COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00171-CR

ROBERT BRANDON MORRIS — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 43RD DISTRICT COURT OF PARKER COUNTY
TRIAL COURT NO. CR15-0169

MEMORANDUM OPINION[1]

I. INTRODUCTION

Appellant Robert Brandon Morris appeals his sentence that a jury assessed after he pleaded guilty to assault causing serious bodily injury or serious mental impairment to a child. In two issues, Morris argues that the trial

[1]*See* Tex. R. App. P. 47.4.

court erred by overruling his challenge for cause to a certain venireperson and by overruling his objection to the prosecutor's closing argument. We will affirm.

II. BACKGROUND

Because this appeal does not implicate the sufficiency of the evidence but rather involves only issues of jury selection and the prosecutor's argument, we need only briefly address the facts of this case.

After severely injuring his six-month-old child by throwing the infant onto a bed and then proceeding to choke the infant in an effort to get the infant to stop crying because Morris desired to go to sleep, the State charged Morris with assault causing serious bodily injury or serious mental impairment to a child.

Morris pleaded guilty to the offense and elected to have a jury assess his punishment. After a punishment hearing, the jury assessed punishment at life imprisonment. The trial court rendered judgment accordingly, and this appeal followed.

III. DISCUSSION

A. Trial Court's Denial of Challenge for Cause

In his first issue, Morris argues that the trial court erred by overruling his challenge for cause regarding a prospective juror's alleged bias. The State argues that the juror in question was a "classic vacillating juror who ultimately stated that he could consider the full range of punishment" and thus the trial court did not abuse its discretion by overruling Morris's challenge. We agree with the State.

During voir dire, the following colloquy occurred:

> [DEFENSE COUNSEL]: -- Kwentus. You had your hand up?
>
> VENIREPERSON KWENTUS: Yeah. As the day started, I would say yeah I could consider the full range. But as you constantly reinforce the fact that this was intentional, this was knowing, I don't know how I could -- I would have to be persuaded against probation, at this point.
>
> [DEFENSE COUNSEL]: Well, let me make sure I understand you, and this is the last subject we're going to talk about. You're saying --
>
> VENIREPERSON KWENTUS: It's no longer hypothetical to me. I mean, the case has been presented, he's pled guilty. You've reinforced that a million times that it was intentional, it was knowing, it wasn't an accident. He's obviously not 17. So, no, it makes it harder and harder to say I could do a probation.
>
> [DEFENSE COUNSEL]: So, you're saying that -- and I'm not -- I know I keep saying so you're saying, but I'm trying to make sure that I cover it for the State, the Judge, and maybe the appellate court. Okay?
>
> You're saying that in a hypothetical case where a person has been found guilty of serious bodily injury to a child, the Judge instructs the full punishment range is five to 99 years, including probation, but you cannot consider the full range of punishment?
>
> VENIREPERSON KWENTUS: I'm saying as I walked into the court, I could. But I can no longer. I'm forming a bias, if that makes sense.
>
> [DEFENSE COUNSEL]: That's fine. So now you have a bias against the lower end of the punishment range?

VENIREPERSON KWENTUS: Yes.

Later, the following exchange occurred:

> THE COURT: All right. Mr. Kwentus. Come on up, Mr. Kwentus.
>
> VENIREPERSON KWENTUS: Yes, sir.
>
> THE COURT: Appreciate you being here today. Sorry for keeping you so long today. The attorneys had some questions they wanted to ask you. [Prosecutor], you may proceed.
>
> [PROSECUTOR]: Thank you, Judge. I have just a few. Mr. Kwentus, one of the things that you said when you were asking Mr. – answering [Defense Counsel's] questions a few minutes ago was that now you feel like you know too much about the case, and you couldn't consider the whole range of punishment anymore?
>
> VENIREPERSON KWENTUS: Yes.
>
> [PROSECUTOR]: Because you know he's not 17, you specifically said that. And you just --
>
> VENIREPERSON KWENTUS: Well, it was reinforced about three or four times that it was intentional, it wasn't accidental, it was intentional.
>
> [PROSECUTOR]: Okay. Okay.
>
> VENIREPERSON KWENTUS: So, after hearing that over and over, you start to think: Well, gosh. When your example, somebody's 17, knocks a kid 14 in the eye, can you consider the full range, sure.
>
> [PROSECUTOR]: Okay. So, for that fact pattern, you could. It would have to be a 13-year-old because they've got to be under 14. But 13 years and 364 days.
>
> VENIREPERSON KWENTUS: Sure.

