



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00081-CR

Ricardo **MARTINEZ**, Jr.,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 186th Judicial District Court, Bexar County, Texas
Trial Court No. 2013CR6697
Honorable Jefferson Moore, Judge Presiding

Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: September 13, 2017

AFFIRMED

Ricardo Martinez, Jr. was convicted by a jury of aggravated sexual assault of a child and indecency with a child and sentenced to fifteen years' and two years' imprisonment, respectively. On appeal, Martinez contends the trial court erred in denying his motion for a mistrial after the prosecutor commented on his failure to testify during closing arguments. We affirm the trial court's judgment.

BACKGROUND

Martinez was charged with continuous sexual abuse of a child and indecency with a child. With regard to the continuous sexual abuse of a child offense, the jury charge allowed the jury to convict Martinez of the lesser included offense of aggravated sexual assault of a child.

M.L. testified Martinez, her uncle, began sexually abusing her when she was around eight years old and continuously sexually abused her until she was sixteen. The abuse stopped shortly after M.L. made an outcry during a church retreat which was reported to authorities. Martinez presented several witnesses in his defense who testified M.L. was not credible and Martinez did not have the opportunity to sexually abuse M.L. After hearing the evidence, the jury found Martinez guilty of aggravated sexual assault of a child and indecency with a child.

STANDARD OF REVIEW AND APPLICABLE LAW

As previously noted, the sole issue presented on appeal is whether the trial court erred in denying Martinez's motion for mistrial after the prosecutor commented on his failure to testify during closing arguments. We review a trial court's refusal to grant a mistrial under an abuse of discretion standard. *Archie v. State*, 340 S.W.3d 734, 738-39 (Tex. Crim. App. 2011); *Martinez v. State*, 276 S.W.3d 75, 78 (Tex. App.—San Antonio 2008, pet. ref'd). Under an abuse of discretion standard, we must uphold the trial court's ruling if it was within the zone of reasonable disagreement. *Wead v. State*, 129 S.W.3d 126, 129 (Tex. Crim. App. 2004); *Martinez*, 276 S.W.3d at 78.

“Commenting on an accused's failure to testify violates his state and federal constitutional privileges against self-incrimination.” *Archie*, 340 S.W.3d at 738. Such a violation occurs when the prosecutor's comment “was manifestly intended or was of such a character that the jury would necessarily and naturally take it as a comment on the defendant's failure to testify.” *Bustamante v. State*, 48 S.W.3d 761, 765 (Tex. Crim. App. 2001); *see also Martinez*, 276 S.W.3d at 79. “[T]he

offending language must be viewed from the jury's standpoint and the implication that the comment referred to the defendant's failure to testify must be clear." *Bustamante*, 48 S.W.3d at 765; *see also Martinez*, 276 S.W.3d at 78. If a prosecutor improperly comments on a defendant's failure to testify, we analyze the following three factors in determining whether the trial court abused its discretion in denying a mistrial: (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*, 340 S.W.3d at 739; *Martinez*, 276 S.W.3d at 79.

ANALYSIS

In response to defense counsel's argument regarding the State not calling additional witnesses and introducing additional evidence, the prosecutor commented:

If I brought you 30 photographs of houses she lived in in the last eight years, would that matter to you? Houses they don't have access to anymore? I'm pretty sure, unless it's a photo of the defendant actually sexually abusing the victim, what value does that give you? We [c]ould have brought in 100 witnesses. But at the end of the day, there's only two people who know what happened. There's only two people who can come in here and tell you what they know.

Defense counsel immediately objected, and the trial court sustained the objection during a bench conference. The trial court then instructed the jury as follows:

THE COURT: I'm going to ask you to disregard any comments that have been made as far as whether Mr. Martinez testified or not throughout this trial.

As I've instructed you in the jury instructions, that is to have no bearing in your deliberations and you're not to consider it for any matters while you are deliberating.

After defense counsel requested a mistrial, the trial court further instructed:

THE COURT: I'm going to do one more instruction for you ladies and gentlemen. I'm going to read from the instructions.

