# In The
# Court of Appeals
# Seventh District of Texas at Amarillo

No. 07-20-00046-CR

JCOLBY JACKSON, APPELLANT

V.

STATE OF TEXAS, APPELLEE

On Appeal from the 432nd District Court
Tarrant County, Texas
Trial Court No. 1538335D, Honorable Ruben Gonzalez, Jr., Presiding

November 10, 2020

## MEMORANDUM OPINION

Before QUINN, C.J., and PARKER and DOSS, JJ.

Jcolby Jackson appeals his two convictions for aggravated robbery (with a deadly weapon) and two for engaging in organized criminal activity. His three issues concern the denial of his request for a mistrial, the admission of purportedly inadmissible evidence, and the denial of his objection to the State's alleged comment on his right to remain silent or failure to testify. We affirm.[1]

[1] Because this appeal was transferred from the Second Court of Appeals, we are obligated to apply its precedent when available in the event of a conflict between the precedents of that court and this Court. *See* TEX. R. APP. P. 41.3.

The charges against appellant arose from appellant's involvement in the robbery of a game room. He and several compatriots entered the establishment, discharged firearms, and relieved patrons of their personalty. Furthermore, one patron was struck in the leg by a discharged bullet.

*Issue One – Mistrial*

Through his first issue, appellant contends that the trial court erred in denying his motions for mistrial. The two came in response to two different witnesses interjecting hearsay. The hearsay consisted of reiterating what was told them by various patrons of the game room when the robbery occurred. The trial court sustained appellant's hearsay objections, directed the jury to disregard them, but denied the ensuing requests for mistrials. We overrule the issue.

When one complains about the denial of a request for a mistrial, the proper question is whether the trial court abused its discretion. *Hawkins v. State*, 135 S.W.3d 72, 76–77 (Tex. Crim. App. 2004). In making that determination we are mindful that considerations utilized in a general harm analysis are pertinent. *Id.* at 77 (stating that the question of whether a mistrial should have been granted involves most, if not all, of the same considerations that attend a general harm analysis applied after finding error). One consideration is the presence of a curative instruction given by the trial court. *Id.* Another consideration is whether the same or similar evidence to that purportedly mandating mistrial was admitted elsewhere without objection. If there is, then its presence mitigates any harm caused by mentioning the improper evidence. *In re I.C.*, No. 02-15-00300-CV, 2016 Tex. App. LEXIS 3643, at *28 (Tex. App.—Fort Worth Apr. 7, 2016, no pet.) (mem. op.) (stating that when identical or similar evidence is admitted elsewhere without objection, there is no harm). These two considerations control our analysis here.

First, the trial court instructed the jury to disregard the hearsay in question. Such instructions are generally enough to cure any harm emanating from the misconduct, and we presume that the jury followed them.

Second, the substance of the hearsay complaints were the substance of other evidence admitted without objection. For instance, one of the hearsay statements consisted of an officer reiterating that a patron told him appellant held a gun on her. The same picture painted by those words were painted in a video admitted without objection. In it, appellant can be seen holding a gun to the patron's head. The same is true of the other bit of hearsay. It involved an officer reiterating what was told him by another patron. According to the officer, the patron said "he had some injuries and he was in the game room at the time." While that may have been objectionable, appellant directed no complaint to the photos of that patron's injuries which were discussed and admitted at trial.

Mistrial is warranted when the impropriety at issue is clearly prejudicial to the defendant and of such character as to suggest the impossibility of withdrawing the impression left on the minds of the jurors. *Wood v. State*, 18 S.W.3d 642, 648 (Tex. Crim. App. 2000). No doubt, the substance of the ***hearsay*** at issue was prejudicial and of the kind to leave mental impressions. Yet, the trial court directed the jury to disregard the impressions when created through hearsay. On the other hand, they were free to retain the very same impressions when created through videos and pictures about which appellant did not complain. Under that circumstance, we find neither an impermissible impression warranting a mistrial or an instance of abused discretion in denying a mistrial. *Sparks v. State*, No. 04-12-00494-CR, 2013 Tex. App. LEXIS 12516, at *11–12 (Tex. App.—San Antonio Oct. 9, 2013, no pet.) (mem. op., not designated for publication)

(holding that the trial court did not err in denying a mistrial because the same evidence was admitted elsewhere without objection).

*Issue Two – Irrelevant Evidence*

Next, appellant argues that the trial court erred in admitting "irrelevant opinion testimony concerning an explanation for a witness' testimony being inconsistent with the State's theory." We overrule the issue.

