Opinion issued August 14, 2008

In The
Court of Appeals
For The
First District of Texas

NO. 01-06-00520-CR

WARREN KEITH RANDLE II, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from 184th District Court
Harris County, Texas
Trial Court Cause No. 1043509

MEMORANDUM OPINION

A jury convicted appellant, Warren Keith Randle II, of possession with the intent to deliver cocaine weighing at least 400 grams and assessed punishment at a

fine of $1.00 and confinement for 25 years in prison. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(f) (Vernon 2003). We determine whether the trial court abused its discretion (1) in allowing the State to strike jurors on the alleged basis of race in violation of the Equal Protection Clause and *Batson*,[1] (2) in allowing the State to present what is contended to be perjured testimony, (3) in not granting a motion for severance, and (4) in allowing the State continually to allude to inadmissible evidence without granting a mistrial. We affirm.

Facts

This case arose out of a drug rip[2] at appellant's home. While appellant was taking one of his children to school, two men entered his residence. One man held appellant's daughter at gunpoint, while the second man rummaged through the house. The second man came downstairs with two bags, whereupon appellant returned home. Seeing the armed men, appellant fled. The two men briefly chased appellant, but then retreated so that appellant was able to return home.

Harris County Sheriff's Department deputies soon arrived pursuant to a neighbor's call to police for help. The neighbor, Mrs. Martinez, turned over to the deputies a letter from a concerned subdivision resident alerting fellow residents that

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[1] *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986).

[2] A drug rip is a robbery to obtain drugs from someone unlawfully possessing or selling them.

appellant and his wife were dealing drugs in the neighborhood. Martinez had heard screams and had observed two men chasing appellant; one wore a mask and the other was armed and carried a bag. When the deputies approached appellant, he denied that the robbers had carried any bags, and, without having checked his home first, appellant said that nothing had been taken.

The deputies checked appellant's home and smelled a strong odor of cocaine, especially in the master bedroom. They observed few signs of disorder, except in the master bedroom, which aroused their suspicion. A videotape surveillance system in the home aroused further suspicion because the deputies knew that illegal narcotics traffickers used such systems. They also observed a broken window of the Cadillac sedan parked in the garage. Appellant told them that he assumed that the robbers had broken it.

Appellant's wife arrived driving a Cadillac Escalade, spoke with appellant, and asked to leave. Rather than taking the Escalade, she moved a car in the driveway that had blocked the sedan in the garage and drove away in the sedan. Suspecting that contraband might be in the sedan, deputies pursued appellant's wife. They stopped her, smelled a strong odor of cocaine coming from the sedan, and saw a digital scale inside a clear plastic bag in the car. Obtaining consent to search, the deputies found in the trunk a duffle bag containing four large packages of cocaine. They arrested appellant's wife and contacted a detective, who had arrived at appellant's home,

instructing the detective to arrest appellant. Appellant stated that his wife had no idea about the narcotics and that they were his, not hers.

Once appellant's wife was returned to the home, appellant and his wife consented to a search of the home. Inside a safe in the master bedroom, the deputies found $4,500; appellant also had $1,100 on his person. A narcotics detection dog made a positive alert on some of the recovered cash, indicating the presence of narcotics.

Batson Challenge

In his first issue, appellant argues that the trial court violated the Equal Protection Clause by allowing the State to exercise peremptory challenges against prospective jurors based on their race, in violation of *Batson v. Kentucky*.[3] Appellant complains that the trial court erred by not holding a proper *Batson* hearing. Appellant asserts that the trial court ruled that appellant had not presented a prima facie case of discriminatory exclusion thereby relieving the State of its burden to give race-neutral reasons in regard to three prospective jurors: number 17, Olubusola Adeseye; number 23, Robert Francois; and number 38, Jeremiah McClean. Appellant requests a remand for an evidentiary hearing in which the State would present its race-neutral reasons for exercising these three peremptory strikes and the trial court would then

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[3] *See* 476 U.S. 79, 106 S. Ct. 1712 (1986). Texas has codified the *Batson* holding. *See* TEX. CODE CRIM. PROC. ANN. art. 35.261 (Vernon 2006). Appellant incorporates a statutory-violation argument into his challenge.

make its determination.

