COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

ARTURO VALTIERRA,	§	No. 08-14-00261-CR
Appellant,	§	Appeal from
v.	§	243rd District Court
THE STATE OF TEXAS,	§	of El Paso County, Texas
Appellee.	§	(TC # 20130D04398)

O P I N I O N

Arturo Valtierra was charged by a five-count indictment with one count of burglary (Count I), three counts of aggravated sexual assault (Counts II, III, and IV), and one count of aggravated robbery (Count V). A jury found him guilty of all five counts and assessed his punishment at 99 years' confinement for his burglary count, and life imprisonment in the Texas Department of Corrections on the remaining four counts. For the reasons that follow, we affirm.

FACTUAL SUMMARY

Voir Dire

The trial court began the voir dire process by discussing the purpose of jury service, the qualifications, and exemptions. The trial court then asked the individual venire members to raise their hands if they already had an excuse as to why they could not participate. After seeing several hands raised, the trial court emphasized the importance of impaneling a jury for this case and stated the following:

> [The trial court]: Now, here's the thing. If enough people decide, You know what? I'm busy. I'm not going to do it. I ain't got time. Let me explain to you the consequences. In the event that the defendant is not guilty, he walks out the door. He walks out the door. In the event a jury says he's guilty, we will look at five to 99 or life, or five to ten community supervision. Do you hear that? One or the other. Now, stop and think. Stop and think. Well, suppose we can't get a jury to hear him. Everybody's too busy. What are we going to do, folks?

No objections were made to these comments. The trial court asked a potential juror what would happen if a jury was not selected that day because enough of the potential jurors were too busy. The potential juror replied that the court could always select another panel. The trial court responded:

> [The trial court]: Let me tell you what I heard. I heard that in El Paso County, if you're charged with aggravated sexual assault, who cares? Who cares? I ain't going to hear it. You're not going to hear it. He's not going to hear it. If a jury does not pass resolution on the defendant, there is nothing anybody's going to do to him. Did you hear that? Did you hear that?
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> [The trial court]: Let's just--now, I find it difficult to believe that in El Paso County, Texas, we don't really care if you get sexually assaulted. Now, Mr. Limas [venire person] would say, Hey, buddy, that's not what I said. I didn't say I didn't care. My heart goes out to you women. Sorry. My heart's with you. But I'm not going to do it. I'm busy. You know, I'm busy. Do you understand the consequences of your conduct? You've already seen the hands. Let me out of this place. I'm busy. You've already seen the hands. Don't look at me like that. Let me see some nodding. Did you see the hands?
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> [Venire Panel]: Yes.
>
> [The trial court]: Did everybody see the hands? They haven't even heard the voir dire. They don't have a clue because some people don't even care. Let me out of here. I let you people out of here, you understand the consequences. Okay. Now, there is another solution to this problem.

Again, no objections were lodged to the trial court's commentary. The trial court proceeded into a discussion related to Mexico's legal system and how its judges retain the decision-making authority. The trial court questioned whether citizens in the United States would accept a system where judges retain all of the power. Finally, the trial court went on to state:

> [The trial court]: Let me tell you about America. You ever heard the expression "freedom is not free"? I don't know who said that, but it's true. Freedom is not free. Okay. America has become very complaisant because we've had these rights for over 200 years. And Americans and generation after generation thinks it's because we're American. I'm here to tell you that for 200 years, men and women have fought around the world to give you the right to come up here and tell the government, You're right, guilty as charged, or, You're wrong, he is not guilty.

The trial court reemphasized the importance of selecting a jury and asked the venire panel to give the citizens of El Paso County, Texas, a week of their time.

Next, the trial court addressed the issue of pretrial publicity and explained that it was very important for jurors to wait until they have heard all of the facts before making a decision, because "every story has two sides." The court also discussed a defendant's Fifth Amendment right to remain silent; the State's burden to prove a defendant's guilt beyond a reasonable doubt; the bifurcated nature of a criminal trial; and that during the punishment phase of a trial, the issue is not whether a venire member would give the minimum or maximum sentence, but rather whether they were able to "consider" the full range of punishment. The parties then conducted their individual voir dire. The jury and alternates were ultimately selected and neither party objected to the seating of the jury. The jury was sworn and given basic instructions. Neither party indicated they had any other issues to address.

