Affirmed and Opinion filed April 27, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00202-CR

ALVARO PRETEL GOMEZ aka OROBIO GAMBOA QUINTILLIANO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 752,464

O P I N I O N

Appellant was charged by indictment with the offense of aggravated robbery. The indictment alleged a prior felony conviction for the purpose of enhancing the range of punishment. A jury convicted appellant of the charged offense. Following appellant's plea of true to the enhancement paragraph, the jury assessed punishment at confinement for life in the Texas Department of Criminal Justice--Institutional Division and a $10,000 fine. We affirm.

I. Factual Summary

Appellant was tried jointly with his co-defendant, Henry Antonio Mora. The complainant had cashed a check and was waiting at a bus stop with his wife when robbed by appellant and Mora. Both the complainant and his wife identified appellant as one of the robbers. These identifications were from a photo spread, a video line-up and in court. However, the complainant and his wife did not render positive identifications of the co-defendant. At trial, the complainant had difficulty identifying the co-defendant as one of the robbers.

In addition to the testimony of the complainant and his wife, the State offered the testimony of an accomplice witness, a pawn shop owner who received property from appellant and the co-defendant, and a firearm identified as the one used by appellant during the robbery. Finally, the State offered a video taped statement made by appellant where he admitted committing the charged offense.

II. Argument and Analysis

Appellant's sole point of error contends the State made improper comments during her final argument at the guilt phase of trial. Specifically, appellant objects to three areas of the State's closing argument. We will address them *seriatim*.

A.

The first area concerns the following argument by the State:

> I am charged in the State of Texas for seeing that justice is done. It's not my job to put anyone in the penitentiary at all. If I don't believe the defendants are guilty I do not have to try this case. I can dismiss it at will.
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> [COUNSEL FOR APPELLANT]: Judge I'm going to object to the interjection of her personal opinion as to whether these people are guilty.
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> THE COURT: That's overruled Counsel. She may argue her case. Stay in the record. You may argue.

There are four permissible areas of jury argument: (1) summation of the evidence; (2) reasonable

deduction from the evidence; (3) answer to argument of opposing counsel; and (4) pleas for law enforcement. *See Felder v. State,* 848 S.W.2d 85, 94-95 (Tex. Crim. App. 1992). A prosecutor "may argue his opinions concerning issues in the case so long as the opinions are based on the evidence in the record and not as constituting unsworn testimony." *McKay v. State,* 707 S.W.2d 23, 37 (Tex. Crim. App. 1985), *cert. denied,* 479 U.S. 871 (1986). The rationale behind this rule of law was aptly explained by the Dallas Court of Appeals:

> **As a general rule, it is improper for a prosecutor to interject his personal opinion into a statement made to the jury**. *Johnson v. State*, 698 S.W.2d 154, 167 (Tex. Crim. App. 1985). **The rationale behind this prohibition is that such a statement may convey to the jury the idea that the prosecutor has a basis for such an opinion in addition to the evidence presented at trial**. *See Wyatt v. State*, 566 S.W.2d 597, 604 (Tex.Crim.App.1978). "The power and force of the government tend to impart an implicit stamp of believability to what the prosecutor says." *Hall v. United States*, 419 F.2d 582, 583-84 (5th Cir.1969). (emphasis supplied)

Jackson v. State, 726 S.W.2d 217, 220 (Tex. App.—Dallas 1987, pet. ref'd). *See also Robillard v. State,* 641 S.W.2d 910, 912 (Tex. Crim. App. 1982) (Improper expression of personal opinion made to bolster the evidence at trial may be reversible error.) The comment by the prosecutor reflected her personal opinion and was therefore improper.

The State responds the comment was invited. The invited argument rule permits prosecutorial argument outside the record in response to defense argument which goes outside the record. *See Johnson v. State,* 611 S.W.2d 649, 650 (Tex. Crim. App. 1981); *Franks v. State*, 574 S.W.2d 124, 126 (Tex. Crim. App. 1978). The State asserts the following comments by the defense somehow invited such argument, also contending that by directly referencing the name of the prosecutor, this somehow repeatedly assailed her conduct:

> [COUNSEL FOR APPELLANT]: [The complainant] already pointed at my client and in the questioning followed Ms. Barnett is over here and she's asking [the complainant] do you see the other man in the courtroom? And once again anything I say is not evidence. And anything she says or Mr. Gonzalez says during his argument is not evidence. We weren't there we're just representing our clients. Ms. Barnett represents the State of