A. The Facts

The record reflects that appellant is African-American and that the three venire members who were struck were also African-American. Initially, the trial court took judicial notice of the comments made by these three prospective jurors and did not require the State to give race-neutral explanations. However, later, the trial court did find a prima facie case, and the State presented race-neutral reasons in regard to all venire members who were challenged. In regard to prospective juror number 17, the State explained that it exercised its challenge because it felt that he was uninterested. The State explained that it challenged prospective juror number 23 because he had open warrants and challenged prospective juror number 38 because he had an open criminal case. The trial court overruled appellant's *Batson* motion.

B. The Standard of Review and the Law Applicable to a *Batson* Challenge

A trial court's *Batson* decision is overturned only when there is a clear abuse of discretion. *Chambers v. State*, 866 S.W.2d 9, 22 (Tex. Crim. App. 1993). A prosecutor is generally allowed to exercise challenges "for any reason at all, as long as that reason is related to his view concerning the outcome of the case to be tried." *Batson*, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719 (1986). However, the Constitution prohibits all forms of purposeful racial discrimination in selecting jurors. *Id*. Selection procedures that purposefully exclude on the basis of race undermine public

confidence in the fairness of our system of justice. *Id.*, 476 U.S. at 87–88, 106 S. Ct. at 1718.

It is the defendant's burden to demonstrate a prima facie case by showing that the totality of the relevant facts gives rise to an inference of a discriminatory purpose in the use of peremptory challenges by the proponent. *Id.*, 476 U.S. at 93–94, 106 S. Ct. at 1721. After the requisite showing has been made, the burden shifts to the State to explain why the challenges were race-neutral. *Id.*, 476 U.S. at 94, 106 S. Ct. at 1721. Unless a discriminatory intent is inherent in the explanation, the reason offered will be deemed neutral. *Purkett v. Elem*, 514 U.S. 765, 768, 115 S. Ct. 1769, 1771 (1995). However, the State cannot meet this burden by general assertions that officials did not discriminate or that they properly performed their official duties. *Batson*, 476 U.S. at 94, 106 S. Ct. at 1721. The State must give clear and reasonably specific explanations of its legitimate reasons for exercising challenges. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 258, 101 S. Ct. 1089, 1096 (1981).

Once the State has given non-discriminatory explanations, the burden shifts back to the defendant to rebut those explanations by showing that they are pretexts for engaging in racial discrimination. *See Pondexter v. State*, 942 S.W.2d 577, 581 (Tex. Crim. App. 1996). The trial court then has the duty to determine if the defendant has established purposeful discrimination. *Batson*, 476 U.S. at 98, 106 S. Ct. at 1724. In deciding whether the defendant made the requisite showing, the trial

court should consider all relevant circumstances. *Id.*, 476 U.S. at 96, 106 S. Ct. at 1723. The ultimate burden rests with the defendant to show, by a preponderance of the evidence, purposeful discrimination as the basis of at least one of the State's peremptory challenges. *Whitus v. Georgia*, 385 U.S. 545, 550, 87 S. Ct. 643, 646 (1967). If, from the evidence, the trial court believes that the State has exercised peremptory strikes to exclude venire persons based on racial considerations, it has a duty to so find. *Tompkins v. State*, 774 S.W.2d 195, 202 (Tex. Crim. App. 1987).

