Opinion issued February 27, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-01011-CR

WILLIE ROSS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Case No. 1441781

MEMORANDUM OPINION

A jury convicted appellant Willie Ross of burglary of a habitation with intent to commit theft. TEX. PENAL CODE § 30.02(a)(1). The court sentenced him to 40 years in prison. Ross brings two issues on appeal. He contends that the evidence

was insufficient to support his conviction. He also argues that the trial court erred by permitting the State to make an improper jury argument.

Because there was sufficient evidence to sustain Ross's conviction, and no reversible error has been shown, we affirm.

Background

Kathy Hinze lived in the same Bellaire neighborhood for 19 years. One morning, she was returning home from work when she noticed a silver van with a paper license plate parked at a stop sign on her street. Hinze felt uncomfortable because she did not recognize the person in the van, so she decided to drive past her home and turn into a neighbor's driveway. When she pulled out of the driveway, the van was gone. She drove through the streets of her neighborhood, which are all dead-ends, but she still did not see the van.

As Hinze drove back toward her home, she saw that the gate leading to the driveway of a corner home on Oakdale Street was open, and the same van was backed into the driveway. A door to the home was also open, and she saw an African-American female sitting in the driver's seat of the van, and an African-American male standing in the driveway. Hinze continued driving and pulled into another neighbor's driveway. She tried to take pictures with her phone, but she was unable to do so because "everythifng was happening so fast." The van pulled away,

and she and another neighbor unsuccessfully tried to call 911 from their mobile phones.

Hinze alerted another neighbor, Richard Miller, who also had seen a van with an African-American male and female in the driveway of the Oakdale Street residence. After reaching the Bellaire Police Department, Hinze reported that she had seen a "black" female in a silver, older-model Ford van with paper plates parked at a stop sign in her neighborhood. She told the operator that the female picked up a black male at the home located at the corner of "Oakdale and Avenue B." She also stated that she had seen that the gate, the back door, and a window to the home were open. The van was no longer at the home.

Several officers responded to the home on Oakdale Street and determined it had been burglarized. When Officer J. Edwards arrived, he saw that the driveway gate was open, and that a door and a window to the house were also open. After speaking with witnesses, Officer Edwards entered the residence along with other officers who had responded to the scene. The officers assessed the house for evidence of missing property. Officer Edwards also took DNA swabs of a gun case, a gun cleaning case, and wires connected to a television in the home. An analyst was unable to obtain a DNA profile from any of the three items.

An officer contacted Ryan Harrison, who lived at the Oakdale address. Harrison contacted his roommate, Jack Langdon. Harrison and Langdon both left

work and returned to their home. The house had been "trashed" and several items were missing, including: two televisions, a video game console, two tablet computers, a shotgun, two rifles, a black gun case, two pistols, several of Harrison's personal identification documents, and various other electronic devices. Both Langdon and Harrison confirmed that the gate, door, and window were normally locked or otherwise secured.

Within a few hours after the police left the house, Harrison recalled that he had set up GPS location tracking one of the tablets. Harrison and Langdon tracked the tablet to a location on Jones Road. They notified the police and provided Harrison's log-in information as well as instructions on how to track the device. Police tracked the device to an apartment complex on Jones Road.

That same afternoon, Sergeant J. Thomas and Deputy Middleton arrived at the apartment complex in an unmarked police vehicle and searched the parking lot for a silver Ford van. Sgt. Thomas saw a silver Ford van parked in a spot near one of the apartment buildings. He observed a man and a woman standing near the van. Sgt. Thomas saw the man remove a long bag, which he believed contained a rifle, from the rear of the van. The man walked toward one of the apartment buildings. Deputy Middleton continued driving in order to get a "better viewpoint," then he parked behind the van, blocking it in. The woman was still beside the van, and Sgt. Thomas saw the man, empty-handed, walking away from the building stairwell and

toward the unmarked police vehicle. Sgt. Thomas got out of his car to approach the man, who immediately fled. Sgt. Thomas identified himself as "police," and he told the man to get on the ground, but the man continued to flee. Sgt. Thomas chased after the man, but was unable to apprehend him.

