

No. 01-24-00018-CR

In the Court of Appeals
for the
First District of Texas

FILED IN
1st COURT OF APPEALS
HOUSTON, TEXAS
5/10/2024 11:51:14 AM
DEBORAH M. YOUNG
Clerk of The Court

JESSE JAMES ARISPE, JR.,
Appellant

v.

THE STATE OF TEXAS,
Appellee

No. 23-CR-2089 in the 122nd District Court
Galveston County, Texas

APPELLANT'S BRIEF

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ORAL ARGUMENT REQUESTED

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TRIAL JUDGE:	Hon. Jeth Jones

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Statement of the Case

Appellant Jesse James Arispe, Jr., was charged by indictment with the second degree felony offense of robbery. CR6. Arispe pled not guilty and a jury convicted him. CR78. The jury assessed a sentence of eight years in prison. CR86. Arispe filed timely written notice of appeal. CR95.

Statement of Facts

Arispe and his girlfriend, Melissa Constante, were checking out of the Mariner Inn in Galveston when a dispute arose over the deposit. The incident was captured by two security cameras positioned in the lobby, but parts of the incident are obscured by a pillar and there is no audio. SX7; 4RR40. The complainant and Arispe gave somewhat conflicting accounts as to what occurred.

Herrera' Account:

Herrera, who worked at the front desk, testified that all guests are informed in writing of the motel's no-smoking policy and a \$100 cash deposit is collected at check-in for guests paying cash. 3RR37-43. When Constante requested return of her cash deposit at check out, Herrera told her that the motel would keep the deposit because housekeeping had informed Herrera that their room had been smoked in. 2RR43. Constante exited the lobby and moments later Arispe entered. He asked Herrera about the issue and Herrera again refused to return the deposit. Herrera

testified that Arispe told her he was going to take some items from the lobby because of the retained deposit. 3RR44.

Arispe grabbed drinks from a snack section and a skeleton decoration. 3RR44-46. Herrera dialed 9-1-1 and began recording the incident on her cell phone. 3RR46-49. Arispe and Constante started to exit the lobby to the parking area, but Arispe returned to the front desk and forcefully grabbed Herrera's phone, causing Herrera to be pulled up onto the counter in the struggle. 3RR47-49, 70. Herrera grabbed an empty cardboard box, charged toward them, and hit Constante over the head with the box. 3RR87. A fight ensued, and Herrera and Constante struck each other repeatedly. 3RR66. During the fight Arispe grabbed Herrera's neck and held her against a wall while Constante hit her and threw a coffee carafe at her. 3RR50-53. Herrera struck Arispe multiple times, and he pushed her away, causing her head to hit a table. 3RR50, 88. Arispe threw her phone on the floor, shattering it, and left the motel with Constante. 3RR52-53. Herrera was not sure whether any items were taken.¹ 3RR77. Herrera sustained minor abrasions and bruising. 3RR55.

Arispe's Account:

Arispe testified that there had been no smoking in the room so he was surprised when Constante informed him that the deposit was being retained. 4RR13-

¹ The skeleton and multiple soda cans were found on the floor by a responding police officer. 3RR25.

14. Arispe entered to lobby and requested a manager, but Herrera refused. 4RR14. Arispe testified that Herrera stated, "You're not getting shit back and I'm not calling anybody." 4RR37. Arispe testified that he grabbed the skeleton and drinks only to get the attention of the staff and had no intent to leave with the items. 4RR15-16. He returned to the front desk and noticed that Herrera was video-recording him with her phone instead of calling a manager. 4RR34. He admitted that he lost his temper and grabbed her phone to delete the video. 4RR18-21. Arispe acknowledged committing a misdemeanor assault in grabbing the phone. 4RR19. Arispe exited the lobby with the phone and was attempting to delete the video, with the intent of returning the phone afterwards, when Herrera charged at Constante and hit her with a box. 4RR25. Arispe never joined the ensuing fight but instead tried to break it up. 4RR40-42. He testified that it was Constante, not him, that grabbed Herrera by the neck. 4RR41-42. Arispe tried to return the phone but Herrera attacked him, scratching his chest and ripping his shirt. 4RR105-07. He pushed her away and threw down her phone. 4RR46, 105-112. Herrera continued to assault him and Constante, backing them out the door. 4RR112. Arispe testified that he and Constante took nothing when they left. 4RR48.

The prosecution presented a recording of a jail phone call to impeach Arispe's testimony. During the call Arispe stated, "She didn't want to give the deposit back. So, I was just like, Well, fuck it. I'm going to take something." 4RR78. Arispe

maintained that he took the items only to get the attention of the staff to address the deposit issue and had no intent to leave with any items. 4RR78.

