Affirmed and Memorandum Opinion filed March 23, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00219-CR

DARRELL JACOBY MARK, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 1437801

MEMORANDUM OPINION

We consider three issues in this appeal from a conviction for robbery: (1) whether the trial court abused its discretion by denying a motion for mistrial; (2) whether the evidence is legally insufficient to support the imposition of an enhanced punishment; and (3) whether the trial court committed charge error in the submission of its punishment charge. Finding no merit to any of these challenges, we affirm the trial court's judgment.

BACKGROUND

Viewed in the light most favorable to the verdict, the evidence showed that appellant committed a robbery when he approached the complainant in a grocery-store parking lot and demanded her purse. Appellant did not display a gun, but he lifted his jersey and gestured as though he had one. He also said, "I have a 380. Just give me your bag and I won't shoot you."

The complainant screamed for help and activated the panic button on her car alarm. As bystanders came to her aid, appellant calmly walked to his car and drove away emptyhanded. One of the bystanders captured appellant's license plate number and reported it to police.

Using the car's registration information, police quickly tracked appellant to a nearby apartment complex. When officers arrived at the apartment complex, appellant was standing outside on a balcony, wearing the same distinctive clothing that had been described to the officers by the complainant. At the sight of the officers, appellant returned to his apartment and hid inside a closet. When officers eventually found him, appellant was no longer wearing the same clothing. No gun was found in his possession.

Police transported appellant back to the grocery store, where the complainant identified him as her attacker. As police placed appellant back into the patrol car, appellant volunteered a statement, saying, "[I] didn't have a gun. [I] just asked her for her money."

MOTION FOR MISTRIAL

During the closing-argument portion of the guilt phase of trial, the defense argued a version of the facts that portrayed appellant's conduct as innocent and not rising to the level of an attempt. This argument was based on evidence that

appellant did not complete a theft and he never "made a mad dash to get away." The State responded with a closing argument that became the focus of an improper-argument objection, which the trial court sustained, and a motion for mistrial, which the trial court denied. In pertinent part, the proceedings unfolded as follows:

> State: Calling this an attempted robbery is asking us to wait. Okay. So let's wait. Let's wait until next time he snatches that purse off her shoulder. Let's wait till next time when he maybe pushes her to the ground and breaks her arm.
>
> Defense: Objection Your Honor. She's arguing matters outside the record Your Honor.
>
> Court: Sustained.
>
> Defense: I ask for instruction to the jury to disregard.
>
> Court: Disregard.
>
> Defense: And I move for mistrial.
>
> Court: Denied.

Appellant complains about this ruling in his first issue.

We review a trial court's ruling on a motion for mistrial for an abuse of discretion. *See Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004). When the refusal to grant a mistrial follows an objection for improper closing argument, we evaluate the trial court's decision using the following factors: (1) the severity of the misconduct; (2) the measures adopted to cure the misconduct; and (3) the certainty of conviction absent the misconduct. *Id.* We examine each of these factors in turn.

Severity of the Misconduct. The first factor looks at the magnitude of the prejudice likely caused by the improper argument. *See Archie v. State*, 340 S.W.3d 734, 740–41 (Tex. Crim. App. 2011). The argument here was improper because it referred to matters not in evidence. Appellant did not snatch the complainant's

purse, or push the complainant to the ground, or break the complainant's arm. The evidence actually showed that appellant took nothing from the complainant and caused no physical injuries whatsoever. The State's reference to these imagined scenarios was unfair because they did not occur and they depicted acts of violence likely "to arouse the passion and prejudices of the jury." *See Borjan v. State*, 787 S.W.2d 53, 57 (Tex. Crim. App. 1990).

Although improper, the State's argument was no more severe than the facts adduced at trial. The evidence showed that appellant threatened to shoot the complainant, which, if carried out, would be an act far more violent than any of the scenarios imagined by the State. The evidence also showed that the complainant was emotionally affected by the incident. Bystanders described her as being "visibly upset," "distraught," and "worked up to the point that she could have been in tears." In light of this other evidence, we do not believe that the State's improper argument was so extreme or outrageous as to create incurable prejudice.

Curative Measures. Under the second factor, we consider the character of the measures adopted to cure the misconduct. *See Archie*, 340 S.W.3d at 741. We generally presume that a prompt instruction to disregard will cure any prejudice associated with an improper argument. *See Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000).