> Texas but I want to look at how Ms. Barnett, how the State was represented here. The question was not once, not twice, not three times, I don't even think it was four times. I think it was the fifth time she asked the question do you see the other person in the courtroom? [The complainant] is sitting there on the witness stand with a bewildered look and he finally, finally said well the guy in the blue shirt. Okay you saw it. You're the one to interpret that little scenario. Folks hey that was right here. We're on the fifth floor in the criminal courthouse, open court, for the whole world to see and that was Ms. Barnett representing the District Attorney, representing the State of Texas, representing the police. Do you see him? Do you see him? Six times, fifth time, somewhere in there.[1]

The State also contends the following invited the prosecutor to inject her personal opinion:

> [COUNSEL FOR APPELLANT]: Okay. When Ms. Barnett gets up she's going to say **well [appellant] got on the stand and lied** to you to save his skin. You're going to hear that argument. Guarantee it. You're close to see all the witnesses. It's in your hands. You decide. You decide who is being square with you.

In support of its invited argument position, the State relies on *Hannah v. State*, 624 S.W.2d 750 (Tex. App.—Houston [14th Dist.] 1981, pet. ref'd), where this court stated:

> Appellant complains in his third point of error of the following statement made by the prosecutor in her closing argument: "My job as a prosecutor is to seek justice. I dismiss cases when there is not sufficient evidence to support what has occurred." **Appellant objected on the basis that it was not a proper rebuttal of his argument. Appellant now argues in his brief that this was a statement of personal belief or opinion as to the guilt of the appellant and was not invited by his argument. Appellant's present argument is not supported by his trial objection**. Considering the ground of error on the basis of the trial objection, the prosecutor's argument was clearly in response to defense counsel's argument to the effect that the prosecutor could not pick through her files and determine which one she wanted to prosecute but that she must prosecute all cases that were assigned to her. Defense counsel further charged: "It's clear the person who put together the scenario that you heard was Kay Burkhalter (the prosecutor) and not the witnesses that were at the scene because their testimony is not conclusive as to what Jerry Ricky Hannah did."

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[1] This argument is a reference to the fact that the complainant was asked numerous times if he could identify the co-defendant. The complainant first stated he could not identify him, then under repeated questioning by the State the complainant appeared to identify someone other than the co-defendant. The prosecutor asked the complainant at least ten times to identify the co-defendant before he did so.

> Argument of the prosecutor which is invited by defense counsel's argument is not error. *Burns v. State*, 556 S.W.2d 270 (Tex. Crim. App. 1977). (emphasis supplied)

Id. at 754.

Appellant's objection at trial was "to the interjection of her personal opinion." Therefore, *Hannah*, is inapposite to the instant case. No other cases were cited by the State on this issue. Therefore, we find the improper argument was not invited.

Having determined the improper argument was not invited, we must conduct a harm analysis under TEX. R. APP. P. 44.2 (a). Under this rule, the applicable legal standard of review is whether, in light of the record as a whole, there is a reasonable possibility the improper argument might have contributed to appellant's conviction. *See Denton v. State*, 920 S.W.2d 311, 312 (Tex. Crim. App. 1996)(citing and quoting *Orona v. State*, 791 S.W.2d 125, 128 (Tex. Crim. App. 1990)). In applying this standard of review we focus on the error and its possible impact. *See Harris v. State*, 790 S.W.2d 568, 586-88 (Tex. Crim. App. 1989). "If the error was of a magnitude that it disrupted the [factfinder's] orderly evaluation of the evidence, no matter how overwhelming it might have been, then the conviction is tainted." *Id.* at 588.

When performing this type of harmless error analysis, the following factors should be considered: 1) the source of the error; 2) the nature of the error; 3) whether the error was emphasized and its probable collateral implications; 4) the weight a juror would probably place upon the error; and 5) whether declaring the error harmless encouraged the State to repeat it with impunity. *Orona*, 791 S.W.2d at 130. Though no one factor is dispositive, the existence and severity of these factors are indicative of the harm caused by the State's improper argument.

First, the source of the error was the State. Second, the nature of the error was to provide expression of personal opinion in order to bolster the evidence at trial. *See Robillard*, 641 S.W.2d at 912. These two factors militate toward a finding of harm.

Third, the error was not emphasized by the prosecutor. Indeed, even though the trial court erred in overruling appellant's objection, the State did not continue with the argument. Instead, the State

discontinued the argument and proceeded to summarize the testimony adduced at trial. This case is therefore comparable to *Orona*, where the State did not advance the improper argument. The *Orona* Court noted that had the State continued with the improper argument, a reversal might have been necessary. 791 S.W.2d at 130. This distinguishes the case from *Wilson v. State*, 938 S.W.2d 57, 62 (Tex. Crim. App. 1996), where the State's continuation of the improper argument called for reversal.

