**Affirmed and Memorandum Opinion filed April 15, 2010.**


**In The**

# Fourteenth Court of Appeals

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**NO. 14-08-00419-CR**

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**JOSHUA ROYCE MAULDIN, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 212th District Court**
**Galveston County, Texas**
**Trial Court Cause No. 07CR1560**

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## MEMORANDUM OPINION

Rejecting his insanity defense, a jury found Joshua Royce Mauldin guilty of injury to a child, and affirmatively found he used or exhibited a deadly weapon, a microwave oven, during the commission of the offense. The jury assessed punishment at twenty-five years' confinement and a $10,000 fine. In two issues, Mauldin argues the trial court erred in the punishment phase by allowing the State to (1) elicit inadmissible and irrelevant

testimony from its own and Mauldin's expert witnesses and (2) make improper jury argument without curative instruction by the court. We affirm.

I

In May 2007, Mauldin and some of his family were staying at a motel in Galveston. The charge against Mauldin arose from injuries he inflicted on his two-month-old daughter while he was alone with her in the motel room. When Mauldin's family returned to the room, someone called 911. According to the responding paramedic, the baby had second and third degree burns on her face, ear, and hand. After providing several versions of what had happened to the baby, Mauldin ultimately confessed he had thrown her from bed to bed, shaken her, punched her, put her in the motel-room safe, took her from the safe, put her in the refrigerator, and took her from refrigerator and put her in the microwave. He forced her in, shut the door and turned the microwave on for ten seconds.

A jury found Mauldin guilty, rejecting his theory he was insane at the time of the incident. The jury also found he had used a deadly weapon, i.e., the microwave, during the commission of the offense.

At the punishment phase, the State called Dr. Harry Faust, a psychiatrist who saw Mauldin at the county jail in May 2007; Dr. Shana Khawaja, a clinical psychologist with the Texas Department of Criminal Justice; Sergeant Don Hollingsworth, a Warren, Arkansas, investigator who testified about a 2006 domestic-violence incident involving Mauldin; and Heather Croxton, who was currently caring for the baby. Mauldin called Dr. Michael Fuller, an associate professor of psychiatry who testified about Mauldin's potential for rehabilitation and amenability to treatment in the community; and Mauldin's mother who testified about supporting him if he were placed on community supervision.

The court instructed the jury that the range of punishment was five years to ninety-nine years or life and a fine not to exceed ten thousand dollars. The State argued for life imprisonment. The defense argued, among other matters, that Mauldin suffered

from mental illness, had not caused a death, and community supervision was appropriate punishment. The jury assessed punishment at twenty-five years' confinement and a $10,000 fine.

II

In issue one, Mauldin argues "[t]he trial court erred by allowing the State to elicit inadmissible and irrelevant testimony from an expert witness of what the proper punishment should be." When reviewing a trial court's decision to admit or exclude evidence, we apply an abuse-of-discretion standard. *Ramos v. State*, 245 S.W.3d 410, 417–18 (Tex. Crim. App. 2008). A trial court does not abuse its discretion if its evidentiary ruling is within the "zone of reasonable disagreement," and is correct under any legal theory applicable to the case. *Winegarner v. State*, 235 S.W.3d 787, 790 (Tex. Crim. App. 2007); *Bargas v. State*, 252 S.W.3d 876, 889 (Tex. App.—Houston [14th Dist.] 2008, no pet.). Because the trial court is usually in the best position to decide whether evidence should be admitted or excluded, we must uphold its ruling unless its determination was so clearly wrong as to lie outside the zone within which reasonable persons might disagree. *See Winegarner*, 235 S.W.3d at 790; *Hartis v. State*, 183 S.W.3d 793, 801–02 (Tex. App.–Houston [14th Dist.] 2005, no pet.).

Regardless of whether the judge or the jury assesses punishment, the prosecution and the defense may offer evidence on "any matter the court deems relevant to sentencing." Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) (Vernon Supp. 2009). Admissibility of evidence at the punishment phase of a non-capital trial is a function of policy, not a question of logical relevance. *Ellison v. State*, 201 S.W.3d 714, 719 (Tex. Crim. App. 2006). Relevancy in this context is "'a question of what is helpful to the jury in determining the appropriate sentence for a particular defendant in a particular case.'" *Id.* (quoting *Rogers v. State*, 991 S.W.2d 263, 265 (Tex. Crim. App. 1999)). Evidence of a defendant's suitability for community supervision is admissible when a defendant seeks community supervision. *See id.* at 722.

