In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-14-00401-CR

BATISTE BREAUX JR. a/k/a BATISTE JOSEPH BREAUX JR., Appellant

V.

STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause No. 08-04431

MEMORANDUM OPINION

A jury convicted appellant Batiste Breaux Jr. of capital murder for intentionally causing the death of Kelly Lee Evans and Gerald Evans by shooting them with a deadly weapon, namely a firearm. *See* Tex. Penal Code Ann. § 19.03(a)(7)(A) (West Supp. 2016).[1] Breaux raises three issues on appeal. After reviewing Breaux's issues, we find them to be without merit. However, through

[1] We cite to the current version of the statute because any amendments subsequent to the date of the offense do not affect our analysis of this case.

our own review of the record, we have found non-reversible error in the written judgment of conviction. We modify the judgment to correct the clerical error and affirm the trial court's judgment as modified.

I. Factual Background

The jury heard evidence that on August 5, 2008, Kelly Evans was celebrating his twenty-fifth birthday at his dad's house on Ironton Street in Beaumont. Kelly's dad, Alcee Bass, Sr., testified that at some point during the celebration, a group of people from the party piled into Bass's Suburban and went to a convenience store to pick up some beer. Bass, Kelly, and Bass's other sons, Gerald Evans and Alcee Jr., were a few of the group that went to the store. The group went into the store, and while in the store, a Cadillac pulled in to the store's parking lot, and a young woman got out of the Cadillac and went into the store. At least one person from Bass's group spoke with the young woman buying cigarettes, who was eventually identified as Sharon Williams. Bass and his group left the store and got back into the Suburban. According to Bass, the Cadillac pulled up in front of him, and the driver of the Cadillac began to stare at him in a way that felt odd to Bass because he did not know the driver. According to Bass, there were only two people in the Cadillac when it pulled in front of him, the driver—who Bass later identified at trial as Breaux—and Sharon Williams. Bass

denied that there was any altercation or drama between anyone in his group and Breaux or Williams.

Bass recalled that on his way home from the convenience store, he realized that the Cadillac from the store was following closely behind his Suburban. However, when Bass turned into his driveway, the Cadillac kept going straight so he thought nothing more of the driver's odd behavior. Bass testified that just a short time later, he observed the same Cadillac traveling very slowly down the street back towards his house. He recalled that the Cadillac pulled onto the street by his house and into an area that was so dark that he could no longer see the Cadillac. Bass testified that he believed someone opened the door to the Cadillac because he saw the lights on the bottom of the door light up. Right after seeing the lights on the door, Bass started hearing gun shots. He testified that his son Gerald was shot twice and his son Kelly was shot, as well. Another person at the party was also shot. Although Bass did not see Breaux shooting, he testified he believed that Breaux was the person that shot his sons.

Sharon Williams testified that Breaux drove her to the convenience store that night because she wanted to purchase some beer and cigarettes. She recalled that while in the convenience store, some of the men from the Suburban were flirting with her but denied that they were rude or disrespectful to her. She recalled that

before leaving the parking lot, she witnessed a "whole bunch of eyeing and staring, eyes staring at each other." She testified that when she and Breaux left the store, Breaux followed the Suburban for a time, and when the Suburban turned into a yard, Breaux circled the block, and then drove back to where the Suburban had stopped. Williams testified that after Breaux parked the car, he opened the car door, put one foot out of the car, and then started shooting at the house. She testified that after Breaux finished shooting, he got back in the car and drove off. Williams recalled that she told Breaux that he had probably shot someone, and that Breaux responded, "Yeah, I probably did. I probably popped 'em."

The jury found Breaux guilty of capital murder. The trial court sentenced Breaux to life without parole in the Texas Department of Criminal Justice, Institutional Division. Breaux appealed the trial court's judgment.

