Affirmed and Opinion filed June 28, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-01325-CR

GARY PAUL KESSRO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law Number Four
Harris County, Texas
Trial Court Cause No. 99-40769

O P I N I O N

Appellant, Gary Paul Kessro, was convicted by a jury of assaulting his wife and sentenced to 120 days confinement in the Harris County Jail. In seven points of error, appellant complains that (1) he was denied his right to a unanimous jury verdict because, over timely objection, the State was not required to elect from among the various manners and means by which he allegedly assaulted his wife; (2) the trial court erred in not suppressing an oral statement he gave to police officers shortly after the incident occurred; (3) the trial court erred in denying his request for a jury charge on the lesser-included offense of misdemeanor

assault; and (4) the trial court erred in overruling his objection to the State's closing argument which purportedly shifted the burden of proof to appellant. We affirm.

I. Background and Procedural History

In the early morning hours of July 30, 1999, Officer Jason Shirley of the Pasadena Police Department was dispatched to a gas station near the home of appellant and his common law wife, Andrea. According to Officer Shirley's testimony, he met Andrea, who was obviously upset, at the gas station, and she told him appellant struck her on the side of the head. She also showed him a bruise on her left arm. According to Andrea, the fight started when appellant became upset after she requested that he leave the house when he was through paying their bills. Andrea told Officer Shirley that appellant grabbed her, pushed her to the ground, and threatened her with a kitchen knife. Andrea also told Officer Shirley that she was afraid of appellant's threats and believed he would follow through with them. Officer Shirley had Andrea complete a victim's report at the gas station, after which the two of them went to appellant's home where they met another officer.

When no one answered the door, Andrea gave Officer Shirley a key to the house. At about this time, the other officer located appellant on the far side of the house, and Officer Shirley joined them there. According to his testimony, Officer Shirley wanted to get appellant's side of the story, so he asked appellant what happened. *Miranda* warnings were not given. Appellant basically gave the same reason for why the argument started, but Officer Shirley only recalled appellant admitting to pushing his wife. After the district attorney agreed to accept assault charges, Officer Shirley drove appellant to the police station. During the drive, appellant stated that the bruising on Andrea's arm was caused by injections she needed for her "physical condition."

At trial, Andrea's testimony changed dramatically. Although she acknowledged calling the police from the gas station for the purpose of having appellant removed from the house following an argument, she testified that she did not remember appellant hitting her or giving

a statement to Officer Shirley that morning that she was in fear of her life. And, although she admitted that she sought a protective order a few days after the incident and signed an affidavit wherein she swore she was afraid of her husband, she testified that because of her physical and emotional condition she would have signed anything. Andrea stated that she was admitted into a mental health treatment center shortly after signing the affidavit. Andrea also told the jury that, although she signed the police report on the day of the incident stating appellant hit her with a closed fist on the side of the head, she could not believe appellant would have done such a thing. Andrea attributed most of her changed testimony to her multiple sclerosis, which she stated causes breaks in her memory and major depression. Finally, Andrea testified that the bruising on her arm was caused by daily injections of a prescription drug.

During her testimony, appellant's attorney admitted into evidence two letters Andrea wrote to the Harris County Assistant District Attorney's Office wherein she expressed her concern about this case. In one, she stated that she and her husband were trying to work out their problems, that she was not in fear of her life, and that appellant should not be held "responsible for the unstable actions of his wife." After Andrea testified, the State presented Nghia T. Dang, a domestic violence caseworker. Dang testified that she met with Andrea for about an hour, and that Andrea was nervous, upset, and crying. During their meeting, Andrea told Dang about the assault. Dang testified that she worked on approximately 1,600 cases involving domestic violence and that often abused women will recant or minimize the abuse because they believe the abuser will change his behavior or because they want to try to reconcile with him.

The jury convicted appellant of assault and, pursuant to the parties' agreement, appellant was sentenced to 120 days confinement in the Harris County Jail. He now brings this appeal.

II. Juror Unanimity

In his first three points of error, appellant contends that he was denied his right to a unanimous jury verdict, as guaranteed by the United States and Texas constitutions and by

Article 36.29 of the Code of Criminal Procedure, because, over timely objection, the trial court did not force the State to elect the manner and means by which it sought to prove appellant assaulted his wife. Consequently, he alleges, some members of the jury may have believed appellant committed the assault by striking Andrea, while others may have believed he grabbed her, and still others could have believed he pushed her.

