



COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

GUILLERMO GAMEZ,	§	No. 08-13-00133-CR
Appellant,	§	Appeal from the
v.	§	371st District Court
THE STATE OF TEXAS,	§	of Tarrant County, Texas
Appellee.	§	(TC# 1289672D)
	§	

OPINION

Appellant Guillermo Gamez was found guilty of the aggravated assault of Oscar Alvarez with a knife and sentenced to 14 years' confinement.¹ On appeal, Appellant contends the trial court abused its discretion in denying his motion for mistrial arising from the admission of hearsay testimony (Issue One) and in denying his objection to the State's improper jury argument (Issue Two). We conclude the trial court's instruction to disregard cured any potential harm arising from the witness's hearsay testimony, and that the improper jury argument was de minimis and did not affect Appellant's substantial rights. We therefore affirm.

BACKGROUND

At one time, Appellant lived with Gloria Martinez, and they had two daughters. But, in

¹ This case was transferred from our sister court in Fort Worth, and we decide it in accordance with the precedent of that court. TEX. R. APP. P. 41.3.

October 2011, Appellant and Gloria separated. Within six months, Gloria began dating Oscar Alvarez. The evening of July 13, 2012, Appellant, who had recently returned to town, ended up sleeping outside on the porch to Gloria's apartment in an attempt to see his two daughters. In the early morning hours of July 14, 2012, Gloria slipped away and went to Oscar's apartment. Later, while Oscar was sleeping in his bedroom and Gloria was in the bathroom, Appellant knocked down the door and burst into Oscar's apartment. Appellant ran into the bathroom, and Gloria saw that he was holding a knife with the blade exposed. Gloria attempted to block Appellant from entering the bedroom where Oscar was sleeping. In the commotion, Oscar woke up and hid in the bedroom closet. Appellant, however, discovered Oscar hiding in the closet. Avoiding Appellant's grasp, Oscar escaped from the closet and ran out of the apartment. Appellant pursued, and once outside, caught Oscar and stabbed him multiple times.

DISCUSSION

Hearsay Objection and Motion for Mistrial

In the guilt-innocence phase of trial, the State examined Oscar about the severity of his stab wounds. During that exchange, Oscar testified, without prompting, that everybody had told him he was lucky to be alive. Appellant lodged a hearsay objection, requested an instruction to disregard, and moved for mistrial:

Q: Did Guillermo Gamez stab you several times?

A: Yes.

Q: Do you believe you could have died that night from what he did to you:

A: Yes.

Q: Do you feel lucky to have lived?

A: Yes. *Everybody has told me so.*

Mr. Bush: Objection, hearsay, Your Honor.
The Court: Sustained.
Mr. Bush: Ask the jury to be instructed to disregard the answer.
The Court: The jury will disregard the last part of the answer of the witness.
Mr. Bush: Move for a mistrial.
The Court: Denied.

In Issue One, Appellant contends a mistrial was required because the trial court's instruction to disregard was insufficient to attenuate the harm of the testimony. Appellant characterizes the testimony as so "extreme" it could have led the jurors to conclude that Oscar's injuries were life threatening and thus "used the severity of the injuries as a circumstance against [him]."

Standard of Review

A mistrial is an appropriate remedy in "extreme circumstances" for a narrow class of highly prejudicial and incurable errors. *Ocon v. State*, 284 S.W.3d 880, 884 (Tex.Crim.App. 2009). We review the denial of a mistrial for an abuse of discretion. *Id.* We must uphold the ruling if it was within the zone of reasonable disagreement. *Id.* In determining whether a trial court abused its discretion by denying a mistrial, we balance three factors: (1) the severity of the misconduct (the magnitude of the prejudicial effect); (2) the effectiveness of the curative measures taken; and (3) the certainty of conviction or the punishment assessed absent the misconduct. *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex.Crim.App. 2004); *Mosley v. State*, 983 S.W.2d 249, 259 (Tex.Crim.App. 1998), *cert. denied*, 526 U.S. 1070 (1999).

