NO. 12-17-00251-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

COLLINS GENTRY, APPELLANT	***§***	***APPEAL FROM THE 402ND***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***WOOD COUNTY, TEXAS***

MEMORANDUM OPINION

Collins Gentry appeals his fifty-six year prison sentence for assault causing bodily injury to a person with whom he had a dating relationship by impeding her breathing or circulation. Appellant raises three issues challenging the trial court's rulings regarding certain jury instructions and its denial of his motion for mistrial. We affirm.

BACKGROUND

Appellant was charged by indictment with assault causing bodily injury to a person with whom he had a dating relationship by impeding her breathing or circulation, a third degree felony.[1] He pleaded "guilty" to the charged offense, but "not true" to the State's allegations of prior felony convictions.[2] The matter proceeded to a jury trial for determinations on the enhancement allegations, punishment, and whether Appellant used his hands as a deadly weapon in the assault.[3]

[1] *See* TEX PENAL CODE ANN. § 22.01(a), (b)(2)(B) (West. Supp. 2017); TEX. FAM. CODE ANN. § 71.0021(b) (West Supp. 2017).

[2] The indictment alleged that Appellant was previously convicted of two felony offenses, and that the second offense occurred after the first conviction was final. If found true by the jury, the allegations would make Appellant's punishment range twenty-five years to life. *See* TEX. PENAL CODE ANN. § 12.42(d) (West Supp. 2017).

[3] *See* TEX. PENAL CODE ANN. § 1.07(a)(17) (West. Supp. 2017).

At trial, the evidence showed that Appellant was in a dating relationship with Patricia Sparkman. One evening, Appellant arrived at Sparkman's residence and saw another man there. Appellant pushed, hit, and choked Sparkman.

Ultimately, the jury determined that the allegations of prior felony convictions were true and that Appellant used a deadly weapon in this offense. The jury assessed Appellant's punishment at imprisonment for fifty-six years. The trial court sentenced Appellant in accordance with the jury's verdict, and this appeal followed.

PAROLE INSTRUCTION

In Appellant's first issue, he complains that the trial court gave the jury the wrong parole instruction. In Appellant's second issue, he challenges the trial court's ruling on his requested parole instruction. We consider these issues together.

Standard of Review

In analyzing a jury charge issue, we first decide if error exists. *See* ***Almanza v. State***, 686 S.W.2d 157, 174 (Tex. Crim. App. 1985) (op. on reh'g); ***Tottenham v. State***, 285 S.W.3d 19, 30 (Tex. App.–Houston [1st Dist.] 2009, pet. ref'd). If we find error, we then consider whether an objection to the charge was made and analyze for harm. ***Tottenham***, 285 S.W.3d at 30.

"The degree of harm necessary for reversal depends upon whether the error was preserved." ***Hutch v. State***, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996). Error properly preserved by a timely objection to the charge will require reversal "as long as the error is not harmless." ***Almanza***, 686 S.W.2d at 171. When the charge error is not preserved, however, "the accused must claim that the error was 'fundamental,'" and he will obtain a reversal only if the error constitutes egregious harm. ***Id.***

When considering whether a defendant suffered harm, we must consider: (1) the entire jury charge; (2) the state of the evidence, including the contested issues and weight of probative evidence; (3) the argument of counsel; and (4) any other relevant information revealed by the record of the trial as a whole. ***Id.*** We examine the record to "illuminate the actual, not just theoretical, harm to the accused." ***Id.*** at 174.

Applicable Law

In criminal jury trials, the trial court must deliver "a written charge distinctly setting forth the law applicable to the case." TEX. CODE CRIM. PROC. ANN. art. 36.14 (West 2006). Because

the charge instructs the jury on the law applicable to the case, it must contain an accurate statement of the law. *See* ***Dinkins v. State***, 894 S.W.2d 330, 339 (Tex. Crim. App. 1995).

Article 37.07 of the code of criminal procedure requires trial courts to instruct juries in most non-capital felony trials about the law of parole generally. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 4 (West. Supp. 2017); ***Luquis v. State***, 72 S.W.3d 355, 360-61 (Tex. Crim. App. 2002). A trial court must choose between three lengthy alternative parole charges. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 4(a)-(c); *see also* ***Stewart v. State***, 293 S.W.3d 853, 855 (Tex. App.–Texarkana 2009, pet. ref'd). The parole charge is selected based on the offense of conviction, whether the sentence is to be enhanced, and whether a deadly weapon finding was made. ***Stewart***, 293 S.W.3d at 855-56.

Generally, when a judgment of conviction contains an affirmative deadly weapon finding, the trial court must charge the jury in the punishment phase as follows:

> Under the law applicable in this case, the defendant, if sentenced to a term of imprisonment, may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.
>
> It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.
>
> Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, the defendant will not become eligible for parole until the actual time served equals one-half of the sentence imposed or 30 years, whichever is less, without consideration of any good conduct time the defendant may earn. If the defendant is sentenced to a term of less than four years, the defendant must serve at least two years before the defendant is eligible for parole. Eligibility for parole does not guarantee that parole will be granted.
>
> It cannot be accurately predicted how the parole law and good conduct time might be applied to this defendant if sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.
>
> You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant.

