Opinion filed May 29, 2020

In The

Eleventh Court of Appeals

No. 11-18-00127-CR

STEFAN T STRONG, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 441st District Court
Midland County, Texas
Trial Court Cause No. CR50422

M E M O R A N D U M O P I N I O N

The jury convicted Appellant, Stefan T Strong, of aggravated robbery. Appellant pleaded "[t]rue" to a prior felony conviction alleged for enhancement purposes. The jury assessed Appellant's punishment at confinement for a term of twenty-two years in the Institutional Division of the Texas Department of Criminal Justice. Appellant raises five issues for our review. We affirm.

Background Facts

On September 25, 2017, Officer Jason Wilson responded to a call from dispatch regarding a burglary of a vehicle in progress. Upon arriving at the scene, a person informed Officer Wilson that the suspect had taken off eastbound around the corner. When Officer Wilson turned the corner, he saw the described suspect carrying a pair of red shoes. Officer Wilson detained Appellant and placed him in handcuffs. As Officer Wilson was detaining Appellant, Nicholas Smith and Ernest Loring ran up. They began speaking with Lieutenant Kyle Sullivan, who had joined Officer Wilson. They explained that Appellant had stolen Smith's red shoes from him and that Appellant had used a knife during the robbery.

Smith and Loring were students at Midland Freshman. They were walking back to school from a store when Appellant initially stopped them. The boys continued walking, but Appellant stopped them again. Smith thought that Appellant was homeless, so he gave him two Laffy Taffys. However, Appellant told Smith, "No, I don't want them. I want your shoes." Appellant then pulled Smith aside and told him to take his shoes off. Smith hesitated, and Appellant told Smith, "Take your shoes off before it get[s] worse." While Smith was taking off his shoes, Appellant was holding a knife by Appellant's hip. Smith testified that he thought Appellant would stab him if he did not give Appellant the shoes. After Smith gave Appellant the shoes, Appellant ran off. Appellant was soon detained by Officer Wilson, and Officer Wilson recovered Smith's shoes, the two Laffy Taffys, and a knife from Appellant.

Appellant was indicted for aggravated robbery. The trial court's jury charge included the indicted charge of aggravated robbery and the lesser included offense of robbery. The jury found Appellant guilty of aggravated robbery.

Issues

Appellant raises five issues on appeal: (1) whether the trial court erred in not including a lesser included charge of theft in the jury charge; (2) whether there was sufficient evidence to support Appellant's conviction for aggravated robbery; (3) whether the prosecutor's opening remarks during the guilt/innocence phase of the trial were improper; (4) whether the prosecutor's closing remarks during the guilt/innocence phase of the trial were improper; and (5) whether the prosecutor's closing remarks during the punishment phase of the trial were improper.

Analysis

In his second issue, Appellant asserts that his due process rights were violated because the evidence was insufficient to support his conviction for aggravated robbery. We review a challenge to the sufficiency of the evidence, regardless of whether it is denominated as a legal or factual sufficiency challenge, under the standard set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010); *Polk v. State*, 337 S.W.3d 286, 288–89 (Tex. App.—Eastland 2010, pet. ref'd). Under the *Jackson* standard, we review all of the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010).

When conducting a sufficiency review, we consider all of the evidence admitted at trial and defer to the factfinder's role as the sole judge of the witnesses' credibility and the weight their testimony is to be afforded. *Winfrey v. State*, 393 S.W.3d 763, 767–68 (Tex. Crim. App. 2013); *Brooks*, 323 S.W.3d at 899; *Clayton v. State*, 235 S.W.3d 722, 778 (Tex. Crim. App. 2007). This standard accounts for the factfinder's duty to resolve conflicts in the testimony, to weigh the evidence, and to

draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319; *Clayton*, 235 S.W.3d at 778.

The indictment alleged that, while in the course of committing theft of property and with intent to obtain or maintain control of said property, Appellant intentionally or knowingly threatened or placed Smith in fear of imminent bodily injury or death and that Appellant used or exhibited a deadly weapon, to-wit: a knife, in doing so. "A person commits robbery if, in the course of committing theft, he intentionally or knowingly threatens or places another in fear of imminent bodily injury or death." *Boston v. State*, 410 S.W.3d 321, 322 n.1 (Tex. Crim. App. 2013); *see* TEX. PENAL CODE ANN. § 29.02(a)(2) (West 2019). "In the course of committing theft" is defined as "conduct that occurs in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of theft." PENAL § 29.01(1). "A person commits aggravated robbery if he commits robbery and uses or exhibits a deadly weapon." *Boston*, 410 S.W.3d at 322 n.1; *see* PENAL § 29.03(a)(2).

