the crime[.]

Id. In the Lisa Scott case, the elements of the crime alleged in the indictment were that appellant attempted to commit aggravated sexual assault by doing an act which amounted to more than mere preparation and which tended but failed to effect the commission of the offense intended. *See* TEX. PENAL CODE ANN.

§ 15.01(a) (Vernon 1994). A person commits the offense of aggravated sexual assault if he intentionally or knowingly causes the penetration of the anus or female sexual organ of another person by any means, without that person's consent, and that he further causes serious bodily injury or attempts to cause the death of the victim or another person in the course of the same criminal episode. *See* TEX. PENAL CODE ANN. § 22.021 (Vernon 1994 & Supp. 2000).

At trial, the State presented testimony from Officer Steven Hull of the Houston Police Department. Officer Hull testified that, on the morning of May 17, 1997, he was dispatched to a "burglary in progress" at a vacant house located at 3211 Campbell in Houston, Harris County, Texas. When he arrived at the scene, he "heard a female screaming for help." When Officer Hull shined his flashlight through one of the windows, he saw the complaining witness, Lisa Scott, nude and laying face down on the floor with appellant on top of her. Scott's hands were tied behind her back with a cord, and she was "pleading with him to stop, to leave her alone, to get off her." Officer Hull testified that he saw appellant use both of his hands to slam Scott's head on the floor at least three times. Officer Hull entered through the back of the house, drew his weapon, and ordered appellant to get off of the complainant, to which appellant reportedly responded, "And what if I don't?" Officer Hull observed that appellant "had his pants lowered, and he had his penis out." A pat-down search of appellant's pockets revealed a package of condoms and a small bottle of lotion. Officer Hull also found a ball of gauze that was used to gag the complainant and a plastic bag laying near her face. Officer Hull reported further that Lisa Scott was crying hysterically and that she had bruising on the side of her head.

The State also presented evidence from the complaining witness, Lisa Scott, who, conceded that she was currently in jail for delivery of a controlled substance, and that she had previously been convicted of drug possession and prostitution. She testified that, on the morning of May 17, 1997, she was working as a prostitute in the Campbell Street area in Houston's Fifth Ward neighborhood to support her drug habit when she first encountered appellant. Appellant reportedly asked Scott if she was interested in a "date" which, in the parlance of prostitution, means to have sex in exchange for money. Scott replied that she was interested, "if the price was right[.]" Scott stated that it was appellant's idea to go inside the vacant 3211 Campbell abode to discuss the transaction. Scott testified that, once in the abandoned house, appellant

put his hand around her neck and shoved her to the floor. Appellant instructed Scott not to scream or he would kill her. Scott said that she "didn't want any money at [that] point." Scott reported that appellant then took some material and a plastic bag from his pocket and tied it around her mouth. Scott testified further that appellant removed her clothes and tied her hands behind her back with some cord. Scott told the jury that she "felt a sense of death because anybody who would tie you up like that, if they didn't mean to kill you after they got through with you, you would be to a point where you would almost be dead[.]" In fear, Scott began to "make noise" and scream in a muffled way because of the gag. Scott also tried to tell appellant that she had AIDS but that, when she did so, appellant became violent and started banging her head on the floor. At that point, Scott saw Officer Hull's flashlight shining through the window.

Appellant testified, in his own defense, that, for $20, he persuaded Scott to let him tie her up so that they could engage in sexual intercourse "doggy style like they do in the porno movies." Appellant added that "that's what prostitutes are for[.]" Appellant commented that he was just "out to have fun, you know." Appellant explained that his way of "fun" was not "harmful" or "illegal," however, because "it's always consensual." In its case on rebuttal to appellant's version of his consensual activities, the State presented evidence that appellant had raped at least two other women, Debra Brooks and Mary Roberts, within the month prior to his attempted assault on Lisa Scott.

Debra Brooks testified that, on April 29, 1997, appellant asked her for a "date" and that, when she refused, he attacked her. Brooks, who admitted she had been incarcerated for a drug offense but denied she was a prostitute, stated that appellant pulled her off the street into the basement of an abandoned house. Brooks reported that appellant beat her head against a tree, tied her hands behind her back, and put a gag in her mouth. Appellant threatened to stab Brooks if she screamed. Appellant went through Brooks's purse, stealing some condoms and a small bottle of lotion (the same ones found in his possession when he attacked Lisa Scott). Brooks testified that appellant then proceeded to have forcible anal intercourse with her for several hours.

Mary Roberts, who had been convicted previously for both prostitution and for possession of a controlled substance, testified that appellant raped her on the night of May 4, 1997. Roberts stated that

she agreed to go to a motel with appellant after he asked her if she was "dating." Roberts told the jury that, on the way to the motel, appellant suddenly put a gun to her mouth and shoved her to a deserted area behind a store. Roberts testified that appellant tore off her clothes, put a gag in her mouth, tied her hands behind her back with a cord that he took from his pocket, and tied her legs between two small trees. Appellant then had anal intercourse with Roberts, repeatedly, and without her consent.

After reviewing the record in the light most favorable to the verdict, we find that a rational juror could have found that appellant intended to commit the offense of aggravated sexual assault on Lisa Scott, but that he failed to effect the commission of the offense intended. *See* TEX. PENAL CODE ANN. §§ 15.01(a), 22.021. The evidence is therefore legally sufficient to support appellant's conviction of attempted aggravated sexual assault beyond a reasonable doubt. *See Johnson*, 2000 WL 140257, at *5; *Clewis*, 922 S.W.2d at 129, 133. Accordingly, the first point of error is overruled.

Factual Sufficiency

The second point of error contends the evidence was factually insufficient to support appellant's conviction in the Scott case. In reviewing the factual sufficiency of the evidence, a reviewing court in Texas is empowered to consider and weigh all the evidence in the case and set aside the verdict and remand the cause for a new trial if it concludes that (1) the evidence is insufficient or if (2) the verdict is so against the great weight and preponderance of the evidence as to be manifestly unjust, regardless of whether the record contains some evidence of probative force in support of the verdict. *See Johnson*, 2000 WL 140257, at *7-8. In that regard, the Texas Court of Criminal Appeals has adopted the following standard:

> If a party is attacking the factual sufficiency of an adverse finding on an issue to which [he] did not have the burden of proof, [he] must demonstrate that there is insufficient evidence to support the adverse finding. In reviewing an insufficiency of the evidence challenge, the court of appeals must first consider, weigh, and examine all of the evidence that supports and that is contrary to the jury's determination. Having done so, the court should set aside the verdict only if the evidence standing alone is 'so weak' as to be clearly wrong and manifestly unjust. Alternatively, a party attacking a jury finding concerning an issue upon which he had the burden of proof must demonstrate that the adverse finding is actually against, *i.e.*, outweighed by, the great weight and preponderance of the available evidence.