Analysis

The trial court is required to grant a motion for a mistrial only when the improper question is "clearly prejudicial to the defendant and is of such character as to suggest the impossibility of

withdrawing the impression produced on the minds of the jurors.” *Simpson v. State*, 119 S.W.3d 262, 272 (Tex.Crim.App. 2003), *cert. denied*, 542 U.S. 905 (2004) (quoting *Wood v. State*, 18 S.W.3d 642, 648 (Tex.Crim.App. 2000)). The Court of Criminal Appeals has instructed 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). Further, on appeal, we generally presume the jury follows the trial court’s instructions in the manner presented. *Thrift v. State*, 176 S.W.3d 221, 224 (Tex.Crim.App. 2005).

Having reviewed the evidence in the light most favorable to the trial court’s ruling, we conclude the trial court did not abuse its discretion in denying Appellant’s motion for mistrial. Oscar’s hearsay testimony was unsolicited and minimal, and was not so extreme or manifestly improper that an instruction to disregard could not cure any possible prejudicial effect. Without objection, the State asked Oscar whether he believed he could have died from the stab wounds and whether he felt lucky to be alive. To each of these questions, Oscar answered “Yes,” without objection. Further, the State’s question to Oscar whether he felt lucky to have lived, did not seek a hearsay answer, and Oscar’s answer added little if anything to the other ample evidence before the jury regarding the severity of his injuries. The evidence admitted for the jury’s consideration included photographs of Oscar and his injuries. Witnesses described Oscar’s stab wounds as emitting blood “like a water hose [had] burst” and in “jets,” and described his intestines as protruding from his abdominal wound. Oscar testified that the stab wounds to his arm and abdomen were deep, that two surgeries were required to repair his wounds, and that he continued to experience weakness in one arm and the loss of movement of several fingers. Oscar displayed

to the jury the scars resulting from the wounds Appellant inflicted upon his stomach, back, and arm.

Moreover, the evidence of Appellant's guilt was strong. Oscar testified that he had been dating Gloria Martinez. On the night of July 14, 2012, Gloria was with Oscar at his apartment. Oscar stated that he awoke to a loud noise and ran to hide in the closet, and when he exited, he saw Gloria blocking Appellant at the bedroom door. Appellant threw Gloria down, and Oscar ran from the apartment. Once outside, Appellant pursued Oscar and attacked him. Oscar showed the jury how he tried to cover himself and attempted to block Appellant's blows, and then noticed blood coming from multiple areas of his body. It was then that Oscar realized Appellant had not struck him with his fists but with a knife. Oscar did not have a weapon to protect himself during the assault. Oscar retreated to his apartment to get his car keys in order to escape and grabbed a sword from the wall to protect himself. He then unsuccessfully attempted to drive himself to the hospital. Detective R.G. Westbrook testified the stab wounds Oscar suffered were sufficiently severe to constitute serious bodily injury.

Appellant testified as well. He admitted that he arrived at Oscar's apartment at 5 a.m. and when no one answered the door, he "exploded" and broke down the apartment door. He admitted that he had a knife and testified that "when [he] pushed the door[,] the same impulse took [him] in" and at that moment he "went in running trying to hurt somebody or trying to do something to [Oscar]." Appellant saw Oscar escaping out of the closet, admitted that Oscar did not have a weapon as they fought, and testified that he believed he had used the knife to cut Oscar, but only out of fear because he heard Oscar yelling for someone to pull out a gun. In later testimony, Appellant denied that he had stabbed Oscar but stated: "I'm not saying that I didn't stab him.

What I'm saying is that I didn't grab the knife and [go] over [to] him and stab him, because if I would have done that, he would have [ended] up with many wounds all over his stomach and his chest."

We conclude the severity of the misconduct and any prejudicial effect was minimal at best, and that the instruction to disregard was effective in dissipating any prejudicial effect. The State did not solicit the hearsay testimony, the testimony was slight, and there was ample other evidence supporting the severity of Oscar's wounds. Also, there is no doubt of the certainty of Appellant's conviction event absent the minimal hearsay testimony. The facts of the aggressive attack on Oscar are essentially uncontroverted, and Appellant's confusing and inconsistent testimony supporting his claim of self-defense was weak and lacking credibility. Having viewed the evidence in the light most favorable to the trial court's ruling, and having balanced the factors to determine whether the trial court abused its discretion, we conclude the trial court's denial of Appellant's motion for mistrial was within the zone of reasonable disagreement and did not constitute an abuse of discretion. Issue One is overruled.

