Affirmed and Memorandum Opinion filed August 15, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00692-CR
NO. 14-16-00693-CR

ENRIQUE GONZALEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause Nos. 1414193 & 1414194

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

Appellant Enrique Gonzalez was convicted by a jury in two separate cases of aggravated robbery. *See* Tex. Penal Code § 29.03(a)(2) (West 2015); *see also* Tex. Penal Code § 29.02(a)(2) (West 2015). Appellant challenges his convictions in two issues.[1] He argues in his first issue that: (1) he was deprived of due process of law

[1] In his brief, appellant enumerates the issues in the table of contents inconsistently with the number of issues presented in the body of the brief. Additionally, appellant fails to list the issue regarding prosecutorial misconduct in the table of contents and raises it for the first time in the "Issues Presented" section.

by Deputy Rincon's bad-faith failure to preserve a copy of a photographic array that might have been shown to complainant Trishell; (2) the trial court erred by failing to exclude Rincon's testimony regarding pre-trial witness identifications; and (3) the trial court erred by failing to exclude or instruct the jury to disregard in-court identifications. In his second issue, appellant argues that the trial court erred in denying his motion for mistrial after four instances of improper prosecutorial argument. Because the first issue is unpreserved for appellate review, and the trial court was not shown to commit any other reversible error, we affirm the judgments of conviction.

BACKGROUND

On the evening of October 11, 2013, appellant and an unidentified accomplice robbed two complainants in the same neighborhood in Houston, Harris County, Texas. First, appellant robbed complainant Trishell as he was driving home. Appellant then robbed complainant Diaz in a similar manner a half hour later. After each robbery, appellant and his unidentified accomplice, who was in the passenger seat, fled in a black Pontiac.

Deputy Rincon with the Harris County Sheriff's Office was assigned to investigate the aggravated robberies of Trishell and Diaz. Rincon compiled photographic arrays (also known as a photographic lineup), which had the photographs of appellant and five "filler" photographs of men with physical features similar to appellant's features. Rincon then administered an array to each complainant. Both complainants identified appellant as the perpetrator.

Despite the brief's internal inconsistencies, we construe the issues according to their presentation in the body of appellant's brief. That is, the first issue includes three sub-issues pertaining to the photographic array, and the second issue pertains to prosecutorial misconduct.

Other evidence tending to link appellant to the offenses was produced in Rincon's full investigation. For instance, complainants had described the black Pontiac used during the commission of the offenses. On the same night of the offenses, and in the same neighborhood in which the offenses were committed, police located and pursued the black Pontiac. The suspects driving the Pontiac eluded pursuit and hastily abandoned the Pontiac in an apartment complex. Inside the Pontiac police recovered appellant's DNA, appellant's birth certificate, and a cell phone linked to appellant through its photographs and his nickname.

The State charged appellant by indictments with the first-degree felony offenses of aggravated robbery with a deadly weapon and alleged one punishment-enhancement paragraph in each indictment. The cases were consolidated into one trial.

At trial, Rincon testified that he administered a "blinded" photographic array to complainant Trishell. Rincon explained that a blinded administration of a photographic array to a witness involves making two folders, each of which contains a different array. While the photographs in each array are the same, they appear in a different, randomized position in each version. Rincon then shuffles the folders and allows the witness to select and view only one folder. The witness should view two pages total—an instruction page and the page of six photographs. Exhibit 6, which is the array administered to Trishell, contained an instruction page and a page of six photographs. Exhibit 6 shows that Trishell identified appellant by circling his picture. Trishell did not circle any other photograph on this page. Rincon could not produce the alternative photographic array that was created for Trishell because he lost it. He testified: "I searched my desk and everywhere and I could not find it"; "I —somehow it must have fallen out because I've had three cases. Maybe when I was carrying it"; and "I have no idea what happened to it. Normally we —I keep them in

a folder until the trial and there was only one on this particular one." Rincon did not anticipate any markings on the alternative photographic array because per the procedure, he does not show it to the witness. Rincon testified that he did not administer an array to Trishell at a Jack-in-the-Box, was not made aware of any other detective doing so, and doubted that anybody would have administered another array because he was the only investigator assigned to this aggravated robbery case. Appellant did not object to Rincon's testimony about the pre-trial identification.

