In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-22-00297-CR

ALBERT JAMALL MCALISTER, Appellant

V.

THE STATE OF TEXAS

On Appeal from Criminal District Court No. 3
Tarrant County, Texas
Trial Court No. 1588866D

Before Sudderth, C.J.; Bassel and Wallach, JJ.
Memorandum Opinion by Justice Bassel

MEMORANDUM OPINION

I. Introduction

Appellant Albert Jamall McAlister appeals his conviction for burglary of a habitation. *See* Tex. Penal Code Ann. § 30.02(a)(3), (c)(2). In two issues, McAlister argues that the evidence is insufficient to support his conviction and that the State's improper closing argument affected his substantial rights. Because the jury could have reasonably inferred from all the evidence (including his fingerprints on the lamp that had sat atop a missing jewelry box) that McAlister had committed burglary, not just criminal trespass, and because the trial court did not abuse its discretion by not granting a mistrial after giving two curative instructions, we affirm.

II. Background

Paula Anderson, a physical-education teacher, testified that she and her son left their home at 7:00 a.m. on February 13, 2019, to head to the school where she taught and where her son was a student; before leaving, she had double-checked the front door to make sure that it was locked. When they returned home at approximately 3:45 p.m., Anderson noticed as she was pulling into the driveway that the front door was open. Upon closer inspection, Anderson could see that the doorjamb was completely broken, so she called the police.

After the police arrived and made sure that no one was in the home, Anderson and her son entered, and she noticed in her master bedroom that her jewelry box,

along with its contents,[1] was missing. She explained that her jewelry box was not one that is placed on a dresser but "was a standing one" that had a plug underneath it and that had a lamp that sat on top of it. The lamp was found in the room, and officers were able to lift two fingerprints from it. Those fingerprints matched McAlister's ten-print card maintained by the sheriff's department.

When asked whether she had given anyone permission to be in her home during the end of January to the time of the incident in February, Anderson said that she had some plumbing work done, but she did not give the plumbers permission to be in her master bedroom. She gave the police the name of the plumbing companies that she had used, and the police determined that McAlister was not employed by any of those companies.

According to one of the investigating officers, the factors that led the police to conclude that McAlister was the person who had burglarized Anderson's home were that Anderson had told officers that she cleaned the lamp "a lot" and that the lamp was found to have fingerprints matching McAlister's; that the lamp had been moved off the jewelry box that was missing; and that McAlister was linked to a gray Nissan, which was the type of vehicle that had been tied to the incident.

[1]Anderson said that her jewelry consisted of a wedding ring, a James Avery bracelet and various charms, costume jewelry, and coins from other countries. Neither the jewelry nor the jewelry box was ever recovered.

Based on this evidence, the jury found McAlister guilty of burglary of a habitation. After finding the habitual-offender notice to be true, the trial court sentenced McAlister to fifty years' imprisonment.

III. Sufficient Evidence Supports Burglary Conviction

In his first issue, McAlister argues that the evidence is insufficient to support his conviction for burglary of a habitation. Specifically, McAlister argues that the evidence left the jury to speculate, rather than to draw a reasonable inference, that he committed the offense. As we explain below, based on McAlister's fingerprints matching the prints that were lifted from the lamp that had been on top of the jewelry box prior to it going missing, the jury could have reasonably inferred that McAlister had committed theft when he entered the home.

A. Standard of Review

In our evidentiary-sufficiency review, we view all the evidence in the light most favorable to the verdict to determine whether any rational factfinder could have found the crime's essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Queeman v. State*, 520 S.W.3d 616, 622 (Tex. Crim. App. 2017). This standard gives full play to the factfinder's responsibility to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Harrell v. State*, 620 S.W.3d 910, 914 (Tex. Crim. App. 2021).