In the course of his investigation, Sgt. Thomas determined that a person named "Willie Ross, Jr." was a possible suspect in the burglary. Using a police database, Sgt. Thomas obtained a photograph of a Willie Ross, Jr., whom he identified as the same person who ran from him at the apartment complex.

The woman Sgt. Thomas had seen with Ross lived in an apartment at the Jones Road complex. The woman, Katisha Chyzinski, gave officers consent to search the apartment. Sgt. Thomas entered Chyzinski's apartment along with other officers. They recovered many of the items that had been reported stolen from the Oakdale Street residence, including: two televisions, three firearms, a video game console, two tablets (including the one that had been tracked to the Jones Road complex), and various documents and electronics. None of the items were swabbed for DNA evidence. The property was later identified by Langdon and Harrison and released to them. Officers also observed several gun cases in the apartment, including the bag Sgt. Thomas had seen Ross remove from the Ford van. Ross was later indicted on burglary of a habitation.

At trial, Hinze and Miller testified about their observations, but neither identified Ross in court nor did either witness provide any further description of the man they saw at the Oakdale Street house on the day of the burglary. Langdon and Harrison also testified. Sgt. Thomas and Officer Edwards testified about the investigation. The State also called two other officers and a DNA analyst. The defense did not call any witnesses. The jury found Ross guilty of burglary, and the trial court sentenced him to 40 years in prison.[*] He now appeals from his conviction.

Analysis

Ross raises two challenges to his conviction on appeal. He contends the evidence was insufficient to prove he committed burglary. He also claims that he was unfairly prejudiced by improper jury arguments made by the prosecutor.

I. Sufficiency of the evidence

Ross challenges the sufficiency of the evidence to support his burglary conviction. He does not argue that the evidence was insufficient to prove that a burglary occurred at Langdon and Morrison's residence. Instead, he asserts that no rational jury could have found that he entered the Bellaire house. Ross emphasizes the lack of an eyewitness identification of him as the man seen outside of the

[*] Although evidence at trial identified appellant as "Willie Ross, Jr.," he is identified in the judgment as "Willie Ross."

burglarized house. He also notes that Hinze's physical description was limited to race and gender, and that she did not actually see anyone enter the residence.

Every criminal conviction must be supported by legally sufficient evidence as to each element of the offense that the State is required to prove beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 315–16, 99 S. Ct. 2781, 2787 (1979); *Adames v. State*, 353 S.W.3d 854, 859 (Tex. Crim. App. 2011). To determine whether this standard has been met, we review all of the evidence in the light most favorable to the verdict, and decide whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Brooks v. State*, 323 S.W.3d 893, 902 (Tex. Crim. App. 2010). The jury is the sole judge of witness credibility and of the weight given to any evidence presented, thus the reviewing court must defer to the jury's determinations as to both. *Brooks*, 323 S.W.3d at 899. Evidence may be circumstantial or direct, and circumstantial evidence alone can be sufficient to establish guilt. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). We permit juries to draw multiple reasonable inferences from the evidence presented at trial. *Id*. When the record supports conflicting inferences, we presume that the jury resolved the conflicts in favor of the verdict. *Jackson*, 443 U.S. at 326, 99 S. Ct. at 2793.

A person is guilty of burglary if, without the effective consent of the owner, he enters a building or habitation with the intent to commit a felony, theft, or an assault. TEX. PENAL CODE § 30.02(a)(1). Direct evidence of entry is not required to sustain a burglary conviction. *See Poncio v. State*, 185 S.W.3d 904, 905 (Tex. Crim. App. 2006). A defendant's unexplained possession of property recently stolen from a burglarized home is sufficient to connect him with the taking of the property, and therefore with the burglary. *Id*.

From the evidence presented at trial, a rational factfinder could have determined that Sgt. Thomas saw Ross in possession of a gun case that had been stolen just hours earlier from the Oakdale Street house. Sgt. Thomas testified that he saw Ross outside of the location where Harrison's stolen tablet had been tracked. He saw Ross remove "a long bag," which Sgt. Thomas believed contained a rifle, from a van matching the description of the one seen at the burglarized house approximately six hours earlier. Sgt. Thomas identified a gun case that had been recovered from a closet in Chyzinski's apartment as the same one he had seen Ross remove from Chyzinski's van.

