AFFIRM; and Opinion Filed November 14, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01336-CR

RICKEY DARRELL MILLER, Appellant
V.
STATE OF TEXAS, Appellee

On Appeal from the 291st Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1476695-U

MEMORANDUM OPINION

Before Justices Bridges, Fillmore, and Stoddart
Opinion by Justice Fillmore

A jury convicted Rickey Darrell Miller of aggravated sexual assault of a child under the age of fourteen, and assessed punishment of forty years' imprisonment. In three issues, Miller contends the trial court erred by allowing the State to impeach him with prior convictions during the guilt phase of the trial; by denying his motion for mistrial following an improper question by the prosecutor; and by violating his common-law right to allocution. We affirm the trial court's judgment.

Background[1]

Miller's eight-year-old granddaughter, N.S., made an outcry to her school counselor that Miller had sexually abused her. N.S. provided more details of two assaults in a subsequent

[1] Because Miller has not challenged the sufficiency of the evidence to support the conviction, we recount only those facts necessary to address his complaints on appeal.

forensic interview at the Dallas Children's Advocacy Center. N.S., who was ten years old at the time of trial, testified about two incidents during which Miller sexually abused her. Miller also testified during the guilt phase of the trial and denied he sexually abused N.S. A jury found Miller guilty of aggravated sexual assault of a child under the age of fourteen, and assessed punishment of forty years' imprisonment.

Admission of Prior Convictions

In his first issue, Miller complains the trial court erred by allowing the State to impeach him with prior convictions for which more than ten years had passed since the later of the date of conviction or release of the witness from confinement. Miller specifically contends the trial court improperly relied on the "tacking doctrine"[2] in allowing him to be impeached with the remote convictions, and failed to determine under rule of evidence 609(b) whether the probative value of the remote convictions was substantially outweighed by their prejudicial effect. *See* TEX. R. EVID. 609(b); *Meadows v. State*, 455 S.W.3d 166, 170–71 (Tex. Crim. App. 2015) (concluding rule of evidence 609 supplants common-law tacking doctrine).

Miller elected to testify during the guilt phase of the trial and requested the State be precluded from impeaching him with his prior convictions. Miller argued the prior convictions were mainly theft-related offenses and, therefore, were not relevant to the allegations in this case. Miller requested the trial court conduct a balancing test to determine whether the "probative value of [the prior] convictions [was] outweighed by their prejudicial effect[.]"

In a hearing held outside the presence of the jury, the trial court reviewed the State's notice of extraneous offenses, and clarified the State intended to impeach Miller with evidence of a 1988 conviction for larceny or theft, a 1992 conviction for burglary of a habitation, a 1993

[2] Under the "tacking doctrine," if a defendant has a prior conviction that is more than ten years old, but also has more recent convictions for felonies or misdemeanors involving moral turpitude, "such intervening convictions remove the taint of remoteness from the prior conviction and make a conviction older than ten years admissible." *Meadows v. State*, 455 S.W.3d 166, 170 (Tex. Crim. App. 2015).

conviction for unlawful delivery of a controlled substance, a 2000 conviction for theft, and a 2007 conviction for theft of property. The State argued these convictions were crimes of moral turpitude, and the "time delay" for the older convictions was "cured by the fact he's had additional arrests for crimes of moral turpitude." The State offered to provide the trial court with "the case law on that," and the trial court responded it understood "the case law on that." The trial court then ruled that "having reviewed the law that's applicable to this situation, as well as the State's notice of extraneous offenses and hearing the arguments of counsel," it would "allow the State to cross-examine Mr. Miller regarding the offenses I have set out, specifically those five offenses alone." The trial court specifically found the probative value of the prior convictions outweighed their prejudicial effect.

During Miller's testimony, his counsel preemptively inquired whether Miller had prior convictions for delivery of a controlled substance, attempted burglary of a building, burglary of a building, misdemeanor theft, theft of a person, misdemeanor assault, criminal trespass of a building, resisting arrest, and unlawfully carrying a weapon. Miller affirmed that he did. On cross-examination, Miller admitted he had five prior convictions for crimes of moral turpitude, including three convictions for theft, and convictions for burglary of a habitation and delivery of a controlled substance.