Mauldin nevertheless complains about the State's direct examination of Dr. Faust and its cross-examination of Dr. Fuller relating to community supervision. Mauldin first objects to the following question directed to Faust:

> Q [by the Prosecutor] And with your experience of this defendant, Dr. Faust, do you believe probation to be an appropriate punishment for him?
>
> [Defense Counsel]: I object to relevance.
>
> THE COURT: Overruled.
>
> Q You can answer.
>
> A [by Faust] I can't answer that. I think his behavior is unpredictable. Maybe more so than the average.

Mauldin contends the prosecutor improperly asked for an expert recommendation regarding punishment and that such testimony is inadmissible under *Sattiewhite v. State*, 786 S.W.2d 271, 290 (Tex. Crim. App. 1989). Even if one assumes the question was improper (and we do not so assume), the mere asking of an improper question will not constitute reversible error unless the question results in obvious harm to the accused. *Brown v. State*, 692 S.W.2d 497, 501 (Tex. Crim. App. 1985); *Yarbrough v. State*, 617 S.W.2d 221, 228 (Tex. Crim. App. 1981).

In the present case, Faust did not make a recommendation for or against probation, but merely responded that Mauldin's behavior was unpredictable, a matter about which he had previously testified without objection.[1] The prosecutor's question thus did not result in new facts being introduced into the trial. *See Richard v. State*, 830 S.W.2d 208, 215 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd) (stating unanswered question did not inject new facts into trial). In short, we do not conclude the prosecutor's question had a "substantial and injurious effect or influence in determining the jury's verdict." *See King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997).

[1] Mauldin also did not object to Faust's response to the specific question about which Mauldin now complains.

Second, Mauldin complains about the following cross-examination of Fuller, Mauldin's expert witness:

> Q [by the Prosecutor] In summer of 2005, did you testify in a case involving the Defendant Martha Burke?
>
> A [by Fuller] I did, yes.
>
> Q Did you testify in the punishment of that case?
>
> [Defense Counsel]: I'm going to object to relevance, Judge.
>
> A I do not know but I may well have.
>
> Q In that case, did you not also recommend - - let me back up.
>
> Do you remember the facts of that case?
>
> A All of them probably not. The important ones, yes.
>
> Q This Defendant was charged with aggravated sexual assault of a child with a deadly weapon; is that correct?
>
> A That is correct.
>
> Q And she stabbed her five year old daughter twice; is that correct?
>
> A While she slept, yes.
>
> Q The daughter was sleeping, yes.
>
> A Yes.
>
> Q And in the punishment phase of that case, did you not also recommend to the jury that she could be treated within the community?
>
> [Defense Counsel]: I'm going to object to relevance, Your Honor.
>
> THE COURT: Overruled.
>
> A Well, I think that the mother - -
>
> [The Prosecutor]: I'm going to object to nonresponsive.

THE COURT: What did he say? I didn't hear what you said, Doctor.

A I said well, I think.

THE COURT: Overruled.

A May I continue?

THE COURT: Yes

A I suggested that she could be treated in the community with a list of about 30 provisions that would make that reasonably safe.

Q Thank you, Dr. Fuller. But the bottom line in that case where she stabbed her five year old twice you also recommended that she could be treated within the community; is that correct?

A That's correct.

Q When does it get bad enough to send somebody to prison, Dr. Fuller?

A It frequently gets bad enough to send people to prison depending on the circumstances of the case.

Q Wasn't that bad enough when Martha Burke stabbed her daughter twice?

[Defense Counsel]: I object. Argumentative, Your Honor.

THE COURT: Sustained.

Q It's not bad enough when Mr. Mauldin placed his child in a microwave oven?

A Did I say that or did you?

Q I'm asking you when does it get bad enough - -

A I have never stated that either one of these persons did not deserve punishment. My focus is whether or not they can be safely, clinically managed in [sic] community and under what conditions. And under those conditions and with those stipulations, the answer is yes.