While possession of stolen items, without more, is not sufficient to establish guilt in a prosecution of theft or burglary, *Grant v. State*, 566 S.W.2d 954, 956 (Tex. Crim. App. 1978), the fact that Ross ran when Sgt. Thomas identified himself as law enforcement is additional circumstantial evidence of his guilt. *See*

Clayton v. State, 235 S.W.3d 772, 780 (Tex. Crim. App. 2007) (a factfinder may draw an inference of guilt from the circumstance of flight); *see also Guillory v. State*, 877 S.W.2d 71, 74 (Tex. App.—Houston [1st Dist.] 1994, writ ref'd) (flight from the scene may be combined with other facts to show that the accused was a party to the offense).

Viewing the evidence in the light most favorable to the verdict, we conclude that a rational factfinder could have found, beyond a reasonable doubt, that Ross burglarized the Oakdale Street home. *See Powell v. State*, 194 S.W.3d 503, 507 (Tex. Crim. App. 2006) (holding that "cumulative force" of all circumstantial evidence can be sufficient to support a guilty verdict). We overrule Ross's first issue.

II. Jury argument

In his second issue, Ross argues that the trial court erred by denying his motions for mistrial following improper comments by the State during its closing argument. He contends that the prosecutor intentionally attempted to improperly influence the jury's decision by introducing inflammatory and prejudicial accusations.

There are four permissible categories of jury argument: (1) summation of the evidence, (2) reasonable deductions from the evidence, (3) responses to argument by defense counsel, and (4) pleas for law enforcement. *Wesbrook v.*

State, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000). An improper argument will be cured by an instruction to disregard unless the remark is "so inflammatory that its prejudicial effect could not reasonably be overcome by such an instruction." *See Wilkerson v. State*, 881 S.W.2d 321, 327 (Tex. Crim. App. 1994).

Ross points to two separate arguments in support of his contention that the trial court should have granted a mistrial. He argues that that the prosecutor introduced "irrelevant and prejudicial" evidence in the following statement:

> Now, I want you to think about that for one second. [Sgt. Thomas] identified the person who ran from him immediately. He did. And he told that to Detective Lacy. You heard Detective Lacy say: Yes, it was a short stocky black male. He gave that description to Detective Lacy. Just because it wasn't written down doesn't mean it didn't happen. Those reports are there to help them remember what happened that day. Now, he gave that description to Detective Lacy and he knew without a doubt that was the person that ran from him –

Ross objected on the basis that it was "a misstatement of the law—a misstatement of the facts that [Sgt. Thomas] knew without a doubt." The court sustained the objection and instructed the jury to disregard the prosecutor's "last comment," but it denied a motion for mistrial.

Sgt. Thomas testified that Ross was the person who ran from him at the Jones Road apartment complex on the day of the burglary. However, he never stated that he knew that "without a doubt," or otherwise specifically testified as to his level of confidence in his identification of Ross.

Ross objected to the comment, requested the jury be instructed to disregard it, and moved for a mistrial. Thus, he has properly preserved this complaint for appeal. *See Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996). Assuming that the prosecutor's remark was improper, because the trial court sustained Ross's objection and instructed the jury to disregard the comment, the issue on appeal is whether the court erred by denying his motion for mistrial. *See Hawkins v. State*, 135 S.W.3d 72, 76–77 (Tex. Crim. App. 2004). We review a trial court's denial of a motion for mistrial for an abuse of discretion. *Id*. at 77. A mistrial is an extreme remedy used only in circumstances when improper conduct has created an incurable prejudice, such that continuation of the trial would be wasteful and futile. *Id*.

In analyzing whether the court's denial of a motion for mistrial during the guilt-or-innocence phase of trial was in error, we balance three factors: (1) the severity of the conduct (its prejudicial effect), (2) curative measures, and (3) the likelihood of a conviction absent the misconduct. *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998); *Williams v. State*, 417 S.W.3d 162, 176 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd). In assessing the severity of the conduct, we consider, in light of the entire record of jury arguments, whether there appeared to be a willful and calculated effort by the State to deprive the appellant of a fair and impartial trial. *Brown v. State*, 270 S.W.3d 564, 573 (Tex. Crim. App. 2008).