"[A] defendant who preemptively introduces evidence of a prior conviction on direct examination may not on appeal claim that the admission of such evidence was error." *Ohler v. United States*, 529 U.S. 753, 760 (2000); *see also Roderick v. State*, 494 S.W.3d 868, 881 (Tex. App.—Houston [14th Dist.] 2016, no pet.) ("By testifying first on direct examination, appellant waived any error regarding the trial court's ruling on the admissibility of his prior conviction.").[3]

[3] *See also Juarez v. State*, No. 05-12-01504-CR, 2014 WL 5475352, at *2 (Tex. App.—Dallas Oct. 30, 2014, pet. ref'd) (mem. op., not designated for publication) (concluding appellant waived any complaint he had with trial court's ruling prior conviction was admissible by introducing evidence himself).

By electing to introduce his prior convictions to the jury when he testified on direct examination, Miller waived any error by the trial court in ruling the convictions were admissible. *See Ohler*, 529 U.S. at 760; *Roderick*, 494 S.W.3d at 881. We resolve Miller's first issue against him.

Motion for Mistrial

In his second issue, Miller complains the trial court erred by denying his motion for a mistrial following an improper question by the prosecutor.[4] As relevant to this complaint, during her cross-examination of Miller during the guilt phase of the trial, the prosecutor noted that, during direct examination, Miller had been crying and smiling. Miller responded that he cried because his counsel brought up Miller's mother. The prosecutor asked, "And then you were smiling thinking about other memories; is that fair?" Miller stated he had been thinking about other memories of his mother. The following exchange then occurred:

> Q. But you've got a whole other side to you, don't you? That you don't want this jury to see; is that correct?
>
> A. This is me.
>
> Q. This is you?
>
> A. This is me.
>
> Q. So you don't remember in a hearing outside the presence of the jury getting yelled at by this judge; do you remember that?

[4] In his brief, Miller also argues the trial court failed to act as a neutral arbiter when it refused to give an instruction to the jury requested by Miller; the prosecutor violated her statutory duty to see that justice was done and her ethical responsibility not to function as both a witness and an advocate; and his right under the Sixth Amendment to the United States Constitution to confront the witness against him, the prosecutor, was violated. The record does not reflect Miller raised any of these objections in the trial court, and none of these complaints constitute fundamental or systemic error that may be raised for the first time on appeal. *See Deener v. State*, 214 S.W.3d 522, 527 (Tex. App.—Dallas 2006, pet. ref'd) (right of confrontation not systemic right and may not be raised for first time on appeal); *Martinez v. State*, No. 08-14-00130-CR, 2016 WL 4447660, at *6 n.5 (Tex. App.—El Paso Aug. 24, 2016, pet. ref'd) (not designated for publication), *cert. denied*, 137 S.Ct. 2170 (2017) (appellant waived argument prosecutor should be disqualified for violating statutory duty to seek justice by failing to raise complaint in trial court); *Mughni v. State*, No. 05-15-00560-CR, 2016 WL 4198856, at *6 (Tex. App.—Dallas Aug. 8, 2016, no pet.) (mem. op., not designated for publication) (because trial court's conduct did not implicate defendant's presumption of innocence, it did not rise to level of fundamental error, and any objection that trial court abandoned its position as neutral and impartial arbiter was required to be preserved in trial court); *Lawrence v. State*, No. 05-13-01138-CR, 2015 WL 1542134, at *13 (Tex. App.—Dallas Apr. 2, 2015, pet. struck) (mem. op., not designated for publication) (complaint that attorney employed by same office as special prosecutor was disqualified from testifying as expert witness based on rule of professional conduct that precluded him from acting as advocate and witness was not systemic error and was not preserved for appellate review). Because Miller's arguments on appeal were not raised in the trial court, they have not been preserved for our review. *See* TEX. R. APP. P. 33.1(a)(1) (to preserve issue for appellate review, party must have made the trial court aware of complaint, unless specific grounds are apparent from context); *Douds v. State*, 472 S.W.3d 670, 674 (Tex. Crim. App. 2015), *cert. denied*, 136 S.Ct. 1461 (2016); *see also Yazdchi v. State*, 428 S.W.3d 831, 844 (Tex. Crim. App. 2014) ("For a party to preserve a complaint for appellate review . . . the point of error on appeal must comport with the objection made at trial.").