Guilt-Innocence Phase Testimony

The victim, A.L., testified that around midnight on June 26, 2013, she was watching TV in her living room when she heard her front door clicking like someone was trying to open it. Her dog began barking at the back door so she walked to her back door and briefly looked through the wrought iron but could not see anything. A.L. also noticed that her kitchen window was open and thought this was unusual because she never opened that window. She closed the kitchen window and went back into her living room. When she went to turn on her front porch

light, she saw Appellant outside ducking down. She started banging on her front door and yelling hoping it would scare Appellant away. All of a sudden, Appellant kicked in her front door and grabbed her. A.L. continued screaming and tried to fight back. Appellant covered his face with a bandana during the struggle but A.L. managed to pull it down, and when she did, Appellant threatened to kill her. The struggle moved to the floor where Appellant pulled off her pajama bottoms and forced his penis into her mouth. He then turned A.L. onto her stomach and penetrated her vagina and anus. A.L. tried to crawl away but Appellant pulled her up by her hair and took her into the kitchen where he grabbed a knife and told her to give him her jewelry, cash, and ATM card. Appellant told A.L. to stay in her bathroom or he would kill her. She waited a few seconds before she opened her bathroom door and called 911 on her cell phone.

A.L. further testified that she never consented to Appellant entering her home, penetrating her orally, vaginally, anally, or taking her property at knife point. She identified Appellant as her attacker both in a photo lineup and in court. Finally, A.L. testified that she never returned to her house on Louisville Street. Since her assault, she now has trouble sleeping at night and fears other men who resemble Appellant. On or about June 26, 2013, El Paso Police Department Officer Michael Ramirez (Officer Ramirez) responded to a reported burglary of habitation on Louisville Street. Officer Ramirez noticed that the front door of the house was forced open. Once inside the house, Officer Ramirez encountered A.L., who told him she had just been raped. Paramedic Raymond Estrada also responded to a call for assistance at the Louisville address. A.L. also told Estrada she was raped, and because she exhibited signs of trauma, Estrada transported her to Sierra Medical Center.

At the hospital, certified sexual assault nurse examiner (SANE) Kathy Justice conducted a sexual assault exam on A.L. who related the events surrounding the rape, indicating that she had been orally, vaginally, and anally penetrated.

Detective Jerome Hinojos was assigned to investigate the sexual assault and burglary. First, he went to the hospital to interview A.L., and then to the crime scene where he observed signs of forced entry along with a shoe print still on the front door. As a result of the investigation, Hinojos identified Appellant as a possible suspect, and created a photo line-up. He showed A.L. the photo line-up, admitted as State's Exhibit 59, and she positively identified Appellant as her attacker. Shortly after A.L's identification, Hinojos obtained an arrest warrant for Appellant and a search warrant for his residence and DNA.

Cathy Serrano, a forensic scientist with the Department of Public Safety crime lab in El Paso, conducted the DNA analysis in A.L.'s case. Based on her analysis, she concluded that Appellant could not be excluded as a contributor to the DNA profile compiled from the evidence collected from A.L.

Punishment Phase Testimony

At the punishment phase of trial, Hinojos testified that he investigated a home invasion on Altura Street on May 31, 2013. He was originally assigned to the gang unit in this investigation because the intruder, Appellant, told the victims, Ivan and Fabiola Perales, that he was a member of the Barrio Azteca gang and that "he had his homies waiting outside." Hinojos met with the Perales family and obtained a physical description of the suspect.

