

**Affirmed as modified; Opinion Filed November 7, 2017.**



**In The  
Court of Appeals  
Fifth District of Texas at Dallas**

**No. 05-16-01182-CR**

**No. 05-16-01183-CR**

**ZAMONDRE DAVON BROWN, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 195th Judicial District Court  
Dallas County, Texas  
Trial Court Cause Nos. F16-51628-N & F16-51629-N**

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**MEMORANDUM OPINION**

Before Justices Lang, Evans, and Schenck  
Opinion by Justice Evans

Zamondre Davon Brown appeals his convictions for aggravated robbery with a deadly weapon and evading arrest. The jury assessed punishment at forty-five years' imprisonment in the aggravated robbery case and fifteen years' imprisonment in the evading arrest case. On appeal, appellant contends that the trial court erred in permitting a police officer to testify about appellant's post-arrest pre-Miranda silence. He also contends that during closing argument, the prosecutor made an impermissible comment on the appellant's right to remain silent. We modify the trial court's judgments to reflect appellant pleaded not true to the enhancement paragraph. As modified, we affirm the trial court's judgments.

## BACKGROUND

Sadiq Al Dawaima and his sister lived in the same apartment complex. On January 26, 2016, Sadiq was at his sister's apartment hanging out with his nieces. He left his sister's apartment about 12:30 a.m., and before going back to his own apartment, went to his car to retrieve a gym bag that had wet clothes in it. As he walked to his car, a black car pulled up beside him. Two men holding guns got out of the car. One man pointed his gun at Sadiq while the other man told him to take out whatever he had in his pockets. Sadiq gave the men his wallet, cell phone, and car keys. One of the men drove away in Sadiq's car, while the other man drove away in the black car. Sadiq called 911.

Approximately ten minutes later, Officers Taylor and Bradley responded to the robbery call. After Sadiq gave the officers his license plate number, a description of his red 2007 Toyota Corolla, and a description of the suspects and their car, the officers drove around the area looking for the robbers. Thirty minutes later, Officer Taylor located Sadiq's red Toyota and continued to follow it until backup officers arrived. Once the backup officers got behind him, Officer Taylor turned on his overhead lights which also activated the dash-cam video. When the Toyota did not stop, he turned on his siren. At that point, the Toyota accelerated and a high-speed chase ensued. The chase ended when the driver was unable to navigate a turn and drove into a brick wall surrounding a fire station.<sup>1</sup> After the vehicle hit the wall, the driver got out and started running. The officers<sup>2</sup> followed the individual and found him in the fire station parking lot between a dumpster and the brick wall that surrounded the dumpster. Officer Taylor arrested

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<sup>1</sup> Officer Taylor estimated that the chase lasted about a minute based upon the fact that the car crashed after he had followed it for about 1.1 miles.

<sup>2</sup> Officer Taylor testified that Officer Bradley and two or three other officers were with him when they found the driver.

the individual and identified appellant as the man he arrested. Appellant was the sole occupant of the vehicle.

Officer Taylor testified that when he reviewed the dash–cam video, he saw the suspect throw something over the wall towards the fire station. A crime scene investigator found a Bersa .380 handgun on the other side of the wall in the parking area used by the fire-rescue officers. The location where the gun was discovered lined up with where Officer Taylor saw the suspect throw something away. The gun had one bullet in the chamber and six bullets in the clip. Crime scene photos of the wrecked vehicle showed a cell phone on the driver’s seat of the car. Officer Taylor testified that the cell phone was never taken into evidence.

When Sadiq got his car back from the police several months later, one of his friends found a cell phone in the passenger side. Sadiq turned the phone on and saw that the background picture was of the same man who robbed him. During trial, Sadiq identified appellant as the man who robbed him and took his car.

## **ANALYSIS**

### **I. Post-arrest, Pre-Miranda Silence**

In his first issue, appellant contends that the trial court erred in permitting a police officer to testify about appellant’s post-arrest pre-Miranda silence in violation of Article 1, Section 10 of the Texas Constitution. Appellant argues that despite the fact that the trial court instructed the jury to disregard the prosecution’s question regarding post-arrest silence, he suffered irreparable harm because the damage was amplified by the prosecutor’s improper jury argument which constituted a comment on appellant’s failure to testify. The State argues that appellant waived his complaint because he objected on Fifth Amendment grounds and not on Texas Constitution grounds. The State also argues that the court’s instruction to disregard cured any prejudicial

effect. For the following reasons, we conclude that appellant failed to preserve his complaint for our review.

