

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-16-00289-CR

KENYARA OMAR HIGHTOWER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 9th District Court
Montgomery County, Texas
Trial Cause No. 15-03-02867-CR

MEMORANDUM OPINION

A jury found Kenyara Omar Hightower guilty of unlawful possession of a firearm by a felon. *See* Tex. Penal Code Ann. § 46.04 (West 2011). The jury found the allegations in the enhancement paragraphs of the indictment “true,” and assessed punishment at twenty-five years of confinement. On appeal, Hightower argues (1) the State failed to meet its burden of disproving Hightower’s necessity defense; (2) it was harmful error for the trial court to exclude certain testimony; and (3) the trial

court abused its discretion in denying Hightower's motion for mistrial after a witness improperly mentioned to the jury the punishment range. We affirm.

Background

Officer Dawn Leggett with the Conroe Police Department testified that she was on patrol on March 22, 2015, when she was dispatched to an apartment complex "in reference to a disturbance with weapons." According to Officer Leggett, dispatch gave a description of a man reportedly threatening to shoot the complainant's boyfriend, and Officer Leggett saw a man matching the description on the premises as she entered the gate of the complex. Officer Leggett testified that she detained the man, whom she identified at trial as Hightower, and put him in handcuffs. Officer Watley and Sergeant Kelemen also responded to the call and appeared at the scene. Officer Leggett explained that for law enforcement's safety she asked Hightower where the gun was, and he denied having a gun and initially said he only had a stick.

Officer Leggett testified that she went to Hightower's mother's apartment unit where the disturbance had occurred, and Officer Leggett obtained a statement from Hightower's mother. Officer Leggett explained to the jury that she also spoke to Taylor Yates (the original complainant and Hightower's niece), Marquis Williams (Yates's boyfriend), and Hightower's girlfriend. According to Officer Leggett, Sergeant Kelemen found a .410 shotgun at the scene. Officer Leggett testified that

after she read Hightower his *Miranda* rights, Hightower told her that Williams had pulled a knife and then Hightower left the apartment and got the gun. Officer Leggett explained at trial that Hightower's version of events was consistent with the other witnesses' versions, but none of the other witnesses reported seeing Williams with a knife. Officer Leggett arrested Hightower for possession of a firearm by a felon. A video recording from Officer Leggett's patrol car was admitted into evidence and played for the jury. According to Officer Leggett, the video depicts Hightower calling his mother from his cell phone while he is detained in the patrol car and arguing with his mother about what had happened.

Sergeant James Kelemen with the Conroe Police Department testified that he was the supervising sergeant on the scene and arrived shortly after Officer Leggett. According to Sergeant Kelemen, witnesses reported that a woman took the gun away from the suspect and the woman and the suspect ran around one of the buildings at the complex. Sergeant Kelemen testified that he backtracked where the witnesses described the couple had been, and he ran to the corner of the building and saw the .410 shotgun lying on the grass in plain view. Sergeant Kelemen explained that the underside of the firearm was wet from the ground but the top had no moisture on it "[s]o it had just recently been placed there."

Hightower's mother testified that on the day of the incident, she, her three great grandchildren, Williams, and Yates were at her apartment. According to Hightower's mother, Hightower was in the apartment complex parking lot and Williams went outside while he was arguing with Hightower on the phone. Hightower's mother testified that Williams came back inside and Hightower appeared at the sidewalk outside his mother's gate. According to Hightower's mother, Hightower and Williams continued to argue, Hightower left, retrieved a gun he had previously placed in her storage closet outside her apartment, and came back. Hightower's mother testified that she told Hightower not to come inside because he had a gun and she did not want anything to happen or to get evicted. According to Hightower's mother, Yates then called 911. Hightower's mother testified that, although she knew Williams to carry a knife and that she knew he had stabbed someone before, she never saw Williams with a knife that day and "didn't see anything in his hand."

Investigator Joey Ashton with the Montgomery County District Attorney's Office testified as to Hightower's 2014 conviction for possession of a controlled substance. According to Investigator Ashton the offense date in the present case—March 22, 2015—was within five years of the prior conviction. Investigator Ashton

also testified that he tested the firearm recovered from the scene and that it is a functioning firearm capable of being fired.

