Affirmed and Opinion filed June 21, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-01353-CR

PAMELA HELEN WRIGHT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause No. 761,141

O P I N I O N

Appellant, Pamela Wright, was convicted of murder by a jury and sentenced to fifty years confinement in the Institutional Division of TDCJ. *See* TEX. PEN. CODE ANN. § 19.02 (Vernon 1994). Challenging her conviction, appellant now raises four issues for review. We will affirm.

Background

On August 16, 1997, Officer Arriaga was dispatched to a residence in Tomball, Texas. Arriaga received instructions to investigate a possible suicide. Upon arrival, he peered through the front screen door and observed two individuals on the living room

floor. Arriaga entered the residence, placed appellant in the kitchen, and turned to the other individual –complainant Danny Crosby. Arriaga observed Crosby leaning against a recliner with what appeared to be a gunshot wound to the forehead. A handgun was on the floor near complainant's body. Police took appellant to the station where she provided a statement admitting to accidentally shooting complainant. Not persuaded, the State charged appellant with Crosby's murder. Subsequently, appellant was convicted by a jury.

Jury Charge Error

In her first point of error, appellant argues that the trial court erred by including instructions regarding good conduct time in the jury charge. Specifically, appellant argues that she was denied due process and due course of law because she was not eligible for good conduct time reduction while serving a sentence for murder.

The standard of review for jury charge complaints requires an appellate court to engage in a two-step analysis. *Hutch v. State*, 922 S.W.2d 166, 170-71 (Tex. Crim. App. 1996). First, we must determine whether error exists in the jury charge. *Id* at 170. Second, we must determine whether sufficient harm was caused by the error to require reversal. *Id*. at 170-71. Error properly preserved by an objection to the charge will require reversal "as long as the error is not harmless." *Almanza v State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). The Court of Criminal Appeals has interpreted this to mean that any harm, regardless of degree, is sufficient to require reversal. *Arline v. State*, 721 S.W.2d 348, 351 (Tex. Crim. App. 1986). However, when a party fails to preserve charging error, a greater degree of harm is required. This standard of harm is described as "egregious harm." *Almanza*, 686 S.W.2d at 171. Errors resulting in egregious harm are those which affect "the very basis of the case," deprive the defendant of a "valuable right," or "vitally affect a defensive theory." *Id*. at 172.

After a close review of the record, we conclude that the trial court did not err by including instructions on good conduct time. Following conviction for murder under Penal Code Section 19.02, appellant was precluded from accumulating good conduct time toward

early release. TEX. GOV'T CODE ANN. § 508.149(a)(2) (Vernon Supp. 2000). Nevertheless, the trial court's charge contained the mandatory language of article 37.07 § 4(a), Texas Code of Criminal Procedure.[1] As we recently stated in *Edwards v. State*, inclusion of this language does not amount to error. 10 S.W.3d 699, 705 (Tex. App.—Houston [14 th Dist.] 1999, pet. granted); *see also Cagle v. State*, 23 S.W.3d 590, 593 (Tex. App.—Fort Worth 2000, pet. filed) (following *Edwards*). First, the good conduct time instruction given in

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[1] Article 37.07, § 4(a) of the Code of Criminal Procedure provides as follows:

> In the penalty phase of the trial of a felony case in which the punishment is to be assessed by the jury rather than the court, if the offense of which the jury has found the defendant guilty is [aggravated robbery], unless the defendant has been convicted of a capital felony, the court shall charge the jury in writing as follows:
>
> Under the law applicable in this case, the defendant, if sentenced to a term of imprisonment, may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.
>
> It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.
>
> Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served equals one-half of the sentence imposed or 30 years, whichever is less, without consideration of any good conduct time he may earn. If the defendant is sentenced to a term of less than four years, he must serve at least two years before he is eligible for parole. Eligibility for parole does not guarantee that parole will be granted.
>
> It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.
>
> You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant.