C. Analysis

Appellant's initial contention that the trial court erred in not holding a hearing and requiring the State to give race-neutral explanations is based on an incomplete appraisal of the record. Although the trial court initially did not hold such a hearing, it later did so. At that hearing, the State gave race-neutral explanations for striking the prospective jurors. *See Allen v. State*, 751 S.W.2d 931, 935 (Tex. App.—Houston [1st Dist.] 1988, no pet.) (holding that lack of interest is race-neutral reason to exclude prospective juror); *Boones v. State*, 170 S.W.3d 653, 656 (Tex. App.—Texarkana 2005, no pet.) (holding that outstanding warrant is race-neutral reason). Because a discriminatory intent was not inherent in the State's explanations, the trial court properly deemed the reasons offered as race-neutral. *See Purkett*, 514 U.S. at 768, 115 S. Ct. at 1771. Moreover, appellant did not show that the State's explanations were a mere pretext. *See Herron v. State*, 86 S.W.3d 621, 631 (Tex.

Crim. App. 2002) (holding that trial court did not err in allowing State's challenge when State offered race-neutral reasons that appellant failed to rebut).

Accordingly, we overrule appellant's first issue.

Perjury

In his second issue, appellant argues that the State knowingly presented perjured testimony to the trial court and failed to acknowledge the same to the defense or court, thereby denying him Due Process. Appellant contends that the trial court erred in denying his motion for a mistrial based on the perjured testimony.

A. Facts

At trial, the State presented the testimony of Martinez, appellant's neighbor. Martinez's testimony was given through an interpreter, Lenny Villavicencio. On direct examination, Martinez testified that she had given investigating police officers a letter that she had received in the mail prior to the offense because she felt that it was important. This letter stated that appellant and his wife were involved with drugs and urged the residents of the community to take action. During cross-examination, outside the presence of the jury, appellant's attorney asked Martinez if she had discussed the letter with anyone, and she denied having done so. The following day, Deputy Lewis testified that he had received the letter from another deputy, who had been given it by Martinez. The contents of the letter were never discussed, nor was the letter introduced or admitted into evidence.

After Martinez and Deputy Lewis had testified, Villavicencio spoke to the court outside the presence of the jury. He stated that he had translated the cross-examination between appellant's attorney and Martinez and that he had also translated a conversation between Martinez and the assistant district attorney, Sally Ring. He was sworn in as a witness and testified that Martinez and Ring had discussed the letter. He stated that he did not think that the witness understood the question. Villavicencio also stated that he did not think that the prosecutor and witness had discussed the contents of the letter, although it was mentioned.

B. The Law

A mistrial is the trial court's remedy for improper conduct that is "so prejudicial that expenditure of further time and expense would be wasteful and futile." *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004). A mistrial is a remedy appropriate for a narrow class of highly prejudicial and incurable errors. *Wood v. State*, 18 S.W.3d 642, 648 (Tex. Crim. App. 2000). The determination of whether a given error necessitates a mistrial must be made by examining the particular facts of the case. *Id*.

A person commits perjury if the person, with the intent to deceive and with knowledge of the statement's meaning, makes a false statement under oath or swears to the truth of a false statement previously made and the statement is required or authorized by law to be made under oath. TEX. PENAL CODE. ANN. § 37.02(a)(1)

(Vernon 2003). A person who commits perjury also commits aggravated perjury if the false statement is made during or in connection with an official proceeding and is material. *Id*. § 37.03(a) (Vernon 2003). A statement is "material" if it could have affected the course or outcome of the official proceeding. *Id*. § 37.04(a) (Vernon 2003).