Detective Cardenas investigated the robbery in this case. During the State's direct examination of the detective, he explained how he became involved in the case and when he came into contact with appellant. The following exchanged then occurred:

Q Detective, at this point the defendant has been arrested. Did you have an opportunity to speak with him?

A I tried.

Q You say you tried. Was he uncooperative?

A He was uncooperative.

Q At that point where did the investigation take you? Did you -- What do you do next?

A Well, at that point when he's uncooperative, I don't have his side of the story, you know. I don't know why things happened, you know.

Q Did you interview the victim at this point?

A Yes.

Q Did you videotape or did you talk to --

[APPELLANT'S COUNSEL]: Excuse me, your Honor. We are going to object to the statement that he was uncooperative, we didn't hear from his side of the story, as that violates my client's fifth amendment rights against self-incrimination and, therefore, would be prejudicial.

[PROSECUTOR]: I think, your Honor, he did not say anything about anyone invoking any rights. He just said that the defendant was uncooperative.

THE COURT: And he was under arrest?

THE WITNESS: Yes.

THE COURT: Ladies and gentlemen, the objection is sustained. Disregard everything you just heard about the statement, please.

MR. LAMB: I move for a mistrial, your Honor.

THE COURT: Overruled.

Generally, to preserve error, a defendant must make a timely and specific objection. TEX. R. APP. P. 33.1(a). Almost every right, whether constitutional or statutory, may be waived by the failure to object. *Fuller v. State*, 253 S.W.3d 220, 232 (Tex. Crim. App. 2008); *Smith v. State*, 721 S.W.2d 844, 855 (Tex. Crim. App. 1986). An objection should be made as soon as the ground for objection becomes apparent. *Dinkins v. State*, 894 S.W.2d 330, 355 (Tex. Crim. App. 1995). If a question clearly calls for an objectionable response, a defendant should make an objection before the witness responds. *Id.* If no objection is made until after the question has been asked and answered, and he can show no legitimate reason to justify the delay, his objection is untimely and error is waived. *Id.*

The State's first two questions, regarding whether the detective had an opportunity to speak with appellant and whether he was uncooperative, was an impermissible comment on appellant's post-arrest silence. *Id.* at 356; *Sanchez v. State*, 707 S.W.2d 575, 579-80 (Tex. Crim. App. 1986). It was apparent at the time the questions were asked that they called for an objectionable response. Yet, appellant allowed these questions to be answered and three more questions to be asked, two of which were also answered, before objecting to the detective's statement that appellant was uncooperative and that he did not have appellant's side of the story. Further, appellant has offered no explanation for his failure to object before the detective answered any of the four previous questions asked. Under these circumstances, we conclude that appellant's failure to timely object waived any error arising from the detective's statement regarding appellant's lack of cooperation and failure to give his side of the story after he was arrested and questioned.

Even if appellant had properly preserved error, an improper comment does not automatically lead to reversal. *Dinkins*, 894 S.W.2d at 356. An effective instruction to disregard

will ordinarily cure its prejudicial effect. *Id.*; *Waldo v. State*, 746 S.W.2d 750, 753 (Tex. Crim. App. 1988); *Fletcher v. State*, 852 S.W.2d 271, 275 (Tex. App.—Dallas 1993, pet. ref'd). An instruction to disregard is effective unless consideration of the facts of the particular case suggests the impossibility of withdrawing the impression produced on the minds of the jury. *Id.* Although not specifically adopted as definitive or exhaustive, the courts have looked to several factors to determine whether an instruction to disregard cured the prejudicial effect: the nature of the error, the persistence of the State, the flagrancy of the comment, the particular instruction, the weight of the evidence, and the severity of the punishment. *Waldo*, 746 S.W.2d at 754; *Johnson v. State*, 83 S.W.3d 229, 232 (Tex. App.—Waco 2002, pet. ref'd); *Fletcher*, 852 S.W.2d at 275.

