Affirmed and Opinion filed October 5, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00571-CR

JERRY STEPHEN PAYNE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law #2
Harris County, Texas
Trial Court Cause No. 98-46657

O P I N I O N

Appellant, following a one day jury trial, was convicted of misdemeanor assault. The court below assessed punishment at one hundred days confinement in the Harris County Jail, probated for fifteen months, and an eight hundred dollar fine. Appellant raises seven points of error on appeal comprising four general categories: 1) legal insufficiency of the evidence; 2) factual insufficiency of the evidence; 3) prosecutorial misconduct; and 4) denial of a hearing on a motion for new trial. We affirm.

I. Background

On November 18, 1998, appellant took Ms. Vick, the complainant, to lunch. Ms. Vick had previously worked at appellant's law firm, and a romantic relationship had developed. On that date, however, Ms. Vick was working for another law firm in downtown, Houston. At lunch, Ms. Vick and appellant argued. This argument continued as appellant was taking Ms. Vick back to work. At the same time, Sgts. Eric Mehl and Brad Rudolph of the Houston Police Department were returning from lunch in an unmarked vehicle. Sgts. Mehl and Rudolph witnessed the car appellant was driving veer sharply to the right and end up on the curb. Additionally, they saw appellant leaning over in his seat striking Ms. Vick. Sgts. Mehl and Rudolph were certain that they saw Ms. Vick struck twice in the face, and as their vehicle passed appellant's vehicle, they looked back and continued seeing appellant swinging at Ms. Vick. At this point, Sgts. Mehl and Rudolph turned their vehicle around and began following appellant's vehicle. They requested that appellant's vehicle be stopped by a marked car. While following appellant's vehicle, Sgts. Mehl and Rudolph noticed that Ms. Vick was being held down.

Eventually, Officer Fike stopped appellant's vehicle. After the vehicle stopped, Sgts. Mehl and Rudolph approached Ms. Vick and asked what had occurred. Ms. Vick was visibly upset, had a bloody nose, slight swelling on the left side of her face, a scratch on her eye, and scratches on her neck. Ms. Vick went freely with the officers to give a sworn written statement. In this statement, Ms. Vick told the police that appellant struck her several times. Before trial, Ms. Vick submitted a second written statement, prepared with the assistance of appellant, that challenged the accuracy of her initial statement.

II. Legal Insufficiency

In appellant's first and third points of error, he contends that the evidence was legally insufficient to sustain a conviction for assault with intent to commit bodily injury. Specifically, appellant complains that the evidence was legally insufficient to show beyond a reasonable doubt that he intentionally or knowingly caused injury to the victim, that he did not act out of necessity, and that he did not act in self-defense.

In reviewing legal sufficiency challenges, appellate courts are to view the evidence in the light most favorable to the prosecution, overturning the lower court's verdict only if a rational trier of fact could not

have found all elements of the offense beyond a reasonable doubt. *See Santellan v. State*, 939 S.W.2d 155, 160 (Tex. Crim. App. 1997) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2871, 2879, 61 L.Ed.2d 560 (1979)). "[I]f any evidence establishes guilt beyond a reasonable doubt, the appellate court may not reverse the fact finder's verdict on grounds of legal insufficiency." *Arthur v. State*, 11 S.W.3d 386, 389 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd).

The only disputed element of the assault, is whether appellant acted intentionally or knowingly. *See* TEX. PEN. CODE ANN. § 22.01 (Vernon 1994). Mental culpability, generally, is of such a nature that it must be inferred from the circumstances under which the prohibited act occurred. *See Moore v. State*, 969 S.W.2d 4, 10 (Tex. Crim. App. 1998); *Hernandez v. State*, 819 S.W.2d 806, 810 (Tex. Crim. App. 1991). The circumstances under which appellant's assault of Ms. Vick occurred, support a finding that appellant's acts were intentional or knowing. Sgts. Mehl and Rudolph testified that they saw appellant strike Ms. Vick twice in the face, and both observed appellant continually swinging his arm at Ms. Vick. Specifically, on direct, Sgt. Eric Mehl testified:

> I saw a female in the passenger seat, the back of her head was pressed against the passenger side window, her hair was swinging back and forth, I saw the driver of the vehicle lean over into the passenger seat and strike the woman two times on the left side of her face.

