Opinion filed December 30, 2016

In The

Eleventh Court of Appeals

No. 11-14-00357-CR

LEONARDO LOPEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 106th District Court

Dawson County, Texas

Trial Court Cause No. 13-7306

M E M O R A N D U M O P I N I O N

The jury convicted Leonardo Lopez of burglary of a habitation, attempted murder, and aggravated assault. *See* TEX. PENAL CODE ANN. §§ 30.02, 19.02, 15.01, 22.02 (West 2011). Appellant pleaded true to one enhancement paragraph, and the jury assessed his punishment at confinement for ninety-nine years for each count; the sentences are to run concurrently. In accordance with an agreement with

Appellant, the State elected to vacate the aggravated assault conviction. Appellant presents three issues on appeal. We affirm.

In Appellant's first and second issues, he argues that the evidence is insufficient to sustain his conviction of burglary and attempted murder. Specifically, Appellant contends that the evidence is insufficient to prove that he did not have consent to enter the residence or that he intended to commit murder. In his third issue, Appellant asserts that the trial court erred when it denied his motion for a mistrial.

We review the sufficiency of the evidence, whether denominated as a legal or as a factual sufficiency claim, under the standard of review set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010); *Polk v. State*, 337 S.W.3d 286, 288–89 (Tex. App.—Eastland 2010, pet. ref'd). Under the *Jackson* standard, we examine all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and any reasonable inferences from it, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010).

Appellant and Iris Daniela Lucio dated from 2009 until September 22, 2011, when Appellant "got aggressive" and broke the windows out of Iris's parents' home. Iris was staying at her parents' home at the time. Although Iris was able to have a friendly relationship with Appellant after their dating relationship ended, that friendship ended around January 2012.

On August 18, 2013, Iris was at her parents' home in Lamesa. Her brother, Jose Lucio, and her son, Achilles, were also there. That night, Jose left the house at approximately 10:00 p.m. and was away from the house for approximately seven to ten minutes. After Jose left the house, Iris went into Achilles's room to turn a movie

on for him. When Iris returned to the living room, she felt a blow to the side of her head. Iris turned around and saw Appellant. Iris asked Appellant what he was doing there, and Appellant said, "I'm here to kill you, b---h. I told you I was going to kill you, b---h."

Appellant grabbed Iris in a bear hug, and she saw that he had a knife. They fell on the couch as Iris kicked and screamed. Appellant stopped the assault on his own and left the house through a back bedroom window. When Jose walked in the house, he found Iris covered in blood; Achilles was screaming. Iris told Jose that Appellant had stabbed her. Appellant had stabbed Iris at least fifteen times, and he also broke three of her ribs. Iris was in the hospital for seven days, three or four days of which were spent in intensive care.

Iris testified that she did not invite Appellant to come into the house and that she did not know he was in the house. Iris's mother, Susie Ann Lucio, also testified that Appellant did not have permission to enter the house. Further, Appellant knew that he was not welcome to enter the house.

Under Section 30.02 of the Texas Penal Code, a person commits burglary if, "without the effective consent of the owner," he "enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault." PENAL § 30.02(a)(1).

In his first issue, Appellant argues that the evidence is insufficient to prove that Appellant did not have the effective consent of the owner. Appellant contends that he knocked on the door and looked at the street and that, when he turned back to the door, the door was open. He saw Iris inside "flipping channels" and walked inside. Appellant testified at trial, "I don't know if [Achilles] let me in or Iris let me in, but I know I was let in." However, Appellant admitted at trial that, on the night of the assault, he was high on methamphetamine and had been up for five or six

days. Again, Iris testified that she did not invite him in and did not know that he was there. Also, as we have said, Iris's mother said that Appellant did not have permission to enter the house.

The jury, as the factfinder, can accept or reject any or all of the testimony of each witness. *Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. [Panel Op.] 1981). The factfinder is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *Wise v. State*, 364 S.W.3d 900, 903 (Tex. Crim. App. 2012). Accordingly, viewing all the evidence in the light most favorable to the verdict, we conclude that a rational trier of fact could have found all of the elements of the offense of burglary beyond a reasonable doubt. Therefore, the evidence is sufficient to support Appellant's conviction for burglary, as charged in Count One. We overrule Issue One.

