NUMBER 13-16-00319-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

HERBERT WAYNE JENKINS, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 377th District Court of Victoria County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Contreras, and Benavides
Memorandum Opinion by Justice Contreras

A jury convicted appellant Herbert Wayne Jenkins of six counts of sexual performance by a child, second-degree felony offenses enhanced to first-degree felonies by the habitual felony offender statute, *see* TEX. PENAL CODE ANN. §§ 12.42(d), 43.25 (West, Westlaw through 2017 R.S.); one count of indecency with a child by exposure, a third-degree felony offense enhanced to a second-degree felony offense, *see id.*

§§ 12.42(d), 21.11(a)(2); and two counts of aggravated sexual assault of a child, first-degree felony offenses, *see id.* § 22.021(a) (West, Westlaw through 2017 R.S.). The trial court sentenced appellant to ninety-nine years' imprisonment for each of the sexual performance by a child offenses, twenty years' imprisonment for the indecency with a child by exposure offense, and ninety-nine years' imprisonment for each of the aggravated sexual assault of a child offenses, with all of the sentences to be served consecutively. By a single issue, appellant contends that the trial court abused its discretion in denying his motion for mistrial after the State violated an order on a motion in limine. We affirm.

I. BACKGROUND

Appellant filed a motion in limine in which he requested that the State be barred from introducing evidence of appellant's prior extraneous bad acts or convictions. The State did not oppose the motion, and the trial court granted it. The order granting the motion required the State "to advise the Court prior to eliciting evidence of any extraneous offense, wrong or act allegedly engaged in by the Defendant, so that a hearing can be conducted outside the presence of the jury to determine the admissibility of said testimony."

During the State's case-in-chief, the prosecutor questioned Cameron Byrd, an officer with the Victoria Police Department, regarding his investigation of the complaint against appellant. The prosecutor asked Officer Byrd, "[a]nd did you—did you encounter [appellant] during your investigation at 1507 Crockett?" Byrd responded: "No, because I had prior knowledge he was incarcerated." Appellant's counsel objected and argued that Byrd's statement referred to appellant's prior bad acts, which violated the order in limine.

Outside the presence of the jury, the trial court sustained defense counsel's objection, but denied his motion for mistrial. The trial court made a finding that the State did not intentionally violate the motion in limine. When the trial resumed, the trial court advised the jurors that appellant's counsel's objection was sustained and instructed the jurors to disregard the prosecutor's last question and Byrd's response.

The jurors found appellant guilty on all counts, and the trial court sentenced him as noted above. This appeal followed.

II. Discussion

By one issue, appellant contends the trial court abused its discretion by denying his motion for mistrial.

An appellate court reviews the granting or denial of a mistrial under an abuse of discretion standard. *Webb v. State*, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007). An abuse of discretion standard means reviewing the evidence in a light most favorable to the trial court's ruling and upholding the ruling so long as it was within the zone of reasonable disagreement. *Id*. A trial court will only be found to have abused its discretion in denying a motion for mistrial if no reasonable view of the record could support the trial court's ruling. *Id*.

A mistrial is an extreme remedy and should be granted "only when residual prejudice remains" after less drastic alternatives are explored. *Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009) (quoting *Barnett v. State*, 161 S.W.3d 128, 134 (Tex. App.—Fort Worth 2005), *aff'd*, 189 S.W.3d 272 (Tex. Crim. App. 2006)). Ordinarily, a prompt instruction to disregard will cure an error associated with an improper question and answer, even one regarding extraneous offenses. *Ovalle v. State*, 13 S.W.3d 774,

783 (Tex. Crim. App. 2000). When a trial court instructs a jury to disregard certain testimony, we generally presume that the jury follows the trial court's instructions. *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999).

In the present case, Byrd briefly mentioned appellant's prior incarceration. Defense counsel's objection was promptly sustained, and the jury was instructed to disregard the question and answer. There were no other instances in which appellant's prior incarceration or extraneous offenses were mentioned or referred to during the remainder of the trial. An instruction to disregard generally cures prejudice from a reference to an extraneous offense. *Marshall v. State*, 210 S.W.3d 618, 628–29 (Tex. Crim. App. 2006); *see Ladd*, 3 S.W.3d at 567. Viewing the evidence in a light most favorable to the trial court's ruling, *see Webb*, 232 S.W.3d at 112, we conclude that the instruction to disregard was sufficient to cure any impropriety. *See Marshall*, 210 S.W.3d at 628–29.

Appellant cites *Perry v. New Hampshire*, 565 U.S. 228 (2012), and *Simmons v. United States*, 390 U.S. 377 (1968), and argues that an instruction to disregard was insufficient to "remove the suggestion of his guilt." The cases cited by appellant concern the admission of an out-of-court identification and are inapposite.

Appellant also cites *Estelle v. Williams* in support of his argument. S*ee* 425 U.S 501, 504 (1976). *Estelle* concerned an accused's right to stand trial dressed in civilian clothing, rather than in prison clothing. *Id.* Appellant argues that Byrd's improper answer "paint[ed] a verbal picture" in the jurors' minds of the defendant in prison garb, which could not be cured by the instruction to disregard. We disagree. As the State argues, appearing in prison garb for the duration of a trial is far more prejudicial than a brief reference to a

prior incarceration. Moreover, even in cases where jurors have seen a defendant either in jail garb or in shackles, any error can be cured by an appropriate instruction. *See Green v. State*, 829 S.W.2d 938, 939 (Tex. App.—Fort Worth 1992, no pet.) (concluding mistrial was not warranted where jurors briefly saw the defendant in jail clothing, shackles and handcuffs); *see also Finch v. State*, No. 06-14-00182-CR, 2015 WL 2376344, at *3 (Tex. App.—Texarkana May 19, 2015, no pet.) (mem. op., not designated for publication) (finding that error was cured by an appropriate instruction where jurors briefly saw the defendant in handcuffs and shackles). If briefly seeing a defendant in prison garb does not warrant a mistrial, certainly a brief "verbal picture" of appellant in prison garb does not warrant a mistrial. *See Green*, 829 S.W.2d at 939.

The trial court did not abuse its discretion by denying appellant's motion for mistrial. We overrule his sole issue.

III. Conclusion

We affirm the trial court's judgment.

DORI CONTRERAS
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
12th day of October, 2017.