[PROSECUTOR]: So that would be a fact pattern you could envision considering probation for?

VENIREPERSON KWENTUS: Correct.

[PROSECUTOR]: Okay. So, basically, there would be fact patterns you could consider --

VENIREPERSON KWENTUS: Oh, certainly.

[PROSECUTOR]: -- a probated sentence for, just not necessarily this case?

VENIREPERSON KWENTUS: I couldn't say that offhandedly. I just said that I was starting to become biased.

[PROSECUTOR]: Okay. But only because you learned about the case.

VENIREPERSON KWENTUS: Yes. And, in my bias, it would be hard for me to do probation.

[PROSECUTOR]: On this particular -- but in the general wide world of injury to a child case, which is intentionally or knowingly --

VENIREPERSON KWENTUS: Yes.

[PROSECUTOR]: -- serious bodily injury or serious mental impairment, for the generalized world of this offense, you could consider probation?

VENIREPERSON KWENTUS: Yes.

[PROSECUTOR]: Okay. Nothing further, Judge.

[DEFENSE COUNSEL]: May I?

THE COURT: Sure.

[DEFENSE COUNSEL]: I'm sorry, sir, I know -- we're not trying to bounce you back and forth like a

ping-pong ball. But it was -- I remember talking to you. It was because it was done intentionally or knowingly, which is a -- not any particular fact of any particular case, but that is an element. So, is that what caused you to have pause about whether or not you could consider punishment -- full range of punishment?

VENIREPERSON KWENTUS: Yes. As you read through the indictment, I guess it was, and emphasized that it wasn't an accident, it was intentional, it was knowingly, you kind of convinced me.

[DEFENSE COUNSEL]: Well, here's what I want you to do. I want you to forget about the indictment for a moment. I'm trying to focus you on -- if I can, sir, on the elements that are always going to be there. An intentional or knowing act that caused serious bodily injury to a child less than 14.

VENIREPERSON KWENTUS: Right.

[DEFENSE COUNSEL]: And the reason I mentioned that about there's not an accident, there's not a defense, is so you're not thinking that well maybe there's some justification. So, understand my question. There's no justification for it.

VENIREPERSON KWENTUS: No justification.

[DEFENSE COUNSEL]: No self-defense, just the pure elements of the offense. Are you saying you -- you have that bias that you cannot consider the full range of punishment, including the minimum, for a serious bodily injury to a child done intentionally or knowingly?

VENIREPERSON KWENTUS: And there were no extenuating circumstances --

[DEFENSE COUNSEL]: No.

VENIREPERSON KWENTUS: Yeah. Then no.

[PROSECUTOR]: Well, and actually -- extenuating circumstances, yes. A legal defense, no. You can have all kinds of extenuating circumstances that might be the reason to justify a probated sentence, just not a legal defense. In other words, for example, on the 17-year-old/13-year-old situation, he intended --

[DEFENSE COUNSEL]: Judge, I object. This is Standefer. He's -- [Prosecutor] is tying him to a specific set of facts to get him to pledge that he can follow the law as to a specific set of facts. And that's a violation of Standefer.

[PROSECUTOR]: Let me rephrase.

THE COURT: Thank you.

[PROSECUTOR]: In a situation where one person hits another person, okay, would you have figured that they intended to hit the other person?

VENIREPERSON KWENTUS: Knowing no more than that, I wouldn't know.

[PROSECUTOR]: Okay. Let's say that they did. Okay? They intentionally tried to hit another person. And let's say you have a situation with young people. Okay? And you don't have a defense. It's not a self-defense. It's not like he's helping defend someone else. It's just a -- you know, they're just young people. In that sort of situation, could you consider probation?

