Affirmed and Memorandum Opinion filed November 18, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00497-CR

THOMAS GEORGE PENCE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 9
Harris County, Texas
Trial Court Cause No. 1558841

MEMORANDUM OPINION

Appellant Thomas George Pence appeals his conviction for aggravated assault, claiming the trial court erred in denying his motion for mistrial and his motion for new trial based on his allegations of prosecutorial misconduct. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was charged with the offense of aggravated assault, to which he pleaded "not guilty." At a jury trial, the State elicited testimony from the complainant, appellant's wife of forty years, that appellant had physically abused her in the past.

On cross-examination, the complainant testified that she reported some of those previous incidents to law enforcement authorities. Several times during the cross-

examination, appellant requested a copy of the complainant's statement to authorities, offense report, or incident report as related to these prior incidents. Twice—regarding a 1983 incident and a 1993 incident—the State responded that the defense had been provided with all of the prior offense reports relating to the complainant's abuse. The trial court ruled both times that it assumed if appellant did not have the reports, then the reports may not exist. When appellant requested a copy of an offense report relating to a second incident in 1993, the prosecutor stated, "Same response," and the trial court stated, "Same ruling."

When, based on information elicited during the complainant's cross-examination, appellant requested an offense report for an undated assault that the complainant asserted took place in the "mid-nineties," the prosecutor stated, "I assume there are plenty of offense reports from the mid nineties, none of which we have with us." The trial court responded, "I guess during the break—we are obviously going to be here tomorrow. If there is a way to run it—." Appellant's trial counsel suggested searching for the offense reports by address. Appellant passed the witness, but requested that the complainant be placed on hold as a witness.

The State next called the arresting officer to testify. According to the officer's testimony, a search of police records revealed two prior "calls for service" involving family violence in which appellant's wife was the complainant. During cross-examination, the officer verified that each time officers respond to a call for service, a record is made and can be searched by address in the city's database. The State rested shortly thereafter, and the trial was recessed until the following afternoon.

The next day, in front of the jury, the parties made the following statements:

> [PROSECUTOR]: If I may, your honor, pursuant to defense counsel's request I am now tendering to him an offense [report] from March 4 that we were able to locate from HPD archives. I am handing that document to him pursuant to his request.

> [DEFENSE COUNSEL]: Judge, at this time pursuant to the [a]ffidavit that has been introduced, defense rests.

The trial was recessed, and the parties next discussed the jury charge with the trial court.[1] Appellant then moved for mistrial, contending that the State, in essence, testified about the report in the jury's presence. The State countered that it produced the document in response to appellant's request for the record. The trial court denied the motion for mistrial and gave the following instruction to the jury members when they returned to the courtroom:

> The offense report is not in evidence. I don't have any idea what it says or when it was. You are not—like I told you earlier, the only things that you are to consider is [sic] any testimony from the witness stand or any exhibits that may be introduced during the course of the trial. I wanted to make sure you are aware of that and that you don't take that into consideration for any purpose whatsoever.

The jury found appellant guilty of the charged offense. The trial court assessed punishment at one year of confinement, probated for two years, and a fine.

Appellant filed a motion for new trial, upon which the trial court held an evidentiary hearing. At the hearing, appellant's trial counsel testified that his trial strategy was to attempt to show that the complainant was not credible because her claims of past abuse were uncorroborated and undocumented. The trial court denied appellant's motion.

ISSUES AND ANALYSIS

Appellant contends that the State engaged in prosecutorial misconduct by presenting the report and characterizes the State's comment on the report in front of the jury as improperly testifying after the State rested its case the previous day. In two issues, appellant claims that the trial court erred in denying his motion for mistrial and in denying his motion for new trial, which was based on the State's conduct. According to

[1] At no time did appellant ask to re-open the evidence, or cross-examine the complainant again. Nor did appellant request a continuance.

appellant, he was denied his constitutional right to due process, due course of law, and a fair trial as a result of the State's conduct.