See id. at *7 (citing W. Wendell Hall, *Revisiting Standards of Review in Civil Appeals*, 24 ST. MARY'S L.J. 1045, 1137 (1993), and William Powers and Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence*," 69 TEX. L. REV. 515, 519 (1991) (noting that "[t]he preferred terminology has the proponent claim that an unfavorable [negative] finding should be set aside because it is 'contrary to the great weight and preponderance of the evidence,' and has the opponent claim that an unfavorable [affirmative] finding was based on insufficient evidence.")).

As with his first point of error, appellant complains that the evidence was factually insufficient to support his conviction because the complaining witness, Lisa Scott, had been convicted of prostitution and delivery of a controlled substance and was therefore "entirely unworthy of belief." A factual sufficiency review requires that "contradictory testimonial evidence is within the sole province of the jury, because it turns on an evaluation of credibility and demeanor." *Cain v. State*, 958 S.W.2d 404, 408-09 (Tex. Crim. App. 1997). In that respect, a factual sufficiency analysis "can consider only those few matters bearing on credibility that can be fully determined from a cold appellate record." *See Johnson*, 2000 WL 140257, at *6. Such an approach occasionally permits some credibility assessment but usually requires deference to the jury's conclusion based on matters beyond the scope of the appellate court's legitimate concern. *See id.* (citing GEORGE E. DIX & ROBERT O. DAWSON, 42 TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 36.19 (Supp.1999)). Unless the available record clearly reveals that a different result is appropriate, an appellate court must defer to the jury's determination concerning what weight to give contradictory testimonial evidence because resolution often turns on an evaluation of credibility and demeanor, and those jurors were in attendance when the testimony was delivered. *See id.*

Notwithstanding appellant's assertion that Scott is lying, Scott's testimony was corroborated by Officer Hull's description of the scene upon his arrival at the 3211 Campbell location. Scott's testimony was further corroborated by testimony from Debra Brooks and Mary Roberts, each of whom described being approached for a "date," forcibly taken to an isolated location nearby, bound, gagged, stripped of their clothing, threatened, and subjected to anal intercourse against their will, all within a few weeks of Scott's assault. We conclude that the available record demonstrates that the evidence was neither insufficient nor the verdict so against the great weight and preponderance of that evidence as to be

manifestly unjust. *See Johnson*, 2000 WL 140257, at *7. Indeed, the evidence against appellant was overwhelming and certainly factually sufficient to support the jury's verdict in this case. Therefore, the second point of error is overruled.

Prosecutorial Misconduct/Conspiracy

The third point of error contends a new trial is warranted because "newly discovered evidence" shows that prosecutorial misconduct and a "conspiracy by corrupt police officers" have convicted appellant of a "crime he did not commit." In support of that claim, appellant points to an unsworn, undated newspaper article from the *Houston Chronicle* which features a local minister, declaring "'war' against corrupt Houston police officers[.]" The article reports on "police activity around Nettleton Park, near the corner of Tuam and Nettleton, where some youths say they have been unfairly targeted by police." In the article, the minister complains of certain unnamed officers whom he accused of "stealing money and sometimes narcotics from area youth." The article does not address appellant or his case.

The granting of a motion for new trial rests within the sound discretion of the trial court and we will not reverse that decision absent an abuse of discretion. *See State v. Gonzalez*, 855 S.W.2d 692, 696 (Tex. Crim. App. 1993). "A new trial shall be granted an accused where material evidence favorable to the accused has been discovered since trial." TEX. CODE CRIM. PROC. ANN. art. 40.001 (Vernon Supp.1999); *Fleming v. State*, 973 S.W.2d 723, 730 (Tex. App.—Beaumont 1998, no pet.). There are four requirements for obtaining a new trial based upon newly discovered evidence: (1) the newly discovered evidence was unknown to the movant at the time of trial; (2) the movant's failure to discover the evidence was not due to his want of diligence; (3) the evidence would probably bring about a different result in another trial; and (4) the evidence is admissible and not merely cumulative, corroborative, collateral or impeaching. *See Moore v. State*, 882 S.W.2d 844, 849 (Tex. Crim. App. 1994), *cert. denied*, 513 U.S. 1114 (1995) (citing *Drew v. State*, 743 S.W.2d 207, 226 (Tex. Crim. App. 1987)).

Although appellant argues the article is proof that his conviction was tainted by perjured testimony from police officers, the article makes no such showing. More importantly, appellant offers no specific explanation as to how this "new evidence" would bring about a different result in another trial, or that the

article would be admissible in a new proceeding. *See Moore*, 882 S.W.2d at 849; *Drew*, 743 S.W.2d at 226. Therefore, we hold the trial court did not err in refusing to grant a new trial on that basis. The third point of error is overruled.

Extraneous Offense Evidence

The fourth point of error argues the trial court committed reversible error by admitting extraneous offense evidence of two other aggravated sexual assaults allegedly committed by appellant. Appellant complains that the trial court abused its discretion by admitting evidence of these other assaults because those offenses were "not relevant to any contested matter in the litigation" or, even if they were, that the probative value of the evidence "was substantially outweighed by its inherent and unfair prejudice" to him. In response, the State argues appellant failed to preserve error on this issue. Alternatively, the State contends that the evidence of extraneous offenses was admissible because appellant "opened the door" by claiming that Lisa Scott consented to engage in sexual activity and to demonstrate appellant's intent to rape the victim.

Appellant testified during his direct examination that, because he never engaged in sexual activity with a woman unless he knew it was consensual, he had no intent to assault Scott in such a manner. After appellant made these remarks, the State announced its intent to introduce evidence concerning extraneous offenses because the defendant, through his testimony, had "opened the door[.]" Appellant objected on the grounds that the other offenses were "irrelevant." Without ruling on appellant's objection, the trial court allowed the State to question appellant about allegations that he had committed aggravated sexual assaults on Debra Brooks and Mary Roberts that were similar in nature to his attempted attack on Scott. Appellant admitted to having had intercourse with Brooks and Roberts but denied that it was without their consent. On redirect examination, appellant explained that Scott, Brooks, and Roberts were lying and that they were part of a conspiracy against him.

When the State called Brooks and Roberts as rebuttal witnesses, appellant lodged a "formal objection" on the grounds that he "didn't open the door for the extraneous offenses." The trial court found that appellant had indeed opened the door and overruled his objection. After appellant renewed his

objection on the grounds of relevancy, the trial court found that, in light of his testimony on the issue of consent, the probative value of Brooks and Roberts's testimony substantially outweighed "any danger of unfair prejudice."

