James Javance Davenport v. the State of Texas

2012 | Cited 0 times | Court of Appeals of Texas | January 11, 2012

AFFIRM;

OPINION

Before Justices FitzGerald, Francis, and Lang-Miers

Opinion By Justice Francis

James Javance Davenport appeals his conviction for the capital murder of Charmennia Hall and her unborn child. After the jury found him guilty, the trial court assessed punishment at life in prison. In seven issues, appellant claims the evidence is legally insufficient to support his conviction, the trial court erred in denying his motions for mistrial, and the trial court erred in overruling (1) his objection to autopsy photographs, (2) his objection to the jury charge, and (3) his request for a lesser included offense instruction. We affirm.

In his first two issues, appellant claims the evidence is legally insufficient to support his conviction for capital murder. Under these issues, appellant contends the evidence did not show he committed the crime or "had knowledge of the unborn child" and intentionally or knowingly killed the fetus.

The standard of review in a challenge to the sufficiency of the evidence is well established; we review the evidence in the light most favorable to the jury's verdict to determine whether any rational trier of fact could have found the essential elements of the offenses beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); Gear v. State, 340 S.W.3d 743, 746 (Tex. Crim. App. 2011). We give deference to the "trier of fact fairly to resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Gear, 340 S.W.3d at 746. The jury is the sole judge of the witnesses' credibility and the weight to be given their testimony and therefore, is free to accept or reject any or all evidence presented by either side. See Isassi v. State, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010).

A person commits the offense of capital murder if he commits murder and murders more than one person during the same criminal transaction. Tex. Penal Code Ann. §§ 19.02(b)(1), 19.03(a)(7)(A) (West 2011). A "person" includes "an individual." Tex. Penal Code Ann. § 1.07(a)(38) (West 2011). An "individual" is "a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth." Tex. Penal Code Ann. § 1.07(a)(26) (West 2011).

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The indictment and jury charge alleged appellant intentionally or knowingly caused Hall's death by striking her on the head with an unknown object, and during the same criminal transaction, caused the death of Hall's unborn child. The jury charge included an instruction on law of the parties. The evidence at trial showed Hall, who was eight-months pregnant with her fourth child, was at her house with her three-year-old son, Rudy Jr. on October 4, 2005. Hall's neighbor and friend, Shalissa Walker, got home from work around 11:30 that morning and saw Hall on the front porch. Hall asked Walker if she wanted to come over and watch TV. Walker agreed and, around 1:00 p.m., went to Hall's house. She noticed a white Ford Escort car with a paper license plate parked in front of Hall's house. As she approached the door, a man Walker described as "basically looking like a dope fiend" was leaving Hall's place. She identified appellant as that man and confirmed her signature on appellant's photograph in the photographic lineup conducted shortly after Hall's death.

When Walker entered Hall's house, Hall asked to borrow her phone. She then walked outside to the front porch stoop and made a phone call to Vernon Parker, the father of her unborn child. The two were arguing. Walker had the impression from the conversation that Parker did not want anything to do with Hall or the baby. Walker overheard Hall tell Parker she did not need him because Rudy Jackson Sr., the father of her other children, was back in their lives, was taking care of them, and she would see him in court. Walker waited for Hall to finish so they could watch their soap operas together but Hall's conversation lasted a long time and Walker decided to go home. She walked back to her house and watched the end of "One Life to Live." At 2:00 p.m., Walker began watching "General Hospital;" around 2:10 p.m., Hall brought Walker's phone back. About ten minutes later, Walker heard something had happened at Hall's house.

Tracey Rodgers lived three houses down from Hall. He knew appellant had been living in the neighborhood with his sister, Rene Barnett, for two to four weeks before Hall's death. Appellant often drove his sister's white Ford Escort. Rodgers arrived home around 2:00 p.m. with his friend, Plaio Thomas. As they drove up, Rodgers saw appellant knocking at his back door. Rodgers thought it strange because the Ford Escort appellant drove was parked in the front of the house. He yelled out the window and asked appellant why he was knocking on the back door. Rodgers glanced at Hall's house a couple of doors down and saw she was on the front porch, talking on the phone. She looked mad. Rodgers, Thomas and appellant stood on Rodgers's porch and chatted briefly, then Rodgers went inside to shower. The other two were not there when he finished showering. He later noticed a police officer in the alley behind Hall's house and found out Hall was dead.

