Opinion issued March 19, 2019

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00304-CR

NICHOLI S. PARRISH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 339th District Court
Harris County, Texas
Trial Court Case No. 1538532

MEMORANDUM OPINION

A jury convicted Nicholi S. Parrish of burglary of a habitation, and the trial court assessed punishment at ten years' confinement. *See* TEX. PENAL CODE § 30.02(a)(1). On appeal, Parrish contends that the trial court abused its discretion

by denying his motion for mistrial after the prosecutor disclosed a fact not in evidence during closing argument. We affirm.

Background

C. Ananoria works inside a home in Houston's River Oaks neighborhood. On the morning of January 25, 2017, Ananoria saw a man peering into a window of the home. When she went outside to confront the man, he left the property. Ananoria told her employer, L. Crawford, about the incident, and Crawford reported it to the River Oaks Patrol.

About thirty minutes later, while River Oaks Patrol Officer J. Cooley was patrolling the area for the suspicious person, Crawford called again—this time to report that Ananoria had spotted the same man in the driveway of the home next door, which was owned by F. Harmon and his wife. Because Officer Cooley was in the area, he arrived at the Harmons' home almost immediately.

As Officer Cooley got out of his patrol car to talk with Crawford and Ananoria, who were both standing outside, the Harmons' security alarm sounded. Officer Cooley walked up the Harmons' driveway to investigate, noticed a broken window and heard movement inside the home, and then called for assistance. He also retrieved a shotgun from his patrol car and secured the Harmons' backyard, believing that anyone inside the home was likely to flee in that direction. With assistance from additional responding officers, Officer Cooley searched the

backyard and found a man later identified as Parrish hiding under the bushes. As he arrested Parrish, Officer Cooley observed that Parrish's hand was cut and bleeding.

After Officer Cooley located and arrested Parrish, F. Harmon returned home and found a significant law enforcement presence there, including not only the River Oaks Patrol but also the Houston Police Department and the United States Marshals Service. Harmon had been contacted by the security alarm monitoring company when the alarm was triggered. According to Harmon, the U.S. Marshal had responded because his wife "works for the federal government, and [the Marshal was] responsible for installing the alarm" and still monitors it.

Inside the home, Harmon found a broken kitchen window and shuffled belongings. He observed that a bicycle was knocked over, a television set was unplugged and moved, and all the doors in the kitchen pantry were opened. In addition, a backdoor that could be unlocked only from the inside was open and smeared with blood, which Officer Cooley attributed to the cut on Parrish's hand.

A grand jury indicted Parrish for burglary of a habitation with intent to commit theft. Parrish pleaded "not guilty," and a jury trial followed. After the close of evidence, the trial court charged the jury on the indicted offense and also the lesser-included offense of criminal trespass of a habitation. The jury found Parrish guilty of burglary of a habitation, and Parrish appealed following the trial court's assessment of punishment.

Motion for Mistrial

In a single issue, Parrish asserts that the trial court erred by refusing to grant a mistrial after sustaining his objection to the prosecutor's disclosure of a fact not in evidence during closing argument and giving an instruction to disregard. We begin our analysis with the standard of review.

A. Standard of review

A mistrial is a procedural tool used to halt trial proceedings when error occurring during trial is so prejudicial that expenditure of further time and expense would be wasteful and futile. *Young v. State*, 283 S.W.3d 854, 878 (Tex. Crim. App. 2009); *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999). We review the denial of a motion for mistrial for an abuse of discretion and must uphold the trial court's ruling if it was within the zone of reasonable disagreement. *Coble v. State*, 330 S.W.3d 253, 292 (Tex. Crim. App. 2010). "A mistrial is an appropriate remedy in 'extreme circumstances' for a narrow class of highly prejudicial and incurable errors." *Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009) (quoting *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004)). A mistrial should be granted only when less drastic alternatives, such as an instruction to disregard, will not cure the prejudice. *See id.* at 884–85; *Buentello v. State*, 512 S.W.3d 508, 520 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd). Whether a mistrial is required

depends on the particular facts of the case. *Ladd*, 3 S.W.3d at 567. With this framework in mind, we turn to Parrish's issue.

