Affirmed and Opinion filed May 18, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00066-CR

LUIS EGIDIO PALACIOS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 208th District Court
Harris County, Texas
Trial Court Cause No. 763,461

O P I N I O N

Appellant was indicted by a Harris County Grand Jury for the felony offense of aggravated robbery. After a plea of not guilty, a jury found appellant guilty as charged in the indictment. The jury assessed punishment at incarceration for twenty-eight years in the Institutional Division of the Texas Department of Criminal Justice. On appeal, appellant contends the trial court committed reversible error by (1) overruling his motion for mistrial following improper opening statement by the prosecution; (2) overruling his motion for mistrial following improper cross-examination by the prosecution; (3) overruling his motion for mistrial when the prosecutor improperly injected her personal opinion during argument; (4)

admitting State's Exhibit 75, a gun, into evidence; and (5) admitting in evidence an oral statement made by appellant after his arrest. We affirm.

On April 3, 1997, appellant and a co-defendant entered complainant's place of business, a tax preparation and title service. Appellant placed a gun at the neck of complainant, told her in Spanish that this was a holdup, and demanded money. Complainant showed appellant the location of the money. Complainant was then tied up with a telephone cord. Three hundred ninety-three dollars belonging to the business and one hundred ninety dollars in personal money was stolen as well as jewelry belonging to complainant and her employee.

At the punishment phase of the trial, the State offered evidence of two robberies allegedly committed by appellant subsequent to the date of the primary offense. Appellant was identified as one of the gun-wielding robbers at a robbery that occurred on May 19, 1997, at Hispano Express. Evidence was admitted of another robbery, at the Grand Express, which occurred July 17, 1997. Testimony established that a gun was found on a street that appellant ran down following the July 17 robbery. Appellant was apprehended by the authorities in the vicinity of the Grand Express.

OPENING STATEMENT

In his first point of error, appellant alleges that the trial court committed reversible error by overruling appellant's motion for mistrial when the prosecutor called appellant an animal in opening statement. The prosecutor made the following statement:

> . . . you will hear that the defendant came in, and having entered her store found a way to coax his way beyond the security device that they have in their store. He convinced her that he wanted to sit down and have her work with him on some forms, so they opened the door and they let him in the back.
>
> *At that point when he got in the back, he took Ms. Quiroz and slammed her into the ground, tied her hands and feet together like an animal, and dragged her around.* (Emphasis added.)

Appellant's objection was sustained. When appellant said, "I'd ask that the jury be instructed to disregard and I move for a mistrial," the court answered, "Denied." The State continued as follows:

> You will learn from the evidence the form of tying that he used to capture Ms. Quiroz is called hogtying. After he hogtied Ms. Quiroz and dragged her around the store with a gun to her neck or to the back of her head, he told his partner to give him the silencer and asked her not to look at him or he would kill her . . .

We disagree with appellant's interpretation of the statement made by the prosecution. When the prosecutor said, "like an animal," she was not calling appellant names but referring to the way in which Ms. Quiroz was restrained by the appellant. Complainant testified that she was bound with a telephone cord, with her hands and feet tied together behind her back. Thus, evidence was presented that the victim was "hogtied" like an animal.

Article 36.01 of the Code of Criminal Procedure provides, "The State's attorney shall state to the jury the nature of the accusation and the facts which are expected to be proved by the State in support thereof." TEX. CODE CRIM. PROC. ANN. art. 36.01(a)(3) (Vernon Supp. 2000). Because the victim's testimony of the manner in which her hands and feet were bound was admissible, there was no error in the prosecution's reference to her being hogtied during opening statement to the jury. *See Watts v. State*, 630 S.W.2d 737, 738 (Tex. App.–Houston [1st Dist.] 1982, no pet.). A preliminary statement of what the State expects to prove is proper. *See Marini v. State*, 593 S.W.2d 709, 715 (Tex. Crim. App. (Panel op.1980). Appellant's point of error one is overruled.