II. Challenge for Cause

In his first issue, Breaux argues that the trial court committed reversible error in granting the State's challenge for cause and removing a venire member from the panel. The State argues that Breaux waived any complaint on appeal as to the trial court's decision to grant the challenge for cause as to this venire member when Breaux failed to object at trial. Our review of the record shows that Breaux did not object when the State challenged this panel member and moved to strike

her for cause, nor did he object when the trial court struck the panel member for cause. Consequently, we conclude that Breaux waived this complaint on appeal. *See* Tex. R. App. P. 33.1; *see also Butler v. State*, 872 S.W.2d 227, 233–34 (Tex. Crim. App. 1994) (providing that defendant's failure to object waived any alleged error by the trial court in granting State's challenge for cause). We overrule Breaux's first issue.

III. Motion for Mistrial

In his second issue, Breaux argues that the trial court erred in denying his motion for mistrial when the prosecutor interjected an improper comment during direct examination of one of the State's witnesses. Breaux contends that the error constituted egregious harm that could not have been cured by an instruction to disregard.

The comment at issue was made during the State's direct examination of State's witness, Tamikka Scott. Scott testified that she was in a relationship with Breaux at the time of the incident but was not with him the night of the incident. She later spoke to him about the shootings and testified that she asked Breaux if he was involved in the shootings, and he denied it. The State then asked Scott if Breaux told her that "someone else did it[.]" Scott responded, "Well, just the stuff -- I mean, I don't know this guy. All I know was his name is N and O." The State

then asked, "So, do you think that . . . [Breaux's] covering up for him? Do you think he's been in jail for six years covering up for someone?" Defense counsel objected to the State's question, explaining that it was improper, not relevant, and highly prejudicial. Breaux's counsel asked the trial court for an instruction to the jury to disregard the question. The State withdrew the question, and the trial court sustained the objection and instructed the jury to disregard the question. Defense counsel then asked the trial court to declare a mistrial, which the trial court denied.

Assuming without deciding that the State's comment was improper, we analyze the trial court's denial of defense counsel's request for a mistrial. We review a trial court's denial of a motion for mistrial under an abuse of discretion standard. *Archie v. State*, 340 S.W.3d 734, 738–39 (Tex. Crim. App. 2011). To determine whether the trial court abused its discretion in denying a mistrial in this context, we balance the severity of the misconduct (the prejudicial effect of the prosecutor's remarks) with the trial court's curative measures and the certainty of conviction absent the misconduct. *See id*. at 739; *Delacerda v. State*, 425 S.W.3d 367, 388-89 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd). A mistrial is the appropriate remedy only when the State's objectionable conduct is so inflammatory that the trial court's curative instructions are unlikely to prevent the jury from being unfairly prejudiced against the defendant. *Id*. (quoting *Young v.*

State, 137 S.W.3d 65, 71 (Tex. Crim. App. 2004)). A mistrial is required only in extreme circumstances. *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004).

We do not believe the prejudicial effect, if any, from the State's comment was highly prejudicial or incurable. First, the State's comment was brief and made during the direct examination of a witness. The State did not repeat or otherwise emphasize the question or any comment contained therein, but rather immediately withdrew the question after defense counsel's prompt objection.

Concerning the second factor, the trial court immediately instructed the jury to disregard the comment. Generally, a prompt instruction to disregard will cure error associated with an improper question and answer. *Ovalle v. State*, 13 S.W.3d 774, 783 (Tex. Crim. App. 2000). Here, the prosecutor's question was not of such "'damning character'" that it would be impossible to remove the harmful impression from the minds of the jurors. *See Young v. State*, 283 S.W.3d 854, 878 (Tex. Crim. App. 2009) (quoting *Rojas v. State*, 986 S.W.2d 241, 250 (Tex. Crim. App. 1998)). Additionally, we presume the jury obeyed the instruction and that it was effective. *See Archie*, 340 S.W.3d at 741; *Holland v. State*, 249 S.W.3d 705, 707–708 (Tex. App.—Beaumont 2008, no pet.). There is nothing in the record to indicate the jury did not follow the court's instruction.

