Affirmed and Memorandum Opinion filed March 23, 2017.

In The

Fourteenth Court of Appeals

NO. 14-15-01046-CR

BILLY WAYNE ATWOOD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 122nd District Court
Galveston County, Texas
Trial Court Cause No. 13CR2466

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

A jury convicted appellant Billy Wayne Atwood[1] of aggravated sexual assault of a child and sentenced him to life imprisonment. Appellant contends that the jury's verdict was unduly influenced when the child complainant testified while

[1] Appellant also was referred to during trial as Billy Wayne Atwood, Jr.; the preliminary judgment signed before appellant was formally sentenced identified the defendant as "Billy Wayne Atwood AKA Billy Wayne Atwood Jr." We use appellant's name as it appears on the final judgment signed by the trial court when appellant was sentenced.

wearing a vest with victims' rights slogans and pins, and a number of similarly attired individuals were present in the courtroom. Appellant also contends that the prosecutor improperly influenced the jury during the punishment phase by mentioning appellant's voluntary absence from the courtroom during closing argument. Because the record fails to demonstrate that the complainant's and spectators' attire posed an unacceptable risk of impermissibly influencing the jury's verdict, and because the comments regarding appellant's absence were invited by the defense's closing argument, we affirm.

BACKGROUND

Appellant sexually assaulted the complainant, his daughter, on numerous occasions from the time she was six or seven years old until she was 13. Appellant was charged with continuous sexual assault of a child. *See* Tex. Penal Code Ann. § 21.02 (Vernon Supp. 2016).

After both sides presented their cases-in-chief, the jury returned a guilty verdict on the lesser-included offense of aggravated sexual assault of a child. *See* Tex. Penal Code Ann. § 22.021 (Vernon Supp. 2016). The State moved to have appellant taken into custody, but the trial court denied the request and admonished appellant to appear the next morning for the punishment phase. Appellant did not appear the next morning. The trial court proceeded with the punishment hearing and the jury assessed appellant's punishment at life imprisonment and a $10,000 fine.

Appellant subsequently was apprehended and formally sentenced by the trial court. Appellant timely appealed.

ANALYSIS

I. Jury Influence

In his first issue, appellant contends that complainant's wearing of a vest adorned with victims' rights slogans and pins, combined with the "cadre of similarly dressed individuals" in the courtroom, created an "overwhelming presence in the courtroom that is reasonably probable to influence the jury's verdict." We construe this issue as alleging that the trial court erred by denying appellant's request for a mistrial on the basis of the complainant's and spectators' attire.

We review a trial court's denial of a mistrial for an abuse of discretion. *Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009). We view the evidence in the light most favorable to the trial court's ruling, and must uphold the ruling if it was within the zone of reasonable disagreement. *Id.* A mistrial is appropriate only in "extreme circumstances" for a narrow class of highly prejudicial and incurable errors. *Id.*

A. Background

The complainant testified for the prosecution during its case-in-chief. As she was taking the stand, the following exchange took place:

> [DEFENSE]: Your Honor, I don't know if this has occurred before, but the complaining witness is wearing a vest that's decorated with all kinds of crime victim saying[s] and I think that is very prejudicial to our case.
>
> THE COURT: How?
>
> [DEFENSE]: Because, Your Honor, it's — I think any advertising professional will tell you if you read something — it's not testimony. And yet, it's in front of the jury and I think it could be considered —

THE COURT: So, there's some pins or insignia. Is that what you're saying?

[DEFENSE]: And phrases as well, Your Honor.

THE COURT: I overrule it.

[DEFENSE]: Okay. Note our exception, Your Honor.

The defense made no further objection until just before it began its cross-examination of appellant's daughter:

> [DEFENSE]: Your Honor, just for the record, first, I wanted to note that the — [complainant's] vest — the back of her vest was within inches of the jury when she was drawing her diagram. And one of the several things it says is I will not be a victim. And, again, I believe that's bolstering.
>
> Also, Your Honor, for the record, there's an entire row of people in the courtroom showing support with her wearing the same vest. And I object and I move for a mistrial. I think it's tainted —
>
> THE COURT: Okay. I have tried many of these and these people have been in the courtroom. You don't deprive witnesses of support groups. It's — your — your motion for mistrial — your objection is overruled and your motion for mistrial is denied. I note your exception.

No other information appears in the record regarding the vest or the members of the audience who also were wearing vests.

