Affirmed and Opinion filed November 9, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00419-CR

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GREGORY ALLEN THOMAS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from 232nd District Court
Harris County, Texas
Trial Court Cause No. 788,313

O P I N I O N

Gregory Allen Thomas appeals a conviction for burglary of a building with intent to commit theft on the grounds of: (1) improper jury arguments; and (2) ineffective assistance of counsel. We affirm.

Background

Appellant was charged by indictment with burglary of a building with intent to commit theft, found guilty by a jury, and sentenced to twenty years' confinement.

Jury Argument

Comment on Failure to Testify

Appellant's first point of error contends that the trial court erred by denying his request for a mistrial after the prosecutor improperly commented on his failure to testify by stating, "Doesn't have the guts to look at you."[1] Defense counsel objected that the statement was a comment on appellant's failure to testify, and the trial court sustained the objection, instructed the jury to disregard the comment, but denied appellant's motion for mistrial.

An instruction to disregard will generally cure a comment on the failure of an accused to testify in all but the most blatant examples. *See Moore v. State*, 999 S.W.2d 385, 405 (Tex. Crim. App. 1999). Therefore, even if the prosecutor's statement was an indirect comment on appellant's failure to testify, it was not so blatant that it rendered the trial court's instruction to disregard ineffective. Accordingly, appellant's first point of error is overruled. Appellant's second point of error complains that the same statement, "Doesn't have the guts to look at you," also improperly argued evidence outside the record. (RR 110) To the extent this is a separate ground for objection from that asserted in the first point of error, as appellant has presented it on appeal, he did not object at trial that the prosecutor's comment was a reference to evidence outside the record. Therefore, he failed to preserve that complaint for review. *See Martinez v. State*, 22 S.W.3d 504, 507 (Tex. Crim. App. 2000) (stating that an objection based on one legal ground may not be used to support a different legal theory on appeal). Accordingly, appellant's second point of error is overruled.

Personal Attack

Appellant's third point of error contends the trial court erred in overruling his objection to the prosecutor's closing argument, "Now, ask yourself what kind of *low life* would steal from his own employer?" (emphasis added) because it was a personal attack in the form of name calling and verbal abuse. Improper jury argument constitutes reversible error only if, "in the light of the record as a whole, the argument is extreme or manifestly improper, violative of a mandatory statute or injects new facts,

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[1] *See, e.g., Dickinson v. State*, 685 S.W.2d 320, 322-25 (Tex. Crim. App. 1984) (holding that prosecutor's argument referring to defendant's lack of remorse was a comment on his failure to testify).

harmful to the accused, into the trial." *See Felder v. State*, 848 S.W.2d 85, 95 (Tex. Crim. App. 1992).[2] Although the prosecutor's characterization was improper, it was not so extreme or harmful as to warrant a reversal of appellant's conviction. Therefore, we overrule appellant's third point of error.

Opinion

Appellant's fourth point of error argues that the prosecutor improperly injected his personal opinion in his closing argument by stating, "I've never seen a better burglary in my whole life . . . ." Defense counsel objected that this statement was the personal opinion of the prosecutor, and the trial court sustained the objection, instructed the jury to disregard the comment, but denied appellant's motion for mistrial.

Where a prosecutor injects a personal opinion in jury argument, an instruction to disregard will cure the error unless the argument is manifestly improper or so extreme that an instruction to disregard will not cure the error. *See Burks v. State*, 876 S.W.2d 877, 907 (Tex. Crim. App. 1994). In this case, the prosecutor's statement was not so inflammatory that it could not be cured by the instruction to disregard. *See Johnson v. State*, 698 S.W.2d 154, 166-67 (Tex. Crim. App. 1985). Therefore, the trial court did not abuse its discretion in denying appellant's motion for a mistrial, and appellant's fourth point of error is overruled.

Ineffective Assistance of Counsel

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[2] *Compare Hernandez v. State*, 791 S.W.2d 301, 307 (Tex. App.—Corpus Christi 1990, writ ref'd) (holding that prosecutor's argument that appellant was a "scum and goat" was not harmful error), *with Stein v. State*, 492 S.W.2d 548, 548 (Tex. Crim. App. 1973) (reversing because the prosecutor violated a trial court order to refrain from using the term "hippie" or referring to appellant by any other name), *and Duran v. State*, 356 S.W.2d 937, 938 (Tex. Crim. App. 1962) (holding that prosecutor's reference to appellant as a "punk" was extremely inflammatory where appellant had never been convicted of a felony or misdemeanor, he was not charged with murder, but the State proved the killing in detail, and there was no instruction to the jury regarding appellant's right of self defense.) As contrasted from *Stein*, the prosecutor in this case used the term "low life" only once and was never instructed by the trial court to refrain from using it. Similarly, the characterization in *Duran* was more prejudicial than that in our case. Appellant's reliance on *Grant v. State*, 472 S.W.2d 531, 533-34 (Tex. Crim. App. 1971) (reference to appellant as "Jim Devil") and *Morris v. State*, 432 S.W.2d 920, 921 (Tex. Crim. App. 1968) (reference to appellant as an "animal") is misplaced because the court held in those cases that there was no reversible error.

Appellant's fifth point of error contends he was denied effective assistance of counsel because his defense counsel failed to investigate and procure mitigating testimony from defense witnesses to present at the punishment phase.

Generally, to prevail on a claim of ineffective assistance of counsel, an appellant must show, first, that counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness, and, second, that appellant was prejudiced in that there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). The burden falls on appellant to show ineffective assistance of counsel by a preponderance of the evidence. *See Thompson*, 9 S.W.3d at 813. In reviewing claims of ineffective assistance of counsel, scrutiny of counsel's performance must be highly deferential. *See Strickland*, 466 U.S. at 689; *Busby v. State*, 990 S.W.2d 263, 268 (Tex. Crim. App. 1999) *cert. denied*, 120 S. Ct. 803 (2000). Also, the record of the case must affirmatively demonstrate the alleged ineffectiveness. *See Thompson*, 9 S.W.3d at 813. An appellate court is not required to speculate on defense counsel's actions; where the record contains no evidence of the reasoning behind those actions, we cannot conclude that counsel's performance was deficient. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994).

Here, appellant argues that the record reflects ineffective assistance because defense counsel failed to honor appellant's request to subpoena his family members to testify at the punishment phase. However, the record does not establish that defense counsel failed to investigate those witnesses, his reasons for not presenting their testimony, what their testimony would have been, or how it would have benefitted appellant's case. Appellant's fifth point of error thus fails to establish that he received ineffective assistance of counsel,

and is overruled. Accordingly, the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed November 9, 2000.

Panel consists of Justices Anderson, Fowler, and Edelman.

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