

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-08-103 CR

TERRY MILLICAN, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 1A District Court
Tyler County, Texas
Trial Cause No. 10,526**

MEMORANDUM OPINION

A jury found Terry Millican, an inmate, guilty of four counts of harassment, a third degree felony. *See* TEX. PEN. CODE ANN. § 22.11 (Vernon Supp. 2008). The jury further found the enhancement allegation to be true and set his punishment on each count at twenty years in prison and a \$10,000.00 fine. The trial court sentenced Millican in accordance with the jury's verdict. On appeal Millican raises two issues. He contends that he was denied his

right to confront certain witnesses and that the trial court erred when it refused to instruct the jury to disregard comments made by the prosecutor. We affirm.

In 2003, Millican was convicted of aggravated robbery and was sentenced to sixty years' confinement in the Texas Department of Criminal Justice, Institutional Division ("TDCJ"). In October 2005 while serving this sentence, Millican threw a carton containing fecal material at four correctional officers, thus leading to the harassment charges for which the State indicted him.¹

On the day of the offenses, Millican rigged his food-tray slot to make it stay open. The slot was located in the cell door, and other than the door, was the only opening to the corridor. Sergeant Vergil Hussey, a correctional officer working on Millican's wing, talked with Millican in an unsuccessful attempt to get him to close the slot. Sergeant Hussey then reported the situation to his superior officer, who authorized the assembly of a team to regain

¹The Texas Penal Code prohibits harassment of a public servant as follows:

(a) A person commits an offense if, with the intent to assault, harass, or alarm, the person:

. . . .

(2) causes another person the actor knows to be a public servant to contact the blood, seminal fluid, vaginal fluid, saliva, urine, or feces of the actor, any other person, or an animal while the public servant is lawfully discharging an official duty or in retaliation or on account of an exercise of the public servant's official power or performance of an official duty.

TEX. PEN. CODE ANN. § 22.11(a)(2) (Vernon Supp. 2008).

control of the slot. As the four-member team approached Millican's cell door, he threw a milk carton at them which bounced off the shield carried by the first officer. The carton's contents spattered on the team members. A subsequent analysis of the clothing worn by a team member established that the carton contained fecal material.

Right to Confront Witnesses

Issue one asserts that the trial court erred by allowing portions of the incident videotape to be played because Sergeant Hussey described "what other prison employees were doing/saying and said employees should have been called to testify about their own actions/words which violated the confrontation rules." Millican contends that Sergeant Hussey "testified about the words and actions" of Captain Moore and Major Gaston, two prison employees. Millican maintains that they should have testified so that his attorney could have cross-examined them.

Millican's complaints on appeal, however, are not consistent with his trial objections. During the trial, Millican complained that different parts of the testimony and different parts of the videotape violated his confrontation rights. Millican's counsel lodged an objection during trial to statements made by Sergeant Hussey at the beginning of the videotape. In those statements, Hussey explained the reasons for assembling the team but did not address the "words and actions" of Captain Moore or Major Gaston.

On appeal, Millican’s complaints concern Hussey’s trial testimony that Captain Moore was issuing instructions to get the obstruction tool to open Millican’s cell door and that Major Gaston was “conversing with [Millican] about coming out, unblocking the door.” Moore’s instructions on the videotape occur substantially after Hussey’s beginning statements, and Gaston’s conversation with Millican occurs almost at the end of the tape.²

To preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection, or motion stating the specific grounds for the ruling desired. TEX. R. APP. P. 33.1(a). A defendant's issue on appeal must comport with the specific objection made at trial. *Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002).

²With respect to Moore’s instructions, Millican’s brief complains about the following specific testimony from Hussey: “Captain Moore instructed someone, I don’t remember who at this time, to obtain the obstruction tool, which is a bar, that we go in there and remove the obstructions.” Regarding Gaston, Millican also complains in his appeal about the trial court’s admission of Hussey’s testimony, as follows:

- Q. Did you have any success [trying to get Millican to remove the obstructions]?
- A. No, sir. That was Major Ken Gaston.
- Q. So, he’s the acting assistant warden at that point; is that correct?
- A. Yes, sir.
- Q. What’s he doing?
- A. He is conversing with Terry about coming out, unblocking the door.
- Q. And did he have any success?
- A. Yes, sir.
- (Videotape was played).
- Q. (By Mr. Hernandez) What’s going on there?
- A. He’s telling him that he’s going to come out.

Because Millican's issue before us addresses testimony that differs from that addressed by the objections he made at trial, we find he failed to preserve his confrontation complaint for review. We overrule issue one.

