Affirmed as Modified and Memorandum Opinion filed February 14, 2017.

In The

Fourteenth Court of Appeals

NO. 14-15-00950-CR

ZACHARY RYAN MORROW, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 56th District Court
Galveston County, Texas
Trial Court Cause No. 14-CR-3409

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

After appellant Zachary Morrow pleaded guilty to aggravated assault, a jury assessed five years' confinement as punishment. Appellant raises two issues in this appeal. First, he contends that the State presented an improper closing argument to the jury. Second, he challenges the trial court's assessment of attorneys' fees. We overrule appellant's first issue and hold that the State's challenged statement was not improper. However, because we conclude that the evidence does not support an

attorney fee assessment against appellant, we modify the judgment to delete the assessment of fees and affirm the judgment as modified.

Factual and Procedural Background

On November 15, 2014, appellant and a friend, Jonathan Waite, went to Paul Hopkins Park in Dickinson, Texas, to fish. They brought along fishing lures and fishing wires, as well as two knives. At the park, appellant and Waite encountered 56-year-old Louella Rice, who was feeding stray cats. Appellant, then 17 years old, did not know Rice.

According to Rice, she first saw appellant and Waite by the edge of the bayou that bisects the park. Once the boys saw her, they began running toward her. Rice was not initially threatened but became concerned that the boys' presence would scare the cats away, and she asked them if she could feed the cats alone. Appellant and Waite did not leave, so Rice started to pack up her supplies to go home. As she turned away from the boys, Rice felt something strike her back, and she thought one of the boys had hit her. Rice turned back around and saw appellant holding a bloody knife, which she realized he had used to stab her once in the center of her back. Rice was treated at a local hospital for her injuries, including a punctured lung, and was released four days later.

A grand jury indicted appellant with the offense of aggravated assault with a deadly weapon. Appellant pleaded guilty and elected to have a jury assess punishment.

During the punishment trial, appellant testified that he did not know why he stabbed Rice. According to appellant, he felt as though he saw himself as a third person or was otherwise "zoned out," "clicked out," or "blacked out" when he stabbed Rice, and he could not stop himself from doing so.

Other testimony indicated that appellant suffered from depression, insomnia, ADHD, severe anxiety, and a mood disorder not otherwise specified. Appellant's parents testified that appellant had never been violent toward anyone in the family or appellant's friends, but that he would get mad and punch inanimate objects, like a wall, a door, or the refrigerator.

During closing argument, the prosecutor told the jury:

> [Prosecutor]: [B]oth of his doctors said this type of impulsivity doesn't just happen just one time. So I want you, I want you to ask yourself when you're back there and you're thinking about what the proper punishment is. Do you trust somebody like Zachary Morrow out in the community with you and your children and your friends and your family?
>
> [Defense]: Judge, I would object to that as improper argument.
>
> [The Court]: Response?
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> [Prosecutor]: Judge, I think they can -- I can argue whether or not they trust him in the community.
>
> [The Court]: Overruled.
>
> [Prosecutor]: Can you trust him? Will you trust him? I submit to you that you can't.

Following deliberations, the jury assessed five years' confinement as punishment, as well as a $10,000 fine. The jury declined to recommend community supervision. The trial court entered judgment on the jury's verdict, and also assessed $331 in court costs and $7,464.50 in attorneys' fees.

Appellant timely appealed.

Analysis

A. Jury Argument

In his first issue, appellant argues that the trial court reversibly erred by overruling appellant's objection to the State's closing argument in asking the jury members to consider whether they would trust someone like appellant in the community with their friends and family. Appellant claims the prosecutor made an improper plea for the jury members to abandon their objectivity in assessing appellant's punishment, and that this argument deprived him of his right to a fair and impartial trial. The State responds that the prosecutor's closing argument was not improper but rather a permissible plea for law enforcement.[1]

We review a trial court's ruling on an objection to jury argument for abuse of discretion. *Smith v. State*, 483 S.W.3d 648, 657 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

