COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

RICARDO ZUNIGA,	§	No. 08-14-00153-CR
Appellant,	§	Appeal from
v.	§	205th District Court
THE STATE OF TEXAS,	§	of El Paso County, Texas
Appellee.	§	(TC # 20130D04852)

O P I N I O N

In 2009, brothers Jesus and Jose Vargas died after they were beaten, stabbed, and shot at the A&M Bar in Socorro, Texas. Members of the Barrio Aztecas gang were present, including Appellant, Ricardo Zuniga. Immediately after the killings, Appellant fled to Mexico and was not arrested until 2012, three years after the murders. In a three-count indictment, Appellant was charged with capital murder (Count I), and two counts of engaging in organized criminal activity (Counts II and III). Appellant was tried before a jury, which returned a verdict of guilty on all three counts. Because the State did not seek the death penalty, Appellant's punishment for the capital murder charge (Count I) was set by law at confinement for life without parole. *See* TEX.PEN.CODE ANN. § 12.31(a)(West 2015). For Counts II and III, the jury returned punishment verdicts of sixty years' confinement. The trial court imposed the sentence in accordance with the jury's verdicts and Appellant filed this timely appeal.

FACTUAL SUMMARY

The primary focus of this appeal is the prosecution's efforts to tie Appellant to the Barrio Azteca gang. The Barrio Aztecas originated within the Texas prison systems around 1986. Several original founding members of the gang were born and raised in El Paso, Texas. They officially signed their "Constitution" in 1987, which contained written rules and regulations that all members must follow. The gang is involved in various forms of criminal activity including high-level narcotics, murder, assassinations for hire, and retaliation.

Gang Turf

The Barrio Aztecas claim the entire El Paso-Juarez region as their "turf," or exclusive territory. If another gang in the El Paso-Juarez region sells narcotics, it is required to pay a "cuota," or a percentage, to the Barrio Aztecas. Police officers assigned to gang cases in the area also refer to cuotas as extortion money. If a rival gang member fails to pay the cuota, the Barrio Aztecas implement several forms of discipline, which may include killing that member. To them, not receiving their cuota payment is a sign of weakness to other gangs in the area.

Extensive testimony was elicited to establish the process by which the El Paso Police Department classifies a person as a gang member. The police are required to follow Chapter 61 of the Texas Code of Criminal Procedure when classifying someone as a gang member. Several of the Code's criteria include self-admission, information obtained from a reliable informant, evidence of a known gang sign or symbol, and being arrested with other known gang members. In addition to the Code, the Texas Department of Criminal Justice (TDCJ) and its correctional facilities have also established their own gang confirmation process. The confirmation process incorporates a point-based approach to classifying gang members within its correctional facilities. TDCJ considers several of the same criteria as the police do under the Texas Code of

Criminal Procedure, but also conducts interviews and extensive research. The police department considers TDCJ's gang membership confirmation process to be a credible source of information because its classification system is more stringent than what the police are required to follow. TDCJ confirmed Appellant's membership in the Barrio Aztecas in September 2004. Several of the people arrested with Appellant at the A&M Bar, including Joe Alarcon, Jose Cordero and Victor "Nacho" Gomez, were also confirmed Barrio Aztecas members.

The Barrio Campestre Locos gang is a traditional regional street gang established in the Socorro area of El Paso, Texas. The gang considers Socorro their turf. They are similarly involved in several forms of criminal activity, including murder, aggravated assaults, robberies, narcotics trafficking, and retaliation. Both of the Vargas brothers were confirmed members of the Barrio Campestre Locos gang.

Events of the Confrontation

Aide Samaniego

On Sunday, June 21, 2009, Aide Samaniego arrived at the A&M Bar at approximately 10:00 or 10:30 p.m., after she left the horse races in Clint, Texas. Her childhood friend, Jose Cordero, arrived with Appellant shortly thereafter. Appellant and Cordero joined Samaniego at a table in the bar. Samaniego knew of Appellant but had never formally met him before. She knew him by the street name "Nano." At approximately 11:30 p.m., Appellant and Cordero briefly left the table and made their way toward the entrance of the bar where they appeared to engage in a confrontation with another group of individuals. They then returned to the table. Later that evening, Samaniego stepped outside to smoke a cigarette. She noticed three other men walk inside the bar to join Appellant and Cordero. These men, whom she described as "gangsters" and "cholos," exited the bar with Appellant and Cordero a few minutes later.

Samaniego returned to the bar, but a fight outside had already begun. According to Samaniego, there were ten or fifteen people punching and kicking two individuals on the ground. She could not identify the victims. Someone yelled out, "cops," and everyone began to scatter. Appellant and another person got into Appellant's car, but before they could leave, someone threw a bottle at the back windshield, which shattered. Appellant then got out of his car, opened his trunk, and pulled out a gun. Samaniego ran away from the bar after she saw Appellant walking toward the fight scene with the gun. He held his gun sideways and was pointing it directly in front of him. Approximately forty-five seconds later, she heard two gunshots.

Several days later, the authorities contacted Samaniego and asked her to identify some individuals involved in the altercation. She identified Appellant, referring to him as "Nano," Jose Cordero, and Victor "Nacho" Gomez as persons in the group that assaulted and murdered the Vargas brothers.

Samaniego did not positively identify Appellant in court. The State attempted to introduce evidence to show that she was afraid to do so. Appellant objected and the trial court sustained his objection, limiting Samaniego's testimony to the fact that she was subpoenaed to appear in court and was not participating voluntarily. Subsequently, the trial court permitted Samaniego to testify that she feared for her safety as a result of testifying in court, however, the trial court still did not permit testimony concerning the reason for her fear.

Cecilia Estrada

Cecilia Estrada arrived at the A&M Bar with her two aunts at approximately 10:00 or 11:00 p.m. She saw Samaniego, Cordero (whom she previously dated for six months), and Appellant, all sitting together at a table. She had met Appellant a few months before the murders and knew him by the name "Nano." When the fight broke out, Estrada ran outside to see what

was happening. She saw five to seven men kicking and beating two men lying face down on the ground. She identified Appellant and Cordero as two of the assailants. She remembered seeing someone throw a glass bottle. As she began to run away, she also heard two gunshots. When she looked back at the fight scene, she saw Appellant with a gun in his hand but she did not actually see the shooting. As she and her aunts drove away from the scene, she noticed two bodies on the ground in the parking lot. Two days later, Estrada positively identified Appellant and Cordero in photo line-ups. Like Samaniego, Estrada identified Appellant as "Nano." She specifically testified that the person she identified in the photo line-ups as "Nano," was the same person she saw holding a gun after she heard the two gunshots. Estrada did not identify Appellant in court, but like Samaniego, was subpoenaed to testify.

Flor Reyes

Flor Reyes was bartending the evening of June 21, 2009. Unlike Samaniego and Estrada, Reyes positively identified Appellant in court and testified that he was present at the bar the night the Vargas brothers were murdered. Earlier in the evening, before the fight broke out, Reyes heard Appellant tell "Sparky," that he (Sparky) had to do his job. Sparky told Appellant no.

When the fight broke out, several individuals came in and told her to call the police. She ran outside to the fight scene and found the Vargas brothers lying face down on the ground. There were several other bystanders attempting to help them, but Reyes saw Appellant along with three to four other men, whom she did not know, controlling the crowd and bystanders by waving and pointing their guns at them, and telling them "not to get close." She heard Cordero yell "[shoot] at him some more." Reyes approached one of the brothers but Appellant shoved her out of the way. He then pulled out his gun and shot one of the brothers in the head. She

couldn't immediately tell which brother had been shot because they were both still face down. She later referred to the brother that Appellant shot as "Caveman." According to Reyes, after Appellant shot Caveman in the head, he then shot him two more times in the back, for a total of three shots. Appellant then walked away, got into his car, and drove off. Reyes did not witness anyone else fire a gun and she testified that the three gunshots were the only ones she heard. Reyes also identified Appellant, "Nacho" Gomez, and Cordero in photo-lineups.

