In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00238-CR

BROCK JIMONE MCNEIL, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Court No. 10-08629; Honorable Raquel West, Presiding

April 4, 2018

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

Appellant, Brock Jimone McNeil, was convicted by a jury of aggravated robbery,[1] enhanced by a prior felony conviction.[2] Following conviction, he was sentenced by the

[1] *See* TEX. PENAL CODE ANN. § 29.03(a)(2), (b) (West 2011). An offense under this section is a first degree felony. Unless otherwise provided, all references herein to "§" or "section" are references to the Texas Penal Code.

[2] As enhanced, the offense was punishable by imprisonment for life, or for any term of not more than 99 years or less than 15 years, together with a fine not to exceed $10,000. TEX. PENAL CODE ANN. § 12.42(c)(1) (West Supp. 2017).

trial court to confinement for life. Appellant timely filed a notice of appeal.[3] On appeal, Appellant raises three issues: (1) the trial court committed jury charge error causing him to suffer egregious harm, (2) reversible error occurred when the State engaged in prejudicial jury arguments denying him a fair trial, and (3) the cumulative effect of the State's improper jury arguments constituted fundamental error. We affirm.

BACKGROUND

In March 2010, an indictment issued alleging that Appellant, while in the course of committing theft of property owned by Yei Lavette Daniels, and with the intent to obtain and maintain control of the property, intentionally, knowingly, and recklessly caused bodily injury to Yei, by shooting her with a deadly weapon, to-wit: a firearm. The indictment also alleged that Appellant had been finally convicted of a prior felony of aggravated robbery with a deadly weapon.

At trial, the State's evidence established that on December 30, 2009, John Daniels was at home with his wife, Yei, and their two children, John III and Jeron. When John left the house to rent a movie, he was approached by two men wearing black masks and gloves. Both men were armed with handguns. The shorter of the two men had a mask that was open in the middle allowing John to get a good look at his eyes.

The two men forced John to return to the front door and knock. When his wife came to the door, John identified himself, and when she opened the door, the two men rushed inside. The taller man ordered John to get on the living room floor and he duct-

[3] Originally appealed to the Ninth Court of Appeals, this appeal was transferred to this court by the Texas Supreme Court pursuant to its docket equalization efforts. TEX. GOV'T CODE ANN. § 73.001 (West 2013). Should a conflict exist between precedent of the Ninth Court of Appeals and this court on any relevant issue, this appeal will be decided in accordance with the precedent of the transferor court. TEX. R. APP. P. 41.3.

taped John's hands behind his back. The taller man then ransacked the house while the shorter man continually asked John where he had hidden his money and drugs. John indicated there was no money in the house and the shorter man stabbed him several times in the back of his legs in an attempt to get John to reveal that information. Yei finally told the two men that she knew where the money was, and she led the taller man to the bedroom where $30,000 was hidden in a book. After they retrieved the money, the two men took Yei and her two children to the kitchen where they tied up Yei and John III with duct tape.

The taller man then questioned John about his cars. Afterwards, the taller man retrieved John's car keys and went outside. The shorter man continued stabbing John in the back of his legs.

Yei worked her hands free from the duct tape and escaped from the kitchen through the back door. Once outside, she attempted to climb over the backyard fence to get help. When they heard Yei open the back door, the shorter man ran out of the living room into the kitchen. John heard him say, "[w]here you going bitch?" The next thing he heard was gunfire. The taller man returned to the living room and asked, "[w]hat is going on?" The shorter man replied, "[m]an, I had to burn that bitch." The two men then left the house. When John was able to work free of the duct tape, he opened the backdoor to the kitchen and saw his wife lying on the ground—but still alive. As a result of being shot, Yei remains paralyzed from the waist down.

During their investigation of the robbery, the police were able to lift Appellant's fingerprint from duct tape found in the kitchen that had been used to bind Yei and her son, John III. Yei also indicated that before she was shot, she was able to see her attacker—

the shorter, light-skinned man. Later, both she and her husband identified Appellant from photographic lineups as the light-skinned shooter because of his unique eyes and lips visible through the hole in his mask. The lineups were conducted two weeks apart using a different order of photographs.

