In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-22-00181-CR

JOSHUA GILDER, APPELLANT

V.

THE STATE OF TEXAS

On Appeal from the 364th District Court
Lubbock County, Texas,
Trial Court No. 2017-413,443, Honorable William R. Eichman II, Presiding

August 4, 2023

MEMORANDUM OPINION

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

Following a plea of not guilty, Appellant, Joshua Gilder, was convicted by a jury of aggravated robbery with an affirmative finding on use of a deadly weapon.[1] Punishment was assessed by the trial court at thirty years' confinement. He presents seven issues challenging his conviction as follows:

[1] *See* TEX. PENAL CODE ANN. § 29.03.

1. the trial court abused its discretion in failing to grant a mistrial when the State improperly proffered extraneous offense evidence without proving he was involved beyond a reasonable doubt;

2. the State acted in bad faith when it improperly proffered extraneous offense evidence without proving he was involved beyond a reasonable doubt;

3. the trial court abused its discretion in failing to grant a mistrial when the State improperly published evidence of his criminal history;

4. the trial court abused its discretion in failing to grant a mistrial when the State improperly commented in closing argument on evidence that was not admitted;

5. he was harmed when the State improperly commented on his invocation of the Fifth Amendment;

6. the trial court abused its discretion in admitting prejudicial hearsay; and

7. his trial was fundamentally unfair due to the cumulative effect of multiple errors.

We affirm.

BACKGROUND

Because Appellant does not challenge the sufficiency of evidence supporting his conviction we discuss only so much of the factual background of his case as necessary for disposition of his appellate issues. On the morning of August 28, 2017, Appellant and Chris Payne robbed at gunpoint the employees of a Lubbock, Texas, game room. Javier Rodriquez, an employee of the game room, was allegedly also involved in the robbery. Appellant and Payne took $2,247 in cash along with money from game machines in an undetermined amount, cell phones, a DVD player, and a laptop computer. Payne was arrested the day of the offense at a nearby motel; Appellant was taken into custody on October 11, 2017.

ANALYSIS

ISSUES ONE AND TWO—IMPROPER EXTRANEOUS OFFENSE EVIDENCE

Appellant complains the State offered improper extraneous offense evidence. First, he argues the trial court abused its discretion and reversibly erred by failing to grant a mistrial. Second, as an apparent alternative to his first issue, Appellant argues the extraneous offense evidence was offered through an act of prosecutorial misconduct requiring reversal. These two issues arise from the following trial excerpt:

> Q. [By Prosecutor of investigating officer] Okay. What items of evidence were you able to locate, if any?
>
> [Defense Counsel]: Judge, I'm sorry. May we approach?
>
> [The Court]: Yes.
>
> [Bench conference]
>
> [Defense Counsel]: My concern here is I anticipate there will be testimony about methamphetamine found. . . . I don't think that's relevant to this case. There hasn't been any testimony about methamphetamine. I'm asking that that not be imputed onto my client. I don't think that's fair to him. And unless they connect that some way, I would ask that their items that they discuss be relevant to the game room incident specifically.
>
> * * *
>
> [The Prosecutor]: We -- we don't plan on indicating that [Appellant] was in possession of methamphetamine or knew about it.
>
> [The Court]: Well, what relevance does it have?
>
> [The Prosecutor]: Well, Your Honor, it's -- one possible use of the proceeds obtained from the game room robbery was --
>
> [The Court]: That's a stretch.
>
> [Defense Counsel]: It's 26.3 grams.
>
> [The Court]: That's a lot.
>
> [Defense Counsel]: Without my client present and no ties to my client, that's going to be held against him.

[The Court]: Unless you can connect it to his client, I'm not letting that part in.

* * *

[The Prosecutor]: I'll tell you what. If --if I can be permitted to speak with [the witness] and just have a -- just let him know that we're not going to get into that.

[The Court]: To that?

[The Prosecutor]: Yes, sir.

[The Court]: I mean, if there's other items that are relevant, I'm not saying that's not admissible.