Ivan testified that on the night of the invasion, he woke up to his wife yelling. He ran into the living room and saw Appellant standing there with his hand behind his back, as if he had a gun. Appellant ordered Ivan to get on the floor while he took their TV. Ivan made an in-court

identification of Appellant as the home intruder. Detective Arturo Ruiz participated in Appellant's investigation. He utilized various databases available to him and located a photograph of Appellant. The El Paso gang unit did not have any information on Appellant. Detective John Armendariz also assisted in the investigation, obtaining leads on suspects. Armendariz was unable to connect Appellant with the Barrio Azteca gang. He was also present when police arrested Appellant. Appellant claimed that the police arrested the wrong person, and gave officers a false name. With Appellant's consent, Armendariz looked at the tattoos on his body. On Appellant's back, Armendariz observed a large tattoo of an Aztec warrior holding a princess. This tattoo matched the description of one of Appellant's tattoos that police had on record. On cross-examination, Armendariz admitted that the Aztec tattoo is fairly common. Again, he discussed how he was unable to recover evidence connecting Appellant to the Barrio Azteca gang and how Appellant did not meet the criteria to be listed in the gang database. Officer Martin Martinez collected evidence at the Altura crime scene, including a pair of khaki shorts, two beer cans, and several buccal swabs from Ivan and Fabiola Perales. Officer Michael Velez testified that he was part of the crime scene unit that processed Appellant's residence. Bruce Orndorff processed a print collected from the television at Appellant's house that matched the prints of one of the Altura victims, Ivan Perales.

Serrano was recalled as a witness and testified that she analyzed the evidence collected at the Altura crime scene. She testified that Appellant's DNA was found on the khaki shorts collected from Ivan Perales.

Hinojos was also assigned to another home invasion case that occurred on June 24, 2013, on Sacramento Street. The victim, G.R., woke up in the middle of the night to find Appellant threatening her with an icepick. Appellant took G.R. next door to a house still under

construction and raped her. He then brought G.R. back to her home and robbed her. G.R. made an in-court identification of Appellant as her attacker.

Orndorff also processed the fingerprints at the Sacramento crime scene and discovered that several of the fingerprints recovered matched Appellant's known prints. SANE nurse Justice conducted the sexual assault exam on G.R., collected evidentiary swabbings, took pictures of G.R.'s injuries, and documented her patient history. Serrano also conducted the DNA analysis in G.R.'s case as well as an additional analysis of evidence collected from Appellant. She opined to a reasonable degree of scientific certainty that Appellant was the source of DNA found on the evidence collected from G.R.'s underwear and thighs.

Appellant called Arturo Perez, a private investigator hired by the defense, to determine whether Appellant had any gang affiliations. Perez was unable to conclude that Appellant was affiliated with any gang. However, Perez also acknowledged on cross-examination that law-enforcement agencies do not always have every Barrio Azteca member in their gang databases, and just because an agency does not have data on a certain individual does not mean that the person could not be a Barrio Azteca member.

After hearing the parties' arguments, the jury deliberated and assessed Appellant's punishment at 99 years' imprisonment for Count I, and life imprisonment for Counts II-V. The trial court sentenced Appellant in accordance with the jury's verdict.

ISSUES FOR REVIEW

Appellant brings two issue for review. First, he contends that the trial court erred in admitting evidence of his gang membership at the punishment phase of his trial. Second, he argues that the trial court's comments made during voir dire constituted fundamental error, thus depriving him of his right to a fair and impartial trial.

ADMISSIBILITY OF GANG EVIDENCE

We review a trial court's decision regarding the admissibility of evidence under an abuse of discretion standard. *Cameron v. State*, 241 S.W.3d 15, 19 (Tex.Crim.App. 2007); *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex.Crim.App. 1991)(stating that the trial court "has the best vantage from which to decide" admissibility questions). Because trial courts are in the best position to decide questions of admissibility, we uphold a trial court's admissibility decision if it falls within the zone of reasonable disagreement. *Montgomery*, 810 S.W.2d at 391. We do not reverse a trial court's decision regarding the admissibility evidence solely because we disagree with the decision. *Id.*; *see also Robbins v. State*, 88 S.W.3d 256, 259-60 (Tex.Crim.App. 2002); *Rodriguez v. State*, 203 S.W.3d 837, 841 (Tex.Crim.App. 2006).