Rodgers gave statements to the police. During one interview, the police said they had spoken with appellant who told them Rodgers asked him to go to Hall's house "to get some dope" the day Hall was killed. Rodgers told the police it was not true because he would not send a man down to a woman's house when she had just gotten back together with her husband; he also said he did not know Hall had drugs. Rodgers cooperated with police and gave a DNA sample. His roommate confirmed Rodgers's activities that day as well as his time line for those events.

Jackson is the father of Hall's surviving children. Although he and Hall split up about seven months before her death, they had gotten back together and Jackson moved back in with Hall and the children days before she was murdered. On the day she died, Hall called Jackson as he was on his way home with a friend, Gerald Carroll, and asked him to pick up some lunch for their son, Rudy Jr. After stopping at Williams Chicken, Jackson and Carroll arrived sometime between 2:00 and 2:45 p.m.

To Jackson's surprise, the front door was locked. He walked around to the back door, went in the kitchen and realized something was wrong. The kitchen floor had a white powdery substance, like flour or sugar, on the floor. When Jackson stepped into the living room, he saw Hall in "a bunch of blood," and thought she had been shot in the back of the head. Jackson feared his son had also been killed and could not bear to see it so he moved to the front door, opened it, and asked Carroll to go upstairs to find Rudy Jr. Jackson called 911. Carroll found Rudy Jr. in his bed upstairs, crying.

According to Jackson, it was obvious Hall was eight-months pregnant just by looking at her. She wore her pants undone because they were too small and she did not want to buy maternity clothes. He told the 911 operator Hall was pregnant.

Rudy Jr. testified he was three years old in 2005. He was in his room upstairs and walked downstairs to ask his mother something but saw sugar or flour on the floor in the kitchen. He noticed his mother and a man standing in the kitchen, talking in low voices. When his mother asked for her phone, the man got Halls's purse and handed it to her. According to Rudy Jr., the man then took a hammer and hit Hall with it. Rudy Jr. went upstairs because he was scared but the man followed him and asked Rudy Jr., "Do you want me to hit you?" Rudy Jr. replied, "No," and the man left. Rudy Jr. stayed upstairs a few minutes, then went downstairs to see his mother was on the carpet, lying in blood. Although he called to her, she did not answer. Rudy Jr. described the man in the kitchen as having on a black suit with long sleeves, long pants, and a hat; he first said he did not remember if the man was wearing gloves but later said the man had gloves on. Rudy Jr. saw a little bit of the man's hand but could not remember the color of his skin. Although he saw the man, he could not describe or remember his face. Appellant and the State stipulated that during an interview in February 2010, Rudy Jr. said the person who attacked his mother was white. The stipulation was admitted and published to the jury.

Appellant gave police a voluntary statement to the police in which he admitted being in Hall's house the day of her murder but told police he was only on the linoleum in the entrance way by the front door, about a three-by-three square foot area. He denied stepping on the carpet or walking beyond the entrance area of Hall's house. Appellant claimed he had tried to buy "weed" from Rodgers but Rodgers told him to go to Hall. She did not have any when he was there but told him to come back later. Appellant denied returning to her house and said he then spent some time with his neighbor.

When Officer William Sipes of the Mesquite Police Department arrived at Hall's house around 2:37 p.m., paramedics were already there. The officers initially believed Hall had suffered a gun shot to

the back of the head. Officer Barrett Smith with the Mesquite Police Department was assigned as a crime scene investigator at the time of Hall's murder. Smith photographed the crime scene, dusted for fingerprints, and collected samples of the blood found on the floor, walls, furniture, vacuum cleaner, and closet door. He took a sample from the closet door, a "fairly contained area" in the corner of the living room, diagonal from the front door.

Amber Moss, a senior forensic scientist at Orchid Cellmark, tested seventeen items for DNA and compared those results to known samples taken from Hall, her unborn baby, Jackson, Rodgers, Thomas, Barnett, and appellant. Most of the items tested identified Hall as the donor of the predominate DNA profile.