Appellant contends that, because Appellant did not point a knife at Smith or injure anyone during the incident, the evidence is insufficient to support a conviction for aggravated robbery. We disagree. A person can commit robbery by placing another in fear of imminent bodily injury. This is a passive element when compared to the dissimilar, active element of threatening another. *Williams v. State*, 827 S.W.2d 614, 616 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd). Under the "*places* another in fear" language, the factfinder may conclude that an individual perceived fear or was placed in fear in circumstances where no actual threats were conveyed by the accused. *Id.*; *see Ex parte Denton*, 399 S.W.3d 540, 551 (Tex. Crim. App. 2013) ("Under the 'placed in fear' language in section 29.02 of the Texas Penal Code, the factfinder may conclude that an individual perceived fear or was

'placed in fear,' in circumstances where no actual threats were conveyed by the accused.").

Viewing the evidence in the light most favorable to the verdict, a rational trier of fact could have found beyond a reasonable doubt that Appellant committed aggravated robbery by either threatening Smith or placing Smith in fear of imminent bodily injury or death. It is undisputed that Appellant committed theft by unlawfully appropriating Smith's shoes with the intent to deprive Smith of the shoes. *See* PENAL § 31.03. Smith testified that he thought he would get hurt if he did not give Appellant his shoes, and when Smith saw the knife, Smith thought that Appellant would stab him. Specifically, when asked how he felt when he saw the knife, Smith testified: "I felt scared as if he was going to, like, actually stab me."

Additionally, Smith testified that Appellant told him, "Take your shoes off before it get[s] worse." Thus, there is evidence that Appellant actually threatened Smith and that Appellant placed Smith in fear of imminent bodily injury or death. Neither the statute nor the indictment required evidence that Appellant pointed the knife at Smith or actually injured him. Even though Smith did not see a knife when Appellant originally demanded the shoes, Appellant still exhibited the knife during the course of the robbery. Accordingly, there was sufficient evidence supporting Appellant's conviction for aggravated robbery. We overrule Appellant's second issue.

In his first issue, Appellant contends that the trial court erred by denying his request for a jury instruction on the lesser included offense of theft. During the charge conference, Appellant argued that he was entitled to a lesser included charge on the offense of theft because he had raised a "scintilla of evidence" that the jury could believe that Appellant was not carrying a knife or had not threatened Smith with serious bodily injury. The trial court denied Appellant's request.

We use a two-step test to determine whether the trial court was required to give a requested charge on a lesser included offense. *Bullock v. State*, 509 S.W.3d 921, 924 (Tex. Crim. App. 2016). Under the first step of the test, an offense is a lesser included offense if it is within the proof necessary to establish the offense charged. *Id.* The second step in the analysis asks whether there is evidence in the record that supports giving the instruction to the jury. *Id.* at 924–25.

It is undisputed that theft is a lesser included offense of aggravated robbery. We must therefore determine under the second step of the analysis if there is any evidence in the record that would permit a jury to rationally find that Appellant is only guilty of theft. *See id.* "This second step is a question of fact and is based on the evidence presented at trial." *Cavazos v. State*, 382 S.W.3d 377, 383 (Tex. Crim. App. 2012). Under the second step, a defendant is entitled to an instruction on a lesser included offense when there is some evidence in the record that would permit a jury to rationally find that, if the defendant is guilty, he is guilty only of the lesser included offense. *Bullock*, 509 S.W.3d at 925 (citing *Rice v. State*, 333 S.W.3d 140, 145 (Tex. Crim. App. 2011)). "The evidence must establish that the lesser-included offense is a valid, rational alternative to the charged offense." *Id.*

As stated by the court in *Bullock*:

> More particularly, the second step requires examining all the evidence admitted at trial, not just the evidence presented by the defendant. *Goad v. State*, 354 S.W.3d 443, 446 (Tex. Crim. App. 2011). The entire record is considered; a statement made by the defendant cannot be plucked out of the record and examined in a vacuum. *Enriquez v. State*, 21 S.W.3d 277, 278 (Tex. Crim. App. 2000). Anything more than a scintilla of evidence is adequate to entitle a defendant to a lesser charge. *Sweed* [*v. State*, 351 S.W.3d 63, 68 (Tex. Crim. App. 2011)]. Although this threshold showing is low, it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense, but rather there must be some evidence directly germane to the lesser-included offense for the finder of fact to consider before an instruction on a lesser-included offense is warranted. *Id.*

509 S.W.3d at 925. Affirmative evidence that is directly germane to the existence of the lesser included offense is required. *See Hampton v. State*, 109 S.W.3d 437, 441 (Tex. Crim. App. 2003). "Meeting this threshold requires more than mere speculation—it requires affirmative evidence that both raises the lesser-included offense and rebuts or negates an element of the greater offense." *Cavazos*, 382 S.W.3d at 385.

