

Opinion issued June 2, 2016



In The
Court of Appeals
For The
First District of Texas

NO. 01-15-00825-CR

DESHAUN D. JACKSON, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Case No. 1434297

MEMORANDUM OPINION

Appellant, Deshaun Demarcus Jackson, was charged by indictment with aggravated robbery.¹ Appellant pleaded not guilty. The jury found him guilty, and the trial court sentenced him to 20 years' confinement. In one issue on appeal,

¹ See TEX. PENAL CODE ANN. §§ 29.02(a)(2), 29.03(a)(2), 31.03(a) (Vernon 2011).

Appellant argues the trial court abused its discretion by overruling his objection to improper jury argument.

We affirm.

Background

Richard Matt hired Joshua Read to fix the septic system on his property. Read came over on July 8, 2014. Matt showed Read the septic tank and then drove to his nearby orchard. After Read performed the repairs, he needed Matt to test the system. Read drove to the orchard, and the two drove back to the house in their vehicles.

Read arrived first and walked to the back of the house, where the septic tank was located. He heard footsteps and talking coming from the back of the house. He saw two men leave the house from a broken window. One of them carried a pillow case stuffed with various items. A chase ensued.

Around the same time, Matt saw a car parked in his driveway. He parked his truck behind the car to block it in and approached the car. After talking to the driver, Matt wrote down the license plate number. Matt then moved his truck out of the other car's way and parked the truck. The car drove away. When Matt parked the truck, he saw two men running towards the street in the direction of the car he had just blocked. He saw Read pursuing the men.

Read jumped into his truck and drove towards the subdivision entrance. Matt followed in his truck. Read stopped his truck at the entrance to the subdivision,

parking his truck at an angle so that no cars could pass the road. Matt parked near Read. They saw the car that had been at Matt's house approach. The driver tried to drive around Read's truck. Instead, the car got stuck in the ditch.

The men in the car got out. One of them was Appellant. Appellant jumped on Read's truck, tapped on the window with a gun, and said, "If you don't move your fucking truck, I'm going to blow your head off." Read "dumped the clutch" on his truck, and Appellant fell off.

Appellant and the two other men began to run away. They then turned around and tried to move the car out of the ditch. While they did this, Matt got out of his truck and said to one of other men, "Hey, guy, give it up. I've already called 9-1-1." That man pointed a pistol at Matt's head and said, "Get the fuck out of here or I'm going to blow your fucking head off." Matt got back into his truck. Appellant and the two others began to flee. As they fled, Appellant and the two other men discarded the stolen items and began shedding clothing. They were apprehended shortly afterwards. No gun was ever found.

Following the presentation of evidence in the guilt-innocence phase of trial, Appellant's counsel presented a couple of theories during closing argument of what the evidence established. First, Appellant's counsel asserted that the jury should conclude that no gun was ever used. He pointed out that no gun had even been found, despite a search by the police. He argued that Matt was old and had become

confused in his state of stress. He further argued that Read had lied about seeing a gun.

In support of his argument that Read lied about seeing a gun, Appellant's counsel pointed to Read's testimony that he did not see a weapon when he saw the two men leaving the house and to a police officer's testimony that Read had reported seeing two armed men leaving the house. Appellant's counsel argued,

So, whichever story you want to believe, it's up to you. But it's obvious that Mr. Read is lying to you. That's the definition of a lie. If you tell one person one story and tell another person another story, guess what? You've lied. Mr. Read is a liar.

Appellant's counsel also pointed out that Read had some prior felony convictions. "This does not make him more credible. It makes him a criminal. Guess what criminals do? They lie. He lied to two police officers and then he got up on the stand and he lied to you." Based on these arguments, Appellant's counsel asserted, "Robbery is the appropriate conviction to give [Appellant]."

Appellant's counsel switched to his next argument that robbery would be the appropriate conviction only if they believe Appellant and the two others arrested were the ones at Matt's house. "It is possible that these three individuals were not the ones in the house. Okay? It is perfectly reasonable to believe that these three individuals were not the ones that committed the crime." Appellant's counsel then developed his argument that bringing the arrested individuals to Matt and Read right after they had been arrested—as opposed to later showing Matt and Read

photographic line ups containing the individuals—was “a suggestive process.” Appellant argued that presenting the arrested individuals to Matt and Read in this manner resulted in a misidentification.

During the State’s closing argument, the prosecutor developed the theme that someone who has an incentive to suggest innocent explanations for problematic evidence should be scrutinized. To do so, he used an example of house buying, finding problems with the house that could suggest structural integrity problems, receiving excuses from the homeowners that suggest benign reasons for the problems, and then deciding whether to trust the person trying to sell you the house or the independent home inspector. In this context, the prosecutor contrasted Appellant’s counsel’s argument that no weapon was used with his argument that Appellant had not been involved in any of the criminal activity. “You can’t say the identification is wrong. My guy wasn’t there. But if he was, there was no deadly weapon. Well, how would you know? You weren’t there.”

Later the prosecutor discussed how Appellant would still be responsible for one of the other men pointing a gun at Matt under the law of parties. The following exchange occurred:

[Prosecutor:] He’s still a party to this guy pulling a gun. But then it all goes back to the, “And how would you know any of that if you weren’t there,” right? We got the wrong guy. Remember? The ID is wrong. But it’s all a bunch of lies that they’re trying to get you to believe even though there’s no evidence of them.

[Appellant's Counsel]: Objection. Striking the Defendant over counsel's shoulder.

THE COURT: Overruled.

Jury Argument

In his sole issue, Appellant argues the trial court abused its discretion by overruling his objection to improper jury argument.

A. Standard of Review

We review a trial court's ruling on an objection to jury argument under the abuse-of-discretion standard. *See Davis v. State*, 329 S.W.3d 798, 825 (Tex. Crim. App. 2010). "The trial court does not abuse its discretion unless its determination lies outside the zone of reasonable disagreement." *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010).

B. Analysis

"Proper jury argument generally falls within one of four general areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to argument of opposing counsel; and (4) plea for law enforcement." *Brown v. State*, 270 S.W.3d 564, 570 (Tex. Crim. App. 2008); *Alejandro v. State*, 493 S.W.2d 230, 231 (Tex. Crim. App. 1973). The State may not "strike at the defendant over the shoulder of counsel" through personal attacks on the defendant's counsel. *Brown*, 270 S.W.3d at 571–73. "A prosecutor risks improperly striking at a defendant 'over the shoulder' of counsel when an argument refers to defense counsel personally and

when the argument explicitly impugns defense counsel's character." *Weeks v. State*, 396 S.W.3d 737, 746 (Tex. App.—Beaumont 2013, pet. ref'd) (citing *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998)).

Appellant argues that the prosecutor's argument "it's all a bunch of lies that they're trying to get you to believe" constituted an impermissible striking at defendant over counsel's shoulders. We disagree.

The context for this statement matters. The prosecutor was echoing his own theme that someone interested in presenting an innocent explanation for problematic evidence should not be trusted outright. In addition, during his closing argument, Appellant's counsel argued that presenting two different stories of events was equivalent to lying. The prosecutor pointed out that Appellant's counsel had argued both that Appellant had only committed robbery and that Appellant had not committed any offense. The prosecutor drew upon Appellant's counsel's own argument that presenting two different stories was equivalent to lying. *See Brown*, 270 S.W.3d at 570 (holding answering argument of opposing counsel is proper jury argument). We hold the trial court did not abuse its discretion by overruling Appellant's objection.

We overrule Appellant's sole issue.

Conclusion

We affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Justices Higley, Bland, and Massengale.

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