

Affirmed and Memorandum Opinion filed August 15, 2017.



In The

Fourteenth Court of Appeals

NO. 14-16-00600-CR

BRANDON DEMON ZENO, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 10th District Court
Galveston County, Texas
Trial Court Cause No. 15CR3022**

MEMORANDUM OPINION

In this appeal from a conviction for assault, we are asked to consider two issues involving claims of improper closing argument. We conclude that error was not preserved as to one of the issues, and that no reversible error is shown with respect to the other. Accordingly, we overrule both issues and affirm the trial court's judgment.

The complainant testified that appellant, her boyfriend, had an aggressive personality. She said that he would sometimes lock her in her apartment by pushing a couch behind a door or by blocking her only exit.

On the night at issue, the complainant was working a late shift at a hospital. She missed the last bus of the evening and was forced to walk home. When she arrived at her apartment later than usual, appellant accused her of having been somewhere else. Not wanting to confront appellant, the complainant went to another room to organize some papers. Appellant followed her and tried to set the papers on fire. For a moment, he also tried to choke her.

The complainant asked appellant to leave, and he did. But he returned later that night and asked the complainant to come to bed. The complainant grabbed a bottle of bleach and poured it on the bed. According to the complainant, appellant was not already on the bed; she merely wanted to prevent him from lying on the bed. Appellant grabbed the bottle of bleach from the complainant and spilled some bleach on himself. Then he became angry and punched the complainant several times.

With blood gushing from her head, the complainant tried to call the police, but appellant took her phone. He then stood in front of the door and refused to let her leave. Later, when he went to a back room in the apartment, the complainant saw an opportunity to escape and she ran away. She eventually took herself to the hospital where she received eight stitches above her eye.

During closing arguments, defense counsel argued that appellant had acted in self-defense. Counsel's theory was that the complainant had been mad because appellant did not pick her up from work, that she provoked a fight by tossing bleach at him, and that he responded to that provocation by punching her in the face.

The prosecutor responded to counsel's argument with these opening remarks: "I'm embarrassed for my colleague that he had to stand before you and make that argument."

Defense counsel timely objected to that statement, and the trial court ruled, "Stay away from personal attacks. It's closing argument. The Jury will be [led] by their collective memory of the evidence and the testimony." Counsel did not request any additional instructions.

The prosecutor then proceeded to address the evidence. At one point, the prosecutor said, "The evidence is that he believed that she was dating somebody else and that he was jealous towards her. She never testified that she believed that he was dating other people. That was never an issue in their relationship. That's why he locked her in the closet. That's why he moved the bed —"

Defense counsel objected to this argument on the grounds that there was no evidence that appellant had ever locked the complainant in a closet. The trial court ruled, "It's closing argument. Again, the Jury will be guided by their collective memories."

Defense counsel asked for an instruction to disregard. The trial court denied that request and told the parties to "move along."

Appellant now complains about these two instances of improper closing argument.

We start with the comment in which the prosecutor said that he was "embarrassed" for counsel. Appellant contends that this comment amounted to an attack over the shoulders of counsel. We conclude that this complaint has not been preserved for appellate review.

To preserve error in a prosecutorial argument, the defendant must timely object to the trial court and pursue his objection to an adverse ruling. *See* Tex. R. App. P. 33.1; *Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007). Appellant did not obtain an adverse ruling here. The trial court did not overrule an objection, nor did it deny a request for an instruction to disregard (which was never made). The trial court’s order to the prosecutor to “stay away from personal attacks” actually carried the tenor of a favorable ruling for the defense. Thus, we conclude that appellant did not preserve his complaint that the prosecutor’s argument was improper. *Cf. Denton v. State*, 946 S.W.2d 607, 611 n.4 (Tex. App.—Fort Worth 1997, pet. ref’d) (complaint was not preserved where record showed that the trial court sustained a defense objection to an improper closing argument).

In his other issue, appellant complains about the prosecutor’s comment that the complainant had been locked in a closet. Unlike the previous issue, appellant preserved error here when he requested an instruction to disregard and the trial court rendered an adverse ruling.

Appellant contends that the prosecutor’s argument was patently improper because it was based on facts not in evidence. The State counters that the argument was proper because it was a reasonable deduction from the evidence.

We need not determine whether the prosecutor’s argument was proper or improper. Assuming without deciding that the argument was improper and that the trial court erred by failing to sustain appellant’s objection and instruct the jury to disregard, we would review the trial court’s error for harm under the standard for nonconstitutional error, and under that standard, the error is harmless. *See Martinez v. State*, 17 S.W.3d 677, 692–93 (Tex. Crim. App. 2000).

Nonconstitutional error must be disregarded if it does not affect the defendant’s substantial rights. *See* Tex. R. App. P. 44.2(b). We consider three factors

when deciding whether error associated with an improper argument affects the defendant's substantial rights: (1) the severity of the misconduct, (2) the curative measures taken, and (3) the certainty of conviction absent the misconduct. *See Martinez*, 17 S.W.3d at 692–93.

The first factor does not weigh in appellant's favor because the prejudicial effect of the prosecutor's comment was minimal. The ultimate issue in the case was who started the fight—appellant or the complainant—and the prosecutor's statement that appellant had locked the complainant in a closet bears no insight on that issue. Also, the prosecutor did not repeat his claim about the closet, which means that the probable impact of the comment was slight. *See Orona v. State*, 791 S.W.2d 125, 130 (Tex. Crim. App. 1990) (“Since the comment was made in passing and not reinforced or emphasized, the probable impact of the error on the jury was minimal, if any.”).

The second factor does not weigh in appellant's favor either. Even though the trial court denied an instruction to disregard the prosecutor's comment, the trial court still gave a *sua sponte* instruction that the jury must be guided by its own memory of the evidence, and as counsel correctly pointed out, there was no evidence that appellant had ever locked the complainant in a closet. *See Freeman v. State*, 340 S.W.3d 717, 728–29 (Tex. Crim. App. 2011) (even though the trial court did not give a curative instruction, the trial court's *sua sponte* instruction that closing arguments were not evidence weighed in favor of harmless error).

We also conclude that the third factor does not weigh in appellant's favor. The complainant gave clear and uncontroverted testimony that appellant assaulted her. Her story was corroborated by her medical records and by physical evidence at her apartment showing that she had indeed been bleeding. Also, there was no evidence or suggestion that anyone other than appellant had assaulted the complainant. Thus,

there was a high degree of certainty that the jury would have convicted appellant even without the prosecutor's comment.

We conclude that any error in the trial court's overruling of appellant's objection was harmless.

The trial court's judgment is affirmed.

/s/ Tracy Christopher
Justice

Panel consists of Justices Christopher, Brown, and Wise.
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