The factfinder alone judges the evidence's weight and credibility. *See* Tex. Code Crim. Proc. Ann. art. 38.04; *Martin v. State*, 635 S.W.3d 672, 679 (Tex. Crim. App. 2021). We may not re-evaluate the evidence's weight and credibility and substitute our judgment for the factfinder's. *Queeman*, 520 S.W.3d at 622. Instead, we determine whether the necessary inferences are reasonable based on the evidence's cumulative force when viewed in the light most favorable to the verdict. *Braughton v. State*, 569 S.W.3d 592, 608 (Tex. Crim. App. 2018); *see Villa v. State*, 514 S.W.3d 227, 232 (Tex. Crim. App. 2017) ("The court conducting a sufficiency review must not engage in a 'divide and conquer' strategy but must consider the cumulative force of all the evidence."). We must presume that the factfinder resolved any conflicting inferences in favor of the verdict, and we must defer to that resolution. *Braughton*, 569 S.W.3d at 608.

To determine whether the State has met its burden to prove a defendant's guilt beyond a reasonable doubt, we compare the crime's elements as defined by a hypothetically correct jury charge to the evidence adduced at trial. *Hammack v. State*, 622 S.W.3d 910, 914 (Tex. Crim. App. 2021); *see also Febus v. State*, 542 S.W.3d 568, 572 (Tex. Crim. App. 2018) ("The essential elements of an offense are determined by state law."). Such a charge is one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. *Hammack*, 622 S.W.3d at 914. The law as authorized by the

indictment means the statutory elements of the offense as modified by the charging instrument's allegations. *Curlee v. State*, 620 S.W.3d 767, 778 (Tex. Crim. App. 2021); *see Rabb v. State*, 434 S.W.3d 613, 616 (Tex. Crim. App. 2014) ("When the State pleads a specific element of a penal offense that has statutory alternatives for that element, the sufficiency of the evidence will be measured by the element that was actually pleaded, and not any alternative statutory elements.").

B. Applicable Law

The offense of burglary of a habitation is defined as follows: "A person commits an offense if, without the effective consent of the owner, the person: (1) enters a habitation . . . with intent to commit a . . . theft . . . or . . . (3) enters a . . . habitation and commits or attempts to commit a . . . theft . . . ." *See* Tex. Penal Code Ann. § 30.02(a)(1), (3). A person commits a theft when he "unlawfully appropriates property with intent to deprive the owner of property." *Id.* § 31.03(a).

C. Analysis

McAlister concedes that the following "are the established facts if the evidence is viewed in the light most favorable to the verdict":

- A house was burglarized;
- Two of McAlister's fingerprints were found on a lamp inside the burglarized house;
- The fingerprints had recently been placed on the lamp;

- The lamp had rested on top of a jewelry box that was stolen during the burglary;
- A gray Nissan was a "suspect vehicle," and a gray Nissan was linked to McAlister; and
- McAlister was not a plumber who had worked inside the burglarized home.

McAlister concludes that such facts established only that he was inside the home at a time near the burglary.[2] He claims that the inside of the house was accessible to the public for an undetermined length of time after the doorjamb was broken, thus implying that he had entered the home and had merely touched the lamp after someone else had broken in and had stolen the jewelry box. McAlister contends that the jury had to speculate that because he had touched the lamp inside the victim's house, he also was the person who had burglarized the home. No such speculation was needed because the jury could have reasonably inferred that McAlister was in the home with the intent to commit theft and that he had touched the lamp in order to move it before taking the item under it—the jewelry box that was the sole item missing from the home. *See Acosta v. State*, 429 S.W.3d 621, 625 (Tex. Crim. App. 2014) ("[T]he trier of fact may use common sense and apply common knowledge, observation, and experience gained in ordinary affairs when drawing inferences from the evidence."); *see also Malena v. State*, No. 05-10-00161-CR, 2010 WL 3769539, at *3

[2]Because McAlister does not challenge that the fingerprints were his or that he was inside the home without Anderson's permission, we focus our analysis on the theft element.

(Tex. App.—Dallas Sept. 29, 2010, pet. ref'd) (not designated for publication) ("It is well established that the specific intent to commit theft may be inferred from the circumstances." (citing *Simmons v. State*, 590 S.W.2d 137, 138 (Tex. Crim. App. [Panel Op.] 1979))).