Taylor Yates testified that Williams and Hightower argued over the phone, Hightower was mad and came inside the door, Yates tried to calm Hightower, Hightower ran outside after his mother told him to leave, Yates went outside, and then Yates saw Hightower outside the gate with a gun pointed towards the window. Yates explained at trial that although she knew Williams to always carry a box cutter, she did not see him pull a knife or box cutter on Hightower that day and that Williams was holding her daughter at the time. Yates testified that Williams never came out of the apartment prior to the arrival of the police, Williams never chased Hightower, and Williams was holding her baby “[t]he whole time[.]” Yates explained at trial that she called the police because she was worried about the safety of her children. According to Yates, Hightower called her prior to trial and tried to get her to “tell that Marquis pulled out a knife.”

Marquis Williams admitted at trial that he had previously been convicted of aggravated robbery with a deadly weapon. He also testified that his girlfriend is Hightower’s niece and for a period of time Williams and Yates lived with Hightower. Williams admitted that “[m]ost of the time[.]” he carried a box cutter on his person because he would use it when he worked at Whataburger.

According to Williams, on the day of the incident with Hightower, he and Hightower were arguing over the phone about money they owed each other and Williams hung up on Hightower. Williams testified that he was holding his child and Hightower tried to barge through the apartment door, Hightower and Williams argued in the doorway, and then, at Hightower's mother's request, Hightower left. Williams explained at trial that Hightower returned and, although Williams never saw a gun because Yates and Hightower's mother were standing in between Williams and Hightower, Williams heard, "He got a gun. He got a gun. We got to leave. We got to leave[.]" and then Yates called 911. Williams denied ever pulling out a knife or box cutter that day.

Hightower testified that in the past he and his fiancé lived with Yates and Williams. According to Hightower, he knew that Williams had committed aggravated robbery with a deadly weapon in the past and that Williams regularly carried a knife and bragged about using it in a violent manner and "cutting people." Hightower testified that the gun was his fiancé's and she was storing it in the outside storage closet at Hightower's mother's apartment. Hightower explained at trial that on the day of the incident he and Williams were arguing over the phone about money, Williams hung up on him, and Hightower opened his mother's apartment door to speak with Williams. According to Hightower, Williams told him he was

going to kill him and was steadily coming towards him with a knife. Hightower testified that he felt threatened because he knew from Williams's past that Williams "would use that knife and cut someone." Hightower retrieved his fiancé's gun from the closet, returned to the apartment gate and told Williams to come outside, and then was told the police had been called. According to Hightower, prior to the police being called he handed the gun to his fiancé because she as the owner was allowed to have it and he did not want any further altercation with the police when they arrived. Hightower admitted at trial that he retrieved the gun because he believed he could have been harmed or killed and that he initially told police that he had had a stick and a crow bar and not a gun because he "was afraid of just being charged with this charge[.]" According to Hightower, he lied about possessing the gun because he did not know at the time that he had a legal right to defend himself with the gun. Hightower acknowledged that he was a convicted felon from a drug case in 2014, he had also been convicted of manufacture or delivery of a controlled substance in 2013, and he had been placed on felony probation in 2008 for drugs and had probation revoked. Hightower admitted at trial that when he called his mother and his brother from the police car he lied to them about whether he had possessed a gun. According to Hightower, even though he had a phone with him and was able to use

the phone to call Williams and Hightower's mother and brother, he did not have time to call the police to report Williams's threat.

Hightower's Necessity Defense

In his first issue, Hightower argues that the State failed to meet its burden of disproving Hightower's necessity defense. Necessity is a statutory defense that exonerates a person's otherwise illegal conduct. *Stefanoff v. State*, 78 S.W.3d 496, 500 (Tex. App.—Austin 2002, pet. ref'd) (citing Tex. Penal Code Ann. § 9.22 (West 2011)). Necessity justifies conduct if: (1) the actor reasonably believes the conduct is immediately necessary to avoid imminent harm; (2) the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct; and (3) a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear. Tex. Penal Code Ann. § 9.22. "Harm" means anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested. *Id.* § 1.07(a)(25) (West Supp. 2016). "Imminent" means something that is immediate, something that is at the point of happening and not about to happen. *See Pennington v. State*, 54 S.W.3d 852, 857 (Tex. App.—Fort Worth 2001, pet. ref'd); *see also Henley v. State*, 493 S.W.3d 77, 89 (Tex. Crim. App. 2016) (necessity defense applies when action is

needed now to avoid harm that is near at hand). More than a generalized fear of harm is required to raise the issue of imminent harm. *Stefanoff*, 78 S.W.3d at 501; *Brazelton v. State*, 947 S.W.2d 644, 648 (Tex. App.—Fort Worth 1997, no pet.). To raise the necessity defense, a defendant must admit that he committed the offense charged and then offer the alleged necessity as a justification for his conduct. *Young v. State*, 991 S.W.2d 835, 838 (Tex. Crim. App. 1999); *see also Juarez v. State*, 308 S.W.3d 398, 401-02 (Tex. Crim. App. 2010).