Reyes testified through an interpreter. She identified Appellant in court as the same person whom she saw shoot one of the Vargas brothers. When the State asked Reyes if Appellant looked the same in court as he did at the time of the murders, she responded, "Well, if he's the one I'm talking about, he was a little bit more robust." She then went on to explain that Appellant appeared to have lost a significant amount of weight since the murders in 2009. During cross-examination, Appellant attempted to utilize Reyes' statement, "Well, if he's the one I'm talking about . . ." to assert that she was unsure of her identification. However, Reyes clarified that she was positive in her identification of Appellant and proceeded to explain that her use of the phrase "if he's the one" was just the way she speaks.

Medical Testimony

The Chief Medical Examiner for El Paso County, Dr. Juan Contin, testified as to the Vargas brothers' ultimate causes of death. He did not perform the autopsies or prepare the autopsy reports[1], but viewed them to form the basis of his expert opinion. Dr. Contin concluded that Jesus suffered several contusions from impacts with fists and other objects. He sustained

[1] Dr. Shrode, the former medical examiner, actually performed the autopsies and prepared the two reports.

non-fatal stab wounds to his abdomen, his back -- some of which perforated the liver -- and to his ear.[2] A single gunshot wound to the neck was the cause of his death:

> [The State]: And was the--what was the fatal blow, I guess? What caused his death?
>
> [Dr. Contin]: The most serious injury was a bullet wound to the neck, that it grazed the cervical spine; but he probably bled--the cause of death was bleeding from the stab wound to the back of the chest and, you know, bleeding--the neck bleeds profusely because it has a lot of blood vessels in the path of the bullet.
>
> [The State]: In your opinion, did the bullet wound cause his death or help cause his death?
>
> [Dr. Contin]: Yes.

Dr. Contin then opined that Jose suffered one fatal injury, a gunshot wound to the back of the head. He described it as a contact wound, meaning the gun was against his head when he was shot. There was no indication of a contact wound on Jesus's body. Like Jesus, Jose also sustained multiple blunt-force injuries to his face and several non-fatal stab wounds to his neck and chest. Each brother was shot only once.

Forensic and Police Testimony

One bullet slug and two shell casings were recovered from the bar parking lot. Alicia Vallario, a firearms and tool-mark expert, analyzed the slug and casings and ultimately concluded that the two shell casings recovered from the scene were fired from the same gun. There was enough evidence to conclude that both the recovered bullet slug and the two shell cases were manufactured by Hi-Point. She could not conclusively determine that the bullet slug came from any of the two shell casings because there was no firearm for her to make a comparison. But she was able to determine that the bullet slug and shell casings were both from a .380 caliber weapon.

[2] It appeared that Jesus was stabbed in his ear with an icepick, part of which was still embedded in his head.

Detective Jeffrey Gibson testified as a gang expert. In his opinion, the attack on the Vargas brothers was an attack consistent with Barrio Azteca activities. The bar was a known "hang-out" for Barrio Azteca members. And as already laid out in the facts above, the Barrio Aztecas were involved in high-level narcotics trafficking; they claimed the El Paso-Juarez region as their territory; and demanded any other gangs in the area to pay them a cuota. Gibson further testified that the Vargas brothers were confirmed Barrio Campestre Locos gang members; that the Barrio Campestre Locos gang was involved in narcotics trafficking; and the attack on the Vargas brothers was consistent with the Barrio Aztectas' criminal activities.

Evidentiary Rulings

Motive

At the beginning of trial, the State notified the court that it intended to elicit evidence that because Appellant was a Barrio Azteca member and the Vargas brothers were members of the Barrio Campestre Locos, the motive for the murders was that the Vargas brothers failed to pay their cuota for selling narcotics. Appellant objected and the trial court ruled that the State would not be permitted to discuss motive during its opening statements.

"Froggy"

During trial, the State attempted to call a witness who was allegedly with one of the Vargas brothers, referred to as "Froggy," the night he was killed. This witness purportedly purchased cocaine from Froggy. Froggy told him he was having problems with the Barrio Aztecas because he had failed to pay the cuota for selling cocaine and marijuana. Appellant objected on the grounds that such testimony would constitute inadmissible hearsay and would violate his right to confront the declarant, the now deceased Vargas brother known as "Froggy." The trial court agreed and ruled that any statements made by the brothers would be inadmissible.

When the State put this witness on the stand, he invoked his Fifth Amendment right and refused to answer any of the State's proffered questions.

The 911 Calls

The State called the custodian of records for 911 communications as its first witness at trial. The witness identified and authenticated the 911 call recordings made in relation to this case and the State offered them into evidence. This proffer occurred *within* the presence of the jury. Appellant objected and the trial court overruled the objection, but did not permit the recordings to be played for the jury until "verification by other testimony." Later in the trial, the court sustained Appellant's objections to playing the 911 calls for the jury and subsequently withdrew the phone calls from evidence. This occurred *outside* the presence of the jury.

The Photo Lineups

When Appellant was finally arrested in Mexico in 2012, three years after the murders, the police needed to confirm his identity in order to secure his deportation from Mexico back to the United States. The police obtained the 2000 driver's license photograph of Appellant that the detectives utilized in their photo line-ups. Both Samaniego and Estrada testified on cross-examination that the photograph of Appellant used in the photo line-ups resembled the way Appellant looked at the time of the murders. Estrada also identified Appellant from another photograph taken at the time of Appellant's arrest in 2012.

When the State rested, Appellant proffered another photo line-up that was shown to other witnesses in this case, none of whom was present at trial. Appellant argued that the photograph used in these line-ups provided a more accurate physical description because it was taken much closer in time to the murders, unlike the driver's license photograph from 2000 shown to Estrada,

Reyes, and Samaniego. Appellant then admitted that he was having difficulty deciphering the exact date the photo was taken.

The defense then called Detective Irene Anchondo to testify that both photo line-ups were used with various witnesses. Anchondo agreed that the only way to determine the exact date of the photograph was to have someone who personally knew Appellant testify that the photograph depicted how Appellant looked at a certain time.

The State's Closing Argument

During closing arguments, the State argued, without objection, that the attack at the A&M Bar was not a random event because it occurred at a location known for its drug trafficking, it was frequented by Barrio Azteca members, and the victims were members of a different gang. The prosecutor then twice referred to the Vargas brothers as drug dealers. Appellant immediately objected on the grounds that the State was assuming facts not in evidence. The trial court sustained his objection, instructed the jurors to disregard these statements, and encouraged the jury to rely on their own memories to recall the evidence. The court then denied Appellant's motion for mistrial.

Also during arguments, the prosecutor referenced the 911 calls, explaining to the jury that the trial court sustained Appellant's objection to admitting the calls, so the 911 calls were no longer in evidence and the jury would not be permitted to consider them. Appellant objected, the trial court sustained the objection, instructed the jury to disregard, and denied the motion for mistrial.

Appellant argued that Reyes's in-court identification was not credible and created reasonable doubt as to Appellant's identification as one of the shooters on the night of the murders. The prosecutor countered that Reyes was unequivocal in her in-court identification and

mentioned the interpreter's translation, but could not complete its comment because Appellant objected:

> [The State]: But when you question her, when you look at her testimony with regard to the I.D., did she said [sic] equivocate? Did she say it wasn't him? She filled it out in the photo lineup. What [defense counsel] is hanging his hat on is a translation, and the translation--
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> [Defense counsel]: I'm going to object, Your Honor. There's no evidence of that.
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> [The Court]: Sustained. Please restate your--
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> [Defense counsel]: Instruction to disregard, You Honor.
>
> [The Court]: Ladies and gentlemen, please disregard that last statement.

The trial court denied Appellant's motion for mistrial. The State continued his argument without referencing the interpreter's translation, but instead indicated that on cross-examination, Reyes clarified what she meant by, "if he's the one."

The defense further argued that the witnesses' identification of Appellant was based on a nine-year old photograph even though the detectives had access to a more recent photograph. Counsel then argued that because the detectives created the line-ups, the State could have obtained the information as to the exact dates the photographs were taken, but chose not to do so because they wanted to hide this information form the jury.