Despite his presence in the home and his fingerprints on the lamp that had sat on the sole object that was taken, McAlister argues that "it has long been held that, without other identification evidence, the State must prove the fingerprints were necessarily made at the time of the burglary. *Dues v. State*, 456 S.W.2d 116, 117 (Tex. Crim. App. 1970)." McAlister acknowledges that *Dues* used "a different version of the sufficiency standard." Because we are constrained to follow the current sufficiency standard, which is set forth above, we decline to base our analysis on a case that uses a standard of review that the Court of Criminal Appeals has since abandoned. *See Luna v. State*, No. 07-01-0387-CR, 2002 WL 711461, at *3 (Tex. App.—Amarillo Apr. 24, 2002, no pet.) (not designated for publication) (stating that "[t]he Court of Criminal Appeals has since abandoned the standard of review in effect at the time [that] *Dues* [was] decided").

Applying the appropriate sufficiency standard of review in which we view the evidence in the light most favorable to the verdict, the jury could have reasonably inferred that McAlister entered Anderson's home with the intent to commit theft and that he did commit theft because his fingerprints were on the lamp that had sat on the jewelry box that was missing as a result of the break-in; thus, we hold that there is

sufficient evidence of the intent to commit theft or that a theft was committed. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Queeman*, 520 S.W.3d at 622; *Harber v. State*, No. 12-13-00118-CR, 2013 WL 6157603, at *4 (Tex. App.—Tyler Nov. 21, 2013, no pet.) (mem. op., not designated for publication) (holding that the cumulative force of incriminating circumstances that included that a vehicle with a description matching appellant's vehicle was seen at the burglarized home, along with the absence of any connection between appellant and the home's owner, supported an inference that appellant had entered the house with the intent to commit theft). Because we have held that sufficient evidence supports the theft element of McAlister's burglary-of-a-habitation conviction, we need not address his argument that he was guilty only of the lesser-included offense of criminal trespass. *See* Tex. R. App. P. 47.1. Accordingly, we overrule McAlister's first issue.

IV. No Abuse of Discretion by Denying Mistrial

In his second issue, McAlister argues that the State made an improper argument that referenced his absence from the trial and that such argument affected his substantial rights. We interpret McAlister's argument to be that the trial court abused its discretion by denying his motion for mistrial. *See Faulkner v. State*, 940 S.W.2d 308, 314 (Tex. App.—Fort Worth 1997, pet. ref'd) (op. on reh'g) (noting that characterizing a prosecutor's improper jury argument as error is incorrect because only the trial court can commit error and stating that properly characterized points of error should refer to actions either taken or not taken by the trial court, e.g., "the trial

court erred in failing to grant a mistrial"). After balancing the required factors, we conclude that the trial court did not abuse its discretion by denying McAlister's motion for mistrial.

A. Standard of Review

To be permissible, the State's jury argument generally must fall within one of the following four general areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to opposing counsel's argument; or (4) plea for law enforcement. *Freeman v. State*, 340 S.W.3d 717, 727 (Tex. Crim. App. 2011). When a trial court sustains an objection and instructs the jury to disregard improper argument but denies a defendant's motion for a mistrial, the issue is whether the trial court abused its discretion by denying the mistrial. *Hawkins v. State*, 135 S.W.3d 72, 76–77 (Tex. Crim. App. 2004). The Court of Criminal Appeals has recognized that "[o]rdinarily, a prompt instruction to disregard will cure error associated with an improper question and answer." *Ovalle v. State*, 13 S.W.3d 774, 783 (Tex. Crim. App. 2000). Therefore, a mistrial is required only in extreme circumstances: when the improper argument causes incurable prejudice—that is, the argument is "so prejudicial that expenditure of further time and expense would be wasteful and futile." *Hawkins*, 135 S.W.3d at 77 (quoting *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999)). In determining whether a trial court abused its discretion by denying a mistrial, we balance three factors: (1) the severity of the misconduct (prejudicial effect); (2) curative measures; and (3) the certainty of conviction absent the misconduct.

Hawkins, 135 S.W.3d at 77; *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998) (op. on reh'g).

B. The Closing Argument

McAlister complains of a gesture or action that occurred toward the end of the State's closing argument:

> [PROSECUTOR]: The lamp was on top of what was stolen[,] and whose fingerprint was on that lamp? Albert McAlister's.
>
> This is about accountability. Some people don't do the right things in their life. Ever. We're asking you to hold him accountable.
>
> On your forms, your jury questionnaire --
>
> [DEFENSE COUNSEL]: Excuse me, Judge. Excuse me[, prosecutor]. I'm going to object[,] and I would ask that the record reflect that the prosecutor was over here pointing out that Mr. McAlister is not here. I can't raise that objection without stating that I'm waiving any of that. But the record needs to reflect that was done and [that] the [c]ourt has specifically instructed everyone not to do that.[3] I object to it.
>
> THE COURT: What's the State's response?
>
> [PROSECUTOR]: I didn't say anything, Your Honor, except it's time to hold somebody accountable.

