Affirmed and Opinion Filed July 19, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00028-CR

HARVEY LAVERN DIXON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Cause No. 91CR1128

O P I N I O N

A jury convicted appellant of murder, and assessed punishment at sixty years' imprisonment. On appeal, appellant raises eight points of error. In his first four points of error, appellant complains that his murder conviction is barred by double jeopardy. Accordingly, these points of error will be discussed together. In his fifth point of error, appellant complains that the trial court erred in overruling his request for a charge of the lesser included offense of voluntary manslaughter. In his sixth point of error, appellant argues that the trial court erred by allowing evidence of an extraneous offense. In his seventh point of error, appellant complains of improper jury argument by the prosecutor. Lastly, in his eighth point of error, appellant complains that the trial court erred in denying his motion for new trial

based on jury misconduct. We affirm.

Appellant was originally indicted for murder in cause numbers 91CR1127 and 91CR1128. After the jury was sworn in cause number 91CR1128, the State, as part of a plea bargain agreement, reduced the charge to voluntary manslaughter and appellant pled guilty. The indictment in 91CR1127 was dismissed. Appellant, after exhausting his state appeals, filed a writ of habeas corpus in federal court alleging that his plea was involuntary. The federal court agreed and set aside the guilty plea and sentence in cause number 91CR1128, and the dismissal in cause number 91CR1127. The State then sought to try appellant on the original murder charge. Appellant filed a pretrial writ of habeas corpus in each cause contending that his prosecution for murder was barred by the double jeopardy clauses of the United States and Texas Constitutions, as well as TEX. CODE CRIM. PROC. ANN. art. 37.14 (Vernon 1994). The court of appeals held that the State was not barred from prosecuting appellant for the greater offense of murder. *Dixon v. State*, 981 S.W.2d 698, 699 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

Appellant now wants to raise the same issues on appeal to this Court. Under the law of the case doctrine, where determinations on questions of law have already been made on a prior appeal to a court of last resort, those determinations will be held to govern the case throughout all its subsequent stages, including a retrial and a subsequent appeal. *Ex parte Granger*, 850 S.W.2d 513, 516 (Tex. Crim. App. 1993). The law of the case doctrine, however, should be disregarded when compelling circumstances require a redetermination of the point of law decided on the prior appeal. *Id*. Commonly, the compelling circumstance requirement has taken the form a fundamental change in the law upon which the underlying decision was based. *See id*.; *Peden v. State*, 917 S.W.2d 941, 956 (Tex. App.—Fort Worth 1996, pet. ref'd). There has, however, been no fundamental change in the law to support appellant's double jeopardy argument.

The court in *Dixon v. State* relied on *Windom v. State*, 968 S.W.2d 360 (Tex. Crim. App. 1998), for the proposition that if the State, as part of a plea bargain agreement, reduces the charges against a defendant in exchange for a guilty plea, and the defendant successfully

challenges the conviction, both parties are returned to their original position. *Dixon*, 981 S.W.2d at 699. There is no assertion by appellant that this is not the law in Texas. Appellant merely argues that *Windom* is distinguishable on the facts. This argument, however, does not rise to the level of a compelling circumstance which would justify this Court disregarding the law of the case doctrine. Accordingly, we overrule appellant's first four points of error.

In his fifth point of error, appellant complains that the trial court erred in overruling his request for a jury charge on the lesser included offense of voluntary manslaughter. Appellant's argument, however, focuses entirely on appellant's entitlement to a charge on the lesser included offense of involuntary manslaughter.

If an objection made in the trial court differs from the complaint made on appeal, nothing has been preserved for review, and the appellate court should express no opinion as to the merits of the claim. *Dixon v. State*, 2 S.W.3d 263, 272 (Tex. Crim. App. 1999). At trial, appellant requested a charge on the lesser included offense of voluntary manslaughter, which the trial court denied. On appeal, the term voluntary manslaughter appears only in the heading for his point of error. The term involuntary manslaughter, however, occurs three times in the argument. For example, in appellant's brief he states "[t]hat Rod Hill, the individual killed, . . . was the source of most of the pressure and that due to these pressures he committed the act of shooting the victim in a state of mind which would make Appellant guilty of involuntary manslaughter." Accordingly appellant has failed to preserve error for our review, and his fifth point of error is overruled.