After a defendant has introduced some evidence supporting a defense, the State continues to bear the burden to prove its case beyond a reasonable doubt, but it does not have a burden to introduce evidence to disprove the defense. *Zuliani v. State*, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003); *Saxton v. State*, 804 S.W.2d 910, 913-14 (Tex. Crim. App. 1991). Therefore, we interpret Hightower's first issue as a challenge to the legal sufficiency of the evidence to defeat his necessity defense. To determine the sufficiency of the evidence to disprove the necessity defense here, we ask whether, after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact would have found the essential elements of the offense beyond a reasonable doubt and also would have found against Hightower on the necessity issue beyond a reasonable doubt. *See Saxton*, 804 S.W.2d at 914. In this case, the trial court instructed the jury on the defense of necessity. The jury's

verdict of guilty is an implicit finding rejecting Hightower's defensive theory. *See id.*

The trier of fact is the sole judge of the weight and credibility of the evidence. *See* Tex. Code Crim. Proc. Ann. art. 38.04 (West 1979); *Winfrey v. State*, 393 S.W.3d 763, 768 (Tex. Crim. App. 2013). When performing an evidentiary sufficiency review, we may not re-evaluate the weight and credibility of the evidence and substitute our judgment for that of the factfinder. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010).

Viewing all of the evidence in the light most favorable to the verdict and deferring to the jury's implicit determination concerning the credibility of the witnesses, we conclude that the jury could have rationally found against Hightower's necessity defense beyond a reasonable doubt. *See Saxton*, 804 S.W.2d at 914. The jury heard Officer Leggett's testimony that she interviewed witnesses at the scene and no witnesses other than Hightower saw Williams pull a knife or box cutter on the day of the incident. The jury heard Hightower's mother's, Williams's, and Yates's testimony that Williams did not pull a knife or box cutter on Hightower and that Hightower was the aggressor. The jury also heard Hightower's testimony that after he retrieved the gun he waited outside the gate and told Williams to come outside. The jury could have rationally believed that Williams did not pull a knife

on Hightower and, therefore, Hightower was never in fear of imminent harm. Although the jury heard evidence that Williams was known to carry a knife or box cutter and had a violent past, more than a generalized fear of immediate harm is required. *See Stefanoff*, 78 S.W.3d at 501. Even if the jury believed Hightower's testimony that he saw Williams pull a knife, the jury could have also rationally found that Hightower did not reasonably believe possessing the gun was immediately necessary to avoid imminent harm because Williams could have retreated or called the police with the cell phone he had on his person. Also, the jury could have rationally doubted Hightower's credibility, based in part on (1) Hightower's admission that he initially lied to police and stated he had a stick and not a gun because he feared being charged with the present charge; (2) Hightower's admission that he lied to his mother and brother about whether he had a gun while detained in the police car; and (3) Yates's testimony that Hightower contacted her prior to trial and asked her to testify that she saw Williams pull a knife. The evidence is sufficient to support the jury's rejection of appellant's necessity defense. *See Saxton*, 804 S.W.2d at 914. Issue one is overruled.

Exclusion of Evidence

In issue two, Hightower contends that the trial court committed harmful error in excluding testimony in support of Hightower's necessity defense. Specifically,

Hightower argues that it was harmful error for the trial court to exclude Charli Jones's testimony that she was present with Williams when he committed armed robbery with a shotgun. According to Hightower's brief, he "was aware of [] Williams'[s] robbery offense, it was relevant to the reasonableness of Appellant's self-protective actions, and it was error for the trial court to exclude Ms. Jones'[s] testimony on this specific instance of conduct."¹ Hightower argues on appeal that this "additional first-hand evidence of Mr. Williams'[s] character for violence may have convinced the jury to find that Appellant acted in a manner he reasonably believed was necessary for his self-protection."