CROSS-EXAMINATION

In his second point of error, appellant contends the trial court committed reversible error by overruling his motion for mistrial when the prosecutor left the impression with the jury that appellant attempted to kill complainant. On cross-examination of complainant by defense counsel, complainant

admitted that she had not been pistol-whipped, beaten up or sexually assaulted during the robbery. The prosecutor then questioned the victim on redirect as follows:

By Ms. DeBorde (prosecutor):

Question:	Do you suffer from a rather serious heart condition?
Answer:	Yes, I do.
Question:	If they had beaten you up more severely, do you think you would be here today to talk about it?
Mr. Mock:	I object to any speculation.
The Court:	Sustained.
Mr. Mock:	I ask that the jury be instructed to disregard.
The Court:	The jury is so instructed.
Mr. Mock:	I'd move for a mistrial.
The Court:	Denied.

At trial, appellant objected on the grounds of speculation. On appeal, appellant claims the prosecutor's statements were not relevant under Rules 401, 402, 403 and 404 of the Texas Rules of Evidence. Because appellant did not object on the basis of relevance at trial, he did not preserve his complaint for review. *See Thacker v. State*, 999 S.W.2d 56, 61 (Tex. App.–Houston [14th Dist.] 1999, pet. ref'd). To preserve error for appeal, a defendant's objection on appeal must comport with his objection in the trial court. *See Knox v. State*, 934 S.W.2d 678, 687 (Tex. Crim. App. 1996); *Webb v. State*, 995 S.W.2d 295, 298 (Tex. App.–Houston [14th Dist.] 1999, no pet.).

Even if error was preserved, it was cured by the court's instruction to disregard. *See Richards v. State*, 912 S.W.2d 374, 377-378 (Tex. App.–Houston [14th Dist.] 1995, pet. ref'd) (finding State's question regarding whether potential defense witness said she would kill all the witnesses if the defendant received jail time cured by instruction to disregard); *Easter v. State*, 867 S.W.2d 929, 933 (Tex. App.–Waco 1993, pet. ref'd) (holding State's question of a defense witness whether defendant had been kicked out of church cured by instruction to disregard). In the present case, the trial court, in sustaining

the objection to the question, determined that the question was improper. The question before us is whether the jury was so affected by the question that it was unable to disregard it in its deliberations as instructed. The question did not suggest or imply an extraneous offense. Nor did the State pursue the line of questioning once the objection was sustained. We find that any prejudicial effect in the minds of the jurors caused by the asking of this single unanswered question was cured by the court's instruction to disregard. *See Richards v. State,* 912 S.W.2d at 378. Thus, no error occurred in denying appellant's motion for mistrial. Appellant's second point of error is overruled.

ARGUMENT

Appellant contends in his third point of error that the trial court committed reversible error by overruling his motion for mistrial when the prosecutor injected her personal opinion on the issue of probation as punishment into the case. At the punishment phase of the trial, appellant noted during argument that the jury had promised it could consider probation in a proper case and asked the jury to consider probation in appellant's case. The prosecutor thereafter argued that she did not think this was an appropriate case for probation, as follows:

> The Code says that when you decide what this man should get as a sentence for aggravated robbery, that deterrent [sic] is important. It is something that you should consider. Think about how he behaved at the robbery scenes, and when the police finally catch up with him, think about his attitude, "You don't know which one of us had it," talking about the gun. I will submit this is an indication of how lightly [sic] he is to be deterred.
>
> *I don't think this is a case that's appropriate for probation.* (Emphasis added.)

Appellant objected to the argument, the trial court sustained his objection and instructed the jury to disregard the State's argument, but denied appellant's request for a mistrial. On appeal, appellant contends that the argument was improper as it invited the jury to disregard the law and not consider the full range of punishment. As such, appellant claims the trial court's failure to grant his motion for mistrial was reversible error.

Jury argument must fall within one of the following general areas to be proper: 1) summation of the evidence; 2) reasonable deductions from the evidence; 3) answer to argument of opposing counsel; or 4) plea for law enforcement. *See Albiar v. State*, 739 S.W.2d 360, 362 (Tex. Crim. App. 1987). Reversible error results from improper prosecutorial argument only when the argument is extreme, manifestly improper, violative of a mandatory statute, or injects new facts harmful to the accused into the trial proceedings and is thus so inflammatory that its prejudicial effect cannot reasonably be cured by an instruction to disregard the argument. *See Allridge v. State,* 762 S.W.2d 146, 156 (Tex. Crim. App. 1988); *McKay v. State,* 707 S.W.2d 23, 38 (Tex. Crim. App. 1985).

