Affirmed and Memorandum Opinion filed May 18, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-00927-CR

IRA MONROE HENDON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Cause No. 06CR1590

MEMORANDUM OPINION

Appellant, Ira Monroe Hendon, was charged with sexual assault of the complainant, A. A. Tex. Penal Code Ann. § 22.011 (Vernon Supp. 2009). The jury found appellant guilty and sentenced him to two years' confinement in the Institutional Division of the Texas Department of Criminal Justice. Appellant now challenges this conviction on appeal. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The complainant first met appellant when he served as a substitute teacher for her fourth grade class. Over the years, the complainant and appellant, who are both deaf,

became close friends. According to the complainant, the two met for dinner and drinks on several occasions prior to the incident at issue in this appeal.

On March 6, 2006, the complainant and appellant met at a restaurant for drinks and they stayed until the restaurant closed at 2:00 a.m. When they left the restaurant, they got into appellant's truck and drove to a park in League City, Texas. Appellant testified that she refused to have sex with appellant, but he then forced himself upon her inside appellant's truck. The complainant struggled with appellant and appellant put his hand on her throat. According to complainant, appellant then calmed down and asked her not to tell anyone he had tried to hurt her. The complainant then told appellant she needed to use the restroom. After initially refusing to let the complainant go, appellant relented and allowed her to go if she was quick. The complainant got out of appellant's truck and began running. Appellant chased and eventually caught up with complainant. Appellant hit the complainant, knocking her down. Appellant then pulled off the complainant's pants and underwear and started having sex with her. When appellant struggled and tried to close her legs, appellant became angry and started choking her. Appellant stopped his assault only when a car came by and two men got out of the car. The complainant eventually got into the car with the two men.

Elizabeth Guisti, a Sexual Assault Nurse Examiner, performed a rape examination on the complainant. Guisti testified that complainant was menstruating and her tampon was present during the assault. Guisti collected the tampon and submitted it as evidence with the rape kit. Pamela Mikulcik, a Department of Public Safety forensic scientist, testified that she performed an apparent blood and semen test on complainant's tampon and found about thirty sperm, which she compared to appellant's DNA sample. Mikulcik then testified that appellant could not be excluded as the contributor and that if appellant did not leave the DNA on the tampon, the probability would essentially be 1 in 26.626 trillion that his DNA would match that found on the complainant's tampon.

The jury found appellant guilty and sentenced him to two years' confinement in the Institutional Division of the Texas Department of Criminal Justice. This appeal followed.

DISCUSSION

In both of his issues on appeal, appellant contends the State engaged in improper jury argument. We address each issue in turn.

I. Did the trial court abuse its discretion when it denied appellant's motion for mistrial during the guilt/innocence phase of the trial?

In his first issue on appeal, appellant collectively complains of two comments made by the State during the State's rebuttal argument in the guilt-innocence phase of appellant's trial. The State began its rebuttal argument as follows: "[a]rguments like that is [sic] why rape victims don't come forward." Appellant objected, stating the argument went outside the record. The trial court sustained appellant's objection. Appellant then asked the trial court for an instruction to the jury that it should disregard the statement. However, before the trial court could respond, appellant moved for a mistrial, which the trial court denied. The State then continued with its closing argument:

> You saw this victim on this witness stand. And you heard just now, this attorney talk about how drunk she was. How she is a mental case. How she has got problems. How she has got a bad family situation. So she is raped two and a half years ago. And two and a half years later she is raped again and again.

Appellant objected again, stating: "Your Honor, I'm going to object to that. My argument was maybe . . . ." The trial court interrupted to sustain appellant's objection. Appellant then asked for an instruction to disregard, which the trial court gave. Appellant then moved for a mistrial, which the trial court denied.

According to appellant the State's argument was so extreme, manifestly improper, and inflammatory that the harm could not be removed from the minds of the jury by the trial court's instruction to disregard and therefore the trial court erred when it denied his motion for mistrial. We disagree.