In appellant's sixth point of error, appellant complains that the trial court erred in admitting evidence of an extraneous offense of aggravated kidnaping committed by appellant. Appellant argues that in order for the extraneous offense to be admissible the State was required to demonstrate that the evidence regarding the aggravated kidnaping was material and that appellant participated in the offense.

Evidence of an extraneous offense is admissible when the State makes a clear showing that, 1) the evidence of the extraneous offense is material; 2) the accused participated in the extraneous offense; and 3) the relevancy of the extraneous offense outweighs its prejudicial

potential. *Harrell v. State*, 884 S.W.2d 154, 158 (Tex. Crim. App. 1994). This standard of admissibility for extraneous offense evidence is known as the "clear proof" standard. *Id*. The Court of Criminal Appeals has interpreted this "clear proof" standard to mean proof beyond a reasonable doubt that the defendant committed the extraneous offense. *Id*.

Moreover, if an accused creates what is purported to be a false impression about his nature as a law abiding citizen or his propensity for committing criminal acts, he has opened the door for his opponent to present rebuttal evidence of extraneous offenses. *Delk v. State*, 855 S.W.2d 700, 704 (Tex. Crim. App.1993). However, this "open the door" exception to the general rule of inadmissibility of extraneous offenses is generally limited to those instances in which a witness makes assertions about his past which are either patently untrue, or clearly misleading. *Lewis v. State*, 933 S.W.2d 172, 179 (Tex. App.—Corpus Christi 1996, pet. ref'd).

The record reveals in the present case that the testimony of the extraneous offense was material and appellant did participate.

First, with regard to the materiality of the extraneous offense, appellant's defense at trial attempted to negate the intentional nature of his act. Appellant called witnesses who testified that he was not a violent man. One witness, Dr. Fason, went so far to say that "crime [was] . . . totally out of character for . . . [appellant]." This statement by Dr. Fason clearly was intended to cast doubt upon appellant's ability to intentionally murder someone. Accordingly, admission of evidence regarding appellant's participation in an aggravated kidnaping would be material to establishing that violence was not so out of character with appellant that he could not have developed the requisite intent to murder. Second, the record reveals that appellant did participate in the extraneous offense. The complaining witness testified that appellant was his football coach, he had borrowed appellant's car on more than one occasion, and that he had gone hunting with appellant on more than one occasion. Moreover, the complaining witness testified that appellant was driving the vehicle that he was forced into at gun point by another individual, and that appellant had pushed him to the ground after they had exited the vehicle.

Lastly, appellant opened the door to the extraneous offense testimony when he testified

that he had never been violent towards anyone. The extraneous offense evidence clearly contradicts this testimony. Accordingly, we overrule appellant's sixth point of error.

Appellant, in his seventh point of error, argues that the trial court erred in overruling his motion for mistrial following a comment about parole law during final argument. A mistrial is an extreme remedy for prejudicial events which occur during the course of a trial. *Bauder v. State*, 921 S.W.2d 696, 698 (Tex. Crim. App. 1996). The trial court's ruling on a motion for mistrial is reviewed under an abuse of discretion standard. *Id*. at 698. A trial court commits error in denying a motion for mistrial only if the argument is extreme, manifestly improper, injects new and harmful facts into the case or violates a mandatory statutory provision and was thus so inflammatory that its prejudicial effect cannot be reasonably removed from the minds of the jury by an instruction to disregard. *Foster v. State*, 25 S.W.3d 792, 798 (Tex. App.—Waco 2000, pet. ref'd); *Carlock v. State*, 8 S.W.3d 717, 725 (Tex. App.—Waco 1999, no pet.). If the reviewing court finds that an instruction cured any prejudicial effect caused by the improper argument, the trial court did not err. *Foster*, 25 S.W.3d at 798; *Faulkner v. State*, 940 S.W.2d 308, 312 (Tex. App.—Fort Worth 1997, pet. ref'd). However, if the instruction did not cure the prejudicial effect, error results, and the reviewing court proceeds with a harm analysis. *Foster*, 25 S.W.3d at 798; *Carlock*, 8 S.W.3d at 724.

