Affirmed and Opinion filed January 13, 2000.

In The

Fourteenth Court of Appeals

NO. 14-97-00900-CR

DONALDO ANTONIO SAENZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Cause No. 743,349

O P I N I O N

Donaldo Antonio Saenz appeals a conviction for aggravated robbery on the grounds that: (1) the trial court improperly denied his motion for mistrial; and (2) the evidence was factually insufficient to prove the use of a firearm in the offense. We affirm.

Background

On January 21, 1997, Rene Hernandez and his relative, Raquel Zamudio, were robbed by three men in Hernandez's brother's apartment. Hernandez and Zamudio identified appellant as one of the assailants and testified that appellant threatened them with a gun during the robbery. Although appellant admitted that he committed the offense with the

other men, he denied that anyone used a weapon of any kind during the robbery. The jury found appellant guilty of aggravated robbery and assessed punishment at sixty years confinement.

Motion for Mistrial

The first of appellant's two points of error argues that the trial court erred in denying his motion for mistrial because the State elicited improper hearsay testimony from one of the witnesses shortly after an objection to similar testimony was sustained. In particular, as the State was questioning Officer Morgan regarding his interview with Pineda, an acquaintance of appellant, concerning the robbery, the following exchange occurred:

[PROSECUTOR]:	Did [Pineda] tell you whether or not at that time who had weapons there at the robbery?
[APPELLANT]:	Your Honor, I guess I'm going to object. It's getting into a lot of hearsay.
THE COURT:	That will be sustained.

As Morgan continued to testify regarding Pineda's statements about where the robbers lived, the layout of their apartment, whether appellant owned a cellular phone, and the types of vehicles the robbers drove, the following exchange took place:

[PROSECUTOR]:	Did [Pineda] say whether or not [appellant] had any type of weapon?
[MORGAN]:	Yes, he did.
[APPELLANT]:	Again, I object to any hearsay.
THE COURT:	That will be sustained.
[APPELLANT]:	I'd ask the Court to admonish the jury to disregard.
THE COURT:	Disregard the last question of the prosecutor.
[APPELLANT]:	I'd ask for a mistrial.
THE COURT:	That will be denied.

Saenz contends that when the State asked Morgan a second time whether Saenz had a gun at the time of the robbery, it required a hearsay answer that had been previously

objected to and sustained, and the question gave the jurors the impression that Saenz possessed a gun.

A mistrial is required for an improper question only when the question is clearly prejudicial to the defendant and is of such a character as to suggest the impossibility of withdrawing the impression produced on the minds of the jurors. *See Ladd v. State*, 3 S.W.3d 547 (Tex. Crim. App. 1999), *petition for cert. filed*, (U.S. Dec. 17, 1999)(No. 99-7472).[1] Therefore, the asking of an improper question will seldom call for a mistrial because, in most cases, any harm can be cured by an instruction to disregard. *See id*.[2]

In this case, the second question and answer did not indicate whether appellant had a weapon at the robbery, but only whether he had told Pineda whether he did or did not. Appellant's point of error fails to demonstrate that such a question and answer, either alone or combined with the first one, could have been so inflammatory that the trial court's

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1 *See also Crawford v. State*, 603 S.W.2d 874, 875-76 (Tex. Crim. App. 1980) (holding that, after the prosecutor asked a question which assumed that appellant actually attempted to poison the deceased and the witness answered affirmatively, the instruction given to the jury did not cure the error because the jury was left with a clear impression that such a poisoning attempt had occurred); *Cavender v. State*, 547 S.W.2d 601, 602-03 (Tex. Crim. App. 1977) (noting that the prosecutor's question concerning whether appellant told his mother that he stabbed and raped his aunt, coupled with the prosecutor's statement that he had all the evidence in the file, was calculated to inflame the minds of the jury and was so prejudicial that its impact could not be withdrawn by the court's instruction); *Edmiston v. State*, 520 S.W.2d 386, 387-88 (Tex. Crim. App. 1975) (commenting that the court's instruction was not sufficient to remove the harmful effect of the testimony deliberately elicited by the prosecutor from the appellant that his attorney had a financial interest in the theater where the undercover agent purchased the obscene magazine).

2 *See also Franklin v. State*, 693 S.W.2d 420, 428 (Tex. Crim. App. 1985) (upholding the denial of a mistrial after the prosecutor inquired into appellant's failure to answer questions while in custody because the court's instruction could withdraw any adverse impression made upon the jury); *Penry v. State*, 691 S.W.2d 636, 655-56 (Tex. Crim. App. 1985) (holding that improperly injecting details of the alleged crime into evidence during the competency hearing was not done in an effort to convince the jury to accept the improper evidence, and thus, error was cured by an instruction); *Kelley v. State*, 677 S.W.2d 34, 36 (Tex. Crim. App. 1984) (finding that an instruction to disregard the testimony concerning needle marks on appellant's arm cured any error); *Woods v. State*, 653 S.W.2d 1, 5 (Tex. Crim. App. [Panel Op.] 1982) (noting that a witness's statement that the tool kit found in appellant's trunk was the type used by people who steal automobiles was not so prejudicial that an instruction to disregard would not cure the error in its admission).

instruction to disregard it did not cure any error. Therefore, the first point of error is overruled.

Factual Sufficiency

Appellant's second point of error argues that the evidence was factually insufficient to prove that a firearm was used during the robbery. Although appellant acknowledges that Hernandez and Zamudio both testified that appellant and his co-defendant, Alvarado, each possessed a gun during the robbery, he claims that their testimony was contradicted during cross-examination. In addition, appellant and Alvarado each testified that they were involved in the robbery but no one had a gun, knife, or other deadly weapon.

A factual sufficiency review takes into consideration all of the evidence and weighs that which tends to prove the existence of the fact in dispute against the contradictory evidence. *See Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999), *cert. denied*, ___ S.Ct. ___ (1999). That a different verdict would be more reasonable is insufficient to justify reversal; the jury's verdict will be upheld, unless it is so against the great weight of the evidence that it is clearly wrong and unjust. *See id*. at 272.

In the present case, Hernandez testified that he was cornered in the garage of his brother's apartment. There, appellant pulled a gun from his jacket, placed the gun in the back of Hernandez's head, ordered him to enter the apartment at gunpoint, and placed him face down on the sofa. Hernandez testified that he also saw Alvarado with a gun. Once on the sofa, Hernandez testified that he was hit with guns at the base of his head and that a gun was placed at the back of his head.

According to Zamudio, who was also present in the apartment during the robbery, when Hernandez entered the apartment from the garage, appellant was pointing a gun at his head. Zamudio also saw Alvarado with a gun. Zamudio testified that after Hernandez was placed on the sofa, he was repeatedly hit and threatened with a gun. Although cross-examination revealed inconsistencies in other aspects of Hernandez's and Zamudio's testimony, none cast doubt on whether firearms were used in the robbery.

Although, appellant and Alvarado each testified that no guns were used in the robbery, their testimony does not render the verdict so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Because appellant's second point of error thus fails to demonstrate that the evidence is factually insufficient to prove the use of a firearm in the offense, it is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed January 13, 2000.

Panel consists of Justices Amidei, Edelman, and Wittig.

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