A. The standard of review and applicable law.

When the trial court sustains a defense objection to the State's closing argument and grants the requested instruction to disregard, the issue is whether the trial court abused its discretion by denying the motion for mistrial. *Newby v. State*, 252 S.W.3d 431, 438 (Tex. App.—Houston [14th Dist.] 2008, pet. ref.) (citing *Hawkins v. State*, 135 S.W.3d 72, 76–77 (Tex. Crim. App. 2004)). Almost any improper argument may be cured by an instruction to disregard. *Id.* Only in extreme circumstances, where the prejudice is incurable, will a mistrial be required. *Hawkins*, 135 S.W.3d at 77. A mistrial is the trial court's remedy for improper conduct that is so prejudicial that expenditure of further time and expense would be wasteful and futile. *Id.* The standard of review for the denial of a motion for mistrial is abuse of discretion. *Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007). The reviewing court should uphold the trial court's ruling if it was within the zone of reasonable disagreement. *Id.* (citing *Wead v. State*, 129 S.W.3d 126, 129 (Tex. Crim. App. 2004)).

Whether a mistrial should have been granted involves most, if not all, of the considerations that attend a harm analysis. *Id.* at 700. Therefore, a reviewing court balances the three factors first enunciated in the case of *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998): (1) the severity of the misconduct (the magnitude of the prejudicial effect of the prosecutor's remarks); (2) the measures adopted to cure the misconduct (the efficacy of any cautionary instruction by the trial judge); and (3) the certainty of conviction absent the misconduct (the strength of the evidence supporting the conviction). *Id.* We turn now to the balancing of the *Mosley* factors.

B. The trial court did not abuse its discretion when it denied appellant's motion for mistrial.

With respect to the first factor, the severity of the misconduct, we conclude the prosecutor's improper argument was not so severe as to warrant a mistrial when viewed in the context of the entire trial and appellant's argument immediately preceding the State's rebuttal. During his closing argument, appellant attacked the complainant's credibility by pointing out her history of prior sexual abuse, the fact she was on felony probation and was unemployed, as well as her alleged mental and drinking problems. The State then responded to appellant's attack on the complainant's credibility by directly addressing those issues. A response to opposing counsel's argument is an appropriate jury argument. *Felder v. State*, 848 S.W.2d 85, 94–95 (Tex. Crim. App. 1992). In addition, a defendant cannot complain of improper prosecutorial argument if he invited the argument. *Ripkowski v. State*, 61 S.W.3d 378, 393 (Tex. Crim. App. 2001).

Next, we examine the measures the trial court adopted to cure the misconduct. Here, the trial court immediately sustained appellant's objection to the State's argument and instructed the jury to disregard. In granting the instruction to disregard, the trial court did not repeat the offending argument, which may have called additional attention to it thereby compounding the impact on the jury. We also note the prosecutor did not repeat the offending conduct during the remainder of her argument. While the State's argument that appellant's closing argument was tantamount to subjecting the complainant to rape a second time was improper, we conclude the trial court's sustaining of appellant's objection and instruction to the jury to disregard was sufficient to cure any harm flowing from the State's comment. *Hawkins*, 135 S.W.3d at 84.

The final factor, the certainty of conviction absent the misconduct, also weighs against granting a mistrial. Here, we conclude appellant's conviction was fairly certain. This was not a he said/she said sexual assault case as objective evidence from the SANE nurse and the DNA results corroborated the complainant's testimony that she had been the

victim of a brutal sexual assault by appellant. In addition, there was evidence that the jury could have relied on to conclude appellant was not credible: (1) he had lied to the police during the investigation of the incident; and (2) he had admitted to his mother he had assaulted someone and deserved to be punished.

Appellant's reliance on the case of *Villareal v. State* does not change our conclusion. *Villareal v. State*, 860 S.W.2d 647 (Tex. App.—Waco 1993, no pet.). In *Villareal* the Waco Court of Appeals held the prosecutor made an improper jury argument when he equated bringing the rape victim into a courtroom full of strangers to testify was tantamount to subjecting her to rape a second time. *Id.* at 649. We do not find *Villareal* persuasive for several reasons. First, we note that *Villareal* does not represent binding authority for this court. Second, *Villareal* was decided before *Hawkins* and *Archie* and therefore the *Villareal* court did not reach its conclusion by balancing the *Mosley* factors. Finally, we conclude *Villareal* is factually distinguishable for two reasons. First, *Villareal* addressed improper jury argument by the prosecutor during the punishment phase of the trial, while appellant's first issue addresses allegedly improper argument during the guilt/innocence phase of the trial. Second, the prosecutor in *Villareal* was not responding to argument invited by the defense counsel as was the case here.