Improper Jury Argument

In Issue Two, Appellant contends the trial court erred by overruling his objection to one assertion in the State's closing argument in the guilt-innocence phase of trial. In addressing Appellant's claim of self-defense, the State argued:

First of all is self-defense. You have to ask yourself when and to the degree the Defendant reasonably believes force is immediately necessary. ...

He could not reasonably believe that force was immediately necessary, because he went into that apartment with his knife out with the blade exposed just like Gloria told you. *She told the police that in her statement that night, that he came in with a knife. That's*

not something that was brought up and made up to come in here to court to tell you good people.

Mr. Bush: No, Your Honor, but I think it is outside the evidence because the officer never received what she said.

Mr. Clayton: Your Honor, that came up in cross-examination by defense counsel.

The Court: Overruled, if that was an objection. [Emphasis added].

Standard of Review

A prosecutor may not present evidence that is outside the record during closing argument. *Freeman v. State*, 340 S.W.3d 717, 728 (Tex.Crim.App. 2011), *cert. denied*, 132 S.Ct. 1099 (2012). Reference to facts that are neither in evidence nor inferable from the evidence are generally designed to arouse the passion and prejudice of the jury and, as such, is inappropriate. *Id.* Error arising from improperly interjecting evidence outside the record during closing argument is generally non-constitutional in nature. *Id.* When non-constitutional error does not affect substantial rights of the defendant, we must disregard it. TEX. R. APP. P. 44.2(b); *Freeman*, 340 S.W.3d at 728; *Martinez v. State*, 17 S.W.3d 677, 692–93 (Tex.Crim.App. 2000). In determining whether an appellant’s substantial rights were affected, we utilize the same factors we balanced in Appellant’s first issue: the severity of the misconduct (*i.e.*, the prejudicial effect), any curative measures taken, and the certainty of conviction absent the misconduct. *Freeman*, 340 S.W.3d at 728; *Martinez*, 17 S.W.3d at 692–93.

Analysis

Appellant does not contend the State improperly asserted that he “went into that apartment with his knife out with the blade exposed just like Gloria told you.” Indeed, Gloria testified that when Appellant ran into the bathroom, she saw that he was holding a knife with the blade exposed.

Instead, Appellant complains only about the State's argument that Gloria "told the police that in her statement that night, that he came in with a knife." The State concedes the trial court erred when it overruled Appellant's objection because Gloria did not testify that she had informed the police that Appellant had displayed a knife upon entering Oscar's apartment. And, we find no such evidence in the record. However, the State, although it concedes error, contends the improper argument was harmless because it did not affect Appellant's substantial rights. We agree the error was harmless.

Although the trial court overruled Appellant's objection and therefore gave no curative instruction, the record shows that the State's comments were but a small portion of the State's entire closing argument, and that the State did not repeat or emphasize its comments. Further, there was no real dispute that Appellant possessed a knife when he broke into Oscar's apartment. Gloria testified that Appellant was holding a knife with an exposed blade when he encountered her at the bathroom. We recognize it can be argued that the State's argument improperly emphasized Gloria's credibility. But her credibility on this issue was not crucial to the conviction because Appellant admitted that he had a knife when he forced his way into Oscar's apartment, and the record is clear that he used that knife to attack Oscar. In light of this evidence, the prejudicial effect of the State's improper argument is minimal at best. Given the brevity of the prosecutor's comments, the lack of prejudice, and the certainty of Appellant's conviction, as we examined in Issue One, we conclude that any error associated with the State's improper argument did not affect Appellant's substantial rights and must be disregarded. Issue Two is overruled.

CONCLUSION

The trial court's judgment is affirmed.

STEVEN L. HUGHES, Justice

January 21, 2015

Before McClure, C.J., Rodriguez, and Hughes, JJ.

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