ISSUE ONE—JURY INSTRUCTIONS

By his first issue, Appellant contends the trial court erred by submitting an erroneous charge to the jury. In the charge of the court, the court defined "robbery" as follows:

> A person commits the offense of Robbery, if, in the course of committing theft, and with the intent to obtain or maintain control of property, he intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

While this abstract definition of robbery is a proper definition as defined in section 29.02 (a)(2) of the Texas Penal Code, Appellant correctly contends that it does not conform to the indictment which alleged that Appellant:

> [D]id then and there while in the course of committing theft of property owned by YEI LAVETTE DANIELS, hereafter styled the Complainant, and with intent to obtain and maintain control of said property, intentionally and knowingly and recklessly cause bodily injury to the Complainant, by SHOOTING COMPLAINANT WITH A FIREARM, and the Defendant did then and there use and exhibit a deadly weapon, to-wit: a FIREARM.

While the abstract definition of robbery given did not conform to the indictment, the trial court also provided the jury with an application paragraph which provided:

> Now, if you believe from the evidence beyond a reasonable doubt that in Jefferson County, Texas, on or about the 30th day of December, Two Thousand and Nine, and anterior to the presentment of this indictment, Brock McNeil did then and there while in the course of committing theft of property owned by Yei Lavette Daniels, hereafter styed the Complainant, and with intent to obtain and maintain control of said property, intentionally

> or knowingly or recklessly cause bodily injury to the Complainant, by shooting complainant with a firearm, and Brock McNeil did then and there use and exhibit a deadly weapon, to-wit: a firearm, you shall find the defendant guilty of Aggravated Robbery.

This application paragraph correctly sets forth the elements of robbery pursuant to section 29.02 (a)(1), and it includes the aggravating element of the use or exhibition of a deadly weapon, making the offense an aggravated robbery pursuant to section 29.03(a)(2). While we agree the statutory definition for robbery in the abstract portion of the jury charge was not the definition contained in the indictment, we find the trial court did not commit error because the application paragraph of the charge tracked the language of the indictment and correctly defined the applicable statutory provision.

STANDARD OF REVIEW

The first step in analyzing a claim of jury charge error is to determine whether the submitted charge was erroneous. *Arteaga v. State*, 521 S.W.3d 329, 333 (Tex. Crim. App. 2017) (citing *Barrios v. State*, 283 S.W.3d 348, 350 (Tex. Crim. App. 2009)). If it was, then we must determine whether the defendant was harmed by the error. *Id.*

It is the trial court's responsibility to deliver to the jury a written charge distinctly setting forth the law applicable to the case. TEX. CODE CRIM. PROC. ANN. art. 36.14 (West 2007); *Vega v. State*, 394 S.W.3d 514, 518 (Tex. Crim. App. 2013). As law applicable to the case, the definitions of words or phrases defined by the statute must be included in the jury charge. *Arteaga*, 521 S.W.3d at 334 (citing *Villarreal v. State*, 286 S.W.3d 321, 329 (Tex. Crim. App. 2009)). If a word or phrase is not defined, the trial court may nonetheless define them in the charge if they have an established legal or technical meaning. *Id.*

The "abstract paragraphs [of a jury charge] serve as a glossary to help the jury understand the meaning of concepts and terms used in the application paragraphs of the charge." *Arteaga*, 521 S.W.3d at 338 (quoting *Crenshaw v. State*, 378 S.W.3d 460, 466 (Tex. Crim. App. 2012)). An abstract statement of the law that goes beyond the indictment's allegations will not present reversible error unless "the instruction is an incorrect or misleading statement of a law which the jury must understand in order to implement the commands of the application paragraph." *Id.* (quoting *Plata v. State*, 926 S.W.2d 300, 302-03 (Tex. Crim. App. 1996), *overruled on other grounds, Malik v. State*, 953 S.W.2d 234, 235 (Tex. Crim. App. 1997)). In contrast, the failure to give an abstract instruction is reversible error only when such an instruction is necessary to correct or complete the jury's understanding of concepts or terms in the application part of the charge. *Id. See generally Vasquez v. State*, 389 S.W.3d 361, 366-67 (Tex. Crim. App. 2012) (application paragraph must specify "all of the conditions to be met before a conviction under such theory is authorized"); *Plata*, 926 S.W.2d at 302 (noting that jurors are not authorized to return a verdict "except under those conditions given by the application paragraph of the charge").

Because Appellant did not raise an objection to that portion of the aggravated robbery charge that he raises on appeal, he can prevail only if he was egregiously harmed by an erroneous charge. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g). In examining the record for egregious harm, we consider the entire jury charge, the state of the evidence, the closing arguments of the parties, and any other relevant information in the record. *Olivas v. State*, 202 S.W.3d 137, 144 (Tex. Crim. App. 2006). Jury charge error is egregiously harmful if it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory. *Sanchez*

v. State, 209 S.W.3d 117, 121 (Tex. Crim. App. 2006). *See Price v. State*, 457 S.W.3d 437, 440 (Tex. Crim. App. 2015) (egregious harm is harm that deprives a defendant of a fair and impartial trial).

