Affirmed and Memorandum Opinion filed August 31, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-01156-CR

DAVID SANDOVAL CASTRO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 180th District Court
Harris County, Texas
Trial Court Cause No. 1095684

MEMORANDUM OPINION

Appellant David Sandoval Castro was convicted of aggravated sexual assault of a child and sentenced to eighteen years' imprisonment. In two issues, appellant contends the trial court erred by (1) refusing his request to strike the entire venire panel and declare a mistrial following alleged prosecutorial misconduct and (2) admitting extraneous-offense evidence at trial. We affirm.

I. FACTUAL BACKGROUND

Although appellant does not challenge the legal or factual sufficiency of the evidence, we will provide a brief recitation of the facts to help place appellant's issues in

perspective. In April 2001, appellant's nine-year-old niece, M.C., informed a teacher that appellant had been touching her "private part" when she stayed at appellant's home on weekends. Following a police investigation, appellant was indicted and tried for the aggravated sexual assault of M.C. At trial, M.C. testified that appellant took her into his bedroom on several occasions and used his fingers to penetrate her vagina. She also stated that, on one occasion, appellant tried unsuccessfully to penetrate her vagina with his penis. Appellant testified that he never sexually assaulted M.C. and developed a defensive theory that M.C. and her mother fabricated the allegations of abuse because they were angry with him for encouraging his younger brother to divorce M.C.'s mother. Appellant also attempted to explain that he lacked any opportunity to sexually assault M.C. because of the close quarters of his home and the number of individuals who spent the night at his home on weekends. To rebut appellant's defensive theories, the State called appellant's daughter, N.C., as a witness. N.C. testified, over appellant's objection, that appellant sexually assaulted her on several occasions from the time she was five or six years of age until her freshman year of high school. Appellant attempted to show that N.C.'s allegations were fabricated because he punished her for allowing her boyfriend to sneak into her bedroom on several occasions. After hearing the evidence, the jury convicted appellant and assessed punishment at eighteen years' confinement in the Texas Department of Criminal Justice, Institutional Division.

Appellant raises two issues on appeal, arguing (1) the State committed prosecutorial misconduct by allowing the venire panel to see information suggesting that he was involved in multiple instances of the charged offense and (2) the trial court erred by allowing N.C. to testify that she was repeatedly sexually assaulted by appellant.

II. PROSECUTORIAL MISCONDUCT

Near the conclusion of the State's voir dire examination, one of the venire members, Mr. Hess, informed the prosecutor that he could read a document attached to a box on the prosecution's table. The document disclosed appellant's name, listed three

separate cause numbers, and stated "Offense: AGGRAVATED SEXUAL ASSAULT OF A CHILD X 3."[1] Mr. Hess then asked if the venire panel would be looking at "three different situations" of the charged offense. The prosecutor responded that appellant was being "tried on one indictment and you have to make a decision based on that one indictment," and the trial court stated that the document was "[n]ot part of the evidence in the case." Several more venire members then mentioned that they saw the box and thought there may be more than one case against appellant. The trial court responded, "I just want to make sure that everybody is clear. You can't convict somebody based on writing on a box." The venire members answered that they agreed.

At this point, defense counsel began questioning the venire panel. He began by asking several questions unrelated to the prosecution's document. A short time later, he asked Mr. Hess:

> [Defense Counsel]: When you saw the box, what did you think?
>
> [Mr. Hess]: I understand my English times three, I think three different situations here.
>
> [Defense Counsel]: Do you think—you see [appellant] over there. Are you thinking guilty right now?
>
> [Mr. Hess]: No.
>
> [Defense Counsel]: Are you thinking there is more than one situation?
>
> [Mr. Hess]: Yeah. Yeah. I read the box. So did everybody else here. I think you got a problem with the box whether you know it or not.
>
> . . . .
>
> [Defense Counsel]: Do you think [appellant] could get a fair trial with you right now?
>
> [Mr. Hess]: Yeah.

[1] Appellant was originally charged with three counts of aggravated sexual assault of a child. Prior to trial, the State sought to consolidate these charges. The trial court granted appellant's objection to consolidation, and the State proceeded to trial on a single charge.

[Defense Counsel]: With the box?

[Mr. Hess]: We shouldn't have been allowed to see that.

Following this exchange, Defense counsel moved on to other topics until Mr. Hess again voiced that he "[s]till [had] a problem with the box." At this point, venire members 8, 9, 10, 11, and 12 expressed concerns about the box. Defense counsel noted these individuals and continued his voir dire examination without further inquiry into their concerns.

