In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-15-00462-CR

TUAD DAMONN WASHINGTON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 9th District Court
Montgomery County, Texas
Trial Cause No. 13-01-00068-CR Count 1

MEMORANDUM OPINION

A jury convicted appellant Tuad Damonn Washington as an habitual offender of aggravated assault of a public servant with a deadly weapon, and the trial court assessed punishment at life imprisonment. In eight appellate issues, Washington challenges the sufficiency of the evidence that he intentionally or knowingly threatened the victim, the sufficiency of the evidence supporting the deadly weapon finding, the trial court's overruling of his objection to evidence of his extraneous offenses or bad acts, the trial court's failure to declare a mistrial after the prosecutor's

allegedly improper comments on the weight of the evidence and incorrect statements of the law, the trial court's denial of his motion to dismiss for an alleged violation of Due Process, the State's use of its peremptory challenges to remove a potential juror allegedly based upon race, and the trial court's alleged failure to guarantee his right to trial by an impartial jury. He also contends that his punishment was cruel and unusual. We affirm the trial court's judgment.

FACTUAL BACKGROUND

The State charged Washington with aggravated assault of a public servant with a deadly weapon and aggravated assault of a security officer with a deadly weapon, "to-wit: a motor vehicle[.]" The incident involved two alleged victims: Doug Houstoun and Anthony Bernius. Houstoun was working as a deputy for the Montgomery County Sheriff's Department on the date in question. He testified that he was assigned to patrol the district that includes The Woodlands Mall. Houstoun was in uniform and was driving a marked patrol car when he went to assist a mall security officer.

Upon arriving at the scene, Houstoun saw a marked mall security vehicle. As Houstoun approached Washington's vehicle, he saw Washington sitting inside the car. Houstoun instructed Washington to put the window down and open the door, and Washington briefly looked at Houstoun. Washington failed to respond, put the

car into reverse, and began to accelerate backward, and Houstoun raised his weapon and shouted at Washington to stop. Houstoun explained that the mall security vehicle was to the rear of Washington's vehicle, "about halfway between each side of his vehicle." According to Houstoun, Washington "rammed" the mall security vehicle, in which Anthony Bernius was sitting, pulled forward, and rammed Bernius's vehicle a second time. Houstoun testified that he became fearful and felt threatened when Washington turned his vehicle toward Houstoun to flee the scene. Houstoun continued to point his weapon toward Washington, and Houstoun fired his weapon because he feared that Washington was not going to stop. Washington then stopped his vehicle immediately. After Washington got out of the vehicle, he told Houstoun that he wanted Houstoun to kill him. Two video recordings of the incident were admitted into evidence.

Anthony Bernius testified that on the date in question, he was employed as a non-commissioned uniformed security officer with Allied Barton Security, the security contractor for The Woodlands Mall. Bernius explained that he was driving a patrol vehicle that had security decals that said "The Woodlands Mall Security" and had red, blue, and green flashing lights on its roof. Bernius was dispatched to investigate someone for suspicious transactions and purchases, and he went to the area where the suspect might be coming out of the mall and parked behind the

suspect's vehicle to detain the suspect until the sheriff's department arrived. At trial, Bernius identified Washington as the suspect. Bernius testified that in his vehicle's side mirror, he saw Houstoun draw his gun and he observed Washington's reverse lights. Bernius tried to move his vehicle out of the way. Washington's vehicle nevertheless struck Bernius's vehicle twice, and Bernius saw Houstoun repeatedly instructing Washington to stop.

According to Bernius, Houstoun was "backpedaling with his gun drawn." Bernius testified that he was concerned for Deputy Houstoun's safety "[b]ecause it was a vehicle versus a human being and he wasn't stopping." Bernius explained that he felt threatened and was concerned for his own safety because if Houstoun missed his target, Bernius could have been shot. Bernius testified that Washington's vehicle was still moving toward Houstoun when Houstoun fired his weapon, and Washington stopped after Houstoun fired. According to Bernius, after Houstoun fired, several sheriff's deputies "swarmed" Washington's vehicle, and Washington was taken into custody. Bernius testified that Washington damaged Bernius's vehicle by backing into it twice and testified regarding photographs that depicted the damage. Bernius explained that he was not treated by EMS and did not go to the hospital after the incident.