ANALYSIS

Here, Appellant asserts the trial court erred in its jury instructions because in the abstract portion of the charge, the trial court quoted section 29.02(a)(2) of the Texas Penal Code instead of section 29.02(a)(1). *See* § 29.02(a)(1), (2) (West 2011). The indictment and the application paragraph of the jury charge, however, alleged the offense of aggravated robbery, i.e., the offense of robbery as defined under section 29.02(a)(1); *see id*. at (a)(1) ("intentionally, knowingly, or recklessly causes bodily injury to another"), and Appellant used a deadly weapon, to-wit: a firearm. *See id.* at § 29.03(a), (2).[4] As noted above, the application paragraph tracts the indictment's language.

Although the trial court's quotation of section 29.02(a)(2) may have been an incomplete statement of the law regarding the offense alleged in the indictment, the statement is not a misleading or incorrect statement of the law regarding robbery as an underlying offense to aggravated robbery. More importantly, however, because the application paragraph tracked the indictment and the indictment properly alleged the offense of aggravated robbery, the trial court did not commit reversible error in its charge. *See Crenshaw*, 378 S.W.3d at 467; *Maudlin v. State*, 628 S.W.2d 793, 796 (Tex. Crim. App. [Panel Op.] 1982) (holding that the submission of an abstract instruction on the law of parties was not error because the abstract instruction was not applied to the facts of

[4] The term "aggravated robbery" was defined in the abstract portion of the jury charge as "[a] person commits the offense of Aggravated Robbery if he commits Robbery and in addition uses or exhibits a deadly weapon."

the case and the court's charge specifically required the jury to find the appellant's guilt based on his own behavior and the elements of the offense).

"It is the application paragraph of the charge, not the abstract portion, that authorizes a conviction." *Yzaguirre v. State*, 394 S.W.3d 526, 530 n.27 (Tex. Crim. App. 2013) (quoting *Crenshaw*, 378 S.W.3d at 466). Here, the application paragraph restricted the jury's consideration to the allegations in the indictment and the jury is presumed to have understood and followed the trial court's charge absent evidence to the contrary. *Crenshaw*, 378 S.W.3d at 467. Accordingly, there being no evidence to the contrary in the record, Appellant's first issue is overruled.

ISSUE TWO—IMPROPER CLOSING ARGUMENT

For his second issue, Appellant asserts the State engaged in prejudicial jury arguments which denied him a fair trial. We disagree.

STANDARD OF REVIEW

We review a trial court's ruling on an objection to improper jury argument under an abuse of discretion standard. *Garcia v. State*, 126 S.W.3d 921, 924 (Tex. Crim. App. 2004). Even if improper, the argument does not constitute reversible error unless, in light of the entire record, the argument is extreme or improper, violates a mandatory statute, or injects harmful new facts about the accused into the trial proceeding. *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000) (stating that "[t]he remarks must have been a willful and calculated effort on the part of the State to deprive appellant of a fair and impartial trial").

Proper jury arguments generally fall within one of four areas: (1) summation of the evidence, (2) reasonable deduction from the evidence, (3) answer to opposing counsel's

argument, and (4) plea for law enforcement. *Freeman v. State*, 340 S.W.3d 717, 727 (Tex. Crim. App. 2011). When examining a challenge to the prosecutor's jury argument, we must consider the offensive remark in the context in which it appears. *Jackson v. State*, 17 S.W.3d 664, 675 (Tex. Crim. App. 2000).

If error exists, we must then decide whether the error warrants reversal, i.e., whether Appellant's substantial rights were affected. *See* TEX. R. APP. P. 44.2(b); *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998) (holding that improper jury arguments are nonconstitutional violations governed by Rule 44.2(b) of the Texas Rules of Appellate Procedure). In so doing, we must consider everything in the record, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence in the case, the jury instructions, the State's theory and any defensive theories, closing arguments, *voir dire*, and whether the State emphasized the error. *Easley v. State*, 424 S.W.3d 535, 542 (Tex. Crim. App. 2014).