TEX. CODE CRIM. PROC. ANN. art. 37.07, § 4(a); art. 42A.054(c) (West. Supp. 2017).

Although a deadly weapon special issue is generally submitted to the jury at the guilt-innocence phase of trial, it may sometimes be decided by the jury at the punishment phase. *See*

Hill v. State, 913 S.W.2d 581, 584, 586 (Tex. Crim. App. 1996). In this situation, if the proper parole instruction depends on the jury's answer to the deadly weapon special issue, the trial court must give the jury two parole instructions—one applicable in the event the jury answers the special issue in the affirmative, and the other applicable in the event it answers in the negative. *See* ***id.*** at 586 (two parole instructions appropriate at punishment phase where defendant objected to submission of deadly weapon special issue in guilt-innocence phase).

Analysis

In this case, the proper parole instruction depended on the jury's answer to the deadly weapon special issue. Rather than including alternative parole instructions, the trial court's proposed punishment charge contained only the following:

> Under the law applicable in this case, the Defendant, if sentenced to a term of imprisonment, may earn time off the sentence imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.
>
> It is also possible that the length of time for which Defendant will be imprisoned might be reduced by the award of parole.
>
> Under the law applicable in this case, if the Defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served plus any good [conduct] time earned equals one-fourth of the sentence imposed. Eligibility for parole does not guarantee that parole will be granted.
>
> It cannot be accurately predicted how the parole law and good conduct time might be applied to this Defendant if he is sentenced to a term of imprisonment because the application of these laws will depend on decisions made by prison and parole authorities.
>
> You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular Defendant. You are not to consider the manner in which parole law may be applied to this particular Defendant. Such matters come [within] the exclusive jurisdiction of the Pardon and Parole Division of the Texas Department of Criminal Justice and the Governor of Texas.

This instruction closely tracks the language of the instruction in section 4(c), which would have been the appropriate instruction in this case if the jury found Appellant did not use a deadly weapon. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 4(c).

At the charge conference, Appellant objected to the trial court's parole instruction on the ground that if the jury found he used a deadly weapon, it would be a misstatement of the law. Appellant requested that the trial court additionally instruct the jury that if it found he used a deadly weapon, he would not become eligible for parole until the actual time served plus any good

conduct time equals one-half of the sentence imposed. This would have been the appropriate instruction if the jury found Appellant used a deadly weapon. *See* ***id.*** § 4(a). The trial court overruled Appellant's objection and refused to submit Appellant's requested instruction. The trial court erred. The jury should have been additionally instructed that, if it determined Appellant used a deadly weapon, he would not become eligible for parole until the actual time served equals one-half of the sentence imposed or thirty years, whichever is less. *See* ***id.***; *see also* ***Hill***, 913 S.W.2d at 586.

Having determined that the trial court's charge to the jury was erroneous, we must determine whether Appellant was harmed by the error. Because Appellant objected at trial, he need only show that the error was not harmless. *See* ***Almanza***, 686 S.W.2d at 171.

In his brief, Appellant asserts that the error is harmful, but he fails to direct us to any part of the record that shows specific, actual harm. Appellant states that the "use of the incorrect instruction is not harmless and the trial court committed error by using the incorrect language." Later in the brief, Appellant states,

> The proposed language by [Appellant's] counsel was a correct statement of the law and the result without its inclusion was a misstatement of the law and incorrect instructions to the jury that resulted in harm that resulted in an improper verdict. Because Appellant properly objected and the incorrect inclusion of the [Appellant's] proposed language was harmful, reversal is proper.

We are not persuaded by Appellant's proclamations of harm. From our review of the entire record, we are confident that Appellant was not harmed by the trial court's erroneous instruction to the jury. Several reasons aid this determination.

First, the charge's own language mitigated the charge error. The jury was instructed not to consider how parole law may be applied to Appellant. *See* ***Igo v. State***, 210 S.W.3d 645, 647 (Tex. Crim. App. 2006).

Second, there was ample evidence to justify a lengthy prison sentence. *See* ***id.*** In his opening statement to the jury, Appellant admitted that he had a "poor" criminal record. The State presented evidence that Appellant had thirteen total convictions, including several felony convictions and convictions for violent crimes.

The evidence showed that Appellant's crime against Sparkman was quite violent. He shoved, punched, and choked her during the incident. Sparkman feared for her life. The jury heard testimony from Dedrick Woods, who knew both Sparkman and Appellant. Woods claimed that

Appellant grabbed a hammer during the incident, but Woods was able to take the hammer before Appellant could hit Sparkman with it. Woods testified that Appellant was the sole attacker and Sparkman was "helpless" in the situation. The jury saw photographs of the injuries that Appellant inflicted upon Sparkman.