In response, the State noted that Appellant had access to the State's file, which contained the names of the detectives that created the photo line-up, and he could have called the exact detective that created it, but chose to call Detective Anchondo instead. Appellant objected, arguing facts not in evidence, and the trial court sustained his objection, instructed the jury to disregard, but denied Appellant's motion for mistrial. When the State repeated these statements, Appellant objected again, but this time the trial court overruled his objection:

> [The State]: And then when they called her and she didn't know, they say, "See, that's her fault." She never claimed to know. She said, "I believe this is a more recent photograph." But none of [the investigating detectives] know what Appellant looks like in 2009. They say this is a driver's license photograph. And who knows when that driver's license photograph--
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> [Defense counsel]: Object, Your Honor, as to improper comment.
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> [The Court]: Overruled.
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> [The State]: Who knows when this driver's license photograph was taken?
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> [Defense counsel]: Renew my objection. Improper comment.
>
> [The Court]: Overruled.

The State addressed Samaniego's failure to identify Appellant in court and highlighted her demeanor on the stand to the jury:

> [The State]: I think some people are scared to come in and point a finger at a Barrio Azteca gang member and say, "That's him." It's one thing to talk to the police and give a statement and not be there. It's another thing to come to court, sit in a stand less than 10 feet away from the man, and point your finger.
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> [Defense counsel]: Your Honor, I'm going to object. There's no evidence from which that can be found.
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> [The Court]: Overruled.
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> [The State]: You can look at the demeanor of Aide Samaniego when [the prosecutor] asked her, "Do you see anybody in here?" I remember her not wanting to look to her right side. She looks around. She did this, she does that (demonstrating), and doesn't want to look over to [Appellant].
>
> [Defense counsel]: I object as to arguing outside the record, Your Honor.
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> [The Court]: Overruled.
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> [Defense counsel]: The record does not reflect any of that.
>
> [The Court]: Overruled.

ISSUES FOR REVIEW

Appellant raises eleven issues on appeal. Because Issues One through Three address the legal sufficiency of the evidence, we will consider them together. Because Issues Four through Nine involve assertions that the trial court abused its discretion when it failed to grant

Appellant's motions for mistrial, we will address those issues together. Appellant's Tenth Issue -- that the cumulative effect of the State's improper jury arguments warrants reversal -- is analyzed under a harm analysis and will be addressed separately. Finally, Appellant contends in Issue Eleven that the trial court abused its discretion when it excluded his proffered cross-examination of Dr. Contin regarding the circumstances surrounding Dr. Shrode's departure from the medical examiner's office.

SUFFICIENCY OF THE EVIDENCE

Standard of Review

In conducting our legal sufficiency review, we must examine all of the evidence in a light most favorable to the verdict, and determine whether, based on that evidence and reasonable inferences therefrom, any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime as alleged in the application paragraph of the jury charge. *Gomez v. State*, No. 08-12-00001-CR, 2014 WL 3408382, at *8-9 (Tex.App.--El Paso July 11, 2014, no pet.); *Hooper v. State*, 214 S.W.3d 9, 16 (Tex.Crim.App. 2007), *citing Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex.Crim.App. 1999). In *Malik v. State*, the Court of Criminal Appeals articulated the modern Texas standard for ascertaining what the "essential elements of the crime" are; they are "the elements of the offense as defined by the hypothetically correct jury charge for the case." 953 S.W.2d 234, 240 (Tex.Crim.App. 1997); *see also Clinton v. State*, 354 S.W.3d 795, 799 (Tex.Crim.App. 2011). A hypothetically correct jury charge is one that at least "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Malik*, 953 S.W.2d at 240.

In our analysis, we do not reexamine the evidence and impose our own judgment as to whether the evidence establishes guilt beyond a reasonable doubt, but determine only if the findings by the trier of fact are rational. *See Lyon v. State*, 885 S.W.2d 506, 516-17 (Tex.App.--El Paso 1994, pet. ref'd). The exclusive judge of the credibility of a witness is the fact finder. *Lancon v. State*, 253 S.W.3d 699, 707 (Tex.Crim.App. 2008). The fact finder also determines the weight that is given to each witness and his or her testimony, and may choose to believe some testimony and disbelieve other testimony. *Id.* Therefore, we do not assign credibility to witnesses or resolve any conflicts of fact. *Lancon*, 253 S.W.3d at 707; *Adelman v. State*, 828 S.W.2d 418, 421 (Tex.Crim.App. 1992); *Matson v. State*, 819 S.W.2d 839, 843 (Tex.Crim.App. 1991); *Belton v. State*, 900 S.W.2d 886, 897 (Tex.App.--El Paso 1995, pet. ref'd). We resolve any inconsistencies in the testimony in favor of the verdict rendered. *Lancon*, 253 S.W.3d at 707.

The standard of review applies to both direct and circumstantial evidence cases. *See Powell v. State*, 194 S.W.3d 503, 506 (Tex.Crim.App. 2006); *Garcia v. State*, 871 S.W.2d 279, 280 (Tex.App.--El Paso 1994, no pet.). If we sustain a legal sufficiency challenge, it follows that we must render a judgment of acquittal. *Clewis v. State*, 922 S.W.2d 126, 133 (Tex.Crim.App. 1996).

Capital Murder

In Issue One, Appellant complains that the evidence was legally insufficient to prove that he killed the Vargas brothers. Specifically, he offers the following arguments:

> Issue 1a: that the evidence was legally insufficient to prove that [Appellant] intentionally and knowingly killed *either* Jesus or Jose Vargas;
>
> Issue 1b: that the evidence was legally insufficient to prove that [Appellant] intentionally and knowingly killed *both* Jesus and Jose Vargas; and

> Issue 1c: that the evidence was legally insufficient to prove that [Appellant] intentionally and knowingly killed the two victims during the same criminal transaction.

To convict Appellant of capital murder, the jury was required to find that he intentionally caused the death of Jesus and Jose Vargas "during the same criminal transaction." TEX.PEN.CODE ANN. § 19.03(a)(7)(A)(West 2015); *Jackson v. State*, 17 S.W.3d 664, 669 (Tex.Crim.App. 2000). Because the Legislature did not define the term "same criminal transaction," the Court of Criminal Appeals has interpreted the phrase to mean "a continuous and uninterrupted chain of conduct occurring over a very short period of time . . . in a rapid sequence of unbroken events." *Id.*; *Rios v. State*, 846 S.W.2d 310, 311-12 (Tex.Crim.App. 1992), *cert. denied*, 507 U.S. 1051, 113 S.Ct. 1946, 123 L.Ed.2d 651 (1993); *Vuong v. State*, 830 S.W.2d 929, 941 (Tex.Crim.App. 1992), *cert. denied*, 506 U.S. 997, 113 S.Ct. 595, 121 L.Ed.2d 533 (1992).

As in this case, a trial court may submit an instruction on the law of parties when the evidence supports both primary actor and party theories of criminal responsibility. *Ransom v. State*, 920 S.W.2d 288, 302 (Tex.Crim.App. 1996). 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 encourages, directs, aids, or attempts to aid the other person to commit the offense. TEX.PEN.CODE ANN. § 7.02(a)(2). Evidence is sufficient to convict the defendant under the law of parties where he is physically present at the commission of the offense, and encourages the commission of the offense either by words or other agreement. *Cordova v. State*, 698 S.W.2d 107, 111 (Tex.Crim.App. 1985); *Tarpley v. State*, 565 S.W.2d 525 (Tex.Crim.App. 1978). To convict someone as a party to an offense, the evidence must show that at the time of the offense the parties were acting together, each doing some part of the

execution of the common purpose. *Cordova*, 698 S.W.2d at 111; *Brooks v. State*, 580 S.W.2d 825 (Tex.Crim.App. 1979).