Differing from Rincon's testimony, Trishell made a pre-trial representation that he viewed "two or three pages" and that he thought he remembered circling two or three photographs at the police substation. He also stated that "sometime after he met with an investigator at the police station he met with another police investigator at a Jack In the Box . . . . [where] he was shown multiple photographs and believes he selected somebody as the person who committed the aggravated robbery." His pre-trial representations were disclosed to appellant in a pre-trial disclosure pursuant to *Brady v. Maryland*. 373 U.S. 83 (1963). At trial, Trishell testified that at the police substation, he thought he saw two pieces of paper with photos but indicated that he only picked one person. He also testified that after meeting with Rincon at the police substation, he later met with an individual whom he thought was a police officer at a Jack-in-the-Box restaurant. Trishell testified that the other, unidentified person "[s]howed [Trishell] some photos" that were different from those that Rincon had showed him and that Trishell thought he made an identification among those photographs, too, though he was not sure. Trishell then identified appellant in open court as the individual who robbed him, but he was hesitant in doing so.

Also during trial, appellant objected to the admission of Exhibit 6. During argument over the admission of Exhibit 6 outside the presence of the jury, defense

counsel requested the court to exclude Exhibit 6 because it was "unreliable" on four separate occasions:

- "The photo line-up, the identification, it's unreliable, Your Honor."
- "My whole contention, Your Honor, is that it's unreliable."
- "The eyewitness — I mean, the identification is completely — I mean, it's unreliable. It wasn't done properly."
- "That this evidence not be admitted — this evidence not be entered — allowed to be entered over defense objection because inherently it's unreliable, it's more prejudicial than probative. The police officer lost evidence that goes directly to Mr. Gonzalez's innocence."

The trial court overruled the objection and admitted Exhibit 6.

The jury found appellant guilty of the offenses as charged in the indictments. The trial court found the State's punishment-enhancement allegations "true"; assessed appellant's punishment in each case at twenty years' confinement in the Texas Department of Criminal Justice, Correctional Institutions Division; and ordered appellant's sentences to run concurrently. Appellant did not file a motion for new trial or other post-trial motion. Appellant timely appealed.

ANALYSIS

A. Appellant did not preserve his first issue for appellate review.

Appellant's first issue complains of a due-process violation in connection with the lost photographic array. To preserve error for appellate review, the Texas Rules of Appellate Procedure require that the record show that the objection "stated the grounds for the ruling that the complaining party sought from the trial court 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)(A). The issue on appeal must comport with the objection made at trial. *Thomas v. State*, 723 S.W.2d 696, 700 (Tex. Crim. App. 1986). "[I]f a party fails to properly object to constitutional errors at trial, these errors can be forfeited." *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012). While no "hyper-technical or formalistic use of words or phrases" is required in order for an objection to preserve an error, the objecting party must still "let the trial judge know what he wants, why he thinks he is entitled to it, and to do so clearly enough for the judge to understand him at a time when the judge is in the proper position to do something about it." *Pena v. State*, 285 S.W.3d 459, 464 (Tex. Crim. App. 2009) (quoting *Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992)). To determine whether a complaint on appeal comports with a complaint made at trial, we look to the context of the objection and the shared understanding of the parties at the time. *Lankston*, 827 S.W.2d at 911.

Appellant asserts on appeal that he was denied due process of law pursuant to *Youngblood v. Arizona*, 488 U.S. 51, 57 (1988). To establish a due-process violation under the *Youngblood* standard, appellant is required to demonstrate that the police acted in bad faith when they failed to preserve potentially useful evidence. *Id.* at 58 ("[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."). The *Youngblood* Court described potentially useful evidence as "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Id.* at 57. Further, "bad faith entails some sort of improper motive, such as personal animus against the defendant or a desire to prevent the defendant from obtaining evidence that might be useful." *Ex Parte Napper*, 322 S.W.3d 202, 238 (Tex. Crim. App. 2010).

However, bad faith is not established by a showing that the State was negligent or grossly negligent. *See Youngblood*, 488 U.S. at 58; *Napper*, 322 S.W.3d at 232–33 (citing "[v]arious jurisdictions [that] have also indicated that bad faith is not established by a mere showing that the government agent was grossly negligent, . . . did not follow proper procedures, . . . exercised poor judgment, or performed sloppy work").

