

Affirmed and Memorandum Opinion filed January 21, 2016.



In The

Fourteenth Court of Appeals

NO. 14-15-00017-CR

JOSEPH JACKSON, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 1405970**

M E M O R A N D U M O P I N I O N

Appellant Joseph Jackson challenges his aggravated assault conviction. *See* Tex. Penal Code Ann. §§ 22.02 (West Supp. 2014). In his sole issue, appellant contends the trial court committed reversible error when it failed to give a curative instruction to the jury after sustaining appellant's objection to the State's improper jury argument. Because the State's argument was not improper, we hold the trial court did not err when it denied appellant's request for a curative instruction. We

therefore affirm the trial court's judgment.

BACKGROUND

Appellant shot his neighbor, James Cole, during an argument outside Cole's house. The shooting occurred after a lengthy dispute regarding appellant's accumulation of dogs. Appellant began breeding dogs at his house in 2006. Over the years, the number of dogs grew to approximately fifty, which the surrounding neighbors viewed as a considerable nuisance. Cole repeatedly told appellant to get rid of the dogs and called police and city health inspectors on multiple occasions. Appellant, in turn, made various threats to Cole and his family.

Their conflict reached its peak when Cole woke up one morning and saw appellant's dogs running through Cole's yard. As appellant attempted to gather the escaped dogs, Cole stood on the front porch of his house and began a conversation with appellant that quickly became heated. According to Cole, appellant threatened Cole and his family. Moments later, Cole walked down to the mailbox in the front of his property and heard appellant say, "Let me catch you on the street. I'm going to kill your [expletive]."

Appellant then entered his own house and returned 20 to 30 seconds later with a gun. According to Cole, appellant ran across his yard and met Cole at the mailbox. Appellant pulled the gun out from behind his back, pointed it at Cole's chest and told him, "You know, I told you I was going to get your [expletive], right?" When Cole tried to shove appellant away, appellant shot him point-blank in the neck. After police arrived, appellant admitted to shooting Cole but claimed he did not shoot Cole intentionally. A jury found appellant guilty of aggravated assault and he was sentenced to seven years in prison. This appeal followed.

ANALYSIS

Appellant's sole issue on appeal is whether the trial court erred in denying his request for a curative instruction after it had sustained appellant's objection to what he asserted was improper jury argument by the State. Appellant argues the prosecutor misstated the law when she told the jury that appellant's extraneous offenses demonstrated that he intentionally or knowingly assaulted Cole. The prosecutor's implication, according to appellant, was that the jury should accept the extraneous acts as true without evaluating their truth beyond a reasonable doubt. Such an implication, appellant contends, was inconsistent with the State's burden of proof under Texas Rule of Evidence 404(b) and the law provided in the jury charge.

At trial, appellant testified that the gun fired accidentally while he and Cole struggled for control of the weapon.¹ To prove appellant acted with the requisite *mens rea* to commit aggravated assault, the State introduced evidence during the guilt phase of appellant's prior threats and other extraneous offenses against Cole and his family. *See* Tex. R. Evid. 404(b)(2). In her closing argument during the guilt phase, the prosecutor made the following statement regarding the extraneous-offense evidence:

You heard all about the history. You heard all about the dogs ad nauseam . . . all of this other stuff that you heard about, it comes in not just because the State [sic] I want to try to make him look like this bad horrible man. It comes in because it goes to the mental state. It goes to show that this was intentional and knowing. And it says right here in the charge that those extraneous acts, those behaviors, and whatnot, they go to motive, to intent . . . [t]hat's why you heard about it.

Appellant's counsel objected to the prosecutor's statement as an improper

¹ The trial court did not instruct the jury on self-defense, as it was not raised by the evidence. Appellant does not challenge the lack of a self-defense instruction.

reading of the charge. When the trial court sustained appellant's objection, appellant's counsel requested an instruction to disregard. The trial court denied the request. Appellant's counsel moved for a mistrial, which the trial court also denied.