Although the nature of the constitutional right affected was serious, its prejudicial effect is limited for several reasons. The State did not persist in questioning the detective about appellant's silence or mention it during closing argument.<sup>3</sup> The evidence of appellant's guilt was strong. Appellant was identified as one of the robbers by the victim in open court. He was located in the surrounding area thirty minutes after the robbery driving the victim's car. Appellant evaded arrest and crashed the car into the wall of a fire station after a high-speed chase through a residential neighborhood. He then jumped out of the car, discarded the weapon, and ran into the parking lot of the fire station. The police arrested him moments later hiding behind a dumpster. The police also found the loaded gun appellant had discarded. A cell phone was found in the victim's wrecked car with appellant's face as the background picture.

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<sup>3</sup> Appellant contends that the State did revisit the subject when the prosecutor made an impermissible comment on appellant's right to remain silent during jury argument. For the reasons stated in our analysis of appellant's second issue, we conclude that the prosecutor's argument did not constitute a comment on appellant's right to remain silent.

In addition, there was strong evidence supporting the jury's sentence. Appellant was sentenced to forty-five years' imprisonment for the aggravated robbery, and fifteen years' imprisonment for evading arrest. Appellant had a prior conviction for the felony offense of assault of a public servant and a prior juvenile adjudication for the offense of robbery. In addition, evidence was presented showing that appellant was a member of a gang. There was also evidence presented regarding how the robbery affected the victim's life. Sadiq testified that after appellant robbed him, he was scared and worried all the time about being robbed again; always watching for who is behind him, always watching who is walking near him.<sup>4</sup> After finding the enhancement paragraph true alleging the prior conviction for assault of a public servant, the range of punishment for the aggravated robbery case was five to 99 years or life imprisonment, and two to twenty years' imprisonment in the evading arrest case. Considering the nature of the offenses, appellant's prior criminal history, and the affect appellant's actions had on the victim's life, we are unable to conclude that the improper question increased the severity of the sentence.

Finally, as set forth above, the trial court gave a thorough, solid instruction to the jury to disregard anything that was said about the statement. *Dinkins*, 894 S.W.2d at 356; *Waldo*, 746 S.W.2d at 753; *Fletcher*, 852 S.W.2d at 275. Under these circumstances, we conclude that the instruction was likely effective and sufficient to ameliorate the prejudicial effect of the improper question and answer referring to appellant's post-arrest silence. We overrule appellant's first issue.

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<sup>4</sup> This testimony was presented during Sadiq's direct examination in the guilt/innocence phase of trial. Sadiq did not testify during the punishment hearing.

## II. Jury Argument

In his second issue, appellant contends that the prosecutor made an improper comment on appellant's right to remain silent during closing argument. We agree with the State that the trial court properly overruled appellant's objection to the argument.

A prosecutor's comment on the defendant's failure to testify violates the accused's Fifth Amendment right against self-incrimination. *Canales v. State*, 98 S.W.3d 690, 695 (Tex. Crim. App. 2003). To violate the right against self-incrimination, the offending language must be viewed from the jury's standpoint and the implication that the comment referred to the defendant's failure to testify must be clear. *Bustamante v. State*, 48 S.W.3d 761, 765 (Tex. Crim. App. 2001). It is not sufficient that the language might be construed as an implied or indirect allusion. *Id.* The test is whether the language used was manifestly intended or was of such a character that the jury would necessarily and naturally take it as a comment on the defendant's failure to testify. *Id.* In applying this standard, the context in which the comment was made must be analyzed to determine whether the language used was of such character. *Id.*

During closing argument, the prosecutor first noted that Sadiq came to America from war-torn Iraq only to encounter the type of violence he tried escape, and then argued:

This case is about so much more than aggravated robbery. It's about so much more than evading arrest. It is the intersection of two young men's lives, one a 23 year old immigrant who comes here and embodies our best values that we strive for. He's getting an education in engineering. He's with his family, spending time with his sister and his nieces.

