**Affirmed and Memorandum Opinion filed September 7, 2017**

**In The**

# Fourteenth Court of Appeals

**NO. 14-16-00432-CR**

**RIGOBERTO CEPEDA, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

**On Appeal from the 176th District Court**
**Harris County, Texas**
**Trial Court Cause No. 1420219**

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

A jury convicted appellant Rigoberto Cepeda of sexual assault and sentenced him to two years' confinement. Appellant appeals his conviction, raising two issues. First, appellant argues the evidence is legally insufficient to support his conviction because (a) the evidence is insufficient to show that he compelled the complainant to have sex by use of physical force and violence, and (b) the complainant had a motive to fabricate the sexual assault. We conclude the evidence is sufficient because (a) there is evidence appellant grabbed and pulled the complainant's arm

and held her legs down with his own, and (b) the jury was responsible for resolving conflicts in the evidence. Second, appellant argues the trial court abused its discretion in denying his motion for mistrial after the State improperly commented on appellant's nontestimonial demeanor during closing argument. We conclude the trial court did not abuse its discretion in denying the mistrial because the improper comment was not severe and the trial court instructed the jury to disregard it. We therefore affirm.

## BACKGROUND

Appellant and the complainant were divorced in Oklahoma in 2012. They had one child together, a son. Appellant lived in Oklahoma but came to Houston occasionally. When appellant came to Houston, he would stay at his mother's house. Before traveling to Houston, appellant would call the complainant, who lives in Houston, to let her know he was coming so that he could see their son.

On November 23, 2013, appellant was in Houston, staying at his mother's house, and the complainant dropped off their son to stay with him. Appellant later called and asked the complainant to bring their son's shoes and a phone charger. On the morning of November 24, the complainant arrived at the house with the items for their son. Appellant answered the door and the complainant extended her arm to hand him the items. According to the complainant, appellant grabbed her by the arm and pulled her into the house. She testified that appellant took her to a room, put her on a bed, and pulled down her pants and underwear. When appellant started kissing her neck she asked him to stop, but he continued. Appellant held her legs with his own and unbuttoned his pants. Appellant then got on top of the complainant and inserted his penis into her vagina. The complainant testified that she again asked appellant to stop, but he continued. The complainant also testified that she pushed appellant, although she did not push very hard because she was pregnant and

concerned about the welfare of her child if she resisted too much.

When appellant left the room, the complainant left the house and drove to the Houston Area Women's Center, but it was closed. She called the police, and when the officer arrived, she told him what happened. The police officer followed the complainant to the hospital for a sexual assault exam, which was performed by a forensic nurse. The complainant told the nurse what happened in order to assist in the exam.

Appellant contended at trial that the complainant had a motive to fabricate the assault because they were involved in a custody dispute over their son at the time. After their divorce, the complainant and appellant agreed to joint custody. Appellant claimed the complainant did not comply with the joint custody agreement, however, because she failed to provide her new address. Appellant asked the Oklahoma court to hold her in contempt. On November 20, 2013, four days before the day in question, the complainant appeared in the Oklahoma court and the judge released her on bail. She agreed to appear before the court on January 22, 2014 to answer the contempt charge against her.

Raul Suarez, who lives with appellant's sister, testified that he was at the house where appellant was staying doing laundry on November 24, 2013. According to Suarez, the complainant and appellant were hugging when they came out of the house, and appellant gave the complainant a goodbye kiss before she left.

Appellant testified at trial. He testified that on November 23, when the complainant dropped off their son, the complainant indicated that she wanted to work things out. According to appellant, when the complainant came back the next day, she wanted to be intimate with him to see how she felt about reconciling. Appellant testified that the complainant never said no or ever pushed him away. After they had sex, the complainant said she would come over for a cookout that

afternoon. Appellant testified he walked her to her car, gave her money, and kissed her goodbye.