Thomas Thrash, the security director for Allied Barton Security at The Woodlands Mall, testified that Bernius was employed with Allied Barton as a non-commissioned security officer on the date in question. Thrash testified that he was investigating Washington regarding suspicious transactions and purchases, so he contacted the sheriff's department. Thrash saw Washington's vehicle back up and strike Bernius's vehicle, so Thrash radioed Bernius and instructed him to move out of the way. Thrash testified that he also saw Washington's vehicle coming straight toward Houstoun. According to Thrash, Houstoun told Washington to stop "at least two or three times[.]" Thrash explained that he believed Houstoun was in danger. Thrash testified that when Houstoun fired his weapon, Washington "[i]mmediately came to a stop." Thrash identified Washington as the suspect in court.

Detective Keith Echols of the Montgomery County Sheriff's Office testified that he interviewed Washington after Washington was taken into custody and had waived his rights. Video recordings of the interview were entered into evidence. Washington's counsel moved for a mistrial on the grounds that the recording contained a reference by Washington to the color of the shirts the sheriff's department personnel wore during this occurrence versus what they wore previously. Washington's counsel asserted that the statement constituted a reference to "prior exposure with the police, which I think is inadmissible[.]" The trial court overruled

the objection and noted that Washington's comment did not necessarily "allude[] to or make[] any reference to any prior criminal contact or police contact[.]"According to Echols, during the interview, Washington said that he wanted Houstoun to kill him. Echols testified that Washington never complained about being unable to hear Houstoun. Echols explained that Washington never said he wanted to harm or kill Houstoun or Bernius.

Dr. Sparks Veasey, the director of forensic services for Montgomery County, testified that he has done numerous autopsies of people who have died as the result of an auto-pedestrian accident, and he has also been asked to assess the potential injuries a person could sustain from particular types of weapons. Veasey explained that he has previously testified in court regarding whether a particular item satisfies the legal definition of a deadly weapon. Veasey testified that he reviewed the video recordings from The Woodlands Mall and Houstoun's patrol vehicle, as well as photographs of the damage to Bernius's vehicle and photographs of the scene. Veasey testified that the legal definition of a deadly weapon includes anything that in the manner of its use or intended use is capable of causing death or serious bodily injury. Veasey opined that the manner in which Washington was using his motor vehicle made the vehicle capable of causing serious bodily injury. According to Veasey, Washington's vehicle

> was not going very fast, but the vehicle hitting the deputy with the deputy facing him and bending his knees back can disrupt a knee severely and impair that person for the rest of his life. A vehicle running over a foot can break that foot and that may create a serious loss of the function of that foot[.]

Veasey explained that if the vehicle knocks a person off his feet, secondary injuries, such as head and chest injuries, can occur. Veasey testified that if Washington's vehicle had struck someone, it could have caused serious bodily injury. During cross-examination, Veasey testified that Bernius was not injured when his vehicle was struck, and Veasey agreed with counsel's assertion that "practically anything[]" is capable of causing serious bodily injury. The State rested after Veasey testified. Washington's counsel asserted that the evidence of a deadly weapon was legally insufficient and moved for a directed verdict. The trial court denied the motion.

Private investigator James McDougal, a former peace officer, testified that he was hired to assist defense counsel with investigating Washington's case. McDougal testified that he photographed Washington's vehicle on two occasions, and the photographs were admitted into evidence. During cross-examination, McDougal testified that he would not want to be standing in front of the vehicle if it were headed toward him because he could be seriously injured. McDougal testified that if someone were driving toward him while he was brandishing his weapon and ordering the person to stop, he would probably feel threatened. McDougal testified

that he would have advised an officer in a similar situation not to stand in front of a vehicle. According to McDougal, if someone were driving a vehicle toward an officer and subsequently told the authorities that he wanted the officer to kill him, the driver intended to threaten the officer with the vehicle.

Traffic accident reconstructionist Randy Pazzaglia testified that he applies accepted scientific methods, such as those of engineering and physics, to evidence that has been collected and tests theories related to the accident. Pazzaglia testified that the defense retained him to investigate Washington's case, and he explained that he reviewed the police report, narratives from police officers, arrest reports, police photographs, and the surveillance video from mall security. Pazzaglia testified that he also researched and obtained the specifications of Washington's vehicle, such as its weight and dimensions.

