Affirmed and Memorandum Opinion filed August 10, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00595-CR

AARON PIERCE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 1496654

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

A jury found appellant Aaron Pierce guilty of indecency with a child by exposure, and the jury assessed punishment at twelve years' confinement. Appellant contends that the trial court erred by denying his request for a mistrial when the State referred to a fact outside the evidence during the closing arguments of the punishment phase. We affirm.

I. BACKGROUND

A. Guilt–Innocence Phase

Appellant and the eleven-year-old complainant lived in the same mobile home park. The complainant and his younger brother were picking fruit from a tree when they heard appellant yelling. The complainant saw that appellant was naked and shooting a shotgun near some stray dogs to try to scare the dogs away. Appellant then asked the boys if they wanted to come inside appellant's home. While asking, appellant was rubbing his penis. The boys ran home.

The boys' father dialed 911 to request police assistance because appellant was standing outside naked and shooting a shotgun.[1] A deputy with the Harris County Sheriff's Office testified that when the deputy arrived, appellant was wearing sweatpants and had a bayonet tucked in the waistband. Appellant told the responding peace officers that they could not come inside appellant's home without a warrant, and appellant threatened to shoot them with a shotgun. Appellant kept going in and out of his home, onto his porch. The deputy described appellant as "very hysterical," and "you could tell something wasn't right." The deputy thought appellant was intoxicated or had some type of mental health issue.

After a standoff lasted about thirty minutes, two peace officers snuck up on appellant and tased him. According to one of the officers, after appellant was arrested, he continued to be "very hysterical"; he was combative, yelling, and "out of it."

[1] The father did not testify. At the time of trial, an arrest warrant had been issued for him for a felony family-violence assault.

B. Punishment Phase

The punishment phase commenced on the day after the jury found appellant guilty. At the beginning of the punishment phase, the trial court informed the jury that appellant had decided to appear before them in an orange jumpsuit rather than clothing that had been brought for him. Through counsel, appellant pleaded "true" to an enhancement.[2]

The trial court admitted fourteen judgments of conviction from a period of about fifteen years, along with appellant's written stipulation that he was the same person convicted of those offenses: three felony thefts, two felony evading arrests, two misdemeanor thefts, two misdemeanor violations of a protective order, a misdemeanor assault, a misdemeanor family-violence assault, a misdemeanor criminal trespass, a misdemeanor criminal mischief, and a misdemeanor possession of marihuana.

The State also adduced testimony from an employee of an Academy Sports and Outdoors store regarding appellant's criminal-mischief conviction. According to the employee, appellant had been in a dressing room causing a disturbance. He had punched a hole in the wall and made stab marks in the door with a knife. He came out of the dressing room hopping, jumping, wielding a knife, and looking everywhere like he did not know where he was. The employee thought appellant was on some type of drug or could have been having a psychotic episode.

Appellant adduced testimony from his father, mother, sister, and niece. They testified, generally, that this indecency charge was out of character for appellant and that he had never done anything like it before. His father testified, "He's had mental

[2] Appellant refused to plead when prompted by the trial court. Appellant said he had "nothing to say" about it.

issues since he was a child from being molested." And, his father testified that appellant is "not really one to bow down to the system."

Appellant's mother testified that appellant had been diagnosed with depression and had been admitted to "MHMRA" twice; one time he was committed for several weeks. She testified that when appellant does not take his medication, he gets frustrated and gets into trouble. During her testimony about appellant's mental health, appellant made an outburst riddled with profanities. He said that he did not need to see "no psych," he was not guilty, and the complainant was lying.

During closing arguments, appellant's counsel asked the jury for leniency because appellant was a victim of mental illness. The State asked for the maximum sentence of twenty years, pointing to appellant's extensive criminal history. The State argued that the crime was serious and that appellant showed no respect to authority or to the jury, noting appellant's "violent outburst."

While recounting appellant's criminal history, the State referred to a fact not in evidence: "We have another incident where he's evading police with his two-month-old child and the six-year-old child in the back of a vehicle." Appellant's counsel objected, asked the trial court to instruct the jury to disregard it, and moved for a mistrial. The trial court denied the mistrial but told the jury, "Disregard the last statement of the Prosecutor."

The jury assessed punishment at twelve years' confinement.

II. ANALYSIS

Appellant contends that the trial court erred by denying his request for a mistrial. In responding to appellant's argument, the State assumes that its jury argument was improper but contends that the trial court did not abuse its discretion by denying the mistrial.