At trial, appellant did not cite *Youngblood*, its progeny, or a related case; he did not argue that Rincon acted in bad faith; and he did not raise a due-process challenge. While appellant objected to the admissibility of Exhibit 6, he emphasized four times that his objection was based on the alleged unreliability of the array. There is nothing in the record to indicate that either the judge or the prosecutor understood appellant's evidentiary objections to be complaints of a denial of due process. Appellant's first sub-issue is unpreserved because his due-process argument on appeal does not comport with his objections at trial. *See Clark*, 365 S.W.3d at 339–40 (evidentiary objections did not preserve error relating to alleged due-process violation where defendant did not object on due-process grounds and nothing in the record put the trial judge or prosecutor on notice that the defendant was complaining about due-process violation); *Temple v. State*, 342 S.W.3d 572, 599 n.8 (Tex. App.—Houston [14th Dist.] 2010), *aff'd*, 390 S.W.3d 341 (Tex. Crim. App. 2013) (complaint that appellant's due-process rights were violated by trial court's erroneous admission of hearsay evidence was unpreserved where defendant failed to object at trial based on due-process violation).

Additionally, appellant did not object to Rincon's testimony about pre-trial identifications. Nor did appellant object to, or request the trial court to exclude, the in-court identifications. Appellant's second and third sub-issues are unpreserved because he presented no objection at trial and he makes these arguments for the first time on appeal. *See* Tex. R. App. P. 33.1(a).

B. The trial court did not abuse its discretion in overruling appellant's objections and motions during the State's closing argument.

In his second issue, appellant contends that four improper prosecutorial remarks made during closing argument warranted a mistrial. The first was the prosecutor's "affirmation" that no markings appeared on the lost page reflecting the photographic array. The second remark involved the prosecutor's presentation of appellant's booking photo with arrows pointing at him. The third remark involved the prosecutor's attempt to "negate Trishell's lack of certainty in his identification [of appellant] by pointing out that [Trishell] did not know about Diaz's identification." The fourth involved the prosecutor's "insinuat[ion] that Trishell might be uncomfortable because he was afraid of retaliation by [a]ppellant." Appellant objected to each remark. The trial court overruled the first two objections and sustained the latter two. Each time the trial court sustained his latter two objections appellant requested instructions to disregard, which the trial court granted. After each instruction to disregard appellant moved for a mistrial, which the trial court denied.

A mistrial is a device used to halt trial proceedings where error is so prejudicial that expenditure of further time and expense would be wasteful and futile. *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999), *cert. denied*, 529 U.S. 1070 (2000); *Smith v. State*, 491 S.W.3d 864, 872 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). We review the denial of a motion for mistrial for an abuse of discretion. *Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007); *Smith*, 491 S.W.3d at 872. We must uphold the trial court's ruling if it was within the zone of reasonable disagreement. *Coble v. State*, 330 S.W.3d 253, 292 (Tex. Crim. App. 2010), *cert. denied*, 564 U.S. 1020 (2011). "Only in extreme circumstances, where the prejudice is incurable, will a mistrial be required." *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004). We determine whether a given error necessitates a

mistrial by examining the particular facts of the case. *Ladd*, 3 S.W.3d at 567; *Smith*, 491 S.W.3d at 872. We analyze the challenged statements in context, in light of the entire argument, not in isolation. *Drew v. State*, 743 S.W.2d 207, 220 (Tex. Crim. App. 1987).

We determine whether the trial court abused its discretion in overruling appellant's motions for mistrial by balancing these *Mosley v. State* factors: (1) "the severity of the misconduct (the magnitude of the prejudicial effect of the prosecutor's remarks)"; (2) the "measures adopted to cure the misconduct (the efficacy of any cautionary instruction by the judge)"; and (3) "the certainty of conviction absent the misconduct (the strength of the evidence supporting the conviction)." *Archie*, 221 S.W.3d at 700 (discussing *Mosley v. State*, 983 S.W.2d 249, 259–60 (Tex. Crim. App. 1998)).

With regard to the first two objections, whether the improper argument was cured is inapplicable because the trial court overruled the objections and for that clear reason, no instruction to disregard was given. *Orona v. State*, 791 S.W.2d 125, 129 (Tex. Crim. App. 1990). We review the trial court's ruling on appellant's objection to improper jury argument for an abuse of discretion. *Garcia v. State*, 126 S.W.3d 921, 925 (Tex. Crim. App. 2004).

