Affirmed and Memorandum Opinion filed August 11, 2011.

In The

Fourteenth Court of Appeals

NO. 14-09-00754-CR

PEDRO TREJO, Appellant

V.

STATE OF TEXAS, Appellee

On Appeal from the 155th Judicial District Court
Waller County, Texas
Trial Court Cause No. 04-06-11,756

MEMORANDUM OPINION

Appellant Pedro Trejo was indicted for aggravated sexual assault of a child. *See* Tex. Penal Code Ann. § 22.021 (Vernon 2011). A jury found him guilty as alleged in the indictment and the trial court sentenced him to imprisonment for 16 years. *See id.* § 12.32 (Vernon 2011). We affirm.

BACKGROUND

Appellant's sister and her family lived in a mobile home on a portion of appellant's property. The complainant is appellant's niece, P.R. P.R. told her mother that appellant sexually assaulted her in the mobile home on five occasions in 2004. P.R. was 12 years old when the assaults occurred.

P.R. testified at trial that appellant told her she would "disappear" if she told anyone about the sexual assaults. However, she informed her mother of the sexual assaults after both learned that P.R. had been pregnant and suffered a miscarriage. Identigene Laboratory Director Laura Gahn testified that appellant could not be excluded as a contributor of the DNA profile taken from the fetal tissue recovered from the miscarriage, and that "[t]he probability that [appellant] is the biological father compared to some unrelated random person in the population . . . was calculated to be 99.9642 percent."

During trial, Jurors Vincent and Spedale complained to the trial court that Juror McKnight was distracting other jurors with speech and gestures that indicated an opinion about the evidence and arguments presented. Juror Vincent stated:

> One of the ladies on the back row, she keeps saying inappropriate things, talking about the case in a way that could influence other jurors. We have talked to her several times about this, and during . . . the proceedings, the defense attorney was asking the witness something about qualifications, and this juror on the back row said she doesn't . . . have to know that, or words to that effect.

Juror Spedale stated:

> Well, it's a distraction to hear someone else continually now right behind you when, you know, our sound is already an issue. . . . I don't know the conditions of other people and . . . I am not hearing all the words, and I will not look at that person, but I'm hearing the motion, and that is not fair.

In response to these allegations, appellant's trial counsel stated:

> For the record, I would move to excuse [Juror McKnight], and if not, I think I would have to be duty bound to voir[] dire each of the fellow jurors that may have heard anything from this woman to protect my client's constitutional rights.

The trial court dismissed Juror McKnight, and appellant requested no further relief in the trial court with respect to Juror McKnight's own conduct.

When the trial court informed Juror McKnight that she was dismissed, Juror McKnight stated:

> I hate being singled out when I, you know, maybe they should be questioned, because they keep saying, well, I am just saying in general, not anything about the case. I am not involved in that conversation, but they sat there at the table and say that, so I don't know why that I happen to be the one that got singled out of all of that. And I haven't even said anything to them on that, but they were all certainly in there saying things and saying, well, no, I am not asking about the case, and I know one lady that has brought it up over and over and over. No one said anything about her. . . . I have not said any more than what has been said at that table, in generality talk, and I didn't discuss it with them.

Appellant moved for a mistrial based on Juror McKnight's statement regarding conduct by other jurors:

> [TRIAL COUNSEL]: [Juror McKnight] announced to this Court . . . that other people are talking about the case. While I don't know the degree to which they are, I would move for a mistrial based on these jurors not being able to follow their duties and obligations as jurors.

The trial court denied appellant's motion for mistrial. Appellant sought no further relief in the trial court in connection with Juror McKnight's statement that jurors were discussing the case in violation of the trial court's instructions.

The jury found appellant guilty of aggravated sexual assault of a child as alleged in the indictment. *See* Tex. Penal Code Ann. § 22.021. The trial court sentenced appellant to imprisonment for 16 years. *See id.* § 12.32.

ANALYSIS

Appellant argues in his only issue on appeal that the trial court abused its discretion when it "denied his motion for mistrial" because the jury was incurably "tainted" by Juror McKnight's alleged misconduct during trial. We reject this contention because appellant did not seek a mistrial on this basis in the trial court.

In order to obtain this relief on appeal, appellant must demonstrate that he first requested this relief in the trial court. *See Jackson v. State*, 287 S.W.3d 346, 353 (Tex. App.—Houston [1st Dist.] 2009, no pet.). Appellant did not move for mistrial on the ground that the jury was incurably "tainted" by Juror McKnight's conduct. The trial court granted all relief requested by appellant related to Juror McKnight's conduct when the trial court dismissed Juror McKnight. Appellant asked to question each juror individually only if the trial court denied appellant's motion to dismiss Juror McKnight; once the trial court granted the motion to dismiss, appellant did not request further relief. Therefore, appellant cannot obtain a new trial on this basis on appeal. *See Jackson*, 287 S.W.3d at 353 (Preserving error for appellate review requires that appellant show a "'timely, specific request that the trial court refuses.'") (quoting *Young v. State*, 137 S.W.3d 65, 69 (Tex. Crim. App. 2004)). We overrule appellant's issue as it relates to Juror McKnight's conduct.

