In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-19-00272-CR
NO. 09-19-00273-CR

FERNANDO ROJAS GUZMAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause Nos. 19-06-07662 & 19-06-07663

MEMORANDUM OPINION

In two indictments, a grand jury charged Appellant Fernando Rojas Guzman with two counts of aggravated sexual assault of a child younger than fourteen years of age. *See* Tex. Penal Code Ann. § 22.021(a)(1)(B). Guzman pleaded not guilty, but a jury found him guilty as charged and assessed punishment in each case at ninety-

nine years' imprisonment and a $10,000 fine. The trial court ordered the sentences to run consecutively.

In one issue, Appellant argues that the trial court erred in denying his motion for mistrial after the prosecutor made a comment during cross-examination of a defense witness "that the Defendant had already confessed to lying about missing work." According to Appellant, the prosecutor's comment was prosecutorial misconduct and was a matter-of-fact assertion that could not have been reasonably foreseen by the defense. Appellant argues that the prosecutor's question was phrased in a way that, in essence, informed the jury that Appellant's veracity was no longer an issue because he had admitted lying in investigative interviews. Appellant further argues that the comment "put pressure on him not to testify[.]" Finding no error, we affirm.

Testimony Relevant to the Stated Issue[1]

The defense called L.V.[2] as a witness, and she testified that Guzman was her mother-in-law's boyfriend and that L.V. had lived with her mother-in-law for about

[1] Six witnesses were called to testify at the guilt-or-innocence phase of trial. We limit our discussion herein to those witnesses whose testimony is relevant to the issue on appeal.

[2] We refer to family members by their initials. *See* Tex. Const. art. I, § 30 (granting crime victims "the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process").

three years. L.V. recalled that Guzman stayed home from work on the day of the incident. On cross-examination, the following exchange occurred:

> [State's counsel]: But the defendant, Fernando, didn't go to work that day, did he?
>
> [L.V.]: Yes -- no, he didn't [go] to work, but there was no one that I know in the house. . . .
>
> . . .
>
> [State's counsel]: . . . we know that the defendant Fernando did not go to work on September 24th, right?
>
> [L.V.]: Yes.
>
> [State's counsel]: And in fact, he didn't go to work because he was intoxicated?
>
> [L.V.]: No, there [were] no materials.
>
> [State's counsel]: Where did you get that information from?
>
> [L.V.]: My mother-in-law.
>
> [State's counsel]: Okay. Are you aware he's admitted that he lied about that and that he didn't go to work because he was intoxicated?
>
> [L.V.]: No.

After the witness had been excused, defense counsel approached the bench and the following discussion occurred:

> [Defense counsel]: Judge, during the State's cross of that witness, [the prosecutor] said, Are you aware that the defendant made a statement

> that he lied about being at work that day -- that he's actually admitted that he lied.
>
> The Court: Yes.
>
> [Defense counsel]: The defendant hasn't testified. There's no information in front of the jury about anything this defendant has said. I believe it's a comment on a failure to testify or at least opens the door to his statement to be introduced.
>
> The Court: So, it was to some degree -- there was no objection at the time of the statement, and there was no objection as to the predicate -- improper predicate for purposes of impeachment.
>
> [Defense counsel]: Agreed.
>
> The Court: Didn't hear any of that. So, I find your objection at this point not to be timely . . . .

Defense counsel agreed the objection was not timely, but counsel argued that he brought the matter to the court's attention at the "first available opportunity[.]" When asked by the court whether introducing Guzman's statement to law enforcement about the reasons Guzman did not go to work would be sufficient to clear up anything that may have been misleading to the jury, defense counsel agreed. The defense called two more witnesses before the proceedings adjourned for the day.

The following morning of trial, the court stated on the record that the defense attorneys had informed the court they wished to have further argument concerning an objection to L.V.'s questioning that was not timely. Defense counsel argued:

> What they are implying is a bad act by being a liar, and that skunk is in the jury box. We cannot eliminate that. Maybe the only thing we could do is be forced to put my client on the stand which would then force him to waive his Fifth Amendment Right against testifying.

The defense also argued that the statement was double hearsay and requested that Guzman's video statement to law enforcement—or a transcription of the statement—be published to the jury with redactions. In the alternative, the defense requested a mistrial "based on the improper reference by the prosecution that my client is a liar based on a double-hearsay-type statement and forcing him to go to his Fifth Amendment considerations." The State argued that the defense's objections were not timely, the questioning was not a comment on the defendant's failure to testify, and that questions are not evidence. The court stated that the identified portions of Guzman's statement to law enforcement would suffice to address any concerns. The trial court concluded as follows:

> . . . the Court does not find that the question itself and the mere mention of a portion of the statement rises to that level being a comment on the defendant's right not to testify. In response to the argument that the jury has been left with the "skunk" in the box, using [defense counsel's] words, the Court is of the opinion that there will be three instructions in the charge that will safeguard certain rights for the defendant along with instructing the jury as to what they must consider as evidence. Those three instructions would be certainly -- the charge -- if the defendant elects not to testify, that charge will have -- contain that instruction, and the jury will be instructed not to give attention or hold against the defendant the fact that he has exercised that right not to testify.