Additionally, Sgt. Mehl testified that as he passed appellant's vehicle, he saw appellant's arm continually swinging, but he did not see any more contact between appellant and Ms. Vick. On cross examination, Sgt. Mehl was asked, "You just saw the motion of the arm." Sgt Mehl responded, "And the striking of the face." Further, Sgt. Rudolph testified:

> I'm the driver, this is the white female. She was more or less turned towards me, her head was pressed against the window which was up, this male was leaning across her and I saw him deliver two blows to the left side of her face, pulled back and struck her twice.

On cross examination the following exchange occurred between defense counsel and Sgt. Rudolph:

> Q: So you don't know whether he saw a closed fist or an open hand?

A: I do not know what he saw.

Q: You just saw that the arm was coming forward?

A: I saw him strike her on the face with his hand, whether his hand was open or closed, I couldn't tell you.

Q: Would that have been consistent with a person trying to gain control of the person?

A: No, it would not have been consistent with a person trying to gain control.

Ms. Vick, moreover, in her initial description of the attack, stated that appellant started punching her in the face and trying to hold her head down to the console. In support of this testimony, Sgts. Mehl and Rudolph testified that when they approached Ms. Vick after appellant's car was stopped, they observed that she had a bloody nose, slight swelling on the left side of her face, a scratch on her left eye, and scratches on her neck. The evidence in this case is legally sufficient to establish that appellant intentionally or knowingly caused bodily injury to Ms. Vick.

Next, appellant contends that the evidence is legally insufficient to establish he did not act out of necessity or self defense. In support of this contention, appellant offers his testimony, and Ms. Vick's testimony, that Ms. Vick was the initial aggressor and that appellant's actions were out of either necessity or self defense. At trial, Ms. Vick testified that she started the altercation between herself and appellant by swinging over in her seat and kicking at appellant. At trial, however, Ms. Vick also testified that when she provided her initial statement to the police, she did not inform them that she had been the aggressor. In fact, her testimony at trial indicates that in her initial statement, she told the police that she tried to strike back at appellant only after appellant began striking her. Additionally, the record reflects that Ms. Vick was given the opportunity to review her statement, and did in fact ask for sections of the statement to be changed. Moreover, the record reflects that the first mention of Ms. Vick being the aggressor occurred in a second statement prepared by Ms. Vick with the assistance of appellant. As further evidence of necessity or self defense, appellant testified that he was kicked under the chin by Ms. Vick with her heel causing him to bite his tongue. The officers present at the scene when appellant was arrested, however, testified that they saw no marks on appellant. Given the conflicting nature of the evidence at trial, the jury was entitled to disbelieve appellant's testimony and find that appellant committed the assault. *See Sharp*

v. State, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986); *Tucker v. State*, 15 S.W.3d 229, 235 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd); *Arthur*, 11 S.W.3d at 389. Viewing the evidence in the light most favorable to the prosecution, we find the evidence legally sufficient to support appellant's conviction. We overrule appellant's first and third points of error.

III. Factual Insufficiency

In appellant's second point of error, he contends that the evidence was factually insufficient to sustain a conviction for assault with intent to commit bodily injury. Specifically, appellant argues that the evidence is so contrary to the overwhelming weight of the evidence to be clearly wrong and unjust in regard to appellant intentionally or knowingly causing injury to Ms. Vick, and in regard to the defenses of necessity and self defense. We disagree.

In reviewing factual sufficiency challenges, appellate courts must determine "whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof." *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). The *Johnson* Court reaffirmed the requirement that "due deference must be accorded the fact finder's determinations, particularly those determinations concerning the weight and credibility of the evidence." *Id*. at 9.

At trial, the testimony established that Sgts. Mehl and Rudolph observed appellant striking Ms. Vick. The testimony, additionally, established that immediately following the assault, Ms. Vick provided a statement to the police, that appellant had struck her and held her head down on the console. Moreover, appellant, Ms. Vick, and Sgts. Mehl and Rudolph, all testified that appellant held Ms. Vick's head down. Further, Sgts. Mehl and Rudolph who observed Ms. Vick being assaulted, testified about the injuries sustained by Ms. Vick.