The State is prohibited under the Fourteenth Amendment of the United States Constitution from the knowing use of perjured testimony. *Vasquez v. State*, 67 S.W.3d 229, 239 (Tex. Crim. App. 2002) (citing *United States v. Bagley*, 473 U.S. 667, 678–79, 105 S. Ct. 3375, 3377 (1985)). The prosecutor's constitutional duty to correct known false evidence is well-established both in law and in professional regulations governing prosecutorial conduct. *Duggan v. State*, 778 S.W.2d 465, 468 (Tex. Crim. App. 1989). This duty is placed on the prosecutor in his capacity as the State's representative in criminal matters. *Id*. Prosecutors are more than mere advocates: they are fiduciaries of the fundamental principles of fairness. *Id*. Furthermore, it is not necessary that the prosecutor actually know that the evidence is false: it is enough that he or she should have recognized the misleading nature of the evidence. *Id*. The purpose of imposing this duty is not to punish the prosecutor or the trial court for error committed, but, rather, to avoid an unfair trial. *Id.* at 469. It is appellant's burden to show that the testimony used by the State was, in fact, perjured. *Luck v. State*, 588 S.W.2d 371, 373 (Tex. Crim. App. 1979).

C. Analysis

In order for a person to commit perjury, she must have the intent to deceive and have knowledge of the statement's meaning. TEX. PENAL CODE ANN. § 37.02(a)(1). The translator opined that even though Martinez had questions repeated to her, he did not think that she understood the questions asked. Confusion or discrepancies in testimony alone do not make out a case for perjury. *Losada v. State*, 721 S.W.2d 305, 312 (Tex. Crim. App. 1986); *see Pearson v. State*, 649 S.W.2d 786, 789 (Tex. App.—Fort Worth 1983, pet. ref'd) (holding that witness's inconsistency in testimony was reasonable mistake, not perjury). Therefore, we hold that the trial court (1) did not abuse its discretion if it implicitly determined that Martinez did not have the requisite intent to deceive necessary for commission of perjury and, thus, (2) did not abuse its discretion in overruling the motion for mistrial. *See* TEX. PENAL CODE. ANN. § 37.02(a)(1).

In addition, for purposes of aggravated perjury, a statement is "material" if it could have affected the course or outcome of the official proceeding. *Id*. § 37.04(a). The issue is not whether the false statement, in fact, affected the course or outcome of the proceeding, but whether it could have affected the course or outcome of that proceeding. *Kmiec v. State*, 91 S.W.3d 820, 823 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd). The false testimony must be related to the decision-making of the proceeding. *Id*. Appellant contends that Martinez's statements tainted the whole trial.

However, the statements were made outside the presence of the jury and were never repeated; as a result, they could not have affected the course or outcome of the proceeding. Therefore, we hold that the trial court also (1) did not abuse its discretion if it implicitly determined that Martinez's testimony was not material and, thus, (2) did not abuse its discretion in overruling the motion for mistrial on this basis. *See* TEX. PENAL CODE. ANN. § 37.03(a).

Accordingly, we overrule appellant's second issue.

Denial of Motion to Sever

In his third issue, appellant argues that the trial court erred in not granting his motion to sever, thus denying him a fair trial in violation of Due Process of Law Under the federal Constitution. *See* U.S. CONST. amends. V, XIV.

When appellant's wife presented her motion to sever, appellant did not present a motion to sever of his own. In fact, the trial court stated that appellant's "lawyers are not a part of this [his wife's] Motion to Sever." The record thus demonstrates that appellant did not present his own motion, did not present evidence, and did not object to the trial court's ruling on his wife's motion to sever. Therefore, appellant did not preserve his complaint for appeal. *See* TEX. R. APP. P. 33.1(a)(1)(A); *Qualley v. State*, 206 S.W.3d 624, 636 (Tex. Crim. App. 2006); *Williams v. State*, 974 S.W.2d 324, 332 (Tex. App.—San Antonio 1998, pet. ref'd).

Accordingly, we overrule appellant's third issue.

Denial of Motion for Mistrial

In his fourth issue, appellant contends that the trial court erred in not granting a mistrial because the State was allowed to allude to inadmissible evidence regarding "information" about appellant, thus violating Due Process. The information was in the letter alerting the subdivision residents to beware of the drug dealings of appellant and his wife. Martinez turned the letter over to the deputies. Appellant contends that the trial court erred by not granting a mistrial when the State was allowed to make references to the letter. He argues that repeated violations were so prejudicial that the issue could not have been withdrawn from the minds of the jury,[4] resulting in a wrongful conviction.