In determining whether the accused participated as a party, the court may rely on actions of the defendant to show an understanding and common design to do the prohibited act as well as look to events occurring before, during, and after the commission of the offense. *Medellin v. State*, 617 S.W.2d 229 (Tex.Crim.App. 1981); *Ex parte Prior*, 540 S.W.2d 723 (Tex.Crim.App. 1976). Moreover, circumstantial evidence may be presented to prove one is a party to an offense. *Wygal v. State*, 555 S.W.2d 465 (Tex.Crim.App. 1977); *see also Garza v. State*, 398 S.W.3d 738, 745 (Tex.App.--Corpus Christi 2010, pet. ref'd)(explaining that the State is not required to present direct evidence to establish guilt). Finally, the Court of Criminal Appeals has repeatedly held that the fact that the offense charged is capital murder is of no consequence; the law of parties is applicable the guilt phase of a capital murder trial, even though not pled in the indictment. *See Skillern v. Estelle*, 720 F.2d 839, 846-47 (5th Cir. 1983), *cert. denied*, 469 U.S. 873, 105 S.Ct. 224, 83 L.Ed.2d 153 (1984)(explaining that the law of parties may support a conviction for capital murder); *English v. State*, 592 S.W.2d 949 (Tex.Crim.App 1980), *cert. denied*, 449 U.S. 891, 101 S.Ct. 254, 66 L.Ed.2d 120 (1980); *Livingston v. State*, 542 S.W.2d 655 (Tex.Crim.App. 1976); *Smith v. State*, 540 S.W.2d 693 (Tex.Crim.App. 1976).

Viewed in the light most favorable to the verdict, it is undisputed that Jesus and Jose Vargas were murdered at the A&M Bar, and that both brothers sustained severe beatings, multiple stab wounds, and a single gunshot wound each. Appellant insists that because Flor Reyes never specifically identified which brother she saw Appellant shoot (in other words, which brother was "Caveman"), the evidence is legally insufficient to prove whom Appellant murdered. We disagree. As the State correctly points out, the evidence in this case is legally sufficient if

any rational juror could have determined, beyond a reasonable doubt: (1) that Appellant killed both Jesus and Jose Vargas; or (2) that Appellant killed only one of the Vargas brothers, but encouraged, directed, or aided one or more of his cohorts to kill the other Vargas brother; or (3) that Appellant did not personally kill either of the two brothers, but still encouraged, directed, or aided one or more of his cohorts to kill them. We hold that the evidence was legally sufficient to show that Appellant was guilty both as a primary actor and as a party under the law of parties.

In *Garza v. State*, 398 S.W.3d 738, 745 (Tex.App.--Corpus Christi 2010, pet. ref'd), no witnesses testified that they actually saw Garza pull the trigger of a gun and shoot the victim, but the jury heard testimony that immediately after the victim was shot, Garza was the only person standing nearby holding a gun. Additionally, several witnesses testified that they saw Garza leave the scene immediately after the victim was shot. *Id.* Our sister court indicated that Garza's flight from the scene constituted an additional piece of circumstantial evidence from which the jury could infer guilt. *See also Clayton v. State*, 235 S.W.3d 772, 780 (Tex.Crim.App. 2007)(recognizing that "a fact[-]finder may draw an inference of guilt from the circumstance of flight"); *Johnson v. State*, 234 S.W.3d 43, 55 (Tex.App.--El Paso 2007, no pet.)(also indicating that flight is a strong indicator of consciousness of guilt). The *Garza* court ultimately concluded that while there was no "physical evidence" linking Garza to the crime, the circumstantial evidence--that Garza was the only person standing nearby holding a gun immediately after the victim was shot--was sufficient to support his murder conviction. 398 S.W.3d at 745. The defendant in *Ervin v. State*, 331 S.W.3d 49, 56 (Tex.App.--Houston [1st Dist.] 2010, pet. ref'd), was similarly convicted of murder when an eyewitness testified that immediately before the victim was shot, he saw Appellant holding a gun while another witness testified that he heard gunshots and then saw Appellant walking away from the scene where the gunshot sounds

originated. *See also Hooper v. State*, 214 S.W.3d 9, 15 (Tex.Crim.App. 2007)(holding that the jury is entitled to draw multiple inferences as long as each inference is supported by the evidence presented at trial).

Given the evidence admitted at trial, a rational juror could have reasonably concluded that Appellant fired the shots that killed both brothers because he was seen with a gun immediately before the shots were fired,[3] was seen actually shooting one of the brothers,[4] and was seen again with a gun in his hand immediately after the shots were fired.[5] Additionally, two shell casings were recovered from the scene, and the firearms expert ultimately concluded that both shell casings were fired from the same gun. Dr. Juan Contin, the medical examiner, testified that the cause of death for each brother was a single gunshot wound. Finally, the jury was also free to infer guilt because just like the fleeing defendants in *Garza*, *Clayton*, and *Johnson*, Appellant immediately fled to Mexico after the shootings occurred.

We have previously held that evidence is legally sufficient to uphold a defendant's guilt as a party to the offense where a defendant participated in beating the victim with fellow gang members. *Romero v. State*, No. 08-10-00074-CR, 2012 WL 3834917, at *4 (Tex.App.--El Paso, Sept. 5, 2012, pet. ref'd)(not designated for publication); *Meraz v. State*, No. 08-98-00196-CR, 2001 WL 857345, at *5-7 (Tex.App.--El Paso, July 31, 2001, no pet.)(not designated for publication). Similarly, our sister courts have held that evidence is legally sufficient to uphold a

[3] Aide Samaniego testified that she saw Appellant walk toward the fight scene with a gun in his hand immediately before two shots were fired.

[4] Flor Reyes testified that she saw Appellant shoot one of the Vargas brothers, known as "Caveman." Reyes also testified that while she saw other individuals waving guns at the crowd, she did not hear or see anyone else fire gunshots. Reyes also indicated that Appellant fired *three* shots at "Caveman," while other witnesses, the medical examiner, and the firearms expert testified that there were two shots fired. As the trier of fact, the jury was free to disbelieve this portion of Reyes' testimony and reconcile any inconsistency therein. *See Fletcher v. State*, No. 08.13-00043-CR, 2014 WL 4922625, at *5 (Tex.App.--El Paso, Sept. 30, 2014, no pet.)(not designated for publication).

[5] During Celia Estrada's testimony, she explained that she saw Appellant with a gun in his hand immediately after two gunshots were fired.

defendant's conviction as a party to the offense where a defendant and his fellow gang members surround and assault a victim, even if the defendant did not actually throw the rock that struck the victim, thus illustrating an understanding and common design. *Anguiano v. State*, No. 05-00-00263-CR, 2001 WL 185517, at *2 (Tex.App.--Dallas, Feb. 27, 2001, no pet.)(not designated for publication); *see Jalomo v. State*, No. 07-10-00345-CR, 2012 WL 222921, at *6-7 (Tex.App.--Amarillo, Jan. 25, 2012, pet. ref'd)(not designated for publication)(evidence was legally sufficient to support defendant's conviction as a party for aggravated assault where he participated with others in a beating of the victim); *Johnson v. State*, No. 05-04-00971-CR, 2006 WL 401127, at *3 (Tex.App.--Dallas, Feb. 22, 2006, pet. ref'd)(not designated for publication)(finding the evidence legally sufficient to support defendant's murder conviction as a party where his joint assault with his co-defendant on the victim evinced a common design to commit the offense).

We also conclude that the evidence was legally sufficient to establish Appellant's guilt as a party. Although the application paragraph of the court's charge does not apply the law of parties to the facts of the case, we must measure the sufficiency of the evidence by a hypothetically correct jury charge. *See Adames v. State*, 353 S.W.3d 854, 861-62 (Tex.Crim.App. 2011).

During trial, the State called three eyewitnesses. Although the testimonies differ to some extent and not all of the witnesses observed the entire series of events, the testimony was legally sufficient to establish that a rational trier of fact could have reasonably concluded that Appellant acted with the intent to promote and assist in the commission of the murders of the Vargas brothers under Section 19.03(7)(A) and he directed, encouraged, and aided his fellow gang members' commission of the assault, ultimately killing the two brothers. Samaniego saw

Appellant, Cordero, and three other "gangsters" exit the bar and shortly thereafter, she saw a group of individuals beating the brothers on the ground. Estrada placed Appellant with the group of individuals beating the brothers. Reyes heard Cordero, a fellow Barrio Azteca gang member, tell Appellant to "[shoot] him some more." Samaniego saw Appellant with a gun in his hand immediately before the shootings, Estrada saw Appellant with a gun in his hand immediately after the shooting, and Reyes witnessed Appellant shoot one of the brothers.