Assuming that error was preserved, we turn to the issue of whether the extraneous offenses offered were relevant. *See Montgomery v. State*, 810 S.W.2d 372, 375 (Tex. Crim. App. 1990). The Texas Rules of Evidence provide that evidence is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." TEX. R. EVID. 401 (Vernon Supp. 2000). All relevant evidence is admissible, except as otherwise prohibited by law. *See* TEX. R. EVID. 402. By contrast, all evidence that is deemed irrelevant is inadmissible. *See id.* Here, the trial court correctly noted that appellant, by testifying that he had never had nonconsensual sexual intercourse, had raised the defensive theory of consent. To be convicted of sexual assault, an accused must have engaged in the conduct intentionally and knowingly without the complainant's consent. *See Rubio v. State*, 607 S.W.2d 498, 499 (Tex. Crim. App. 1980); *Webb v. State*, 995 S.W.2d 295, 297-98 (Tex. App.—Houston [14th Dist.] 1999, no pet.). When the defensive theory of consent is raised, a defendant necessarily disputes his intent to commit the act without the complainant's consent. *See Webb*, 995 S.W.2d at 298. The State may then offer extraneous offenses which are relevant to that contested issue. *See id.* Therefore, we find the extraneous offenses were relevant to the issue of his intent to sexually assault Lisa Scott, without her consent.

However, a finding that the proposed evidence is relevant does not end our inquiry. Appellant argues that, even if relevant, the prejudicial effect of the extraneous offenses clearly outweighed the probative value of the evidence, rendering it inadmissible. This argument is, in effect, an attempt to invoke Rule 404(b) of the Texas Rules of Evidence. That rule provides as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided upon timely request by the accused, reasonable notice is given in advance of trial of intent to introduce in the State's case in chief such evidence other than that arising in the same transaction.

TEX. R. EVID. 404(b). The Texas Court of Criminal Appeals has explained that Rule 404(b) requires a balancing of certain factors to determine whether character evidence is admissible under Texas Rule of Evidence 403. *See Mozon v. State*, 991 S.W.2d 841, 846 (Tex. Crim. App. 1999); *Montgomery*, 810 S.W.2d at 377. Under that rule, evidence, although relevant, may yet be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." TEX. R. EVID. 403.

In reviewing the trial court's balancing test determination under Rule 403, a reviewing court is to reverse the trial court's judgment "rarely and only after a clear abuse of discretion." *Mozon*, 991 S.W.2d at 847 (citing *Montgomery*, 810 S.W.2d at 389). The reviewing court, however, cannot simply conclude that "the trial judge did in fact conduct the required balancing and did not rule arbitrarily or capriciously." *Id*. The trial court's ruling must be measured against the relevant criteria by which a Rule 403 decision is made. *See id*. In other words, the reviewing court must look at the proponent's need for the evidence in addition to determining the relevance of the evidence. *See id*. The relevant criteria in determining whether the prejudice of an extraneous offense outweighs its probative value include the following:

> (1) how compellingly the extraneous offense evidence serves to make a fact of consequence more or less probable--a factor which is related to the strength of the evidence presented by the proponent to show the defendant in fact committed the extraneous offense;
>
> (2) the potential the other offense evidence has to impress the jury "in some irrational but nevertheless indelible way";
>
> (3) the time the proponent will need to develop the evidence, during which the jury will be distracted from consideration of the indicted offense;
>
> (4) the force of the proponent's need for this evidence to prove a fact of consequence, *i.e.*, does the proponent have other probative evidence available to him to help establish this fact, and is this fact related to an issue in dispute.

Mozon, 991 S.W.2d at 847 (citing *Santellan v. State*, 939 S.W.2d 155, 169 (Tex. Crim. App.1997) (citing *Montgomery*, 810 S.W.2d at 389-90)).

In reviewing the evidence presented to the trial court, we find that the extraneous offense evidence served to make a fact of consequence (*i.e.*, appellant's intent to sexually assault Lisa Scott without her consent) more probable. The State presented strong evidence to show that each of the extraneous offenses bore a striking resemblance to the attempted assault against Lisa Scott. Debra Brooks and Mary Roberts each offered a detailed description of being approached by appellant for a "date," forcibly taken to an isolated location nearby, bound, gagged, stripped of their clothing, threatened, and subjected to anal intercourse by force. These extraneous assaults all occurred within a few weeks of appellant's attempted assault on Scott. Although the extraneous evidence undoubtedly had an impression on the jury, a significant amount of time was devoted at trial to the issue of consent, both by appellant and the State. Indeed, the thrust of appellant's defense was to discredit Scott as a prostitute and drug addict who, because of her profession, had no credible way to withhold her consent to sexual intercourse. It follows that the State's need for the extraneous offense evidence to prove appellant's intent to assault Lisa Scott without her consent was strong. In light of these facts, we hold that the trial judge did not abuse her discretion in concluding that the danger of unfair prejudice did not substantially outweigh the probative value of this evidence. The fourth point of error is overruled.

Challenges for Cause

In his fifth and sixth points of error, appellant contends that the trial court erred in overruling his challenge for cause to juror no. 2, who allegedly had "expressed an opinion that the appellant was guilty, yet served on the jury as the jury foreman." The State argues appellant has not preserved error, if any, because he did not challenge the juror for cause.

To preserve error on a trial court's denial of a challenge for cause, "it must be demonstrated on the record that appellant asserted a clear and specific challenge for cause, that he used a peremptory challenge on that juror, that all his peremptory challenges were exhausted, that his request for additional strikes was denied, and that an objectionable juror sat on the jury." *Green v. State,* 934 S.W.2d 92, 105 (Tex. Crim. App. 1996), *cert. denied*, 520 U.S. 1200 (1997). A review of the record shows that appellant cannot meet the first of these threshold elements because he did not make a "clear and specific

challenge for cause" with respect to juror no. 2. Therefore, points five and six are not preserved for our review.

Motion to Quash the Venire

The seventh point of error contends the trial court erred in refusing to quash the entire venire after "a number of veniremen made prejudicial and inflammatory remarks expressing an opinion that the appellant was guilty." Specifically, appellant argues that "a number of the members of the jury panel expressed the sentiment that, based upon [his] questions and conduct while he was conducting voir dire of the panel, that he was guilty of the offense charged." The record shows that, after listening to appellant's repeated questioning on whether a person who meets the dictionary description of a "slut," "tramp," or "whore" can be raped, one juror finally stated:

> [A Juror:] You are wasting our time. You should have accepted counsel when they offered one to you.