At the close of voir dire, the trial court asked for agreements and challenges for cause from the lawyers. Defense counsel challenged venire members one through fifteen based on the box. The trial court granted the defense's request as to all but one of these individuals.[2] Defense counsel then requested that the trial court "ask anyone who has seen anything, heard anything about the box if they have any opinions that would—anyone else besides the ones who have been excused." The trial court responded "I think everyone here has been asked about 54 times if there is anything else from that man speaking up." Defense counsel then requested that the trial court strike the entire venire panel, arguing that the panel had been "poisoned" by the suggestion of extraneous offenses on the box. The trial court denied this request and selected the jury. The following day, before the start of the guilt/innocence phase of the trial, the trial court denied defense counsel's second request to strike the panel and pick a new jury.

Appellant contends in his first issue that the trial court erred in denying his requests to strike the venire panel during voir dire because the State committed prosecutorial misconduct by placing the box referencing possible extraneous offenses in the panel's view. In response, the State argues that appellant has failed to preserve this issue for appellate review.

[2] Venire member two served as a juror at trial.

A. Preservation of Error

To preserve error for appellate review, a party must make a timely request, objection, or motion and obtain a ruling by the trial court on the issue. *See* TEX. R. APP. P. 33.1(a); *Fuller v. State*, 253 S.W.3d 220, 232 (Tex. Crim. App. 2008); *Clark v. State*, 305 S.W.3d 351, 354 (Tex. App.—Houston [14th Dist.] 2010, no pet.). There are two main purposes for requiring a timely and specific request: (1) to inform the trial court of the basis of the request and provide an opportunity for the court to make a ruling and (2) to allow opposing counsel the chance to remove the objection. *Garza v. State*, 126 S.W.3d 79, 82 (Tex. Crim. App. 2004); *Lewis v. State*, 191 S.W.3d 335, 338 (Tex. App.—Waco 2006, pet. ref'd). Failure to properly preserve error forfeits the assertion of that error on appeal. *Fuller*, 253 S.W.3d at 232. Almost any error, including constitutional error, may be forfeited by a failure to object. *Id.*

To preserve error for a claim of prosecutorial misconduct, a party must (1) make a timely and specific objection, (2) request an instruction that the jury disregard the matter improperly placed before it, and (3) move for a mistrial. *Penry v. State*, 903 S.W.2d 715, 764 (Tex. Crim. App. 1995); *Morrison v. State*, 132 S.W.3d 37, 48–49 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd). However, this sequence is not essential to preserve a complaint for appellate review. *Jackson v. State*, 287 S.W.3d 346, 353 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (citing *Young v. State*, 137 S.W.3d 65, 69 (Tex. Crim. App. 2004)). The essential requirement is a timely, specific request that is refused by the trial court. *Id.* Appellant's motion to strike the venire panel is equivalent to a motion for a mistrial. *See Moss v. State*, 877 S.W.2d 895, 898 (Tex. App.—Waco 1994, no pet.); *Alvarez v. State*, 804 S.W.2d 617, 619 (Tex. App.—El Paso 1991), *aff'd*, 864 S.W.2d 64 (Tex. Crim. App. 1993). In certain circumstances, a request for a mistrial may be the first instance of a timely, specific request for relief. *Id.* A request for a mistrial is timely only if it is made as soon as the grounds for it become apparent. *Griggs v. State*, 213 S.W.3d 923, 927 (Tex. Crim. App. 2007).

In this case, appellant contends that the venire panel was tainted by references to possible extraneous offenses contained on the box. During oral argument, appellant's counsel stated that the venire panel had been tainted after Mr. Hess first mentioned the box. However, no objection or request for a limiting instruction or mistrial was made at that time. Nor did appellant request any form of relief after the box was discussed at least three more times during voir dire. Appellant's first request for relief was made after voir dire had concluded and the trial court had excused thirty-three potential jurors from service. By not seeking any form of relief soon after the prosecution's document was discussed, appellant's request that the trial court strike the venire panel was not timely made. *See id.* at 925–27 (request for mistrial based on extraneous-offense testimony from two witnesses was not timely because request was not made until both witnesses had concluded their testimony); *Young v. State*, 137 S.W.3d 65, 70–71 (Tex. Crim. App. 2004) (request for mistrial during voir dire was timely where request was made immediately after venire member made objectionable statement). Appellant has thus not preserved his claim of prosecutorial misconduct for our review. *See Penry*, 903 S.W.2d at 764 (concluding that, "[b]y failing to object at the earliest possible moment," appellant failed to preserve prosecutorial misconduct complaint for appellate review); *Lozano v. State*, No. 13-08-00180-CR, 2010 WL 411753, at *1 (Tex. App.—Corpus Christi Feb. 4, 2010, no pet.) (mem. op., not designated for publication) (holding that appellant failed to preserve prosecutorial misconduct claim by failing to object to prosecutor's comments during voir dire).