Finally, Appellant complains that there was no evidence presented at trial to show that the brothers were shot and killed during the same criminal transaction. We disagree. The jury's verdict should not be disturbed if the evidence supports a rational inference that both victims were killed in the same criminal transaction. *Heiselbetz v. State*, 906 S.W.2d 500, 506 (Tex.Crim.App. 1995)(holding that resolution of conflicts or inferences therefrom lies within the exclusive province of the jury as trier of fact, and it may choose to believe all, none, or some of the evidence or testimony presented).

In *Jackson v. State*, two victims were killed with the same weapon in the same manner and were found dead in the same apartment. 17 S.W.3d 664, 669 (Tex.Crim.App. 2000). The court ultimately held that this evidence was sufficient to allow a jury to reasonably find that the defendant "engaged in a continuous and uninterrupted process, over a short period of time, of carrying on or carrying out murder of more than one person." *Id.*, *quoting Rios v. State*, 846 S.W.2d 310, 314-15 (Tex.Crim.App. 1992), *cert. denied*, 507 U.S. 1051, 113 S.Ct. 1946, 123 L.Ed.2d 651 (1993). In *Rios*, both victims were also shot in the same manner with the same weapon and their bodies were deposited at a cemetery only a few feet away from each other. *Id.* at 314. Again, the Court of Criminal Appeals held that such evidence, while circumstantial,

suggested no realistic scenario but that the defendant murdered the two victims in a continuous and uninterrupted process over a short period of time. *Id.*

Here, there is no evidence to suggest that the Vargas brothers' bodies were transported from another location to the A&M Bar, like the victims' bodies in *Rios*. Rather, the evidence establishes that both brothers were beaten, stabbed, and killed during the evening attack that took place at the A&M Bar parking lot.[6] Moreover, investigators retrieved two shell casings from the scene and the firearm expert concluded that both casings were fired from the same gun. Such evidence, which is perhaps even stronger than the evidence in *Rios*, is sufficient to allow a rational juror to conclude that the Vargas brothers were killed during the same criminal transaction. The evidence was legally sufficient to support Appellant's conviction of capital murder and his first issue is overruled in its entirety.

Engaging in Organized Criminal Activity (Counts II and III)

In his second and third issues, Appellant asserts that the evidence is legally insufficient to allow a rational juror to reasonably conclude that that he committed the murders of Jose and Jesus Vargas with the intent to establish, maintain, or participate . . . as a member of the Barrio Aztecas. Specifically, Appellant contends the following:

> Issue 2a: whether the evidence was legally sufficient to prove that [Appellant] murdered Jose Vargas as alleged in Count 2.
>
> Issue 2b: whether the evidence was legally sufficient to prove that [Appellant] committed the offense of engaging in organized criminal activity as alleged in Count 2.
>
> Issue 3a: whether the evidence was legally sufficient to prove that [Appellant] murdered Jesus Vargas as alleged in Count 3.

[6] Aide Samaniego testified that she saw two individuals on the ground being attacked and beaten. Cecilia Estrada also testified that immediately after witnessing the incident, she drove away from the scene and as she drove away, she noticed two bodies lying in the parking lot. The medical examiner conclusively identified the two bodies from the A&M Bar as Jesus and Jose Vargas.

> Issue 3b: whether the evidence was legally sufficient to prove that [Appellant] committed the offense of engaging in organized criminal activity as alleged in Count 3.

Appellant was charged by indictment with two counts of engaging in organized criminal activity. Count II alleges Appellant murdered Jose Vargas as a member of a criminal street gang, the Barrio Aztecas. Count III alleges Appellant murdered Jesus Vargas as a member of the Barrio Aztecas. Since the sufficiency of the evidence is measured by the elements of the offense in the hypothetically correct jury charge for the case, we must look to the application paragraph:

> As to Count II: Now if you find from the evidence beyond a reasonable doubt that on or about the 22nd day of June, 2009 in El Paso County, Texas, [Appellant] did then and there, with intent to establish, maintain, or participate as a member of a criminal street gang, to wit: Barrio Azteca, commit the criminal offense of Murder of Jose Vargas, as alleged in the indictment, then you will find the defendant guilty as charged in the indictment.
>
> As to Count III: Now if you find from the evidence beyond a reasonable doubt that on or about the 22nd day of June, 2009 in El Paso County, Texas, [Appellant] did then and there, with intent to establish, maintain, or participate as a member of a criminal street gang, to wit: Barrio Azteca, commit the criminal offense of Murder of Jesus Vargas, as alleged in the indictment, then you will find the defendant guilty as charged in the indictment.

The charge was hypothetically correct. Therefore, if the evidence is insufficient to support a jury finding beyond a reasonable doubt that Appellant murdered the Vargas brothers with the intent to establish, maintain, or participate as a member of the Barrio Aztecas, the two convictions must be reversed.

Under the Texas Penal Code, a person engages in organized criminal activity if, with the intent to establish, maintain, or participate as a member of a criminal street gang, the person commits or conspires to commit one or more of the listed offenses, including capital murder. TEX.PEN.CODE ANN. § 71.02 (West 2015). Section 71.01(d) of the Code defines a criminal street gang as three or more persons having a common identifying sign or symbol or an

identifiable leadership who continuously or regularly associate in the commission of criminal activities. *Id.* § 71.01(d).

Engaging in organized criminal activity contains two mental state requirements. *Hart v. State*, 89 S.W.3d 61, 63 (Tex.Crim.App. 2002). One of the mental state requirements is included in the commission of one of the enumerated offenses. § 71.02(a). For example, if the enumerated offense is capital murder, the State must prove that the appellant murdered more than one person during the same criminal transaction as part of proving the underlying enumerated offense. § 71.03(7)(A).

The other mental state requirement in section 71.02(a) is that the appellant intend to establish, maintain, or participate [as a member of a criminal street gang]. *Hart*, 89 S.W.3d at 63. This second requirement necessarily requires more than the intent to commit the enumerated offense because otherwise the statutory element would be superfluous. *Id.* The State must prove not only that the defendant is a member of a criminal street gang and committed one of the enumerated offenses; the evidence must support a finding that the defendant intended to establish, maintain, or participate [as a member of a criminal street gang]. *Id.* Otherwise, the statute's express requisite intent is meaningless. *Id.* at 64.

However, direct evidence of the requisite intent is not required. *Id.* The Texas Court of Criminal Appeals has previously explained that "[a] jury may infer intent from any facts which tend to prove its existence including the acts, words, and conduct of the accused, and the method of committing the crime and from the nature of wounds inflicted on the victims." [Citations omitted]. *Manrique v. State*, 994 S.W.2d 640, 649 (Tex.Crim.App. 1999). A jury may also infer knowledge from such evidence. *Id.* This has been the rule in Texas for over 100 years. *Id.* The law of parties discussed above likewise applies to the commission of the underlying offense in a

prosecution for engaging in organized criminal activity. *See Gomez*, 2014 WL 3408382, at *10; *Otto v. State*, 95 S.W.3d 282, 284 (Tex.Crim.App. 2003).

We agree with Appellant that the evidence is legally insufficient to allow a rational juror to conclude that he murdered the Vargas brothers with the intent to establish, maintain, or participate as a member of the Barrio Aztecas. We initially note that the State relies on *Jaramillo v. State*, No. 08-00-00489-CR, 2002 WL 1301566, at *5-7 (Tex.App.--El Paso, June 13, 2002, pet. ref'd)(not designated for publication), for the proposition that evidence of a defendant acting in concert with co-defendants and fellow gang members in committing a criminal act is sufficient to prove that the defendant intended to participate in a combination. The State's analysis of our previous decision is misplaced. Jaramillo challenged the legal sufficiency of the evidence that he was a member of a criminal street gang. *Id.* at *5-6. Our analysis here centers on the intent element of the statute and is thus distinguishable from *Jaramillo* on these grounds.