A. The Facts

The record reflects that, during direct examination, Deputy Lewis testified that one of the reasons for pursuing appellant's wife was information in a letter that had led him to believe that the vehicle contained illegal items or large amounts of cash. Appellant objected on the basis of hearsay, and the trial court instructed the jury to disregard the statement and to consider it for no purpose. Appellant also asked for a mistrial, which was denied.

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[4] Appellant argues that the jury must have been very interested in the letter because the first question sent out by the jury asked for the letter. The trial court instructed the jury that it could not have the letter, however, because it had not been admitted into evidence.

B. The Law

In jury cases, proceedings must be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as by making statements or offers of proof or by asking questions in the hearing of the jury. TEX. R. EVID. 103(c). As we stated above in addressing issue two, a mistrial is the trial court's remedy for improper conduct that is "so prejudicial that expenditure of further time and expense would be wasteful and futile." *Hawkins*, 135 S.W.3d at 77. A mistrial is a remedy appropriate for a narrow class of highly prejudicial and incurable errors. *Wood*, 18 S.W.3d at 648. The determination of whether a given error necessitates a mistrial must be made by examining the particular facts of the case. *Id*. The asking of an improper question will seldom be grounds for a mistrial because, in most cases, any harm can be cured by an instruction to disregard. *Id.* A mistrial is required 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 jurors. *Id*. Appellate courts presume that an instruction to disregard the evidence will be obeyed by the jury. *Gardner v. State*, 730 S.W.2d 675, 696 (Tex. Crim. App. 1987).

A trial court's denial of a mistrial is reviewed under an abuse-of-discretion standard. *State v. Gonzales*, 855 S.W.2d 692, 696 (Tex. Crim. App. 1993). An appellate court is obligated to uphold the trial court's ruling if that ruling is within the

zone of reasonable disagreement. *Wead v. State*, 129 S.W.3d 126, 129 (Tex. Crim. App. 2004).

C. Analysis

An officer is permitted to testify to the information upon which he acted. *Parker v. State*, 192 S.W.3d 801, 807 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (quoting *Schaffer v. State*, 777 S.W.2d 111, 114–15 (Tex. Crim. App. 1989)). However, the officer should not be permitted to relate historical aspects of the case, replete with hearsay statements in the form of complaints and reports, on the ground that he was entitled to tell the jury the information upon which he acted. *Id*. The trial court ruled that the content of the letter could not be presented to the jury and instructed the prosecutor to make sure that Deputy Lewis did not discuss the content. In conformity with this ruling, the prosecutor never discussed the content, but only the existence of the letter. Deputy Lewis stated only that one of his reasons to pursue appellant's wife was based upon a letter, but he did not testify about the content of the letter. Because the contents were never discussed, no error occurred. *See Black v. State*, 503 S.W.2d 554, 557 (Tex. Crim. App. 1974) (concluding that there was no error when officer was not permitted to relate contents of report, but was allowed to testify that he heard broadcast that gave description of participants); *see also Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999) (concluding that no abuse of discretion occurred when question asked by prosecution did not actually assert that

appellant was smoking cocaine on night of murder and trial court could have reasonably concluded that question was not so inflammatory as to be incurable by instruction). Nevertheless, even if error had occurred, the trial court could have concluded that its instruction to disregard effectively removed any possible prejudice. *See Wead*, 129 S.W.3d at 130; *Gardner*, 730 S.W.2d at 696. Therefore, we hold that the trial court did not abuse its discretion in denying appellant's motion for mistrial.

Accordingly, we overrule appellant's fourth issue.

Conclusion

We affirm the judgment of the trial court.

Tim Taft
Justice

Panel consists of Justices Taft, Keyes, and Alcala.

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