



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 02-16-00302-CR

ADRIAN DEVONE PHILLIPS

APPELLANT

V.

THE STATE OF TEXAS

STATE

FROM CRIMINAL DISTRICT COURT NO. 2 OF TARRANT COUNTY
TRIAL COURT NO. 1416255D

MEMORANDUM OPINION¹

A jury found appellant Adrian Devone Phillips guilty of burglary of a habitation. After Phillips pleaded true to two prior felonies, the trial court sentenced him to 35 years in prison. On appeal, Phillips brings two points: (1) the trial court erred by denying his motion for continuance, and (2) the trial court

¹See Tex. R. App. P. 47.4.

erred by failing to conduct a hearing when Phillips alleged possible juror misconduct. We affirm.

Summary of the offense

Around 2:00 p.m. on May 19, 2015, Phillips forcibly entered Faedra Wills's Arlington home while, apparently unknown to him, Wills locked herself in the bathroom and called 911. Arlington police officers arrived at Wills's home while Phillips was loading stolen property into the trunk of his car, which he had backed into Wills's driveway. When the officers ordered Phillips to stop, he did just the opposite: Phillips got in his car, started it, revved the engine, and sped out of the driveway. Corporal Richard Hernandez thought Phillips was going to run him over, so he fired six times at Phillips's car; a second officer fired once. Undeterred, Phillips headed toward Highway 287. The officers chased Phillips at speeds exceeding 100 miles per hour but lost sight of him.

Meanwhile, by 2:44 p.m., Fort Worth police had received a 911 call regarding a shooting and a man dripping blood walking into his residence. When a Fort Worth police officer arrived, he met with the 911 caller, who directed him to Phillips's home where the officer saw bloody footprints and blood near the door. Concerned that someone had been shot and needed medical attention, the officer knocked on the door, which prompted the barking of what sounded like a large dog.

Now it was the police's turn to proceed undeterred. The officer cracked open the door, which was not locked, and saw a large pit bull inside that was

barking, snapping, and snarling at him. The officer also saw blood on the carpet. After the officer announced himself, a woman covered in blood—Phillips’s girlfriend—came out of the bedroom. When the officer determined that the woman was not the person shot, he instructed her to put the pit bull in a kennel, which she did.²

The woman directed the officer to the bedroom, and after searching in vain, the officer and a second officer who had also arrived at the scene eventually found Phillips hiding behind a wall panel in a water-heater space. The officer testified that he had no reason to think that Phillips was a suspect for anything and treated him simply as someone who needed medical attention. The officer did, however, think that Phillips’s explanation about how he got his injuries—a claimed gang-related shooting in the Stop Six area that day—was odd because there had not been any shooting reports in that area that day. Phillips declined any medical help, but after some persuasion he agreed to go to a hospital.

Although the Fort Worth officer had no reason to think Phillips was a suspect in a crime, the Arlington police department did, and an Arlington crime-scene investigator appeared at Phillips’s home that same day. Some of Wills’s property was found inside Phillips’s home and in the trunk of his car.

²The woman described the discussion regarding kenneling the pit bull a bit differently. She testified that she thought the officer was going to shoot it, so she grabbed it and put it in the kennel.

The police also determined that the license plates on Phillips's car were those of another person and another car. The investigator explained, "In cases where suspects use vehicles to commit criminal offenses, they will put license plates that do not belong to that vehicle on that vehicle so if somebody sees that license plate or records that license plate number, it will not come back to them."

The trial court properly denied the motion for continuance

In Phillips's first point, he contends that the trial court erred by denying his motion for continuance because a full investigation into the underlying offense had not been completed. We disagree.

The record

Trial was set for the week starting July 18, 2016. On July 13 Phillips moved for a continuance because his counsel was currently in trial; because counsel was also set for trial on July 18, 2016, at 9:00 a.m. in Navarro County; and because on July 13, 2016, the State had served discovery on his counsel in another case that would require her attention.

Before trial began on July 19, Phillips's counsel argued her motion for continuance and added that a new unit in the Tarrant County District Attorney's office was now investigating all cases involving officer shootings and that in Phillips's case, two officers had shot him. The trial court denied Phillips's motion:

The State has advised the Court and you, [defense counsel], that they're going to try burglary of a habitation. They're not going to try the assault on a police officer case.

