Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-19-00197-CR

Addie James **BATTEN**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 25th Judicial District Court, Guadalupe County, Texas
Trial Court No. 17-2121-CR-C
Honorable Dwight Peschel, Judge Presiding

Opinion by: Beth Watkins, Justice

Sitting: Rebeca C. Martinez, Justice
Irene Rios, Justice
Beth Watkins, Justice

Delivered and Filed: August 12, 2020

AFFIRMED

A jury found appellant Addie James Batten guilty of two counts of aggravated sexual assault of a child with an enhancement for a prior aggravated sexual assault conviction, and the trial court sentenced him to two consecutive life sentences. On appeal, Batten argues the court erred in: (1) denying his request for a mistrial because the State made an improper jury argument; and (2) denying him due process by coercing him to plead true to the enhancement. We affirm the court's judgment.

BACKGROUND

During a car ride, seven-year-old I.W. told his father and stepmother that his six-year-old sister A.W. told him Batten put his private part in her mouth. At the time, Batten was dating I.W.'s and A.W.'s mother. When asked about the incident, A.W. confirmed the allegation and told her stepmother that Batten also touched her privates when she was in the bathroom with him. The children's father and stepmother took A.W. to the hospital, where a sexual assault nurse examiner (SANE) conducted an exam that resulted in "nonspecific examination findings." The nurse also took DNA samples, but no DNA evidence was found. The hospital contacted the San Antonio Police Department, who transferred the case to the Guadalupe County Sheriff's Office. During its investigation, the Sheriff's Office interviewed A.W., who described the allegations in detail.

The State charged Batten with two counts of aggravated sexual assault of a child with an enhancement paragraph based on a previous aggravated sexual assault conviction. Batten pled not guilty, and the case proceeded to a jury trial. The jury returned a guilty verdict, and the trial court sentenced Batten to two consecutive life sentences. The judgment of conviction shows Batten pled "true" to the enhancement paragraph. Batten now appeals.

ANALYSIS

Improper Jury Argument

Batten first argues the trial court erred in denying his request for a mistrial because the State made an improper jury argument that prejudiced him. In response, the State argues Batten failed to preserve this issue for appeal or alternatively, the State's argument was proper and not prejudicial.

Standard of Review and Applicable Law

We review a trial court's denial of a mistrial for abuse of discretion and will only reverse in extreme circumstances when the prejudice stemming from the improper argument is

inflammatory and incurable. *Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007); *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004). A prosecutor's argument is permissible so long as it falls within one of four categories: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) response to opposing counsel's argument; or (4) plea for law enforcement. *Gallo v. State*, 239 S.W.3d 757, 767 (Tex. Crim. App. 2007); *Garcia v. State*, 246 S.W.3d 121, 143 (Tex. App.—San Antonio 2007, pet. ref'd). A prosecutor may not interject his personal opinion or facts not supported by the record into the argument because such comments pose a danger of influencing the jury's opinion. *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000); *Garcia*, 246 S.W.3d at 145. "[H]owever, such error is not reversible unless, in light of the record, the argument is extreme or manifestly improper." *Garcia*, 246 S.W.3d at 143. In many cases, a curative instruction to disregard the remarks cures the error. *Id.* When the trial court instructs the jury to disregard the comment, we must presume the jury followed the trial court's instructions. *See Waldo v. State*, 746 S.W.2d 750, 752–53 (Tex. Crim. App. 1988).

Application

Batten argues the following statement made by the prosecutor during her closing argument was improper:

> Once again, I think some of you on the jury are probably parents and you know how kids act. And you know -- that before this SANE exam, you know, you can deduce that the last thing she had in her mouth is not Addie James Batten's penis, it's not true. And he didn't ejaculate in her mouth. We talked about it in voir dire. We talked about in voir dire delays in outcry resulting in no physical evidence. Do not go back into that jury room and say because [A.W.] delayed her outcry, he gets to walk away. That's not justice. That's not fair. Because the person in control this entire time was Addie James Batten. You know why there's no DNA on this child, because he made sure of it.

Immediately after the prosecutor made this statement, Batten's counsel objected:

> Objection, your Honor. Again, testimony not in evidence. This has gone far enough. I would ask the Court for a mistrial.

The court agreed the statement was not a reasonable deduction and instructed the jury to disregard the statement. The prosecutor continued her closing argument, stating:

> And defense counsel told you it's Pauline's [the detective who investigated the case] fault because she didn't call the lawyer for Addie James Batten to give a statement. He didn't call her either. And you do not get to have it both ways. That's not fair. You can't be mad at Pauline for not getting a statement unless you're mad at him for not calling her back.

Again, Batten's counsel objected, arguing such evidence was not before the jury. The trial court overruled Batten's objection.