The indictment alleged that, in obtaining or maintaining control of Smith's property, Appellant intentionally and knowingly threatened and placed Smith in fear of imminent bodily injury and used and exhibited a deadly weapon. If there is affirmative evidence in the record showing that Appellant did not threaten Smith or place Smith in fear of imminent bodily injury when he appropriated Smith's property without Smith's effective consent, then Appellant was entitled to an instruction on the lesser included offense of theft.

Appellant argues on appeal that an instruction on theft was appropriate because he never pointed the knife at anyone, never attacked anyone with the knife, and never made any aggressive movements with the knife. We disagree with Appellant's analysis. The issue is not whether Appellant used the knife in a threatening manner; the issue is whether there is affirmative evidence showing that Appellant did not threaten Smith or that Appellant did not place Smith in fear of imminent bodily injury. There is no affirmative evidence that Appellant did not threaten Smith or place him in fear of imminent bodily injury. Accordingly, the trial court did not err in denying Appellant's requested charge on the lesser included offense of theft. We overrule Appellant's first issue.

In his third, fourth, and fifth issues, Appellant argues that the prosecutor's remarks during her opening statement and her closing arguments in the guilt/innocence phase of trial and the prosecutor's remarks during her opening

statement and her closing argument in the punishment phase of the trial were improper. Appellant takes issue with several statements made by the prosecutor. However, at no point during the opening statement or the closing arguments in either the guilt/innocence phase or the punishment phase did Appellant object to the remarks about which Appellant complains on appeal.

We note at the outset that "[o]rdinarily, a conviction is not overturned unless the trial court makes a mistake." *Johnson v. State*, 169 S.W.3d 223, 228–29 (Tex. Crim. App. 2005). Thus, appellate issues are more properly directed at the conduct of the trial court rather than opposing counsel. Furthermore, "Rule 33.1 provides that a contemporaneous objection must be made to preserve error for appeal." *Burg v. State*, 592 S.W.3d 444, 448–49 (Tex. Crim. App. 2020) (citing TEX. R. APP. P. 33.1). "[O]bjections promote the prevention and correction of errors" by informing the trial court of the basis of the objection and affording it the opportunity to rule on it and correct it. *Saldano v. State*, 70 S.W.3d 873, 887 (Tex. Crim. App. 2002). Additionally, a timely, specific objection provides opposing counsel an opportunity to remedy the alleged error. *Id.*

Instances of improper jury argument are not exempt from the error preservation requirement. Generally, to preserve error for an improper jury argument, a defendant should (1) contemporaneously object to the statement, (2) request an instruction that the jury disregard the statement if the objection is sustained, and (3) move for a mistrial if the request for an instruction is granted. *Cooks v. State*, 844 S.W.2d 697, 727–28 (Tex. Crim. App. 1992). Thus, Appellant was required to object in the trial court and proceed to an adverse ruling to preserve his complaints about the prosecutor's arguments for review on appeal. *See id.* "[A] defendant's failure to object to a jury argument or a defendant's failure to pursue to an adverse ruling his objection to a jury argument forfeits his right to complain about the argument on appeal." *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App.

1996). Because Appellant failed to contemporaneously object to each of the prosecutor's statements with which he now takes issue, Appellant failed to preserve Issues Three, Four, and Five for appellate review.

Moreover, we disagree with Appellant's contention that the prosecutor's arguments would have led to reversible error. Appellant's third issue concerns the following remark made by the prosecutor during her opening statement: "After the State has presented all of the evidence that we have in this case, we are confident that you will find the Defendant guilty beyond a reasonable doubt because, quite simply, he is." Appellant contends that this remark was so prejudicial that it denied him a fair trial.