B. No Inherent Prejudice

A defendant has a constitutional right "to be tried by impartial, indifferent jurors whose verdict must be based upon the evidence developed at trial." *Howard v. State*, 941 S.W.2d 102, 117 (Tex. Crim. App. 1996), *overruled on other grounds by Easley v. State*, 424 S.W.3d 535, 538 n.23 (Tex. Crim. App. 2014). When an appellant claims reversible error based on external juror influence, the appellant must show either actual or inherent prejudice. *Id.*

Here, appellant does not assert actual prejudice; instead, appellant contends the jury was inherently prejudiced by the complainant's and spectators' vests.[2] Inherent prejudice involves an unacceptable risk that impermissible factors came into play to influence the jury. *See id.* (citing *Holbrook v. Flynn*, 475 U.S. 560, 569 (1986)). Inherent prejudice rarely occurs and is reserved for extreme occasions. *Id.*

The Court of Criminal Appeals previously has rejected a claim of inherent prejudice when the record lacked sufficient evidence to demonstrate that the external influence interfered with the jury's verdict. *See id.* at 117-18. In *Howard*, the defendant was charged with the capital murder of a State Trooper. *Id.* at 107. At trial, the defendant objected to the presence of 20 uniformed peace officers spectating in the courtroom. *Id.* at 117. The trial court took judicial notice of the uniformed officers; noted that they were spectators and were in the back of the courtroom; and further took judicial notice that there were 81 other "civilians" distributed throughout the courtroom. *Id.*

The Court of Criminal Appeals rejected the appellant's contention that the presence of 20 uniformed officers inherently prejudiced the jury. *Id.* at 118. The court noted that, "[i]f the record at bar indicated some overt conduct or expression, or perhaps a higher ratio of police officers, or even perhaps some indication that the law-enforcement contingency gravitated toward the jury, then there might be some basis for appellant's argument," but that none of those considerations was present. *Id.* Accordingly, based on a record that was "quite sparse," the court rejected the appellant's argument and noted, "[w]e will not lightly assume the jury

[2] Actual prejudice requires that the jurors actually articulated a consciousness of some prejudicial effect. *Howard*, 941 S.W.2d at 117.

disregarded its instructions and rendered a verdict based upon the presence of these peace officers alone." *Id.* at 117-18.

This court and several of our sister courts likewise have rejected claims of inherent prejudice where the record of the alleged prejudicial conduct was not well developed. *See Parker v. State*, 462 S.W.3d 559, 568-69 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *Davis v. State*, 223 S.W.3d 466, 475 (Tex. App.—Amarillo 2006, pet. ref'd, untimely filed); *Nguyen v. State*, 977 S.W.2d 450, 457 (Tex. App.—Austin 1998), *aff'd*, 1 S.W.3d 694 (Tex. Crim. App. 1999).

In *Parker*, the appellant contended that the presence of 60 to 70 courtroom spectators and witnesses dressed in purple to signify domestic violence awareness was inherently prejudicial. 462 S.W.3d at 566. This court determined that, although the record did evidence the presence of the large number of individuals in purple, "there [was] no indication that there was overt conduct by the spectators or that they gravitated toward the jury." *Id.* at 568. Moreover, "[t]he record also [did] not establish the *ratio* of spectators with purple dress to those not wearing purple." *Id.* (emphasis in original). We concluded that, "even more so than in *Howard*, the record [was] too sparse to conclude that appellant suffered inherent prejudice based on spectators' wearing the color purple." *Id.*

In *Davis*, the appellant challenged the denial of his request to prohibit courtroom spectators from wearing victim medallions bearing the picture of the slain police officer. 223 S.W.3d at 474. The Amarillo Court of Appeals rejected the contention that the victim medallions created inherent prejudice, noting that the record did not show how many spectators wore the medallions; where the spectators wearing the medallions sat; the size of the medallions; or whether any juror saw the medallions. *Id.* at 475.

In *Nguyen*, the challenged juror influence involved courtroom spectators wearing "large buttons portraying a color photograph of the deceased while they were in the courtroom where the jurors could see the buttons during the trial." 977 S.W.2d at 457. Defense counsel established on the record that seven individuals out of at least 25 in the courtroom were wearing the buttons. *Id.* Defense counsel also stated on the record that the buttons would "be clearly visible to the jurors." *Id.* The Austin Court of Appeals rejected the assertion of inherent prejudice because the record "contain[ed] no indication where the individuals were sitting, whether they were seated together, or if the jurors did in fact see the buttons from where they were seated." *Id.* Accordingly, the court concluded, "It is impossible to tell from this record whether the buttons even came close to being such an overwhelming presence in the courtroom that it was reasonably probable they influenced the jury's verdict." *Id.*

Here, the record is similarly limited and reveals only that complainant was "wearing a vest that's decorated with all kinds of crime victim saying[s];" that the vest had some sort of "pins or insignia" and "phrases;" that one of the phrases on the vest was "I will not be a victim;" that complainant stood in front of the jury while drawing a diagram and the back of the vest was allegedly "within inches of the jury;" and that there was a row of similarly attired spectators in the courtroom. The record does not reveal the size of the pins, insignia, or phrases on the vest; does not identify the content of any phrases other than "I will not be a victim;" and does not identify the size of any allegedly prejudicial text on the vest or how visible it would have been to the jury. The record does not reveal what allegedly prejudicial material appeared on the back of the vest facing the jury when complainant stood in front of the jury. Finally, the record does not reveal how many other spectators were wearing the vest; the ratio of those spectators to other

spectators not wearing the vest; or the proximity of those wearing the vest to the jury.