We begin our analysis by considering whether Batten preserved this issue for appeal. To preserve a complaint of improper jury argument, a defendant must urge his objection until he obtains an express or implicit adverse ruling. *Archie*, 221 S.W.3d at 699; *Hinojosa v. State*, 433 S.W.3d 742, 761 (Tex. App.—San Antonio 2014, pet. ref'd) (citing TEX. R. APP. P. 33.1(a); *Mathis v. State*, 67 S.W.3d 918, 926–27 (Tex. Crim. App. 2002)). In addition to objecting to the improper statement, the defendant must request a curative instruction if the error is curable and make a motion for a mistrial. *Archie*, 221 S.W.3d at 699; *Hinojosa*, 433 S.W.3d at 761. Ideally, the usual sequence for these requests should be "objection, instruction to disregard, and motion for mistrial," but that sequence is not essential, and we do not apply a hyper-technical analysis. *Archie*, 221 S.W.3d at 698–99.

Here, Batten's counsel objected to the prosecutor's argument, gave an adequate ground for that objection, and requested a mistrial. The court sustained the first objection and *sua sponte* gave the jury an instruction to disregard the first statement. As to the second statement, the court overruled Batten's objection. When considering these facts, we conclude Batten's counsel

preserved this issue by pursuing his objection "to an adverse ruling," i.e. the constructive denial of his motion for mistrial. *Id.* at 699.

Turning to the prosecutor's first statement, and assuming that the statement that Batten made sure his DNA was not on A.W. was improper, there is no evidence the comment was so inflammatory that it could not be cured. *Id.* Here, the statement related to the absence of DNA evidence, a fact that was before the jury, and the trial court gave a prompt curative instruction to disregard the comment. There is nothing in the record to suggest the jury disregarded the instruction, and we must presume the jury obeyed that instruction. *See Waldo*, 746 S.W.2d at 752–53. Although Batten admits such an instruction typically cures any error, he urges us to hold otherwise. We decline to do so and conclude the trial court cured any error caused by the prosecutor's first statement with its instruction. *See Garcia*, 246 S.W.3d at 143.

Batten also argues the prosecutor's second statement warranted a mistrial because it misled the jury. We disagree. During closing argument, the defense criticized Detective Pauline Castro for failing to call Batten's attorney. In response, the prosecutor pointed out that Batten's attorney also did not call the detective. Because the prosecutor's statement was a direct response to defense counsel's statement, it was a proper jury argument, and the trial court did not err in denying Batten's request for a mistrial. *See Gallo*, 239 S.W.3d at 767. We therefore overrule Batten's first issue.

Plea of True

Batten next contends the trial court denied him due process by coercing him to plead true to the enhancement paragraph. The State counters, arguing the court did not coerce Batten to plead true, but instead sought clarification from Batten regarding his plea.

Standard of Review and Applicable Law

The State may use an enhancement paragraph alleging a prior conviction to increase a defendant's range of punishment. *Lugo v. State*, 299 S.W.3d 445, 455 (Tex. App.—Fort Worth 2009, pet. ref'd). "To establish that a defendant has been convicted of a prior offense, the State must prove beyond a reasonable doubt that (1) a prior conviction exists, and (2) the defendant is linked to that conviction." *Flowers v. State*, 220 S.W.3d 919, 921 (Tex. Crim. App. 2007). If the defendant pleads true to the enhancement paragraph, the State's burden of proof is satisfied, and a defendant cannot complain on appeal that the evidence is insufficient to support the enhancement. *Wilson v. State*, 671 S.W.2d 524, 525 (Tex. Crim. App. 1984).

Application

The following exchange occurred when the trial court asked Batten for his plea to the enhancement paragraph:

> THE COURT: Let the record reflect counsel for the State, counsel for the defendant and defendant are present. We can proceed with the punishment phase of the trial. And at this time, Ms. Hines, I'll ask you to read the enhancement allegation contained in the indictment. Ms. Hines.
>
> THE STATE: Enhancement as to Count 1 and Count 2: And it is further presented that prior to the commission of the charged offense on May 28, 2004, in Cause Number 03-0560 in the 25th Judicial District Court of Guadalupe County, Texas, the defendant was finally convicted of a sexually violent offense, namely, aggravated sexual assault.
>
> THE COURT: To that allegation, how do you plead, true or not true?
>
> THE DEFENDANT: Not true, you honor. I was advised by my attorney at that time to take a plea bargain, so that's the reason –
>
> THE COURT: Sir –
>
> THE DEFENDANT: I said it's not true. I was advised by my attorney at that time to take a plea bargain.
>
> THE COURT: We're not – we're not going into any of the procedural matters concerning what may or may not have happened in 2004. It's – the question is: Are

> you the individual that was convicted in the cause number of that offense on that date in here in Guadalupe County?
>
> THE DEFENDANT: True.
>
> THE COURT: True?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Okay.

According to Batten, this exchange shows the court "bullied" him into pleading true to the enhancement paragraph. We disagree. While this exchange shows Batten initially pled not true to the enhancement paragraph, it also shows Batten started explaining why he entered into a plea bargain agreement to the 2004 offense. The court then clarified its question to determine whether Batten was the individual convicted of the 2004 offense, and Batten pled true. *See Flowers*, 220 S.W.3d at 921. The court confirmed that plea, ensuring Batten's plea was voluntary. Contrary to Batten's argument, we conclude there is nothing in this exchange showing the court coerced Batten to plead true. Accordingly, we overrule Batten's second issue.

CONCLUSION

Based on the foregoing, we affirm the trial court's judgment.

Beth Watkins, Justice

Do Not Publish