Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-19-00280-CR

Edgar Mario **MORENO**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 111th Judicial District Court, Webb County, Texas
Trial Court No. 2017CRF-001147-D2
Honorable Monica Z. Notzon, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Luz Elena D. Chapa, Justice
Irene Rios, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: June 24, 2020

AFFIRMED

Appellant Edgar Moreno appeals his convictions for sexual assault of a child and indecency with a child by contact. Moreno raises five issues on appeal, arguing the trial court erred by denying his requests for a mistrial and complaining the prosecutor engaged in misconduct during closing argument. Moreno additionally argues the combination of errors that occurred during trial requires reversal. We affirm.

BACKGROUND

Following a weekend visit to a family member's home, the complainant made an outcry, alleging that Moreno, her uncle, sexually abused her. Ultimately, the State charged Moreno with one count of sexual assault of a child and three counts of indecency with a child by contact. A jury convicted Moreno of the charged offenses. Based upon the jury's recommendation, the trial court sentenced Moreno to ten years' imprisonment for sexual assault of a child and five years', two years', and three years' imprisonment, respectively, for each count of indecency with a child by contact. The trial court suspended the five-year sentence in favor of community supervision for a period of five years and ordered that the sentences be served consecutively.

DENIAL OF MISTRIAL

Standard of Review and Applicable Law

We review a trial court's denial of a request for mistrial for an abuse of discretion. *Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009). We view the evidence in the light most favorable to the trial court's ruling, and we uphold the ruling if it was within the zone of reasonable disagreement. *Id*.

A mistrial is appropriate only in "extreme circumstances" for a narrow class of highly prejudicial and incurable errors. *Id*. Ordinarily, a prompt instruction to disregard is sufficient to cure error associated with an improper question and answer. *Ovalle v. State*, 13 S.W.3d 774, 783 (Tex. Crim. App. 2000). As to jury argument, mistrial is the proper remedy only when the improper argument is so inflammatory that curative instructions are not likely to prevent the jury from being unfairly prejudiced against the defendant. *See Archie v. State*, 340 S.W.3d 734, 739 (Tex. Crim. App. 2011). On appeal, we generally presume that the jury followed the trial court's instructions. *Thrift v. State*, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005). This presumption is refutable, but the appellant must rebut the presumption by pointing to evidence in the record

indicating that the jury failed to follow the trial court's instructions. *Id*. Whether an error requires a mistrial must be determined by the particular facts of the case. *Ocon*, 284 S.W.3d at 884.

Jury Argument

In his first issue, Moreno argues the State improperly referred to his right to remain silent and the trial court erred by not granting the requested mistrial. The State responds that Moreno's decision to testify placed him in the same position as any other witness, which subjected him to being treated as any other witness in every respect.

During the State's closing argument of the guilt/innocence phase, the prosecutor commented:

> All of a sudden he never had any recollection of [the complainant] ever being in the room. That's skeptical. That's strange that it would change on the day of trial, but in the last three years we haven't heard anything about him forgetting that.

Defense counsel objected that the prosecutor referred to appellant's statements, which defense counsel argued violated appellant's right to remain silent. Defense counsel moved for a mistrial and requested a curative instruction. The trial court instructed the jury to disregard the prosecutor's comment but denied defense counsel's motion for a mistrial.

As a general rule, when an accused voluntarily takes the stand before a jury, he is subject to the same rules as any other witness in that he may be impeached, contradicted, and cross-examined. *Feldman v. State*, 71 S.W.3d 738, 755 (Tex. Crim. App. 2002), *superseded by statute on other grounds*, TEX. CODE CRIM. PROC. ANN. art. 37.071, *as recognized in Coleman v. State*, No. AP–75478, 2009 WL 4696064 (Tex. Crim. App. Dec. 9, 2009). However, where overriding constitutional or statutory prohibitions exist, as here, the accused may not be treated as just another witness. *Alexander v. State*, 740 S.W.2d 749, 763 (Tex. Crim. App. 1987). One limitation on the treatment of an accused as any other witness involves the constitutional privilege against self-incrimination. *Sanchez v. State*, 707 S.W.2d 575, 582 (Tex. Crim. App. 1986). The Texas Court

of Criminal Appeals has held that "[a] comment on a defendant's post-arrest silence violates the Fifth Amendment prohibition against self-incrimination." *Dinkins v. State*, 894 S.W.2d 330, 356 (Tex. Crim. App. 1995) (citing *Doyle v. Ohio*, 426 U.S. 610, 617–18 (1976); *Miranda v. Arizona*, 384 U.S. 436, 468 n.37 (1966)). The court explained that such a comment "attempts to raise an inference of guilt arising from the invocation of a constitutional right." *Id.*