It is improper for a prosecutor to inject personal opinion in statements to the jury if he implies a special expertise coupled with an implied appeal to the jury to rely on that expertise in deciding the contested issues. *See Johnson v. State,* 698 S.W.2d 154, 167 (Tex. Crim. App. 1985). However, not every statement that sounds like personal opinion is reversible error. It is the combination of an argument that sounds like personal opinion with statements suggesting special expertise that is prohibited because jurors may infer that the prosecutor's opinion is based on outside information not available to the jury. *See Hernandez v. State,* 931 S.W.2d 49, 51 (Tex. App.–Fort Worth 1996, no pet.); *Bui v. State*, 964 S.W.2d 335, 345 (Tex. App.–Texarkana 1998, pet. ref'd). Thus, a prosecutor may argue his opinions concerning issues in the case so long as the opinion is based on evidence in the record and does not constitute unsworn testimony. *See Bui v. State,* 964 S.W.2d at 345.

In *Frias v. State*, 775 S.W.2d 871, 875 (Tex. App.–Ft. Worth 1989, no pet.), the Fort Worth Court of Appeals overruled a point of error based on an argument identical to that in the instant case. There, the prosecutor argued, "I don't think probation is appropriate..." The *Frias* court determined that the argument, in context, was an analysis of the evidence and was a reasonable deduction therefrom. *See id*. Similarly, in *Hernandez v. State*, 931 S.W.2d at 51, the same court held the following punishment argument to be proper:

> The State is going to tell you right here and now, in no uncertain terms, that it is the State's position that this case–both cases are absolutely in no way indicative of a probated

sentence. The murder of [victim] and attempted murder of [victim] are not probation cases.

Accordingly, we find that the argument in the present case did not suggest special expertise or knowledge possessed by the prosecutor. The State's argument was a proper response to appellant's request during his argument that the jury consider a probated sentence as punishment. *See Parker v. State*, 792 S.W.2d 795, 801 (Tex. App.–Houston [14th Dist.] 1990, pet. ref'd). While perhaps inartfully phrased in the first person, the prosecutor's argument was essentially that the purpose of law enforcement would be served by sending appellant to prison rather than assessing a probated sentence. As such, the argument was a plea for law enforcement and was not improper. *See Rische v. State*, 834 S.W.2d 942, 949 (Tex. App.–Houston [1st Dist.] 1992, pet. ref'd); *Murray v. State*, 861 S.W.2d 47, 54 (Tex. App.–Texarkana, 1993, pet. ref'd). Even if the argument were improper, any error was cured by the trial court's instruction to disregard. *See Richards v. State*, 912 S.W.2d at 377-378; *Rische v. State*, 834 S.W.2d at 951. Appellant's third point of error is overruled.

ADMISSIBILITY OF GUN

In his fourth point of error, appellant argues that the trial court committed reversible error by allowing into evidence a gun marked as State's Exhibit 75. During the punishment phase of the trial, the State offered evidence of an extraneous robbery that occurred on May 19, 1997, after the commission of the primary offense, at the Hispano Express. In this second robbery, appellant was identified as having a gun. Approximately two months later, one of the witnesses who had been robbed at Hispano Express saw appellant going into a friend's store, Grand Express, suspected Grand Express was about to be robbed, and contacted the police. The police officer identified appellant as a person who exited Grand Express and ran down the street away from the scene. The officer gave chase. He testified that "the only time [he] lost eye contact with him [appellant] is when he [appellant] first made the corner around from Long Point there." Appellant was subsequently discovered hiding beside an air-conditioning unit at a nearby residence. The officer identified State's Exhibit 75 as a pistol recovered on the side of the street that appellant had just run down.

At trial, appellant objected to the admission of State's Exhibit 75, as follows:

(Voir Dire examination of Officer Potel by defense counsel)

Answer: . . . there were a couple of gentlemen from the Christian Center that actually found the pistol on the side of the road in a grassy area where the defendant ran past.

Question: Do you have no direct connection to that, correct?

Answer: No, sir, I didn't see him throw the gun.

Mr. Mock (defense counsel): That's my objection, your honor.

The Court: Overruled.

Mr. Mock: Note my exception, your honor.