Request for Jury Instruction to Disregard

Issue two contends that the trial court erred during the punishment phase when it refused Millican's request for a jury instruction to disregard the prosecutor's statement questioning why the defendant did not offer certain reports into evidence. Millican requested the instruction after the trial court sustained his objection to the prosecutor's statement. Millican argues that the prosecutor improperly commented on his attorney's actions.

During closing argument, the prosecutor referred to reports prepared by Dr. Floyd Jennings, one of Millican's witnesses. The prosecutor stated: "And you'll notice that these three documents right here, these last three, they came from [Millican's] witness. Strangely enough, I had to offer them into evidence. They didn't. Now, you got to wonder why that is." Millican's attorney immediately objected, and the trial court sustained the objection. When Millican's attorney then requested a jury instruction to disregard, the trial court said: "Let's just move on with your closing argument."

Citing *Bell v. State*, Millican argues that the prosecutor's statements were improperly intended to indicate defense counsel acted in bad faith by not offering the documents as evidence. *See* 614 S.W.2d 122, 123 (Tex. Crim. App. 1981) (Prosecutor "was striking at the

appellant over the shoulders of his counsel in an attempt to prejudice the jury against the appellant.”). The State argues that the prosecutor’s comment was only mildly inappropriate and did not affect any of Millican’s substantial rights. We agree.

In the punishment phase, Millican called Dr. Jennings, a court-appointed psychologist who had evaluated Millican to assess his competency to stand trial. Dr. Jennings testified that he reviewed Millican’s records, including his disciplinary history within the TDCJ, and interviewed him for approximately an hour. Based on the records and interview, Dr. Jennings concluded that Millican was competent to stand trial because he had a rational and factual understanding of the proceedings against him and had a present ability to assist his lawyer with a reasonable degree of rational understanding. Dr. Jennings also concluded that Millican was legally sane when he harassed the officers. Dr. Jennings explained that Millican “was aware that he had received disciplinary action for at that time 68 cases of one sort or another. He knew very well that he would conceivably be punished for his then acts.” Dr. Jennings also testified that Millican had been hospitalized several times in TDCJ hospitals for psychiatric reasons and had been diagnosed as having a chronic, mild-to-moderate schizoaffective disorder. Dr. Jennings stated that Millican, who was twenty-four at the time of trial, presented the “difficult situation of a bright, antisocial, acting-out kid who also was mentally ill.” Dr. Jennings opined that Millican was receiving insufficient doses of the antidepressant and antipsychotic medications he was taking and that “he would be

managed far the better if he had been medicated more aggressively.” When asked how stronger doses could help Millican, Dr. Jennings stated:

Nobody has a crystal ball and can predict with absolute certainty, but there is data to indicate that the frequency of disruptive outbursts would be reduced and the intensity would be reduced. So, if he had had 68 cases of one kind or another in the three years he had been in the system and he were treated aggressively, we could reduce that 20-some-odd a year significantly.

During the State’s cross-examination, Dr. Jennings testified he stood by the conclusions he reached in the three reports he prepared for the trial court. Dr. Jennings’s competency report concluded Millican was competent to stand trial. The sanity report concluded Millican had a mental illness but it was not one “that would give rise to an insanity claim.” Moreover, the sanity report stated that Millican

expressed awareness that a host of behaviors are met with punishment, and are ‘wrong’ in the context in which he finds himself—such awareness would include harassment. Moreover, the type of act with which charged requires such planning and volition that relating it to some bizarre delusion or delusions of sufficient moment that a defendant would be unaware of the wrongfulness of such, strains the limits of credulity—as these particular acts are conducted precisely because they are understood to be regarded as wrong and offensive. Ergo, despite his troubled psyche, he meets the criteria for sanity and is to be considered SANE at the time of the alleged offense(s).

Dr. Jennings also submitted another report addressing whether Millican presently had a mental illness that required court-ordered mental health services. *See* TEX. CODE CRIM. PROC. ANN. art. 46C.105 (Vernon 2006). While that report stated that Millican had a mental illness and likely was a danger to himself or others, the report further explained that

Millican's dangerousness was not predicated on his mental illness but upon his antisocial personality disorder, a condition that does not warrant court-ordered mental health treatment.

In closing, Millican's counsel invoked Dr. Jennings's testimony as a basis for requesting a four-year sentence instead of the twenty-year sentence sought by the State.

Millican's counsel argued:

I do hope that the testimony you heard from Dr. Jennings is helpful. I think perhaps you're now given a little clearer picture of who Terry Millican is. He's a very troubled individual. He's got mental health issues. He's got behavioral issues. And Dr. Jennings made no attempt to try to conceal that information from you

. . . .