The jury convicted appellant of sexual assault and sentenced him to two years' confinement. Pursuant to the jury's recommendation, the trial court suspended the sentence and placed appellant on community supervision for two years. This appeal followed.

## ANALYSIS

### I. The evidence is legally sufficient to support appellant's conviction.

Appellant argues the evidence at trial was legally insufficient for two reasons: (1) the evidence was insufficient to support a finding that appellant compelled the complainant by use of physical force and violence; and (2) the evidence revealed that the complainant had a motive to fabricate the sexual assault because of an ongoing custody dispute. After reviewing the record, we conclude there was sufficient evidence to support appellant's conviction.

#### A. Standard of review and applicable law

We review the sufficiency of the evidence under the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). *See Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). The reviewing court must consider the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Fernandez v. State*, 479 S.W.3d 835, 837–38 (Tex. Crim. App. 2016).

The jury is the sole judge of the credibility of the witnesses and the weight to afford testimony. *Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). The jury may reasonably infer facts from the evidence presented, credit the

witnesses it chooses, disbelieve any or all of the evidence or testimony proffered, and weigh the evidence as it sees fit. *See Canfield v. State*, 429 S.W.3d 54, 65 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd). We defer to the jury's responsibility to resolve any conflicts in the evidence. *Johnson v. State*, 421 S.W.3d 893, 896 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

A person commits sexual assault if he intentionally or knowingly causes the penetration of the sexual organ of another without the other person's consent. Tex. Penal Code Ann. § 22.011(a)(1)(A) (West 2011). A sexual assault is without consent if the actor compels the other person to submit or participate by the use of physical force or violence. *Id.* § 22.011(b)(1). The focus of the offense is "on the actor's compulsion rather than the victim's resistance." *Hernandez v. State*, 804 S.W.2d 168, 170 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd). Physical injury is not required to prove that the actor compelled a victim to participate. *Edwards v. State*, 97 S.W.3d 279, 291 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd). "There is no requirement that a certain amount of force be used, only that it is used." *Edoh v. State*, 245 S.W.3d 606, 609 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

**B. There is sufficient evidence that appellant used physical force.**

There is no dispute that appellant and the complainant had sexual intercourse. Appellant argues only that there was insufficient evidence that he compelled the complainant to participate by use of physical force or violence.[1]

Here, the complainant testified about what happened when she went to the

[1] Appellant frames his argument using the conjunctive language alleged in the indictment: physical force *and* violence. The jury charge, however, instructed that a sexual assault is without consent if the defendant compels the other person to submit to participate by the use of force *or* violence. Even though the indictment alleges differing methods of committing the offense in the conjunctive, it was proper for the jury to be charged in the disjunctive. *See Kitchens v. State*, 823 S.W.2d 256, 258 (Tex. Crim. App. 1991).

house to drop off items for her son. She testified that appellant grabbed her arm and pulled her inside the house. The complainant said she felt pain when he grabbed her arm. Once inside, he took her to a room with a bed. Appellant put her on the bed and pulled down her pants and underwear. Her legs hung over the bed, and appellant held her legs with his legs as he unbuttoned his pants. The complainant testified he kissed her neck, opened her legs with pressure as he got on top of her, and penetrated her. Even though complainant pushed appellant and asked him several times to stop, appellant continued.

The officer who met complainant after the sexual assault testified that she was crying and shaking. The nurse who examined the complainant testified the complainant was quietly crying and said that she was afraid. The complainant's statements to both the officer and the nurse were essentially the same as her testimony: that appellant grabbed and pulled her by the arm into the house, he pulled her pants and underwear down, he put her on the bed, she pushed him away and said no, but he continued anyway.

Appellant points to evidence of the complainant's lack of resistance. The focus on the offense of sexual assault, however, is on the actor's compulsion, not the victim's resistance. *See Hernandez*, 804 S.W.2d at 170. Therefore, to determine if there is sufficient evidence of sexual assault, we look to evidence of appellant's compulsion, not the complainant's resistance. Here, there is evidence he grabbed and pulled her arm, held her legs with his legs, and used pressure to open her legs.