Once an improper jury argument is made, an instruction to disregard the argument generally cures any error. *Shannon v. State*, 942 S.W.2d 591, 597 (Tex. Crim. App. 1996). The trial court commits error if it refuses an instruction to disregard after sustaining an objection to the argument. *Watts v. State*, 371 S.W.3d 448, 457 (Tex. App.—Houston [14th Dist.] 2012, no pet.). Assuming without deciding appellant preserved this issue for appellate review, we conclude there was no error because the argument was not improper.²

Proper jury argument includes four areas: (1) summation of the evidence presented at trial, (2) reasonable deductions drawn from the evidence, (3) answer to opposing counsel's argument, and (4) a plea for law enforcement. *Brown v. State*, 270 S.W.3d 564, 570 (Tex. Crim. App. 2008). An attorney may also quote or paraphrase the jury charge provided the attorney's statement of the law is not contrary to that presented in the charge. *Orsag v. State*, 312 S.W.3d 105, 120 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd) (citing *Whiting v. State*, 797 S.W.2d 45, 48 (Tex. Crim. App. 1990)). Jury argument must be analyzed in light of the attorney's entire argument rather than just isolated sentences. *See Temple v. State*, 342 S.W.3d 572, 603 (Tex. App.—Houston [14th Dist.] 2010), aff'd, 390 S.W.3d 341 (Tex. Crim. App. 2013); *see also Mosley v. State*, 686 S.W.2d 180, 183 (Tex. Crim. App. 1985). We also consider an attorney's remark in the context in which it appears. *Id.*

² The State argues appellant failed to preserve this issue for appellate review because the grounds upon which appellant objected at trial differ from those raised on appeal. *See Tex. R. App. P. 33.1*. We need not reach this issue because even if preserved, it is overruled.

A review of the prosecutor's argument in this case shows that it did not conflict with the law or the charge. Throughout her argument, the prosecutor repeatedly acknowledged that she had to prove all elements of the offense beyond a reasonable doubt. When she began discussing the extraneous-offense evidence, the prosecutor stated, "the question that you have when you go back there is: Did I meet my burden beyond a reasonable doubt?" The prosecutor reiterated the State's burden when she clarified that the jury did not have to agree unanimously that appellant committed the offense intentionally or knowingly as long as they believed "beyond a reasonable doubt that it was at least one of those." Finally, the prosecutor mentioned the State's burden a third time when she stated, "[t]he burden in this case is absolutely on me. It's absolutely on me to prove to you beyond a reasonable doubt that the shooting in this case was intentional or that it was knowing."

We also find it significant that after making the argument to which appellant objected, the prosecutor asked the jury to read and interpret the instructions. The instructions, which were not challenged by appellant, properly placed the burden by directing the jury not to consider any extraneous-offense evidence unless the State proved the offense beyond a reasonable doubt, and even then only to consider such evidence for certain purposes such as determining appellant's intent. We presume the jury followed this instruction absent evidence to the contrary. *Crenshaw v. State*, 378 S.W.3d 460, 467 (Tex. Crim. App. 2012).

Although the prosecutor did not specifically state that each extraneous offense must be proven beyond a reasonable doubt, her argument did not misstate the State's burden or indicate that the burden did not exist. The challenged portion of the argument is not improper; the prosecutor paraphrased another portion of the jury charge and explained that the State introduced the evidence to show appellant

acted with intent and knowledge. *Orsag*, 312 S.W.3d at 120. Such a statement is not contrary to the charge’s instruction regarding the burden of proof for extraneous-offense evidence. We therefore conclude the trial court did not err when it denied appellant’s request for a curative instruction. *See Sweningson v. State*, No. 03-14-00249-CR, 2014 WL 7474215, at *1 (Tex. App.—Austin Dec. 31, 2014, no pet.) (mem. op., not designated for publication) (concluding instruction to disregard was not necessary after trial court sustained hearsay objection because testimony was not hearsay); *see also Caron v. State*, 162 S.W.3d 614, 618 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (holding although trial court sustained objection to improper jury argument, argument was proper and therefore court did not err in denying request for mistrial).

CONCLUSION

For the reasons stated above, we overrule appellant’s issue and affirm the trial court’s judgment.

/s/ J. Brett Busby
Justice

Panel consists of Justices Boyce, Busby and Brown.

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