Third, parole was only discussed briefly twice during the trial, and both times by Appellant. *See* ***id.*** During voir dire, Appellant attempted to question the venire members regarding the parole law that was potentially applicable in the case. The State objected, and the trial court sustained the objection. Later, in his closing argument, Appellant attempted to discuss parole with the jury. The State objected, and the trial court sustained the objection. The State never mentioned parole or its potential application to Appellant.

Fourth, this is not a case in which the jury gave the maximum sentence. *See* ***id.*** (no egregious harm even though Appellant was given maximum sentence because other factors indicated that a maximum sentence could have been given if the jury had been properly instructed). Appellant essentially argues that the jury intended for Appellant to only serve fourteen years in prison. Appellant was forty-eight years old at the time of trial. The jury heard evidence of the dangerous tendencies of Appellant, his abuse of women, and his disdain for following the law. We do not believe that the jury considered parole, but instead we find it much more likely that the jury determined that fifty-six years of imprisonment was a proper punishment for someone who had shown little desire and even less ability to change his violent, criminal ways.

Finally, we note that nothing in the record indicates the jury was concerned with parole law. The jury did not ask any questions regarding parole law either in voir dire or during their deliberations.

Accordingly, we are confident that Appellant received a fifty-six year prison sentence from the jury because of the crime he committed and his lengthy criminal history rather than because of an erroneous understanding of parole law. We, therefore, conclude that the trial court's error was harmless. *See* ***Almanza***, 686 S.W.2d at 171. We overrule Appellant's first and second issues.

MOTION FOR MISTRIAL

In Appellant's third issue, he contends that the trial court's failure to grant a mistrial after improper jury argument by the State was reversible error.

Standard of Review and Applicable Law

A trial court's denial of a motion for mistrial is reviewed under an abuse of discretion standard. ***Ladd v. State***, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999). Mistrial is the appropriate remedy when an error is so prejudicial that expenditure of further time and expense on a trial would be futile. ***Id.*** Generally, it is presumed that the jury can and will follow a court's curative instruction to disregard objectionable events. *See* ***Bauder v. State***, 921 S.W.2d 696, 698 (Tex. Crim. App. 1996). Mistrial is an extreme and exceedingly uncommon remedy that is appropriate only when it is apparent that an objectionable event at trial is so emotionally inflammatory that curative instructions are not likely to prevent the jury from being unfairly prejudiced against the defendant. ***Id.*** It is a remedy intended for extreme circumstances, when prejudice is incurable and less drastic alternatives have been explored. ***Ocon v. State***, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009).

Parties should use closing argument to facilitate the jury's proper analysis of the evidence presented at trial. *See* ***Zambrano v. State***, 431 S.W.3d 162, 171 (Tex. App.—San Antonio 2014, no pet.). Proper argument consists of (1) summation of the evidence; (2) reasonable deductions from the evidence; (3) answer to argument of opposing counsel; and (4) a plea for law enforcement. ***Brown v. State***, 270 S.W.3d 564, 570 (Tex. Crim. App. 2008). To determine if the prosecuting attorney made an improper argument, the reviewing court must consider the entire argument in context, not merely isolated sentences. *See* ***Rodriguez v. State***, 90 S.W.3d 340, 364 (Tex. App.—El Paso 2001, pet. ref'd).

We examine three factors to determine if impermissible jury argument requires a mistrial. ***Mosley v. State***, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998). They are (1) the severity of the misconduct, (2) measures adopted to cure the misconduct, and (3) the certainty of the conviction absent the misconduct. ***Id.***

Analysis

Appellant complains of the following argument by the prosecutor: "My role, [my trial partner's] role is going to be different than [Appellant's counsel's] role. Our role is to see that justice is done. His role is to do the best he can for his client, which he has done." Appellant objected at trial that this was improper argument. The trial court instructed the jury to disregard the argument and denied Appellant's motion for mistrial.

Appellant contends that the State's argument was too prejudicial to be cured by an instruction to disregard. However, as discussed below, even if we assume that the State's argument was improper, Appellant fails to demonstrate that the trial court abused its discretion by denying Appellant's motion for mistrial.

First, the severity of the State's misconduct is not extreme. *See* ***id.*** Second, Appellant objected to the State's argument, and the trial court immediately instructed the jury to disregard the comparison between the State's role and Appellant's counsel's role. *See* ***id.*** We assume that the jury followed the trial court's instruction. *See* ***Bauder***, 921 S.W.2d at 698. Third, as we previously discussed, Appellant's conduct coupled with his criminal record and violent past made a lengthy prison sentence very likely. *See* ***Mosley***, 983 S.W.2d at 259. Under these circumstances, we conclude that the trial court was well within its discretion to deny Appellant's motion for mistrial. *See* ***id.*** Accordingly, we overrule Appellant's third issue.

DISPOSITION

Having overruled Appellant's first, second, and third issues, we ***affirm*** the judgment of the trial court.

BRIAN HOYLE
Justice

Opinion delivered March 29, 2018.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

MARCH 29, 2018

NO. 12-17-00251-CR

COLLINS GENTRY,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 402nd District Court
of Wood County, Texas (Tr.Ct.No. 22,830-2016)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Brian Hoyle, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.