



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00133-CR

Jose Mario **TREVINO**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 49th Judicial District Court, Webb County, Texas
Trial Court No. 2015CRS001588D1
Honorable Elma T. Salinas Ender, Judge Presiding

Opinion by: Karen Angelini, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Irene Rios, Justice

Delivered and Filed: July 5, 2018

AFFIRMED

Jose Mario Trevino was charged with one count of continuous sexual assault of a child and two counts of sexual assault of a child. After a jury trial, he was acquitted of count 1 (continuous sexual assault of a child), but was found guilty of two counts of sexual assault of a child. He was sentenced to twenty years of imprisonment on each count, to run consecutively. On appeal, he argues the trial court erred in failing to grant a mistrial. We affirm.

BACKGROUND

At trial, Trevino's granddaughter "Child A"¹ testified that under a custody arrangement, she and her brother stayed at her maternal grandparents' home every two weeks so that they could visit their mother. According to Child A, during these visits, she and her much younger half-sister slept in the same bed as her maternal grandfather, Trevino—with Child A sleeping in the middle of the king-sized bed between Trevino and her little sister. Child A testified her grandmother, Armida Trevino, slept alone on a single bed in a separate bedroom. According to Child A, she was first sexually abused by Trevino when she was nine or ten years old. Child A testified that Trevino would touch her "private areas" with his hands and that when she was twelve or thirteen years old, the sexual abuse "escalated to penetration." Child A testified Trevino penetrated her "vagina and [her] butt" with "[h]is penis." According to Child A, she was first shown pornography by Trevino in his bedroom. The sexual abuse by Trevino continued until she was fifteen years old. Child A testified the last time Trevino sexually abused her was the night of August 15, 2015. On Sunday August 16, 2015, Child A needed to leave her grandparents' home early to pick up her schedule for high school. When Trevino learned Child A and her brother were leaving early, he became angry. Child A testified "people," including Trevino and Armida Trevino, were "yelling, arguing." Child A's mother then texted Child A's father that he needed to come and pick up the children early. According to Child A, when her mother told Trevino that Child A's father was coming early to pick her and her brother up, Trevino yelled, "Where's your father? I am going to f—cking kill your father." Child A testified she "was very scared." When she got home, she realized she was really "sick of it all" and "knew that [she] had to, like, say something. Already it was enough."

¹ "Child A" was the pseudonym used at trial to refer to the complainant in this case.

She then told her stepmother about the sexual abuse and later that day told her father what had been happening.

In addition to Child A, witnesses for the State included Child A's stepmother and father, Child A's therapist, a medical doctor who examined Child A, a special investigator employed by the State, a detective with the Laredo Police Department, and a police officer with the Laredo Police Department. The only witness called by the defense was Trevino's wife, Armida Trevino, who testified Child A could not have been abused by Trevino because she "was always there watching [Child A]." Armida Trevino testified that when Child A visited, she slept with her mother in a bed in the front living room. Armida Trevino admitted that "sometimes" Child A would sleep in the master bedroom with Trevino. However, Armida Trevino testified that Child A would never sleep alone with Trevino. Armida Trevino testified she was also present in the bed, and Child A's little sister was also present, usually sleeping on the floor. Armida Trevino testified she did not believe Child A's allegations: "I know [Trevino] so well that I don't believe it, and I think it's a false allegation."

On appeal, Trevino argues the trial court erred in not granting his motion for mistrial because a statement made during the State's closing argument constituted incurable jury argument. In context, the prosecutor argued the following to the jury during closing argument:

[F]inally, in 2015, August 16, 2015, [Child A] finally tells someone who she felt safe with, her stepmother. She finally said, enough is enough. I need to say what this monster has been doing to me for the last five years. I need to say something. Ladies and gentlemen, do you know how difficult it was for her to do that? How difficult do you think it was for her to be up there? And what did she do? What did "Child A" do when she was up on that stand? She reverted back to her safe feeling. Everything is fine. She reverted back, because she's confronted with this trauma in a room with her abuser, having to discuss disgusting details. She had to get up there and talk about a sexual experience, something that happened to her, something that was so traumatic that she held onto it for five years. And she purged that from her soul before you ladies and gentlemen. And she did it because she doesn't want anything like that to happen to any other child.

Now, defense counsel wants to say, yeah, these are – there’s so many inconsistencies. Okay. What about their witness? Armida Trevino, we already know that she’s a biased witness. The last question I asked her was, “You’d do anything for your husband, wouldn’t you?” She said, “Yes, I would do anything for my husband.” And she did. She got up there, and she lied to you. She lied to each and every one of you. Because she told—during her testimony, she said, “I would always sleep in the bed with my husband.” Always sleep in the bed with my husband. But then when I confronted her with the truth, with what she told CPS, she backpedaled. And I – and I brought it up on cross-examination. I asked her, “But didn’t you say that you always slept in another room? Even when your children weren’t with you, you slept in another room.” And it’s in there, black and white. She said, “No, that’s not what I said.” She lied to each and every one of you. Why? Why? Because she has a motive to lie. I asked her, “You don’t want your husband to go to prison, do you?” And, she said, “No. I’ve been married to him for forty years. I don’t want him to go to prison.”

So let’s talk about that a little bit, a motive to lie. Why should you believe her? Why? Why should you believe her? Defense counsel is—is convinced that there’s no corroboration whatsoever, that it’s just her word. It’s a mere allegation. It’s merely conjecture. This little girl has no motive to lie. What is she possibly going to gain from coming in here and subjecting herself to cross-examination? What does she have to gain by being in this courtroom facing the person that stuck his penis into her vagina when she was thirteen years old? What does she have to gain from being in the same room with the person who put his disgusting fingers in her vagina? Who touched her genitals since she was ten years old? What does she have to gain, ladies and gentlemen? That is the question you must ask yourself when you go into that deliberation room: What is her motive to lie?

