

**Affirmed and Opinion filed March 15, 2001.**

**In The**  
**Fourteenth Court of Appeals**

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**NO. 14-99-01119-CR**

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**GONZALO JOSEPH GARCIA, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 180th District Court  
Harris County, Texas  
Trial Court Cause No. 791,639**

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**OPINION**

A jury found appellant, Gonzalo Joseph Garcia, guilty of murder. In a single point of error, appellant contends the trial court erred in denying his motion for mistrial because the State improperly commented on his failure to testify. We affirm.

**I. FACTUAL BACKGROUND**

The State charged appellant by indictment with the offense of first degree murder, a violation of Texas Penal Code section 19.02. *See* TEX. PEN. CODE ANN. § 19.02 (Vernon

1994). Appellant pled not guilty to this offense and proceeded to trial before a jury, which found him guilty of the offense. After finding allegations in the indictment's enhancement paragraphs true, the trial court sentenced appellant to 75 years' confinement in the Texas Department of Criminal Justice-Institutional Division.

During the State's closing argument, the prosecutor made two separate remarks, which appellant contends constitute an improper comment on his failure to testify. Appellant non-specifically objected to the first remark and moved for a mistrial. The court sustained the objection but refused to grant appellant's motion for mistrial. Appellant then made a second request for a mistrial, and again the court refused. Appellant lodged no objection to the prosecutor's second remark.

## **II. ISSUE PRESENTED ON APPEAL**

In one point of error, appellant complains the trial court erred in denying his motion for mistrial because the prosecutor's remarks improperly commented on appellant's failure to testify.

## **III. ANALYSIS**

Appellant's sole point of error is based upon two statements made by the prosecutor during closing arguments. Appellant argues that these comments violated the jury charge, the United States Constitution, Article I section 10 of the Texas Constitution, and Texas Code of Criminal Procedure, article 38.08. Appellant contends the trial court committed reversible error in denying his request for a mistrial because "it cannot be said beyond a reasonable doubt that the prosecutor's argument did not contribute to the guilty verdict."

To preserve error for an improper jury argument, counsel must object, move for a mistrial, and request an instruction to disregard. *See Cook v. State*, 858 S.W.2d 467, 473 (Tex. Crim. App. 1993) (citing *Coe v. State*, 683 S.W.2d 431, 436 (Tex. Crim. App. 1984)).

In addition to objecting, before complaining about improper jury argument on appeal, an accused has the duty to press for the trial court's ruling. *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996) (holding that 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.).

In the first remark complained of, the prosecutor stated:

So, what is the only other defense if self-defense isn't an issue? What is the only other defense? I didn't do it. That's the only other thing he could say, right? That's all that's left. Well you know I don't hear him saying that.

Although appellant objected to this remark, he failed to state the basis for his objection. The trial court sustained the objection, and appellant moved for a mistrial, arguing that the prosecutor's statement commented on the appellant's failure to testify. The trial court refused to grant a mistrial. Appellant then made a second request for a mistrial, and the court again refused. Appellant failed to request a jury instruction to disregard this remark.

Appellant also complains of the following, second comment made by the prosecutor:

You heard that . . . he [appellant] looked mad. Nobody said anything different than that. There was nobody that testified: Oh, he was over there just for a friendly visit.

Appellant made no objection to this remark.

We find that appellant failed to preserve review of his sole point of error because (1) he failed to lodge any objection to, and did not request a mistrial for, the prosecutor's second remark and (2) he failed to request a jury instruction to disregard the prosecutor's first remark. *See Kiser v. State*, 893 S.W.2d 277, 286 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd) (stating that where "an appellant's objection is sustained and he moves for a mistrial without first requesting an instruction to disregard the improper argument, the appellant

waives error unless the improper argument is ‘so inflammatory that its prejudicial effect could not have been alleviated by an instruction to disregard.’”) (quoting *Johnson v. State*, 611 S.W.2d 649, 650 (Tex. Crim. App. 1981)). Accordingly, appellant’s single point of error is overruled.

The judgment of the trial court is affirmed.

/s/      Kem Thompson Frost  
            Justice

Judgment rendered and Opinion filed March 15, 2001.

Panel consists of Justices Yates, Wittig, and Frost.

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