A swab from a blood smear on the closet door in the living room identified appellant as the predominate DNA profile. Moss explained that the phrase "a predominate DNA profile" meant there was a mixture, but one person-in this case, appellant-contributed "a greater amount of DNA in the mixture and so much, in fact, that the second contributor" was unknown. Moss said that if a person touched the wall, leaving DNA cells, and a second person touched the same location, leaving blood, the blood DNA would be the predominate profile.

According to Moss, the likelihood of finding another random individual who would match the DNA profile obtained from the swab on the closet door was one in 299.9 trillion.

Another forensic DNA scientist for Orchid Cellmark, Huma Masir, tested Hall's clothing for DNA and compared those results to the known samples given by appellant, Rodgers, and Thomas. Masir took a sample from a stain on the back right pocket of Hall's shorts. The sample produced a partial male profile that was "consistent with originating from at least two different male donors." Appellant was excluded as the predominant contributor but no determination could be made whether he was a trace or minor contributor to the mixture. From the same sample, Rodgers was excluded as a possible contributor but Thomas could not be excluded as a possible contributor. Masir then tested a second stain on the back right pocket of Hall's shorts. The second sample was a mixture from two males; appellant and Rodgers were excluded as possible contributors but Thomas could not be excluded. A third stain from the front left pocket of Hall's shorts had a mixture of DNA from at least two males; no determination could be made whether appellant was a contributor, Rodgers was excluded, and Thomas could not be excluded. Masir explained that a person would be excluded if she could conclusively decide, after examining the samples, that the evidence did not match the reference known standard of an individual. In contrast, DNA results can be shared among individuals and since these are partial profiles, meaning we don't have results at every marker we tested, some individuals can share some of the DNA with other people and it can make it very difficult to determine whether it's their DNA that is present in the sample or [it is] really somebody else's. And if you cannot conclusively tell that it's their DNA or not, we say that we cannot make a determination whether that individual is present in that sample or they are not present in the sample.

Shawn Hanley of the Mesquite Police Department investigated Hall's murder. During his investigation, he identified a number of potential suspects: Jackson, Rodgers, Thomas, Parker, Vincent Taylor, and appellant. After interviewing each person, verifying alibis, and checking the results of DNA testing, Hanley focused on appellant. Although appellant insisted he did not step off the three-by-three square foot linoleum area at the entrance of Hall's house, his DNA was found on the closet door approximately fifteen to twenty feet away from the front door of Hall's house. Furthermore, the neighbor appellant claimed to have spent time with that day denied seeing him.

Dr. Reade Quinton is a medical examiner for Dallas County. He performed Hall's autopsy. Hall was not shot in the head; rather she had a number of blunt force injuries to the head, neck, and hands, in addition to lacerations and contusions. Quinton identified at least eight injuries to Hall's head; because the injuries overlapped and were severe, he said there could be more. Most were deep injuries, going through the underlying skull. Hall's skull was shattered in several places, and brain matter protruded through the skull. Hall suffered a subdural hemorrhage and significant bleeding as a result of the injuries. Quinton described the force needed to cause the type of injuries in Hall's skull as "significant force" and that these types of injuries are common in high velocity impacts, such as car wrecks. When Hall died of a result of her head injuries, her blood ceased flowing to her unborn child who then, in turn, died. According to the doctor, the unborn child would have died almost instantaneously at the same time Hall died.

In summary, the evidence shows appellant was at Hall's house around 1:00 p.m. to buy drugs but Hall said she did not have any and told him to come back later. As he left, Walker arrived and saw him. Around 2:00 p.m., appellant was at Rodgers's house and spoke with Rodgers and Thomas. Rodgers went inside to shower and when he came out, the other two men were gone. At 2:10 p.m., Hall returned Walker's phone to her at Walker's house. About ten minutes later, Walker learned something had happened to Hall. Police arrived around 2:37 p.m., after receiving a 911 call from Jackson. Appellant later admitted being in Hall's house but denied having stepped off the three-by-three square foot entrance area immediately inside the front door. Police found his DNA in a bloody smear on the closet door on the other side of the room, about fifteen to twenty feet away from the entrance where appellant claimed to have stood. He also claimed to have been with his neighbor after leaving Rodgers's porch but the neighbor denied seeing appellant on the day of Hall's murder.