Here, the degree of misconduct was mild. The State argued that Sgt. Thomas had "no doubt" that the person who ran from him was Ross. Throughout his testimony, Sgt. Thomas maintained that Ross was the person that ran from him. Therefore, although Sgt. Thomas never expressly stated that he had "no doubt" as to his identification of Ross, the prosecutor's remark may have been correct. *See, e.g.*, *Foster v. State*, No. AP-74901, 2006 WL 947681, at *12 (Tex. Crim. App. Apr. 12, 2006) (improper argument about a fact that a witness did not testify to, but may have been correct, supported a conclusion that the degree of misconduct was mild). The improper comment made up less than one line (only three words) out of approximately nine pages of the State's closing argument. *See id.* (the fact that improper comment made up a single sentence of the State's argument weighed in favor of a finding that the remark was harmless). The remark was not repeated. *See, e.g.*, *Carballo v. State*, 303 S.W.3d 742, 748 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd) (prejudicial effect of State's improper argument was lessened because the conduct was brief and was not repeated). The trial court reasonably could have concluded that the improper argument was not so egregious that it indicated a willful and calculated effort by the State to deprive Ross of a fair and impartial trial.

As to the second factor, the trial court sustained counsel's objection and immediately instructed the jury to disregard the improper comment. Given that the

jury reasonably could have inferred from Sgt. Thomas's testimony that he was confident in his identification of Ross, the prosecutor's remark overstating the strength of the actual evidence was not so inflammatory that the court's instruction to disregard could not have cured any harm. Further, the court's charge informed the jury that it was the exclusive judge of the facts proved, the credibility of the witnesses, and the weight to be given to their testimony, and it instructed the jury to consider only the evidence presented during deliberations. *See Williams*, 417 S.W.3d at 179 (charge instructing the jury to consider only the evidence presented in their deliberations was an additional curative measure to consider in analyzing whether court erred by denying appellant's motion for mistrial); *see also Roberts v. State*, No. 03-14-00637-CR, 2016 WL 6408004, at *16 (Tex. App.—Austin Oct. 26, 2016, pet. ref'd) (mem. op., not designated for publication). Absent any evidence to the contrary, we presume that the jury understood and followed the trial court's charge. *Taylor v. State*, 332 S.W.3d 483, 492 (Tex. Crim. App. 2011).

The third factor—the certainty of a conviction absent the misconduct—also supports a conclusion that the trial court did not abuse its discretion by denying a mistrial. Sgt. Thomas was questioned at length about his ability to observe the person who ran from him as well as his subsequent identification of that person as Ross. The record reflects that Sgt. Thomas's testimony about his observations and his identification of Ross was read back to the jury. While the identification was

one of the most significant pieces of evidence in the State's case, the record supports a conclusion that the jury made its determination as to the reliability of Sgt. Thomas's identification based on the evidence it properly could consider, rather than the State's comment. Accordingly, it is likely that Ross would have been convicted absent the State's improper argument.

Balancing the relevant considerations, we cannot conclude that the trial court abused its discretion by denying Ross's motion for a mistrial.

Ross also contends that the trial court erred by denying a subsequent motion for mistrial after the State argued that Ross was the "mastermind" behind the burglary although the evidence did not support that contention. Specifically, the prosecutor stated: "I think that Mr. Ross is the mastermind . . . ." Defense counsel objected, arguing that the prosecutor was not permitted to "argue what she thinks," or "argue what the evidence is." The court sustained the objection, and it instructed the jury to disregard the comment. The defense moved for a mistrial, which the court denied. Immediately following the court's denial of a mistrial, the State continued its argument, stating, "although Mr. Ross is the mastermind behind this burglary . . . ." Ross made no objection.

A defendant must object each time an improper argument is made. *See Howard v. State*, 153 S.W.3d 382, 385 (Tex. Crim. App. 2004). If a defendant objects to one instance of an improper argument, but fails to object to other

instances of the same or similar arguments, he waives his complaint. *See id*. Accordingly, Ross has waived his complaint as to the State's "mastermind" remarks.

We overrule Ross's second issue.

Conclusion

We affirm the judgment of the trial court.

Michael Massengale
Justice

Panel consists of Justices Radack, Massengale, and Brown.

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