Based on this limited record, we cannot say that the vest worn by complainant and other courtroom spectators posed an unacceptable risk of impermissibly influencing the jury's verdict. *See Howard*, 941 S.W.2d at 117-18; *Parker*, 462 S.W.3d at 568; *Davis*, 223 S.W.3d at 475; *Nguyen*, 977 S.W.2d at 457. Accordingly, we hold that appellant has not demonstrated inherent prejudice and the trial court did not abuse its discretion in denying appellant's motion for a mistrial.

Appellant's first issue is overruled.

II. Comment Regarding Appellant's Absence

During the punishment phase, the jury heard testimony from several witnesses, including appellant's great-niece. She testified that appellant exposed his penis to her when she was four years old.

During its punishment closing argument, the defense attempted to cast doubt upon the great-niece's memory of the incident:

> [The great-niece] was four years old when that happened. She doesn't remember what time of year it was. It may have been in the fall. I want to remind you that there were two Billies at the house at that time. Her — Billy, my client, who would be her uncle removed — I don't know — great-uncle, I guess, great-uncle, and her great-grandfather. Right? And you really didn't hear any kind of identifying testimony. There isn't any evidence that singles out my client from — from the father, Billy 1 from Billy 2. Okay? So, just please keep that in mind. I mean, she was only four.

The State responded in its punishment-phase closing argument with the following statement of which appellant now complains:

> [THE STATE]: Maybe if [appellant] had shown up today, maybe [the great-niece] could have identified him here in court this morning. But he chose to remove himself from these proceedings. That is a slap in the face of your verdict. That is a slap in the face of this system, to this Court, and he made that decision on his own.
>
> [DEFENSE]: Objection, Your Honor. There's no evidence as to why my client isn't here.
>
> THE COURT: The — I sustain the objection.
>
> And there — there — we know — what we do know is that he's not present. Okay?
>
> So, let's move along.
>
> [DEFENSE]: I ask the jury to disregard, Your Honor. It's not evidence in any way.
>
> THE COURT: Well, the reasons why he is not here, don't speculate. Okay?

The defense did not request a mistrial after the trial court instructed the jury not to speculate as to the reason for appellant's absence.[3]

Appellant concedes that, because trial counsel did not request a mistrial after the trial court effectively instructed the jury to disregard the comment, this issue was not preserved for our review. *See, e.g.*, *Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007) ("To preserve error in prosecutorial argument, a defendant must pursue to an adverse ruling his objections to jury argument."); *McGinn v. State*, 961 S.W.2d 161, 165 (Tex. Crim. App. 1998) (to preserve error on appeal if a trial court sustains an objection concerning an improper jury argument, the complaining party must additionally request an instruction to disregard if such an instruction could cure the prejudice, or request a mistrial if such prejudice was incurable).

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[3] The trial court subsequently determined that appellant voluntarily absented himself from the proceedings.

Even had the issue been preserved, we still would conclude that no error occurred. To be permissible, jury argument must fall within one of four areas: (1) summation of evidence; (2) reasonable deduction from the evidence; (3) an answer to the argument of opposing counsel; or (4) a plea for law enforcement. *Gallo v. State*, 239 S.W.3d 757, 767 (Tex. Crim. App. 2007). Counsel's remarks during final argument must be considered in the context in which they appear. *See Gaddis v. State*, 753 S.W.2d 396, 398 (Tex. Crim. App. 1988). If the remarks are made in response to the defendant's argument, then they are permissible. *See Albiar v. State*, 739 S.W.2d 360, 362 (Tex. Crim. App. 1987); *Acosta v. State*, 411 S.W.3d 76, 93 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

The State's remarks regarding appellant's absence were made in response to the defense's argument that the State had not elicited "identifying testimony" from the great-niece that appellant was the "Billy" who had exposed himself to her. Because the remark was invited by the defense's closing argument, it was not improper. *See Albiar*, 739 S.W.2d at 362; *Acosta*, 411 S.W.3d at 93.

Appellant's second issue is overruled.

CONCLUSION

Having overruled appellant's issues, we affirm the trial court's judgment.

/s/ William J. Boyce
Justice

Panel consists of Justices Boyce, Busby, and Wise.
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