ANALYSIS

Appellant first asserts that the State made an improper argument when the prosecutor made the statement during closing argument that "[Defense counsel] told you his client fled this courtroom, fled his first trial setting because he didn't think he could get a fair trial." Appellant's objection was that the statement was factually incorrect because his client appeared at the first trial setting but failed to appear at his second trial setting. The trial court sustained the objection but did not give a curative instruction, although requested by Appellant's counsel. Assuming, without deciding, the trial court erred by failing to give a curative instruction to the jury to disregard the statement, we find that the error, if any, did not affect Appellant's substantial rights. The State's statement was

correct that Appellant failed to appear but incorrect as to the particular trial setting where he failed to appear. As such, the State's statement was technically incorrect but substantively correct. Moreover, we find that if there were an error, Appellant did not suffer any substantive harm because his conviction was still certain given that his fingerprint was found on the duct tape used to bind two of the victims and two eyewitnesses identified him as the shooter from a photographic lineup.

Appellant next asserts the trial court improperly overruled his objection to the State's statement during closing argument that "[f]light can be considered as evidence of guilt" because there was "no instruction in the jury charge relating to flight."[5] Here, we find the trial court committed no error. *Bilbrey v. State*, 594 S.W.2d 754, 759 (Tex. Crim. App. 1980) (finding the trial court did not err by permitting State to assert that flight constituted evidence of guilt during closing argument). Moreover, the State's reference to Appellant's "flight" was responsive to Appellant's counsel's three references to his client's flight during closing that culminated in his inference that Appellant fled because he could not get a fair trial. *Gonzalez v. State*, 522 S.W.3d 48, 64 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (responding to opposing counsel's argument is proper jury argument). Accordingly, the trial court properly overruled this objection.

Appellant next asserts the trial court erred by overruling his objection to a statement by the prosecution that "[t]he defense's strategy this whole time has been to try to confuse the [twelve] of you with things that didn't happen and things that don't exist." Appellant's objection was that the State was "striking" at his client. The State's remarks did not impugn or personally attack Appellant or defense counsel. *Magana v. State*, 177

[5] Appellant does not assert on appeal that the trial court erred because there was no instruction on flight in the jury charge.

S.W.3d 670, 674-75 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (a prosecutor improperly strikes at defense counsel when he makes an argument that is personal against defense counsel and explicitly impugns defense counsel's character). Rather, the remarks were invited by defense counsel when he asserted in closing argument that the State did not test for DNA and there were no DNA test results. Comments that facially appear aimed at defense counsel but actually strike at his argument may be appropriate because the State may properly respond when the defense invites the argument. *See Howard v. State*, 896 S.W.2d 401, 405 (Tex. App.—Amarillo 1995, pet. ref'd). As such, because Appellant invited the State's argument, the trial court properly overruled this objection.

Finally, Appellant contends that the trial court improperly overruled his objection to the State's statement that Appellant threatened to take "the baby from his mother." The trial court properly overruled Appellant's objection because Yei testified at trial that Appellant made such a threat during the robbery. As such, the State's statement was proper as the State was merely summarizing the evidence. *Guidry v. State*, 9 S.W.3d 133, 154 (Tex. Crim. App. 1999).

In sum, other than finding a technical error with regard to one objection, the State's closing arguments were proper and the trial court did not abuse its discretion in overruling Appellant's remaining objections. Further, having conducted a harm analysis and finding that any harm suffered by Appellant due to the technical error was minimal and his substantial rights unaffected, we overrule Appellant's second issue.

ISSUE THREE—CUMULATIVE ERROR

Appellant asserts the four purported errors made by the State during closing argument constitute reversible error because they had the cumulative effect of denying him a fair trial. We disagree.

Multiple errors may be found to be harmful in their cumulative effect, even if each error considered separately, would be harmless. *Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex. Crim. App. 1999). The mere existence of multiple errors, however, does not warrant reversal unless they operated in concert to undermine the fundamental fairness of the proceedings. *Estrada v. State*, 313 S.W.3d 274, 311 (Tex. Crim. App. 2010). Moreover, if an individual's claims of error lack merit, then there is no possibility of cumulative error. *Gamboa v. State*, 296 S.W.3d 574, 585 (Tex. Crim. App. 2009).

As noted above, of the four purported errors asserted by Appellant, only one "assumed" error appears to underlie his overall claim of cumulative harm, and the "assumed" error was a technical one. Appellant does not cite any authority and we are unaware of any authority holding that non-errors may in their cumulative effect cause error. *See Chamberlain*, 998 S.W.2d at 238. Neither does Appellant cite any authority holding that a *single* error may result in *cumulative* error. Having already found that the "assumed error" was not constitutional and did not cause Appellant substantial harm, we cannot say that the same error was of constitutional magnitude. Appellant's third issue is overruled.

CONCLUSION

The trial court's judgment is affirmed.

Patrick A. Pirtle
Justice

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