The State first calls to our attention Appellant's failure to preserve his first issue for our review. We agree. The Texas Rules of Appellate Procedure require that evidentiary error be preserved by making a proper objection and securing a ruling on that objection. TEX.R.APP.P. 33.1(a)(1); TEX.R.EVID. 103(a)(1); *Layton v. State*, 280 S.W.3d 235, 239 (Tex.Crim.App. 2009); *Gillenwaters v. State*, 205 S.W.3d 534, 537 (Tex.Crim.App. 2006); *Wilson v. State*, 71 S.W.3d 346, 349 (Tex.Crim.App. 2002). A proper objection is one that is both specific and timely. *Wilson*, 71 S.W.3d at 349. With two exceptions, a party must continue to object each time inadmissible evidence is offered. *Ethington v. State*, 819 S.W.2d 854, 858 (Tex.Crim.App. 1991); *Gillum v. State*, 888 S.W.2d 281, 285 (Tex.App.--El Paso 1994, pet. ref'd). The two exceptions require counsel to either (1) obtain a running objection, or (2) request a hearing outside the presence of the jury. *Martinez v. State*, 98 S.W.3d 189, 193 (Tex.Crim.App. 2003). Evidentiary error is cured when the same evidence is admitted elsewhere without objection. *Leday v. State*, 983 S.W.2d 713, 718 (Tex.Crim.App. 1998); *Gillum*, 888 S.W.2d at 285. When

not preserved, there is nothing for an appellate court to review. *Ethington*, 819 S.W.2d at 858 (error not preserved where defendant fails to object to evidence at trial); *Hudson v. State*, 675 S.W.2d 507, 511 (Tex.Crim.App. 1984).

While the record reveals a few of instances in which Appellant made timely, specific objections to Armendariz's testimony regarding Appellant's affiliation with the Barrio Aztecas, he did not object to Hinojos' earlier testimony which elicited the same or similar responses. Nor did he obtain a running objection or a court ruling outside the presence of the jury. By failing to object each time to testimony concerning his gang membership with the Barrio Aztecas, Appellant failed to preserve his first issue for our review. *See Vargas v. State*, No. 14-96-01352-CR, 1998 WL 820703, at *3 (Tex.App.--Houston [14th Dist.] Nov. 25 1998, pet. ref'd)(not designated for publication)(holding that appellant failed to preserve his issue for review where he failed to object to each reference to his gang membership).

Moreover, we also agree with the State that Appellant's argument on appeal fails to comport with the objections he made at trial. Where an objection at trial does not comport with the issue raised on appeal, the appellant also fails to preserve anything for review. *Pena v. State*, 285 S.W.3d 459, 464 (Tex.Crim.App. 2009)("Whether a party's particular complaint is preserved [for review] depends on whether the complaint on appeal comports with the complaint made at trial."). At trial, Appellant objected to Detective Armendariz's testimony concerning his gang affiliation on the grounds that it "assumed facts not in evidence." Now, on appeal, Appellant argues that the admission of the gang member testimony constituted constitutional error, citing *Dawson v. Delaware*, 503 U.S. 159, 165-66, 112 S.Ct. 1093, 1098, 117 L.Ed.2d 309 (1992). Clearly, his objection at trial does not comport with his appellate argument that the admission of such evidence arose to constitutional error.

Even if Appellant had properly preserved his first point of error, we find it without merit. Appellant relies on *Beasley v. State*, 902 S.W.2d 452, 456 (Tex.Crim.App. 1995). There, the Court of Criminal Appeals concluded that gang membership evidence was admissible, without linking the defendant to specific "bad acts" of the gang, if the jury was: (1) provided with evidence of the defendant's gang membership, (2) provided with evidence of character and reputation of the gang, (3) not required to determine if the defendant committed the bad acts or misconduct and (4) only asked to consider reputation or character of the accused. *Id.* at 457. However, the *Beasley* decision relied on a pre-1993 version of the Texas Code of Criminal Procedure which did not allow the admission of unadjudicated extraneous bad acts. *Sierra v. State*, 266 S.W.3d 72, 78 (Tex.App.--Houston [1st Dist.] 2008, pet. ref'd). Texas law now permits the admission of unadjudicated extraneous bad acts at the punishment phase. *See, e.g., State v. Vasilas*, 187 S.W.3d 486, 489 n.4 (Tex.Crim.App. 2006)(noting that *Beasley* relied upon a prior version of the Texas Code of Criminal Procedure, and that the Texas Legislature specifically amended the Code to make evidence of "unadjudicated extraneous offenses and prior bad acts" admissible at the punishment phase); *Brooks v. State*, 961 S.W.2d 396, 400 (Tex.App.--Houston [1st Dist.] 1997, no pet.)(taking "judicial notice of the struggle between the legislature and the Court of Criminal Appeals over enlarging the scope of evidence admissible at the punishment stage of non-capital trials").