Appellant responded by asking that juror for his or her number, presumably for the purpose of exercising a challenge, to which another juror volunteered,

> [A Juror:] You might want to add 49 to that [list of potential strikes] . . ., because before I was very – I tried to be as impartial as I could, and I had to say, as a possible victim. But after the kind of questions that you ask and some of the things you have implied, I thought you guilty and there is no intention in my mind —
>
> [Appellant:] You've found me guilty?
>
> [A Juror:] Add 31 to that, too.

At which point, a flurry of potential jurors volunteered a similar view that, in their minds, appellant was guilty. After the close of voir dire, but before the jury was selected, appellant made an oral "motion to quash the panel," based on the number of jurors who intimated they would find him guilty. The motion was denied, but the trial court granted appellant's challenges for cause each of the veniremembers who had purportedly pre-determined his guilt.

Following a denial of a defendant's motion to quash a jury panel because of alleged prejudicial remarks made before the venire, a defendant must prove the following to show harm:

(1) other members of the jury panel heard the remark(s);

(2) those who heard the remark(s) were influenced by it to the prejudice of the defendant; and

(3) the juror in question or any other juror who may have had a similar opinion was forced upon the defendant.

Calkins v. State, 780 S.W.2d 176, 188 (Tex. Crim. App 1986), *cert. denied*, 497 U.S. 1011 (1990) (citing *Johnson v. State*, 205 S.W.2d 773, 774-75 (Tex. Crim. App. 1947)).

Appellant has not identified any juror who may have had a similar opinion as to his guilt who was forced upon him. Therefore, the seventh point of error is overruled.

Limits on Voir Dire

In his eighth point of error, appellant complains the trial court erred by "limiting his voir dire examination of the panel to a period of 60 minutes." The State argues appellant has waived error on this issue.

Prior to voir dire, the trial court warned appellant in advance to "plan accordingly" and to use the time allotted to him "wisely." During his voir dire, the court further prompted appellant to make use of his time "to get information from the jurors." At the close of one hour, the trial court directed appellant to "conclude [his] remarks." In response, appellant conceded "Okay. That's it. That's all I need to know."

To preserve error in the context of limitations placed on the time to conduct voir dire, a defendant must object and make the following showing: (1) present to the trial court specific questions formulated in the manner they were to be asked, and (2) obtain an adverse ruling. *See Godine v. State*, 874 S.W.2d 197, 201 (Tex. App.—Houston [14th Dist.] 1994, no pet.). In this instance, appellant did not object to the limits placed on the amount of time given for voir dire, nor did he tender "specific questions" which remained to be asked of the jury. Appellant has therefore failed to preserve this issue for appellate review. The eighth point of error is overruled.

Remarks by the Trial Court

The ninth point of error claims the trial court committed reversible error "in making inflammatory and harmful comments and remarks to the jury panel about the appellant representing himself pro se [sic] and proceeding as his own lawyer." The State responds that no "harmful" comments were made and, even if any were, no objection was lodged, and so no error was preserved.

During voir dire, the trial court commented to the venire that appellant's decision to represent himself may be "unwise." Specifically, the record shows:

> Let me explain that if an individual chooses or indicates that what they want to do is represent themselves, there is a lengthy process of questioning and instruction that I give this person. I advise them of the disadvantages that they would be encountering and insist that they consider the many disadvantages and give them an opportunity to consider and reconsider that decision. *It may be an unwise decision, but it's their decision ultimately to make.* And that is what has happened in this case. Just so that you know, it's not just something that somebody walks in and says, "Well, I'm going to represent myself," and no one questions or gives them an opportunity to explore the education and all the different types of experience that comes into play here. So it is his decision.

Appellant did not object to the comment.

In Texas, the general rule is that, in order to preserve for appellate review a complaint about a trial judge's comments during trial, a party must object or otherwise bring the complaint to the trial court's attention so that the judge has an opportunity to correct the error. *See* TEX. R. APP. P. 33.1(a)(1) (Vernon Supp. 2000); *Sharpe v. State*, 648 S.W.2d 705, 706 (Tex. Crim. App. 1983). Because appellant did not object to the trial court's remark about his pro se status, he has waived error, if any. We further find that the trial court's comments were appropriate, in this context, to both explain appellant's decision to exercise his right to self-representation and to assure the jury that he had knowingly and voluntarily done so. Accordingly, appellant's ninth point of error is overruled.

***Batson* Challenge**

The tenth point of error contends the trial court erred in overruling appellant's challenge under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), when the State exercised

peremptory challenges against two black veniremembers (nos. 42 and 44). The State responds that it gave race-neutral explanations for each complained of strike. The State argues, therefore, this point of error should be overruled.

The analysis used to test a *Batson* challenge consists of three steps. The objecting party must first make a prima facie showing that the other party has used a peremptory challenge to remove a member of the venire on account of race. *See Ladd v. State*, 3 S.W.3d 547, 563 (Tex. Crim. App. 1999), *cert. denied*, __ U.S.__ (April 17, 2000) (citing *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 1770, 131 L.Ed.2d 834 (1995)). Once the objecting party has made a prima facie showing of purposeful discrimination (step one), the burden of production shifts to the other party to come forward with a race-neutral explanation (step two). *See id.* If a race-neutral explanation is proffered, the trial court must then decide (step three) whether the objecting party has proven purposeful discrimination. *See id.* Because the trial court's decision will turn largely on an evaluation of credibility, an appellate court must give that decision great deference and must not disturb it unless it is clearly erroneous. *See id.* (citing *Robinson v. State*, 851 S.W.2d 216, 226 (Tex. Crim. App. 1991), *cert. denied*, 512 U.S. 1246 (1994)).

In this case, appellant challenged the composition of the jury under *Batson* on the grounds that the State used peremptory challenges to exclude veniremembers 42 and 44 improperly based on race. The trial court responded as follows:

> [The Court:] Well, I'm going to take judicial notice of the fact that you appear to be African-American. I am going to take judicial notice of the fact that there are – appear to be two African-Americans . . . on the jury as seated. Based on your proffer, I do not find that you have established a prima facie case. However, given the circumstances with this defendant being pro se, I'm going to ask [the prosecutor] to give racially neutral explanations for his challenges of Jurors 42 and 44, if you can.

The prosecutor responded veniremember 42 had stated an opinion that prostitutes were "treated too lightly" under the law and so, given that he anticipated calling "persons with prostitution convictions in their backgrounds" as witnesses, the State exercised a peremptory challenge. The prosecutor added that he exercised a peremptory strike as to veniremember 44 because he stated "could not sit in judgment" of

others and that "he could not consider the full range of punishment." The trial court found the prosecutor's reasons "to be credible, that his explanations are racially neutral," and that the State "has not engaged in purposeful discrimination." Accordingly, the trial court denied appellant's *Batson* challenge.