Mauldin contends this testimony was irrelevant and counter to the rule in *Sattiewhite*. In *Sattiewhite*, the court of criminal appeals held that an expert witness could not express an opinion on what punishment should be assessed. 786 S.W.2d at 290–91. Mauldin does not explain how the preceding testimony constituted an opinion (at least not an adverse one) on the punishment to be assessed in the present case.

Moreover, on direct examination, Mauldin had asked Fuller whether prison was an appropriate place for him or whether he could benefit and be rehabilitated in society. Fuller responded, "It's my personal belief that . . . from a management psychiatric social perspective that Joshua could be relatively easily [treated] compared to many treated successfully in the community." Fuller also testified he was absolutely not "one of these individuals that just wants to help everybody."

The State's line of questioning about which Mauldin complains was an obvious attempt to show Fuller's bias and impeach his credibility. Texas Rule of Evidence 611(b) provides that a party may cross-examine a witness on any matter relevant to any issue in the case, including credibility. Tex. R. Evid. 611(b). The trial court has discretion regarding the extent of cross-examination of a witness on the issue of credibility or bias. *See Cantu v. State*, 939 S.W.2d 627, 635 (Tex. Crim. App. 1996). Given Fuller's testimony on direct examination, we conclude the trial court did not abuse its discretion in permitting the cross-examination about which Mauldin complains. *See Sparks v. State*, 943 S.W.2d 513, 515–17 (Tex. App.—Fort Worth 1997, pet. ref'd) (concluding trial court acted within its discretion in permitting cross-examination of defendant's expert regarding prior testimony in another trial despite defendant's arguments expert's prior testimony (1) was not inconsistent with present testimony, (2) was inadmissible hearsay, (3) involved collateral matters, and (4) involved specific instances of conduct).

For the preceding reasons, we overrule Mauldin's first issue.

III

In issue two, Mauldin argues "[t]he trial court erred by allowing the State to make improper jury arguments, without the trial court making a curative instruction to disregard to the jury as requested." His complaint rests on the following two segments of the State's argument:

> And defense counsel comes up here and says, well, she didn't die. Thank God, she did not die. But we do not reward people for not killing their children when they try because that's what he was doing. We don't reward people for that.
>
> [Defense Counsel]: I'm sorry. I'm sorry. Judge, I move to strike that and object to the statement he was trying to kill his daughter.
>
> THE COURT: Sustained.
>
> . . .
>
> Dr. Fuller came back and testified. I don't know when a crime is bad enough for Dr. Fuller to recommend somebody go to prison. He previously testified in a case where a woman stabbed her sleeping daughter. That she should be out on probation.
>
> [Defense Counsel]: Your Honor, I'm going to object to improper communication.
>
> THE COURT: Sustained.

After the court sustained Mauldin's objections to each argument, he made no further request of the court. Mauldin did not request an instruction for the jury to disregard the argument and did not move for a mistrial. The prosecutor resumed argument without any additional instructions or comments by the court.

To complain on appeal about erroneous jury argument—including erroneous jury argument so prejudicial an instruction to disregard could not cure it—an appellant must show he lodged an objection during trial and pressed that objection to an adverse ruling. *Johnson v. State*, 233 S.W.3d 109, 114 (Tex. App.—Houston [14th Dist.] 2007, no pet.)

(citing *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex.Crim.App.1996)). Mauldin did not do so. [2] He has not preserved his improper-jury-argument issue for review.

For the preceding reasons we overrule Mauldin's second issue.

* * *

Having overruled the appellant's two issues, we affirm the judgment.

/s/ Jeffrey V. Brown
Justice

Panel consists of Justices Yates, Seymore, and Brown.

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[2] Mauldin attempts to obviate the fact he did not pursue either objection to an adverse ruling. He contends his motion "to strike" was a request for an instruction to disregard, and complains the court failed to act on his request. He also contends "[t]rial counsel was not allowed the opportunity, from the record to request a mistrial, because Ms. Vandiver immediately resumed her closing argument, without further comment from the trial court." He provides no authority to support his purported exceptions to the need to pursue an objection to an adverse ruling.