Rather than *Beasley*, it is Article 37.07, section 3(a), of the Texas Code of Criminal Procedure that now governs the admissibility of evidence during the punishment stage of a non-capital criminal trial. *Erazo v. State*, 144 S.W.3d 487, 491 (Tex.Crim.App. 2004). The current version of Article 37.07, section 3(a)(1) states that in a punishment phase:

> Evidence may be offered by the [S]tate and the defendant as to any matter the court deems relevant to sentencing, including but not limited to the prior criminal

> record of the defendant, his general reputation, his character, an opinion regarding his character, the circumstances of the offense for which he is being tried, and . . . any other evidence of an extraneous crime or bad act . . . .

TEX.CODE CRIM.PROC.ANN. art. 37.07, § 3(a)(1)(West Supp. 2016). Thus, a wide scope of evidence of any "bad acts" is allowed at the punishment phase in a case such as Appellant's. *Id.* With regard to evidence to be introduced during the punishment phase, "[r]elevance in this context is more a matter of policy than an application of Rule of Evidence 401; it fundamentally consists of what would be helpful to the jury in determining the appropriate punishment." *Garcia v. State*, 239 S.W.3d 862, 865 (Tex.App.--Houston [1st Dist.] 2007, pet. ref'd), *citing Mendiola v. State*, 21 S.W.3d 282, 285 (Tex.Crim.App. 2000) *and* TEX.R.EVID. 401 (defining relevant evidence as evidence having any tendency to make existence of fact that is of consequence to determination of action more probable or less probable than it would be without evidence); *see also Payne v. Tennessee*, 501 U.S. 808, 820-21, 111 S.Ct. 2597, 2605-06, 115 L.Ed.2d 720 (1991)(observing that "the sentencing authority has always been free to consider a wide range of relevant material"); *United States v. Tucker*, 404 U.S. 443, 446, 92 S.Ct. 589, 591, 30 L.Ed.2d 592 (1972)(noting that, in sentencing proceedings, "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come").

Evidence of membership in a gang such as the Barrio Aztecas would come under the type of "bad acts" relevant to sentencing, and Article 37.07 explicitly allows the introduction of such evidence, even without satisfying the requirements set forth in *Beasley*. *See, e.g., Garcia*, 239 S.W.3d at 865. Accordingly, Appellant's reliance on *Beasley* is misplaced.

Finally, assuming without deciding that error occurred, any error was harmless. Texas Rule of Appellate Procedure 44.2(b) provides that a nonconstitutional error "that does not affect

substantial rights must be disregarded." TEX.R.APP.P. 44.2(b); *Motilla v. State*, 78 S.W.3d 352, 355 (Tex.Crim.App. 2002). Substantial rights are not affected by the erroneous admission of evidence "if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight effect." *Solomon v. State*, 49 S.W.3d 356, 365 (Tex.Crim.App. 2001); *Johnson v. State*, 967 S.W.2d 410, 417 (Tex.Crim.App. 1998). When we assess the likelihood that the jury's decision was adversely affected by the error, we consider the entire record, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, and the character of the alleged error and how it might be considered in connection with other evidence in the case. *Morales v. State*, 32 S.W.3d 862, 867 (Tex.Crim.App. 2000). We may also consider the State's theory and any defensive theories, closing arguments, the jury instructions, and even voir dire, if applicable. *Id.*; *see also Llamas v. State*, 12 S.W.3d 469, 471 (Tex.Crim.App. 2000). The Court of Criminal Appeals has also recognized that whether the State emphasized the error can be a factor. *King v. State*, 953 S.W.2d 266, 272 (Tex.Crim.App. 1997).