Appellant argues there was evidence that the complainant had a motive to fabricate the sexual assault because of the custody dispute. Although the jury heard evidence about the dispute, it was the jury's responsibility to weigh the credibility of the evidence and resolve all conflicts. *See Canfield*, 429 S.W.3d at 65; *Johnson*, 421 S.W.3d at 896. As evident from the verdict, the jury did not believe that the

complainant fabricated the sexual assault.

In reviewing the evidence in the light most favorable to the verdict, we conclude a rational trier of fact could have concluded that appellant compelled the complainant to submit or participate by the use of physical force. *See Jackson*, 443 U.S. at 319. We overrule appellant's first issue.

## II. The trial court did not abuse its discretion in denying appellant's motion for mistrial.

The prosecutor made the following statement during closing argument:

> There are so many protections that are afforded to the defendant in the criminal justice system, as there should be. As there should be. But the complainant really doesn't have those kinds of protections. The complainant has to get on the stand and she has to testify, all the while he sits in a protective bubble and he glares at her. I watched him during the trial.

Appellant objected, stating, "[t]hat's outside the presence." The trial court sustained appellant's objection and asked the parties to approach the bench. The trial court admonished the prosecutor for arguing personal opinion. Appellant requested that the statement be stricken from the record, and the trial court instructed the jury that "[t]he last statement of the prosecutor should be disregarded . . . ." The prosecutor continued her closing argument by saying, "[s]o the complainant needs to be afforded the same protections." Appellant then moved for a mistrial, and the trial court denied appellant's request.

On appeal, appellant argues the trial court abused its discretion by denying appellant's motion for mistrial. First, the State responds that appellant did not properly preserve error on these grounds. Second, the State argues that even if preserved, the trial court did not abuse its discretion because the prejudice of the prosecutor's comment was low, the trial court instructed the jury to disregard the

statement, and appellant's conviction was certain even absent the remark.

### A. Appellant preserved his challenge to the trial court's denial of his motion for mistrial.

To preserve error, a party must timely object with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context. Tex. R. App. P. 33.1(a)(1). We do not use a hyper-technical approach in determining whether error was preserved, but the issue on appeal must comport with the objection made at trial. *Harris v. State*, 475 S.W.3d 395, 400 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). The preferred procedure for a party to voice a complaint of improper jury argument is to (1) object, (2) request an instruction for the jury to disregard, and (3) move for a mistrial. *Jackson v. State*, 287 S.W.3d 346, 353 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

There are four approved areas for jury argument: (1) summation of the evidence, (2) reasonable deduction from the evidence, (3) answer to argument of opposing counsel, and (4) plea for law enforcement. *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000). A comment on a defendant's nontestimonial demeanor does not fall within any of these approved areas. *Good v. State*, 723 S.W.2d 734, 736–38 (Tex. Crim. App. 1986). A defendant's nontestimonial demeanor is not evidence and a prosecutor may not refer to it. *Id.* at 736. The prosecutor violated that rule here.

Appellant objected to the prosecutor's argument on the ground that it was "outside the presence." It is apparent from the record, and the State does not dispute, that appellant meant "outside the record." After the trial court sustained his objection, appellant went on to request that the prosecutor's statement be stricken from the record, and the trial court instructed the jury to disregard the prosecutor's

last statement. Appellant then moved for a mistrial, which the trial court denied.

The State argues an "outside the record" objection does not comport with appellant's argument on appeal that the prosecutor made an improper comment on appellant's nontestimonial demeanor. We disagree. An objection of "outside the record" will preserve error on a prosecutor's comment on the defendant's nontestimonial demeanor because that demeanor is not evidence in the record. *See Good*, 723 S.W.2d at 735 (defendant objected on grounds "[i]t is not evidence" and "[i]t is outside the record," and the Court of Criminal Appeals held nontestimonial demeanor is not evidence). Therefore, appellant preserved his challenge to the denial of his motion for mistrial based on the prosecutor's comment on his nontestimonial demeanor.

