Affirmed and Opinion filed November 10, 1999.

In The

Fourteenth Court of Appeals

NO. 14-98-00301-CR

CEDRIC S. DEMERY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause No. 700,299

O P I N I O N

A jury convicted Cedric S. Demery, appellant, of sexual assault, and the jury assessed his punishment at three years imprisonment. In five issues, appellant contends the trial court erred in: (1) failing to declare a mistrial after the complainant gave a nonresponsive answer that she had taken a polygraph examination; (2) in failing to grant a mistrial when the complainant gave numerous self-serving, nonresponsive answers; (3) in failing to include the lesser included offense of public lewdness in the jury charge; (4) in failing to instruct the jury regarding the limited admissibility of extraneous offenses at the

punishment stage; and (5) in failing to admit previously redacted sections of a document into evidence. We affirm.

Appellant was Jimmie Perry's parole officer, and on April 21, 1995, he contacted her and told her to report to him. Appellant had previously made sexual advances to her, which she had rejected. Fearing appellant would revoke her parole, Perry reported to appellant at the parole office. After their meeting, appellant forced Perry to perform oral sex on him. Perry was afraid appellant would revoke her parole if she did not comply with appellant's demand. A few weeks later, appellant went to her house and tried to take her for a ride in his car. Fearing another sexual attack, Perry refused to go. Thereafter, Perry reported these incidents to appellant's supervisor, Charles Pressler, and sexual assault charges were filed against appellant for sexual assault on Ms. Perry.

In his first issue, appellant contends the trial court erred in refusing to declare a mistrial after Perry volunteered that she had been given a polygraph test when the State asked her if the statement she had given a police officer was in her own words. The trial court instructed the jury to disregard Perry's remark, and overruled appellant's motion for a mistrial. Perry's statement was nonresponsive, and was not repeated nor emphasized by the State later in the trial. The results of Perry's polygraph were never mentioned to the jury. Appellant cites *Kugler v. State*, 902 S.W.2d 594 (Tex.App.–Houston[1st Dist.] 1995, pet. ref'd) as authority for the proposition that the trial court's refusal to grant a mistrial was error. Unlike this case, *Kugler* involved a nonresponsive answer disclosing that the defendant refused to submit to a polygraph exam when one was offered. *Id.* at 595-596.

Numerous cases have held that where a witness gives a nonresponsive answer that mentions that a polygraph test was offered or taken, but does not mention the results of such test, there is no error in failing to grant a mistrial. *See Richardson v. State*, 624 S.W.2d 912, 914-915 (Tex.Crim.App.1981) (no error where complainant stated in a nonresponsive

answer to prosecutor's question that she had taken a polygraph exam); *Hannon v. State*, 475 S.W.2d 800, 803 (Tex.Crim.App.1972) (no error where witness gave nonresponsive answer that indicated he had been put on a lie detector machine); *Roper v. State,* 375 S.W.2d 454, 457 (Tex.Crim.App.1964) (no error where officer disclosed that defendant had been given a polygraph exam where answer was nonresponsive and did not reflect the result of the test); *Richardson v. State,* 823 S.W.2d 710, 712 (Tex.App.--San Antonio 1992, pet. ref'd) (no error where officer disclosed in a nonresponsive answer to prosecutor's question that defendant submitted to polygraph exam); *Barker v. State*, 740 S.W.2d 579, 583 (Tex.App.--Houston [1st Dist.] 1987, no pet.) (no error where officer stated in a nonresponsive answer to prosecutor's question that the defendant had been offered a polygraph exam). In these cases, the courts held that an instruction to disregard the answer was sufficient to reduce any persuasive effect that the answers might have had in the minds of the jurors. *Kugler*, 902 S.W.2d at 596. In this case, we find there was no "apparent design to elicit the answer given" and no bad faith was evident. *Id.* Therefore, we find the trial court did not err in refusing to grant appellant a mistrial. We overrule appellant's contentions in issue one.