B. Motion to Strike Venire Panel

Even if appellant's request to strike the venire panel was timely made, we cannot say the trial court abused its discretion in denying the request. As the equivalent of a motion for mistrial, we review the trial court's ruling on appellant's request to strike the panel for an abuse of discretion. *See Webb v. State*, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007); *Austin v. State*, 222 S.W.3d 801, 815 (Tex. App.—Houston [14th Dist.]

2007, pet. ref'd); *see also Moss*, 877 S.W.2d at 898; *Alvarez*, 804 S.W.2d at 619. 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. *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004). A mistrial is required only in extreme circumstances where prejudice is incurable. *See Austin*, 222 S.W.3d at 815. When determining whether the trial court should have granted a mistrial, we consider (1) the severity of the misconduct, (2) the curative measures taken, and (3) the certainty of conviction absent the prejudicial event. *Hawkins*, 135 S.W.3d at 77; *Austin*, 222 S.W.3d at 815.

Considering these factors, the record shows the trial court did not abuse its discretion in denying appellant's request to strike the venire panel. The conduct here was not extreme. Although the venire panel should certainly have never seen the information on the box, both the prosecution and the defense counsel stated at trial that the placement of the box was unintentional and not the result of deliberate misconduct. This contrasts sharply with cases of prosecutorial misconduct involving deliberate, repeated conduct in the face of adverse rulings. *See, e.g.*, *Stahl v. State*, 749 S.W.2d 826, 830–31 (Tex. Crim. App. 1998). Further, once the information on the box was noticed, the trial court quickly told the venire panel that it was not evidence and that appellant could not be convicted "based on the writing on a box." We presume the venire panel followed these instructions. *See Kirsch v. State*, 306 S.W.3d 738, 748 n.33 (Tex. Crim. App. 2010). The trial court personally questioned one juror regarding whether he had formed an opinion based on the box, and the trial court dismissed all three jurors who specifically expressed concern over the box.[3] Finally, the State introduced substantial evidence against appellant, including evidence of multiple sexual assaults against the complainant and his own daughter. The State did not attempt to use the information on the box in any way and in fact stressed to the venire panel that appellant was being tried on a single

[3] Defense counsel initially requested that the first fifteen jurors be excused based on "[t]he box." We note that only one of these jurors served on the jury.

indictment and that any determination of appellant's guilt must be based on evidence related to that charge. Additionally, each of the venire members who were questioned about the box, including Mr. Hess, stated that the document did not lead them to believe appellant was guilty and that appellant could still receive a fair trial. These facts undermine appellant's contention that the jury was "poisoned" or "biased" due to the information on the box. This is not one of those "exceedingly uncommon" circumstances where an extreme remedy was warranted, and the trial court did not abuse its discretion in denying appellant's request to strike the venire panel. *See Hudson v. State*, 179 S.W.3d 731, 738 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

We conclude that (1) appellant has failed to preserve error for his prosecutorial-misconduct claim by making an untimely request to strike the venire panel and (2) the trial court did not abuse it discretion in denying appellant's request. For these reasons, we overrule appellant's first issue.

III. EVIDENCE OF OTHER CRIMES, WRONGS, OR ACTS

In his second issue, appellant contends that the trial court erred by allowing his daughter, N.C., to testify that he repeatedly sexually abused her. According to appellant, N.C.'s testimony constitutes inadmissible extraneous-offense evidence under Texas Rule of Evidence 404(b).

A. Standard of Review

Whether extraneous-offense evidence has relevance apart from character conformity is a question for the trial court. *De La Paz v. State*, 279 S.W.3d 336, 343 (Tex. Crim. App. 2009). We review a trial court's ruling on the admissibility of extraneous-offense evidence for an abuse of discretion. *Prible v. State*, 175 S.W.3d 724, 731 (Tex. Crim. App. 2005). There is no abuse of discretion so long as the trial court's ruling is within the zone of reasonable disagreement and was correct under any legal theory applicable to the case. *Winegarner v. State*, 235 S.W.3d 787, 790 (Tex. Crim. App. 2007). The circumstances justifying the admissibility of extraneous-offense

evidence must be judged on a case-by-case basis. *Pollard v. State*, 255 S.W.3d 184, 188 (Tex. App.—San Antonio 2008), *aff'd*, 277 S.W.3d 25 (Tex. Crim. App. 2009).