And I will stand here before you and tell you that defense counsel and the defense has not produced one single solitary motive for that young lady to lie. Not one. We have an outcry. You had both stepmother and father.

(emphasis added).

Defense counsel then objected, “Your Honor, we have to lodge objections to counsel’s indication that defense counsel has to bring forth any motive or any type of evidence whatsoever to defend himself. I want the record to reflect and ask for a mistrial.” The trial court responded,

Well, we’ll sustain your objection. Ladies and gentlemen, we’re going to instruct you once again. As we’ve told you throughout the proceedings, the entire burden is on the State of Texas. They must prove each and every element of the offense. The defendant is not required to put on any evidence at all. And if the defendant elects not to testify, you may not take that fact or circumstance and – against him and use it or refer to it in any way in your deliberations. A motion for mistrial is denied.

IMPROPER JURY ARGUMENT

Trevino argues the prosecutor's comment that "defense counsel and the defense has not produced one single solitary motive for that young lady to lie" constituted improper jury argument because it indirectly commented on the defendant's right not to testify and "injected a new and potentially harmful element of motive into the trial." In response, the State emphasizes that defense counsel never requested the trial court instruct the jury to disregard the prosecutor's statement. Instead, after objecting, defense counsel moved for a mistrial.

The court of criminal appeals has explained that "while the 'traditional and preferred procedure' for a party to preserve error is to (1) object in a timely manner, (2) request an instruction to disregard, and (3) move for mistrial if the instruction to disregard seems insufficient, such a sequence is not essential to preserve complaints for appellate review." *Cruz v. State*, 225 S.W.3d 546, 548 (Tex. Crim. App. 2007) (quoting *Young v. State*, 137 S.W.3d 65, 69 (Tex. Crim. App. 2004)). According to the court, when "the appellant moved for mistrial without delay, even though the motion was not preceded by an instruction to disregard, appellate review is limited to whether the trial court erred in denying the motion for mistrial." *Id.* According to the court, "[a] request for an instruction to disregard is essential to the preservation of error only when such an instruction could have had the effect desired by the requesting party." *Id.* "If such an instruction would not be sufficient—that is, if the harm caused by the objectionable statements is incurable—then the defendant is entitled to a mistrial, and the denial of the motion for mistrial is sufficient by itself to preserve error for appellate review." *Id.*

Thus, we must consider whether the prosecutor's comment constituted incurable jury argument. The harm arising from improper jury argument is incurable such that a defendant would be entitled to a mistrial "if the argument (1) is extreme, improper, injects new and harmful facts into the case, or violates a mandatory statutory provision and (2) as a result, is so inflammatory

that its prejudicial effect cannot reasonably be cured by an instruction to disregard.” *Thompson v. State*, 89 S.W.3d 843, 851 (Tex. Crim. App. 2002).

“[P]roper jury argument generally falls within one of four general areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to argument of opposing counsel; and (4) plea for law enforcement.” *Brown v. State*, 270 S.W.3d 564, 570 (Tex. Crim. App. 2008). Additionally, a “prosecutor may properly comment on a defendant’s failure to produce evidence, as long as the remarks do not fault the defendant for failing to testify.” *Zambrano v. State*, 431 S.W.3d 162, 173 (Tex. App.—San Antonio 2014, no pet.). We look “at the challenged language from the jury’s standpoint and determine[] whether the 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.’” *Id.* (quoting *Bustamante v. State*, 48 S.W.3d 761, 765 (Tex. Crim. App. 2001)).

Trevino argues that the prosecutor’s comment was an indirect comment on his right not to testify, and an attempt to inject the inapplicable element of motive and shift the burden from the State to the defense. We disagree with Trevino. Read in context, the prosecutor’s comment related to defense witness Armida Trevino’s testimony that Trevino never slept in the same bed as Child A when Armida Trevino was not present; that she would know if sexual abuse had happened because she was always watching Child A; and that she did not believe the allegations and thought they had been fabricated. Armida Trevino’s testimony directly contradicted Child A’s testimony and advanced Trevino’s fabrication defense. In reading the entirety of the prosecutor’s argument, we conclude the prosecutor’s comment was an attack on Armida Trevino’s testimony and a rebuttal to Trevino’s fabrication defense. The prosecutor was arguing that Child A had no motive to lie about the allegations she had made against Trevino. The prosecutor’s comment was not a reference to any motive *Trevino* had to commit the offense. In considering the comment in context

from the jury's standpoint, we cannot conclude it "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." *Id.*

Further, even though not requested by Trevino, the trial court in this case immediately instructed the jury that "the entire burden is on the State," which must "prove each and every element of the offense" and that the "defendant is not required to put on any evidence at all." The trial court continued by instructing the jury that "if the defendant elects not to testify, you may not take that fact or circumstance and – against him and use it or refer to it in any way in your deliberations." Thus, even if the prosecutor's comments could have been interpreted in an improper manner by the jury, the trial court immediately cured any error by instructing the jury. We cannot conclude that the comment made by the prosecutor in this case was "so inflammatory" that its prejudicial effect could not be cured by the trial court's instruction to disregard. *Thompson*, 89 S.W.3d at 851. Therefore, we find no error by the trial court in denying Trevino's motion for mistrial.

The judgment of the trial court is affirmed.

Karen Angelini, Justice

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