* * *

[Bench conference ends.]

[The Court to the Witness]: [W]ill you step down so that the prosecutor can visit with you just a second based on a ruling I'm making. Thank you.

[Off the record.]

* * *

[The Court]: You may proceed.

* * *

Q. [By the Prosecutor of the Witness]: Okay. So the items located within the room, if you could walk us through the items that you located -- that you and any other officers located in the search of Mr. Payne's hotel room.

A. Okay. We recovered a firearm, a Ruger 1911. And then some drug paraphernalia.

[Defense Counsel]: Judge, I'll object. Renew my objection and move for a mistrial.

[The Court]: Okay. I will sustain your objection as to the second thing that [the Witness] testified to finding. Mistrial is denied.

[Defense Counsel]: Request an instruction to the jury.

* * *

[The Court]: All right. Ladies and gentlemen of the jury, you're instructed to disregard the statement after they located the firearm Ruger 1911. Okay. You can't consider that.

We review a trial court's denial of a motion for mistrial for an abuse of discretion. *Alfred v. State,* No. 07-21-00226-CR, 2022 Tex. App. LEXIS 6762, at *8 (Tex. App.—Amarillo Sept. 1, 2022, no pet.) (mem. op., not designated for publication) (citing *Archie v. State,* 221 S.W.3d 695, 699 (Tex. Crim. App. 2007)). Declaring a mistrial halts a trial proceeding on the occurrence of error so prejudicial that expenditure of further time and expense would be wasteful and futile. *Id*. A mistrial is warranted only in cases where the reference was clearly calculated to inflame the minds of the jury or was of such damning character as to suggest it would be impossible to remove the harmful impression from the jurors' minds. *Id*. A witness's inadvertent reference to an extraneous offense is generally cured by a prompt instruction to disregard. *Carrasco v. State,* No. 07-14-00001-CR, 2015 Tex. App. LEXIS 10790, at *7 (Tex. App.—Amarillo Oct. 20, 2015, pet. ref'd) (mem. op., not designated for publication) (citing *Young v. State,* 283 S.W.3d 854, 878 (Tex. Crim. App. 2009)). A reviewing court assumes the harm created by the error is cured by an instruction to disregard, except in extreme cases where it appears the question or evidence is clearly calculated to inflame the minds of the jury and is of such character as to suggest the impossibility of withdrawing the impression produced on their minds. *Dekneef v. State*, 379 S.W.3d 423, 430 (Tex. App.—Amarillo 2012, pet. ref'd).

Possession of drug paraphernalia is a Class C misdemeanor punishable by a fine not to exceed $500. TEX. HEALTH & SAFETY CODE ANN. § 481.125(a), (d); TEX. PENAL CODE ANN. § 12.23. We conclude the witness's mention of finding drug paraphernalia in a hotel room not linked to Appellant was not clearly calculated to inflame the minds of the jury nor was it of such damning character as to suggest the impossibility of removing a harmful

impression from the jurors' minds. Harm, if any, was sufficiently removed by the trial court's instruction to the jury. Appellant's first issue is overruled.

As for Appellant's second issue, the claim of prosecutorial misconduct warranting a mistrial, that assertion was not lodged as a ground for mistrial in the trial court. Error preservation, including alleged prosecutorial misconduct, requires a party object with specificity in the trial court; furthermore, the error asserted on appeal must conform to the objection made at trial. *Patterson v. State,* 496 S.W.3d 919, 928 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd) (citing *Clark v. State,* 365 S.W.3d 333, 339 (Tex. Crim. App. 2012)); TEX. R. APP. P. 33.1(a). Therefore, a claim of prosecutorial misconduct may not be raised for the first time on appeal. *Patterson,* 496 S.W.3d at 928. Because the error Appellant alleges was not preserved in the trial court, it is forfeited. Appellant's second issue is overruled.

