paragraphs alleging prior convictions were true, and assessed punishment at imprisonment for life.

We affirm.

Appellant's sole ground of error alleges that the court's charge was fundamentally defective because it permitted a conviction without the finding of a culpable mental state. The portion of the charge that the appellant claims is defective reads as follows:

> Now, if you find from the evidence beyond a reasonable doubt that on or about the 29th day of December, 1984, in Harris County, Texas, the defendant Larry Jerome Garrett, then and there unlawfully, intentionally or knowingly by the use of physical force or violence or by threatening the present use of force or violence against Juliet Alice Bixby, and Juliet Alice Bixby believed that the defendant had the present ability to execute the threat, and Juliet Alice Bixby was not the spouse of the Defendant, did cause the penetration of the vagina of Juliet Alice Bixby by placing his sexual organ in the vagina of Juliet Alice Bixby and without the consent of Juliet Alice Bixby and in the course of the same criminal episode the Defendant used or exhibited a deadly weapon, namely, a knife, then you will find the defendant guilty of aggravated sexual assault.
>
> Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the Defendant of aggravated sexual assault.

Appellant argues that the charge permitted the jury to convict appellant if they found that appellant unlawfully used physical force to sexually assault complainant, without their finding that appellant intentionally or knowingly committed such acts.

[redacted] Two courts have held that the term "unlawfully," when used prior to "intentionally or knowingly" in a jury charge, is surplusage and that such a charge does not permit the jury to convict without finding a culpable mental state. *Tatum v. State,* 666 S.W.2d 181 (Tex.App.—Corpus Christi 1983, no pet.); *Grice v. State,* 635 S.W.2d 890, 893 (Tex.App.—Dallas 1982, pet. ref'd). We adopt these holdings as the law of this case. Even if the inclusion of the word "unlawfully" was objectionable, it would not constitute reversible error in this case.

The complainant testified that she and her boyfriend had befriended appellant, an ex-convict. On the night of the sexual attack, appellant came to her apartment. He left for a while, came back, talked, and smoked a cigarette. He then picked up a knife in the kitchen and sexually assaulted the complainant. There was no question of identity. After the assaults ceased, and while appellant was lying on the bed, the complainant dressed, grabbed the knife, and ran for help. Shortly thereafter, the police arrested appellant at his apartment.

Appellant's defense consisted of his own testimony claiming that the rape never happened. He claimed that he and complainant, a local pediatrician, were smoking cocaine mixed with ether, and that complainant "freaked out" and ran from the apartment. He denied having intercourse with complainant that night, but claimed that he had intercourse with her on a prior occasion. The jury was entitled to believe the complainant's version of the incident, and if there was error at all, it was not egregious. *See Almanza v. State,* 686 S.W.2d 157 (Tex.Crim.App.1984).

Appellant's ground of error is overruled, and the judgment is affirmed.

[redacted]

Kenneth Leroy McINTIRE, Jr., Appellant,

v.

The STATE of Texas, Appellee.

No. 13-82-231-CR.

Court of Appeals of Texas, Corpus Christi.

Dec. 19, 1985.

[redacted]

Jeffrey W. Jones, Harlingen, for appellant.

Ben Euresti, Jr., Brownsville, for appellee.

Before NYE, C.J., and KENNEDY, J.

OPINION

NYE, Chief Justice.

The Court of Criminal Appeals remanded this case to this Court with instructions that we abate the appeal and remand the cause to the trial court for a preliminary hearing on the feasibility of hearing a motion for new trial. *McIntire v. State*, 698 S.W.2d 652 (Tex.Crim.App.1985).

As noted in the opinion delivered by the Court of Criminal Appeals, the cause is returned to the trial court for a preliminary hearing to determine the feasibility of holding a hearing wherein appellant may obtain a free, fair and full presentation of evidence in support of his motion for new trial. At such hearing, the burden will be on appellant to prove, by a preponderance of the evidence, that a free, fair and full presentation of evidence is not feasible.

Should appellant sustain his burden of showing the infeasibility of the presentation of evidence, at the hearing on the motion for new trial, or if after hearing on motion for new trial appellant's motion is granted, the cause should then be docketed in the trial court for trial. In the event the trial court should rule that the hearing on motion for new trial is feasible, conduct such hearing but then deny the motion, appellant may appeal to this Court any asserted error in the feasibility hearing, and any assertion of abuse of discretion in denial of the motion for new trial.

The appeal is accordingly abated so that the trial court may comply with the above instructions.

UNITED STATES FIRE INSURANCE COMPANY, Appellant,

v.

Michelle Renee KELLY, by Next Friend Louise THOMAS, Appellee.

No. 05-85-00770-CV.

Court of Appeals of Texas, Dallas.

Dec. 19, 1985.

Rehearing Denied Jan. 20, 1986.

Newton J. Jones, Robert D. Allen, Vial, Hamilton, Koch & Knox, Dallas, for appellant.

John D. Crawford, Dallas, for appellee.

Before STEPHENS, ALLEN and GUILLOT, JJ.

GUILLOT, Justice.

Appellant, United States Fire Insurance Company ("USFI"), appeals from a June 3, 1985 judgment awarding appellee, Michelle Renee Kelly, periodic worker's compensation benefits for the death of her father and awarding periodic payments of attor-