I'll also note for the record that Mr. Phillips has been in custody since May of 2015, better than a year, and this case has been set for trial. You are the number one on this. I did receive your motion back on July the 13th. It is now July the 19th. And it's been the Court's policy that when a court -- the case is called to trial, then we go to trial unless there's an extenuating circumstance that would preclude it. I feel that Mr. Phillips has been in custody long enough, he needs to have his day in court. We are here ready to have it. And for that and for what I've just articulated, your motion is denied.

The record shows that defense counsel had filed a representation letter in June 2015—more than a year earlier.

Standard of review

The trial court may continue a criminal action based on a defendant's written and verified motion so long as the motion fully sets forth sufficient cause. Tex. Code Crim. Proc. Ann. arts. 29.03, 29.08 (West 2006). Granting or denying a motion for continuance is within the trial court's discretion, and we will not reverse the trial court's ruling absent an abuse of that discretion. *Janecka v. State*, 937 S.W.2d 456, 468 (Tex. Crim. App. 1996), *cert. denied*, 522 U.S. 825 (1997). To show an abuse of discretion, the defendant must show that he was actually prejudiced by counsel's inadequate preparation time. *Id.* Examples of specific prejudice are unfair surprise, an inability to effectively cross-examine the State's witnesses, or the inability to adduce crucial testimony that potential witnesses could have given. *See id.* But merely stating that counsel did not have enough time to prepare an adequate defense does not show prejudice. *Id.*; *see Dotson v. State*, 146 S.W.3d 285, 297 (Tex. App.—Fort Worth 2004, pet. ref'd). To show reversible error predicated on the denial of a pretrial motion for

continuance, a defendant must show both that the trial court erred in denying the motion and that the lack of a continuance harmed him. *Gonzales v. State*, 304 S.W.3d 838, 843 (Tex. Crim. App. 2010).

Discussion

Phillips does not argue that his lawyer was unprepared. See *id.* at 841–44 (holding that trial court did not err by denying motion for continuance where, among other factors, counsel had been on case for more than eight months). In any event, nothing in our review of the record suggests that defense counsel was not prepared.

The investigation that Phillips complains was not yet finished involved the officers' firing at Phillips—that is, the officers' purported wrongdoing. Phillips does not explain what difference it would have made in the evidentiary presentation.³

We hold that Phillips has shown neither an abuse of discretion nor prejudice. See *id.* at 843. We overrule his first point.

The trial court properly denied the motion for mistrial

In Phillips's second point, he contends that the trial court erred by denying his request for mistrial because a key witness—the officer who had shot Phillips

³ “[E]vidence of extraneous offenses that are indivisibly connected to the charged offense and necessary to the State’s case in proving the charged offense may be admissible as relevant evidence to explain the context of the offense for which the defendant is on trial.” *Lockhart v. State*, 847 S.W.2d 568, 571 (Tex. Crim. App. 1992), *cert. denied*, 510 U.S. 849 (1993).

and who was now working at the Tarrant County criminal courthouse—had access to the jurors. We again disagree.

The record

Near trial's end, defense counsel and the trial court engaged in the following colloquy:

[DEFENSE COUNSEL]: Your Honor, over the break, I had an opportunity to go downstairs on the plaza level of this building. There are two exits on the plaza level and two entrances, the north entrance and the south entrance. At the north entrance door Richard Hernandez, who was one of the witnesses in our trial who works for the sheriff's department, was manning that door on the north side. Jurors are coming in and out of that door, and he is one of the officers that is bringing -- or bringing in the jurors or the public.

THE COURT: Yeah.

[DEFENSE COUNSEL]: It's inappropriate at best that he is a witness in this case and not with the other witnesses or away from the courthouse. Most of the State's witnesses have been kept in an area away from the jury. This particular witness, who was the officer that actually did all the shooting, is downstairs manning a public entrance that the jurors are coming in and out of.

THE COURT: Okay.

[DEFENSE COUNSEL]: Certainly the Court tells all jurors -- I mean, all witnesses not to discuss the case, you know, with anyone but the lawyers, whatever the case may be. It is just -- it just has -- it's improper, Judge.

THE COURT: Well, I mean, he works here. He's a sheriff.

[DEFENSE COUNSEL]: It doesn't matter, Judge.

THE COURT: What's the problem with him manning the door?

[DEFENSE COUNSEL]: We're in the middle of trial and jurors are coming in and out past this man.

THE COURT: Well, more than jurors come in and out past the man. I mean, I don't see anything improper with that.