Proper jury argument falls into four categories: (1) a summation of the evidence introduced at trial; (2) reasonable deductions that may be drawn from the evidence; (3) responses to opposing counsel's arguments; or (4) an appropriate plea for law enforcement. *Guidry v. State*, 9 S.W.3d 133, 154 (Tex. Crim. App. 1999). Error exists when facts not supported by the record are interjected in the argument. *Allridge v. State*, 762 S.W.2d 146, 155 (Tex. Crim. App. 1988), *cert. denied*, 489 U.S. 1040 (1989); *Cannon v. State*, 668 S.W.2d 401, 404 (Tex. Crim. App. 1984) (improper argument, which injected new facts that tended to bolster State's sole

witness, was not harmful to appellant after considering totality of facts and arguments of parties). "Generally, a prompt instruction to disregard by the trial court will cure error associated with improper closing argument, unless it appears the argument was so clearly calculated to inflame the minds of the jury or is of such a damning character as to suggest it would be impossible to remove the harmful impression from the juror's minds." *See Torres v. State*, 424 S.W.3d 245, 261 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd).

(1) Objections following the first two comments

First, the prosecutor's argument that no marks appeared on the lost photographic array was not improper.[2] The argument arose as follows:

> [Prosecutor:] Clinton Trishell's photo array. Clinton Trishell told you that he met with the officer in a police station, looked at it, and did not feel pressured. He said if he hadn't recognized anybody, he wouldn't have chosen anybody. But he did. And he chose the defendant.
>
> Now, yes, Deputy Rincon did misplace a piece of evidence. We're human. Nobody is perfect. Would I prefer him to have not? Absolutely. But I'm going to show you Gerardo Diaz's where we have both pages. Only one page is circled because that's the procedure. The page that's lost is a blank page that, following procedure, Clinton Trishell should have never been shown because it's a blinded photo array.
>
> [Defense Counsel]: I'm going to object again. The prosecutor is mischaracterizing the evidence again.
>
> [Trial Court]: Ladies and gentlemen, you've heard the evidence and you will be guided thereby.
>
> [Prosecutor]: So, Deputy Rincon places two in a file, they choose which one — a file folder, they choose which one, and look at it. They then use that one to circle if they identify somebody. So, the page that is lost is just the second page that he should have never been shown.

[2] While the record does not clearly demonstrate that appellant preserved this objection for appellate review the State does not argue otherwise. We assume without deciding that appellant's objection is sufficiently preserved.

Rincon testified that per the procedure, which he followed when administering the array to Trishell, a witness neither would have seen nor marked the alternative array. Accordingly, the remarks accurately summarized Rincon's testimony regarding his administration of the photographic array to Trishell. *See Guidry*, 9 S.W.3d at 154 (proper argument includes summary of evidence and reasonable deductions drawn from evidence).

Next, the prosecutor's use of appellant's booking photograph was not improper. Appellant complains that the prosecutor's presentation of appellant's booking photo with arrows pointing at him was used "to deprive [him] of a fair and impartial trial." The photograph is not in the record. Assuming that the photograph is as appellant describes, it was used demonstratively to summarize the evidence that linked appellant to the offenses.[3] *See id.* (proper argument includes summary of evidence).

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[3] The photograph was presented as follows:

> [Prosecutor:] This is a lot of evidence. And all of this evidence conveniently points to just one person, and that is the defendant, Enrique Gonzalez.
>
> Now, they can say that yes, he uses the car. They're not arguing that he uses the car, but in order for Gerardo Diaz and Clinton Trishell —
>
> [Defense Counsel]: Your Honor, I'm going to object to that. I didn't see that before that was published today.
>
> [Prosecutor]: I absolutely showed —
>
> [Trial Court]: One moment. One moment. Please don't argue.
>
> Please approach.
>
> (At the Bench, on the record)
>
> . . . .
>
> [Trial Court]: Wait a minute. What's the objection?
>
> [Defense Counsel]: The objection is it's very, very inflammatory. It has a picture of Enrique Gonzalez, a booking photo, with all the arrows pointing at him, DNA, and alibi and all of that. It's inflammatory, Your Honor.