The State also relies on *Gomez v. State*, 2014 WL 3408382, at *12. In *Gomez*, we held that the evidence was sufficient to support the jury's verdict that Gomez, one of Appellant's fellow gang members, engaged in organized criminal activity by committing aggravated assault upon Jose and Jesus Vargas. *Id.* As in this case, evidence was admitted to show that Gomez, along with his other co-defendants, were confirmed members of the Barrio Aztecas. *Id.* at *11. However, the evidence establishing Gomez's intent to establish, maintain, or participate in the aggravated assault as a member of the Barrio Aztecas was much more substantial. *Id.* at *11-12. For example, Detective Gibson testified how a prior assault by the Vargas brothers on the Appellant here would be considered an affront to Appellant's respect and that a subsequent attack on the Vargas brothers would be consistent with Barrio Azteca activities. *Id.* at *11.

Moreover, the State in *Gomez* elicited evidence from a passenger who was present while Gomez was being transported on an El Paso County Detention Facility bus. *Id.* This passenger testified that he heard Gomez state that he went to the A&M Bar, asked the Vargas brothers for the fee, and then stabbed one of them. *Id.* This passenger also heard Gomez state that "Joe" had beaten one victim and our Appellant shot one of the brothers. *Id.*; *see also Romero v. State*, No. 08-10-00074-CR, 2012 WL 3834917, at *5 (Tex.App.--El Paso, Sept. 5, 2012, pet. ref'd)(not designated for publication)(holding that the evidence was sufficient to convict the appellant of engaging in organized criminal activity where a few minutes before the violent assault broke out, the appellant approached several other Crips members and told them they need to "violate" someone and where testimony was admitted to explain that "violating" someone meant beating them because they showed disrespect). A rational juror in *Romero* and *Gomez* would certainly be able to infer from the ample evidence admitted that the defendants committed their offenses with the intent to establish, maintain, or participate as a member of a criminal street gang.

Here, the record reflects that the State attempted to introduce evidence to show that the murders were gang-related. Specifically, the State tried to call a witness who was with "Froggy" the night he was murdered. The State planned to elicit testimony that "Froggy" was having problems with the Barrio Aztecas because he failed to pay them their cuota for selling cocaine and marijuana. None of this testimony was admitted at trial because the trial court sustained Appellant's hearsay and confrontation objections. Without such testimony, the record lacks sufficient evidence to indicate that Appellant murdered the Vargas brothers with the specific intent of participating as a member a criminal street gang. Instead, it establishes the following: (1) Appellant is a confirmed member of the Barrio Aztecas; (2) several of the individuals involved in the assault and who were later arrested were also confirmed members of the Barrio

Aztecas; (3) the Vargas brothers were members of the local Barrio Campestre Locos gang; (4) the A&M Bar was a frequent "hang out" destination for several Barrio Azteca gang members; (5) Appellant told someone named "Sparky" that he had to do his job; (6) Detective Gibson described the cuota system generally, but no specific evidence was admitted to show that a cuota dispute arose in this instance; (7) and Detective Gibson ultimately concluded that the murders were consistent with Barrio Azteca activity, but later admitted on cross-examination that such murders would be consistent with almost any gang's activities, not just Barrio Azteca. This evidence only establishes that Appellant was a confirmed member of the Barrio Aztecas and that he committed the offense of capital murder, along with other Barrio Azteca members. It is not sufficient to establish that Appellant had the requisite intent to commit the offense as a member of a criminal street gang. *See Hart*, 89 S.W.3d at 63-64)(explaining that the engaging in organized criminal activity statute requires more than just proof that an appellant is a member of a criminal street gang and that he committed one of the enumerated offenses). Accordingly, we conclude that the evidence is insufficient to support the jury's verdict that Appellant murdered the Vargas brothers with the intent to establish, maintain, or participate as a member of the Barrio Aztecas. We sustain Issues Two and Three.

Denial of Motions for Mistrial

Issues Four through Nine all assert that the trial court erred when it did not grant Appellant's various motions for mistrial. Appellant complains that several statements by the State during closing argument constitute reversible error. Specifically, Appellant argues:

> Issue Four: The trial court erred when it failed to grant a mistrial after the State improperly argued that the decedents were involved in drug dealing.
>
> Issue Five: The trial court erred when it failed to grant a mistrial after the State improperly discussed the 911 calls not admitted into evidence.

> Issue Six: The trial court erred when it failed to grant a mistrial after the State improperly questioned the accuracy of the translation by the certified court interpreter.
>
> Issue Seven: The trial court erred when it failed to grant a mistrial after the State improperly discussed how Appellant chose not to call a witness.
>
> Issue Eight: The trial court erred when it overruled Appellant's objection to the State's improper reference to Aide Samaniego's demeanor on the witness stand.
>
> Issue Nine: The trial court erred when it twice overruled Appellant's objection to the improper argument concerning when Appellant's driver's license photo was taken.

Appellant failed to preserve error with regard to Issues Five and Nine because his trial objections do not comport with the arguments raised on appeal. We also note that Appellant has improperly briefed Issues Six and Seven, and as result, we find that these issues have also been waived. *See* TEX.R.APP.P. 33.1. Appellant insists that the State's arguments were so egregious and improper so as to amount to reversible error. We will briefly address the comments of which Appellant complains, but ultimately conclude that none of them, individually or in the aggregate, amount to reversible error.

We review a trial court's denial of a motion for mistrial for an abuse of discretion. *Archie v. State*, 221 S.W.3d 695, 699-700 (Tex.Crim.App. 2007); *Salazar v. State*, 38 S.W.3d 141, 148 (Tex.Crim.App. 2001). We uphold a trial court's ruling if it is within the zone of reasonable disagreement. *Id.*, *citing Wead v. State*, 129 S.W.3d 126, 129 (Tex.Crim.App. 2004). "Generally, a mistrial is only required when the improper evidence is 'clearly calculated to inflame the minds of the jury and is of such a character as to suggest the impossibility of withdrawing the impression produced on the minds of the jury.'" *Hinojosa v. State*, 4 S.W.3d 240, 253 (Tex.Crim.App. 1999), *citing Hernandez v. State*, 805 S.W.2d 409, 414 (Tex.Crim.App. 1990). "Only in extreme circumstances, where the prejudice is incurable, will a

mistrial be required." *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex.Crim.App. 2004); *Freeman v. State*, 340 S.W.3d 717, 727-28 (Tex.Crim.App. 2011), *cert. denied*, ___ U.S. ___, 132 S.Ct. 1099, 181 L.Ed.2d 986 (2012); *Archie*, 221 S.W.3d at 699-700. Otherwise, where the prejudice is curable, an instruction by the court to disregard eliminates the need for a mistrial. *Young v. State*, 137 S.W.3d 65, 69 (Tex.Crim.App. 2004)

Permissible jury argument falls within one of four categories: (1) summation of evidence; (2) reasonable deduction from the evidence; (3) an answer to the argument of opposing counsel; and (4) a plea for law enforcement. *Davis v. State*, 329 S.W.3d 798, 821 (Tex.Crim.App. 2010), *cert. denied*, ___ U.S. ___, 132 S.Ct. 128, 181 L.Ed.2d 50 (2011); *Jackson v. State*, 17 S.W.3d 664, 673 (Tex.Crim.App. 2000). The Court of Criminal Appeals has held that improper references to facts that are neither in evidence nor inferable from the evidence are "designed to arouse the passion and prejudices of the jury and as such are highly inappropriate." *Ex parte Lane*, 303 S.W.3d 702, 712 (Tex.Crim.App. 2009), *citing Borjan v. State*, 787 S.W.2d 53, 55 (Tex.Crim.App. 1990). We examine the entire record and assess the complained-of argument in its proper context to determine whether the State's jury argument falls within one of the permissible categories. *See Harris v. State*, No. 08-11-00117-CR, 2013 WL 4130398, at *5 (Tex.App.--El Paso, Aug. 14, 2013, pet. ref'd)(not designated for publication).