Appellant testified that he did not strike Ms. Vick, but merely reached for her to gain control over her and stop her from kicking him. Further, Ms. Vick testified in support of appellant's account of the altercation. Ms. Vick's testimony, however, is suspect. As discussed previously, Ms. Vick immediately

following the incident in question did not mention to the police officers anything regarding her kicking at appellant. Ms. Vick was provided an opportunity to review her initial statement, in which she stated that appellant had struck her several times. The testimony at trial indicates that she took advantage of this opportunity to review her statement, and requested that certain parts of the statement be changed. Allegations of Ms. Vick being the initial attacker did not surface until Ms. Vick and appellant collaborated on a statement. Since the jury is the sole judge of credibility, they could have chosen to disbelieve the testimony of appellant and his witness. *See Sharp*, 707 S.W.2d at 614; *Tucker*, 15 S.W.3d at 235; *Arthur*, 11 S.W.3d at 389. Moreover, the jury's verdict of guilty against appellant was an implicit finding rejecting appellant's self defense and necessity theories. *See Saxton v. State*, 804 S.W.2d 910, 913 (Tex. Crim. App. 1991); *Tucker*, 15 S.W.3d at 235.

Based on a review of the evidence, we do not find appellant's conviction greatly outweighed by contrary proof. Accordingly, we overrule appellant's second point of error.

IV. Prosecutorial Misconduct

In appellant's fourth and fifth points of error, appellant complains of prosecutorial misconduct. Specifically, appellant argues that the misconduct consisted of: 1) misstatements of the law during voir dire; and 2) improper jury arguments.

A misstatement of the law during voir dire will warrant reversal only if the appellant was harmed by the statements. *See Carlson v. State*, 695 S.W.2d 695, 697 (Tex. App.—Dallas 1985, pet. ref'd); *Bedford v. State*, 666 S.W.2d 574, 578 (Tex. App.—Houston [1st Dist.] 1984, pet. ref'd). In *Williams v. State*, 622 S.W.2d 116, 119 (Tex. Crim. App.1981), the Court of Criminal Appeals held that the misstatement of law by the trial court during voir dire did not warrant reversal because, among other things, the error did not harm the defendant.

The record does not suggest that appellant was harmed by the misstatements of law made by the prosecutor during voir dire. Defense counsel objected on three occasions as to the prosecutor's characterization of the burden of proof on self defense. On not one occasion did defense counsel ask the judge to properly instruct the jury on self defense. Additionally, when defense counsel was conducting the

voir dire, the prosecutor objected to defense counsel's explanation of self defense. The trial judge, without a request from either party, provided the prospective jurors a proper explanation of the burden of proof on self defense. Moreover, because the trial court sustained all three of defense counsel's objections, there was no harm. *See McFarland v. State*, 989 S.W.2d 749, 751 (Tex. Crim. App. 1999); *Darty v. State*, 709 S.W.2d 652, 655 (Tex. Crim. App. 1986). Appellant's forth point of error is overruled.

It is well settled that permissible jury argument falls into four categories: 1) summation of the evidence; 2) reasonable deduction from the evidence; 3) answer to the argument of opposing counsel; and 4) a plea for law enforcement. *See Moody v. State*, 827 S.W.2d 875, 894 (Tex. Crim. App. 1992); *Whiting v. State*, 797 S.W.2d 45, 48 (Tex. Crim. App. 1990). Any argument outside of these areas will not constitute reversal unless the argument is manifestly improper, violates a mandatory statute, or injects new and harmful facts into the proceeding. *See Harris v. State*, 905 S.W.2d 708, 710 (Tex. App.—Houston [14th Dist.] 1995, pet. ref'd); *Moore v. State*, 804 S.W.2d 165, 167 (Tex. App.—Houston [14th Dist.] 1991, no pet.).

In order to preserve error in jury argument for appellate review, the defendant must: 1) make an objection; 2) request an instruction to disregard; and 3) make a motion for mistrial. *See Cook v. State*, 858 S.W.2d 467, 473 (Tex. Crim. App. 1993); *see also McGinn v. State*, 961 S.W.2d 161, 165 (Tex. Crim. App. 1998) (explaining that if a trial court sustains an objection to improper jury argument, the complaining party must request an instruction to disregard to preserve error on appeal, if the instruction could have cured the error). Defendant must have objected and pursued that objection to an adverse ruling. *See McFarland*, 989 S.W.2d at 751; *Cockrell v. State*, 933 S.W.2d 73, 79 (Tex. Crim. App. 1996); *Cook*, 858 S.W.2d at 473. Appellant complains of numerous instances in which the prosecutor's arguments to the jury were impermissible, but has only successfully preserved error as to one instance.

