



NUMBER 13-16-00529-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

CASEY WILLIAM KINNEY,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

**On appeal from the 105th District Court
of Nueces County, Texas.**

MEMORANDUM OPINION

**Before Justices Rodriguez, Contreras, and Benavides
Memorandum Opinion by Justice Benavides**

By two issues, appellant Casey William Kinney appeals his convictions for aggravated kidnapping, unlawful carrying of a weapon on a licensed premises, and theft of a firearm. See TEX. PENAL CODE ANN. §§ 20.04, 46.02, 31.03 (West, Westlaw though Ch. 49, 2017 R.S.). Kinney alleges that: (1) the State committed prosecutorial vindictiveness and punished him for exercising his right to a jury trial on punishment; and

(2) the State's closing argument was improper. We affirm.

I. BACKGROUND

Kinney was charged by indictment on three counts: (1) aggravated kidnapping of Joseph Toomey, a first-degree felony; (2) unlawfully carrying a weapon on a licensed premises¹, a third-degree felony; and (3) theft of a firearm, a state jail felony. *See id.* Kinney pleaded guilty to all three counts and requested a jury to assess punishment.

After a short presentation of evidence by both the State and Kinney, the jury found Kinney had released Toomey in a safe place, which reduced the aggravated kidnapping to a second-degree felony. *See id.* at 20.04(d) (West, Westlaw through Ch. 49, 2017 R.S.). The jury assessed punishment at ten years' imprisonment in the Texas Department of Criminal Justice–Institutional Division (TDCJ–ID) for the aggravated kidnapping, five years' imprisonment in TDCJ–ID for the unlawful carrying of a weapon, and two years' imprisonment in a state jail facility for the theft of a firearm. *See id.* §§ 20.04, 46.02, 31.03. The trial court ran the sentences concurrently. This appeal followed.

II. NO PROSECUTORIAL VINDICTIVENESS OCCURRED

By his first issue, Kinney alleges the State committed prosecutorial vindictiveness and punished him for asserting his right to a jury trial on punishment.

¹ A licensed premises is a location that has a license or permit issued by the State of Texas for the sale of alcoholic beverages. *See* TEX. PENAL CODE ANN. § 46.02(c) (West, Westlaw through Ch. 49, 2017 R.S.). In this case, Kinney was found in a convenience store with a handgun.

A. Standard of Review and Applicable Law

We review an allegation of prosecutorial misconduct on a case-by-case basis. See *Stahl v. State*, 749 S.W.2d 826, 830 (Tex. Crim. App. 1988) (en banc); see also *Day v. State*, No. 13-13-00338-CR, 2016 WL 4272383, at *9 (Tex. App.—Corpus Christi Aug. 11, 2016, pet. ref’d) (mem. op., not designated for publication).

“Both Texas and federal courts have recognized that prosecutors have broad discretion in deciding which cases to prosecute.” *Neal v. State*, 150 S.W.3d 169, 173 (Tex. Crim. App. 2004) (en banc). “Courts must presume that a criminal prosecution is undertaken in good faith and in nondiscriminatory fashion to fulfill the State’s duty to bring violators to justice.” *Id.* “A decision to prosecute violates due process when criminal charges are brought in retaliation for the defendant’s exercise of his legal rights.” *Id.*

A constitutional claim of prosecutorial vindictiveness may be established in either of two distinct ways: (1) proof of circumstances that pose a ‘realistic likelihood’ of such misconduct sufficient to raise a ‘presumption of prosecutorial vindictiveness,’ which the State must rebut or face dismissal of the charges; or (2) proof of ‘actual vindictiveness’—that is, direct evidence that the prosecutor’s charging decision is an unjustifiable penalty resulting solely from the defendant’s exercise of a protected legal right.

Id. (quoting *United States v. Johnson*, 171 F.3d 139, 140–41 (2d Cir. 1999) and *United States v. Goodwin*, 457 U.S. 368, 380–81 (1982)).