TEX. CODE CRIM. PROC. ANN. Art. 37.07 § 4(a) (Vernon Supp. 2001)

this case was upheld against a due course of law challenge in a case tried after reenactment of Texas Code of Criminal Procedure Article 37.07 § 4 (a). TEX. CONST. Art. IV, § 11(a) (amended 1989); *Oakley v. State*, 830 S.W.2d 107 (Tex. Crim. App.1992). The *Oakley* court held that the constitutional amendment removed the due course of law constraint that plagued the former article 37.07, section 4. *Oakley*, 830 S.W.2d at 111. Further, the language of the charge itself is instructive. The "good conduct time" portion of the mandatory charge is stated generally and in terms of a possibility, not a certainty. *Martinez v. State*, 969 S.W.2d 497, 500 (Tex. App.—Austin 1998, no pet.). Conversely, the charge also contains language that speaks of certainties rather than possibilities: "if the defendant is sentenced to a term of imprisonment, he *will not become* eligible for parole until the actual time served equals one-half of the sentence imposed . . . without consideration of good conduct time." TEX. CODE CRIM. PROC. ANN. Art. 37.07 § 4(a) (Vernon Supp. 2000) (emphasis added).

The jury was instructed, in accordance with article 37.07, section 4(a), that appellant may earn time off the period of incarceration imposed through the award of good conduct time. The instruction included a description of appellant's parole eligibility. Also, the jury was informed that good conduct time would not be considered in calculating parole eligibility. The jury was warned that an award of good conduct time cannot be predicted. Finally, the jury was instructed not to consider the extent to which good conduct time might be awarded. Consonant with our holding in *Edwards*, we are not persuaded that the jury charge mandated by article 37.07, section 4(a) violated appellant's due course of law and due process rights. *See Edwards*, 10 S.W.3d at 705. For all of the above reasons, we overrule appellant's first point of error.

Improper Jury Argument

In her second issue for review, appellant argues that the trial court erred in overruling her objection to the prosecutor's misstatement of the evidence during final argument. Specifically, appellant contends that the prosecutor's injection of new facts into

the record was a calculated attempt to undermine her defense that she did not intentionally or knowingly shoot the complainant.

The four permissible areas of jury argument consist of summation of the evidence, reasonable deduction from the evidence, answer to argument of opposing counsel, and pleas for law enforcement. *Mijores v. State*, 11 S.W.3d 253, 257 (Tex. App.—Houston [14th Dist.] 1999, no pet.). An argument that exceeds these bounds is erroneous. *Felder v. State*, 848 S.W.2d 85, 94-95 (Tex. Crim. App. 1992). However, in making jury argument, wide latitude is allowed without limitation in drawing inferences from the evidence, so long as the inferences drawn are reasonable, fair, legitimate, and offered in good faith. *Gaddis v. State*, 753 S.W.2d 396, 398 (Tex. Crim. App.1988). With this standard in mind, we turn to relevant portions of the appellant's statement and the State's closing argument.

A review of the record shows that appellant provided police with a statement explaining her role in the complainant's death. The prosecutor read the following portion of the statement which was admitted into evidence:

> I went to my bedroom and got my gun because I weigh 110 pounds and he was something like 225 pounds. I came back into the den and [complainant] was still sitting but when he saw the pistol in my hand he stood up. I cocked the hammer back to show him that I meant business, and I pointed the gun in his direction, and he laughed and ***the gun went off***. I did not mean to shoot him, I just wanted to get his attention. (emphasis added).

Later, the prosecutor referenced this statement in her closing argument as follows:

> Now, let's talk about a few things. The judge told you there's two ways that the State could prove murder. First, intentionally and knowingly committing an act clearly dangerous to human life. Pointing a gun. I cocked the hammer. I pointed the weapon in his direction and ***I shot it***. Intentionally and knowingly committing an act dangerous to human life. (emphasis added).

Appellant's objection to this portion of the prosecutor's closing argument was overruled.

After applying the above mentioned standards, we conclude that the prosecutor engaged in improper jury argument. The prosecutor's misquotation, *i.e.*, "I shot it," clearly

was an attempt to convince the jury that appellant confessed to intentionally shooting the gun. There is no support in the record for this mischaracterization of appellant's statement. Therefore, the prosecutor's misstatement cannot be termed a summation of the evidence as contended by the State. The State also cites *Hoover v. State* for the proposition that the prosecutor's argument was a reasonable deduction from the evidence and thus proper jury argument. *See* 449 S.W.2d 60 64-65 (Tex. Crim. App. 1969). However, we disagree because there is a significant difference between the prosecutor's argument in *Hoover* and the argument in the instant case.