[Terry] also has some very serious emotional and mental health issues. Probably—and this is in part and parcel to what I'd consider mitigation. If TDC had more aggressively treated him, your service may not have been required. We may not be going through this exercise, adjudicating the issues of guilt and innocence and in punishment today, this week. And instead had they placed him on a higher dosage of the medication or changed his medication to something that could more aggressively address his emotional problems, then these issues we would not have to be dealing with today.

. . . .

Let's chalk this up to a serious lapse in judgment that could have been addressed with more aggressive treatment for Terry, and let's not throw him out as a lost cause. Four years. Four years.

During rebuttal, immediately after defense counsel's argument requesting a four-year sentence, the prosecutor made the comments that are the subject of Millican's complaint.

Our analysis of issue two begins with noting that improper jury argument is generally considered non-constitutional error. *See Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998); *see also* TEX. R. APP. P. 44.2(b) (Non-constitutional errors not affecting

substantial rights are disregarded.). In determining whether a defendant's substantial rights are affected, we balance three factors: 1) the misconduct's severity, 2) the measures adopted to cure the misconduct, and 3) the certainty of punishment without the misconduct. *See Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004).

The most egregious forms of a prosecutor's improper jury argument may involve 1) accusations of manufactured evidence, 2) contrasting the ethical obligations of prosecutors with those of defense counsel, and 3) casting doubt on defense counsel's truthfulness. *Mosley*, 983 S.W.2d at 258-59. Noting the difficulty of articulating a precise rule regarding improper argument, the *Mosley* Court concluded that

it is fair to say that a prosecutor runs a risk of improperly striking at a defendant over the shoulder of counsel when the argument is made in terms of defense counsel personally and when the argument explicitly impugns defense counsel's character. In the present case, the argument referred to counsel personally and, although not saying so explicitly, it suggested that counsel wanted to divert the jury from the truth.

Id. at 259.

The *Mosley* Court found that the prosecutor's comments were "mildly inappropriate" as they neither directly accused the defense attorneys of lying nor suggested that the defense manufactured any evidence. *Id.* at 258, 260 (considering comments that defense counsel was attempting to get the jury to stray from "the main road" leading to the truth and instead wanted the jury to take "side roads, rabbit trails" leading to a dead end). The Court concluded that the conduct's severity was relatively small and that factor, therefore, did not weigh very

heavily in the appellant's favor. *Id.* at 260. As to whether measures were adopted to cure the misconduct, the Court further noted there was no attempt to correct the misconduct; instead, the prosecutor reemphasized the statements after the trial court overruled the defendant's objections. *Id.* With respect to the third factor, the certainty of punishment without the misconduct, the *Mosley* Court found that factor to weigh heavily in the State's favor. The Court concluded that the prosecutor's comments were harmless, given their mildness and the strength of the State's case. *Id.*

Similar to *Mosley*, the prosecutor here did not accuse Millican's attorney of lying or manufacturing evidence. At most, the prosecutor's comments suggest the defense recognized that the doctor's reports contained evidence that did not favor Millican. As in *Mosley*, the prosecutor's comments in Millican's trial did not "inject new facts into the record, and the jury [was] in a position to evaluate the truthfulness of the prosecutor's assertion." *Id.* Thus, the first factor, severity of the misconduct, does not significantly weigh in Millican's favor.

As to the measures adopted to cure the prosecutor's misconduct, that factor is less significant under the circumstances here than in *Mosley*. In *Mosley*, the trial court overruled the defendant's objection; here, the trial court sustained Millican's objection and by doing so likely indicated to the jury that the prosecutor's comments were improper. *See id.*

The third factor, the strength of the State's case supporting punishment, weighs heavily in the State's favor. The jury heard Dr Jennings's testimony that while incarcerated, Millican

had been involved in sixty-eight instances involving disciplinary actions over a three-year period, was sane when he harassed the correctional officers, and knew he could be punished for his actions. The trial court admitted Dr. Jennings's three reports into evidence. The sanity report noted that twenty-two of Millican's disciplinary actions involved assaults on staff members, and the report explained that Millican was aware his behavior was wrong and that such acts were "conducted precisely because they are understood to be regarded as wrong and offensive." Another of Dr. Jennings's reports attributed Millican's dangerousness to his antisocial personality disorder. Thus, the jury had ample evidence before it to consider in determining Millican's punishment.

Based on the factors used to decide whether the alleged errors affected Millican's substantial rights, we conclude that Millican's substantial rights were not affected when the trial court declined to instruct the jury to disregard the prosecutor's comments. *See* TEX. R. APP. P. 44.2(b). We overrule issue two and affirm the trial court's judgment.

AFFIRMED.

HOLLIS HORTON
Justice

Submitted on December 4, 2008
Opinion Delivered December 17, 2008
Do Not Publish

Before McKeithen, C.J., Kreger and Horton, JJ.