ISSUE THREE—CRIMINAL HISTORY

Appellant argues the trial court reversibly erred by failing to grant a mistrial after the State improperly displayed before the jury evidence indicating Appellant had a criminal history.

During trial, the State offered a social media photograph of Appellant. The picture bore a screen name, "Convict_Cowboy." The trial court sustained an objection by Appellant to inclusion of the screen name and, following its redaction, the photograph was admitted as State's Exhibit 22. Later during trial, while the prosecutor examined a witness, the original version of State's Exhibit 22, bearing the Convict_Cowboy screen name, was displayed before the jury on a video screen. It appears undisputed that within

seconds the prosecutor discovered the error and replaced the screen image with a blackout slide. The trial court immediately convened a hearing outside the jury's presence. Appellant objected to the display before the jury of the unredacted version of State's Exhibit 22 and moved for a mistrial. Over the course of the hearing, the trial court spoke at length with counsel for Appellant and the State. It considered and discussed relevant case law before denying Appellant's motion for mistrial. The court then considered proposals for wording a jury instruction to disregard the unredacted version of State's Exhibit 22. The trial court ultimately instructed the jury, "You are instructed to disregard the last item that was published to you. It was not admitted into evidence and that includes any writing that was contained thereon. Okay? You're instructed to disregard that."

Appellant argues "[i]n proffering evidence that alluded to Appellant's prior convictions, the State was trying to inflame the jury." According to Appellant, "[t]he State's failure to . . . remove the harmful caption from the photo was at the very least reckless, and . . . was likely deliberate." He concludes he "suffered substantial harm due to the State's misconduct in publishing highly prejudicial evidence in violation of Appellant's motion in limine and the court's order," and therefore "the trial court abused its discretion in denying him a mistrial."

At trial, defense counsel made no express accusation that the prosecutor acted intentionally or recklessly by publishing the unredacted version of State's Exhibit 22. While arguing outside the jury's presence, defense counsel explained that the prosecutor "to his credit - - caught the mistake. Based on my objection, he attempted to take it down." Defense counsel subsequently asked that the unredacted version of State's Exhibit 22 be

placed back on the screen so he could make a photograph, even if the prosecutor's publication was "accidental." The prosecutor acknowledged fault before the trial court. When he explained publishing the unredacted version of State's Exhibit 22 was not intentional, the court responded, "I know. I know." Later, the court stated it found no intent on the part of the prosecutor. In announcing its denial of Appellant's motion for mistrial, the court, in part, grounded its decision on a finding the prosecutor's conduct was not intentional.

We do not find this an extreme instance involving evidence clearly calculated to inflame the minds of the jury nor was the erroneous display of State's Exhibit 22 of such character as to suggest the impossibility of withdrawing the impression the exhibit may have produced on the minds of jurors. *See Dekneef*, 379 S.W.3d at 430. We conclude harm, if any, resulting from the erroneous display of an unredacted copy of State's Exhibit 22 on a video screen to the jury, for a matter of seconds, was eviscerated by the court's instruction. The trial court did not abuse its discretion by overruling Appellant's motion for mistrial. Moreover, earlier in trial, a photograph of Appellant's hand, bearing the tattooed declaration "American Gangster" was admitted into evidence without objection. *See Jackson v. State,* No. 07-20-00046-CR, 2020 Tex. App. LEXIS 8824, at *2 (Tex. App.—Amarillo Nov. 10, 2020, pet. ref'd) (mem. op., not designated for publication) (explaining when an appellate court considers whether a trial court abused its discretion by denying a motion for mistrial one consideration is a curative instruction. "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."). Appellant's third issue is overruled.

ISSUE FOUR—VIOLATION OF ORDER ON MOTION IN LIMINE

Appellant next complains the trial court reversibly erred by failing to grant a mistrial after the prosecutor argued outside the record by mentioning Appellant was dressed in the same attire at trial as when arrested.