Appellant relies on *Richardson v. United States* in support of his argument that the trial court erred by failing to force the State to elect from among the various manner and means by which appellant assaulted his wife. 526 U.S. 813 (1999). His reliance on this case is misplaced. First, what the Court was faced with there was whether a *federal statute*—not the United States Constitution—required juror unanimity. *Id*. at 817–18. Second, and more importantly, the Court contrasted the case before it with a hypothetical federal bank robbery statute and concluded that the robbery statute would not require unanimity as to whether, in committing the offense, the defendant used a particular means of force, *e.g.*, a gun or a knife, "so long as all 12 jurors unanimously concluded that the Government had proved the necessary related *element*, namely that the defendant had threatened force." *Id*. at 817 (citing *McKoy v. North Carolina*, 494 U.S. 433, 449 (1990) (Blackmun, J., concurring) (emphasis added)). Moreover, the Supreme Court has expressly rejected appellant's argument that a jury must unanimously agree on the means by which a defendant committed a particular crime. *See, e.g.*, *Schad v. Arizona*, 501 U.S. 624, 633 (1991) (plurality opinion) (criticizing dissent's "inflexible rule of maximum verdict specificity" which would require a jury to indicate on which of alternative means it based the defendant's guilt whenever a statute provided more than one means of committing a crime).

Instead, this case is governed by *Kitchens v. State*. 823 S.W.2d 256 (Tex. Crim. App. 1991) (en banc). In *Kitchens*, a capital murder case, the Court of Criminal Appeals held that the State was not required to elect between alternative theories of the offense, *viz*., whether murder was committed while in the course of aggravated sexual assault or while in the course of robbery. *Compare id*. at 257 *with Francis v. State*, 36 S.W.3d 121, 125 (Tex. Crim. App.

2000) (holding that, where instances of indecency with a child occurred on separate dates and thus constituted separate offenses against the same victim, it is impermissible to charge the jury in the disjunctive). *Kitchens*, however, held that "[i]t is appropriate where the alternate theories of committing the same offense are submitted to the jury in the disjunctive for the jury to return a general verdict if the evidence is sufficient to support a finding under *any* of the theories submitted." 823 S.W.2d at 258 (emphasis added). That is the situation here. The evidence supports a finding that, on a single occasion, appellant assaulted his wife either by grabbing her, or pushing her, or threatening her with a kitchen knife—or by all of these means.[1] Appellant's first three points of error are overruled.

III. Suppression of Appellant's Statement

In his fourth point of error, appellant complains that the trial court erred in overruling his motion to suppress his statement to Officer Shirley because it violated article I, section 9 of the Texas Constitution and articles 38.22 and 38.23 of the Code of Criminal Procedure. Essentially, appellant's argument is that, because he was in custody, it was incumbent upon Officer Shirley to read him his "statutory warnings."

A person is in custody only if a reasonable person would conclude that, under the circumstances, his freedom of movement is restrained to a degree consistent with formal arrest.[2] *Dowthitt v. State*, 931 S.W.2d 244, 254 (Tex. Crim. App. 1996) (citing *Stansbury v. California*, 511 U.S. 318 (1994)). Four scenarios illustrate what may constitute custody: (1) the suspect is physically deprived of his freedom of action in a significant way, (2) a police

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[1] As Justice Scalia observed, "When a woman's charred body is found in a burned house and there is ample evidence that the defendant set out to kill her, it would be absurd to set him free because six jurors believe he strangled her to death (and caused the fire accidentally in his hasty escape), while six others believe he left her unconscious and set the fire to kill her." *Schad*, 501 U.S. at 649–50 (1991) (Scalia, J., concurring).