Assuming without deciding that the trial court erred by denying the requested mistrial, we analyze the trial court's error as constitutional error under Rule 44.2(a) of the Texas Rules of Appellate Procedure. *See Snowden v. State*, 353 S.W.3d 815, 818 (Tex. Crim. App. 2011). Under Rule 44.2(a), we reverse the judgment unless we can conclude beyond a reasonable doubt that the error did not contribute to the defendant's conviction or punishment. *Id.* (citing TEX. R. APP. P. 44.2(a)). This standard creates a rebuttable presumption of harm. *Casias v. State*, 36 S.W.3d 897, 900 (Tex. App.—Austin 2001, no pet.); *see Arnold v. State*, 786 S.W.2d 295, 311 (Tex. Crim. App. 1990) (noting that the predecessor rule, which included the same standard as Rule 44.2(a), 5 "mandates an appellate 'presumption' of harm").

Under this harm analysis, we must determine the likelihood that the error genuinely corrupted the fact-finding process. *Snowden*, 353 S.W.3d at 819. A constitutional error does not contribute to a defendant's conviction, and is therefore harmless, if the verdict would have been the same absent the error. *Crayton v. State*, 463 S.W.3d 531, 536 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (citing *Clay v. State*, 240 S.W.3d 895, 904 (Tex. Crim. App. 2007)).

With respect to jury argument, in determining whether an event was so harmful as to warrant reversal on appeal, "[w]e consider such factors as the nature of the error, whether the State emphasized the error, the probable implications of the error, and the weight the jury likely would have assigned to the error in the course of its deliberations." *Id.* at 536 (citing *Snowden*, 353 S.W.3d at 822). "The trial court's error is not harmless beyond a reasonable doubt if there is a

reasonable likelihood that the error materially affected the jury's deliberations." *Id*. (citing *Neal v. State*, 256 S.W.3d 264, 284 (Tex. Crim. App. 2008)).

Based upon our review of the record, we conclude beyond a reasonable doubt that any error committed by the trial court did not contribute to Moreno's conviction. The State presented the testimony of the complainant and the complainant's mother to relate the events surrounding the underlying incident and the events following the complainant's outcry. The State also presented testimony from the complainant's therapist who explained the symptoms and behaviors displayed by the complainant were consistent with the complainant having experienced abuse. The investigating officer also testified regarding the interview he conducted with Moreno. The prosecutor's single comment was brief and its impact was minimal, particularly when considered in light of all the evidence before the jury.

Accordingly, we determine beyond a reasonable doubt that the prosecutor's statement did not contribute to Moreno's conviction and that the trial court's failure to grant the requested mistrial was harmless.

Issue one is overruled.

Witness Testimony

In his second issue, Moreno contends the trial court erred by denying his motion for a mistrial based on improper testimony by the State's witness, Ana Dlouhy. Dlouhy, a therapist at the Children's Advocacy Center, counseled the complainant in an individual setting after the complainant made the allegations of sexual abuse against Moreno. During the defense's cross-examination of Dlouhy, the following complained-of testimony occurred:

> [Defense:] So, if she didn't say — if she didn't tell you that there was abuse, all of her other behaviors could be behaviors that someone could have for many reasons?
>
> [Dlouhy:] After — after doing this work for eight years I would think that there's some abuse going on with the symptoms that she's showing.

At that time, defense counsel moved for a mistrial, arguing: "This witness is their witness, and this witness should have been prepared. That's an improper answer to the question. I'm going to ask the Court to grant us a mistrial, Judge, because it's improper." The trial court denied the request for a mistrial but instructed jurors to disregard the last portion of Dlouhy's testimony.