According to Appellant, the following portion of the prosecutor's closing argument at the guilt/innocence phase was "highly prejudicial," producing for him substantial harm and unfair prejudice:

> We've got to prove [Appellant] did it. I submit to you he was acting in concert, but, yes, he was there. Let's talk about that. There he is in the game room wearing the same hat that he's wearing in social media. There he is wearing the same shirt that Corporal Helmuth found on him when he was placed under arrest about a month later. There he is wearing the boots.

Defense counsel objected on the ground the prosecutor's mention of Appellant's arrest violated an order in limine. The trial court sustained the objection and reiterated an instruction from the charge which was read to the jury before the commencement of argument: "Do not consider that the fact that the defendant has been arrested, confined or indicted or otherwise charged. You may not draw any inference of guilt from any of these circumstances." The court denied Appellant's request for a mistrial.

Regardless of Appellant's trial attire, we discern the essence of his complaint is reference to his arrest. This is validated by his objection before the trial court which was limited to his arrest. We have already noted a mistrial is warranted only in cases where

the reference was clearly calculated to inflame the minds of the jury or was of such damning character as to suggest it would be impossible to remove the harmful impression from the jurors' minds. *Alfred,* 2022 Tex. App. LEXIS 6762, at *8. We are not shown and fail to see how the prosecutor's mention of Appellant's arrest during argument may be classified as clearly calculated to inflame the jury or of an irreparably damning character when only moments earlier the trial court, reading to the jury from the charge, stated without objection, "Do not consider the fact the defendant has been arrested . . . ." Finding the trial court did not abuse its discretion by denying Appellant a mistrial because of the prosecutor's mention of Appellant's arrest, we overrule his fourth issue.

ISSUE FIVE—FIFTH AMENDMENT

Appellant next argues the trial court committed reversible error by not granting a mistrial after the prosecutor framed a witness question containing an improper comment on Appellant's Fifth Amendment right to remain silent. Appellant elaborates on appeal, "The State was purposeful in insinuating to the jury that Appellant was guilty of the charged offense because he did not provide officers with a statement. The State was not acting in good faith when it commented on his Fifth Amendment invocation, and it would be reasonable to determine that the jury naturally took the statement as a comment on Appellant exercising his constitutional right to remain silent."

While examining a sheriff's department investigator about his work leading to his conclusion Appellant was one of the robbers, the prosecutor asked, "Now, you never spoke with [Appellant]; is that correct?" Without objection the witness responded, "That's correct." Moments later in the examination the prosecutor asked the witness, "But you

ultimately never got a statement from [Appellant]; is that correct?" Defense counsel immediately objected and in a hearing outside the presence of the jury argued Appellant had a right not to incriminate himself including not giving a statement to law enforcement. He expounded the State was not permitted to comment on his exercise of the right against self-incrimination by inferring or implying he did not provide a statement to law enforcement. Appellant's objection to the prosecutor's question was sustained. Appellant pursued an adverse ruling. At his request the court instructed the jury, "The defendant has a constitutional right to remain silent. The failure to obtain a statement from the defendant is not evidence of guilt." Appellant's motion for a mistrial was denied, however, and whether that ruling was an abuse of discretion is the question before us.

A defendant in a criminal case has the right to remain silent and the State may not comment on the defendant's failure to testify. U.S. CONST. amend. V; TEX. CODE CRIM. PROC. ANN art. 38.08; *Ashton v. State,* No. 07-05-00416-CR, 2006 Tex. App. LEXIS 7085, at *3–4 (Tex. App.—Amarillo Aug. 10, 2006, pet. ref'd) (mem. op., not designated for publication). To violate the accused's constitutional and statutory rights, the objectionable comment, when viewed from the jury's perspective, must be manifestly intended to be of such a character that the jury would necessarily and naturally take it as a comment on the accused's failure to testify. *Id*. (citing *Fuentes v. State,* 991 S.W.2d 267, 275 (Tex. Crim. App. 1999)). Indirect or implied allusions to the accused's failure to testify does not violate the accused's right to remain silent. *Id*.