VENIREPERSON KWENTUS: Yes.

[PROSECUTOR]: Okay. Even -- and that is an intentional and knowing act.

VENIREPERSON KWENTUS: Yes.

[PROSECUTOR]: Okay. And there's no -- there's no defense, there's no legal justification that would be of a defensive nature. There may be extenuating circumstances.

VENIREPERSON KWENTUS: Right.

[PROSECUTOR]: Okay. But for that situation, you could consider probation?

VENIREPERSON KWENTUS: Sure.

[PROSECUTOR]: Okay. Nothing further.

[DEFENSE COUNSEL]: So, a few moments ago -- out there a while ago when you were saying it, now you've developed a bias; that's true or not true?

VENIREPERSON KWENTUS: It's true.

[DEFENSE COUNSEL]: So you have developed a bias?

VENIREPERSON KWENTUS: Yes.

[DEFENSE COUNSEL]: As just -- not as to any specific facts, just this type offense, even though the Judge instructs --

VENIREPERSON KWENTUS: It's not this type offense. The emphasis was constantly that it was -- this individual, knowingly and intentionally. That was droned several times. So, you didn't -- yeah, I was convinced.

[DEFENSE COUNSEL]: Well, that's what I -- but that's an element that's -- they have to assume to be --

VENIREPERSON KWENTUS: It takes it from a theoretical, to me, to this case. It just changed it.

[PROSECUTOR]: And was it because of the particulars of what was in the indictment, the choking and the hitting a person's head on the object?

VENIREPERSON KWENTUS: And the constant emphasis that it was knowingly and it was intentional, yes.

[PROSECUTOR]: Okay. And that's -- that is absolutely 100 percent an element of this offense, no matter how it's charged. And so that has to play into the hypothetical. In that hypothetical, knowing it must be intentionally and knowingly, you're still good with considering the whole range of punishment, as a hypothetical? Not in this case, as a hypothetical.

VENIREPERSON KWENTUS: Yes.

[PROSECUTOR]: Okay.

THE COURT: And, Mr. Kwentus, question. If the court gives you the law, will you be able to follow whatever that law is?

VENIREPERSON KWENTUS: Yes.

THE COURT: Okay. Anything further?

[DEFENSE COUNSEL]: I'm sorry. May I, Judge? I just want to make sure I understand you, sir. Because I owe it to my client to make sure. I don't want you to think about the indictment. But you do have to assume that it wasn't an accident, it was intentional or knowing.

So, knowing there's been a finding of guilt and you're assessing punishment for intentionally or knowingly causing serious bodily injury to a child, you can consider the full range of punishment, including five years probation?

VENIREPERSON KWENTUS: Yes. Yes I could.

THE COURT: Thank you, sir.

[DEFENSE COUNSEL]: Thank you. Thank you, sir.

[PROSECUTOR]: Thank you very much.

The trial court later denied Morris's challenge for cause regarding venireperson Kwentus. The trial court also denied Morris's request for an additional peremptory challenge that he alleged he was entitled to because the trial court had denied his challenge to venireperson Kwentus. These rulings serve as the basis for Morris's first issue on appeal.

We review a trial court's ruling on a challenge for cause with considerable deference because the trial court is in the best position to evaluate the veniremember's demeanor and responses. *Newbury v. State*, 135 S.W.3d 22, 32 (Tex. Crim. App.), *cert. denied*, 543 U.S. 990 (2004); *Tucker v. State*, 183 S.W.3d 501, 511 (Tex. App.—Fort Worth 2005, no pet.). We will reverse a trial court's ruling on a challenge for cause only upon a clear abuse of discretion. *Newbury*, 135 S.W.3d at 32; *Tucker*, 183 S.W.3d at 511. In determining whether the trial court abused its discretion, we review the total voir dire record in context. *Mathis v. State*, 67 S.W.3d 918, 924 (Tex. Crim. App. 2002); *Emenhiser v. State*, 196 S.W.3d 915, 927–28 (Tex. App.—Fort Worth 2006, pet. ref'd). A trial court does not abuse its discretion by refusing to strike a veniremember who expresses bias or prejudice when the juror is subsequently "rehabilitated." *Westbrook v. State*, 846 S.W.2d 155, 160–61 (Tex. App.—Fort Worth 1993, no pet.).