Pazzaglia explained that because the surveillance video has a clock on it, he could estimate the vehicle's rate of acceleration and speed, and he testified that he used a 3D accident reconstruction simulator in performing his analysis. Pazzaglia testified that he was unable to reconstruct the entire accident, but that he "did feel that there was adequate information from the time that [Washington's vehicle] pulled forward and stopped and then backed up and struck the vehicle a second time[.]" According to Pazzaglia, "[t]he results of the simulation showed that

[Washington's vehicle] never . . . exceeded four miles per hour either in reverse or forward." Pazzaglia testified that the simulator predicted that the speed of Washington's vehicle when it struck Bernius's vehicle the second time was "a little over two and a half miles per hour." Pazzaglia also testified that although he could not estimate the speed of the first collision, based upon the damage to the vehicles, he believed the first collision did not exceed the speed of the second collision. According to Pazzaglia, the average speed that a human being can run is approximately twenty-four or twenty-five miles per hour.

During cross-examination, Pazzaglia testified that although he would not feel safe with a vehicle driving toward him at a speed of four miles per hour, he would feel that he could outrun it. Pazzaglia testified that if a car traveling four miles per hour struck a person, it would probably injure the person. At the conclusion of Pazzaglia's testimony, the defense again moved for a directed verdict on the grounds that there was "no evidence that this use of the vehicle was capable of causing serious bodily injury outside of a hypothetical situation, which the Courts have said . . . is legally insufficient." The trial court denied the motion. The jury convicted Washington of aggravated assault of a public servant (Houstoun), acquitted him of the charge of aggravated assault of a security officer, and the trial court assessed punishment at life imprisonment.

ISSUES ONE AND TWO

In his first issue, Washington argues that the evidence was legally insufficient to show that he intentionally or knowingly threatened Houstoun with imminent bodily injury. In his second issue, Washington contends that the evidence was legally insufficient to support the deadly weapon finding. We address issues one and two together.

In reviewing the legal sufficiency of the evidence, we review all the evidence in the light most favorable to the verdict to determine whether any rational fact finder could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). The fact finder is the ultimate authority on the credibility of witnesses and the weight to be given their testimony. *Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. [Panel Op.] 1981). We give full deference to the fact finder's responsibility to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Hooper*, 214 S.W.3d at 13. If the record contains conflicting inferences, we must presume that the fact finder resolved such facts in favor of the verdict and defer to that resolution. *Brooks v. State*, 323 S.W.3d 893, 899 n.13 (Tex. Crim. App. 2010); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We "'determine

whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict.'" *Clayton*, 235 S.W.3d at 778 (quoting *Hooper*, 214 S.W.3d at 16-17). "'Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt.'" *Id*. (quoting *Hooper*, 214 S.W.3d at 13).

A person commits the offense of aggravated assault if the person commits assault as defined in section 22.01 of the Penal Code and uses a deadly weapon. Tex. Penal Code Ann. § 22.02(a)(2) (West 2011). Section 22.01(a)(2) of the Penal Code provides that a person commits the offense of assault if the person "intentionally or knowingly threatens another with imminent bodily injury[.]" *Id*. § 22.01(a)(2) (West Supp. 2016). A person acts intentionally "when it is his conscious objective or desire to engage in the conduct or cause the result[,]" and a person acts knowingly "when he is aware of the nature of his conduct or that the circumstances exist." *Id*. § 6.03(a), (b) (West 2011). The jury may infer intent from circumstantial evidence, such as the defendant's acts, words, and conduct. *Guevara v. State*, 152 S.W.3d 45, 49-50 (Tex. Crim. App. 2004).

The Penal Code defines "deadly weapon" as "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." Tex.

Penal Code Ann. § 1.07(a)(17)(B) (West Supp. 2016). The Penal Code defines "serious bodily injury" as "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." *Id*. § 1.07(a)(46). The plain language of the statute does not require that the actor actually intend to cause death or serious bodily injury. *Smith v. State*, 316 S.W.3d 688, 696 (Tex. App.—Fort Worth 2010, pet. ref'd); *see also* Tex. Penal Code Ann. § 1.07(a)(17). A car may constitute a deadly weapon. *Callison v. State*, 218 S.W.3d 822, 827 (Tex. App.—Beaumont 2007, no pet.); *Butler v. State*, 928 S.W.2d 286, 288 (Tex. App.—Fort Worth 1996, pet. ref'd). "To be legally sufficient to sustain a deadly weapon finding, the evidence must show that: (1) the alleged deadly weapon meets the statutory definition; (2) the defendant used or exhibited the deadly weapon while committing the crime for which he was convicted; and (3) other people were actually endangered." *Callison*, 218 S.W.3d at 826 (citing *Cates v. State*, 102 S.W.3d 735, 738 (Tex. Crim. App. 2003)).