B. Rule 404(b)

Under Rule 404(b), evidence of other crimes, wrongs, or acts is not admissible to prove an individual's character or to show action in conformity with that character. TEX. R. EVID. 404(b). This is because evidence of extraneous acts forces the accused to defend himself against uncharged crimes in addition to the charged offense and encourages the jury to convict based on the accused's bad conduct rather than the proof at trial. *Daggett v. State*, 187 S.W.3d 444, 451 (Tex. Crim. App. 2005). Extraneous-offense evidence may be admissible, however, for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. TEX. R. EVID. 404(b). This list of exceptions is illustrative, not exhaustive. *Fox v. State*, 283 S.W.3d 85, 92 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd).

Rebuttal of a defensive theory is one of the "other purposes" for which extraneous-offense evidence may be admitted under Rule 404(b). *Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009), *cert. denied*, No. 09-9635, — S. Ct. — , 2010 WL 978827 (U.S. June 14, 2010); *Isenhower v. State*, 261 S.W.3d 168, 180 (Tex. App.—Houston [14th Dist.] 2008, no pet.); *see also Bargas v. State*, 252 S.W.3d 876, 890 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (extraneous-offense evidence may be admitted under Rule 404(b) to rebut defensive theories raised in an opening statement or by cross-examination of the State's witnesses). Appellant acknowledges the general rule that extraneous-offense evidence may be admissible to rebut a defensive theory, but argues that he did not raise any defensive theories at trial. The record establishes the contrary.

During appellant's opening statement, defense counsel argued that M.C.'s allegations were fabricated and motivated by her mother's desire for revenge because of appellant's desire for his brother to divorce her. Counsel also argued that appellant lacked any opportunity to sexually assault M.C. because of the small size of his home and

the sleeping arrangements when his nieces and nephews stayed over. Appellant further developed his defenses through his cross-examination of the State's witnesses and through direct examination during his case-in-chief. Appellant cross-examined the State's forensic interviewer about how a parent could "coach" a child to make false accusations of sexual abuse. While cross-examining M.C., appellant questioned how many times she talked with her mother before speaking with the police and whether she changed her story after speaking with her mother. Appellant also asked M.C. about where she, her cousins, and appellant's wife slept when she stayed at appellant's home. During his case-in-chief, appellant called several witnesses to testify that they never saw or heard appellant take M.C. into his bedroom. Appellant also elicited testimony showing that appellant and M.C.'s mother did not have a good relationship. While cross-examining M.C.'s mother, appellant asked whether she was aware of appellant's desire for his brother to divorce her and if she knew appellant had tape-recorded her conversations in a family member's home. Further, defense counsel informed the trial court during the charge conference that appellant's defense was that M.C. created the allegations of abuse "for revenge and retribution." Defense counsel requested that the trial court instruct the jury it could consider N.C.'s testimony only to rebut the defensive theory of "retribution or fabrication."

A trial court does not abuse its discretion in admitting extraneous-offense evidence to rebut a defensive theory of fabrication or retaliation or that the defendant lacked opportunity to commit the charged offense. *See* TEX. R. EVID. 404(b) (stating extraneous-offense evidence is admissible to establish opportunity); *Bass v. State*, 270 S.W.3d 557, 563 (Tex. Crim. App. 2008) (involving defensive theory of fabrication based on premise that the appellant, as a "real deal" and "genuine pastor," would not molest a child); *Wheeler v. State*, 67 S.W.3d 879, 887–88 (Tex. Crim. App. 2002) (involving defensive theories of conspiracy or frame-up motivated by greed and that the appellant "was never alone" with the complainant); *Powell v. State*, 63 S.W.3d 435, 438–40 (Tex. Crim. App. 2001) (involving defensive theory of lack of opportunity to molest the

complainant); *Isenhower*, 261 S.W.3d at 181 (involving defensive theory of retaliation after the defendant and the complainant's mother ended their relationship). It is clear from the record that defense counsel raised these defensive theories during his opening statement, cross-examination of the State's witnesses, and case-in-chief. Under these circumstances, the trial court did not abuse its discretion in overruling appellant's Rule 404(b) objection and determining that N.C.'s testimony was relevant rebuttal evidence. We overrule appellant's second issue.

CONCLUSION

The trial court did not abuse its discretion by refusing to grant appellant's request to strike the venire panel or by overruling his Rule 404(b) objection to the extraneous offense evidence. We affirm the trial court's judgment.

/s/ Leslie B. Yates
Justice

Panel consists of Chief Justice Hedges and Justices Yates and Boyce.
Do Not Publish — TEX. R. APP. P. 47.2(b).