Opinion issued October 7, 2010

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00843-CR

DAVID WILLIAM PONCE-RIVERA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Case No. 1171611

MEMORANDUM OPINION

A jury found appellant, David William Ponce-Rivera, guilty of the offense of burglary of a habitation with intent to commit sexual assault[1] and assessed his

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[1] *See* TEX. PENAL CODE ANN. § 22.011 (Vernon Supp. 2009), § 30.02 (Vernon 2003).

punishment at confinement for twenty-five years. In his sole point of error, appellant contends that the trial court erred in overruling his objection during the punishment phase to the State's improper argument that appealed to "community expectations."

We affirm.

Background

The complainant, a 72-year-old woman, testified that on June 18, 2008, she went outside of her home to work in her yard, and she did not lock her door. About thirty minutes later, she went back inside her home to repair a chair. Shortly thereafter, appellant, wearing "pull-on" "maroon shorts" and no shirt, ran down the hallway at the complainant. He grabbed the complainant by her arms, dragged her across the floor on her knees into the hallway, knocked her to the floor onto her back, and then removed her shorts and underwear. The complainant momentarily passed out, but when she came to, she felt appellant penetrate her vagina with his penis and afterward put his mouth on her vagina. After appellant ran away, the complainant telephoned for emergency assistance. She was taken to a hospital where a nurse performed a sexual assault exam and obtained DNA buccal swabs from the complainant's vaginal area.

Harris County Sheriff's Office ("HCSO") Sergeant M. Weinel testified that he interviewed the complainant, who described appellant as her assailant and stated

that he lived next door to her. Weinel obtained permission from individuals living in the house next door to the complainant's home to search the house. On his second sweep through the house, Weinel found appellant "in a bed . . . curled up in a fetal position against the wall [with] the comforter [] bunched up on top of him." Weinel arrested appellant and obtained a DNA buccal swab from him.

Sergeant Weinel developed a photographic lineup that included a photograph of appellant, and he showed it to the complainant. She identified appellant as her assailant and stated that she recognized him because she had seen him living next door and he wore the maroon shorts "just about every day."

Harris County Medical Examiner DNA Analyst Michal Pierce testified that he performed DNA testing on the buccal swabs obtained from the complainant and appellant. He opined that the DNA profile from the swabs taken from the vaginal area of the complainant was "consistent with" the DNA profile from the swabs taken from appellant.

Improper Jury Argument

In his sole point of error, appellant argues that the trial court erred in overruling his objection "to the State's argument at punishment because the argument was an improper plea that only a high sentence would satisfy community expectations."

Proper jury argument is limited to (1) summation of the evidence presented

at trial, (2) reasonable deductions drawn from that evidence, (3) answers to opposing counsel's argument, and (4) pleas for law enforcement. *Jackson v. State*, 17 S.W.3d 664, 673 (Tex. Crim. App. 2000); *Swarb v. State*, 125 S.W.3d 672, 685 (Tex. App.—Houston [1st Dist.] 2003, pet. dism'd). To determine whether a party's argument properly falls within one of these categories, we must consider the argument in light of the entire record. *Swarb*, 125 S.W.3d at 685.

When the State asks a jury to assess a particular punishment "because their neighbors desire it," it violates a defendant's fundamental right to confront the witnesses against him and be punished based only on testimony that has been subject to cross-examination and rebuttal and evidence that has been presented at trial. *Cortez v. State*, 683 S.W.2d 419, 420 (Tex. Crim. App. 1984) (holding that argument that only life imprisonment "would be any satisfaction at all to the people of this county" was improper plea for jury to heed expectations of community); *Porter v. State*, 154 Tex. Crim. 252, 254, 226 S.W.2d 435, 436 (1950) (holding that argument that community expected jury to assess death penalty was improper). Argument that beseeches a jury to assess "a particular punishment because 'the people' desire such is improper jury argument." *Cortez*, 683 S.W.2d at 420. Such an argument has the effect of asking a jury to punish a defendant upon the outside influence of "public sentiment or desire rather than upon the evidence that the jury had received." *Id*. at 421. The State may, however,

make a plea for law enforcement by reminding jurors that they may be called upon by friends, co-workers, and family to explain both the case and the verdict. *See Bell v. State*, 724 S.W.2d 780, 801 (Tex. Crim. App. 1986). The State may also ask the jury to "be the voice" of the community and to consider the impact of its verdict on the community. *Cortez*, 683 S.W.2d at 421; *Borjan v. State*, 787 S.W.2d 53, 56 (Tex. Crim. App. 1990).