**B. Standard of review and applicable law**

We review a trial court's denial of a mistrial for an abuse of discretion. *Hawkins v. State*, 135 S.W.3d 72, 76–77 (Tex. Crim. App. 2004). The question whether the trial court abused its discretion in denying a motion for mistrial involves the same considerations as a harm analysis. *Id.*; *Newby v. State*, 252 S.W.3d 431, 438 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd). In cases such as this where no constitutional rights are implicated, we look to the *Mosley* factors to evaluate the effect of improper jury argument on the outcome of the trial: (1) the severity of the misconduct (the magnitude of the prejudicial effect); (2) the measures adopted by the trial court to cure the misconduct; and (3) the certainty of conviction absent the misconduct (strength of the evidence supporting the conviction). *Archie v. State*, 340 S.W.3d 734, 738–39 (Tex. Crim. App. 2011) (citing *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998)); *Newby*, 252 S.W.3d at 438. "Only in extreme circumstances, where the prejudice is incurable, will a mistrial be required." *Hawkins*, 135 S.W.3d at 77.

### C. Because the prejudicial effect of the improper comment was not severe and the jury was instructed to disregard it, the trial court did not abuse its discretion in denying the mistrial.

In applying the *Mosley* factors, we conclude the prejudicial effect was not so severe that it could not be cured by an instruction to disregard the improper comment. The first factor evaluates the severity of the misconduct, which is the magnitude of the prejudicial effect of the prosecutor's improper comment. *Archie*, 340 S.W.3d at 740. The prejudicial effect of the prosecutor's comment was not severe for two reasons. First, the improper comment on appellant's glaring did not expressly suggest he was guilty. *Cf. Mayberry v. State*, 830 S.W.2d 176, 178 (Tex. App.—Dallas 1992, pet. ref'd) (comment, "[g]lare of an innocent man? I don't think so" was harmful because prosecutor urged a subjective interpretation of appellant's demeanor to support a finding of guilt). Second, the prosecutor's improper comment was made only once in the middle of closing argument. *Cf. id.* at 179 (improper comments "were made at the conclusion of the arguments and were among the last words the jury heard").

As to the second factor, we conclude the trial court's instruction to disregard was sufficient to cure the misconduct. *See Archie*, 340 S.W.3d at 741. Appellant argues the jury likely did not understand the instruction because it came after a bench conference. A bench conference between the statement and the instruction to disregard, however, does not automatically render a curative instruction insufficient. *See id.*; *Hargrove v. State*, No. 03–07–00341–CR, 2008 WL 900139, at *6 (Tex. App.—Austin Apr. 3, 2008, no pet.) (mem. op., not designated for publication) (holding instruction to disregard following bench conference was sufficient in context for jury to conclude that instruction referred to improper question). Here, the trial court instructed the jury to disregard the prosecutor's last statement, and the last statement the prosecutor made before the jury was the improper comment. In

context, it was obvious the trial court was referring to the prosecutor's comment on appellant's nontestimonial demeanor, and we presume the jury followed the trial court's instruction. *See Archie*, 340 S.W.3d at 741.

For the third factor, we look to the certainty of the conviction absent the misconduct. *Id.* This case came down to a credibility determination: did the jury believe appellant or the complainant? Although the evidence against appellant was not overwhelming, after balancing these factors, we conclude the trial court did not abuse its discretion in denying a mistrial given that the prejudice of the comment was not severe and the trial court instructed the jury to disregard it. We overrule appellant's second issue.

## CONCLUSION

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

/s/ J. Brett Busby
Justice

Panel consists of Justices Christopher, Busby, and Jewell.
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