A mistrial is required because of improper testimony only when it is "clearly prejudicial to the defendant and is of such character as to suggest the impossibility of withdrawing the impression produced on the minds of the jurors." *Russeau v. State*, 171 S.W.3d 871, 885 (Tex. Crim. App. 2005). "Ordinarily, a prompt instruction to disregard will cure error associated with an improper question and answer … ." *Ovalle*, 13 S.W.3d at 783. "Only in extreme circumstances, where the prejudice is incurable, will a mistrial be required." *Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2005). We review a trial court's denial of a request for mistrial for an abuse of discretion. *Ocon*, 284 S.W.3d at 884.

On appeal, Moreno complains Dlouhy, as an expert witness, was not permitted under Texas Rule of Evidence 702 to give an opinion regarding the complainant's truthfulness. *See* TEX. R. EVID. 702. Even if we were to determine Dlouhy impermissibly offered an opinion on the complainant's credibility, Dlouhy previously testified at length that the symptoms and behaviors demonstrated by the complainant were consistent with those demonstrated by someone who suffered abuse. Given this, even if Dlouhy's isolated answer during cross-examination is interpreted as an opinion regarding the complainant's credibility, we do not find Dlouhy's complained-of testimony to be of the "extreme circumstance" where prejudice is so severe it is incurable by an instruction to disregard the testimony. Further, the trial court instructed the jury to disregard the testimony, and we find nothing in the record to suggest that the jury disregarded the trial court's instruction. Therefore, we presume jurors followed the trial court's instruction. *See Gamboa v. State*, 296 S.W.3d 574, 580 (Tex. Crim. App. 2009) (relying on presumption that

the jury followed the trial court's instructions). Accordingly, we conclude the trial court did not abuse its discretion by denying Moreno's motion for a mistrial in this circumstance.

Issue two is overruled.

Bolstering

Moreno's third issue on appeal combines several contentions relating to the underlying complaint that the State improperly bolstered the complainant's testimony. Moreno contends the trial court erred by denying his motions for mistrial on two occasions — once while he was cross-examined by the State and once during the State's closing argument. Also within issue three, Moreno raises an independent contention of prosecutorial misconduct. A point of error is multifarious if it combines more than one contention in a single point of error. *Sterling v. State*, 800 S.W.2d 513, 521 (Tex. Crim. App. 1990). A multifarious point of error presents nothing for review and may be overruled on that basis alone. *See County v. State*, 812 S.W.2d 303, 308 (Tex. Crim. App. 1989). However, in the interest of justice, we consider the merits of Moreno's sub-issues. *See Prihoda v. State*, 352 S.W.3d 796, 801 (Tex. App.—San Antonio 2011, pet. ref'd) ("As an appellate court, we may refuse to review a multifarious issue or we may elect to consider the issue if we are able to determine, with reasonable certainty, the alleged error about which the complaint is made.").

1. Cross-Examination

In the first sub-issue, Moreno complains the prosecutor asked improper questions during cross-examination that were designed to bolster the complainant's testimony. During the State's cross-examination and after a series of questions to which Moreno answered affirmatively that the complainant lied to various people, the prosecutor asked Moreno, "And a 15-year-old convinced all of those people?" In a bench conference, defense counsel objected that the question was improper and requested the trial court instruct the jury to disregard the last question. The trial

court overruled the objection and denied the request. The State's cross-examination continued for approximately five more pages in the record before the State passed the witness. Defense counsel stated he had no questions and indicated he wished to call the next witness. The trial court then gave jurors a short break. At the conclusion of the approximately ten-minute break, defense counsel requested a mistrial based upon the above objection. The trial court denied Moreno's request for a mistrial.

Rule 33.1 of the Texas Rules of Appellate Procedure provides that, as a prerequisite to presenting a complaint for appellate review, the record must show that the complaint was made to the trial court by a timely and specific request, objection, or motion. TEX. R. EVID. 33.1. In accordance with Rule 33.1, a motion for mistrial must be both timely and specific. *Young v. State*, 137 S.W.3d 65, 69 (Tex. Crim. App. 2004) "A motion for mistrial is timely only if it is made as soon as the grounds for it become apparent." *See Griggs v. State*, 213 S.W.3d 923, 927 (Tex. Crim. App. 2007). The preferred procedure for preserving error is to (1) object, (2) request an instruction to disregard, and (3) move for a mistrial. *Young*, 137 S.W.3d at 69.