B. Analysis

Parrish complains that the trial court should have granted his motion for mistrial when the prosecutor disclosed a fact not in evidence—that Harmon's wife is a judge—during closing argument. In closing, the prosecutor stated:

> PROSECUTOR: And burglaries have an effect on all of you, through your family, through someone you've known. Everyone has been affected by burglary of a habitation; young, old, male, female. It doesn't matter. You've been touched by it. Does it matter that Mr. Harmon is – *his wife is a judge*? Did the defendant know –
>
> DEFENSE COUNSEL: Objection, outside the record.
>
> THE COURT: Sustained.
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> DEFENSE COUNSEL: Please instruct the jury to disregard.
>
> THE COURT: Disregard the last comment by the prosecutor, ladies and gentlemen.
>
> DEFENSE COUNSEL: I'm forced to move for a mistrial.
>
> THE COURT: Denied.
>
> PROSECUTOR: Did the defendant know he was breaking into a home where the complainant knows – is an attorney? Does it matter? It does not matter because everyone is treated the same.

(Emphasis added.)

Parrish urges that, by disclosing that a judge lived in the Harmon home, the prosecutor injected a new and harmful fact into the record that was designed to "prejudice the jury" against him. According to Parrish, such outside-the-record information may have swayed the jury to convict him of the greater offense of burglary of a habitation instead of criminal trespass, an offense that would have carried a lighter sentence. Although we agree that the prosecutor's disclosure of a fact not in evidence was error, we disagree that it necessitated a mistrial. *See Bailey v. State*, 531 S.W.2d 628, 629–30 (Tex. Crim. App. 1976) (prosecutor's statement injecting new facts into case was error); *Phillips v. State*, 130 S.W.3d 343, 355 (Tex. App.—Houston [14th Dist.] 2004), *aff'd*, 193 S.W.3d 904 (Tex. Crim. App. 2006) ("Improper closing arguments include references to facts not in evidence[.]").

In most instances, a trial court's instruction to disregard an improper jury argument will cure any error. *See Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000); *Williams v. State*, 417 S.W.3d 162, 176 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd). This is true even "when the prosecutor mentions facts outside the record during argument." *Martinez v. State*, 17 S.W.3d 677, 691 (Tex. Crim. App. 2000); *see Guidry v. State*, 9 S.W.3d 133, 154 (Tex. Crim. App. 1999). As this Court has explained, "only in the most egregious cases when there is an 'extremely inflammatory statement' is an instruction to disregard . . . considered an insufficient response by the trial court." *Williams*, 417 S.W.3d at 176; *see Moore v. State*, 999

S.W.2d 385, 405–06 (Tex. Crim. App. 1999); *Dinkins v. State*, 894 S.W.2d 330, 357 (Tex. Crim. App. 1995). This is not one of those cases.

The prosecutor's statement revealing that a judge lived in the Harmon home was not so extreme as to render the trial court's instruction to disregard ineffective. Before the prosecutor gave any closing argument in this case, the jury heard testimony from Harmon that his wife works for the federal government and is under the protection of the U.S. Marshal. From Harmon's testimony that the U.S. Marshal monitors the security of his home, the jury reasonably could infer that Harmon's wife held a prominent position within the federal government, even if there was no testimony disclosing her status as a judge. The prosecutor's erroneous statement was singular; it was not emphasized. The prosecutor did not urge sympathy or anger based on the judgeship. To the contrary, she argued that a homeowner's occupation or socioeconomic status was irrelevant to determining whether a burglary occurred. And, there is no suggestion in the record that the jury was inclined to apply a different standard as a result of the prosecutor's disclosure. Accordingly, we hold that the trial court's prompt instruction to disregard was sufficient to cure the error.

Because its instruction to disregard was curative, the trial court did not abuse its discretion by denying a mistrial. *See Ocon*, 284 S.W.3d at 884. Parrish's issue is overruled.

Conclusion

Having overruled Parrish's sole appellate issue, we affirm the trial court's judgment.

Sarah Beth Landau
Justice

Panel consists of Justices Keyes, Higley, and Landau.

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