The State's argument was neither extreme, nor manifestly improper:

> The first thing I would like to call your attention to is that it tells you that you have already found him guilty of murder; and, like I say, I think that's the correct verdict. I think you did a good job on that. Now, they talk about parole laws on the bottom on Page 1 and the top of Page 2; and, you know, I wouldn't be too concerned with that because this is going to be something that is going to be up to the Board of Pardons & Paroles. Depending on how somebody is doing in the penitentiary, they're going to be the judges whether this person is fit to be back in society or

> needs to be there. But you can get a good idea of what you can expect someone to serve if you give a certain amount of years.

The State was merely attempting to paraphrase the parole law contained in the court's jury charge. While the State's attempt at paraphrasing parole law was inartful, it did not inject new and harmful facts into the case or violate a mandatory statute. In reviewing the record, nothing indicates that the State intended to taint the proceedings through its description of parole law. Furthermore, the jury is presumed to have obeyed the instruction, and a review of the record reveals no indication that the jury failed to follow the instruction. *See Bauder*, 921 S.W.2d at 698. Assuming, without deciding, the argument was improper, we hold the instruction given by the trial court cured the prejudicial effect, if any. Accordingly, appellant's seventh point of error is overruled.

In his eighth point of error, appellant argues that the trial court erred in denying his motion for new trial based upon jury misconduct. Specifically, appellant contends that jury misconduct is supported by an affidavit provided by the foreman of the jury, describing jurors discussing, during deliberations, appellant's eligibility for parole and how long appellant would have to spend in prison. This allegation, however, is insufficient to establish jury misconduct.

When jury misconduct is raised in a motion for new trial, whether misconduct has occurred is a decision for the trial court, and we will not disturb that ruling absent a clear abuse of discretion. *Lewis v. State*, 911 S.W.2d 1, 7 (Tex. Crim. App. 1995); *Short v. State*, 995 S.W.2d 948, 954 (Tex. App.—Fort Worth, pet. ref'd); *Hernandez v. State*, 938 S.W.2d 503, 507 (Tex. App.—Waco 1997, pet. ref'd). A movant for a new trial based on jury misconduct must show that (1) misconduct occurred, and (2) the misconduct resulted in harm to the movant. *Garza v. State*, 630 S.W.2d 272, 274 (Tex. Crim. App. [Panel Op.] 1981). Texas Rule of Evidence 606(b) now limits jury misconduct to only an outside influence that was improperly brought to bear upon any juror. TEX. R. EVID. 606(b); *Hart v. State*, 15 S.W.3d 117, 123–24 (Tex. App.—Texarkana 2000, pet. ref'd); *Lincicome v. State*, 3 S.W.3d 644, 647 (Tex. App.—Amarillo 1999, no pet.); *Hines v. State*, 3 S.W.3d 618, 622 (Tex. App.—Texarkana 1999, pet. ref'd); *Sanders v. State*, 1 S.W.3d 885, 887 (Tex. App.—Austin

1999, no pet.). Accordingly, jurors may testify only to whether any outside influence was brought to bear upon them. *Hart*, 15 S.W.3d at 124; *Hines*, 3 S.W.3 at 621. We recognize that the Texas Court of Criminal Appeals in *Salazar v. State*, 38 S.W.3d 141, 148–49 (Tex. Crim. App. 2001) recently determined that a trial court did not abuse its discretion in denying a motion for new trial after examining affidavits of several jurors which detailed discussions during jury deliberations on the effect of parole law. The court in *Salazar* acknowledged that Rule 606(b) may now prevent considering affidavits of jurors on anything other than an outside influence; however, it determined that any potential objection under 606(b) was waived by both parties and the issue was not preserved. *Salazar*, 38 S.W.3d at 155 n.3.

Appellant asserts that the affidavit of the juror constitutes evidence of an outside influence. We disagree. The jurors' discussions about the effect of parole law on appellant's sentence were clearly made by jurors during deliberations and thus emanated from inside the jury. *Hines*, 3 S.W.3d at 623. The trial court correctly overruled appellant's motion for new trial. Accordingly, we overrule appellant's eighth point of error.

We affirm the judgment of the trial court.

/s/ Paul C. Murphy
Senior Chief Justice

Judgment rendered and Opinion filed July 19, 2001.

Panel consists of Justices Edelman, Frost, and Murphy.*

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

* Senior Chief Justice Paul C. Murphy sitting by assignment.