And as he walks out to his car, he encounters another young man, a 21 year old who embodies our worst values, callousness, violence, theft. A defendant who feels that it was worth risking Sadiq's life over an entry level sedan. Members of the jury, make no mistake, with one slip of the finger, one muscle movement, this could have been a murder case instead of an aggravated robbery case. But this defendant shows you what is in his heart.

There's a lot of ways to steal cars. You can go on YouTube and watch a two minute video on how to hot wire a car. There's a lot of ways to get money.



But it takes a particular type of individual, something very, very disturbing in one's soul, to take a gun and say, your life or your money.

The prosecutor continued by going through the evidence presented by the State and addressing some of the points raised by appellant's counsel during his argument. The prosecutor then argued:

[M]ake no mistake, it is the State's burden to prove this beyond a reasonable doubt. But they haven't even offered an alternative theory, merely now posing the conspiracy theory.

What I'm asking you to do is to think about what is in this defendant's heart. As prosecutors, we can become very cynical about these cases because we do them all the time. It's very easy for me to say, come back with a guilty verdict.

But I know that when you are standing in judgment of somebody like this, how big of a burden is this. I know the delays have been frustrating. I know that this is a judgment call that many of you have never been asked to give before. So when I ask you for a guilty, when I tell you that the verdict has to be for your community, for this evidence, guilty, I take that seriously. And I know the burden that you're under. Because we see what's in his heart, because we see how he behaved –

[APPELLANT'S COUNSEL]: Objection, your Honor. Judge, I'm going to object to this on the ground that the question that is proposed by counsel, we see what is in his heart, I submit to you, Judge, that is a comment on his failure to testify, the only way we would know that. And so we would object on those grounds, your Honor.

THE COURT: Overruled. Proceed.

[PROSECUTOR]: When you come back with a verdict of guilty, you can feel secure in knowing you've done the right thing, that you're loving justice, that you're hating robbery and wrongdoing. And when you say those words, you'll know you can sleep well at night.

The State's closing argument neither directly, nor indirectly, commented on appellant's failure to testify. Rather, the argument was a reference to what the jury could infer from appellant's conduct during the offense and thus, constituted a reasonable deduction from the evidence. Reasonable deductions from the evidence is a permissible area of jury argument.

*Dinkins*, 894 S.W.2d at 357. We overrule appellant's second issue.

### **III. Modification of Judgments**

The trial court's judgment in each case reflects that appellant pleaded "True" to the enhancement paragraph. However, the record reflects appellant pleaded "not true" to the enhancement paragraph. Accordingly, we modify the section titled "Plea to 1st Enhancement Paragraph" in the judgment in each case to state "Not True." *See* TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27 (Tex. Crim. App. 1993); *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd.).

### **CONCLUSION**

We modify the trial court's judgment in each case to reflect appellant pleaded "not true" to the enhancement paragraph of the indictment. As modified, we affirm the trial court's judgments.

/David W. Evans/  
DAVID EVANS  
JUSTICE

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**Court of Appeals  
Fifth District of Texas at Dallas**

**JUDGMENT**

ZAMONDRE DAVON BROWN, Appellant

No. 05-16-01182-CR      V.

THE STATE OF TEXAS, Appellee

On Appeal from the 195th Judicial District  
Court, Dallas County, Texas

Trial Court Cause No. F16-51628-N.

Opinion delivered by Justice Evans, Justices  
Lang and Schenck participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** to reflect Zamondre Davon Brown pleaded "Not True" to the 1<sup>st</sup> enhancement paragraph. As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered this 7th day of November, 2017.



**Court of Appeals  
Fifth District of Texas at Dallas**

**JUDGMENT**

ZAMONDRE DAVON BROWN, Appellant

No. 05-16-01183-CR      V.

THE STATE OF TEXAS, Appellee

On Appeal from the 195th Judicial District  
Court, Dallas County, Texas

Trial Court Cause No. F16-51629-N.

Opinion delivered by Justice Evans, Justices  
Lang and Schenck participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** to reflect Zamondre Davon Brown pleaded "Not True" to the 1<sup>st</sup> enhancement paragraph. As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered this 7th day of November, 2017.