[2] Because this is a mixed question of law and fact which turns on the credibility of Officer Shirley—the only witness to testify at the hearing—the trial court's ruling is afforded almost complete deference. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997).

officer tells the suspect that he cannot leave, (3) a police officer creates a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted, and (4) if there is probable cause to arrest and the police officer does not tell the suspect that he may leave. *Id*. at 255 (citing *Shiflet v. State*, 732 S.W.2d 622, 629 (Tex. Crim. App. 1985)). In the first three scenarios, "the restriction . . . must amount to the degree associated with an arrest as opposed to an investigative detention." *Id.* As to the fourth, the Court held "*Stansbury* dictates that the officers' knowledge of probable cause be manifested to the suspect." *Id.* In deciding whether a person reasonably believed he was in custody, one of the primary factors a court considers is whether there was probable cause to arrest at the time of the interrogation. That factor is relevant, however, only if the officer communicated that to the defendant. *Id.* Here, Officer Shirley testified that (1) appellant was not placed in handcuffs, (2) he was free to leave if he wanted to, and (3) Officer Shirley wanted to talk to him to "get the other side of the story." In light of Officer Shirley's testimony, we find the trial court properly concluded that this was an investigative detention. The first three situations outlined in *Dowthitt* do not apply here because they require a restriction of movement more severe than that described by Officer Shirley. And, because there was no testimony that appellant knew the police had probable cause to arrest, the fourth situation described in *Dowthitt* does not apply. Accordingly, appellant's statement was admissible and his fourth point of error is overruled.

IV. Testimony of Nghia Dang

In his fifth point of error, appellant complains that the trial court erred in allowing domestic violence caseworker Nghia Dang to testify because the State failed to lay the proper predicate under evidentiary Rule 701. Appellant argues that Dang's testimony was neither based upon her personal knowledge nor helpful to the jury.[3]

[3] Initially, the State offered Dang as an expert witness under Rule 702. After appellant's objection on that basis was sustained, the State then offered her as a trained lay witness under Rule 701. Appellant's objection was overruled.

A trial court has wide latitude in ruling on the admissibility of evidence and will not be reversed absent an abuse of that discretion. *Prystash v. State*, 3 S.W.3d 522, 527 (Tex. Crim. App. 1999). An abuse of discretion occurs if the trial court acts without reference to any guiding rules or principles, *i.e.*, when it acts arbitrarily or unreasonably. *Lyles v. State*, 850 S.W.2d 497, 502 (Tex. Crim. App. 1993); *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990). Whether an opinion is within the parameters of Rule 701 is a matter left to the sound discretion of the trial court. *Fairow v. State*, 943 S.W.2d 895, 901 (Tex. Crim. App. 1997). No abuse of discretion occurs if there is evidence in the record supporting the trial court's decision to admit or exclude an opinion under Rule 701. *Id.*

In order to lay a proper predicate, the party offering a Rule 701 witness must show that the testimony is "rationally based on the perception of the witness" and is "helpful to the clear understanding of the witness' testimony *or the determination of a fact in issue*." TEX. R. EVID. 701 (emphasis added). In order to satisfy the first prong of Rule 701, the witness must establish that the testimony is based upon her personal knowledge of events from which his or her opinion is drawn. *Fairow*, 943 S.W.2d at 898. An opinion will satisfy the personal knowledge requirement if it is an interpretation of the witness's objective perception of events (*i.e.*, his own senses or experience). *Id.* at 899.

Appellant argues Dang's testimony essentially was a comment on why Andrea's testimony changed, and thus, it invaded the province of the jury by commenting on her subjective mind set. In support of this argument, appellant cites *Fairow* as "preclud[ing] its use when there is an attempt to communicate the subjective mindset" of another. However, *Fairow*'s holding is much more narrow than appellant would have us read it. There, the defendant sought to introduce evidence that a co-defendant, Middleton, formed the opinion that another co-defendant, Young, did not intend to shoot the victim because that is what Young told Middleton after the shooting. The court found that the proffered testimony was directed not to what the witness observed, but to what the witness was told. 943 S.W.2d at 901. Moreover, the court found that the testimony was properly excludable because the witness was not

provided with a legal definition of "intent." *Id.*[4] In other words, the record supported the trial court's ruling.

