

Affirmed and Memorandum Opinion filed January 28, 2010.



In The

**Fourteenth Court of Appeals**

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NO. 14-08-00175-CR

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**JOHN WESLEY HAMILTON, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 179th District Court  
Harris County, Texas  
Trial Court Cause No. 1061991**

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**MEMORANDUM OPINION**

John Wesley Hamilton appeals his conviction for aggravated robbery. In a single issue, he contends the trial court erred by denying his request for a mistrial after the State asked a witness an improper question. Because all dispositive issues are settled in law, we issue this memorandum opinion and affirm. *See* Tex. R. App. P. 47.4.

## I. BACKGROUND

According to the State's evidence, Cynthia Zeedyk was manager of a used car dealership where appellant occasionally performed various jobs. After Zeedyk closed the dealership for the evening of March 18, 2006, appellant, who had been working that day, requested a ride to another location. Zeedyk complied and waited while he briefly entered the other business. When they returned to the dealership, Zeedyk noticed appellant's nephew at the gate. Zeedyk allowed appellant and his nephew to enter the lot because there were ongoing discussions regarding the nephew's potential purchase of a car. After Zeedyk deactivated the alarm, appellant shot Zeedyk several times and repeatedly asked about the location of the money. Zeedyk replied that the owner had the money and she did not have any. Zeedyk gave appellant the keys to the office, and he briefly left her sight. Appellant then returned and shot Zeedyk several more times. After removing car keys and cash from her person, appellant left the dealership in Zeedyk's truck. Despite her multiple gunshot wounds, Zeedyk summoned the police. Zeedyk later discovered appellant also took various vehicle records stored in the office. Zeedyk survived her wounds and described the incident at trial. A jury convicted appellant of aggravated robbery, and the trial court assessed a life sentence.

## II. ANALYSIS

At trial, appellant's sister attempted to provide an alibi by claiming he was home at the time of the incident. Appellant made his request for a mistrial after the following portion of the State's cross-examination of this witness:

Q. And, therefore, from Day One, when he gets locked up in custody, you must have run to the police and said, Hey got a mistake; my brother's innocent, and y'all locked him up, and I can tell you he didn't commit the crime because he was with me?

A. No.

Q. No. Why not?

A. Because, once again, my daughter had gotten molested by a family member; and I was going back and forth to court trying to handle that.

Q. Okay. Well, then certainly when you were up here in court one of those days, you passed by the District Attorney's Office in the same building and said, Hey, I got to tell y'all, you made a mistake here; you've got my brother in custody, and he's innocent because he was with me? He didn't commit this crime, right? Did you do that?

A. No, I didn't.

Q. And why not?

A. Once again, I was going through with my daughter. My daughter was twelve years old, and I was going through that with her; and, I mean, that's where my mind was at the time.

Q. Okay. But one of the days where you didn't have to go to court and there was nothing going on, did you take five minutes or so to dial up the phone, call somebody, call the media, Hey, I want to put a story about how they have my brother wrongfully locked up in jail? He didn't do anything? He was with me?

A. No, no, I didn't.

Q. So, your brother has been locked up in custody for the entire two years since he was arrested?

[DEFENSE COUNSEL]: I object, Judge, that that's improper.

THE COURT: Sustained.

[DEFENSE COUNSEL]: I ask --

[STATE]: Judge, it goes to her motive.

THE COURT: Ladies and gentlemen, disregard the last response of this witness and the last question by the prosecutor.

[DEFENSE COUNSEL]: And I move for a mistrial.

THE COURT: Denied.

Appellant argues he was entitled to a mistrial because the State's question suggesting he had been incarcerated for the two years since his arrest destroyed his constitutional rights to presumption of innocence and trial by impartial jury.

We review the trial court's denial of a motion for mistrial under an abuse-of-discretion standard. *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004). We must uphold the trial court's ruling if it was within the zone of reasonable disagreement. *Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007). A mistrial is required only in extreme circumstances when the prejudice is incurable. *Id.* (citing *Hawkins*, 135 S.W.3d at 77). Although our review of the denial of a mistrial involves determining whether error occurred, our consideration involves most, if not all, the same factors that attend a harm analysis. *See Archie*, 221 S.W.3d at 699–700 (citing *Hawkins*, 135 S.W.3d at 77). To determine whether a trial court abused its discretion by denying a mistrial, we apply the test articulated in *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998), which requires balancing three factors: (1) severity of the misconduct (magnitude of the prejudicial effect of the prosecutor's remarks); (2) measures adopted to cure any harm from the conduct (efficacy of any cautionary instruction by the trial court); and (3) certainty of conviction absent the misconduct (strength of the evidence supporting the conviction). *See Archie*, 221 S.W.3d at 700.

In this case, these factors weigh in favor of the trial court's ruling. We note that the trial court instructed the jury to disregard the last question in the above-cited exchange, which directly inquired about appellant's incarceration. In fact, the witness did not answer the question because the trial court immediately sustained appellant's objection. However, the State had already elicited, without objection or instruction to disregard, testimony suggesting appellant had been in custody since his arrest. Therefore, despite the trial court's instruction, we cannot necessarily conclude the jury disregarded any reference to appellant's incarceration.

Nevertheless, we conclude the references to incarceration, whether in the last question or through other testimony elicited without objection or instruction to disregard, did not warrant a mistrial. It is obvious from the context that the references were intended to discredit the alleged alibi provided by the witness and not to imply appellant must have committed the robbery or he would not have been in custody; the State

emphasized that appellant's sister allowed him to remain in custody for two years without ever raising the alibi. Further, the State did not mention the incarceration in closing argument although it challenged the alleged alibi on other grounds.

Appellant contends the effect on the jury from the State's references to his incarceration was analogous to a defendant's appearance in front of a jury in handcuffs, shackles, or jail clothing. *See Randle v. State*, 826 S.W.2d 943, 944–45 (Tex. Crim. App. 1992) (holding that compelling defendant to stand trial in prison clothes, over timely objection, violates rights to fair trial and presumption of innocence); *Long v. State*, 823 S.W.2d 259, 282 (Tex. Crim. App. 1991) (stating defendant suffers infringement of constitutional presumption of innocence when jury sees him in handcuffs or shackles). We disagree that any effect on the jury from the brief suggestion appellant was incarcerated equates to the recurring impression created when a defendant appears throughout trial in handcuffs, shackles, or jail clothing.

Moreover, the certainty of conviction absent the references to incarceration also weighs against granting a mistrial. Zeedyk testified she had known appellant for approximately six years before the incident. At trial, she unequivocally identified him as her assailant. Additionally, while Zeedyk was still at the car lot shortly after the incident, she identified appellant as her assailant to the police and the owner of the dealership. Further, a friend of Zeedyk testified she arrived at the dealership to visit Zeedyk on the evening of the incident. The friend saw appellant lock the gate of the dealership. When she asked about Zeedyk's whereabouts, appellant replied she had left. He then entered Zeedyk's truck and drove away, traveling the wrong way down a freeway feeder road. Accordingly, the jury heard significant evidence to support its finding of guilt irrespective of any effect on the jury from references to appellant's incarceration.

In sum, the trial court did not abuse its discretion by denying appellant's request for a mistrial. We overrule appellant's sole issue and affirm the trial court's judgment.

/s/

Charles W. Seymore  
Justice

Panel consists of Chief Justice Hedges and Justices Seymore and Sullivan.

Do Not Publish — Tex. R. App. P. 47.2(b).