As noted, before the challenged portion of the question by the prosecutor the jury was made aware, via the investigator's unchallenged response, that Appellant did not speak with the investigator. The investigator's response to the challenged question did

not expressly refer to Appellant's invocation of his right against self-incrimination. Indeed, from the perspective of the jury, it is difficult to extract the challenged portion of the prosecutor's question from the general inquiry of the investigator's investigation of the robbery or separate it from his prior statement that Appellant did not speak with him. We conclude the challenged portion of the prosecutor's question would not necessarily and naturally be understood by the jury as referring to a decision by Appellant to invoke his right against self-incrimination by choosing not to provide a statement for law enforcement. Because the challenged portion of the question was not a comment on Appellant's invocation of his right against self-incrimination, even though the trial court may have believed otherwise, the trial court's denial of Appellant's motion for mistrial was not error. *See Griffin v. State,* No. 07-03-00060-CR, 2004 Tex. App. LEXIS 5738, at *2–4 (Tex. App.—Amarillo June 29, 2004, no pet.) (mem. op., not designated for publication).

ISSUE SIX—HEARSAY STATEMENT

Appellant argues the trial court reversibly erred by admitting a hearsay statement made by Payne as a declaration against interest under the exception to the rule against hearsay provided by Rule of Evidence 803(24). The statement in question, "They will put me away forever for what is in this room," was made by Payne to a sheriff's department officer searching a hotel room Payne occupied.

We review a trial court's decision to admit or exclude a hearsay statement offered under Rule 803(24) for an abuse of discretion. *Bingham v. State*, 987 S.W.2d 54, 57 (Tex. Crim. App. 1999).

A statement is hearsay if not made by the declarant while testifying at the current trial or hearing and a party offers it in evidence to prove the truth of the matter asserted in the statement. TEX. R. EVID. 801(d). Hearsay evidence is generally not admissible unless it falls within one or more of the recognized exceptions. *See* TEX. R. EVID. 802, 803. Rule 803(24) provides an exception to the rule against hearsay for a statement against interest. TEX. R. EVID. 803(24). The exception is based on the assumption a reasonable person would not admit committing a crime unless it was true. *Walter v. State*, 267 S.W.3d 883, 890 (Tex. Crim. App. 2008). The Rule 803(24) exception requires a two-step foundation. *Id.*; *Rodriguez v. State,* No. 07-09-01045-CR, 2010 Tex. App. LEXIS 9105, at *8 (Tex. App.—Amarillo Nov. 16, 2010, no pet.) (mem. op., not designated for publication). The trial court first determines whether the statement tends to expose the declarant to criminal liability and whether the declarant realized this when he made the statement. *Walter*, 267 S.W.3d at 890–91. Next, the trial court determines whether corroborating circumstances clearly establish the statement's trustworthiness. *Id.* at 891; *Bingham*, 987 S.W.2d at 57. The first prong is satisfied by showing the utterance was genuinely self-inculpatory and not made for the purpose of blame shifting or currying favor. *Howard v. State,* 945 S.W.2d 303, 306 (Tex. App.—Amarillo 1997, no pet.) (citing *Cofield v. State,* 891 S.W.2d 952, 955–56 (Tex. Crim. App. 1994)). The corroboration requirement is met if the circumstances clearly indicate trustworthiness. *Id.* (citing *Davis v. State*, 872 S.W.2d 743, 749 (Tex. Crim. App. 1994)).

Payne's statement may intimate his involvement in some unspecified wrongdoing but does not expressly link him to a specific act of wrongdoing. The self-inculpatory character of a statement, however, is only determined by viewing it in context. *Williamson*

v. United States, 512 U.S. 594, 603, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994) (discussing FED. R. EVID. 804(b)(3)). Thus, the context may prove even a facially neutral statement to actually be a statement against the declarant's interest. *Id.* Useful examples supplied by the Court in *Williamson* are: "'I hid the gun in Joe's apartment' may not be a confession of a crime; but if it is likely to help the police find the murder weapon, then it is certainly self-inculpatory." "'Sam and I went to Joe's house' might be against the declarant's interest if a reasonable person in the declarant's shoes would realize that being linked to Joe and Sam would implicate the declarant in Joe and Sam's conspiracy." *Id.* In each instance, the central question is whether the statement was sufficiently against the declarant's penal interest that a reasonable person in the declarant's position would not have made the statement unless believing it to be true, and this question can only be answered in light of all the surrounding circumstances. *Id.* at 603–04.