Here, the record supports the court's ruling that Dang's testimony was based on events she personally observed. The State's direct was limited to Dang's observations in about 1,600 other cases she has been involved in. On cross, appellant inquired about possible alternative reasons that would explain why Andrea's story changed, including the fact that Andrea suffered from multiple sclerosis, was on anti-depressants, as well as more general "mental and physical issues." On re-direct, Dang testified that Andrea did not tell Dang she was unable to remember or perceive events. Dang further testified that she formed the opinion Andrea was capable of remembering and perceiving events. Unlike *Fairow*, Dang's testimony was based on what she personally observed—not on what female victims of domestic violence told her. Accordingly, we find that Dang's testimony was rationally based on what she observed, *i.e.*, notwithstanding what Andrea told Dang, Dang's observations led her to conclude that Andrea changed her testimony in order to continue her relationship with appellant.

Appellant also argues Dang's testimony was not useful under the second prong of Rule 701. The obvious purpose of Dang's testimony was to explain why Andrea's story changed between the time the initial complaint was filed and trial. Appellant cites *Speer v. State* for the proposition that Dang's testimony should have been excluded. 890 S.W.2d 87 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd). Like *Fairow*, however, *Speer* simply states the trial court did not abuse its discretion in excluding a defense expert's testimony because it "was not the type of testimony found outside the range of a layperson's knowledge." *Id.* at 97. In *Speer*, the defense called an expert to rebut the State's theory that the defendant killed on

[4] Because of the degree of deference incorporated into the standard of review, it is problematic to rely on a case that found no abuse of discretion to support the proposition that a court must exclude arguably similar evidence, a point noted in *Fairow*: "Because evidence in the record supports [the trial court's ruling], the trial court did not abuse its discretion in [excluding the testimony]." 943 S.W.2d at 901 (citing *Carroll v. State*, 916 S.W.2d 494, 503 (Tex. Crim. App. 1996) and *Meek v. State*, 790 S.W.2d 618, 620 (Tex. Crim. App. 1990)).

the promise of remuneration and instead killed because of a dependent personality disorder. *Id.* at 96. The court found the expert's testimony was not "specialized knowledge" within the meaning of Rule 702 because the defense already called two lay witnesses who testified that the defendant had low self-esteem, needed the approval of others, and engaged in menial tasks in order to gain that approval. *Id.* at 97. The court also found that the testimony was not useful because it could not exclude the possibility Speer killed for money, even though it was offered for that purpose. *Id*.

The record here, however, does not support appellant's argument that "the jury, as evidenced by their responses during voir dire, was aware of the dynamics of the relationship between a spouse and his/her purported abuser." Instead, the record shows that, in response to questioning on *voir dire*, although three members on the jury panel provided possible reasons a wife might not want to testify against her husband, only one served on the jury. The record, therefore, does not support appellant's contention that this is a case where the jury was possessed of the same information as Dang. *Cf. Roberts v. State*, 743 S.W.2d 708 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd) (holding testimony by defense witness that officers harassed defendant was inadmissible because it was for the jury to decide that issue). Because the record supports the trial court's ruling that Dang's testimony was not of the sort ordinarily within a layman's knowledge, the court did not abuse its discretion in admitting Dang's testimony. Appellant's fifth point of error is overruled.

V. The Lesser-Included Offense

In his sixth point of error, appellant complains that the trial court erred in refusing his request that the jury be instructed on the lesser-included offense of a Class C misdemeanor assault under section 22.01(a)(3) of the Texas Penal Code. We disagree.

A lesser-included offense (1) is established by proof of the same or less than all the facts required to establish the greater offense; (2) differs from that with which the defendant has been charged only in respect to a less serious injury or risk of injury; (3) differs from the

offense charged only in that it requires a less-culpable mental state; or (4) it consists of an attempt to commit the charged offense. TEX. CODE CRIM. PROC. ANN. art. 37.09 (Vernon 1981). To be entitled to such an instruction, a defendant must show (1) the lesser included offense is included within the proof necessary to establish the offense with which the defendant is charged and (2) the record contains some evidence to support a jury's finding that, if the defendant is guilty, he is guilty only of the lesser included offense. *Rousseau v. State*, 855 S.W.2d 666, 672–73 (Tex. Crim. App. 1993). Anything more than a scintilla of evidence is sufficient to entitle a defendant to a lesser charge. *Jordan v. State*, 1 S.W.3d 153, 156 (Tex. App.—Waco 1999, no pet.) (citing *Arevalo v. State*, 970 S.W.2d 547, 548 (Tex. Crim. App. 1998)). Questions such as the credibility of the evidence and whether it conflicts with other evidence may not be considered in determining whether such an instruction should be given. *Penry v. State*, 903 S.W.2d 715, 755 (Tex. Crim. App. 1995). We review the entire record. *Harvard v. State*, 800 S.W.2d 195, 216 (Tex. Crim. App. 1989).