In the instant case, the alleged grounds for Moreno's motion for mistrial first became apparent during the State's cross-examination of Moreno. However, Moreno failed to move for a mistrial until after the conclusion of his testimony. Under these circumstances, Moreno's motion for mistrial was untimely, and he failed to preserve this complaint for appellate review.

2. Closing Argument

In the second sub-issue, Moreno complains the prosecutor improperly bolstered the complainant's testimony by stating the complainant "told the truth." Defense counsel objected that the prosecutor's statement was "improper vouching." Defense counsel requested a mistrial, as well as a curative instruction. The trial court denied Moreno's request for a mistrial and

instructed jurors to disregard the prosecutor's statement. On appeal, Moreno argues that the prosecutor's comment "went far beyond" the acceptable areas of jury argument.

In making closing arguments, a prosecutor may "strike hard blows," but not "foul ones." *Jordan v. State*, 646 S.W.2d 946, 948 (Tex. Crim. App. 1983). The law provides for, and presumes, a fair trial free from improper argument. *Long v. State*, 823 S.W.2d 259, 267 (Tex. Crim. App. 1991). Permissible jury argument falls into one of four areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) an answer to the argument of opposing counsel; and (4) a plea for law enforcement. *Brown v. State*, 270 S.W.3d 564, 570 (Tex. Crim. App. 2008); *Cannady v. State*, 11 S.W.3d 205, 213 (Tex. Crim. App. 2000). Even when an argument exceeds the permissible bounds of these approved areas, it is not reversible unless, in light of the record as a whole, the argument is extreme or manifestly improper, violates a mandatory statute, or injects into the trial new facts harmful to the accused. *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000). The remarks must constitute a willful and calculated effort on the part of the State to deprive an appellant of a fair and impartial trial. *Id*.

Ordinarily, it is improper for a prosecutor to vouch for the credibility of a witness during his argument. *Menefee v. State*, 614 S.W.2d 167, 168 (Tex. Crim. App. 1981); *Hinojosa v. State*, 433 S.W.3d 742, 763 (Tex. App.—San Antonio 2014, pet. ref'd). However, a prosecutor may argue his opinion concerning a witness's credibility or the truth of a witness's testimony if the opinion is based on reasonable deductions from the evidence and does not constitute unsworn testimony. *Thomas v. State*, 445 S.W.3d 201, 211 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd) (response to defense argument). "Remarks of counsel must be considered within the context in which they appear." *Kelly v. State*, 18 S.W.3d 239, 244 (Tex. App.—Amarillo 2000, no pet.); *see Gaddis v. State*, 753 S.W.2d 396, 398 (Tex. Crim. App. 1988).

Here, it was apparent from the outset that Moreno's strategy was to attack the complainant's credibility. In fact, during defense counsel's opening statement, counsel told jurors the complainant would tell them "a story that is not believable." Additionally, during a bench conference, defense counsel verbalized that strategy, stating "we're not saying that she's been inconsistent in what she's been telling different people. We're saying she's lying and that her whole story is made up."

During the State's case-in-chief, the complainant and the complainant's mother related the events surrounding the underlying incident and the events following the complainant's outcry, and the investigating officer described his interview with Moreno. Additionally, the complainant's therapist explained that the symptoms and behaviors displayed by the complainant were consistent with the complainant having experienced abuse.

To further the defense strategy of questioning the complainant's credibility and to challenge the complainant's version of events, defense counsel attacked the complainant's credibility through cross-examination of the State's witnesses and by presenting testimony of defense witnesses, at least one of whom flatly testified that the complainant lied. Additionally, during his cross-examination, Moreno clearly stated several times that the complainant lied. Therefore, the prosecutor's arguments appear to be in response to Moreno's defense strategy, as well as reasonable deductions from the evidence.