> The second instruction contained in the charge will be an extraneous offense or bad act instruction, and I believe that will provide a safeguard for the mere mention of a bad act in questioning. There will also be an instruction in the charge that will cover what is evidence and what is not evidence, and it will say -- the instruction itself will say that the statements made by the lawyers, that the questions proposed by the lawyers are not evidence and that the jury should not consider those statements or questions as evidence.
>
> That along with the arguments of counsel earlier, I'm going to find that it was not a comment on the defendant's right not to testify.

The trial court denied the request for a mistrial.

Thereafter, Guzman testified. Guzman denied the charges against him and testified that he did not have to go to work on the day the alleged incident occurred because of a lack of materials. He also testified that on the day of the incident he did not feel well and had "[a] headache, migraine[]" and that he told police that he did not go to work that day because "there weren't any materials and that [he] was hungover." On cross-examination, Guzman identified text messages he had with his brother from the day of the offense in which he told his brother that he was sick and "hammered[]" but he denied that he meant that he was intoxicated.[3] He also agreed he told police that he had told his brother "Don't come get me. I'm wasted[.]"

[3] In the text exchange between Guzman and his brother, which was in Spanish, Guzman texted "Ando pedo." At trial, the translator translated the message to say "I'm hammered."

Standard of Review

We review the trial court's denial of a motion for mistrial for an abuse of discretion, viewing the evidence in the light most favorable to the trial court's ruling, and considering only those arguments before the court at the time of the ruling. *Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009). We must uphold the ruling if it was within the zone of reasonable disagreement. *Id.* A mistrial is the appropriate remedy only when the objected-to events are so emotionally inflammatory that curative instructions are not likely to prevent the jury from being unfairly prejudiced against the defendant. *See Young v. State*, 137 S.W.3d 65, 71 (Tex. Crim. App. 2004).

A mistrial is required only in extreme circumstances where the prejudice is incurable because it "is of such character as to suggest the impossibility of withdrawing the impression produced on the minds of the jurors." *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999); s*ee also Ocon*, 284 S.W.3d at 884. Because a mistrial is an extreme remedy, "a mistrial should be granted 'only when residual prejudice remains' after less drastic alternatives are explored." *Ocon*, 284 S.W.3d at 884-85 (quoting *Barnett v. State*, 161 S.W.3d 128, 134 (Tex. Crim. App. 2005)).

To preserve an issue for appellate review, the defendant must make a timely request, objection, or motion stating specific grounds for the ruling he desires the trial judge to make and obtain a ruling on the objection. Tex. R. App. P. 33.1; *Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002) (citing *Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995)). The objection must be made at the earliest possible opportunity, and "[a] motion for mistrial is timely only if it is made as soon as the grounds for it become apparent." *Griggs v. State*, 213 S.W.3d 923, 927 (Tex. Crim. App. 2007); *King v. State*, 953 S.W.2d 266, 268 (Tex. Crim. App. 1997); *Turner v. State*, 805 S.W.2d 423, 431 (Tex. Crim. App. 1991)). "[A] party who fails to request an instruction to disregard will have forfeited appellate review of that class of events that could have been 'cured' by such an instruction." *Young*, 137 S.W.3d at 70. In addition, the ground of error presented on appeal must comport with the objection raised at trial, otherwise nothing is presented for review. *See Bivins v. State*, 706 S.W.2d 165, 167 (Tex. App.—Beaumont 1986, pet. ref'd) (citing *Crocker v. State*, 573 S.W.2d 190 (Tex. Crim. App. 1978); *Watkins v. State*, 572 S.W.2d 339 (Tex. Crim. App. 1978)).

Analysis

Based on the record before us, we conclude that the defense failed to make a timely objection to the prosecutor's comment because defense counsel waited until

the witness had finished testifying and after the witness had been excused before making any objection. The trial court found the defense's objection untimely, and *the defense agreed* that the objection was untimely, although counsel argued that he brought the matter to the court's attention at the "first available opportunity[.]" When asked by the court whether introducing Guzman's statement to law enforcement about the reasons Guzman did not go to work would be sufficient to clear up anything that may have been misleading to the jury, defense counsel agreed that would be sufficient. The defense attorney then waited and did not seek a mistrial until after calling two more witnesses and then only after trial recommenced the next day. The State argues that by failing to make a timely objection or motion for mistrial, Appellant waived error. We agree. *See Griggs*, 213 S.W.3d at 927 (where the grounds for appellant's motion for mistrial first became apparent during a witness's testimony but appellant failed to move for mistrial until after the witness had concluded his testimony, the motion was untimely and failed to preserve the complaint for appeal). In addition, Appellant's argument that the objected-to question by the prosecutor amounted to "prosecutorial misconduct" was not argued to the trial court. Appellant's argument on appeal does not comport with his objection at trial. *See Bivins*, 706 S.W.2d at 167.

We conclude that the trial court's denial of the motion for mistrial was within the zone of reasonable disagreement. *See Ocon*, 284 S.W.3d at 884. We overrule Appellant's issue and affirm the judgment of the trial court.[4]

AFFIRMED.

_____
LEANNE JOHNSON
Justice

Submitted on May 20, 2020
Opinion Delivered July 1, 2020
Do Not Publish

Before McKeithen, C.J., Kreger and Johnson, JJ.

[4] We need not conduct a harm analysis because we have concluded that the trial court did not err. *See Hawkins v. State*, 135 S.W.3d 72, 76 (Tex. Crim. App. 2004) ("A harm analysis is employed only when there is error, and ordinarily, error occurs only when the trial court makes a mistake.").