The jury heard evidence that Deputy Houstoun instructed Washington to roll down his window and open the door, and Washington looked briefly at Houstoun. The jury also heard evidence that Washington put his vehicle into reverse and accelerated. In addition, the jury heard evidence that Washington twice rammed the

mall security vehicle in which Bernius was sitting. The jury heard evidence that Houstoun felt threatened, began backpedaling with his gun drawn, and discharged his weapon when Washington turned the vehicle toward Houstoun. Furthermore, Washington told Houstoun and other authorities that he wanted Houstoun to kill him.

Viewing the evidence in the light most favorable to the verdict, we conclude that the evidence supporting the finding that Washington acted intentionally or knowingly is legally sufficient. *See* Tex. Penal Code Ann. §§ 6.03(a), (b), 22.01(a)(2), 22.02(a)(2); *Godsey v. State*, 719 S.W.2d 578, 583 (Tex. Crim. App. 1986); *see also Jackson*, 443 U.S. at 319; *Brooks*, 323 S.W.3d at 899 n.13; *Clayton*, 235 S.W.3d at 778; *Hooper*, 214 S.W.3d at 13; *Penagraph*, 623 S.W.2d at 343. If Washington's objective was to force Houstoun to kill him, Washington had to demonstrate a credible threat that would justify Houstoun's use of deadly force. *See Godsey*, 719 S.W.2d at 583. In addition, viewing the evidence in the light most favorable to the verdict, we conclude that the evidence supporting the deadly weapon finding was legally sufficient. *See* Tex. Penal Code Ann. § 1.07(a)(17), (46); *Smith*, 316 S.W.3d at 696; *Callison*, 218 S.W.3d at 827; *Butler*, 928 S.W.2d at 288. In this case, the jury heard evidence from which it could conclude that Washington's vehicle met the statutory definition of a deadly weapon; Washington used a deadly weapon while committing the crime; and Houstoun was actually endangered. *See*

Callison, 218 S.W.3d at 827. Washington struck Bernius's vehicle twice, and Washington was driving his vehicle toward Houstoun while Houstoun was moving backward with his weapon drawn and ordering Washington to stop. Accordingly, we overrule issues one and two.

ISSUE THREE

In his third issue, Washington contends the trial court erred by overruling his objection to evidence of his extraneous offenses or bad acts. Specifically, Washington complains of the admission of his videotaped interview with the authorities following his arrest, because during a portion of the video, the interviewing officer stated that part of a police officer's job is "to protect [Appellant] from the things that he was doing to the community."

We review a trial court's admission of extraneous-offense evidence under an abuse of discretion standard. *Rankin v. State*, 974 S.W.2d 707, 718 (Tex. Crim. App. 1998). "A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party[.]" Tex. R. Evid. 103(a); *see* Tex. R. App. P. 44.2(b). We will not overturn a conviction if, after an examination of the record as a whole, we have fair assurance that the error did not influence the jury or had but slight effect. *Taylor v. State*, 268 S.W.3d 571, 592 (Tex. Crim. App. 2008).

At the outset, we conclude that it is unclear whether the complained-of evidence even constituted evidence of an extraneous offense or bad act. However, assuming without deciding that the complained-of evidence did refer to extraneous offenses or bad acts, viewing the record as a whole, we have fair assurance that the error did not influence the jury or had only a slight effect. *See Taylor*, 268 S.W.3d at 592. We overrule issue three.

ISSUE FOUR

In issue four, Washington contends the trial court erred by refusing to declare a mistrial after the prosecutor's allegedly improper comments on the weight of the evidence and incorrect statements of the law during closing argument. Specifically, Washington complains that the following statements by the prosecutor warranted a mistrial: (1) "You have a limited amount of defenses you can make. Another defense that you do is to put the officers on trial[]" and (2) "the threatening and the deadly weapon go hand in hand. He's either guilty of agg[ravated] assault with a deadly weapon or he's not guilty of anything, folks. Because if you believe that he threatened, then you have to believe that his intent was to use that vehicle to cause injury to Doug Houstoun so that he can effectuate getting out of there."