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). The trial court's ruling must be upheld if it is within the zone of reasonable disagreement. *Id.* "A mistrial is an appropriate remedy in 'extreme circumstances' for a narrow class of highly prejudicial and incurable errors." *Id.* (quoting *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004)). "Because it is an extreme remedy, a mistrial should be granted 'only when residual prejudice remains' after less drastic alternatives are explored." *Id.* at 884–85 (quoting *Barnett v. State*, 161 S.W.3d 128, 134 (Tex. Crim. App. 2005)).

In deciding whether to grant a mistrial, a trial court conducts an appellate function: "determining whether improper conduct is so harmful that the case must be redone." *Hawkins*, 135 S.W.3d at 77. Thus, the question of whether a mistrial should have been granted "involves most, if not all, of the same considerations that attend a harm analysis." *Id.* In reviewing the trial court's ruling on a motion for a mistrial, we balance three factors: "(1) the severity of the misconduct (prejudicial effect), (2) curative measures, and (3) the certainty of the punishment assessed absent the misconduct (likelihood of the same punishment being assessed)." *Id.* In most cases, an instruction to disregard cures the harm from an improper argument. *See id.* at 84; *see also Dinkins v. State*, 894 S.W.2d 330, 357 (Tex. Crim. App. 1995) ("[A]n instruction to disregard the argument generally cures the error.").

In this case, the severity of the misconduct was slight. The State informed the jury, during punishment, about a single fact concerning one of appellant's extraneous offenses: that appellant's young children were in the car while appellant evaded arrest.[3] The trial court promptly instructed the jury to disregard the State's

[3] Appellant suggests in his brief that the fact related to an offense that did not result in a conviction. But, the jury would not have known whether the State's argument related to one of appellant's prior convictions for evading arrest or to another, unadjudicated charge of evading

comment. And, the jury was unlikely to have assessed a greater punishment based on the State's isolated reference to a fact not in evidence concerning one of appellant's many extraneous offenses. The State's reference to a fact not in evidence was brief, and the State focused the remainder of its argument about appellant's criminal history and demeanor during the trial.

Under these circumstances, and considering that the jury assessed a punishment far below the State's request for the maximum, we conclude that the trial court did not abuse its discretion by denying the mistrial. *Cf. Freeman v. State*, 340 S.W.3d 717, 728–29 (Tex. Crim. App. 2011) (no harm during guilt-innocence phase from improper reference to a fact not in evidence—that appellant had attempted to commit "the worst criminal act on law enforcement ever in the United States' history"—although the trial court did not give a curative instruction, the comment was brief, there was a lack of prejudice, and evidence supporting the conviction was strong); *Brown v. State*, 270 S.W.3d 564, 572–73 (Tex. Crim. App. 2008) (no harm during guilt-innocence phase from improper reference to defense counsel lying and personally attacking the prosecutor and referring to other defense attorneys who had done the same thing; although there were no curative measures, the State did not dwell on the matter, and the evidence of guilt included corroborated accomplice-witness testimony); *Rideaux v. State*, 498 S.W.3d 634, 640–41 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (no harm during punishment phase, although the defendant received the maximum punishment, from the State's improper reference to a fact not in evidence—that the defendant had "done this before," i.e., an aggravated robbery—because the inadvertent, and ultimately corrected, impression that the defendant may have committed a prior aggravated

arrest. In other words, the State's comment did not convey to the jury that appellant's criminal history was greater than what was in evidence.

robbery was not so significant to undermine the certainty of punishment when the State proved multiple prior felony convictions); *Irielle v. State*, 441 S.W.3d 868, 881–82 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (no error to deny mistrial during guilt-innocence phase after the State referred to a fact not in evidence based on the prosecutor's specialized knowledge or experience—that the prosecutor had worked in a prison and a person would not have "found a bit of my semen anywhere in that unit"—because the remark was brief and inconsequential, the evidence supporting guilt was strong, and the trial court instructed the jury to disregard the statement); *Coggeshall v. State*, 961 S.W.2d 639, 642–43 (Tex. App.—Fort Worth 1998, pet. ref'd) (no harm during punishment phase from the State referring four times to a fact not in evidence—that the child victim of sexual abuse used to hide under her desk at school—while the State discussed the victim's emotions; the State presented ample evidence regarding the defendant's sexual abuse of multiple children, and the fact from outside the record was trivial in comparison to the other overwhelming evidence).

Appellant's issue is overruled.

III. CONCLUSION

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

/s/ Ken Wise
Justice

Panel consists of Chief Justice Frost and Justices Donovan and Wise.
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