The pertinent standard of review is abused discretion, and discretion is abused when the trial court's ruling falls outside the zone of reasonable disagreement. *De La Paz v. State*, 279 S.W.3d 336, 343–44 (Tex. Crim. App. 2009). Next, the evidence in question consisted of a gang expert testifying about the reasons why a gang member would refuse to inculpate another member when testifying at trial. Appellant objected when the witness was first asked about the topic of "snitching." That objection was sustained. The State later asked the witness: "would it surprise you if one of the co-defendants in this case had made a deal to cooperate and then decided not to once called as a witness?" That led to an objection on relevance, which the court overruled. Four more questions touching on the topic were asked without appellant objecting. Not until the fifth one did he again broach the topic of relevance, and the court overruled his complaint. That led to several more questions being asked without further objection.

Though appellant twice objected, he did not do so with regard to each question. Nor did he request or receive a running objection to the line of questioning. Given these omissions, he failed to preserve for review his complaint about the relevancy of the questioning. *Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003) (stating that "[t]o preserve error in admitting evidence, a party must make a proper objection and get a ruling on that objection" and "object each time the inadmissible evidence is offered or

obtain a running objection"); *McGuire v. State*, No. 02-18-00030-CR, 2019 Tex. App. LEXIS 7817, at *5 (Tex. App.—Fort Worth Aug. 28, 2019, no pet.) (mem. op., not designated for publication) (stating the same).

*Issue Three – Comment on Failure to Testify*

Appellant finally asserts that the trial court erred in allowing the State to comment on his failure to testify and his failure to "'get up there and tell you the truth.'" We overrule the issue.

The State may not comment on the accused's failure to testify. *Randolph v. State*, 353 S.W.3d 887, 891 (Tex. Crim. App. 2011); *Barringer v. State*, No. 07-16-00068-CR, 2017 Tex. App. LEXIS 9327, at *5 (Tex. App.—Amarillo Oct. 3, 2017, no pet.)(mem. op., not designated for publication). But every comment that may somehow be construed as such an utterance is not necessarily one. This is because "the implication that the State referred to the defendant's failure to testify must be a clear and necessary one." *Randolph v. State*, 353 S.W.3d at 891. "If the language might reasonably be construed as merely an implied or indirect allusion, there is no violation." *Id.* "The test, then, 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." *Id.* "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." *Id.* So too must the analysis be made from the perspective of the jury. *Id.*

The comment at issue is that wherein the State said: "Anthony Barber got 15 years for this, which is the minimum, and we did that. But 15 years is for people who are remorseful, who get up there and tell you the truth." The utterance came during the State's rebuttal to appellant's closing argument at the punishment phase of the trial.

During appellant's earlier closing remarks, he alluded to various plea agreements the State made with others participating in the robbery. One of them was Anthony Barber, who received a 15-year prison term for admitting guilt. That led to appellant asking the jury to forgo levying upon him a greater sentence simply because he invoked his constitutional right to a jury trial.

Once appellant ended his remarks, the State began its rebuttal. In response to the quip about being punished for exercising his right to a jury, the prosecutor said: "I would never ask you to punish Jcolby Jackson for exercising his constitutional rights," he had "the right to hear from you," and "now you have the duty to tell him what you think about the case." Then he segued into the utterance underlying appellant's current complaint. After the trial court overruled the objection to it, the State continued with: "You heard Jcolby's rambling two-hour interview. Does that sound like remorse to you? That story changed more -- more times than I can count." In further alluding to the taped interview, the prosecutor argued that the detective could be heard informing appellant that this was "your opportunity to tell that jury that you're sorry." Yet, appellant did not accept the invitation but rather had "the audacity to tell the Fort Worth Police Department that he didn't even go in there . . . and you still never got the truth from him."

Appellant would have us conclude that the State asked the jury to assess greater punishment because he "did not 'get up there and tell you the truth.'" His reference to "get up there" unmistakably meant the witness stand. Nevertheless, the context of the utterance under attack reveals that the State was attempting to address an argument raised by appellant. It pertained to whether punishment should mirror that received by appellant's co-actors who executed plea agreements. Appellant believed it should, while the State endeavored to distinguish their circumstances from his. They admitted their

culpability, but appellant did not. Instead, he continued to lie, according to the State, and therefore deserved a greater sentence. Its entire context precludes us from holding that the utterance in question "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." Rather it was a plea to forgo leniency due to appellant's lying and lack of remorse ***as exemplified by evidence actually heard at trial***.

Having overruled each issue raised by appellant, we affirmed the judgments of the trial court.

Brian Quinn
Chief Justice

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