The record reflects that defense counsel objected to both of the prosecutor's statements, and the trial court overruled the objections, but defense counsel did not

ask the trial court to declare a mistrial, either when the prosecutor made the statements or at the conclusion of the prosecutor's argument. As stated above, Washington complains on appeal that the trial court erred by not declaring a mistrial, not that the trial court overruled his counsel's objections. To preserve a complaint for appellate review the record must show that the party made the complaint to the trial court by a timely request, objection, or motion that stated the grounds for the ruling with sufficient specificity to make the trial court aware of the complaint. Tex. R. App. P. 33.1(a)(1)(A). In addition, the issue raised on appeal must comport with the objection made at trial. *Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002). Because Washington did not request a mistrial, he may not complain on appeal about the failure to declare a mistrial. *See* Tex. R. App. P. 33.1(a)(1)(A); *Wilson*, 71 S.W.3d at 349. We overrule issue four.

ISSUE FIVE

In his fifth issue, Washington argues that the trial court erred by denying his motion to dismiss the case for an alleged Due Process violation. Specifically, Washington complains that the State's seizure and sale of Washington's vehicle constituted spoliation because the vehicle's speakers had been removed, so trial counsel could not "show the jury that the vehicle had speakers and that [Washington]

was listening to music[,] which was why he did not hear . . . Houstoun when he told him to stop."

The State has a duty to preserve exculpatory evidence, and its good or bad faith in failing to do so is irrelevant. *Ex parte Napper*, 322 S.W.3d 202, 229 (Tex. Crim. App. 2010). "[W]hen the destruction of potentially useful evidence is at issue, the defendant must show 'bad faith' on the part of the State in destroying the evidence in order to show a violation of due process." *Id*. "Exculpatory evidence is . . . evidence which tends to justify, excuse[,] or clear the defendant from alleged fault or guilt." *Little v. State*, 991 S.W.2d 864, 866-67 (Tex. Crim. App. 1999).

Washington was required to affirmatively show that the vehicle was favorable to his defense. *See White v. State*, 125 S.W.3d 41, 44 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd). As discussed above, the jury heard evidence that Washington briefly looked at Houstoun when Houstoun approached the vehicle, as well as evidence that Washington said he wanted Houstoun to kill him. To cause Houstoun to use deadly force, Washington had to demonstrate that he posed a credible threat to Houstoun. *See Godsey*, 719 S.W.2d at 583. The jury further heard evidence that Washington drove his vehicle directly toward Houstoun. Washington does not point to evidence in the record to show that the vehicle would have justified, excused, or cleared him from guilt. *See Little*, 991 S.W.2d at 886-67.

The record must demonstrate bad faith to establish a constitutional violation:

> "Bad faith" is more than simply being aware that one's action or inaction could result in the loss of something that is recognized to be evidence. . . . [B]ad faith entails some sort of improper motive, such as personal animus against the defendant or a desire to prevent the defendant from obtaining evidence that might be useful. Bad faith cannot be established by showing simply that the analyst destroyed the evidence without thought, or did so because that was the common practice, or did so because the analyst believed unreasonably that he was following the proper procedure.

Napper, 322 S.W.3d at 238. The record does not demonstrate any improper motive, personal animus against Washington, or an intention to prevent Washington from obtaining potentially useful evidence, and Washington does not identify any such evidence. *See id*. Because the record fails to demonstrate that the evidence was exculpatory or that potentially useful evidence was lost as a result of bad faith by the State, we overrule issue five.

ISSUE SIX

In his sixth issue, Washington argues that the State used its peremptory challenges to remove a potential juror from the jury pool based upon race. According to Washington, the prosecutor used a peremptory challenge to strike venireperson number fifty-eight, who was the only remaining black female after challenges for cause. Defense counsel made a *Batson* challenge, which the trial court overruled.