At trial, appellant complained that veniremember 23, who was white, had expressed a similar sentiment about prostitutes similar to veniremember 42 but that veniremember 23 was not struck. In fact, the record shows that appellant struck veniremember 23 because she had worked at a rape crisis center. Appellant also complained that, veniremembers 2 and 3, who were both Caucasian, had expressed opinions similar to veniremember 44, but veniremembers 2 and 3 were not struck by the State. The record, however, does not support appellant's arguments. In fact, the record shows that, unlike veniremember 44, veniremembers 2 and 3 agreed they could sit in judgment and consider the full range of punishment. Thus, appellant's efforts to rebut the State's race-neutral reasons are without merit.

With respect to appellant's *Batson* challenge, there is no clear error on the face of the record. Thus, the trial court's decision to deny appellant's *Batson* objections is entitled to great deference. *Ladd*, 3 S.W.3d at 563. The tenth point of error is overruled.

Motion to Recuse/Disqualify

The eleventh point of error contends the conviction should be reversed because the trial court refused to grant the motion to recuse Judge Davies. The State contends that appellant's motion to recuse, which was styled as a "motion for disqualification," was properly denied as procedurally defective. The State also maintains that, because appellant failed to follow proper procedures, he has waived error. The State argues further that appellant's motion was properly denied because he presented no proof of his allegations to warrant a disqualification or recusal.

Motions for recusal or disqualification of a trial judge are governed by Rule 18a of the Texas Rules of Civil Procedure. *See Arnold v. State*, 853 S.W.2d 543, 544 (Tex. Crim. App. 1993) (holding that Rule 18a also applies to criminal cases). Rule 18a(a) requires a motion to recuse be verified. See TEX. R. CIV. P. 18a(a) (Vernon Supp. 2000). However, appellant's motion was not verified. A trial court is not required to entertain a motion to recuse that is not verified. *See Bruno v. State*, 916 S.W.2d 4, 7-8

(Tex. App.—Houston [1st Dist.] 1996, pet. ref'd); *Vargas v. State*, 883 S.W.2d 256, 259 (Tex. App.—Corpus Christi 1994, pet. ref'd). Further, failure to meet the verification requirement waives error. *See Bruno*, 916 S.W.2d at 7-8.

Moreover, appellant has not demonstrated that a disqualification or recusal was warranted. Notwithstanding the procedural defects found in appellant's motion, Judge Davies transferred the case to the administrative judge, as required by Rule 18a, and the Honorable Fred Edwards was assigned to hear the motion. At the hearing, appellant presented his own testimony that Judge Davies (1) refused to answer his questions concerning whether her daughter had been the victim of a sexual assault; (2) limited appellant to only one hour of voir dire; (3) denied his motions to hold the Harris County Sheriff's Department in contempt for failing to provide him with stamps and legal supplies; (4) quashed his subpoenas for "reporters for news agencies" so that he could generate "public interest" in his case; and (5) was "undignified, uncourteous, and impatient." Judge Edwards denied appellant's motion on the grounds that it did not meet the procedural requirements of the law. Judge Edwards further denied the motion because the allegations made by appellant were "not grounds for disqualification or for recusal."

The grounds for disqualification are expressly set out in the Texas Constitution. If a judge is disqualified under the constitution, he or she is absolutely without jurisdiction in the case, and any judgment rendered by that judge is void and subject to collateral attack. *See Degarmo v. State*, 922 S.W.2d 256, 267 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd) (citing *Lee v. State*, 555 S.W.2d 121, 124 (Tex. Crim. App. 1977)). Disqualification of a judge in a criminal case can occur when: (1) the judge is the injured party; (2) the judge has been counsel for the accused or the State; or (3) the judge is related to the defendant or complainant by affinity or consanguinity within the third degree. *See* TEX. CODE CRIM. PROC. ANN. art. 30.01 (Vernon 1981). Appellant has neither alleged nor proven any of the three grounds for disqualification. Therefore, we need only address appellant's complaint regarding recusal.

Recusal occurs in instances when "a judge voluntarily steps down and those instances in which a judge is required to step down on motion of a party for reasons other than those enumerated as disqualifying in the constitution." *Degarmo*, 922 S.W.2d at 267 (citing William W. Kilgarlin & Jennifer

Bruch, *Disqualification and Recusal of Judges*, 17 ST. MARY'S L.J. 599 (1986)). "When bias is alleged as a ground for disqualification or recusal, a trial judge ruling on the motion must decide whether the movant has provided facts sufficient to establish that a reasonable person, knowing all the circumstances involved, would harbor doubts about the impartiality of the trial judge." *Id.* (citing *Kemp v. State*, 846 S.W.2d 289, 305 (Tex. Crim. App. 1992), *cert. denied*, 508 U.S. 918 (1993)). Bias may be a ground for judicial disqualification or recusal when the bias is "of such character that it denies a defendant due process." *Id.* Bias does not constitute grounds for recusal unless it stems "from an extrajudicial source and result[s] in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *Id.* at 305-06 (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966)). Appellant presented no extrajudicial evidence which shows that Judge Davies had formed an impermissible opinion concerning appellant's case, or that she was otherwise prejudiced against him. Further, for reasons set out elsewhere in this opinion, appellant has not shown that his due process rights were violated.

The denial of a defendant's motion for recusal or disqualification is reviewable only for abuse of discretion. *See* TEX. R. CIV. P. 18a(f). On review, an appellate court should not reverse a trial judge whose ruling was within the zone of reasonable disagreement. *See Kemp*, 846 S.W.2d at 306. In this instance, appellant's complaints about Judge Davies are not of the sort which require a recusal or disqualification. Indeed, a review of the trial and pretrial record shows that Judge Davies worked to assist appellant at every turn, even when he refused to help himself or to consult with his court-appointed professionals. Therefore, we hold point of error eleven is without merit and is, therefore, overruled.

Impeachment Evidence

In his twelfth point of error, appellant complains that the trial court erred by refusing to admit certain impeachment evidence. At trial, appellant sought to introduce his own medical records in order to show he was not infected with the H.I.V. virus. Appellant argues this evidence was "crucial" for impeaching Lisa Scott, who testified that, in an effort to prevent appellant from assaulting her, she claimed to be H.I.V. positive. As noted above, relevant evidence is that which has a tendency to make the existence of a fact

that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *See* TEX. R. EVID. 401. The State points out that, because appellant was charged with *attempted* aggravated sexual assault, evidence tending to show that appellant did not penetrate Lisa Scott was not relevant. If a trial court determines that evidence is irrelevant, as it did here, the evidence is absolutely inadmissible and the trial court has no discretion to admit it. *See Webb v. State*, 991 S.W.2d 408, 418 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). Questions of relevance should be left largely to the trial court and should not be reversed absent an abuse of discretion. *See id.* Here, the record reflects no such abuse. Appellant's twelfth point of error is overruled.