Appellant does not argue specifically on appeal, as he did to the trial court, that he was entitled to a mistrial because of discussions among other jurors during trial. Even if we consider this argument, we conclude that the trial court acted within its discretion when it denied a mistrial.

The jury was instructed:

> Do not discuss anything about this case or even mention it to anyone whomsoever, including your spouse, nor permit anyone to mention it in your hearing until you are discharged as jurors or excused from this case. If anyone attempts to discuss the case, please report it to me at once. Do not even discuss this case among yourself until after you have heard all of the

> evidence, the Court's charge, the attorney's arguments and until I have sent you to the jury room to consider your verdict.

Assuming that Juror McKnight's statement to the trial court can be construed as an allegation that the other jurors discussed the case among themselves in violation of the trial court's instruction, reversal is not warranted.

A mistrial is an appropriate remedy in extreme circumstances for a "narrow class of highly prejudicial and incurable errors" where the error is so prejudicial that the "expenditure of further time and expense would be wasteful and futile." *Ocon*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009); *see Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999). We review a trial court's denial of a motion for mistrial for abuse of discretion and will uphold a trial court's ruling if it was within the zone of reasonable disagreement. *Ocon*, 284 S.W.3d at 884. We view the evidence in the light most favorable to the trial court's ruling, considering the particular facts of the case and only those arguments before the court at the time of the ruling. *Id.* at 884; *see Ladd*, 3 S.W.3d at 567.

"Because it is an extreme remedy, a mistrial should be granted 'only when residual prejudice remains' after less drastic alternatives are explored." *Ocon*, 284 S.W.3d at 884-85 (quoting *Barnett v. State*, 161 S.W.3d 128, 134 (Tex. Crim. App. 2005)); *see Jackson*, 287 S.W.3d at 353-54. "Less drastic alternatives include instructing the jury 'to consider as evidence only the testimony and exhibits admitted through witnesses on the stand,' and, questioning the jury 'about the extent of any prejudice,' if instructions alone do not sufficiently cure the problem." *Ocon*, 284 S.W.3d at 885 (quoting *Arizona v. Washington*, 434 U.S. 497, 521-22 (1978)); *see also Jackson*, 287 S.W.3d at 353-54. Although requesting a less drastic remedy is not prerequisite to a motion for mistrial, "when the movant does not first request a lesser remedy, we will not reverse the court's judgment if the problem could have been cured by the less drastic alternative." *Ocon*, 284 S.W.3d at 885; *see also Jackson*, 287 S.W.3d at 353-54.

Appellant bears the burden of establishing juror misconduct. *Hughes v. State*, 24 S.W.3d 833, 842 (Tex. Crim. App. 2000). Appellant did not request an inquiry to determine whether a violation of trial court instructions had occurred; appellant did not request an instruction to remind the jurors of the trial court's previous instructions or to resolve any prejudice resulting from the alleged violation. Even if the jurors violated the trial court's instructions and such violation constituted juror misconduct,[1] this record does not support the conclusion that a less drastic remedy, such as a jury instruction or an inquiry to determine the existence and extent of any prejudice, would not have cured the asserted prejudice in this case. *See Ocon*, 284 S.W.3d at 885; *Jackson*, 287 S.W.3d at 353-54. The alleged violation was not the kind of error that falls in the "narrow class of highly prejudicial . . . errors" that could be cured only by the extreme remedy of a mistrial. *See Ocon*, 284 S.W.3d at 884-85, 887. Therefore, the trial court did not abuse its discretion in denying appellant's motion for mistrial. *See id.* at 884. We overrule appellant's issue as it relates to his argument to the trial court that the remaining jurors violated the trial court's instructions not to discuss the case among themselves.

[1] We need not decide whether the alleged juror discussion as described rises to the level of juror misconduct. *Cf. Noland v. State*, 264 S.W.3d 144, 153-54 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (not abuse of discretion to deny motion for new trial based on allegation that two jurors discussed the evidence and contemporaneous impressions about that evidence during break in trial; citing civil case in which court of appeals held juror discussion among themselves did not constitute juror misconduct); *Gomez v. State*, 991 S.W.2d 870, 872–73 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (affirming trial court's denial of motion for new trial based on allegation that two jurors discussed case in elevator; "[W]e can find no case holding that a trial court abused its discretion in denying a motion for new trial when two jurors discussed the case with each other on breaks.").

CONCLUSION

Having overruled appellant's only issue on appeal, we affirm the judgment of the trial court.

/s/ William J. Boyce
Justice

Panel consists of Chief Justice Hedges, Justice Seymore, and Justice Boyce.

Do Not Publish — Tex. R. App. P. 47.2(b).