In closing arguments, the prosecution stated: "You've got to think about what you are doing back there and don't fall into one of these nonsense defense tricks, come pick a defense, whatever you want to pick." Appellant objected and the court overruled appellant's objection. From a complete review of closing arguments, this statement by the prosecutor was not impermissible. Rather, the statement made by

the prosecutor constituted an answer to an argument by opposing counsel. Defense counsel in his earlier closing argument stated:

> Your objective, and you'll decide based upon the evidence that was presented to you and I submit to you folks they did not prove their case. They did not remove every reasonable doubt, No. 1, they did not remove reasonable doubt regarding necessity. No. 2, they did not remove reasonable doubt regarding self defense. You have three choices, any of them are sufficient for you to make what is the appropriate verdict.

The closing argument made by the prosecution was permissible. Accordingly, appellant's fifth point of error is overruled.

V. Appellant's Motion for New Trial

In appellant's sixth and seventh points of error, appellant complains of jury misconduct and the trial court's refusal to grant a hearing on his motion for new trial.

Appellant has inadequately briefed the issue of jury misconduct, neglecting to present the facts pertinent to this point of error, and failing to provide argument and authorities in support of this point of error. *See* TEX. R. APP. P. 38.1 (f), (h); *Dunn v. State*, 951 S.W.2d 478, 480 (Tex. Crim. App. 1997); *Smith v. State*, 907 S.W.2d 522, 532 (Tex. Crim. App.1995) (overruling point of error because arguments and authorities presented were "different in character" from the error alleged under the point). Appellant's sixth point of error is overruled.

A defendant does not have an "absolute right" to a hearing on a motion for new trial. *See Carranza v. State*, 960 S.W.2d 76, 81 (Tex. Crim. App. 1998); *Reyes v. State*, 849 S.W.2d 812, 815 (Tex. Crim. App.1993); *Moore v. State*, 4 S.W.3d 269, 278 (Tex. App.—Houston [14th Dist.] 1999, no pet.). A hearing is not necessary if all the issues raised by the motion for new trial are determinable from the record. *See Carranza*, 960 S.W.2d at 81; *Reyes*, 849 S.W.2d at 816. A trial court, however, abuses its discretion in denying a hearing on a timely filed motion for new trial if the motion raises matters extrinsic to the record. *See Carranza*, 960 S.W.2d at 81; *Reyes*, 849 S.W.2d at 816. A supporting affidavit must contain sufficient facts to demonstrate reasonable grounds for holding that relief

should be granted. *See Jordan v. State*, 883 S.W.2d 664, 665 (Tex. Crim. App. 1994); *Reyes*, 849 S.W.2d at 816. A motion for new trial alleging jury misconduct "'must be supported by the affidavit of a juror or some other person who was in a position to know the facts.'" *McIntire v. State*, 698 S.W.2d 652, 658 (Tex. Crim. App. 1985) (quoting *Dugard v. State*, 688 S.W.2d 524, 528 (Tex. Crim. App. 1985)); *see also Hicks v. State*, 15 S.W.3d 626, 630 (Tex. App.—Houston [14th Dist.] 2000, no pet. h.) (holding that jury misconduct can be proven through the testimony of a nonjuror with personal knowledge of the misconduct). Moreover, with the passage of TEX. R. EVID. 606(b),[1] the affidavit must allege that outside influences affected the jury's decision. *See Hines v. State*, 3 S.W.3d 618, 623 (Tex. App.—Texarkana 1999, pet. ref'd).

The affidavit attached by appellant is neither from a juror, nor a person in a position to know what was considered by the jury. Additionally, the affidavit makes no allegations that an outside influence was brought to bear upon the jury deliberations. The affidavit focuses merely on the allegation that three of the jurors failed to hold the prosecutor to the appropriate burden of proof. Appellant's affidavit attached to his motion for new trial is insufficient to demonstrate reasonable grounds for the granting of a new trial. Appellant's seventh point of error is overruled.

Because we overrule all of appellant's points of error, we affirm the judgment of the trial court.

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[1] TEX. R. EVID. 606(b) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the jury's deliberations, or to the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent or dissent from the verdict or indictment. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in evidence for any of these purposes. However, a juror may testify: (1) whether any outside influence was improperly brought to bear upon any juror; or (2) to rebut a claim that the juror was not qualified to serve.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed October 5, 2000.

Panel consists of Chief Justice Murphy and Justices Amidei and Hudson.

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