

Affirmed and Memorandum Majority and Concurring Opinions filed August 1, 2023.



In The

Fourteenth Court of Appeals

NO. 14-22-00322-CR

MICHAEL F. ALMODOVAR, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 1669463**

MEMORANDUM MAJORITY OPINION

In this appeal from a conviction for evading arrest or detention, appellant argues in a single issue that the trial court abused its discretion by denying his motion for mistrial. For the reasons given below, we overrule that issue and affirm the trial court's judgment.

BACKGROUND

Appellant was pulled over at night for speeding. Two deputies approached his vehicle from either side. The first deputy obtained appellant's driver's license and proof of insurance, while the second deputy used a flashlight to inspect the passenger side of appellant's vehicle. When the second deputy saw that appellant possessed a firearm in the backseat, he alerted the first deputy and told him to instruct appellant to turn off his vehicle, unlock the doors, and place his hands on the steering wheel. Appellant did not heed those instructions. Instead, he shifted his vehicle into gear and took off at a high rate of speed. The deputies gave chase at speeds approaching one hundred thirty miles per hour, but they quickly lost sight of appellant and eventually abandoned their pursuit.

Appellant was apprehended at a later date and charged with evading arrest or detention. He pleaded not guilty to that charge, but a jury found otherwise, and the trial court assessed his punishment at four years' imprisonment.

MOTION FOR MISTRIAL

Appellant did not testify in his own defense during the guilt phase of the trial. Nor did the defense put on any witnesses. However, defense counsel argued in both opening and closing statements that the jury should acquit appellant based on a claim—which was disputed—that the first deputy had actually instructed appellant to exit the freeway in favor of a safer location. As part of this defensive theory, counsel asserted that appellant had left the traffic stop for a nearby gas station, and that the deputies had simply failed to find him.

In response, the prosecutor began his closing statements with a comment that had been reiterated throughout the entire trial: "You cannot escape the responsibility of tomorrow by evading it today." The prosecutor then continued, "That's probably

the third or fourth time I said it to you. The reason why I'm saying it to you is because the Defendant is still trying to avoid the consequences today.”

The defense promptly objected to that statement. Even though the defense did not assert the grounds for the objection, the trial court sustained it. The defense then requested to approach to bench, which led to the following exchange:

Defense: I'm going [to] have to move [for] a mistrial on that, Judge, because he just basically told the jury that my client is here—is taking this to trial because he's trying to avoid the prosecution. My client has a right to have a trial. That has painted the jury, Judge. I don't think this can go forward.

The Court: I'm going to overrule the motion for a mistrial. I am going to instruct the jury to disregard the last statement by the prosecutor If you repeat that sentiment, I'm going [to] grant [defense counsel's] motion.

Prosecutor: Yes, Your Honor. My apologies.

The Court: All right.

Ladies and gentlemen of the jury, you are ordered to disregard the last statement by the prosecutor. I would just like an affirmative nod from everyone in the box that they can follow this court's instruction regarding the statement of the prosecutor. The last statement of [the] prosecutor. If you'll just give me a nod if you can follow the court's order.

Okay. So that the record is clear, everyone in [the] jury box—every member of the jury has nodded in the affirmative that they will follow the court's order regarding—disregarding the last statement made by the prosecutor.

Appellant now challenges the trial court's ruling on his motion for mistrial, which we review for an abuse of discretion. *See Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009).

When deciding whether a trial court abused its discretion by denying a motion for mistrial, we consider three factors: (1) the severity of the misconduct; (2) any measures taken to cure the prejudicial effect of the misconduct; and (3) the certainty of conviction absent the misconduct. *See Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004).

Beginning with the first factor, we do not believe that the prosecutor's closing statements were severe. The prosecutor began by saying, "You cannot escape the responsibility of tomorrow by evading it today." The prosecutor made a nearly identical comment in his opening statements—without objection—and on neither occasion did the prosecutor expressly criticize appellant for exercising his constitutional right to a jury trial.

The prosecutor also stated that "the Defendant is still trying to avoid the consequences today." This statement does not expressly criticize appellant for exercising his right to a jury trial either. Nor does it malign appellant for consuming the jury's time, which we have determined in another case to be improper. *See Wages v. State*, 703 S.W.2d 736, 740–41 (Tex. App.—Houston [14th Dist.] 1985, pet. dismiss'd) (holding that a closing statement was improper where the prosecutor said, "You didn't ask to spend four days down here at the courthouse this week."). The jury could have plausibly construed this statement as merely expressing two ideas: (1) that appellant believed he was not guilty, and (2) that the prosecutor believed otherwise. Because these ideas were already apparent to the jury, this factor does not weigh in favor of finding that the trial court abused its discretion.

Turning next to the second factor, we observe that the trial court instructed the jury to disregard the prosecutor's statements. Such instructions are generally considered sufficient to cure any improprieties that occur during a trial. *See Gamboa v. State*, 296 S.W.3d 574, 580 (Tex. Crim. App. 2009). We also generally presume

that a jury follows a trial court's curative instructions. *Id.* In this case, there is no need for a presumption, because the record affirmatively shows that every member of the jury agreed to follow the trial court's instruction to disregard. Accordingly, this factor also weighs against a finding that the trial court abused its discretion by denying appellant's motion for mistrial.

As for the third and final factor, there was strong evidence of appellant's guilt. Body camera video showed appellant leaving the traffic stop at a very high rate of speed, which ultimately exceeded one hundred miles per hour. Also, the first deputy repeatedly testified that he did not instruct appellant to exit the freeway or otherwise change the location of the traffic stop at all. Instead, the deputy testified that he instructed appellant to turn off the car, unlock the doors, and put his hands on the steering wheel. This evidence cast doubt on appellant's defensive theory and supported the prosecution's claim that appellant was evading arrest or detention.

Considering all of the factors together, we cannot say that the trial court abused its discretion by denying appellant's motion for mistrial.

CONCLUSION

The trial court's judgment is affirmed.

/s/ Tracy Christopher
Chief Justice

Panel consists of Chief Justice Christopher and Justices Jewell and Spain. (Spain, J., concurring).

Do Not Publish — Tex. R. App. P. 47.2(b).