[DEFENSE COUNSEL]: I'm not concerned with anybody else, Judge, but the jury.

THE COURT: All right.

[DEFENSE COUNSEL]: And we'd ask for a mistrial.

THE COURT: Come on, give me a break.

[DEFENSE COUNSEL]: We would ask for a mistrial.

THE COURT: Well, you're not going to get it.

[DEFENSE COUNSEL]: I'm still going to ask.

THE COURT: Well, it's denied. I mean, it doesn't make sense. Nothing that you just said makes sense.

[DEFENSE COUNSEL]: Judge, jurors are not -- witnesses --

THE COURT: I've denied it, [counsel].

[DEFENSE COUNSEL]: I understand.

THE COURT: All right. Let's get the jury in.

Standard of review

A trial court's denial of a mistrial is another of those actions that are reviewed for an abuse of discretion. *Grotti v. State*, 209 S.W.3d 747, 776 (Tex. App.—Fort Worth 2006) (citing *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999), *cert. denied*, 529 U.S. 1070 (2000)), *aff'd*, 273 S.W.3d 273 (Tex. Crim. App. 2008). We are to view the evidence in the light most favorable to the trial court's ruling, considering only those arguments before the court at the time it ruled. See *Wead v. State*, 129 S.W.3d 126, 129 (Tex. Crim. App. 2004). We

must uphold the trial court's ruling if it was within the zone of reasonable disagreement. *Id.* A trial court abuses its discretion in denying a requested mistrial only when no reasonable view of the record could support its ruling. See *Webb v. State*, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007).

Article 36.22 of the Texas Code of Criminal Procedure provides that “[n]o person shall be permitted to converse with a juror about the case on trial except in the presence and by the permission of the court.” Tex. Code Crim. Proc. art. 36.22 (West 2006). When a juror talks with an unauthorized person about the case, injury to the defendant is presumed, and a new trial may be warranted. *Hughes v. State*, 24 S.W.3d 833, 842 (Tex. Crim. App.), *cert. denied*, 531 U.S. 980 (2000). But the appellant must prove the juror-misconduct allegations. *Id.* Determining the facts and assessing the witnesses’ credibility are matters left almost entirely to the trial court’s discretion. *Id.*

Discussion

The record contains no evidence that Corporal Hernandez spoke to any juror, much less that he spoke to any juror about the case. Phillips bore the burden of showing misconduct. See *id.* Without something more than the fact that Corporal Hernandez worked at one of the two courthouse entrances, the trial court did not abuse its discretion by concluding that Phillips was not deprived of a fair and impartial trial. See *Frnka v. State*, No. 04-08-00650-CR, 2009 WL 2882939, at *2 (Tex. App.—San Antonio Sept. 9, 2009, no pet.) (mem. op, not designated for publication) (holding no abuse of discretion in denying

motion for mistrial when arresting officer shook the hands of all the jurors, the attorneys, and the defendant before leaving the courtroom). Moreover, when Corporal Hernandez took the stand as the State's second trial witness, among the first words out of his mouth were that he worked the doors as a bailiff in the same building in which Phillips's trial was occurring. Phillips's belated complaint—that Corporal Hernandez's working security at one of the building's entrances was, by itself, improper—was not timely. See Tex. R. App. P. 33.1(a).

To the extent Phillips argues that the trial court erred by not having a hearing on his complaint, defense counsel did not object to the trial court's denying the motion for mistrial on that basis. See *Wead*, 129 S.W.3d at 129 (stating that when determining whether trial court abused its discretion, appellate courts consider only those arguments before the trial court at the time of the ruling). Because Phillips's argument on appeal does not comport with the argument at trial, the alleged error is not preserved.⁴ See *Reyna v. State*, 168 S.W.3d 173, 177–78 (Tex. Crim. App. 2005).

We overrule Phillips's second point.

⁴We note that Phillips did not pursue this issue in a motion for new trial. See Tex. R. App. P. 21.3(f) (“The defendant must be granted a new trial, or a new trial on punishment, for any of the following reasons: . . . (f) when, after retiring to deliberate, the jury has received other evidence; when a juror has talked with anyone about the case . . .”).

Conclusion

Having overruled both of Phillips's points, we affirm the trial court's judgment.

/s/ Elizabeth Kerr
ELIZABETH KERR
JUSTICE

PANEL: MEIER, GABRIEL, and KERR, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: August 24, 2017