From these facts, we conclude a rational jury could infer appellant intentionally or knowingly caused Hall's death by striking her on the head repeatedly with an object. Furthermore, a rational jury could conclude appellant "had knowledge" of Hall's unborn child. Jackson testified Hall was obviously pregnant and the jury saw the photograph of a visibly pregnant Hall lying on the floor with her abdomen exposed. We conclude the evidence is legally sufficient to support appellant's conviction for capital murder. We overrule appellant's first two issues.

In his third issue, appellant claims the trial court erred in allowing the autopsy photographs into evidence. He argues they were cumulative and the prejudicial effect substantially outweighed their

evidentiary value.

We review a trial court's decision to admit or exclude evidence under an abuse of discretion standard. Williams v. State, 301 S.W.3d 675, 690 (Tex. Crim. App. 2009). Generally, a photograph is admissible if verbal testimony as to matters depicted in the photographs is also admissible. Gallo v. State, 239 S.W.3d 757, 762 (Tex. Crim. App. 2007). If there are elements of a photograph that are genuinely helpful to the jury in making its decision, the photograph is inadmissible only if the emotional and prejudicial aspects substantially outweigh the helpful aspects. Erazo v. State, 144 S.W.3d 487, 491-92 (Tex. Crim. App. 2004). Visual images of the injuries a defendant inflicted on his victim are relevant to the jury's determination, and the fact that the jury also heard testimony regarding the injuries depicted does not reduce the relevance of the visual depiction. Gallo, 239 S.W.3d at 762. A trial court may consider many factors in determining whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice. Id. These factors include the number of exhibits offered, their gruesomeness, their detail, their size, whether they are in color or black and white, whether they are close-up, and whether the body depicted is clothed or naked. Id.

Appellant complains of ten color photographs of the deceased: one showing her on a body bag, fully clothed but with her abdomen exposed to show she was visibly pregnant; one showing a close up of her face with a laceration on her right check; two showing the numerous injuries to the back of the her head; and six showing the severe skull fractures and damage to the brain. Although several show various angles of the brain injuries, the photographs are not repetitive; each has a different focus from the others. The only alteration to the body is the portion of the victim's hair that was shaved to show the head wounds. The photographs were used during the medical examiner's testimony to help explain the nature and severity of the wounds. The nine photographs are no worse than would be expected in this sort of crime, showing the injuries the deceased suffered shortly before her death. Under the facts and circumstances of this case, we cannot conclude the probative value of these photographs was substantially outweighed by their prejudicial effect. The trial court did not err in allowing the photographs into evidence. We overrule appellant's third issue.

In his fourth issue, appellant argues the trial court erred in denying his motion for mistrial because the State did not timely turn over interview notes to the defense that contained "Brady" material. See Brady v. Maryland, 373 U.S. 83, 87-88 (1963). Specifically, appellant claims the State failed to timely turn over evidence that Hall's murderer was white, the evidence was favorable to him because he is African-American, and the trial outcome would have been different had the prosecutor made a timely disclosure.

We review a trial court's denial of a motion for mistrial under an abuse of discretion standard. Ladd v. State, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999). To find reversible error under an alleged Brady violation, a defendant must show the State failed to disclose evidence, regardless of the prosecution's good or bad faith; the withheld evidence is favorable to the defendant; and the evidence is material, that is, there is a reasonable probability had the evidence been disclosed, the outcome of the trial

would have been different. Hampton v. State, 86 S.W.3d 603, 612 (Tex. Crim. App. 2002). The defendant bears the burden of showing that, in light of all the evidence, it is reasonably probable the outcome of the trial would have been different had the prosecutor made a timely disclosure. Id. The mere possibility an item of undisclosed information might have helped the defense or affected the outcome of the trial does not establish "materiality" in the constitutional sense. Id.

As noted above, Rudy Jr. testified his mother and a man were standing in the kitchen, talking in low voices. The man then hit Hall with a hammer. Rudy Jr. said the man was wearing a black suit with long sleeves and long pants and also wore a hat and gloves. During cross-examination, defense counsel McClung put her hand next to the boy's and asked if there was something different about her hand from his. Rudy Jr. responded that her hand was white and his was black. When she asked if Rudy Jr. could see what color the man's hand was, he replied, "Not really."