Finally, the evidence supporting Breaux's conviction is strong. Bass testified that Breaux followed him home from the convenience store. Bass also testified that while Breaux did not initially stop at Bass's home, the Cadillac Breaux was driving returned to Bass's house shortly after they had arrived home and pulled into a dark area of the street. Sharon Williams testified that she was with Breaux in the Cadillac that night and confirmed that she and Breaux were the only occupants of the Cadillac during the incident. She testified that she and Breaux followed Bass home, that Breaux circled the block and parked by Bass's home, and that Breaux started firing a weapon at Bass's home.

The State also offered testimony and some evidence showing gunshot residue from the steering wheel of the Cadillac Breaux was driving and from the driver's side floorboard. The detective assigned to investigate the case testified that they located Breaux, and he gave a statement to officers. The officer testified as to the contents of Breaux's statement, which we summarize herein. Breaux stated that he had gone to the convenience store that night with Sharon Williams and a man named Junior. While Sharon was in the store, Breaux spotted a group of black males in a Suburban. Breaux recognized the men because he had problems with them earlier that day. According to Breaux, upon leaving the convenience store, the Suburban cut him off. After the Suburban cut him off, several black men

stepped out of the Suburban and told Breaux that they were going to get him and then they jumped back into the Suburban and left. Thereafter, Breaux decided to try to locate the Suburban. He found the Suburban at an address on Ironton, and pulled off onto the street in front of the house. After he pulled off, several of the men from the Suburban came over to Breaux's vehicle and began banging on his window. He claimed that some of the men had guns. Breaux stated to officers that he had no choice but to pull out his pistol. Breaux recalled "fire" coming out of his gun and then claimed he blacked out. Given the evidence before the jury, the likelihood of Breaux's conviction absent the prosecutor's statement was high.

For all of these reasons, we conclude the trial court did not abuse its discretion in denying Breaux's motion for mistrial. We overrule Breaux's second issue.

IV. Improper Argument

In his third issue, Breaux argues that the trial court committed reversible error in overruling his objection to the State's improper argument during closing argument. Breaux contends that the prosecutor was striking at him over the shoulders of his defense counsel.

During closing argument, the prosecutor stated, "But that's what the Defense's job is to do is to make something small a big deal to keep you from

focusing on the real issue." Defense counsel immediately objected to the comment and explained that defense counsel's job was "to seek truth and justice." The trial court overruled the objection and instructed the State to proceed.

We review the trial court's ruling on an objection to improper jury argument for an abuse of discretion. *See Garcia v. State*, 126 S.W.3d 921, 925 (Tex. Crim. App. 2004). Proper jury argument falls within one of four categories: (1) summation of the evidence; (2) reasonable deductions from the evidence; (3) answer to an argument of opposing counsel; and (4) appropriate plea for law enforcement. *Freeman v. State*, 340 S.W.3d 717, 727 (Tex. Crim. App. 2011). A prosecutor may properly comment on the merits of defense counsel's argument. *See Garcia*, 126 S.W.3d at 925. However, a prosecutor's argument runs a risk of improperly striking at a defendant over the shoulder of counsel when it is made in terms of defense counsel personally and when it explicitly impugns defense counsel's character. *Brown v. State*, 270 S.W.3d 564, 572 (Tex. Crim. App. 2008)(quoting *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998)).

Here, the State argues that the comment in question was made in response to statements made by defense counsel during his closing argument. The State contends that during his closing argument, defense counsel listed each and every possibility of doubt, even if unreasonable given the evidence presented, in order to

plant in the jurors' mind that there was reasonable doubt as to Breaux's guilt. For example, defense counsel stated,

> And you even heard that this was a thorough investigation. A thorough investigation when no one went and talked to anyone at that party. No one. Hey, was Junior here? Never asked. Let's assume he doesn't exist. Although later, a guy files an affidavit, and in it he says there's Mr. Breaux in the car and two occupants. Oh, we don't have to investigate that.