Here, even though venireperson Kwentus initially expressed bias or prejudice regarding what he would consider minimum sentencing, he later affirmed to the trial court and to defense counsel that he would be able to follow

the law, including being able to consider probation. Because venireperson Kwentus was "rehabilitated" from his bias, the trial court did not abuse its discretion by denying Morris's challenge for cause to venireperson Kwentus. *See id.* (holding trial court did not err by denying challenge for cause because prospective juror was rehabilitated upon further questioning by prosecutor and trial court). We overrule Morris's first issue.

B. Morris's Objection to the State's Closing Argument

In his second issue, Morris argues that the trial court erred by overruling his objection to the prosecutor's closing argument. Specifically, Morris alleges that the prosecutor made a comment on Morris's decision to not testify. The State argues that because the prosecutor made similar statements without objections at other times during the hearing, Morris has failed to preserve this issue for our review. We agree with the State.

During closing arguments at the punishment hearing, the prosecutor made the following statement:

> I don't know what all this defendant did to [the victim] in that room that night. I know some of the things. And they're horrible. They're unspeakable. But I don't know everything. Neither do you. You know why? Because he didn't tell you.

Morris objected on the grounds that the prosecutor was commenting on Morris's decision to not testify. The trial court overruled Morris's objection. But, as the State points out, the prosecutor also stated later in his closing that Morris "did not tell you the complete story, based upon what you heard the injuries are

and what you see in front of you the injuries are to this baby," and Morris did not object.

To preserve a complaint for our review, a party must have presented to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling if they are not apparent from the context of the request, objection, or motion. Tex. R. App. P. 33.1(a)(1); *Douds v. State*, 472 S.W.3d 670, 674 (Tex. Crim. App. 2015), *cert. denied*, 136 S. Ct. 1461 (2016). Further, the trial court must have ruled on the request, objection, or motion, either expressly or implicitly, or the complaining party must have objected to the trial court's refusal to rule. Tex. R. App. P. 33.1(a)(2); *Everitt v. State*, 407 S.W.3d 259, 262–63 (Tex. Crim. App. 2013). A reviewing court should not address the merits of an issue that has not been preserved for appeal. *Ford v. State*, 305 S.W.3d 530, 532 (Tex. Crim. App. 2009).

These preservation requirements apply to closing arguments. *See Turner v. State*, 87 S.W.3d 111, 117 (Tex. Crim. App. 2002), *cert. denied*, 538 U.S. 965 (2003). And like all complaints that are subject to preservation, a defendant must object each time an improper argument is made, or he forfeits his complaint, regardless of how egregious the argument. *See Valdez v. State*, 2 S.W.3d 518, 521–22 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd); *Wilson v. State*, 179 S.W.3d 240, 249 (Tex. App.—Texarkana 2005, no pet.).

Here, even though Morris initially objected to the prosecutor's argument, because he did not object when the prosecutor made the same statement again,

he has failed to preserve this issue for our review. *See Polk v. State*, 02-13-00556-CR, 2015 WL 1883014, at *11 (Tex. App.—Fort Worth Apr. 23, 2015, pet. ref'd) (mem. op., not designated for publication) ("To the extent that appellant complains on appeal about the State's repeated argument . . . , we similarly conclude that appellant forfeited the complaint by failing to object to each occasion . . . that the State made that argument."). We overrule Morris's second issue.

IV. CONCLUSION

Having overruled Morris's two issues on appeal, we affirm the trial court's judgment.

/s/ Bill Meier
BILL MEIER
JUSTICE

PANEL: WALKER, MEIER, and SUDDERTH, JJ.

SUDDERTH, J., filed a concurring opinion.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: June 15, 2017