In issue two, appellant contends the trial court erred in failing to grant a mistrial when the complainant continued to give self-serving, nonresponsive answers. Appellant contends these answers were designed to bolster the testimony of Perry, and were prejudicial. Appellant states in his brief that the trial court properly sustained objections to these answers, and instructed the jury to disregard them. Appellant asks this court to check numerous pages in the record for alleged errors, but does not tell us what specific statements were improper nor why. Appellant has nowhere in this point applied the law to the facts thus showing why he should prevail in this instance. For these reasons we hold this point of error to be inadequately briefed under Texas Rules of Appellate Procedure

38.1(h); *Smith v. State*, 907 S.W.2d 522, 532 (Tex.Crim.App. 1995). We overrule appellant's contentions in issue two.

In issue three, appellant contends the trial court erred in refusing to include public lewdness as a lesser included offense to sexual assault in the jury charge. Whether a charge on a lesser included offense is required is determined by a two-pronged test. *Schweinle v. State*. 915 S.W.2d 17, 18 (Tex.Crim.App. 1996). First, we must determine whether the offense constitutes a lesser included offense. *Id.* Article 37.09, Texas Code of Criminal Procedure, provides that an offense is a lesser included offense if, inter alia: "it is established by proof of the same or less than all the facts required to establish the commission of the offense charged." *Id.* Second, the lesser included offense must be raised by the evidence at trial. *Id.* In other words, there must be some evidence which would permit a rational jury to find that if guilty, the defendant is guilty only of the lesser offense. Anything more than a scintilla of evidence from any source is sufficient to entitle a defendant to submission of the issue. *Id.*

The Texas Penal Code defines public lewdness as follows:

> (a) A person commits an offense if he knowingly engages in any of the following acts in a public place or, if not in a public place, he is reckless about whether another person is present who will be offended or alarmed by his:
>
> (1) act of sexual intercourse;
>
> (2) act of deviate sexual intercourse;
>
> (3) act of sexual contact; or
>
> (4) act involving contact between the person's mouth or genitals and the anus or genitals of an animal or fowl.

TEX. PEN. CODE ANN. § 22.07 (Vernon 1994 & Supp. 1999).

The elements of a sexual assault are:

(a) A person commits an offense if the person:

(1) intentionally or knowingly:

(B) causes the penetration of the mouth of another person by the sexual organ of the actor, without that person's consent;

* * * * * * * * * *

(b) A sexual assault under Subsection (a)(1) is without the consent of the other person if:

* * * * * * * * * *

(8) the actor is a public servant who coerces the other person to submit or participate.

TEX. PEN. CODE ANN. § 22.011(a)(1), (b)(8) (Vernon 1994 & Supp. 1999)

Public lewdness requires an element that the offense of sexual assault does not–the commission of the act of deviate sexual intercourse or sexual contact *in a public place or recklessness* about whether another person is present who will be offended or alarmed by the offense. The offense of sexual assault requires an element that the offense of public lewdness does not–the commission of the *offense without the other person's consent.* We hold that the proof needed for a charge of public lewdness is not included in the proof necessary to establish sexual assault. Because appellant's argument does not satisfy the first prong of the lesser included offense test, we overrule appellant's contention in issue three.

In issue four, appellant contends that the trial court should have given a limited admissibility instruction under rule 105(a), Texas Rules of Evidence, at the punishment phase with respect to any extraneous offenses introduced into evidence by the State. Appellant cites *Rankin v. State,* 974 S.W.2d 707 (Tex.Crim.App. 1996) as authority that such limiting instructions should be given simultaneously with the extraneous offense

evidence. *Rankin* involved rule 105(a) for extraneous evidence introduced at the guilt-innocence phase and is not applicable to this case which involves extraneous evidence "relevant to sentencing" at the punishment phase.

This case involves the applicability of Rule 105(a) which states in part:

> When evidence which is admissible . . .for one purpose but not admissible . . . for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly; but in the absence of such request the court's action in admitting such evidence without limitation shall not be a ground for complaint on appeal.