Appellant was charged with a Class A misdemeanor assault and requested an instruction on assault as a Class C misdemeanor. Appellant correctly points out that the difference between the two crimes is that a Class A assault requires bodily injury, whereas a Class C assault results only requires offensive or provocative contact. *Compare* TEX. PEN. CODE ANN. § 22.01(a)(1) (Vernon 1994) with *id.*, § 22.01(a)(3). Appellant's basis for believing he was entitled to an instruction on Class C assault is Andrea's conflicting statements[5] regarding whether his actions caused her bodily injury. Bodily injury is statutorily defined as "physical pain, illness, or any impairment of physical condition." TEX. PEN. CODE ANN. § 1.07(a)(8) (Vernon 1994). Bodily injury includes any contact so long as it rises above an offensive touching. *Lane v. State*, 763 S.W.2d 785, 786 (Tex. Crim. App. 1989).

[5] These statements include those she made to Officer Shirley, an affidavit she signed, several letters she wrote to the District Attorney wherein she requested the charges be dropped, and her testimony at trial. In the statement she signed for Officer Shirley and in her affidavit, Andrea indicated appellant's conduct caused her arm to bruise; but in her call to the police, she never stated he caused her pain. Several letters she wrote to the District Attorney's office suggested she was not injured by appellant.

None of Andrea's statements suggests, however, that if appellant is guilty, he is guilty only of offensive or provocative contact. Andrea's testimony at trial was that appellant never touched her, let alone offensively or provocatively; she testified that she called the police simply because she wanted her husband removed from the house after an argument they had earlier that day. Additionally, she denied that the bruising on her arm was caused by appellant. When the State tried to refresh her recollection by having her read from the affidavit she signed and the offense report, she testified the "whole incident was a blur" but she did not remember her husband hitting her. Both documents indicate appellant caused bodily injury to Andrea.[6] The defense also introduced a document entitled "Crime Victim Impact Statement" wherein Andrea checked a box indicating she did not "suffer[] any physical injury as a result of the crime." Finally, Andrea testified that her husband would not do "these things." Accordingly, all the evidence suggests that, if appellant is guilty, he is guilty only of causing her bodily injury. Otherwise, he is not guilty. In other words, no evidence suggests appellant only caused offensive or provocative contact. Appellant's sixth point of error is overruled.

VI. Improper Jury Argument

In his final point of error, appellant complains the trial court erred in overruling his objection to the State's closing argument because it shifted the burden of proof by commenting on his failure to testify.

The Court of Criminal Appeals held that a reviewing court should apply the harm analysis to improper jury argument, *i.e.*, we must be satisfied, beyond a reasonable doubt, that the error in question did not contribute to the conviction of the accused. *Orona v. State*, 791 S.W.2d 125, 129–30 (Tex. Crim. App. 1990). Obviously, we must first be convinced that the State's closing argument was improper and that error was preserved.

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[6] The offense report indicated appellant struck her and caused her arm to bruise and the affidavit indicates appellant tried to stab her with a kitchen knife and hit her on her face with his closed fist and caused her arm to bruise.

Proper jury argument must fall within one of the following categories: (1) a summary of the evidence; (2) a reasonable deduction therefrom; (3) an answer to the opponent's argument; or (4) a plea for law enforcement. *Alejandro v. State*, 493 S.W.2d 230, 231 (Tex. Crim. App. 1973). A prosecutor has wide latitude during argument. *Denison v. State*, 651 S.W.2d 754, 761–62 (Tex. Crim. App. 1983). However, a prosecutor's comment on the defendant's failure to testify is manifestly improper argument. *Bird v. State*, 527 S.W.2d 891, 894 (Tex. Crim. App. 1975). When a defendant elects not to testify, his silence is not a proper subject for either direct or indirect comment by the prosecutor. *Dickinson v. State*, 685 S.W.2d 320, 322 (Tex. Crim. App. 1984). Such a comment violates the United States Constitution, the Texas Constitution, and Texas statutory law. U.S. CONST. amend. V; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 38.08 (Vernon 1979); *see also Bird*, 527 S.W.2d at 893. If the challenged remarks could have only been supplied by the defendant, then such an argument is tantamount to a direct comment on the defendant's failure to testify and the conviction must be reversed. *Angel v. State*, 627 S.W.2d 424, 426 (Tex. Crim. App. 1982).