In his second issue, Appellant argues that the evidence is insufficient to prove that Appellant is guilty of attempted murder. Appellant asserts that he did not have the intent to commit murder or any other felonies. Further, Appellant contends that he did not even have the intent to harm or assault Iris. Appellant testified at trial that he did not bring a knife with him to Iris's house and that he does not know where the knife came from. Appellant explained at trial that he thought he was hitting Iris, not stabbing her, and that when he saw the blood, he stopped.

A person commits murder if he "intentionally or knowingly causes the death of an individual" or if he "intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual." PENAL § 19.02. Section 15.01 of the Texas Penal Code provides that a person commits the offense of criminal attempt if, "with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended." PENAL § 15.01. Intent can be inferred from

the acts, words, and conduct of the accused, and it can also be inferred from the extent of the injuries. *Ex parte Weinstein*, 421 S.W.3d 656, 668 (Tex. Crim. App. 2014); *Patrick v. State*, 906 S.W.2d 481, 487 (Tex. Crim. App. 1995). The evidence established that Iris was stabbed more than fifteen times, had three broken ribs, and was in the hospital for seven days, three or four of which were in the ICU. Further, Iris testified at trial that Appellant told her he was there to kill her and that she believed he was going to kill her. Accordingly, viewing all the evidence in the light most favorable to the verdict, we conclude that a rational trier of fact could have found all of the elements of the offense of attempted murder beyond a reasonable doubt. Therefore, the evidence is sufficient to support Appellant's conviction. We overrule Issue Two.

In his third issue, Appellant argues that the trial court erred when it denied his motion for a mistrial. Ariel Rodriguez, a police officer for the Lamesa Police Department at the time of the assault, testified for the State. Officer Rodriguez testified that he knew who Appellant was because he had "dealt with him also in the past." Appellant objected, and the trial court sustained his objection and specifically instructed the jury, "The statement that was just made, you are to disregard. It is not to be considered in evidence in any way." Appellant moved for a mistrial, but the trial court denied it.

We review a trial court's denial of a motion for mistrial under an abuse of discretion standard. *Hawkins v. State*, 135 S.W.3d 72, 76–77 (Tex. Crim. App. 2004). Only highly prejudicial and incurable errors will necessitate a mistrial. *Simpson v. State*, 119 S.W.3d 262, 272 (Tex. Crim. App. 2003). To evaluate whether a trial court abused its discretion in refusing to grant a mistrial, a reviewing court considers the three *Mosley* factors: (1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the certainty of conviction absent

the misconduct. *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998). Prejudice is incurable only when "the reference was clearly calculated to inflame the minds of the jury or was of such damning character as to suggest it would be impossible to remove the harmful impression from the jurors' minds." *Rojas v. State*, 986 S.W.2d 241, 250 (Tex. Crim. App. 1998).

The State argues that the prompt instruction to disregard the statement was sufficient to cure the improper answer. Additionally, the State directs us to additional evidence that was admitted without objection and showed that the police had had prior contact with Appellant. In its brief, the State discusses evidence that Appellant had damaged Iris's car when he saw her with her new boyfriend, that Appellant had broken into Jose's home and attacked Iris's friend, and that Jose had contacted the police to have a criminal trespass warning issued to Appellant. Further, the State points out that Officer Rodriguez testified without objection that he had had prior contact with Iris and Appellant that related to harassment allegations and also to a second car-damaging incident; both involved Appellant.

We agree with the State. Generally, a prompt instruction to disregard cures error caused by an improper question and answer regarding an extraneous offense. *Ovalle v. State*, 13 S.W.3d 774, 783 (Tex. Crim. App. 2000). We are to presume the jury followed the trial court's instruction to disregard. *See Williams v. State*, 937 S.W.2d 479, 490 (Tex. Crim. App. 1996). Upon request from Appellant, the trial court immediately gave an instruction to disregard the statement. Further, in light of the overwhelming evidence presented against Appellant, the severity of the comment was minor. Additionally, as the State points out, there was additional evidence admitted without objection that showed prior contact between Appellant and the police. *See Rogers v. State*, 853 S.W.2d 29, 35 (Tex. Crim. App. 1993).

Therefore, the trial court did not err when it denied Appellant's motion for a mistrial. We overrule Issue Three.

We affirm the judgments of the trial court.

JIM R. WRIGHT
CHIEF JUSTICE

December 30, 2016

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.