On appeal, appellant argues that the exhibit was not relevant because there was no affirmative link to the appellant and that its admission was inflammatory, outweighing its probative value, citing Rule 401 and Rule 403 of the Texas Rules of Evidence. Appellant, however, failed to make a specific objection to the admission of the exhibit and failed to state a ground for the objection. Generally, in order to preserve error for review on appeal, an objection must be specific and must state the grounds for the objection, unless the particular ground was apparent from the context. *See Ethington v. State,* 819 S.W.2d 854, 857 (Tex. Crim. App. 1991). Appellant has failed to preserve error for review.

Even if appellant had preserved error, his contention is without merit. As a general rule, the State is entitled to show the circumstances surrounding the arrest of an accused, unless such evidence is inherently prejudicial and has no relevance to any issue in the case. *See Maddox v. State,* 682 S.W.2d 563, 564 (Tex. Crim. App. 1985). Here, the gun was admissible as a circumstance surrounding the arrest of appellant. *See Lenzi v. State,* 456 S.W.2d 99, 100 (Tex. Crim. App. 1970) (finding no error in allowing State to identify pistol as exhibit before jury when pistol was found in car occupied by appellant upon arrest, some eleven days after the primary offense); *Jones v. State,* 471 S.W.2d 413 (Tex. Crim. App. 1971) (finding evidence that car appellant was riding in when arrested almost three months after the offense was hot-wired was admissible as a circumstance surrounding his arrest). Further, there is nothing to indicate that the introduction into evidence of the gun was inherently so prejudicial as to cause the rendition

of an improper verdict. *See Paz v. State*, 749 S.W.2d 626, 629 (Tex. App.–Corpus Christi 1988, pet. ref'd). The trial court in the instant case did not abuse its discretion in admitting the gun into evidence. Appellant's fourth point of error is overruled.

ADMISSIBILITY OF ORAL STATEMENT

In a fifth point of error, appellant complains that the trial court committed reversible error by allowing into evidence oral statements made by appellant after his arrest. During the punishment phase of the trial, Officer G. T. Hammons testified that while he was transporting the defendant to the jail, after the attempted robbery at Grand Express on July 17, 1997, a transmission was broadcast over the patrol car radio that a gun had been found. Hammons then repeated the transmission out loud, that a gun had been found, in the appellant's presence and hearing in the patrol car. At that time appellant stated, "...he don't (sic) know which one of us had it." According to Hammons, the statement made by appellant was spontaneous.

On appeal, appellant argues that the statement was made while the appellant was in custody, while being questioned by the officer, and was in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) and *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). Appellant also argues that the statement was not relevant and that its prejudicial value far exceeded its probative value.

Before the statement of the defendant was admitted in evidence, the trial court held a hearing out of the presence of the jury. During the hearing, Hammons testified that the statement was not made in response to questioning. Hammons stated he had no intent to elicit any statement or response from appellant.

Admission of a statement that does not stem from custodial interrogation is authorized by the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22, §5 (Vernon Supp. 2000). Interrogation encompasses any word or action on the part of an officer that he should know is reasonably likely to elicit an incriminating response from the suspect. *See Rhode Island v. Innis*, 446 U.S. at 301, 100 S.Ct. at 1689-90, 64 L.Ed.2d at 308. General and routine questions do not constitute interrogation.

See Jones v. State, 795 S.W.2d 171, 174 n. 3 (Tex. Crim. App. 1990); *Shepherd v. State*, 915 S.W.2d 177, 179 (Tex. App.–Fort Worth 1996, pet. ref'd). Offhand remarks, not designed to elicit any kind of incriminating response, do not constitute interrogation. *See Rhode Island v. Innis*, 446 U.S. at 303, 100 S.Ct. at 1690, 64 L.Ed.2d at 309; *Janecka v. State*, 739 S.W.2d 813, 828-829 (Tex. Crim. App. 1987). The evidence in the record does not establish that appellant's statement was the product of custodial interrogation or was staged in a calculated attempt to elicit an incriminating response. *See Cooks v. State*, 844 S.W.2d 697, 734-735 (Tex. Crim. App. 1992). Appellant's fifth point of error is overruled.

There being no reversible error, the judgment of the trial court is affirmed.

/s/ Frank Maloney
Justice

Judgment rendered and Opinion filed May 18, 2000.

Panel consists of Justices Anderson, Frost, and Maloney.[1]

Do not publish—TEX. R. APP. P. 47.3(b).

[1] Senior Justice Frank Maloney sitting by assignment.