Under both prongs, initially the defendant carries the burden of proof. See *id.* at 173–74. “[I]f the defendant is unable to prove actual vindictiveness or a realistic likelihood of vindictiveness, a trial court need not reach the issue of government justification.” *Id.* at 175 (quoting *United States v. Contreras*, 108 F.3d 1255 (10th Cir. 1997)). The “State can stand mute unless and until the defendant carries his burden of

proof under either prong.” *Id.*

B. Discussion

“In this case, the trial court neither disregarded an absolute requirement (such as jurisdiction over the subject or person), nor denied appellant a waivable-only right (such as the right to counsel or a jury trial), so the only issue is whether appellant complied with Rule 33.1(a).” *Id.* Texas Rule of Appellate Procedure 33.1 provides as a prerequisite to presenting a complaint for appellate review, the record must show a timely, specific objection and a ruling by the trial court. See TEX. R. APP. P. 33.1. Although Kinney objected during the State’s opening and closing arguments, he never objected on the grounds now being raised under “prosecutorial vindictiveness.” Due to the lack of objection on the ground he now raises before this Court, the State never had notice of the claim, the defense offered no evidence in support of the claim, the State was given no opportunity to rebut the claims or offer evidence in support of its position, and the trial court was never given the opportunity to rule on the claim of vindictiveness. See *Neal*, 150 S.W.3d at 179–80. Therefore, because Kinney never presented his prosecutorial vindictiveness claim in the trial court, we conclude he failed to preserve this issue for appellate review. We overrule Kinney’s first issue.

III. NO ERROR IN THE STATE’S CLOSING ARGUMENT

By his second issue, Kinney argues the trial court abused its discretion in overruling his objection to statements in the State’s closing argument.

A. Standard of Review

We review a trial court's ruling on an objection to improper jury argument for an abuse of discretion. *Rodriguez v. State*, 446 S.W.3d 520, 536 (Tex. App.—San Antonio 2014, no pet.). “Such argument does not result in reversal ‘unless, in light of the record as a whole, the argument is extreme or manifestly improper, violative of a mandatory statute, or injects new facts harmful to the accused into the trial proceeding.’” *Id.* (citing *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000)). “The remarks must have been a willful and calculated effort on the part of the State to deprive appellant of a fair and impartial trial.” *Id.*

B. Applicable Law

The “purpose of closing argument is to facilitate the jury’s proper analysis of the evidence presented at trial so that it may arrive at a just and reasonable conclusion based on the admitted evidence alone.” *Fant-Cauchman v. State*, 61 S.W.3d 25, 28 (Tex. App—Amarillo 2001, pet. ref’d). Jury argument must fall within one of 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.” *Id.* (citing *Cantu v. State*, 939 S.W.2d 627, 633 (Tex. Crim. App. 1997)). In order to determine if the State’s argument falls into one of the four permissible areas, we must consider the argument in the context where it appears and in light of the entire record. *See Gaddis v. State*, 753 S.W.2d 396, 398 (Tex. Crim. App. 1988).

C. Discussion

Kinney argues that the State made improper arguments during closing by stating Kinney should be an example to the community and his guilty plea did not show he took

responsibility for the offense. Additionally, Kinney alleges that the State's closing argument also interjected facts outside the record and those facts influenced the jury's verdict.

During closing arguments, the State made the following statements:

State: And here, he is going to get treatment inside prison. Not anyone up there said, he wasn't going to get treatment inside the prison system. They grudgingly acknowledged, Oh they have MHMR. That kind of involves—

Defense: Your Honor, that is a misstatement of the evidence. The evidence was, the only evidence about the prison system having treatment is when somebody is on parole. Nothing inside prison, that's argument outside the record.

Court: The jury will remember what the evidence is. You may continue.

State: They grudgingly admitted there was some mental health services. They don't mention, we all know you get college degrees in there; you could get medical care in there; you get a lot of things inside prison. Those being drug addicts, have some of the most serious needs. That is just common sense. You brought common sense to court with you. Understand that, yes, he needs treatment. Yes, he will get that inside TDC.

Defense: Your Honor, argument outside the record. I object. He has produced no evidence that you get treatment inside TDC.