Here, the State's evidence was significant and included eyewitness identifications, DNA evidence, and fingerprint evidence. The State also presented the jury with extensive evidence illustrating Appellant's involvement in two additional violent home invasions, which involved the threatened use of deadly weapons, specifically a knife and an icepick. *Crain v. State*, 373 S.W.3d 811, 816 (Tex.App.--Houston [14th Dist.] 2012, pet. ref'd)(any alleged error in admission of extraneous offense evidence was harmless where State introduced evidence of three other extraneous offenses); *Kelly v. State*, No. 05-10-00167-CR, 2011 WL 2438517, at *3 (Tex.App.--Dallas June 20, 2011, no pet.)(mem. op., not designated for publication)(appellant failed to demonstrate any harm from admission of evidence of his gang membership, as the

jury's sentencing decision could have been based on appellant's commission of additional offenses); *Barracks v. State*, No. 14-07-00625-CR, 2008 WL 2838099, at *6 (Tex.App.--Houston [14th Dist.] Jul. 22, 2008, pet. ref'd)(mem. op., not designated for publication)(any error in admitting gang evidence was harmless in light of violent nature of crime coupled with appellant's prior convictions). In addition to the evidence discussed above, the jury even heard from Appellant's own expert forensic psychologist, Dr. Dunham, that Appellant bore a high risk of being a sexual re-offender. All of this evidence provides assurance that the admission of testimony regarding gang membership did not influence the jury's decision. *See Thorton v. State*, 925 S.W.2d 7, 13-14 (Tex.App.--Tyler, pet. ref'd)(admission of gang evidence rendered harmless because other evidence admitting to demonstrate the violent circumstances of crime and appellant's prior convictions).

Moreover, the complained-of gang affiliation evidence was ultimately a *de minimis* aspect of the State's punishment case. It served as an explanation as to why the case was initially investigated by the El Paso gang unit. As the State correctly points out, any harmful impact from such evidence would have been diminished by the testimony of Ruiz and Armendariz that they were ultimately unsuccessful in locating any record or information confirming Appellant's affiliation with the Barrio Azteca gang.

Additionally, during closing arguments, the State urged the jury to disregard the evidence presented of Appellant's gang affiliation if they did not believe it beyond a reasonable doubt. *Vann v. State*, No. 08-13-00104-CR, 2015 WL 3793917, at *2 (Tex.App.--El Paso June 17, 2015, pet. ref'd)(not designated for publication)(trier of fact is sole judge of weight and credibility of evidence presented). The record otherwise fails to reflect that the State heavily

emphasized the evidence. Finally, in evaluating the trial court's jury instructions in this instance, the trial court provided the following:

> You are instructed that if there is any testimony before you in this case regarding the defendant having committed offenses other than the offenses alleged against him in the indictment in this case, you cannot consider said testimony for any purpose unless you find and believe beyond a reasonable doubt that the defendant committed such other offense or offenses, if any were committed.
>
> In the event you have a reasonable doubt as to whether the defendant committed any such extraneous offenses after considering all the evidence before you and these instructions, you will not consider such extraneous offenses for any purpose whatsoever.
>
> Further, even if you find that the State has proven the defendant's guilt of such other offenses beyond a reasonable doubt, if any, you may only consider the evidence as it may aid you, if it does, in determining the appropriate punishment in relation to the offense for which you have found the defendant guilty in this case. You are not to punish the defendant for the commission of any such extraneous offenses, if any.

Instructions to the jury are generally considered sufficient to cure improprieties that may have occurred during trial. *Gamboa v. State*, 296 S.W.3d 574, 580 (Tex.Crim.App. 2009). And we generally presume that a jury follows the judge's instructions. *Colburn v. State*, 966 S.W.2d 511, 520 (Tex.Crim.App. 1998). After considering the court's instructions to the jury, we think this factor also weighs in favor of a finding that any error in admitting evidence of Appellant's possible gang affiliation was harmless. The trial court's instruction serves to mitigate any harm which might have resulted from the error, if any, in admitting this evidence. After viewing the entire record, we conclude that the gang-related evidence did not affect Appellant's substantial rights and overrule Appellant's first issue.