The Equal Protection Clause forbids the State from exercising peremptory strikes based solely on a potential juror's race. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986); *Nieto v. State*, 365 S.W.3d 673, 675 (Tex. Crim. App. 2012). To make a *Batson* claim, (1) the defendant must make a *prima facie* showing of racial discrimination; (2) if the defendant makes this showing, the State must then articulate a race-neutral explanation for the strike; and (3) the trial court must determine if the defendant has proved purposeful discrimination. *Nieto*, 365 S.W.3d at 676. Absent exceptional circumstances, we defer to the trial court's ruling. *Id*. We consider the entire voir dire record, but we need not limit our review to the specific arguments presented to the trial court. *Id*. We focus on the genuineness, not the reasonableness, of the asserted non-racial motive. *Id*. We may not substitute our judgment for that of the trial court in deciding that the State's explanation was a pretext. *Id*. We will sustain the trial court's ruling unless it is clearly erroneous. *Id*.

The record reflects that toward the end of the State's voir dire, the prosecutor asked, "Anybody here know anybody who is currently incarcerated?" Veniremember fifty-eight and nineteen other veniremembers responded affirmatively. The prosecutor then asked whether knowing someone who is incarcerated would "potentially sway you one way or the other to where you're either

going to hold that against me or the State or hold that against the defendant[.]" None of the jurors responded affirmatively.

After the challenges for cause and peremptory challenges, defense counsel stated that she was asserting a *Batson* challenge because veniremember fifty-eight "was the only black female who was left after challenges for cause and the State used a peremptory strike to strike her." The prosecutor responded that he could give reasons for why he struck each person. The prosecutor explained that veniremember fifty-eight and six other veniremembers were all on two lists and were struck for the same reason. The prosecutor stated, "I didn't even know the races for the various people, but . . . they were on both of those lists." The State indicated that the two lists contained people who had responded affirmatively to the State's question about knowing someone who was incarcerated or had been formerly incarcerated and who responded in a particular manner to defense counsel's first sliding scale question. Defense counsel's first sliding scale question was whether prospective jurors agree that people's misfortunes result from the mistakes they make. The trial judge noted that veniremember fifty-eight had responded to both questions in the manner the State indicated it found objectionable, as had several other veniremembers on which the State exercised its peremptory challenges.

Washington argues on appeal that the prosecutor's question about which veniremembers knew someone who was incarcerated "is not a race neutral question as it is a well-known fact that African-American incarceration rates are much higher than other ethnic groups[]" and that the question is "designed to improperly deny African-Americans their [c]onstitutional right to serve on a jury for an ostensibly race neutral reason. In addition, Washington asserts that the prosecutor's assertion regarding the sliding scale question is incorrect because "[t]here was no third sliding scale question." As explained above, the record reflects that the State was referring to defense counsel's first "sliding scale question[,]" which she identified as such before she asked it.

The State articulated its reasons for peremptorily striking veniremember fifty-eight, and the trial court ruled on the issue of discrimination. *See Young v. State*, 283 S.W.3d 854, 866 (Tex. Crim. App. 2009). We now proceed to a review of whether the trial court's ruling that there was no discriminatory intent was clearly erroneous. *See id*. The reason for exercising a peremptory strike is race neutral, unless a discriminatory intent is inherent in the explanation given by the prosecutor. *See Purkett v. Elem*, 514 U.S. 765, 768 (1995). The State's explanation need not be persuasive or even plausible. *Id*. at 767-68. The persuasiveness of the justification is

relevant to the trial court's determination of whether the opponent of the strike proved purposeful discrimination. *Id*. at 768.

Viewing the entire voir dire record, we conclude that the trial court's finding that the State's explanation was race-neutral is supported by the record and is not clearly erroneous. *See id*. The trial court did not abuse its discretion by overruling Washington's *Batson* challenge. Accordingly, we overrule issue six.

ISSUE SEVEN

In his seventh issue, Washington contends the trial court failed to guarantee his right to an impartial jury because the trial court (1) refused to dismiss a juror who opened the courtroom doors and allegedly saw Washington in handcuffs and (2) the van transporting Washington could have been seen by the jury shortly before Washington appeared in the courtroom. Washington asserts that "[t]he situation infringed on [his] constitutional presumption of innocence[]" and tainted the jury.