Before addressing the merit of appellant's argument, we comment on preservation of error. Appellant's objection on grounds of "improper argument" was not specific. Ordinarily, such general objections do not preserve error. *See Vasquez v. State*, 501 S.W.3d 691, 705 (Tex. App.—Houston [14th Dist.] 2016, pet. filed) (holding that defendant's objection of "improper argument" was insufficient to preserve error because the objection was general, rather than specific). But a general objection can suffice when the record shows that the trial

[1] In his brief, appellant also references another portion of the State's closing argument, in which the prosecutor asked the jury members to "imagine for a second that you're in your favorite spot . . . [a]nd a complete and utter stranger comes up behind you and stabs you in your back." Appellant did not object to this statement at trial and does not expressly challenge it here. We do not consider this second, unobjected-to statement in reaching our decision today. *See Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007) ("To preserve error in prosecutorial argument, a defendant must pursue to an adverse ruling his objections to jury argument.").

court understood the nature of the objection. *See Everett v. State*, 707 S.W.2d 638, 641 (Tex. Crim. App. 1986) (en banc). On this record, and considering the overall context of the argument, we assume for purposes of this appeal that the trial court understood the specific nature of the objection.

The law provides for, and presumes, a fair trial, free from improper argument by the State. *See Borjan v. State*, 787 S.W.2d 53, 56 (Tex. Crim. App. 1990) (en banc) (per curiam). Proper jury argument is generally limited to four areas: (1) summation of the evidence presented at trial; (2) reasonable deductions and inferences from the evidence; (3) responses to opposing counsel's argument; and (4) appropriate pleas for law enforcement. *Alejandro v. State*, 493 S.W.2d 230, 231-32 (Tex. Crim. App. 1973).

A prosecutor may invite the jury to "consider the full, unvarnished specter of the defendant's actions." *Torres v. State*, 92 S.W.3d 911, 921 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd). A prosecutor may not, however, ask jurors to place themselves in the shoes of the victim, or in the shoes of others affected by the offense. *See Ayala v. State*, 267 S.W.3d 428, 435 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd); *Nickerson v. State*, 478 S.W.3d 744, 762 (Tex. App.—Houston [1st Dist.] 2015, no pet.). In doing so, the prosecutor invites the jury to abandon their objectivity. *Torres*, 92 S.W.3d at 920.

Advocating a particular punishment because the community expects or demands it is similarly impermissible. *See Borjan*, 787 S.W.2d at 56. But a simple reference to "the community" is not necessarily an improper appeal to community expectations. *See Caballero v. State*, 919 S.W.2d 919, 924 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd). For instance, it is proper for a prosecutor to draw on the relationship between the jury's verdict and the deterrence of crime in general, as well as to emphasize the impact of the jury's verdict on the community at large.

See Watts v. State, 371 S.W.3d 448, 457 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

Here, appellant contends that the prosecutor urged the jurors to consider their own welfare and the safety of their friends and family when punishing appellant, which was tantamount to a request that the jurors abandon their objectivity and put themselves in the victim's shoes. We disagree.

The context of the prosecutor's statement shows a concern for potential future violent behavior based on the medical evidence. In asking the jury members whether they would trust somebody like appellant in their community and with their family and friends, the prosecutor was arguing that appellant could not be trusted to refrain from acting on violent impulses. She was not invoking a sense that this was the jurors' chance to punish appellant as though he had harmed them personally. The prosecutor did not ask the jury members how they would feel if they had been attacked or to place themselves (or a loved one) in Rice's shoes. Rather, the prosecutor essentially asked the jurors to "consider the full, unvarnished specter of [appellant's] actions." *Torres*, 92 S.W.3d at 921. This falls within the categories of proper jury argument, including a plea for law enforcement. *See, e.g.*, *Whittington v. State*, 580 S.W.2d 845, 847 (Tex. Crim. App. 1979) (comment that "you will want to give them an answer you can be proud of, that your friends and neighbors can be proud of" constituted a proper plea for law enforcement); *Ledesma v. State*, 828 S.W.2d 560, 563-64 (Tex. App.—El Paso 1992, no pet.) (comment that "[n]ow, it comes down to a question of whether you want vicious individuals like this man here running lose [sic] and free in your community" was proper plea for law enforcement).