In *Hoover*, a jury convicted the appellant of murdering his girlfriend with a handgun. *Id*. at 62. At trial, Hoover testified that his shooting of the decedent was accidental because he intended to fire his gun toward the ceiling and merely awaken her. *Id*. During closing, the prosecutor used the court's instruction on malice in an effort to persuade the jury that appellant intended to both pull the trigger and kill. *Id*. at 64. Based on Hoover's testimony that he fired the gun, the court held that this was a reasonable deduction from the evidence. *Id*. In the case at bar, however, appellant did not admit to firing the gun. She stated that it accidentally "went off." Therefore, the prosecutor's statement that appellant admitted to intentionally shooting complainant was not a deduction from the evidence, but an injection of new evidence. *See Reynolds v. State*, 505 S.W.2d 265, 266-67 (Tex. Crim. App. 1974) (reasoning that where no evidence of the prosecutor's deduction exists, such argument cannot be termed a deduction, but an injection of new evidence and thus error). Accordingly, we find that the prosecutor's statement did not fall within the four permissible areas of jury argument. The trial court erred by overruling Appellant's objection. *Mijores*, 11 S.W.3d at 257.

Having found that the trial court should have sustained appellant's objection, we must determine whether this error warrants reversal. TEX. R. APP. P. 44.2. Erroneous rulings related to jury argument are generally treated as non-constitutional error within the purview of Rule 44.2(b). *Jones v. State*, 38 S.W.3d 793, 796 (Tex. App.—Houston [14th Dist.] pet. filed) (citing *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998)).

Rule 44.2(b) requires that we disregard any error not affecting substantial rights. TEX. R. APP. P. 44.2(b). Stated differently, "[a] criminal conviction should not be overturned for non-constitutional error if the appellate court, after reviewing the record as a whole, has fair assurance that the error did not influence the jury or had but a slight effect." *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998). Finally, courts use the following three factors in analyzing the harm associated with improper jury argument: (1) severity of the misconduct (the magnitude of the prejudicial effect of the prosecutor's remarks); (2) measures adopted to cure the misconduct (the efficacy of any cautionary instruction by the judge); and (3) the certainty of conviction absent the misconduct (the strength of the evidence supporting the conviction). *Martinez*, 17 S.W.3d 677, 692-93 (Tex. Crim. App. 2000); *Mosley*, 983 S.W.2d at 259.

A. Severity of Misconduct

Rule 44.2(b) is the guide to our harm analysis in this case. It was taken directly from Federal Rule of Criminal Procedure 52(a) without substantive change. *See* TEX. R. APP. P. 44, Notes and Comments; *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998). Therefore, in construing the impact of this rule and its three factors relating to improper jury argument, federal case law provides guidance. *Mosley*, 983 S.W.2d at 259. An examination of such precedent demonstrates that the cumulative effect of improper argument is part and parcel of assessing the severity of prosecutorial misconduct. *Jones* 38 S.W.3d at 799 (citing *United States v. Millar*, 79 F.3d 338, 343 (2nd Cir. 1996); *United States v. Palmer*, 37 F.3d 1080, 1085 (5th Cir. 1994)) (Baird, J., dissenting).

The prosecutor's misstatement of the evidence consisted of a single reference to appellant's written statement. The statement, however, had previously been read and admitted into evidence; therefore, the jury had ample opportunity to ignore the mischaracterization. After considering the cumulative effect of the improper argument, we conclude that the prosecutor's misstatement had minimal effect on the jury's verdict.