In determining whether allegedly improper jury argument warrants a mistrial, we balance the severity of the misconduct (the magnitude of the prejudicial effect of the prosecutor's remarks), the measures adopted to cure any misconduct (the efficacy of any cautionary instruction by the trial court to the jury), and the certainty of conviction absent the misconduct (the strength of the evidence supporting the conviction). *See Mosely v. State*, 983 S.W.2d 249, 259 (Tex.Crim.App. 1998), *cert. denied*, 526 U.S. 1070, 119 S.Ct. 1466, 143 L.Ed.2d 550

(1999); *Faust v. State*, No. 08-13-00244-CR, 2015 WL 1735664, at *4 (Tex.App.--El Paso, Apr. 15, 2015, no pet. h.)(not designated for publication). We now turn to each of Appellant's specific complaints.

WHETHER THE VARGAS BROTHERS WERE INVOLVED IN DRUG DEALING

During closing argument, the prosecutor twice referenced the Vargas brothers' involvement in drug dealing. The State's reference to drug dealing appears to be an attempt to provide a reason for the murders. The following exchange occurred between the trial court, defense counsel, and the State:

> [Prosecutor]: He could not let these brothers get away with what they were doing. Could not let them get away with their drug dealing.
>
> [Defense]: Your Honor, I object. That's assuming facts not in evidence.
>
> [The Court]: Objection sustained. Please disregard the last statement that was made by the prosecutor.
>
> [Prosecutor]: You heard the testimony. The Vargas brothers were involved in drug dealing. You . . . heard that.
>
> [Defense]: Again, Your Honor, same objection. Same objection.
>
> [The Court]: Ladies and gentlemen of the jury, I will rely on your memory as to what the evidence is, so you rely on that memory to determine the issues in this case.
>
> [Defense]: Your Honor, may I get a ruling?
>
> [The Court]: Sustained.
>
> [Defense]: Move for a mistrial, Your Honor.
>
> [The Court]: Denied.

The trial court's instruction to the jury to disregard the statements, its statement to the jury to rely on their own collective memories as to what the evidence was, and its jury charge that properly instructed the jury on the applicable law, were all sufficient curative measures that ensured no prejudicial effects occurred from the prosecutor's statements. *Hawkins*, 135 S.W.3d at 84

(explaining that a jury charge that properly instructs the jury on the applicable law is considered an additional curative measure). Accordingly, Appellant's fourth issue is overruled.

THE 911 CALLS AND THE DATE OF THE DRIVER'S LICENSE PHOTOGRAPH

In his fifth issue, Appellant complains that the State's reference to the 911 calls improperly invited the jury to speculate as to what the 911 calls would have indicated and were so extreme and improper so as to warrant a reversal of Appellant's conviction. In his ninth issue, he contends that the State's reference to the year when his driver's license photograph was taken constituted an improper comment on Appellant's ultimate decision not to testify at trial. The State brings to our attention that Appellant failed to preserve his complaints for review.

Typically, an objection to "improper argument" is too general to preserve error. *Miles v. State*, 312 S.W.3d 909, 911 (Tex.App.--Houston [1st Dist.] 2010), *citing Hougham v. State*, 659 S.W.2d 410, 414 (Tex.Crim.App. 1983)(holding that appellant's objection, "[w]e will object to this line of argument," was too general to apprise the trial court of the grounds for his objection regarding the complaint about prosecutor's jury argument); *Davila v. State*, 952 S.W.2d 872, 878 (Tex.App.--Corpus Christi 1997, pet. ref'd)(noting that ordinarily an "improper argument" objection is a general objection to prosecutor's jury argument); *Huggins v. State*, 795 S.W.2d 909, 912 (Tex.App.--Beaumont 1990, pet. ref'd)(noting that "[t]he rule has been firmly established that general objection such as improper and impermissible when leveled against the prosecutor's jury arguments simply fail to present a viable point for appellant review."); *Lowe v. State*, 676 S.W.2d 658, 662 (Tex.App.--Houston [1st Dist.] 1984, pet. ref'd)(holding that appellant failed to preserve error where his objection, "I object to this type of argument," was too general). However, a general objection can be sufficient to preserver error when the record reflects that the trial court understood the nature of the objection. *Miles*, 312 S.W.3d at 911. For

example, as is the case here, error may be preserved when the trial court denies a motion for mistrial or subsequently gives an instruction to the jury to disregard the same matter raised on appeal. *Id.*; *see, e.g., Everett v. State*, 707 S.W.2d 638, 641 (Tex.Crim.App. 1986); *Davila*, 952 S.W.2d at 878 (noting that the "improper argument" objection was general in nature, but error nonetheless preserved because trial court admonished prosecutor before denying motion for mistrial); *Martinez v. State*, 833 S.W.2d 188, 192 (Tex.App.--Dallas 1992, pet. ref'd)(holding "improper and inflammatory" objection to jury argument was general but sufficient to preserve error under circumstances because trial judge and prosecutor were aware of substance of objection as court instructed jury to remember testimony as they heard it).

The State's first witness at trial was the custodian of records for 911 communications. The calls, while initially admitted into evidence in the presence of the jury, were later withdrawn outside their presence. At the beginning of its closing argument, the State mentioned the 911 calls made to the police:

> [Prosecutor]: Now, the Defense lodged an objection to the 911 calls which was sustained so there are no 911 calls in evidence.
>
> [Defense]: I object. Alluding to that in any way is improper.
>
> [The Court]: Objection sustained. Please move on.
>
> [Defense]: Instruction to disregard?
>
> [The Court]: Ladies and gentlemen, please disregard that last statement.
>
> [Defense]: Move for a mistrial, your Honor.
>
> [The Court]: Denied.

In Appellant's fifth issue, he directs us to several cases for the proposition that discussing excluded evidence, like the 911 calls, improperly invites the jury to speculate as to what such evidence would show had it been admitted. *Lopez v. State*, 705 S.W.2d 296, 298 (Tex.App.--San Antonio 1986, no pet.); *see also Jordan v. State*, 646 S.W.2d 946, 947 (Tex.Crim.App.

1983)(explaining that argument inviting speculation is dangerous because it leaves each juror to imagine what other extraneous "facts" may exist that would support a conviction).

In our view, Appellant's vague and general objection that references to the 911 calls were "improper" indeed preserved error because the record reflects that both the prosecutor and the trial court understood the nature of his objection. Nonetheless, when trial objections fail to comport with complaints later raised on appeal, nothing is preserved for review. *Garcia v. State*, No. 04-02-00118-CR, 2003 WL 21697229, at *2 (Tex.App.--San Antonio, July 23, 2003, no pet.)(not designated for publication); *Huerta v. State*, 933 S.W.2d 648, 650 (Tex.App.--San Antonio 1996, no pet.); Nelson v. State, 607 S.W.2d 554, (Tex.Crim.App. 1980). Because Appellant failed to object on speculation grounds, and instead objected in a general manner -- "[a]lluding to that in any way is improper" -- any error has been waived. Issue Nine is waived for the same reason. Defense counsel objected to an "improper comment". But the argument on appeal is that the State's argument negatively reflected on Appellant's ultimate decision not to testify at trial. We overrule Issues Five and Nine.

THE INTERPRETER'S TRANSLATION
AND THE FAILURE OF APPELLANT TO CALL A PHOTOGRAPH LINE-UP WITNESS

In Issue Six, Appellant contends that the State attempted to attack the certified court interpreter's translation of Flor Reyes. Defense counsel objected immediately and the court sustained the objection. The trial court then instructed the jury to disregard and denied Appellant's motion for mistrial. In his seventh issue, Appellant complains that the State's remarks concerning Appellant's choice not to call the witness who personally created the photo line-up injected new and harmful facts not in evidence. Aside from citing a single authority for the proposition that a prosecutor may not argue facts not in evidence[7], Appellant has failed to

[7] Appellant's sixth and seventh issues rely entirely on *Borjan v. State*, 787 S.W.2d 53, 57 (Tex.Crim.App.

cite any relevant authority that supports both complaints that the State improperly questioned the court interpreter's translation and Appellant's choice not to call the witness who created the photo line-up. In doing so, Appellant has failed to preserve Issues Six and Seven for our review. *See* TEX.R.APP.P. 38.1(h); *Camacho v. State*, No. 08-06-00090-CR, 2008 WL 882640, at *2-4 (Tex.App.--El Paso, Apr. 3, 2008, no pet.)(not designated for publication). Moreover, both appellate issues fail to comport with the vague and general objection made at trial. We overrule Issues Six and Seven.