While counsel referenced an affidavit that would have placed two other people in the car with Breaux the night of the incident, the affidavit was not introduced into evidence. A retired investigator with the D.A.'s office testified that he had authored an affidavit to obtain a search warrant in this case and in the process of doing that, was told that there were three people in the Cadillac. However, he admitted that he had no personal knowledge of the facts of the case.

During his closing argument, defense counsel also made a number of references questioning the thoroughness of the police officers' investigation of this offense. Specifically, counsel questioned officers' failure to fully investigate whether someone else was in the Cadillac and whether that person was the shooter.

In the statement Breaux gave to officers, he indicated that there was a man named Junior in the Cadillac with them that night. According to the detective on the case, Breaux did not give officers any other information about "Junior" and they were unable to locate Junior or even confirm his existence. The detective

testified that none of the witnesses he had spoken to were familiar with the person Breaux referred to as "Junior." Most importantly, even if Junior did exist, and was in the car that night with Breaux, Breaux did not tell officers that Junior was the shooter. Thus, the State's comment suggesting that defense counsel was essentially attempting to distract the jury away from the real issue in the case, could reasonably be interpreted as a response to defense counsel's tactic in arguing the existence of "Junior."

During his closing argument, defense counsel also made the following statement: "Then we have the video of them at the store. I submit to you they've all been drinking and some had been smoking a little dope and they were confused." However, there is no evidence in the trial record to support that anyone had been smoking dope. Defense counsel also argued, "You know, then we heard evidence there are two Cadillacs. Ms. Scott, [w]ell, I got a Cadillac looks kinda like that one. Did they check her Cadillac?" However, there is no testimony in the record to support that there were two Cadillacs.

In this case, the prosecutor's comment that it was defense counsel's job to distract the jury from the real issue of the case appears to have been made in response to the defense's theories and arguments and was, therefore, proper argument. *See Garcia*, 126 S.W.3d at 925 (concluding that the prosecutor did not

engage in improper argument but was responding to defense counsel's theories and arguments when he told the jury that defense counsel was "going to argue that hogwash that you've heard"); *Maxwell v. State*, 253 S.W.3d 309, 319 (Tex. App.—Fort Worth 2008, pet. ref'd) (concluding that the State's argument that defense counsel was trying to put everyone else on trial was proper argument in response to defense counsel's argument questioning State's witnesses); *Howard v. State*, No.14-99-01004-CR, 2003 WL 21195473, at *7-8 (Tex. App.—Houston [14th Dist.] May 22, 2003, pet. ref'd) (op. on reh'g) (not designated for publication) (concluding that the State's argument that defense counsel was trying to distract the jury from the truth was not an improper argument but was a proper response to defense counsel's closing argument). We overrule Breaux's third issue.

V. Error in the Written Judgment

On review of the record, we observed that the written judgment of conviction in this case contains non-reversible clerical error. The judgment of conviction states that the "Statute for Offense" is "19.03(a)(6)(A)[.]" However, the applicable statutory provision for the offense is "19.03(a)(7)(A)[.]" This Court has the authority to modify the trial court's judgment to correct clerical errors. *See* Tex. R. App. P. 43.2(b) (providing that the court of appeals may "modify the trial court's judgment and affirm it as modified"); *Bigley v. State*, 865 S.W.2d 26, 27–

28 (Tex. Crim. App. 1993) (holding that the court of appeals has the power to reform judgments to correct clerical errors); *Asberry v. State*, 813 S.W.2d 526, 529–30 (Tex. App.—Dallas 1991, pet. ref'd) (holding that the court of appeals has the authority to *sua sponte* correct clerical errors in the trial court's judgment to "speak the truth"). Accordingly, we modify the judgment to reflect that the "Statute for Offense" is "19.03(a)(7)(A)."

Having overruled all of Breaux's issues on appeal, we affirm the judgment of the trial court as modified.

AFFIRMED AS MODIFIED.

CHARLES KREGER
Justice

Submitted on July 8, 2015
Opinion Delivered September 28, 2016
Do not publish

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