When law enforcement searched Payne's hotel room, they found a loaded handgun along with $1,749 in cash. According to trial testimony, law enforcement believed the gun was the same or similar to that used in the robbery. Testimony placed the estimated total amount of money taken at $5,100. When asked if Payne made any other statements, the testifying officer stated Payne asked if law enforcement "had found the money" and pointed to a set of drawers in the hotel room where "a plastic container . . . full of U.S. currency" was found. Based on the circumstances surrounding the voluntary search of Payne's hotel room, we conclude a reasonable person in Payne's position would not have made the statement unless he believed it true; viz., that the room contained contraband.

There is no definitive standard for analyzing the corroboration prong. *Howard,* 945 S.W.2d at 306. The trial court nevertheless considers circumstances supporting and undermining the declarant's reliability. *Id.* That said, the Court of Criminal Appeals has identified factors relevant to the inquiry: (1) whether the guilt of the declarant is inconsistent with the guilt of the accused, (2) whether the declarant was so situated he might have committed the crime, (3) the timing of the declaration and its spontaneity, (4) the relationship between the declarant and the party to whom the declaration was made, and (5) the existence of independent corroborating facts are quite influential. *Id*. (citing *Cofield,* 891 S.W.2d at 955 and *Davis,* 872 S.W.2d at 749).

Here, Payne was arrested the day of the robbery in a nearby hotel room containing a handgun and cash law enforcement believed were tied to the robbery; Payne confessed to law enforcement his involvement in the offense; during the voluntary search of his hotel room, he pointed out the location of the cash; pictorial evidence taken from the game room security cameras depicted the involvement of Payne and Appellant in the robbery.

We conclude the trial court did not abuse its discretion in admitting Payne's statement as a declaration against interest. Appellant's sixth issue is overruled.

ISSUE SEVEN—CUMULATIVE EFFECT OF MULTIPLE ERRORS

Finally, Appellant argues he "was substantially harmed by the cumulative effect of the multiple errors committed at trial, rendering his proceeding fundamentally unfair." He describes his trial as "riddled with harmful error."

Error may accumulate to such a level that the accused is denied a fair trial. *Tello v. State,* No. 07-08-00314-CR, 2009 Tex. App. LEXIS 8401, at *18–19 (Tex. App.—

Amarillo Oct. 30, 2009, no pet.) (mem. op., not designated for publication). However, reversal of the conviction is not warranted unless the combined force of the errors undermined the fundamental fairness of the trial. *Estrada v. State*, 313 S.W.3d 274, 311 (Tex. Crim. App. 2010) (citing *United States v. Bell*, 367 F.3d 452, 471 (5th Cir. 2004)); *cf. United States v. Wood*, 207 F.3d 1222, 1237 (10th Cir. 2000) ("A cumulative error analysis aggregates all the errors that individually might be harmless, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless."). Furthermore, if an appellant's individual claims of error lack merit, then there is no possibility of cumulative error. *Rodriguez v. State*, 553 S.W.3d 733, 752 (Tex. App.—Amarillo 2018, no pet.) (citing *Gamboa v. State,* 296 S.W.3d 574, 585 (Tex. Crim. App. 2009)).

Appellant does not analyze or even specify what errors, on accumulation, compel a conclusion his trial was fundamentally unfair. As for his appellate issues, we have overruled each. We therefore find his seventh issue without merit, and it too is overruled.

CONCLUSION

Having overruled each of Appellant's issues, we affirm the trial court's judgment.

Alex Yarbrough
Justice

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