Continuance

The thirteenth point of error claims the trial court erred in denying appellant's motion for continuance on the grounds that he had inadequate time to prepare for trial.[2] The Code of Criminal Procedure provides that a continuance may be granted "when it is made to appear to the satisfaction of the court that by some unexpected occurrence since the trial began, which no reasonable diligence could have anticipated, the applicant is so taken by surprise that a fair trial cannot be had." TEX. CODE CRIM. PROC. ANN. art. 29.13 (Vernon 1989). The granting or denial of a motion for continuance is vested in the sound discretion of the trial court. *See Duhamel v. State*, 717 S.W.2d 80, 83 (Tex. Crim. App. 1986), *cert. denied*, 480 U.S. 926 (1987). When reviewing the trial court's denial of a motion for continuance, we examine the circumstances presented to the trial court and determine whether it abused its discretion in denying the motion. *See Heiselbetz v. State*, 906 S.W.2d 500, 517 (Tex. Crim. App. 1995).

Appellant was arrested and indicted for attempted aggravated assault on Lisa Scott in May of 1997. Appellant was granted the right to proceed pro se, after lengthy hearings on that issue, in June of 1997. Since June 13, 1997, appellant had the assistance of stand-by counsel and, since June 27, 1997,

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[2] At trial, appellant also complained that a continuance was necessary so that he could locate a potential witness, Ronnie Scott - a purported "confidant" of the complaining witness. Redic's appellate brief is silent on this specific issue. Further, as the State correctly notes, this issue was not properly preserved for review. *See* TEX. R. APP. P. 33.1(a); *Varela v. State*, 561 S.W.2d 186, 1919 (Tex. Crim. App. 1978) (requiring a verified motion setting out testimony expected from a missing witness). Therefore, we do not consider this issue.

a court-appointed investigator to aid him with his trial preparation. Appellant filed a motion to discharge his stand-by counsel in September of 1997, and that motion was granted at appellant's insistence. Appellant's initial trial setting in the Lisa Scott case was for December 12, 1997. That trial was postponed until February of 1998, to allow for the resolution of an internal affairs investigation into appellant's allegations against the arresting officer. On February 16, 1998, appellant's original trial judge recused himself and the case was transferred to Judge Davies in the 177th District Court. On March 20, 1998, Judge Davies appointed new stand-by counsel to help appellant prepare for trial, which was re-set for May 4, 1998. In summary, appellant had almost a full year to prepare his case. Indeed, during that time, he peppered the court with nearly ninety (90) handwritten motions, pleadings, and miscellaneous requests.

To establish an abuse of discretion in this context, there must be a showing that the defendant was actually prejudiced by the denial of his motion for a continuance. *See Janecka v. State*, 937 S.W.2d 456, 468 (Tex. Crim. App. 1996), *cert. denied*, 522 U.S. 825 (1997); *Heiselbetz*, 906 S.W.2d at 511. Here, appellant complains that he was prejudiced by the trial court's refusal to grant a continuance because, if he had additional time, he would have been able to study a trial notebook given to him by his new standby counsel on April 24, 1998, and "would have been more adequately prepared to try his case." However, other than his own general poor performance at trial, appellant does not establish any specific prejudice to his case as required by Texas law. *See Janecka*, 937 S.W.2d at 468. That a party "merely desired more time to prepare does not alone establish an abuse of discretion." *Id*. We find no abuse of discretion. The thirteenth point of error is overruled.

Leg Irons

In his fourteenth point of error, appellant contends the trial court committed reversible error by ordering him restrained in leg irons in front of the jury. The record demonstrates that, on the third day of appellant's trial, May 8, 1998, appellant was brought to court in "leg irons" described as ankle cuffs secured by a "light chain." Outside the presence of the jury, the court's bailiff testified that, following a recess on the previous day, a security key to the holdover cell disappeared. A search of appellant's jail cell resulted in a physical confrontation. The key was found hidden in the holdover cell where only

appellant could have placed it. The bailiff testified that the incident indicated appellant was a "flight risk." Upon reflection, and after appellant assured the judge that he would behave, the trial court ordered the bailiff to remove appellant's chains before the jury entered the courtroom.

When a defendant is restrained while before the jury, his presumption of innocence is seriously infringed. *See Cooks v. State*, 844 S.W.2d 697, 722 (Tex. Crim. App. 1992), *cert. denied*, 509 U.S. 927 (1993); *Long v. State*, 823 S.W.2d 259, 282 (Tex. Crim. App. 1991), *cert. denied*, 505 U.S. 1224 (1992). However, if there is no evidence that the jury actually saw the defendant in shackles, the defendant is not harmed or prejudiced in any way. *See Cooks*, 844 S.W.2d at 722 (citing *Long*, 823 S.W.2d at 283). Because the record in this case shows that appellant's leg irons were removed before the jury entered the room, there is no evidence that the jury saw him in shackles and, thus, no violation of his presumption of innocence. The fourteenth point of error is overruled.

Limiting Cross-Examination

Appellant complains, in his fifteenth point of error, that the trial court committed reversible error by limiting his cross-examination of the complainant, Lisa Scott. Specifically, appellant argues he was not allowed to cross-examination Scott "about whether she had been raped before, or accused anyone of rape in the past."

The Sixth Amendment protects the defendant's right not only to confront the witnesses against him, but to cross-examine them as well. *See Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974). "[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Id*. at 316-17, 94 S.Ct. at 1110. The accused is entitled to great latitude to show a witness' bias or motive to falsify his testimony. *See Hodge v. State*, 631 S.W.2d 754, 758 (Tex. Crim. App. [Panel Op.] 1982). The Court of Criminal Appeals has stated:

> ... Evidence to show bias or interest of a witness in a cause covers a wide range and the field of external circumstances from which probable bias or interest may be inferred is infinite. The rule encompasses all facts and circumstances, which when tested by human

> experience, tend to show that a witness may shade his testimony for the purpose of helping to establish one side of the cause only.

Carroll v. State, 916 S.W.2d 494, 497-98 (Tex. Crim. App. 1996).

However, the right of cross-examination is not unlimited. The trial court retains wide latitude to impose reasonable limits on cross-examination. *See Delaware v. Van Arsdall*, 475 U.S. 673, 678, 106 S.Ct. 1431, 1434-35, 89 L.Ed.2d 674 (1986). The trial court must carefully consider the probative value of the evidence and weigh it against the risks of admission. *See Hodge*, 631 S.W.2d at 758. These potential risks include "the possibility of undue prejudice, embarrassment or harassment to either a witness or a party, the possibility of misleading or confusing a jury, and the possibility of undue delay or waste of time." *Id.*; *see also Chambers v. State*, 866 S.W.2d 9, 27 (Tex. Crim. App. 1993), *cert. denied*, 511 U.S. 1100 (1994); *Castillo v. State*, 939 S.W.2d 754, 758 (Tex. App.—Houston [14th Dist.] 1997, pet ref'd); *McKee v. State*, 855 S.W.2d 89, 91 (Tex. App.—Houston [14th Dist.] 1993, no pet.).

