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

CONCURRING MEMORANDUM OPINION[1]

While I agree with the result reached by the majority, I respectfully disagree with the majority's analysis of Morris's second issue on appeal. Thus, I concur.

In his second issue, Morris complains that the trial court erred by overruling his objection to the prosecutor's closing argument, contending that it

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

constituted an improper comment on his decision not to testify. The majority holds that "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." I would hold that because the second argument was not "the same statement again," and because the second argument was not objectionable, Morris had no obligation to object to the second statement to preserve error with regard to the first.

The first statement—the statement of which Morris complains on appeal—began,

> 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.* [Emphasis added.]

Morris's counsel immediately lodged an objection to this argument that "[t]hat's a comment on his failure to testify."

At that point, the following exchange occurred:

> [PROSECUTOR]: Judge, and I will clarify my statement. He did not tell you in the video, and he did not tell law enforcement.
>
> [DEFENSE COUNSEL]: May I have a ruling, Your Honor?
>
> THE COURT: What was your response, [Prosecutor]?
>
> [PROSECUTOR]: I was - - I meant in the interview, which is what I was just talking about.
>
> THE COURT: Clarify for us, please.
>
> [PROSECUTOR]: I think I just did. But in no way[,] shape[,] or form does this defendant have to testify.

> [DEFENSE COUNSEL]: Excuse me. So, Your Honor, my objection is overruled?
>
> THE COURT: Yes.
>
> [DEFENSE COUNSEL]: Thank you.
>
> [PROSECUTOR]: *As I was talking about during the conversation with law enforcement that you heard on that video, the defendant 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. It just isn't logically possible for all of these events to fit together.* [Emphasis added.]

It is the prosecutor's last statement in the passage above that the majority characterizes as the "same statement again" to which Morris did not object. I disagree with the majority's premise and would hold that the second statement, albeit similar, was not the same as the original statement to which Morris objected.

Morris's first objection—to the prosecutor's original statement—was well-taken. The prosecutor had posed a question as to why she and the jury did not know everything that had happened during the incident and posited the answer as simply, "Because he didn't tell you." Without proper context, the prosecutor's argument could fairly have been characterized as a comment on Morris's failure to testify. Morris's timely and specific objection was eventually overruled, and thus, he preserved error for our review.

In the prosecutor's second statement, she clearly confined her remarks to the context of a statement that Morris made to law enforcement, and she further

restricted her argument to a failure on Morris's part to provide law enforcement a "complete story" that would explain the injuries the child had suffered. In this context, rather than a comment on Morris's failure to testify, the argument challenged the veracity of Morris's statement, which had been admitted into evidence. Had Morris objected to the second statement, his objection would have been unmeritorious, and the law does not require a party to lodge an invalid objection to preserve error on appeal.

That is, if Morris had objected to this second statement as a comment on his failure to testify, the trial court would have committed no error by overruling his objection. As the court of criminal appeals explained in *Bustamante v. State*:

> To violate the right against self-incrimination, the offending language must be viewed from the jury's standpoint and the implication that the comment referred to the defendant's failure to testify must be clear. It is not sufficient that the language might be construed as an implied or indirect allusion. The test is whether the language used was manifestly intended or was of such a character that the jury would necessarily and naturally take it as a comment on the defendant's failure to testify. In applying this standard, the context in which the comment was made must be analyzed to determine whether the language used was of such character.

48 S.W.3d 761, 765 (Tex. Crim. App. 2001) (citations omitted).

And, as the court has further instructed, any ambiguities in the language used must be resolved in favor of it being a permissible argument. *Randolph v. State*, 353 S.W.3d 887, 891 (Tex. Crim. App. 2011). Given that the prosecutor deliberately confined her argument in her second statement to the context of Morris's failure to provide a complete story during his conversation with law

enforcement, there was no right-against-self-incrimination objection to be preserved.

As to the prosecutor's first statement, even assuming error, I would find no harm. In response to Morris's objection, the trial court demanded that the prosecutor "clarify" her remarks, and the prosecutor did so—immediately, thoroughly, and unequivocally. By requiring that the prosecutor place her comments into the proper context, the trial court cured any potential harm from the original statement.

Because I would find no harm here, I concur in the result reached by the majority.

/s/ Bonnie Sudderth
BONNIE SUDDERTH
JUSTICE

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

DELIVERED: June 15, 2017