TEX. R. EVID. 105(a).

At the punishment-phase charge conference, the appellant requested a limiting instruction in the charge, as follows, in pertinent part:

> I am requesting on the record that prior to any extraneous conduct coming out that the court make a limiting instruction as to extraneous offenses as to how the jury would view it based upon the law. And I'd cite to the court a case . . . . The case is Randall Alan Rankin . . . . The admissibility is limited – it does not prove the fact that it, in fact, occurred; that it's there to aid the jury in determining under 404(b) whether or not there is same or similar conduct and, of course, our general objection would be that under 404(b) and 609 that the offense does not involve a final conviction, that the prejudicial effect outweighs the probative value of the evidence and that it would only have as its purpose to inflame the minds of the jury. And there is no issue as to identity in the case.

The prosecutor responded that she was not proceeding under 404(b) or 609(f), but was proceeding under section 3, article 37.07, of the Texas Code of Criminal Procedure, permitting the admission of extraneous unadjudicated offenses at the punishment stage.

The trial court indicated he thought appellant wanted him to orally admonish the jury of the standard "reasonable doubt" instruction in the jury charge prior the introduction of any extraneous offenses. Appellant did not offer to clarify his request. The trial court denied appellant's request, and appellant objected without specifying a reason. Thereafter, there was an off-record discussion. Appellant did not ask the court for a specific instruction limiting the evidence to a specific purpose at the punishment stage.

Rule 105(a) stands for the proposition that should the trial court admit evidence for a limited purpose, then upon timely request, the court should instruct the jury that the evidence is limited to whatever purpose the proponent has persuaded the trial court to allow for its admission. *Montgomery v. State*, 810 S.W.2d 372, 387 (Tex.Crim.App.1990). The instruction requested in this case wholly fails to inform the trial court as to what limitation should be placed upon the evidence; the requested instruction is not sufficiently specific and preserves nothing for review. *See Puente v. State*, 888 S.W.2d 521, 528 (Tex.App.-San Antonio 1994, no pet.). We overrule appellant's contention in issue four.

In issue five, appellant contends the trial court erred in refusing to admit into evidence a portion of State's exhibit number 6 that had been redacted at appellant's request. While cross-examining Mr. Pressler about entries on the unredacted portion of the exhibit, appellant apparently decided he wanted to question Mr. Pressler about the portion he had previously requested be redacted. The State objected, and the trial court sustained the State's objection. Appellant argued to the trial court the "rule of optional completeness" applied and that if part of a document had been admitted, the rest of it could be admitted upon request under rule 107, Texas Rules of Evidence. On appeal, appellant contends the ruling of the trial court refusing to admit the redacted portion of exhibit 6 was error. Appellant has not preserved this issue for review. Although appellant claims he "offered the portion of the document under the rule of optional completeness," it is not in the record. Appellant stated that the redacted portion "amounts to the date that Ms. Perry reappeared

at the parole office which would have been May 15th, as I understand, and she did not take a urine test . . . ." The appellant never made an offer of proof or bill of exception to establish what portions of the redacted exhibit 6 appellant wished to use in his cross-examination of Pressler, nor is the subject matter of the redacted portion clear from the trial record. The appellant has not met his burden of establishing what evidence he intended to offer which was excluded by the trial court. *See* TEX. R. EVID. 103(a)(2); *Stewart v. State*, 686 S.W.2d 118, 122 (Tex.Crim.App.1984); *Kapuscinski v. State* 878 S.W.2d 248, 249 (Tex.App.-San Antonio 1994, pet. ref'd). We overrule appellant's contentions in issue five.

We affirm the judgment of the trial court.

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Bill Cannon
Justice

Judgment rendered and Opinion filed November 10, 1999.

Panel consists of Justices Sears, Cannon, and Draughn.*

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

* Senior Justices Ross A. Sears, Bill Cannon, and Joe L. Draughn sitting by assignment.