B. Measures Adopted to Cure Misconduct

The second Mosley factor requires that we examine the court's efforts to cure misconduct. Specifically, we look to whether the court provided any cautionary instruction, and the efficacy of such instruction. In the present case, the court provided no cautionary instruction after overruling appellant's objection to the prosecutor's improper jury argument. However, the prosecutor did nothing to emphasize the erroneous aspects of this ruling. We believe this inaction by the prosecutor attenuated any harm which might have occurred because of the court's failure to take curative measures. *See Jones* 38 S.W.3d at 797. Therefore, the court's failure to provide a cautionary instruction or otherwise take corrective measures does not militate toward a finding of harm.

C. Certainty of the Conviction Absent Misconduct

The final factor in *Mosley* requires that we ascertain the certainty of appellant's conviction absent improper jury argument. Appellant did not testify and no witnesses were called on her behalf. The State called a number of witnesses, including firearms expert David Tanner. Tanner testified that the trigger pull on the weapon in question was such that it would require physical action from an outside force. In other words, the gun would not merely "go off" when cocked – as appellant claimed in her statement. In addition, the prosecutor's mischaracterization of appellant's statement was minimized because she previously read the pertinent portion verbatim. Also, the statement was admitted into evidence. Therefore, we conclude that the prosecutor's improper jury argument had nominal affect on the jury's decision to convict.

After applying the three *Mosley* factors in conjunction with the harm analysis required in Rule 44.2(b), we have fair assurance that the error in overruling appellant's objection had, at most, a slight effect on the jury's finding of guilt. TEX. R. APP. P. 44.2(b); *Johnson,* 967 S.W.2d at 417. Accordingly, we overrule appellant's second issue for review.

Improper Jury Argument

In her third and fourth issues for review, appellant argues that the prosecution engaged in improper jury argument during the punishment phase. Specifically, appellant contends that the trial court erred by overruling her objections to the prosecutor's use of two hypothetical situations. We will address both issues concurrently.

Having already stated the standard of review for claims of improper jury argument, we proceed to that portion of the prosecutor's closing argument at issue:

Prosecutor:	Five years to 99 or life, and Judge Ellis, during voir dire, told you that as defense counsel pointed out, that big range is there because there are different types of murders, there are different types of defendants. Talked about the guy, if you remember, who shot his mother.
Defense Counsel:	Excuse me. Excuse me. Argumentative. Assuming facts not in evidence, your honor.
Court:	Overruled.
Prosecutor:	He talked –
Defense Counsel:	The Court knows where I'm going with this and understands the nature of my objection?
Court:	Yes, I understand. Overruled.
Defense Counsel:	Yes. Thank you.
Prosecutor:	With regard to somebody who's maybe committed a crime or a murder to save their parent and then there is maybe a drug deal gone bad.
Defense Counsel:	Excuse me. For the record, I object to her using other cases not in evidence to compare them to the appropriateness of the sentencing in this case. Objection, outside the record, improper argument.
Court:	Overruled.

After considering the above jury argument in context, we disagree with appellant's contention that the prosecutor "injected new facts harmful to appellant into the punishment stage of her trial." The prosecutor's hypothetical scenarios are not "facts."[2] Instead, we

[2] A "fact" refers to "a thing done; an actual occurrence; an actual happening in time space or an event mental or physical; that which has taken place." BLACK'S LAW DICTIONARY 531-32 (5th ed. 1979).

conclude that these scenarios were nothing more than pleas for law enforcement intended to explain the range of punishment available to the jury. A plea for law enforcement is permissible jury argument. *Mijores* at 257. As the Court of Criminal Appeals has recently explained, "[a] plea for law enforcement simply denotes an argument that is otherwise unobjectionable. It is merely a label given to an argument that is determined to be proper and is not an independent ground for assessing the propriety of an argument." *Holberg v. State*, 38 S.W.3d 137, 141 (Tex. Crim. App. 2000). Applying the principle that prosecutors have wide latitude in the language and manner of arguing their side of the case, we hold that the hypothetical scenarios at issue were not improper jury argument but pleas for law enforcement. *Id*. Accordingly, we overrule appellant's third and fourth issues for review and affirm the judgment of the trial court.

/s/ Charles W. Seymore
Justice

Judgment rendered and Opinion filed June 21, 2001.

Panel consists of Justices Anderson, Hudson, and Seymore.

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