Before trial began, one of the jurors opened the door to the courtroom to retrieve a water bottle she had forgotten. At a bench conference outside the presence of the jury, the trial court asked the juror whether she saw anything that was going on in the courtroom, and she said that she did not. Defense counsel asked the juror how far into the courtroom she came, and the juror stated, "[j]ust behind the door[]" and stated "I didn't really see anything. She made it very clear for me to stay back."

Defense counsel asked the trial court to excuse the juror because Washington was in handcuffs when the juror opened the door and "there's too much of a chance that [the juror] saw something that she didn't realize what she saw or she wasn't being fully honest with the Court." Defense counsel also stated as follows:

> When they brought [Washington], . . . as they drove around the block, which would go under the windows of the jury room, the lights were blazing on top of the van, which may have . . . called their attention. Shortly thereafter, Mr. Washington appeared here in the courtroom, so we think that that was a sufficient clue for this jury to realize that he is in custody, which is a statement, and we would ask for a mistrial on that basis.

The trial court denied both defense counsel's motion for a mistrial and her request to excuse the juror.

We review a trial court's denial of a motion for mistrial under an abuse of discretion standard. *Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009). We consider "the evidence in the light most favorable to the trial court's ruling, considering only those arguments before the court at the time of the ruling." *Id*. We must uphold the trial court's ruling if it was within the zone of reasonable disagreement. *Id*. Mistrial is an appropriate remedy only when the error is highly prejudicial and incurable. *Id*. (citing *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004)). We review the trial court's denial of a motion to excuse a juror

for abuse of discretion. *Johnson v. State*, 773 S.W.2d 322, 330 (Tex. Crim. App. 1989).

Under the circumstances presented in this case, both the trial court and counsel questioned the juror about what she saw, and the juror explained that she did not see anything that was going on in the courtroom. The record contains no evidence that the jury saw the van that was transporting Washington to the courtroom, nor does Washington point to any such evidence. We conclude that the trial court's rulings were within the zone of reasonable disagreement and, therefore, did not constitute an abuse of discretion. *See Ocon*, 284 S.W.3d at 884; *see generally Johnson*, 773 S.W.2d at 330. Accordingly, we overrule issue seven.

ISSUE EIGHT

In his eighth issue, Washington argues that his sentence of imprisonment for life is cruel and unusual, and he contends that the severity of his sentence was "excessive and disproportionate." The record does not reflect that Washington raised this complaint in the trial court. *See* Tex. R. App. P. 33.1(a). However, even if Washington had preserved the issue for our review, his argument would still fail.

As discussed above, the indictment charged Washington with aggravated assault of a public servant with a deadly weapon. The indictment contained two enhancement paragraphs which alleged that Washington had been convicted in 1997

and 2007 of the felony offense of unlawful possession of a firearm by a felon. Aggravated assault is a first-degree felony if it is committed against (1) a public servant acting under color of his office or employment or (2) a person the actor knows is a public servant while the public servant is lawfully discharging an official duty. Tex. Penal Code Ann. § 22.02(b)(2)(A), (B) (West 2011). "An individual adjudged guilty of a felony of the first degree shall be punished by imprisonment in the Texas Department of Criminal Justice for life or for any term of not more than 99 years or less than 5 years." *Id*. § 12.32 (West 2011).

Even without the enhancement paragraphs, Washington faced the possibility of a sentence of life imprisonment. *Id*. § 22.02(b). Generally, a sentence that is within the range of punishment established by the Legislature will not be disturbed on appeal. *Jackson v. State*, 680 S.W.2d 809, 814 (Tex. Crim. App. 1984). In addition, a punishment that is within the statutory range for the offense is generally not excessive or unconstitutionally cruel and unusual. *Kirk v. State*, 949 S.W.2d 769, 772 (Tex. App.—Dallas 1997, pet. ref'd). Furthermore, assuming without deciding that Washington's sentence was disproportionate, the record contains no evidence reflecting what sentences are imposed for similar offenses in Texas or other jurisdictions by which to make a comparison. *Jackson v. State*, 989 S.W.2d 842, 846 (Tex. App.—Texarkana 1999, no pet.). For all of these reasons, we overrule issue

eight. Having overruled all of Washington's issues, we affirm the trial court's judgment.

AFFIRMED.

_____

STEVE McKEITHEN
Chief Justice

Submitted on December 12, 2016
Opinion Delivered February 15, 2017
Do Not Publish

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