In this instance, we note that appellant, as a defendant proceeding pro se, was attempting to cross-examine the victim in a sexual assault case and so the potential risk for undue embarrassment and harassment was high. We note further that the trial court afforded appellant not one but two opportunities to question Scott about the events of May 17, 1997, as well as matters concerning her credibility, once during cross-examination and once as a witness for appellant's case-in-defense.

As for the questioning which appellant pursued, Rule 412 of the Texas Rules of Evidence provides that, in a prosecution for sexual assault or aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault, reputation or opinion evidence of the past sexual behavior of an alleged victim of such crime is not admissible. Specific instances of past sexual behavior are also inadmissible unless the defendant first informs the court out of the hearing of the jury prior to introducing any such evidence or asking any such question on cross-examination so that an in camera hearing can be held on the admissibility of such evidence. *See* TEX. R. EVID. 412(c). Evidence concerning a victim's prior accusation of sexual assault is inadmissible in the absence of evidence that the accusation was false. *See Lape v. State*, 893

S.W.2d 949, 956 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd). Because appellant failed to follow the procedures set out in Rule 412 of the Texas Rules of Evidence, and because he presented no evidence to show that Scott had falsely accused anyone else of rape, the trial court did not err in sustaining the State's objections to his questions regarding Lisa Scott's sexual history. Nor has he shown that the trial court's limitations on his ability to cross-examine Scott were unreasonable, given the circumstances.

Additionally, appellant complains he "was prevented from conducting full and vigorous cross-examination by the trial court's rulings sustaining the prosecutor's objections on relevance and materiality on a large number of occasions." Appellant points to twenty-four pages in the record and claims, without briefing each instance or demonstrating how each individual objection constituted error, that "the sheer number of objections by the prosecutor and the rulings in favor of the prosecutor by the trial court clearly shows that all the prosecutor had to do was stand up" and his right to fully cross-examine Lisa Scott was effectively limited. A conclusory allegation that the cumulative effect of two or more purported errors by the trial court denied appellant a fair trial is not a proper ground of error and presents nothing for review. *See* TEX. R. APP. P. 38.1(h); *see also Lape*, 893 S.W.2d at 953 (citing *Hollis v. State*, 509 S.W.2d 372, 375 (Tex. Crim. App. 1974); *Christopher v. State*, 819 S.W.2d 173, 178 (Tex. App.—Tyler 1991, pet. ref'd)). Thus, appellant's conclusory contention that the "sheer number of objections" sustained by the trial court deprived him of a fair proceeding need not be addressed. Appellant's fifteenth point of error is overruled.

Issues Presented in the Roberts Case (Cause No. 755,973):

Appellant also complains that his conviction for the aggravated sexual assault of Mary Roberts should be reversed, and he raises six points of error in support of that assertion. In his first point of error in the Roberts case, appellant argues that his right to "due process was violated" because the jury's verdict was "based upon the prosecutor's passive use of perjured testimony." The second point of error raised by appellant contends that the trial court committed reversible error by overruling appellant's challenge for cause to veniremember 4, who expressed prejudice against appellant because he was acting as his own attorney. In his third point of error, appellant complains that the trial court abused its discretion in

overruling appellant's challenge for cause to veniremember 4, who was "biased against the [a]ppellant as a matter of fact." Appellant's fourth point of error alleges that the prosecutor "conducted improper voir dire of the jury when he used a 'hypothetical' fact situation of the sexual assault of a prostitute to commit the jurors to return a guilty finding." Appellant's fifth point of error accuses the trial court of "making inflammatory and harmful comments and remarks to the jury panel about the appellant representing himself pro se [sic] and proceeding as his own lawyer." Finally, appellant's sixth point of error contends that the trial court committed reversible error when it overruled appellant's objection to the prosecutor's closing punishment argument "which heaped personal abuse and insults on the [a]ppellant in front of the jury." We will address these points seriatim.

Perjured Testimony

The first point of error contends the conviction should be reversed because the prosecutor made "passive use of perjured testimony before the jury." In particular, appellant alleges there is a discrepancy between the testimony given by Officer Hull in the Roberts case and the testimony that he gave during the trial of the Scott case. The State responds that there is no contradictory testimony present in the record and therefore no perjury. The State argues further that, even if there was a discrepancy between Hull's testimony, any such discrepancy was insufficient to show that the testimony was perjured.

Appellant points to testimony given by Officer Hull during the Scott case on whether he knew Mary Roberts. When asked by appellant during the Scott case if Hull was "familiar with a Mrs. Mary Roberts," Hull replied that he was not. At the trial of the Roberts matter, Hull admitted that he had, in fact, "searched for evidence" in the Roberts case, but that "he did not investigate the case." Appellant complains that Hull's testimony shows that he was "simply lying to the jury" about this role and knowledge of the Roberts case. Appellant concedes that "there is nothing in the present record to show any intentional prosecutorial misconduct," but complains nevertheless that his conviction cannot stand because of Hull's alleged "lie."

A person commits perjury if, with intent to deceive and with knowledge of the statement's meaning, he makes a false statement under oath. *See* TEX. PENAL CODE ANN. § 37.02 (Vernon 1994); *Hicks v. State*, 864 S.W.2d 693, 694 (Tex. App.—Houston [14th Dist.] 1993, no pet.). Here, appellant has

not shown that Officer Hull made a false statement. Whether Officer Hull actually knew Roberts and whether he helped to investigate or collect evidence in her case are separate questions. Because appellant has not demonstrated that Officer Hull intentionally testified falsely about whether he was familiar with Roberts, appellant has not shown the verdict was the product of perjured testimony.[3] The first point of error is overruled.

Jury Selection

The second and third points of error contend the trial court erred in overruling appellant's challenge for cause to veniremember 4, who allegedly expressed prejudice against appellant because he was acting as his own attorney. Appellant claims further that the trial court abused its discretion in overruling appellant's challenge for cause to veniremember 4, who was allegedly "biased against appellant as a matter of fact" for that same reason. The State responds that appellant failed to properly preserve error on either of these contentions.