We conclude that the trial court did not abuse its discretion when it overruled appellant's motion for mistrial. Therefore, we overrule appellant's first issue on appeal.

II. Did the trial court err when it overruled appellant's objection to the State's rebuttal argument during the punishment phase of the trial?

After the jury found appellant guilty, the trial proceeded to the punishment phase. During appellant's punishment phase argument, appellant spent much of his time discussing probation, appellant's eligibility for probation, potential conditions of probation, and that, aside from the sexual assault for which he had just been found guilty, argued appellant was a "giving, good, hard worker, an honest person, good heart, good family man."

The State then proceeded to give its rebuttal argument. The State asked the jury for justice and said "I don't have a beef with the law. I completely agree with the law. You know, defense counsel made a big huge deal about this victim being on probation for damaging property. Now, that is a probation case when you damage some property." At this point, the appellant objected that the State had gone outside the record. The trial court did not rule on appellant's objection but instructed the jury to disregard. Appellant moved for a mistrial, which the trial court denied.

The State then continued its argument by explaining probation is a form of trust and asserted that appellant was not trustworthy because he had lied to the jury under oath. The State also pointed out appellant had abused the trust the complainant had placed in him and had used that trust to take advantage of her. The State then asked for justice and that justice required that appellant go to prison. The State then commenced the specific argument at issue in appellant's second issue: "So, I'm not going to stand here and give you a number. Like I said, ya'll are responsible, hard working, smart members of this community. I can tell you what it's not, it's not probation." Appellant then objected, asserting the State was asking the jury not to consider what is provided by the law. The trial court overruled appellant's objection. The jury ultimately sentenced appellant to two years' confinement in the Institutional Division of the Texas Department of Criminal Justice.

In his second issue on appeal, appellant contends the trial court erred when it overruled his objection that the prosecutor's argument was improper as it contradicted the court's charge and instructions to the jury on probation.

A. The standard of review and applicable law.

The purpose of closing argument is to facilitate the jury's analysis of evidence presented at trial to arrive at a just and reasonable conclusion based on the evidence alone

and not on facts that were not admitted into evidence. *Campbell v. State*, 610 S.W.2d 754, 756 (Tex. Crim. App. [Panel Op.] 1980). The four permissible areas of jury argument are (1) summation of the evidence; (2) reasonable deductions drawn from the evidence; (3) answer to opposing counsel's argument; or (4) a plea for law enforcement. *Jackson v. State*, 17 S.W.3d 664, 673 (Tex. Crim. App. 2000). Even when a jury argument exceeds these approved areas, it will not constitute reversible error unless the argument is extreme or manifestly improper, violative of a mandatory statute, or injects new facts harmful to the accused into the trial proceeding. *Westbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000). When reviewing alleged error in jury argument, the appellate court must analyze the statement in light of the entire argument and not on isolated sentences. *Delarus v. State*, 102 S.W.3d 388, 405 (Tex. App.—Houston [14th Dist.] 2003, pet. ref.) (citing *Drew v. State*, 743 S.W.2d 207, 220 (Tex. Crim. App. 1987)). The State is allowed wide latitude in drawing inferences from the evidence as long as the inferences drawn are reasonable and offered in good faith. *Cantu v. State*, 939 S.W.2d 627, 633 (Tex. Crim. App. 1997). In addition, a prosecutor may argue her opinion concerning issues in the case so long as the opinion is based on the evidence in the record and does not constitute unsworn testimony. *McKay v. State*, 707 S.W.2d 23, 37 (Tex. Crim. App. 1985).

B. The trial court did not err when it overruled appellant's objection to the State's closing argument during the punishment phase of the trial.

Having reviewed the entire record of the trial and argument, we conclude the State's argument did not contradict the charge and the law on probation, but instead was a statement of the prosecutor's personal opinion that, in view of the evidence in the case, while probation was a possible punishment, it was not appropriate in this case. This is not improper argument and therefore the trial court did not err when it overruled appellant's objection. *Id.* We overrule appellant's second issue on appeal.

CONCLUSION

Having overruled appellant's issues on appeal, we affirm the trial court's judgment.

/s/ John S. Anderson
Justice

Panel consists of Justices Anderson, Boyce, and Mirabal.[1]

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[1] Senior Justice Margaret G. Mirabal sitting by assignment.