A trial court's decision to admit or exclude evidence is reviewed under an abuse of discretion standard. *Torres v. State*, 71 S.W.3d 758, 760 (Tex. Crim. App. 2002). We will not reverse a trial court's ruling unless that ruling falls outside the zone of reasonable disagreement. *See id.* We uphold the trial court's ruling if it is reasonably supported by the record and is correct under any theory of law applicable to the case. *See Willover v. State*, 70 S.W.3d 841, 845 (Tex. Crim. App. 2002).

¹ Hightower notes in his brief that the trial court also excluded Jones's testimony regarding another specific act of violence by Williams, but Hightower concedes that the additional testimony was not relevant because the other act occurred after the confrontation between Williams and Hightower and Hightower could not have been aware of that act at the time of the confrontation.

Outside of the jury's presence, the trial court explained that testimony of Williams's general character for violence would be allowed, that if Hightower was aware that Williams had been convicted of aggravated robbery with a firearm in the past ten years that Hightower could testify to such, and that, if Williams testified, Williams could be impeached regarding the aggravated robbery:

THE COURT: If you were going to mention a specific incident of misconduct --

[Defense counsel]: I've got a certified copy of his aggravated robbery where he used his gun to rob a store clerk that he pled guilty to and then was adjudicated.

THE COURT: Well, you can impeach him with that, obviously, if he testifies. But -- and that will obviously bring it before the jury. . . .

. . . .

THE COURT: You can discuss his general character for violence. You can discuss the aggravated robbery he was convicted on for purposes of impeachment if he testifies. . . .

. . . .

[Defense counsel]: . . . [I]f my client is aware that Mr. Williams had been, within the last 10 years, convicted of aggravated robbery which, once again, goes into his reasonableness -- this is a violent felon

THE COURT: We have a judgment that states that he was convicted of aggravated robbery?

[Defense counsel]: . . . [Y]eah, it was a 2006 judgment.

THE COURT: You can -- he can say that.

[Defense counsel]: Okay.

THE COURT: I think that's relevant.

The testimony Hightower argues should not have been excluded was not his own testimony, but the testimony of Charli Jones. In the bill of exception presented by the defense outside the presence of the jury, Jones testified as follows regarding Williams's alleged aggravated robbery with a firearm:

[Defense counsel]: . . . [A]re you aware of any robberies that Mr. Williams might have committed using a weapon?

[Jones]: Yes, sir.

[Defense counsel]: And could you describe what those would be?

[Jones]: Zone D Erotica.

[Defense counsel]: What weapon did he use?

[Jones]: A shotgun, a 12 gauge.

[Defense counsel]: And you have personal knowledge that he went and robbed the place?

[Jones]: Yes, sir.

. . . .

[Defense counsel]: Was this Zone D Erotica robbery before or after the incident that occurred between Mr. Hightower and Mr. Williams?

[Jones]: Before.

Regarding the complained-of excluded testimony, the following discussion occurred outside the jury's presence:

[Defense counsel]: . . . We are going to ask based on the testimony in the Bill that Ms. Jones be allowed to testify as to the aggravated robbery that she has personal knowledge of that Mr. Williams committed in her presence.

THE COURT: I don't think that's relevant. I think your client, if he testifies and says that he was aware of this aggravated robbery that occurred, is relevant.

In general, evidence of a person's character may not be used to prove that the person "behaved in a particular way at a given time." *Tate v. State*, 981 S.W.2d 189, 192 (Tex. Crim. App. 1998). On the other hand, a defendant may be allowed to offer evidence of a victim's character for violence to show that a victim was the first aggressor in a violent encounter, regardless of whether the defendant was aware of that evidence. *Ex parte Miller*, 330 S.W.3d 610, 619 (Tex. Crim. App. 2009). Such evidence must be in the form of opinion or reputation, and not specific instances of violent behavior. *Id.*; Tex. R. Evid. 404(a), 405(a). A defendant may offer reputation or opinion testimony or evidence of specific prior acts of violence by the victim to show the "reasonableness of [the] defendant's claim of apprehension of danger" from the victim. *Ex parte Miller*, 330 S.W.3d at 618 (citing *Torres*, 71 S.W.3d at 760 & n.4). This purpose invokes Rule 404(b) because the evidence is offered to show the defendant's own self-defensive state of mind and the reasonableness of that

state of mind. *Id.* at 618-19; *Mozon v. State*, 991 S.W.2d 841, 846 (Tex. Crim. App. 1999). The defendant must show that he was aware of the victim's specific acts for the evidence to be admissible for this purpose. *Torres*, 71 S.W.3d at 760 n.4.