VOIR DIRE

In his second issue, Appellant contends that the trial court's comments made during voir dire constituted fundamental error by depriving him of his right to a fair and impartial trial. We disagree.

The requirements for preservation of error on appeal also apply to comments made by the trial court during voir dire. *Fuentes v. State*, 991 S.W.2d 267, 273 (Tex.Crim.App. 1999)(holding that appellant waived complaint about trial court's explanation of reasonable doubt standard during voir dire when he failed to renew objection when trial court repeated the explanation); *Moore v. State*, 907 S.W.2d 918, 923 (Tex.App.--Houston [1st Dist.] 1995, pet. ref'd)(appellant waived complaint about trial court's comment during voir dire about the weight of the evidence when he failed to object); *Brewer v. State*, 572 S.W.2d 719, 723 (Tex.Crim.App. 1978)(where no objection is made, remarks and conduct of the trial court may not be subsequently challenged unless they are fundamentally erroneous); *Brown v. State*, No. 08-10-00057-CR, 2011 WL 2714117, at *1 (Tex.App.--El Paso Jul. 13, 2011, pet. ref'd)(not designated for publication)(waiver rule applies to alleged improper comments made by trial court during voir dire). Because Appellant failed to object to the comments the trial court made during voir dire, he has failed to preserve his second point of error for our review. TEX.R.EVID. 103(a); TEX.R.APP.P. 33.1(a)(1); *Brown*, 2011 WL 2714117, at *1.

Even if Appellant had properly preserved his second argument for review, we find it unpersuasive. First and foremost, Appellant's reliance on *Blue v. State*, 41 S.W.3d 129 (Tex.Crim.App. 2000)(plurality op.), is misplaced. Appellant relies on *Blue* for the proposition that because the trial court's comments made during voir dire constituted fundamental error, no objection was required. The State correctly points out that the applicable test for deciding whether a Texas court may address unassigned error is set forth in *Marin v. State*, 851 S.W.2d

275 (Tex.Crim.App. 1993), *overruled on other grounds*, *Cain v. State*, 947 S.W.2d 262, 264 (Tex.Crim.App. 1997); *see also Brumit v. State*, 206 S.W.3d 639, 644 (Tex.Crim.App. 2006); *Sanchez v. State*, 120 S.W.3d 359, 365-66 (Tex.Crim.App. 2003). *Marin* identified three types of rules: "(1) absolute requirements and prohibitions; (2) rights of litigants which must be implemented by the system unless expressly waived; and (3) rights of litigants which are to be implemented upon request." *Brumit*, 206 S.W.3d at 644; *Marin*, 851 S.W.2d at 279-80. Of these three categories, only "violations of 'rights which are waivable only' and denials of 'absolute systemic requirements'" enable the appellate court to hear a complaint without a proper trial objection. *Aldrich v. State*, 104 S.W.3d 890, 895 (Tex.Crim.App. 2003); *Saldano v. State*, 70 S.W.3d 873, 888 (Tex.Crim.App. 2002); *see also Williams v. State*, 273 S.W.3d 200, 220 (Tex.Crim.App. 2008), *citing Marin*, 851 S.W.2d at 279. Rights that must be implemented unless expressly waived include the "rights to the assistance of counsel, the right to trial by jury, and a right of appointed counsel to have ten days of trial preparation . . . ." *Aldrich*, 104 S.W.3d at 895. "Absolute systemic requirements [that may not be waived] include jurisdiction of the person, [and] the subject matter, and a penal statute's being in compliance with the Separation of Powers Section of the state constitution." *Id.* Violation of these non-waivable absolute systemic rights constitutes fundamental error. *See Saldano*, 70 S.W.3d at 887-88; *Marin*, 851 S.W.2d at 278 (stating, "[s]ome rights are widely considered so fundamental to the proper functioning of our adjudicatory process as to enjoy special protection in the system. TEX.R.CRIM.EVID. 103(d). A principle characteristic of these rights is that they cannot be forfeited.").