Appellant cites one case to support his argument that the prosecutor's statement was not a proper plea for law enforcement but rather an improper request

that the jurors abandon their objectivity, but the case he cites is distinguishable. *See Brandley v. State*, 691 S.W.2d 699, 712 (Tex. Crim. App. 1985) (en banc). In *Brandley*, the prosecutor asked the jury to consider "how you would feel if you lost your children." *Id*. The prosecutor's argument in *Brandley* asked the jurors to step into the shoes of the father of a murdered child, and the Court of Criminal Appeals found the argument to be an improper plea to the jurors to abandon their objectivity. *Id.*[2]

Here, the prosecutor's argument is of a qualitatively different nature than that presented in *Brandley*. The prosecutor did not request the jurors to put themselves in the victim's position. Instead, she asked them to consider the impact of their verdict on the community, an appropriate subject of argument. *See Bell v. State*, 724 S.W.2d 780, 801-02 (Tex. Crim. App. 1986) (en banc) (comment urging jury to "remember and think about how [friends and neighbors] will ask you at the end of case when it's all over" did not "assert or imply that the community demands or expects" a particular outcome); *see also Caballero*, 919 S.W.2d at 924 ("You represent the community" is permissible argument). This argument was permissible, particularly considering the medical evidence that suggested appellant's attack of Rice was not likely to be an isolated occurrence.

We hold that the trial court did not abuse its discretion in overruling appellant's objection to the prosecutor's closing argument.[3]

We overrule appellant's first issue.

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[2] The *Brandley* court ultimately held the error harmless. *See Brandley*, 691 S.W.2d at 713.

[3] The State alternatively urges affirmance because the prosecutor's statement, if error, was harmless and, in any event, merely responded to the defense's arguments. Because we have determined that the challenged statements constitute a permissible plea for law enforcement, we do not reach the State's additional arguments. *See* Tex. R. App. P. 47.1.

B. Attorneys' Fees

In his second issue, appellant argues that the trial court erred by assessing attorneys' fees against him in the final judgment because appellant was indigent throughout trial. The State concedes this point and joins appellant's request that we modify the judgment to remove the assessment of attorneys' fees. We agree.

If a defendant is indigent, he has a right to appointed counsel. Tex. Code Crim. Proc. art. 1.051(c). Once a defendant has been found indigent, the defendant is "presumed to remain indigent for the remainder of the proceedings in the case unless a material change in the defendant's financial status occurs." *Id.* art. 26.04(p).

Appointed counsel is not paid by the indigent defendant, but is paid from the general fund of the county in which the prosecution was initiated. *Id.* art. 26.05(f). A trial court may order a defendant to repay fees for legal services provided if the court determines that a defendant has financial resources enabling him to offset those attorneys' fees, in part or in whole. *Id.* art. 26.05(g). Absent sufficient evidence of the defendant's financial resources and ability to pay, however, the defendant may not be ordered to pay attorneys' fees. *See West v. State*, 474 S.W.3d 785, 795 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

Here, the trial court found appellant indigent pre-trial and appointed counsel. Appellant presumptively remained indigent throughout trial, absent a material change in his financial circumstances. The present record reveals no reason to disturb this presumption. We find nothing in the record indicating that the trial court reconsidered its determination of indigence. The trial court did not identify any evidence of changed financial circumstances either during or after trial, and the parties do not direct us to any such evidence in the record. Further, the trial court

found that appellant was indigent for purposes of appeal and appointed new counsel for appellant on appeal.

Because no record evidence indicates appellant's financial status has materially changed, the trial court erred in assessing attorneys' fees in the final judgment. Accordingly, we order the judgment modified to delete that portion of the judgment requiring appellant to pay attorneys' fees. *See West*, 474 S.W.3d at 795 (affirming trial court judgment as modified to delete attorneys' fees when no evidence of changed circumstances).

We sustain appellant's second issue.

Conclusion

The trial court's judgment is affirmed as modified.

/s/ Kevin Jewell
Justice

Panel consists of Justices Jamison, Wise, and Jewell.
Do Not Publish — Tex. R. App. P. 47.2(b).