We review a trial court's denial of a motion for mistrial and a motion for a new trial under the abuse-of-discretion standard. *Webb v. State*, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007). In applying this standard, we view the evidence in the light most favorable to the trial court's ruling and uphold the ruling if it falls within the zone of reasonable disagreement. *Id.* A reviewing court cannot substitute its judgment for that of the trial court. *Id.* Rather, a reviewing court decides whether the trial court's decision was arbitrary or unreasonable. *Id.* Under this standard, a trial court abuses its discretion if no reasonable view of the record could support the trial court's ruling. *See id.*

To preserve error about lack of due process or due course of law, an accused must make a timely and specific objection on these grounds. *See* TEX. R. APP. P. 33.1(a); *Briggs v. State*, 789 S.W.2d 918, 924 (Tex. Crim. App. 1990). A defendant's appellate contention must comport with the specific objection made at trial. *Wilson v.* State, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002). An objection stating one legal theory at trial may not be used to support a different legal theory on appeal. *Broxton v.* State, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995). When appellant moved for mistrial, he claimed, "[T]he State has now testified in front of the jury there is an incident report." Appellant contends on appeal that he was denied due process, due course of law, and a fair trial, but appellant did not raise these particular appellate contentions at all in the trial court when he moved for a mistrial. *See* TEX. R. APP. P. 33.1(a). Likewise, in his motion for new trial, appellant alleged, for the first time, that he was denied due process, due course of law, and a fair trial as a result of the alleged prosecutorial misconduct; these contentions, however, were not timely made. *See id.* Accordingly, appellant has not preserved these complaints for appellate review.

To the extent that the State's production of the documents or the prosecutor's comments regarding the offense report could be construed as improper, a reviewing court

balances the following three factors in determining whether a mistrial was warranted: (1) the severity of misconduct, (2) the measures adopted to cure the misconduct, and (3) the certainty of conviction absent misconduct. *See Ramon v. State*, 159 S.W.3d 927, 929 (Tex. Crim. App. 2004) (applying factors articulated in *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998)).

In considering the severity of the alleged misconduct, we note that the State's comment on the report offered no details about the contents of the report; the State named only a date on the offense report, but did not name the complainant, appellant, or offer any details about the alleged incident. Such factors weigh in favor of determining the comments to be tangential. *See id.* at 932 (involving prosecutor who testified about the contents of a phone message left by the prosecutor for the State's expert witness, which was considered "tangential" under the balancing factors). Additionally, the record reflects that during trial appellant repeatedly requested documents corroborating the complainant's testimony of prior abuse at the hands of appellant. When the State denied possessing the requested report from the "mid-nineties," the trial court indicated that the State could search for it during the court's recess. Appellant's trial counsel suggested the reports could be found by searching by address; the arresting officer confirmed as much in his testimony. The State's production of the report in response to appellant's request militates against any finding of severe misconduct.

In considering the second factor, curative measures, we note that soon after the incident, the trial court admonished the jury to consider only evidence introduced at trial or testimony from the witness stand. We presume the jury complied with the trial court's instruction. Such an instruction to disregard was sufficient to cure any error in allowing the testimony.[2] *See id.* at 931.

[2] Appellant relies on *Scruggs v. State*, 782 S.W.2d 499, 502 (Tex. App.—Houston [1st Dist.] 1989, pet. ref'd), for support that the trial court's instruction to disregard did not cure any error. That case involved multiple instances of improper conduct by a prosecutor. *See id.* at 501. Regarding one instance in which the prosecutor attempted to enter results of a breath test into evidence, the *Scruggs* court stated,

Finally, given the strength of the State's evidence—consisting of the complainant's testimony regarding the alleged offense and history of abuse at the hands of appellant, coupled with the officer's testimony confirming the existence of two prior offense reports involving family violence in which the complainant was the same complainant as in the case at hand—the alleged improper conduct did not likely contribute to or have any significant impact on appellant's conviction. *See id.* at 932. Any admission of improper evidence does not require reversal if the same facts are proved by other and proper testimony. *See id.* at 931.

In balancing the factors, we conclude the trial court did not abuse its discretion in declining to declare a mistrial. *See id.* at 932. Likewise, we conclude the trial court did not abuse its discretion in denying appellant's motion for new trial. *See Webb*, 232 S.W.3d at 112 (providing that a trial court abuses its discretion if no reasonable view of the record could support the trial court's ruling).

We overrule appellant's two issues and affirm the trial court's judgment.

/s/ Kem Thompson Frost
Justice

Panel consists of Justices Anderson, Frost, and Seymore.
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"If this were the only error before us, we would affirm because the court gave a prompt and strong instruction to disregard, the results of the test were not disclosed, and appellant could have prevented the error by making a pretrial motion in limine." *Id.* In the case at hand, given this one allegation of misconduct, in which the contents of the report were not disclosed, the trial court's instruction to disregard would be sufficient to overrule appellant's complaint. *See id.*