[3]McAlister's trial counsel appears to be alluding to the conversation that he had with the trial court prior to the start of closing arguments on the second day of trial. After the trial court had waited more than two hours for McAlister to appear, the trial court decided to proceed with closing arguments in his absence. McAlister's trial counsel requested that the trial court grant a motion in limine "on the part of the State or the [c]ourt" regarding McAlister's absence. McAlister's trial counsel stated that "[o]bviously, [the State] can point out that he's not here, but . . . there's no evidence as to why he's not here." The trial court stated that it did not intend to address that fact, and the prosecutor said that he did not intend to go into that. The trial court then concluded, "Very good."

THE COURT: All right. I'll overrule the objection.

[DEFENSE COUNSEL]: Thank you.

[PROSECUTOR]: Your form had rehabilitation, punishment[,] and det[e]rrence. Det[e]rrence is the law. Det[e]rrence is a locked door. Rehabilitation, we can't begin to rehabilitate anybody until we hold them accountable. There is a punishment aspect to this whole system. You have a victim that had sentimental jewelry stole[n] from her that will never be recovered. It wasn't a dollar amount to her. It was the safety[] and the loss of sentimental value. And for those reasons we are asking you to hold [McAlister] guilty. Thank you.

THE COURT: [Defense counsel], reconsidering your objection, can you restate it?

[DEFENSE COUNSEL]: I object, first of all, I can't make [an] objection without drawing attention to the obvious[—]that Mr. McAlister is not here. But the [c]ourt instructed the parties to not refer to that. I made a specific request prior to the jury coming in here. And the record that I wanted to make sure the record reflected is that [the prosecutor] -- who is so someone else that might read this record -- [the prosecutor] is at the prosecutor's table far end of the prosecutor's table, the closest person to the jury and came directly over to where I was seated, which there's no reason for him to be over here. There's no -- there's no demonstrative evidence over here, other than *he kicked this chair that Mr. McAlister was sitting in out in front of him to make it very obvious that Mr. McAlister is not here*[,] and that's a direct violation, in my opinion, of what the [c]ourt had told us to do.

So that's my objection. I just want to make sure the record reflected where everybody was walking[,] and it was about 20 feet for him to come over here.

THE COURT: I will sustain that objection.

[DEFENSE COUNSEL]: Then I would ask that the jury be instructed to disregard.

> THE COURT: The jury will disregard the prosecutor's action of touching the chair where [McAlister] was and moving it forward.
>
> [DEFENSE COUNSEL]: And I would respectfully ask for a mistrial because I don't believe that your instruction can cure that error. I think it's something that cannot be cured.
>
> THE COURT: I will deny that motion.
>
> [DEFENSE COUNSEL]: Thank you.
>
> THE COURT: But I, again, will instruct the jury to disregard that and also to not consider the fact that your client is not here. [Emphasis added.]

The trial court then instructed the jury to deliberate.

C. Analysis

We first look at the objected-to argument to see if it falls outside the categories of permitted closing arguments. To the extent that McAlister's objection can be broadly read to challenge the prosecutor's actual statements, rather than solely the prosecutor's action of kicking McAlister's empty chair, the prosecutor sought to have the jury hold McAlister accountable, which constitutes a plea for law enforcement.[4] *See Reed v. State*, 421 S.W.3d 24, 32 (Tex. App.—Waco 2013, pet. ref'd) ("The State, in its closing argument, pleaded with the jury . . . to hold appellant accountable for his action—or, in other words, made a plea for law enforcement."); *see also Waldon v. State*,

[4]On appeal, McAlister contends that the State's argument encouraged the jury to find him guilty because of his attitude or character. McAlister's trial-court objection, however, was based on how the prosecutor's argument and action emphasized that McAlister had absented himself from the second day of trial. McAlister failed to present this character-conformity ground to the trial court; therefore, he failed to preserve this argument for appeal. *See generally* Tex. R. App. P. 33.1(a)(1)(A); *Landers v. State*, 402 S.W.3d 252, 254 (Tex. Crim. App. 2013).