WITNESS DEMEANOR

In Appellant's eighth issue, he complains that the State improperly referenced Aide Samaniego's demeanor during its closing argument. The State addressed Samaniego's failure to identify Appellant in court and her testimony that she was fearful to testify:

> [The State]: I think some people are scared to come in and point a finger at a Barrio Azteca member and say, "That's him." It's one thing to talk to the police and give a statement and not be there. It's another thing to come to court, sit in a stand less than 10 feet away from the man, and point your finger.
>
> [Defense Counsel]: Your Honor, I'm going to object. There's no evidence from which that can be found.
>
> [The Court]: Overruled.
>
> [The State]: You can look at the demeanor of Aide Samaniego when Mr. Duke asked her, "Do you see anybody in here?" I remember her not wanting to look to her right side. She looks around. She does this, she does that (demonstrating), and doesn't want to look over to [Appellant].
>
> [Defense Counsel]: I object as to arguing outside the record, Your Honor.
>
> [The Court]: Overruled.
>
> [Defense Counsel]: The record does not reflect any of that.
>
> [The Court]: Overruled.

1990)(improper references to facts that are neither in evidence nor inferable from the evidence are "designed to arouse the passion and prejudices of the jury and as such are highly inappropriate")

Appellant further asserts that because the record fails to reflect how Samaniego behaved during her testimony, it was improper for the State to reference her demeanor during its closing argument and as a result, reversal is required.

"During jury argument, a party may allude to a testifying witness' demeanor if the jury had an equal opportunity to observe the witness." *Good v. State*, 723 S.W.2d 734, 736 (Tex.Crim.App. 1986). The State in *Orcasitas v. State*, ___ S.W.3d ___, No. 04-14-00130-CR, 2015 WL 2405227, at *5 (Tex.App.--San Antonio, May 20, 2015, no pet. h.)(not yet reported), similarly commented on two testifying witnesses' facial expressions, body language, and demeanor. The court noted that the jury had an opportunity to observe the two witnesses during their testimony and held that it was proper for the prosecutor to comment on their conduct. *Id.*; *see also Hinojosa v. State*, 433 S.W.3d 742, 763 (Tex.App.--San Antonio 2014, pet. ref'd); *Good*, 723 S.W.2d at 736. The jury in this instance had the same opportunity to observe Samaniego's facial expressions, body language, and demeanor when she testified. We overrule Issue Eight.

CUMULATIVE ERROR

In his tenth issue, Appellant complains of the harmful cumulative effect of Issues Four through Nine. He relies on *Lopez v. State*, 705 S.W.2d 296, 298 (Tex.App.--San Antonio 1986, no pet.) for the proposition that the cumulative effect of the State's improper jury argument can form the basis for reversal. When an appellant raises an issue of cumulative error, we must conduct a harm analysis. *Etienne v. State*, No. 08-12-00266-CR, 2014 WL 4450096, at *6 (Tex.App.--El Paso, Sept. 10, 2014, no pet.)(not designated for publication). However, before conducting a harm analysis, we must find multiple errors have occurred. *See Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex.Crim.App. 1999), *cert. denied*, 528 U.S. 1082, 120 S.Ct. 805,

145 L.Ed.2d 678 (2000)(explaining that unless and until multiple errors are found to have been committed, there can be no cumulative error effect because non-errors cannot in their cumulative effect create harmful error).

Appellant utilizes the *Lopez* court's analysis of cumulative error, which focuses on the improper nature of the State's arguments. Texas courts of appeals have since recognized that the *Lopez* cumulative error threshold is satisfied where the record reflects that the State repeatedly exceeded the bounds of acceptable jury argument and ignored the trial court's rulings. *McCarthy v. State*, No. 01-12-00240-CR, 2013 WL 5521926, at *12 (Tex.App.--Houston [1st Dist.], Oct. 3, 2013, no pet.)(not designated for publication); *Grant v. State*, 738 S.W.2d 309, 311 (Tex.App.--Houston [1st Dist.] 1987, pet. ref'd). As we previously discussed, the State's arguments were not improper as Appellant continues to insist. Because we do not find multiple errors in any of the above jury arguments, it thus follows that there cannot be cumulative error. *Chamberlain*, 998 S.W.2d at 238. With the exception of Issue Four -- where the prosecutor repeated his drug dealing statement immediately after the trial court sustained Appellant's initial objection -- the prosecutor did not ignore the trial court's rulings, but respected them and proceeded to move forth with his closing argument after each objection was sustained. None of the State's comments amount to the threshold established by *Lopez*. Accordingly, Issue Ten is overruled.

CROSS-EXAMINATION OF DR. CONTIN

In his final issue, Appellant maintains that the trial court abused its discretion when it did not allow Appellant to cross-examine Dr. Juan Contin regarding the circumstances under which the prior medical examiner, Dr. Shrode, left the medical examiner's office. At the close of Dr. Contin's testimony, Appellant proffered the questions he wished to ask regarding Dr. Shrode. He indicated that he would have questioned Dr. Contin on Dr. Shrode's reputation, his falsified

resume, and his false statements that he obtained a law degree and was board-certified in forensic pathology. This, he argues, would have been relevant to Dr. Contin's expert opinion as to the ultimate causes of death of the Vargas brothers.

A defendant's Sixth Amendment right to confront witnesses includes the right to cross-examine witnesses to attack their general credibility or to show any possible biases, self-interests, or motives in testifying. *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). However, this right is not unqualified; the trial court retains wide discretion in limiting the scope and extent of cross-examination. *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)("[T]rial judges retain wide latitude" under the Confrontation Clause to impose restrictions on cross-examination based on such criteria as "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant"); *Lopez v. State*, 18 S.W.3d 220, 222 (Tex.Crim.App. 2000); *see also Hammer v. State*, 296 S.W.3d 555, 561 (Tex.Crim.App. 2009). Accordingly, we review a trial court's ruling limiting the cross-examination of a witness under an abuse of discretion standard. *Billodeau v. State*, 277 S.W.3d 34, 39 (Tex.Crim.App. 2009); *Rohr v. State*, No. 08-12-00219-CR, 2014 WL 4438828, at *3 (Tex.App.--El Paso, Sept. 10, 2014, no pet.)(not designated for publication).

Generally, the right to present evidence and to cross-examine witnesses under the Sixth Amendment does not conflict with the corresponding rights under state evidentiary rules. *United States v. Scheffer*, 523 U.S. 303, 316, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998); *Potier v. State*, 68 S.W.3d 657, 660-62 (Tex.Crim.App. 2002). Therefore, most questions involving cross-examination of a witness may be resolved simply by looking to the Texas Rules of Evidence. *Hammer*, 296 S.W.3d at 561.

In this instance, Rules 703 and 705 of the Texas Rules of Evidence are applicable. Rule 703 specifically authorizes an expert, like Dr. Contin, to base his expert opinion of facts or data in the case that "the expert has been made aware of, reviewed or personally observed." TEX.R.EVID. 703. Moreover, "[i]f experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted." *Id.* Rule 705 further provides that an expert may also state an opinion and give reasons for that opinion without first testifying to the underlying facts or data. TEX.R.EVID. 705(a). However, the expert may still be required to disclose the underlying facts or data during cross-examination. *Id.*

The trial court allowed Appellant to cross-examine Dr. Contin on the underlying autopsy report created by Dr. Shrode. Dr. Contin admitted that he did not prepare the report himself, but was relying on it to form his expert opinion and that such opinion could only be as reliable as the underlying information upon which it was based. Accordingly, the trial court properly permitted Appellant to inquire into the underlying autopsy report originally prepared by Dr. Shrode and relied upon by Dr. Contin to the extent permitted by the rules of evidence. Finding no abuse of discretion, we overrule Issue Eleven.

CONCLUSION

Having overruled Issue One, we affirm the judgment of conviction as to Count One. We further overrule Issues Four through Eleven. Having sustained Issues Two and Three, we reverse and render judgment of acquittal as to Counts Two and Three.

September 21, 2016

ANN CRAWFORD McCLURE, Chief Justice

Before McClure, C.J., Rodriguez, and Hughes, JJ.

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