(2) Motion for mistrial following the final two comments

Appellant presents similar challenges to the final two remarks, which arose in succession. Accordingly, we address them together. The prosecutor made the third remark in the following manner:

> [Prosecutor:] Now, Clinton Trishell was tentative on his I.D. in court. He did not appear to be comfortable to say that the defendant right here is the defendant that robbed him. But what he did tell you is that the person in the photo array is the person who did it. He did tell you that he doesn't want somebody to go to prison just on his word. That makes him uncomfortable. And that's understandable, I think, for anyone. You want to make sure you're right when you say that. **But what Clinton Trishell doesn't know is about all this other stuff. He doesn't know about Gerardo Diaz.** He doesn't know —
>
> [Defense Counsel]: I'll object, Your Honor. Improper closing argument.
>
> [Trial Court]: Sustained.
>
> [Defense Counsel]: Please instruct the jury to disregard.
>
> [Trial Court]: Disregard the last statement.
>
> [Defense Counsel]: Defense moves for a mistrial.
>
> [Trial Court]: Denied.

(emphasis added).

The final, challenged remark arose next, as follows:

> [Prosecutor]: Clinton Trishell picked in that photo array who put that

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> (Open court, defendant and jury present)
>
> [Trial Court]: All right. The objection is overruled. You may continue.
>
> [Prosecutor]: So, all of this leads to one person. In order for this not to lead to Enrique Gonzalez, this has to be a huge conspiracy. This has to be Gerardo Diaz and Clinton Trishell, two people who don't know each other, two people who get robbed at very — at different places, at different times, colluding to both pick the same person out of a photo array.

> gun in his face. He was comfortable saying that the defendant here today looked or resembled the person who did it.
>
> But let's talk about another reason why he might be uncomfortable. If you remember the very beginning of Mr. Trishell's testimony, I asked him where he resided. And he gave me two cross streets. He didn't give me an address. From there, I think one can deduce that Clinton Trishell, who stated he was robbed by gunpoint three houses down from where he lives, might live in the same place. He might not want to stand up in court and say: That's the man. He might be scared. But he did tell you —
>
> [Defense Counsel]: Your Honor, once again, I'm going to object to the prosecutor's closing arguments. Absolutely improper.
>
> [Trial Court]: Ladies and gentlemen, you've heard the evidence and you'll be guided by the evidence.
>
> [Defense Counsel]: Can I have a ruling, Your Honor?
>
> [Trial Court]: Sustained.
>
> [Defense Counsel]: Please instruct the jury to disregard.
>
> [Trial Court]: Disregard the last statement.

Under the first of the three *Mosley* factors, appellant indicates that the third and fourth remarks were improper because they were an attempt to bolster Trishell's credibility, asserting "[w]hether Trishell was correct in his pretrial identification . . . was for the jury to decide, at that point." Appellant also argues that the fourth comment "insinuated" facts not in evidence, namely, that Trishell feared appellant would retaliate against him, to explain Trishell's apparent uncertainty when he identified appellant in open court. Under the second *Mosley* factor, appellant argues that the trial court's curative instructions were insufficient because the prosecutor attempted to bolster Trishell's credibility again after the third remark. Lastly, appellant contends the evidence supporting the conviction was not strong, re-asserting his defensive theory that complainants were mistaken about appellant's identity as the perpetrator.

Assuming without deciding that the argument was improper, we disagree with appellant's position that the trial court's curative measures were "insufficient" or that the conviction was not certain absent the misconduct. *See Archie*, 340 S.W.3d at 739. The comments were quickly followed by the trial court's instruction to disregard, which we presume was complied with by the jury. *See Colburn v. State*, 966 S.W.2d 511, 520 (Tex. Crim. App. 1998). Neither of the comments was inflammatory or of such damning character that the instruction to disregard was ineffective. *See Torres*, 424 S.W.3d at 261. Moreover, the evidence supporting the conviction was not weak. The defensive theory was mistaken identity, yet the jury heard persuasive evidence linking appellant to the robberies. For instance, the robberies occurred in the same neighborhood and within a half hour of each other. Both complainants identified the car used during the robbery as a black Pontiac. The cell phone, birth certificate, and DNA evidence linked appellant to the same Pontiac used during the robberies. Trishell and Diaz identified appellant as the perpetrator when the array was administered to them months after the robberies. While Trishell was hesitant in identifying appellant as the perpetrator in open court, Diaz identified appellant without hesitation.

The trial court did not abuse its discretion in denying appellant's motions for mistrial. *See id.* Accordingly, we overrule appellant's second issue.

CONCLUSION

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

/s/ Marc W. Brown
Justice

Panel consists of Justices Christopher, Brown, and Wise.
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