In reviewing whether an improper comment by the prosecutor during opening statements constitutes reversible error, appellate courts have determined whether, when viewed in conjunction with the record as a whole, the comment was so prejudicial as to deny appellant a fair trial. *Herrera v. State*, 915 S.W.2d 94, 97 (Tex. App.—San Antonio 1996, no pet.). In instances involving closing arguments, courts have considered the measures adopted to cure the alleged misconduct and the certainty of conviction absent the alleged misconduct. *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998) (discussing harm analysis under TEX. R. APP. P. 44.2(b)). To the extent that the remark made by the prosecutor during her opening statement constituted her personal opinion of Appellant's guilt, Texas courts have repeatedly held that an instruction to disregard the remark would have cured the error. *McGee v. State*, 689 S.W.2d 915, 921 (Tex. App.—Houston [14th Dist.] 1985, pet. ref'd) (collecting cases); *see McGinn v. State*, 961 S.W.2d 161, 165 (Tex. Crim. App. 1998) (Generally, the appropriate remedy for improper argument is an instruction to disregard.). Furthermore, the evidence of Appellant's guilt was overwhelming. The certainty of Appellant's conviction, absent the complained-of remark, was high. *See Mosley*, 983 S.W.2d at 259. Accordingly, the

prosecutor's opening statement did not deprive Appellant of a fair trial. We overrule Appellant's third issue.

"Proper jury argument must fall within one of the following four categories: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) response to argument of opposing counsel; or (4) plea for law enforcement." *Cooks*, 844 S.W.2d at 727. In his fourth issue, Appellant complains about the following arguments made by the prosecutor at the close of the guilt/innocence phase:

1. "The State has met their burden. We have proven every element of our case beyond a reasonable doubt. And we ask that you find the Defendant guilty, because he is."

2. "Did place Nicholas Smith in fear of imminent bodily injury or death. You heard him on the stand say that he was scared. He said that he took off those shoes because he didn't know what was going to happen to him if he didn't. He was afraid that he could easily have been injured as that knife was pointing at him, or killed."

3. "We know that [the knife] was pointed at Nicholas Smith because he said that it was pointed at him. The officers who were there at the scene said, I believed him when he said it."

4. "And we've also proven beyond a reasonable doubt that he used and exhibited a deadly weapon."

5. So, again, the State will ask that you find the Defendant guilty, because he is guilty. He's guilty. He is guilty. He is guilty. He is guilty. He's guilty. Thank you.

Appellant asserts that the first, fourth, and fifth arguments were improper because the prosecutor was stating her opinion on the strength of the State's case. However, we have previously noted that an argument of this type would be curable with an instruction. Furthermore, the strength of the evidence against Appellant was

overwhelming—to the point that the prosecutor's argument likely had little effect on Appellant's conviction. *See Mosley*, 983 S.W.2d at 259.

Appellant asserts that the second and third arguments stated facts not in evidence. He contends that there is no evidence that Smith was afraid of being killed or that Appellant pointed the knife at Smith. We disagree with Appellant's assessment of the evidence. During Smith's direct examination, the prosecutor asked him: "How did you feel when you saw that knife?" Smith replied: "I felt scared as if he was going to, like, actually stab me." Because of Smith's testimony that he was afraid that Appellant would stab him, the prosecutor's argument that Smith was afraid that he would be injured or killed was a reasonable deduction from the evidence. Furthermore, while Smith did not testify that Appellant pointed the knife at him, he testified that Appellant displayed the knife during the robbery and that the knife was close to Smith. Thus, the prosecutor's argument about the knife was a reasonable deduction from the evidence. We overrule Appellant's fourth issue.

Appellant's fifth issue concerns remarks made during the punishment phase. He first complains about the following remark made during the prosecutor's opening statement: "How many chances have been given? How many chances have been ignored? How many times has this occurred in the past, if it has, if it hasn't?" Appellant asserts that this statement assumed a fact not in evidence when the prosecutor made reference to "[h]ow many times has this occurred in the past." We disagree. The prosecutor's remark was in the form of a rhetorical question that the prosecutor conditioned by following it with "if it has, if it hasn't."

Appellant also challenges the following argument from the prosecutor during closing argument at punishment:

> The real question here is, how seriously do we take the safety of the children in this community? This man in broad daylight, in the

> middle of the afternoon, before most of us had even gotten off of work, held a knife to two 15-year-old kids who went to the store and demanded their shoes.

Appellant asserts that this argument was outside the evidence. We disagree. Based on the evidence offered at trial, the prosecutor's argument was summation of the evidence and a plea for law enforcement. To the extent that Appellant contends that the argument was outside the evidence, the argument was not so extreme or inflammatory to make it incurable had Appellant requested an instruction to disregard from the trial court. We overrule Appellant's fifth issue.

This Court's Ruling

We affirm the judgment of the trial court.

JOHN M. BAILEY
CHIEF JUSTICE

May 29, 2020

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

Panel consists of: Bailey, C.J.,
Stretcher, J., and Wright, S.C.J.[1]

Willson, J., not participating.

[1]Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.