Our law provides that a defendant may testify in his own behalf, if he elects to do so. This, however, is a right accorded the defendant. And in the event he

elects not to testify, that fact cannot be taken as a circumstance against him. In this case, the defendant has elected not to testify. And you are instructed that you cannot and must not refer or allude to that fact throughout your deliberations or take it into consideration for any purpose whatsoever as a circumstance against him.

The trial court then denied defense counsel's request for a mistrial.

A. Improper Comment

In its brief, the State does not advocate that the prosecutor's comment was proper. Instead, the State argues the comment does not require reversal.

We hold the comment was improper. Viewing the comment from the jury's standpoint, the prosecutor's comment that only two people could testify regarding the events in question necessarily referred to M.L. and Martinez, and the jury would naturally take the comment as referring to Martinez's failure to testify. *See Bustamante*, 48 S.W.3d at 765; *Martinez*, 276 S.W.3d at 78-79; *see also Madden v. State*, 799 S.W.2d 683, 700 (Tex. Crim. App. 1990) (holding comment that only one person knows why the defendant signed his name to credit card invoices called for testimony only the defendant could supply and was direct comment on defendant's failure to testify); *McDaniel v. State*, 524 S.W.2d 68, 69-70 (Tex. Crim. App. 1975) (holding comment that only three people could tell the jury what happened and two of those present were too young and not legally competent to testify was improper comment on defendant's failure to testify since comment pointed out that only competent witness to testify regarding what happened was the defendant).

B. Refusal to Grant Mistrial

Because we hold the prosecutor improperly commented on Martinez's failure to testify, we next must consider the three factors the trial court was required to balance in determining whether a mistrial was warranted. With regard to the severity of the misconduct (the magnitude of the prejudicial effect of the prosecutor's remarks), the prosecutor's comment "was brief and was not

repeated.” *Martinez*, 276 S.W.3d at 79. With regard to the measures adopted to cure the misconduct (the efficacy of any cautionary instruction by the judge), the trial court immediately and specifically instructed the jury to disregard the comment. In addition, the jury was instructed during voir dire that Martinez had the right not to testify and the jury could not use his decision not to testify against him,¹ defense counsel already referenced this right in his closing argument,² and the trial court not only verbally instructed the jury to disregard the prosecutor’s comment but also immediately read the specific instruction from the jury charge to the jury. *See id.* Finally, with regard to the certainty of conviction absent the misconduct (the strength of the evidence supporting the conviction), “[a]lthough the defense attempted to discredit [her] testimony, [M.L.] provided the jury with details of the abuse perpetrated by Martinez,” and the jury was the sole judge of M.L.’s credibility. *Id.*; *see also Cary v. State*, 507 S.W.3d 750, 757 (Tex. Crim. App. 2016) (noting jury is sole judge of witnesses’ credibility). Having balanced the three factors, we hold the trial court did not abuse its discretion in denying the mistrial.

¹ After asking the venire panel if they had heard about the right to remain silent, the trial court instructed the jury:

THE COURT: Most likely. I mean, it’s part of the Miranda warnings given out by law enforcement. That’s one of the first things they say: You have the right to remain silent. You continue to have the right to remain silent through a trial. Any criminal trial in the United States, the Defense does not have to do anything. The Defense can sit there the whole time, if he or she wants to. They have no obligation to prove anything. The burden remains with the State to prove the case beyond a reasonable doubt.

Now, if the Defense wants to put on a defense, that is up to them, of course. But you cannot hold it against a defendant if a defendant decides to assert a right to remain silent. But the main thing you should know is that if you’re selected to be one of the jurors here today, that if you are deliberating on this case, at the end of the evidence and once I’ve given you the law, you cannot, if the State — if the Defense asserts its right, you cannot use that against the Defense of, The defendant didn’t say anything. The defendant didn’t take the stand. If you hear yourself or one of your fellow jurors saying that, you have to stop him or her and say, We cannot use that as evidence against the defendant because they have a right to remain silent. I want to make sure and impart that to you, as well.

² During closing argument, defense counsel asserted:

.... And remember, it’s the State’s burden in this case, not our burden. The fact that Mr. Martinez did not testify cannot be used against him.

CONCLUSION

The trial court's judgment is affirmed.

Sandee Bryan Marion, Chief Justice

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