However, it is an unresolved issue whether and when a trial court's comments constitute fundamental constitutional due process error that may be reviewed in the absence of a proper objection. In *Blue*, a plurality of the Court of Criminal Appeals held that a trial judge's

comments to the venire indicating that the judge would have preferred for the defendant to plead guilty were fundamental constitutional error that tainted the presumption of innocence and, therefore, required no objection to be preserved for appeal. 41 S.W.3d at 132. Subsequently, in *Jasper v. State*, the Court of Criminal Appeals held that, even if it were bound to follow the plurality opinion in *Blue*, the judge's comments correcting defense counsel's misrepresentation of previously admitted testimony, showing irritation at the defense attorney, and clearing up a point of confusion failed to rise to "such a level as to bear on the presumption of innocence or vitiate the impartiality of the jury" and therefore, were not fundamental error. 61 S.W.3d 413, 421 (Tex.Crim.App. 2001); *see also Murchison v. State*, 93 S.W.3d 239, 262 (Tex.App.--Houston [14th Dist.] 2003, pet. ref'd)(stating that trial court may interject to correct misstatement or misrepresentation of previously admitted testimony).

Similarly, in *Brumit*, while recognizing that a plurality of the court had held in *Blue* that the judge's comments constituted fundamental error requiring no objection, the Court of Criminal Appeals concluded that it was not necessary to reach that issue because the judge's comment that an earlier case made him think that anybody who ever harmed a child should be put to death did not reflect bias, partiality, or the failure of the trial court to consider the full range of punishment, and thus did not violate due process, when such comments were made after the judge had heard extensive evidence of the defendant's repeated sexual abuse of two children, the defendant had six prior convictions for child sexual assault, and explicit evidence showed that the judge had considered the full range of punishment in sentencing the defendant to life in prison. 206 S.W.3d at 644-45, *distinguishing Blue*, 41 S.W.3d at 132. The *Brumit* court reiterated that "[d]ue process requires a neutral and detached hearing body." *Id.* at 645. However, "[a]bsent a clear showing of bias, a trial court's actions will be presumed to have been

correct." *Id.*; *see also Gordon v. State*, 191 S.W.3d 721, 726-27 (Tex.App.--Houston [14th Dist.] 2006, no pet.)(holding that when a judge had not commented on defendant's guilt or innocence, his comments during voir dire that criminal justice system treated everyone exactly alike and that defendant controlled everything about system were comments on how criminal justice system operates and did not constitute fundamental error); *Davis v. State*, 651 S.W.2d 787, 790 (Tex.Crim.App. 1983)(holding that judge's comment to venire that if jury did not follow law under court's instructions case would have to be tried again, although not a proper instruction, did not imply that defendant would be convicted, was not reasonably calculated to benefit or prejudice defendant, and thus was not reversible error).

We conclude here, as the Court of Criminal Appeals did in *Brumit* and *Jasper*, that it is unnecessary for us to decide whether a trial court's comments that taint the presumption of innocence or destroy fundamental fairness constitute fundamental constitutional error that may be reviewed without a proper objection because the trial court's comments in this case did not rise "to such a level as to bear on the presumption of innocence or vitiate the impartiality of the jury." *See Jasper*, 61 S.W.3d at 421. The trial court's comments here simply provided anecdotal examples of what may happen to the criminal justice system if it could not find enough qualified jurors to impanel a jury. The court also addressed the issue of pretrial publicity in this instance. It discussed the value of the jury system and reminded the jury that despite such publicity, there are always two sides to the story. The court's comments were a permissible exercise of the court's discretion to explain and clarify a point of law or clear up confusion. *See Jasper*, 61 S.W.3d at 636; *Murchison*, 93 S.W.3d at 262. Because the trial court's comments fail to rise to such a level as to bear on the presumption of innocence or vitiate the impartiality of the jury, we overrule Issue Two and affirm the judgment of the trial court below.

September 21, 2016

ANN CRAWFORD McCLURE, Chief Justice

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

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