Appellant objected to the following portion of the State's argument:

> PROSECUTOR: Now, you've got to decide is she trying to tell the truth now when she's writing these letters. Like Exhibit 2 and copying the Defense attorney? Is that what really happened on that day when she's writing letters and copying them to the Defense? Or is what really happened that day what she said and wrote down for the police within an hour of the event? Now, how do you make that decision? They want you to say that just because she'll get on the stand today and say that I'm not sure, that you would have to accept that. Well, you can tell that it's evident from the evidence that she's not being forthcoming on that. How do you know? Because it doesn't fit into the totality of the circumstances. You can't force something back into what happened. Life is too complicated, too interrelated for that. This is what I mean. Had she been trying to get him out of the house, which is the only version that they brought forth today of why she would have behaved that way . . . .

> THE DEFENSE: I object to that as an attempt to shift the burden.
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> THE COURT: Overruled.
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> PROSECUTOR: Things would have been far different. For one thing, it doesn't make sense when a woman with a very capable job at an insurance company receiving promotions doesn't call a lawyer having him out of the house in 48 hours. That would have been the easy thing to do. It also doesn't make sense because the defendant's own conduct doesn't affirm that.
>
> Now, do we have problems believing her? Look at his conduct on that very day. Yes, he admits that he was angry. Yes, he admits that he grabbed and pushed her with his hand. He is making admissions that are integrated into the very fact pattern which she described that day to the officer. Admissions which are inconsistent with the version that we're hearing now. Now, what is today's version? Well, I have psychological problems. Actually, she seemed pretty capable on the witness stand. I haven't seen any evidence other than her own statements that confirms that she was on medication, that confirms that she's been hospitalized, that confirms that she's ever been unable to perceive and think. In fact, the only . . . .
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> THE DEFENSE: Excuse me. I object again. An attempt to shift the burden on the Defense and that's improper argument.

Both of these objections were overruled by the trial court.

The State's closing argument neither directly nor indirectly commented on appellant's failure to testify. Rather, it is a direct comment on Andrea's vacillating testimony and why the jury ought to believe what she said initially and disregard what she testified to before the jury. Accordingly, this was proper jury argument. *See, e.g., Giesberg v. State*, 945 S.W.2d 120, 126 (Tex. App—Houston [1st Dist.] 1996) (stating that as long as a prosecutor's argument about the witness's credibility is based on evidence and inferences therefrom, it is proper), *aff'd*, 984 S.W.2d 245 (Tex. Crim. App. 1998), and *cert. denied*, 525 U.S. 1147 (1999). Moreover, the evidence which the prosecutor argued would have exonerated appellant could

have been supplied by other witnesses who testified.[7] Judging by the verdict, however, the jury simply did not believe her.

Appellant's final point of error is overruled.

Affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed June 28, 2001.

Panel consists of Justices Yates, Fowler, and Lee.[8]

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

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[7] Appellant compares the State's closing here to *Anderson v. State*. 813 S.W.2d 177, 180 (Tex. App.—Dallas 1991, no pet.). In that case, the court reversed based on the following argument:

> Remember, he doesn't have to put up any defense or anything. Remember that. It's like "put up or shut up." And that's what he's told us to do, "put up or shut up." But has he put up any kind of explanation as to how those fingerprints ended up on the truck? Has he?

Id. at 181. The Court held that "it is clear the prosecutor switched the focus of the argument from a response to defense counsel's argument about the nonappearance of the gas station clerk to appellant's failure to come forward with evidence to explain how his fingerprint came to be on the passenger door of the truck. Nothing in the record leads to the conclusion some witness *other than appellant* could have supplied the missing evidence." Here, the State's closing was a reasonable deduction from the evidence and, as noted above, was not a comment on evidence that only appellant could have provided.

[8] Senior Justice Norman R. Lee sitting by assignment.