Court: Members of the jury, you will remember what the evidence is. You may continue.

State: I'm asking that you make a point on him because he has had at least 20 years to do something about this problem. He is wanting to play the victim card. My daddy beat me. My mamma didn't treat me properly. I didn't get the benefits. I have had a terrible love life. My girlfriend is a drug addict. My girlfriend won't let me see my son. That's where you stand up and take responsibility for yourself. Yes, he came in here and ple[d guilty. That was not for the purposes, that it is, it just looks better. I plead guilty, I'm taking

responsibility. No, he is not taking responsibility. Because he needs to be served as an example to all of society. The time that you steal somebody's gun and within hours you are carrying it into a convenience store, not once, but twice. Then you are using it, making somebody take you to that convenience store. All along the line, he has escalated this from 12 years of age of sneaking alcohol while his parents and brother are oblivious to it, to the point of getting to a convenience store by threatening the life of a retired, not retired schoolteacher.

Asking for Kinney to be sent to prison and be made an example of would constitute a proper plea for law enforcement. "A proper plea for law enforcement may take many forms, one of which is to argue the relationship between the jury's verdict and the deterrence of crime in general." *Borjan v. State*, 787 S.W.2d 53, 55 (Tex. Crim. App. 1990). This Court "has upheld arguments that probation would be an inappropriate penalty for a certain offense." *Cerda v. State*, 10 S.W.3d 748, 757 (Tex. App.—Corpus Christi 2000, no pet.). The State was within the boundaries of proper jury argument to ask for the jury to confine Kinney to prison instead of probate his sentence. There was no error in this line of jury argument.

Kinney also complains that the State alleged he did not take responsibility for the offense. "One can accept responsibility by pleading guilty. Thus, the defense may fairly argue, during punishment, that the defendant has accepted responsibility by pleading guilty." *Randolph v. State*, 353 S.W.3d 887, 892 (Tex. Crim. App. 2011). However, a "defendant may expressly deny responsibility by putting on an alibi defense or asserting that the result was an accident." *Id.* "Thus, the prosecution may fairly argue, during the guilt or punishment stage, that the defendant denied responsibility because he testified to an alibi or he claimed that the deceased died as the result of an

accident.” *Id.* Kinney pleaded guilty to all the offenses alleged. However, he also put on multiple witnesses that testified that his addiction to drugs and alcohol caused him to behave in a manner that caused the offenses to occur. Additionally, there was testimony that Kinney was high on pills, alcohol, and drugs when he committed the aggravated kidnapping and entered the convenience store with a handgun. The State could have fairly argued that even though he pleaded guilty, Kinney was trying to show his lack of responsibility by intoxication and addiction at the punishment phase. There was no error with this jury argument either.

Kinney lastly argues the State injected new facts not in evidence and misstated the evidence regarding the programs available in TDCJ–ID. “Even when argument exceeds the permissive bounds of [the approved areas of jury argument], such will not constitute reversible error unless, in light of the record as a whole, the argument is extreme or manifestly improper, violative of a mandatory statute, or injects new facts harmful to the accused into the trial proceeding.” *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000) (en banc). “The remarks must have been a willful and calculated effort on the part of the State to deprive the appellant of a fair and impartial trial.” *Id.* “In most instances, an instruction to disregard the remarks will cure the error.” *Id.* Although Kinney believes the State injected new facts during its closing, the trial court did not rule on his objection, instead telling the jury to remember the evidence as they heard it. See TEX. R. APP. P. 33.1. Even if we construe this instruction as an implicit ruling on the objection, the evidence Kinney alleges was injected before the jury was not an intent by the State to deprive Kinney of a fair and impartial trial. See *id.* We conclude that no error occurred because the State’s complained-of argument did not

inject new facts that were harmful to Kinney. See *Wesbrook*, 29 S.W.3d at 115. We overrule Kinney's second issue.

IV. CONCLUSION

We affirm the judgment of the trial court.

GINA M. BENAVIDES,
Justice

Do not publish.
TEX. R. APP. P. 47.2 (b).

Delivered and filed the
20th day of July, 2017.