The trial court gave a curative instruction in this case, but appellant contends that the instruction was "as weak as could be" because it was just a single word: "Disregard." We would agree that the instruction could have been stronger and more specific, but when read in context with defense counsel's objection, we think the jury reasonably understood that it was to disregard the State's argument to the extent it referred to "matters outside the record."

Certainty of Conviction. We finally consider the certainty of conviction absent the State's misconduct. *See Archie*, 340 S.W.3d at 741.

The State presented a strong case of robbery. By comparison, appellant's defensive theory was relatively weak. Although appellant did not testify himself, defense counsel admitted that appellant approached the complainant in the grocery-store parking lot. Counsel's main point of disagreement was in the nature of appellant's interaction with the complainant. Rejecting the notion that appellant had threatened the complainant, counsel argued that appellant's behavior was innocent because appellant was merely panhandling. The jury was free to believe otherwise. Indeed, the jury could have reasonably concluded that appellant did more than just benignly ask for money because panhandlers do not normally drive away in cars, flee into their homes at the sight of police, change their clothing, and then hide in a closet. Even without the State's improper argument, appellant's conviction was more likely than not.

Having considered all of the relevant factors, we conclude that the trial court did not abuse its discretion by denying appellant's motion for mistrial.

ENHANCEMENT ALLEGATION

During the punishment phase of trial, the State sought to enhance appellant's sentence on the basis of two prior felony convictions. One of the convictions was for a burglary of a habitation alleged to have been committed in "Palestine County, Texas." This enhancement allegation was recited in the trial court's charge on punishment, and the jury by its answer found the allegation to be true. Appellant now argues that the evidence is insufficient to support that finding because there is no county in Texas by that name.

Appellant is correct that Palestine County is not a county in Texas. However, we judicially notice that Anderson County is a county in Texas, and its county seat is the city of Palestine. We also notice that the record contains a written stipulation of evidence, signed by appellant, stating that he was convicted of burglary of a habitation in Anderson County. The trial court cause number and date of conviction in this written stipulation match the allegations set forth in the State's indictment and the trial court's punishment charge. The only variance is the identification of the county.

We conclude that the variance between the proof and the allegation is immaterial because appellant had adequate notice of the underlying conviction. *Cf. Straughter v. State*, 801 S.W.2d 607, 611 (Tex. App.—Houston [1st Dist.] 1990, no pet.) (variance in cause numbers was immaterial where the State proved the correct sentencing court, county, date, and offense, and where the defendant was not prevented from finding the record of his past conviction). Indeed, appellant pleaded "true" to the allegation. We may disregard this immaterial variance because we measure the sufficiency of the evidence under a hypothetically correct jury charge. *See Byrd v. State*, 336 S.W.3d 242, 247–48 (Tex. Crim. App. 2011) (immaterial variances are to be disregarded when reviewing the sufficiency of the evidence); *Young v. State*, 14 S.W.3d 748, 750 (Tex. Crim. App. 2000) (the sufficiency of the evidence is measured by a hypothetically correct jury charge, even when considering the findings necessary to sustain the imposition of an enhanced punishment).

A hypothetically correct jury charge would have asked the jury whether appellant was convicted of a burglary of a habitation in Anderson County, not Palestine County. *See Gollihar v. State*, 46 S.W.3d 243, 256 (Tex. Crim. App. 2001) ("A hypothetically correct charge need not incorporate allegations that give

rise to immaterial variances."). Because appellant stipulated that he had been convicted of that offense, we conclude that there is legally sufficient evidence to support the finding necessary to sustain the imposition of appellant's enhanced punishment.

CHARGE ERROR

Appellant's third issue is closely related to his second. He argues that the trial court erred by submitting a punishment charge that referred to Palestine County instead of Anderson County.

Because appellant did not object to the trial court's erroneous charge, he can only obtain relief if he suffered egregious harm. *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh'g). Appellant cannot meet this difficult standard. The trial court's error did not decrease the State's burden of proof or impair one of appellant's defensive theories. Appellant actually pleaded "true" to the allegation that he was convicted in the erroneously identified Palestine County. He also stipulated that he was convicted in the correctly identified Anderson County.

We conclude that the trial court's charge error was harmless.

CONCLUSION

The trial court's judgment is affirmed.

/s/ Tracy Christopher
Justice

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