To preserve error on a trial court's denial of a challenge for cause, "it must be demonstrated on the record that appellant asserted a clear and specific challenge for cause, that he used a peremptory challenge on that juror, that all his peremptory challenges were exhausted, that his request for additional strikes was denied, and that an objectionable juror sat on the jury." *Green v. State*, 934 S.W.2d 92, 105 (Tex. Crim. App. 1996), *cert. denied*, 520 U.S. 1200 (1997). Appellant has failed to meet several of these requirements.

At voir dire, veniremember 4 stated that he would "have a problem with a defendant asking questions of the accuser, especially in a case where it's sexually oriented." When the trial court asked the veniremember if he could "put that aside and base [his] verdict on the witness's answers," he answered that he "might be able to, but I would think that I would have difficulty keeping it separate." Appellant moved to strike the veniremember for cause on the grounds that he said "he didn't think he would be able to listen

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[3] Alternatively, the discrepancies or deviations, if any, between the testimony given by Officer Hall during the Scott case and the statements that he made during the Roberts case were minor and do not support a finding of perjury. *See Losada v. State*, 721 S.W.2d 305, 311 (Tex. Crim. App. 1986); *Velasquez v. State*, 941 S.W.2d 303, 308 (Tex. App.—Corpus Christi 1997, pet. ref'd).

to me." The trial court denied the challenge, and appellant exercised a peremptory strike on the veniremember. Appellant now argues the trial court's denial constituted reversible error because the veniremember "was biased and prejudiced"and "in favor of the State as a matter of law."

Although appellant exhausted his peremptory challenges, he did not request an additional one as required to preserve error. *See Green*, 934 S.W.2d at 105. Nor has appellant alleged or shown that an objectionable juror sat on the jury. *See id*. Therefore, these issues are not preserved. The second and third points of error are overruled.

Improper Voir Dire

In his fourth point of error, appellant contends that the prosecutor "conducted improper voir dire of the jury when he used a 'hypothetical' fact situation of the sexual assault of a prostitute to commit the jurors to return a guilty finding." The State contends appellant has not preserved error on this issue.

The record shows that, during voir dire in the Roberts case, the prosecutor questioned the members of the panel about whether a prostitute could be a victim of aggravated sexual assault, as follows:

> [Prosecutor:] What I want to pose to you in terms of a hypothetical question, let's say we're talking aggravated sexual assault and we're talking about proving that lack of consent, talking about by physical force and violence, talking about using and exhibiting a deadly weapon or firearm, what I want to pose to you is a situation where you have say a prostitute, somebody that is a prostitute, somebody convicted of prostitution or somebody in that situation in that line of work in that lifestyle.
>
> ....
>
> Does that cause you, the fact that the person had either been convicted or will tell you that they are a prostitute or had been engaged in that lifestyle, that line of work, would that close your mind off to the possibility that that person could in fact still be the victim of an aggravated sexual assault?

Appellant did not object to this portion of the State's voir dire. To preserve error for review, a party must make a timely and specific objection that is followed by an adverse ruling. *See* TEX. R. APP. P. 33.1(a)(1). Because appellant did not object, he has failed to preserve the issue of whether the State improperly questioned the venire for review. The fourth point of error is overruled.

Remarks by the Trial Court

Appellant's fifth point of error alleges that the trial court erred in "making inflammatory and harmful comments and remarks to the jury panel about the appellant representing himself pro se [sic] and proceeding as his own lawyer." Specifically, appellant points out that, during the jury voir dire, the trial judge remarked that appellant's decision to act as his own lawyer, while legal, was not "the smartest thing to do." The State argues that, by failing to object, appellant once again has waived error.

The record shows that the trial court's comments were made in the following context:

> In this case Mr. Redic has chosen to represent himself. That is his right under our law. He has been thoroughly advised and it *may very well not be the smartest thing to do*. He's also been told after extensive discussions that the rules of evidence and the rules of court procedures apply every bit as much to Mr. Redic as they do to all lawyers in the case. The fact that he is not a lawyer does not entitle him to any extra credit. The fact that he's not a lawyer and representing himself does not mean that he should receive extra punishment. The point of it is that the jurors' decisions in this case must be reached upon the evidence that they receive here in the courtroom and not influenced by anyone else.

The record confirms that no objection was lodged by appellant in response to the trial court's comment.

As noted above, to preserve for appellate review a complaint about a trial judge's comments during trial, a party must object or otherwise bring the complaint to the trial judge's attention so that the judge has an opportunity to correct the error. *See* TEX. R. APP. P. 33.1(a)(1); *Sharpe v. State*, 648 S.W.2d 705, 706 (Tex. Crim. App. 1983). Because appellant did not object to the trial court's statement, this issue is not preserved for our review. The sixth point of error is overruled.

Statements Made in Closing Arguments

In his sixth point of error, appellant contends the trial court erred in overruling appellant's objection to the prosecutor's closing punishment argument "which heaped personal abuse and insults on the [a]ppellant in front of the jury." Specifically, the objection relates to the prosecutor's characterization of appellant as a "predator waiting in the bushes." The State contends that error, if any, was not preserved and, further, that the prosecutor's characterization was supported by the evidence.

The record shows that the following exchange occurred during the prosecutor's argument in the punishment phase of the trial:

> [Prosecutor:] He could have chosen any category. That's the category [of victim] he chose. [Reward] him with anything less than life in prison and you reward him for the choice he made that he just happened to choose the right victim. What you've done is you blame that victim for being in the wrong place at the wrong time, for a situation that that person couldn't control *because he is a predator waiting in the bushes*.
>
> [Appellant]: Objection, Your Honor. Malicious and – predator. He called me a predator. That's malicious.
>
> [The Court]: Objection is overruled.

The State contends that, although an objection was lodged, appellant failed to state any legal grounds in support of that objection. *See* TEX. R. APP. P. 33.1(a)(1)(A) (requiring that a complaining party state the grounds for a ruling on the objection).

The evidence adduced at trial demonstrated appellant traversed Houston's Fifth Ward neighborhood at night dressed in a black sweatsuit, that he overpowered and abducted several women and then brutally attacked these women. We find the prosecutor's characterization of appellant as a "predator" is more than adequately supported by the evidence. *See Burns v. State*, 556 S.W.2d 270, 285 (Tex. Crim. App.), *cert. denied*, 434 U.S. 935 (1977) (holding that the State's characterization of the defendant as an "animal" was supported by evidence of his "bestial aspect"). Therefore, the sixth point of error is overruled.

Conclusion

Based on the foregoing, all of the points of error raised by appellant in this consolidated appeal are overruled, and the judgments of the trial court are affirmed.

/s/
Charles F. Baird
Justice

Judgment rendered and Opinion filed June 22, 2000.

Panel consists of Justices Fowler, Edelman, and Baird.*

Do Not Publish — TEX. R. APP. P. 47.3(b).

* Justice Baird sitting by assignment.