Following Rudy Jr.'s testimony, the trial court had a hearing outside the jury's presence. At issue was whether the State should have turned over prosecutor Patty Morris's written notes about Rudy Jr.'s February 12, 2010 second interview with the State. During the hearing, defense counsel Tatum stated prosecutor Lisa Fox told him, one week prior to trial, that when they interviewed Rudy Jr. for the second time, the boy said he saw the skin of the man's hand either through the glove or around the glove, and it was "light or white." Fox was hesitant to tell defense counsel because she did not have her notes with her and did not want to relate something that was incorrect. Regardless, she disclosed the gist of what Rudy Jr. had said. Morris's notes were turned over to the trial court for review.

The following morning, defense counsel Franklin moved for mistrial based on prosecutorial misconduct. Franklin alleged the State had "in their hands evidence that the perpetrator of this crime was a white person. They did not turn over that evidence to the State prior to trial. They didn't turn over that evidence to . . . [the defense] . . . until, like, about their fifth witness." After hearing the argument of defense counsel and the State, the trial court found the notes were work product but that the information contained in the notes was exculpatory. While the State did not turn over the notes, it did turn over, prior to trial, the information in the notes that Rudy Jr. had said the man who attacked his mother had light or white skin. The court further found no bad faith on the part of the State and denied the motion for mistrial. Finally, the court stated it would do everything possible to ensure appellant had a fair trial, including allowing the defense to recall Rudy Jr. or granting a motion for continuance to allow the defense to conduct further investigation or inquiry into the issue.

The record shows the State revealed the information to defense counsel one week prior to trial. A review of Rudy Jr.'s testimony shows defense counsel had the information and used it during Rudy Jr.'s cross-examination. Although the trial court allowed appellant the option of recalling the witness or seeking a continuance, appellant did neither. Finally, the information was given to the jury in a joint stipulation which stated the following discovery has been tendered to the defense in this cause: That on February 12, 2010, during an interview of Rudy Jr., a child then 7 yrs of age, by Lisa Fox and in the presence of Patty Morris and Joe DeCorte, stated the person who attacked his mother was

white.

Because defense counsel had the information before trial and used it during Rudy Jr.'s testimony, and the same information was published to the jury in the stipulation, appellant has not met his burden of showing the State failed to disclose the information or that the outcome of the trial would have been different. Under these circumstances, we cannot conclude the trial court abused its discretion in denying appellant's motion for mistrial. We overrule appellant's fourth issue.

In his fifth issue, appellant claims the trial court erred in overruling his objection to the submission of a charge on the law of parties and that it is "reversible error."

When addressing an allegation of jury charge error, we first determine whether error exists in the charge. If jury charge error exists, we then determine whether sufficient harm was caused by the error to require reversal of the conviction. Airline v. State, 721 S.W.2d 348, 351 (Tex. Crim. App. 1986). If the error in the charge was the subject of a timely objection in the trial court, then reversal is required if the error is "calculated to injure the rights of defendant;" an error which has been properly preserved by objection will call for reversal as long as the error is not harmless. Abdnor v. State, 871 S.W.2d 726, 732 (Tex. Crim. App. 1994).

Under the law of parties, a "person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both." Tex. Penal Code Ann. § 7.01(a) (West 2011). A person is "criminally responsible" for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense. Id. at § 7.02(a)(2). A person is also "criminally responsible" for an offense committed by the conduct of another when "in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators . . . if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of carrying out the conspiracy." Id. at § 7.02(b). An instruction on the law of parties "may be given to the jury whenever there is sufficient evidence to support a jury verdict that the defendant is criminally responsible under the law of parties." Ladd, 3 S.W.3d at 564-65.

The State requested the instruction on law of the parties because certain evidence at trial raised the possibility that at least one other person was present at Hall's house when she was murdered. According to the stipulation admitted and published to the jury, one month before trial, Rudy Jr. said the person who attacked his mother was white; the record reflects appellant is African- American, and his DNA was found in a blood smear on the closet door. In addition, testing on DNA evidence taken from Hall's shorts excluded appellant but could not exclude Thomas. Because this evidence raises the possibility of another actor involved in Hall's murder, we cannot conclude the trial court erred in allowing the instruction on law of the parties. And if, as appellant contends, there was no evidence tending to show appellant's guilt as a party, the jury would almost certainly not rely upon

the law of the parties instruction in arriving at its verdict, basing its verdict instead on the evidence tending to show appellant's guilt as the principal actor. See id. at 565. We overrule appellant's fifth issue.