The Video:

The video shows Arispe enter the lobby and speak very briefly with Herrera. Arispe then grabs a skeleton from a wall and two beverages from a refrigerator. Arispe hands the items to Constante, who is standing in the doorway, then turns toward the front desk and speaks with Herrera again. Herrera begins recording Arispe with her phone. Arispe forcefully grabs the phone from Herrera, pulling her up on the counter as she clings to it. As Arispe and Constante exit with the phone and other items, Herrera charges at Constante and hits her with a box. The two women begin fighting and move into the lobby, striking each other repeatedly, while Arispe stands nearby. The scuffling women move behind a pillar, which obscures the video footage. Arispe approaches the women but it is unclear whether he is joining the fight or trying to break it up. As the group emerges from behind the pillar Herrera and Arispe are struggling with each other and Constante grabs a coffee carafe and throws it at Herrera. Herrera lunges at Arispe and he pushes her, causing her to collide with a table. Herrera lunges at Arispe again and he throws her phone down forcefully. The three tussle again briefly near the doorway, then Arispe and Constante exit.

Issue Presented

The trial court abused its discretion in denying a mistrial.

Summary of the Argument

The trial court abused its discretion in denying Arispe's request for a mistrial when the State played a jail phone call recording in which Arispe stated that he was willing to accept a plea bargain offer of four years. This evidence was extremely prejudicial because it was tantamount to an admission of guilt. Arispe's defense was that he was guilty only of misdemeanor assault, not robbery, because he had no intent to steal. The inadmissible plea bargain evidence had an indelible and incurable effect because common sense dictates that the jury would conclude that a person who is innocent would not contemplate admitting guilt.

Arguments

A. Facts

The jail phone call recording (State's Exhibit 9) was admitted for the purpose of impeaching Arispe's testimony. When the prosecution played the recording the jury heard Arispe and the other person on the call discussing a plea bargain offer. Specifically, the callee mentioned a four-year offer from the prosecution for a guilty plea to robbery, and Arispe replied, "I don't even care about taking the four years." SX9 at 9:00 – 9:15. The State stopped the playback and began skipping ahead to the pertinent portion of the recording. Defense counsel asked to approach the bench and

moved for a mistrial, arguing that the admission of evidence of plea negotiations was incurable error. The trial court noted that the entire recording had been admitted, denied the request for a mistrial, and offered to give an instruction to disregard. Defense counsel declined the instruction because it would only draw more attention to the prejudicial evidence. 4RR79-80.

B. Standard of Review

An appellate court reviews a trial court's denial of a mistrial for an abuse of discretion. *Webb v. State*, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007).

C. The trial court abused its discretion in denying a mistrial when the jury heard evidence of plea negotiations.

The Court of Criminal Appeals has repeatedly held that evidence of plea negotiations is not admissible under Texas Rule of Evidence 403 because any minimal relevance is “substantially outweighed by the danger of both unfair prejudice and of misleading the jury.” *Jenkins v. State*, 493 S.W.3d 583, 607–08 (Tex. Crim. App. 2016); *Smith v. State*, 898 S.W.2d 838 (Tex. Crim. App.), *cert. denied*, 516 U.S. 843, 116 S.Ct. 131, 133 L.Ed.2d 80 (1995) (holding that reference to plea negotiations was subject to exclusion under Rule 403 since any minimal relevance it may have had in that case was substantially outweighed by the danger of both unfair prejudice and of misleading the jury); *Prystash v. State*, 3 S.W.3d 522,

527 (Tex. Crim. App. 1999) (reaffirming that evidence of plea negotiations is subject to exclusion under Rule 403).

A mistrial is an appropriate remedy in extreme circumstances for a narrow class of highly prejudicial and incurable errors. *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004); *Wood v. State*, 18 S.W.3d 642, 648 (Tex. Crim. App. 2000). A mistrial halts trial proceedings when error is so prejudicial that expenditure of further time and expense would be wasteful and futile. *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999).

To determine if the trial court abused its discretion by denying a mistrial motion, courts use the three-factor test announced in *Mosley v. State*, 983 S.W.2d 249, 259–60 (Tex. Crim. App. 1998), which considers (1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the certainty of conviction absent the misconduct. *Archie v. State*, 340 S.W.3d 734, 740 (Tex. Crim. App. 2011).

(1) Severity of the misconduct

“The potential impact upon jurors of the mention of plea negotiations cannot be overstated.” *Canfield v. State*, 429 S.W.3d 54, 74 (Tex. App.—Houston [1st Dist.] 2014, pet. ref’d), quoting *Bowley v. State*, 310 S.W.3d 431, 442 (Tex. Crim. App. 2010) (dissent). The harm in mentioning plea negotiations is the risk that the jury will conclude that a person who is innocent would not contemplate admitting guilt.