We conclude that the trial court's decision to exclude Jones's testimony regarding Williams's commission of aggravated robbery does not fall outside the zone of reasonable disagreement. *See id.* at 760. Evidence of the specific act was only relevant to show Hightower's state of mind and the reasonableness of that state of mind. Jones did not testify that Hightower knew of the aggravated robbery, and therefore, the trial court could have reasonably concluded that the purpose of her testimony would have been to show that Williams acted in conformity with his violent character, which is prohibited by Rule 404(a) of the Texas Rules of Evidence. Hightower testified that at the time of his confrontation with Williams, he knew that Williams had committed aggravated robbery with a deadly weapon, and based on the trial court's comments outside the jury's presence, the trial court allowed Hightower's testimony regarding his knowledge of Williams committing aggravated robbery because it was relevant to Hightower's state of mind when he retrieved the gun. Issue two is overruled.

Denial of Motion for Mistrial

In issue three, Hightower argues the trial court abused its discretion in denying Hightower's motion for mistrial. During defense counsel's cross-examination of Yates, Yates testified that Hightower asked her to testify at his trial and "he brought up the 25 to Life[.]" Defense counsel objected without stating a basis for the objection, the trial court sustained the objection, and the trial court, at defense counsel's request, instructed the jury to disregard the witness's last comment. The trial court denied Hightower's motion for mistrial.

A mistrial is required only in extreme circumstances where the prejudice is incurable. *Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009). Prejudice is incurable when it "is of such character as to suggest the impossibility of withdrawing the impression produced on the minds of the jurors." *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999). Because a mistrial is an extreme remedy, "a mistrial should be granted 'only when residual prejudice remains' after less drastic alternatives are explored." *Ocon*, 284 S.W.3d at 884-85 (quoting *Barnett v. State*, 161 S.W.3d 128, 134 (Tex. Crim. App. 2005)). An instruction to disregard is a corrective measure because it attempts to cure any harm or prejudice resulting from events that have already occurred. *Young v. State*, 137 S.W.3d 65, 69 (Tex. Crim. App. 2004). In a case where the prejudice is curable, an instruction eliminates the

need for a mistrial and serves to conserve judicial resources. *Id.* When a trial court instructs the jury to disregard an improper comment or question, we presume the jury followed the court's instruction unless the remark or comment was so prejudicial or extreme the instruction was incapable of removing the harm. *Gardner v. State*, 730 S.W.2d 675, 696 (Tex. Crim. App. 1987). We review the trial court's denial of a motion for mistrial for an abuse of discretion, viewing the evidence in the light most favorable to the trial court's ruling, and considering only those arguments before the court at the time of the ruling. *Ocon*, 284 S.W.3d at 884. We must uphold the ruling if it was within the zone of reasonable disagreement. *Id.*

Assuming without deciding that the defense counsel's objection was specific enough to preserve error, and assuming without deciding that Yates's testimony of the range of punishment that Hightower told her he was facing was improper, we conclude that the trial court's instruction to disregard was a sufficient measure to cure the prejudice, if any, resulting from an isolated reference to the sentencing range. *See Kinnamon v. State*, 791 S.W.2d 84, 89 (Tex. Crim. App. 1990), *overruled on other grounds by Cook v. State*, 884 S.W.2d 485, 491 (Tex. Crim. App. 1994) (noting that "an instruction by the court to disregard the comment will normally obviate the error[]") (citations omitted); *McClure v. State*, 544 S.W.2d 390, 393 (Tex. Crim. App. 1976) (The harm from remarks about range of punishment during

the guilt-innocence stage of a trial generally will be cured by an instruction to disregard, unless the statements were so manifestly improper as to inflame and prejudice the minds of the jury.).² There is no indication in the record before us that the statement and reference to the punishment range inflamed the jury or prejudiced the jury. We conclude that the trial court did not abuse its discretion in denying Hightower's motion for mistrial. Issue three is overruled.

The trial court's judgment is affirmed.

AFFIRMED.

LEANNE JOHNSON
Justice

Submitted on August 7, 2017
Opinion Delivered October 4, 2017
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Before McKeithen, C.J., Horton and Johnson, JJ.

² We also note that the jury assessed punishment at twenty-five years of confinement, the lowest end of the applicable range of punishment.