Appellant complains that an argument made by the State during the sentencing phase of trial was an appeal for a sentence "based on community expectations rather than a plea for [law] enforcement" and "an improper plea that only a high sentence would satisfy community expectations." In pertinent part, the argument reads as follows:

> [The State]: . . . you're gonna look at what does it take to keep our community safe. That's a big one, ladies and gentlemen. Keeping our community safe from people like him is a huge one in this case. You're right, you don't know if he'll complete his sentence and then maybe get deported. You don't know. Well, we certainly saw how easy it was for him to get here the first time.
>
> Ladies and gentlemen, at the end of the day, at the end of all this, you're going to be able to go home to your wives, see your spouse, go back to work, talk to your co-workers. And they're going to know that you had jury duty. And they're going to know that you can now talk about the case. And they're going to want to know about it, probably been pretty interesting compared to just regular going to work days.

And you're going to get a chance to tell them what the case was about. Oh, yeah, this guy, he snuck into this lady's house when she wasn't looking, when she was busy out in the backyard and he waited for her to come inside. And then he grabbed her and he raped her, pulled her into the hallway and raped her. And then when he was done raping her, he put his mouth down on her vagina too. And she was trying to beat him off, but he got the best of her. And then he ran out and he hid in the house next door for three hours.

[Trial Court]: Let's draw it to a conclusion, please.

[The State]: Ladies and gentlemen. You're going to be able to tell them all that. And then you know what else you're going to say. Oh, yeah, and she was 72 years old. And then you know what, they're going to be, like, wow, what did you do?

[Trial Counsel]: Judge, I'm going to object to this line of argument. Improper plea for law enforcement, improper plea for community sentiment and I object to it.

[Trial Court]: It's overruled.

[The State]: You're going to tell 'em, we took the key and we threw it away. We decided that the best way to get this community safe and to keep [the complainant] from ever having to worry about anything to happen to any of her children, the best way for him to become a distant memory in all of our minds is to lock him up and throw away the key for life. That's the best way. That is the only verdict that is appropriate in this case. People like him need to be in a prison where we know where he is because we know he knows how to get her.

Go back there, pick the first option, number one. If you want to give him a break, fine, don't give

him a fine. But he deserves, he's earned every day to spend in prison. Tell him he deserves life.

[Trial Court]: All right. Thank you. . . .

Appellant asserts that "the prosecutor's argument that the jurors' spouses, family, and co-workers would inquire about the details of the case and exclaim 'wow, what did you do?'" sent a message to the jury that the "'community' would be incensed and outraged by the facts of the case" and this equates to a plea that the community "would expect a lengthy sentence."

Informing the jurors that their friends, family, and co-workers will ask them about the facts of the case and the result reached is not improper argument because it is common knowledge that the community will be curious about the jurors' experience. *See Bell*, 724 S.W.2d at 801 (argument that jury should consider what friends and neighbors would ask them not improper); *Whittington v. State*, 580 S.W.2d 845, 847 (Tex. Crim. App. [Panel Op.] 1979) (common knowledge that friends and neighbors will ask about jury experience). Accordingly, we hold that the trial court did not err in overruling appellant's objection to that portion of the State's argument.

Appellant's further complaint regarding the remainder of the State's argument, however, was not properly preserved. To preserve error, a party is required to continue to object each time an objectionable argument is made. *See Ethington v. State*, 819 S.W.2d 854, 858 (Tex. Crim. App. 1991); *Dickerson v.*

State, 866 S.W.2d 696, 699 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd). After the trial court overruled appellant's objection, the State continued arguing that "the best way" for the jury to protect the community was to give appellant a "life" sentence. Appellant did not renew his objection, and, thus, has not preserved anything for our review. *See Dickerson*, 866 S.W.2d at 699; *see also* TEX. R. APP. P. 33.1(a). Even had appellant preserved error, the State's argument was not improper. Unlike in *Cortez*, the State did not tell the jury that the community would not be satisfied with a sentence less than life. *Id*. The prosecutor urged the jurors to "decide[] that the best way to get this community safe" was to impose a life sentence and a life sentence was the only "appropriate" sentence. Accordingly, we hold that none of the complained of argument constituted an appeal to the jury to sentence appellant based on the expectations of the community.

We overrule appellant's sole point of error.

Conclusion

We affirm the judgment of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Alcala, and Sharp.

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