A. Me getting yelled at?

At this point, Miller's counsel stated he was "going to object to that." After an unrecorded bench conference, the trial court sustained "defense counsel's objection," and instructed the jury "to disregard the last question of counsel and the last statement of the witness." The trial court denied Miller's motion for mistrial. Miller's counsel then requested that the trial court instruct the State not to go into matters "they know are erroneous." The trial court stated the State understood "the parameters that the Court has established."

When, as here, the trial court sustains a defense objection and instructs the jury to disregard improper questioning, the issue is whether the trial court abused its discretion by denying the motion for mistrial. *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004); *see also Balderas v. State*, 517 S.W.3d 756, 783 (Tex. Crim. App. 2016), *cert. denied*, 137 S.Ct. 1207 (2017) ("We review a trial court's denial of a mistrial for an abuse of discretion."). We will uphold the trial court's ruling if it is within the zone of reasonable disagreement. *Coble v. State*, 330 S.W.3d 253, 292 (Tex. Crim. App. 2010).

"[W]hether a mistrial should have been granted involves most, if not all, of the same considerations that attend a harm analysis." *Archie v. State*, 221 S.W.3d 695, 700 (Tex. Crim. App. 2007) (quoting *Hawkins*, 135 S.W.3d at 77). These factors include: (1) the severity of the misconduct (magnitude of the prejudicial effect of the prosecutor's remarks); (2) the measures adopted to cure any harm from the misconduct (efficacy of any cautionary instruction by the trial court); and (3) the certainty of conviction absent the misconduct (strength of the evidence supporting the conviction). *Id.* at 700 (citing *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998)). In balancing these factors, we examine the particular facts and circumstances of the case. *See Jenkins v. State*, 493 S.W.3d 583, 612 (Tex. Crim. App. 2016); *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999). "A mistrial is a device used to halt trial proceedings

when error is so prejudicial that expenditure of further time and expense would be wasteful and futile." *Wood v. State*, 18 S.W.3d 642, 648 (Tex. Crim. App. 2000) (quoting *Ladd*, 3 S.W.3d at 567); *see also Hawkins*, 135 S.W.3d at 77. "Only in extreme circumstances, where the prejudice is incurable, will be mistrial be required." *Hawkins*, 135 S.W.3d at 77; *see also Jenkins*, 493 S.W.3d at 612 ("A mistrial is an extreme remedy that should be granted only if residual prejudice remains after less drastic alternatives have been explored.").[5]

A mistrial due to an improper question is required only when the question is "clearly prejudicial" to the defendant and "of such character as to suggest the impossibility of withdrawing the impression produced on the minds of the jurors." *Ladd*, 3 S.W.3d at 567.[6] "Ordinarily, a prompt instruction to disregard will cure error associated with an improper question and answer, even one regarding extraneous offenses." *Ovalle v. State*, 13 S.W.3d 774, 783 (Tex. Crim. App. 2000) (per curiam); *see also Young v. State*, 283 S.W.3d 854, 878 (Tex. Crim. App. 2009) (per curiam).[7] We generally presume the jury followed the trial court's instructions in the absence of evidence it did not. *Thrift v. State*, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005). The presumption is refutable, but the appellant must rebut the presumption by pointing to evidence in the record indicating the jury failed to follow the trial court's instructions. *Id.*[8]

In this case, the State asked Miller only once about his behavior in a previous hearing. The State did not attempt to solicit the same information again from Miller or from any other witness. After an unrecorded bench conference following Miller's objection, the trial court

[5] *See also Ricks v. State*, No. AP-77,040, 2017 WL 4401589, at *13 (Tex. Crim. App. Oct. 4, 2017) (not designated for publication).

[6] *See also Clark v. State*, No. 05-15-00142-CR, 2016 WL 1733389, at *2 (Tex. App.—Dallas Apr. 28, 2016, no pet.) (mem. op., not designated for publication).

[7] *See also Ricks*, 2017 WL 4401589, at *13.