No. 11-12-00101-CR, 2014 WL 1778246, at *9 (Tex. App.—Eastland Apr. 30, 2014, no pet.) (mem. op., not designated for publication) (holding that argument about appellant's not wanting to be held accountable was not a direct comment on his failure to testify). We therefore conclude that the prosecutor's actual statements do not constitute improper argument.

With regard to the prosecutor's action of kicking McAlister's empty chair, the State concedes in its brief that this gesture "invited an inference that [McAlister] was absent because he wanted to avoid a conviction" and that such action "was improper." Assuming without deciding that the action was improper,[5] we proceed to balance the three factors set out above to determine whether the trial court abused its discretion by denying a mistrial.

As to the severity of the misconduct—the prejudicial effect—the State agrees with the argument in McAlister's brief that the prosecutor's action possibly implied facts not in evidence but argues that McAlister's absence "was something the jury was well aware of."[6] The State further explains that the prosecutor's action of kicking McAlister's chair "did not 'inject new facts' in[to] the case in the sense of informing the jury of facts known to the prosecutor but hitherto unknown to the jury. Instead,

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[5] *See, e.g.*, *Sandoval v. State*, 665 S.W.3d 496, 550 (Tex. Crim. App. 2022) (holding that comment on appellant's absence during the punishment proceedings was not an improper comment on his failure to testify), *pet. for cert. filed*, No. 23-5618 (U.S. Sept. 20, 2023).

[6] McAlister claims in his brief that "[t]he jury knew nothing of [his] absence," but this is simply not true.

its prejudicial effect was that it ran the risk of inviting jury speculation." The State describes the action as "not severe" and concedes that the action created "slight prejudice." We agree that the prejudicial effect from the prosecutor's action was not of a large magnitude because the jury was present in the courtroom for both days of the trial and was free to take notice on its own that McAlister was not present on the second day. Moreover, there is no indication in the record that the prosecutor repeated the action during the remainder of his closing argument, and the trial court twice gave an instruction for the jury to disregard the action and to not consider the fact that McAlister was not present.[7] *See Gamboa v. State*, 296 S.W.3d 574, 580 (Tex. Crim. App. 2009) (stating that appellate court generally presumes that a jury will follow a trial court's curative instructions). Furthermore, the State's case, which included fingerprint evidence and testimony about a suspect car, was not so weak that the State's isolated action suggested a verdict on an improper basis. We conclude, after balancing the appropriate factors, that the trial court did not abuse its discretion by denying McAlister's mistrial motion. *Cf. Lockett v. State*, No. 01-22-00302-CR, 2023

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[7]McAlister contends that "[t]he trial court['s] revisiting the error only brought more attention to the improper argument." McAlister's argument fails because he (1) cites no authority to support that argument and (2) ignores the balancing test in which the trial court's curative instructions and the certainty of the conviction absent the prosecutor's action outweigh the slight prejudice from the prosecutor's action. *See Ortega v. State*, No. 05-12-00293-CR, 2013 WL 1614717, at *4 (Tex. App.—Dallas Apr. 11, 2013, pet. ref'd) (mem. op., not designated for publication) (involving circumstance in which the trial court initially denied the appellant's objection and then revisited the ruling and sustained the objection but holding based on the balancing factors that the trial court did not abuse its discretion by denying appellant's request for a mistrial).

WL 4496919, at *5 (Tex. App.—Houston [1st Dist.] July 13, 2023, pet. ref'd) (mem. op., not designated for publication) (holding that despite the State's improper comment on appellant's failure to testify, the trial court did not abuse its discretion by denying the mistrial motion because the comment was brief and isolated, the trial court took immediate action, appellant did not show that the jury did not follow the instruction, and the evidence was compelling). We thus overrule McAlister's second issue.

V. Conclusion

Having overruled McAlister's two issues, we affirm the trial court's judgment.

/s/ Dabney Bassel

Dabney Bassel
Justice

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Tex. R. App. P. 47.2(b)

Delivered: November 30, 2023