Canfield, 429 S.W.3d at 74. The potential for this evidence to affect the jury in an irrational way is high. *Jenkins*, 493 S.W.3d at 608. “[T]he jury’s knowing that a plea bargain discussion or discussions were held can only prejudice a defendant where the issue is ‘did he do it?’ Common sense tells us, and a juror, that a person who tries to cut a deal is probably guilty.” *Guerrero Lara v. State*, No. 13-01-099-CR, 2002 WL 1765543, at *3 (Tex. App.—Corpus Christi—Edinburg Aug. 1, 2002, no pet.) (not desig. for pub.).

In this case, the prejudice is particularly severe because the jury heard Appellant state that he “didn’t even care about taking the four years.” This statement indicated that he seriously considered accepting the State’s offer and pleading guilty. To a juror such a statement is tantamount to an admission of guilt. Because of the implication of an admission of guilt, evidence indicating that a defendant considered accepting a plea bargain is harmful and requires reversal. *See Taylor v. State*, 19 S.W.3d 858, 864 (Tex. App.—Eastland 2000, pet. ref’d) (reversing where prosecution impeached defendant with the defendant’s statement to another prosecutor that he wanted probation because it was his first offense).

(2) Curative measures

No curative measures were taken. Defense counsel declined the trial court’s suggested instruction to disregard, concluding that it would only draw more attention

to the error. The decision not to draw further attention to prejudicial error can be legitimate strategy. *See Ex parte Bryant*, 448 S.W.3d 29, 41 (Tex. Crim. App. 2014).

Though the defendant need not request lesser remedies before moving for mistrial, a reviewing court will not reverse the court's judgment if the less drastic alternative could have cured the problem. *Young v. State*, 137 S.W.3d 65, 70 (Tex. Crim. App. 2004). Here, the instruction to disregard would not have cured the high likelihood that the jury would equate Arispe's statement with an admission of guilt.

(3) The certainty of conviction absent the misconduct

Arispe's defense was that he was guilty only of misdemeanor assault because he had no intent to steal. Arispe testified that he grabbed the decoration and drinks to taunt the staff into summoning a manager to address the deposit dispute, and that he grabbed Herrera's phone only to delete the video. The robbery and theft statutes require, and the jury was instructed, that the defendant must have the intent to "withhold the property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner." *See* Tex. Pen. Code §§ 29.02 (robbery); 31.03 (theft); 31.01 (defining "deprive").

The video supports Arispe's testimony. After grabbing the decoration and beverages, which had a combined value of less than \$10 (3RR46), Arispe and Constante did not rush out the door with the items. They remained in the lobby and

Arispe returned to the front desk to wait for a manager. SX7 at 1:02 – 1:30. Arispe's conduct indicates an intent to escalate the dispute in hopes of summoning management, not an intent to make off with a skeleton and two drinks. His tactic may have been foolish and misguided, but it does not amount to theft or robbery. While the video shows Arispe briefly exiting the lobby with Herrera's phone, he remained on the premises and had possession of the phone for only one minute before throwing it down. SX7 at 1:40 – 2:40. The responding police officer testified that the skeleton and beverages were also left on the floor of the lobby. 3RR25, 33-35.

The evidence on an intent to permanently deprive the owner of property was weak, so a robbery conviction was not so certain as to eliminate the risk of harm from the plea bargain evidence. Arispe insisted that he was guilty only of misdemeanor assault, but his statement on the jail call that he considered accepting a plea bargain offer for a felony prison sentence critically undermined his testimony and his defense.

This is not a case in which the plea bargain evidence consisted only of a plea offer and did not show a willingness to plead guilty. For example, in *Munsinger v. State*, No. 12-11-00028-CR, 2011 WL 3915671 (Tex. App.—Tyler Sept. 7, 2011, no pet.) (not desig. for pub.), the defendant moved for a mistrial because the State inadvertently failed to redact information about a plea offer from an exhibit. The

jury heard a witness read a portion of a letter in which the defendant stated that the prosecution had offered twenty-five years. *Id.* at *5. The court of appeals held that the trial court did not abuse its discretion in overruling the appellant's motion for mistrial because "the short statement about a plea offer is not an indication that Appellant had agreed to accept a plea or that he had conceded that he was guilty of the charged offenses." *Id.* Accordingly, the court concluded that the evidence was not the sort "that would inflame the jury or that jurors would find impossible to remove from their mind." *Id.*

Here, in contrast, the jury heard Arispe state that he was willing to accept a plea offer of a four-year prison sentence. Common sense dictates that the jury would conclude that a person who is innocent would not contemplate admitting guilt. *See Canfield*, 429 S.W.3d at 74.

The *Mosely* three-factor analysis indicates that the trial court abused its discretion in denying the request for a mistrial because the error was highly prejudicial and incurable.

Prayer

Appellant respectfully requests that the Court reverse his conviction and remand for a new trial.

Respectfully submitted,

/s/ Adam Banks Brown

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Pursuant to Texas Rule of Appellate Procedure 9.4(i), the undersigned attorney certifies that the relevant sections of this computer-generated document have **2,571** words, based on the word count function of the word processing program used to create the document.

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