Furthermore, even if we were to find the prosecutor's statement to be impermissible, we cannot agree with Moreno that any error caused by the prosecutor's argument would require reversal. The jury is the sole judge of a witness's credibility and makes determinations about the weight to be given to a witness's testimony. *See, e.g., Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). Not only did the trial court instruct the jury to disregard the prosecutor's statement, the trial court also instructed the jury of its duty to consider witness credibility.

Specifically, the jury charge instructed jurors: "You are the exclusive judges of the facts proved, of the credibility of the witnesses and the weight to be given to their testimony … ."[1] The jury was aware of its duty regardless of the prosecutor's statement. Accordingly, we determine the trial court did not abuse its discretion by overruling Moreno's request for a mistrial.

3. Prosecutorial Misconduct

In the third sub-issue, Moreno alleges the prosecutor engaged in misconduct. This portion of Moreno's brief, however, only vaguely refers to the State's questioning of witnesses and closing argument. An appellate brief must state all issues presented for review clearly and concisely and include appropriate citations to authorities and to the record. *See* TEX. R. APP. P. 38.1(f), (i). In this sub-issue, Moreno does not point to any specific objectionable conduct contained within the record. Accordingly, Moreno has waived this argument within this sub-issue. *Id*. 38.1(i).

Having determined each sub-issue presented in Moreno's brief lacks merit, we overrule issue three.

PROSECUTORIAL MISCONDUCT

In his fourth issue, Moreno lists seven instances of alleged prosecutorial misconduct during the State's closing argument and rebuttal about which he complains. Moreno specifically argues in each instance that the prosecutor disparaged the work of defense counsel during closing argument.

To preserve any error based on improper jury argument, the defendant must object to the argument and pursue the objection until the trial court rules adversely. TEX. R. APP. P. 33.1(a); *Hernandez v. State*, 538 S.W.3d 619, 623 (Tex. Crim. App. 2018). The objection must be "a

[1] We note the prosecutor reinforced the trial court's instructions, as well as those contained in the jury charge, by reminding jurors, "You are the sole judges of the facts. You determine how much you believe from what you've heard on the stand; some, all[,] or nothing."

timely, specific request that the trial court refuses." *Young*, 137 S.W.3d at 69. Further, the objection made at trial must comport with the complaint on appeal. *Hallmark v. State*, 541 S.W.3d 167, 171 (Tex. Crim. App. 2017).

Of the seven instances during which Moreno argues the prosecutor committed misconduct by disparaging defense counsel, Moreno objected to only one. During closing argument, the prosecutor stated, "Now, we're here for one reason, for [the complainant]. Don't get distracted by all of the deflection and detracting strategies the [d]efense used." Moreno made the following objection:

> Your Honor, this is improper vouching, this. We're asking for a mistrial. Judge, I had asked the Court for an instruction and the Court denied the instruction to counsel, and now she's vouching for the witness. She's said that she believed the witness. It's prosecutorial misconduct, Judge, and it's a violation of our due-process rights in a right to fair and impartial jury. We ask that Counsel not make these statements and that the Court give us a mistrial, Judge.

"An objection stating one legal theory [at trial] may not be used to support a different legal theory on appeal." *Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995) (quoting *Johnson v. State*, 803 S.W.2d 272, 292 (Tex. Crim. App. 1990)). Because the complaint on appeal does not comport with the complaint made at trial, Moreno presents nothing for review regarding the first listed instance of alleged prosecutorial misconduct.

With respect to the remaining six listed instances of alleged prosecutorial misconduct, our review of the record shows that Moreno did not object to each instance as it occurred. Therefore, Moreno failed to preserve for review his complaints regarding the six additional listed instances. *See Davis v. State*, 329 S.W.3d 798, 823 (Tex. Crim. App. 2010).

Issue four is overruled.

CUMULATIVE ERROR

In issue five, Moreno contends the cumulative errors committed during trial require reversal. Because we have concluded in each of the previous four issues raised on appeal that no error occurred or that no error was presented for our review, there is no harm to accumulate. *See Murphy v. State*, 112 S.W.3d 592, 607 (Tex. Crim. App. 2003) ("Because we have found little or no error in the above-alleged points, there is no harm or not enough harm to accumulate.").

Issue five is overruled.

CONCLUSION

For the above reasons, we affirm the judgment of the trial court.

Irene Rios, Justice

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