In his sixth issue, appellant claims the trial court erred in denying his request for an instruction on the lesser included offense of murder.

We use a two-prong test to determine whether a defendant is entitled to the instructions. Hall v. State, 158 S.W.3d 470, 473 (Tex. Crim. App. 2005). The first step requires us to determine whether the requested instructions are lesser included offenses of the charged offense as defined by article 37.09 of the code of criminal procedure. Id. A person commits murder if he intentionally or knowingly causes the death of an individual. Tex. Penal Code Ann. § 19.02(b) (West 2011). The State concedes that murder is a lesser included offense of capital murder as alleged in the indictment in this case.

The second step is whether the record contains some evidence that would permit a rational jury to find the defendant is guilty only of the lesser included offense. Hall, 158 S.W.3d at 473. The evidence must establish the lesser included offense as a valid, rational alternative to the charged offense. Wesbrook v. State, 29 S.W.3d 103, 113 (Tex. Crim. App. 2000). That is, there must be some evidence from which a rational jury could acquit appellant of the higher offense while convicting him of the lesser; in making this decision, we evaluate the evidence in the context of the entire record, but do not consider whether the evidence is credible, controverted, or in conflict with other evidence. Hall, 158 S.W.3d at 473.

To be entitled to an instruction on the lesser included offense of murder, some evidence must show appellant was guilty only of murder. As detailed above, the evidence showed Hall was eight months pregnant at the time of her death. Jackson testified Hall was obviously pregnant and did not button her shorts or pants because they did not fit and she did not want to buy maternity clothes. The medical examiner said Hall was visibly pregnant. Photos of Hall shown to the jury show her stomach is exposed. Appellant's defense was not that he did not know she was pregnant but that he did not kill her. Appellant did not point us to evidence, and our review has found none, that would permit a rational jury to find appellant guilty only of the lesser included offense of murder. Under these circumstances, we cannot conclude the trial court erred in denying his request. We overrule appellant's sixth issue.

In his seventh issue, appellant claims the trial court erred in denying his motion for mistrial made after the prosecutor said, referring to defense counsel's closing argument, "Then to be so offensive in that closing argument that you just heard, no wonder people hate lawyers." Although the trial court sustained his objection and instructed the jury to disregard the comment, appellant argues the trial court should have granted his motion for mistrial.

We review a trial court's denial of a motion for mistrial under an abuse of discretion standard.

Simpson v. State, 119 S.W.3d 262, 272 (Tex. Crim. App. 2003). Mistrial is appropriate for only "highly prejudicial and incurable errors;" it may be used to end trial proceedings when faced with error so prejudicial that the "expenditure of further time and expense would be wasteful and futile." Ladd, 3 S.W.3d at 567; see Woods v. State, 18 S.W.3d 642, 648 (Tex. Crim. App. 2000). When the question is whether a mistrial should have been granted following improper jury argument, we consider most, if not all, of the same considerations that attend a harm analysis when a trial court erroneously overrules an objection to jury argument. Hawkins v. State, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004). We consider (1) the severity of the misconduct (the magnitude of the prejudicial effect caused by the State's improper jury argument); (2) measures adopted to cure the misconduct (the effectiveness of any curative instruction given by the trial court); and (3) the certainty of conviction absent the misconduct (the strength of the evidence supporting the defendant's conviction). Martinez v. State, 17 S.W.3d 677, 692-93 (Tex. Crim. App. 2000). Only in extreme circumstances, where the prejudice is incurable, will a mistrial be required. Hawkins, 135 S.W.3d at 77.

After reviewing the record, including the defense attorney's closing argument as well as the prosecutor's comment and closing argument, we cannot conclude the trial court abused its discretion in denying appellant's motion for mistrial. The prosecutor's comment did not attribute "improper motive or conduct" nor was it overly severe in light of the tenor of defense counsel's closing argument. Although appellant refers to the "error" being repeated, he does not cite where in the record it was repeated or where he objected. The trial court sustained appellant's objection and promptly instructed the jury to disregard the comment. The prosecutor's statement did not contribute to appellant's conviction. We cannot conclude the trial court abused its discretion in denying appellant's request for a mistrial. We overrule appellant's seventh issue.

We affirm the trial court's judgment.

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