[8] *See also Ricks*, 2017 WL 4401589, at *13.

immediately took curative measures by sustaining Miller's objection to the question and instructing the jury to disregard both the question and Miller's response. In its charge, the trial court instructed the jury:

> As to any offer of evidence that has been rejected by the Court, you, of course, must not consider the same. As to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

There is no indication in the record that the jury disregarded the trial court's instructions.

Finally, the jury heard substantial evidence that Miller sexually assaulted N.S. By finding Miller guilty of aggravated sexual assault of a child, the jury indicated it found N.S. to be credible. Although N.S.'s testimony alone is sufficient to support the conviction, TEX. CODE CRIM. PROC. ANN. art. 38.07(a) (West Supp. 2016); *Revels v. State*, 334 S.W.3d 46, 52 (Tex. App.—Dallas 2008, no pet.), the jury also heard testimony from N.S.'s school counselor and the individual who conducted a forensic interview of N.S. at the Dallas Children's Advocacy Center about N.S.'s outcry, including the details N.S. was able to provide about the abuse. N.S.'s mother also testified about Miller's abuse of her as a child that was similar to the abuse alleged by N.S. Miller attempted to discredit all this testimony, but the jury chose to believe Miller had sexually abused N.S. Accordingly, we are unable to conclude the State's question about Miller's conduct in a prior hearing in the case was so clearly prejudicial or of such a character that it was impossible to withdraw the impression from the minds of the jury, and, given the jury's determination that N.S. was credible, we do not doubt the certainty of Miller's conviction absent the State's reference to the extraneous conduct.

We conclude that, under the facts of this case, the trial court did not abuse its discretion by denying Miller's motion for mistrial. We resolve Miller's second issue against him.

Common-Law Right to Allocution

In his third issue, Miller contends he is entitled to a new punishment hearing because the trial court violated his common-law right to allocution. When the evidence concluded in the punishment phase of the trial, the trial court asked if there was "any reason at last that [Miller] cannot now be formally sentenced[.]" Miller's counsel replied, "No reason at law, Your Honor." The trial court then sentenced Miller to forty years' imprisonment.

"Allocution" refers to the trial court providing a criminal defendant an opportunity "make a statement or to present information in mitigation of the sentence to be imposed." *Allocution*, BLACK'S LAW DICTIONARY (10th ed. 2014).[9] Article 42.07 of the code of criminal procedure requires the defendant be asked, before sentence is pronounced, "whether he has anything to say why the sentence should not be pronounced against him." TEX. CODE CRIM. PROC. ANN. art. 42.07 (West 2014). The circumstances where sentence cannot be pronounced are limited to when a defendant (i) has been pardoned, (ii) is incompetent to stand trial, or (iii) when a defendant escapes after conviction and before sentencing and another person is brought to sentencing who is not the defendant. *Id.*

Miller concedes the trial court complied with the requirements of article 42.07, but argues there is also a common-law right to allocution that is broader than the statutory right. He further contends that such a right has been recognized by the United States Supreme Court and some of our sister courts, and maintains their decisions should persuade us to also recognize that right. Miller, however, did not assert a common-law allocution right in the trial court.

[9] *See also Miranda v. State*, No. 05-16-01187-CR, 2017 WL 2774454, at *3 (Tex. App.—Dallas June 27, 2017, no pet.) (mem. op., not designated for publication).

The denial of the right to allocution must be preserved, *Graham v. State*, 498 S.W.2d 197, 198 (Tex. Crim. App. 1973),[10] and Miller has provided no authority for the proposition that a common-law right to allocution, if any, would be subject to different preservation rules than the statutory right. Because the record demonstrates Miller's common-law allocution argument was not preserved, we resolve his third issue against him without deciding whether Texas currently recognizes a common-law allocution right. *See* TEX. R. APP. P. 33.1.

We affirm the trial court's judgment.

/Robert M. Fillmore/
ROBERT M. FILLMORE
JUSTICE

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[10] *See also Miranda*, 2017 WL 2774454, at *4.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

RICKEY DARRELL MILLER, Appellant	On Appeal from the 291st Judicial District Court, Dallas County, Texas,
No. 05-16-01336-CR V.	Trial Court Cause No. F-1476695-U.
	Opinion delivered by Justice Fillmore,
STATE OF TEXAS, Appellee	Justices Bridges and Stoddart participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 14th day of November, 2017.