Regarding the fourth factor, the weight a juror would probably place upon the error, we find that as it pertained to appellant the jury would have placed little weight on the argument. Clearly, the argument was made in response to the complainant's suspect in-court identification of appellant's co-defendant. As noted, in part I, *supra*, the complainant identified appellant as the robber who used the firearm. Appellant's identification was not seriously questioned during trial. Moreover, appellant gave a video taped statement where he admitted committing the charged offense.

The final factor is the probable effect of holding the State's improper argument harmless. While we fear declaring the error harmless might inspire the State to make similar arguments, we note that the error here was not in the magnitude of the error in *Wilson*, where the State struck at the defendant over the shoulders of counsel. 938 S.W.2d at 62.

When these factors are considered, we hold the error was harmless in that it did not contribute to appellant's conviction.

B.

Appellant next contends the following argument was improper:

> [S]peaking of Tazzie Gray if Antonio Orobio Quintilliano says that Tazzie Gray and he didn't commit these robberies. Why didn't he bring her to testify? Why did he not bring her to sit at the stand and tell you the same thing he told you? There is no legal reason in the world why he didn't call that witness to the stand.
>
> * * * *
>
> The State is not the only person that has the ability to subpoena witnesses and compel their testimony. You know or you should know that if there's anything this lawyer thinks that he can bring forward on that witness stand to get his client off he could do it. One example right here is the testimony of his own client. You notice when he put the question mark by his client he was assuming what the other two did tell the truth? You also notice in his

> closing remark he didn't address it. Why didn't he address the testimony of his own client? Why didn't he call Tazzie Gray to the stand? With --

It is within the bounds of permissible jury argument for the State to comment on the appellant's failure to call competent and material witnesses. *Sonnier v. State*, 913 S.W.2d 511, 523 (Tex. Crim. App. 1995); *Albiar v. State*, 739 S.W.2d 360, 362-63 (Tex. Crim. App. 1987). The State may also argue that the defendant's reason for failing to call competent and material witnesses is that such testimony would be unfavorable to the defendant. *Carrillo v. State*, 566 S.W.2d 902, 912-13 (Tex. Crim. App. [Panel Op.] 1978); *Reese v. State*, 905 S.W.2d 631, 637 (Tex. App.—Texarkana 1995, pet. ref'd). The argument of the State was justifiable and did not shift the burden of proof. If appellant had called Tazzie Gray, her testimony might very well have not been favorable to appellant. This argument was within the proper scope of closing argument.

C.

Appellant next complains of the following argument by the State:

> Along with the same lines of a photospreads[sic] on Earl Bundage what is that a red herring, a rabbit trail? Don't you know that if either one of those men believed that Earl Bundage was the true perpetrator of this crime they could have compelled him to come to court. They could have compelled that police officer to compile that photospread? What they want to do is stand behind the tree and say Earl Bundage, look at him. He's the one. They could have made that happen but they didn't.

Appellant's objection that the prosecutor's argument was an attempt to shift the burden of proof was overruled.

Whether appellant could have compelled the police to prepare a photospread is questionable; however, the objection by counsel was again that the burden of proof was being shifted. The argument by the State correctly referred to the right of appellant to call witnesses on his behalf and was also a response to the argument of appellant and missing witnesses and gaps in the State's presentation. *See Sonnier*, 913 S.W.2d at 523.

D.

Finally, appellant complains of the following argument:

> The only person that has the motive to lie in this case is [appellant]. He's the one that's facing 15 years to 99 years or life in prison for this offense. He's the one that told you that he's an illegal immigrant from Columbia that smokes dope in this country and was caught with 14 grams of cocaine before this case was even filed. He's got the motive to lie. Nobody else does.

Appellant claims the foregoing argument was a re-assertion of the argument that only the prosecutor knew the true facts and that the defense attorney was attempting to hide information from the jury. Appellant, however, failed to object to the above argument and has not preserved the issue for appellate review. *See Cockrell v. State*, 933 S.W.2d 73, 79 (Tex. Crim. App. 1996), *cert. denied*, 520 U.S. 1173 (1997).

Appellant's sole point of error is overruled. The judgment of the trial court is affirmed.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed April 27, 2000.

Panel consists of Chief Justice Murphy and Justices Anderson and Baird.[2]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[2] Former Judge Charles F. Baird sitting by assignment.