**MODIFY and AFFIRM; and Opinion Filed January 19, 2017.**

**In The**
# Court of Appeals
# Fifth District of Texas at Dallas

**No. 05-15-01427-CR**

**No. 05-15-01428-CR**

**REGINALD DONELL RICE, Appellant**
**V.**
**THE STATE OF TEXAS, Appellee**

**On Appeal from the 265th Judicial District Court**
**Dallas County, Texas**
**Trial Court Cause Nos. F-1476788-R & F-1476789-R**

## MEMORANDUM OPINION

Before Justices Francis, Fillmore, and Stoddart
Opinion by Justice Fillmore

A jury convicted Reginald Donell Rice of two offenses of aggravated assault with a deadly weapon against Devaunce McCoy and Frederick Evans. Rice pleaded true to two alleged enhancements, and the jury assessed punishment of seventy years' imprisonment on each offense. In seven points of error, Rice contends the trial court erred by (1) admitting into evidence video surveillance footage, and photographs extracted from the footage, because the State failed to establish the proper predicate; (2) overruling his objection that a police officer's conclusion about the identity of the perpetrator of the offenses invaded the province of the jury; (3) overruling his objection that evidence of a statement made by a witness who did not testify at trial was hearsay and violated his right to confront and cross-examine the witness against him; (4) denying his request for a mistrial following improper jury argument by the prosecutor; and

(5) overruling his objection that other jury argument by the prosecutor was outside the record. We modify the trial court's judgments to reflect that Rice pleaded true to both the alleged enhancements and the jury found both enhancements to be true. As modified, we affirm the trial court's judgments.

## Background[1]

On December 9, 2014, Rice knocked on the door to Room 332 at the Orange Extended Stay Hotel. When McCoy, also known as Dee or Dee-Skeet, answered the door, Rice pulled out a handgun. McCoy tried to shut the door and then turned to run toward the window. Because he was in fear for his life, McCoy jumped from the third-story window. He suffered cuts from the broken glass, broken bones in his heel, and was briefly "knocked out" when he hit the ground. Rice fired fourteen shots into the room, hitting Evans in his stomach, hand, and arm, and Anthony Murphy, also known as Ant, in his stomach and side. Rice then left the room. A video surveillance camera recorded Rice running down the hallway with a gun in his hand.

At trial, McCoy and Evans testified Rice was the shooter. Romerros Jackson, who was in Room 332, but was turned away from the door at the time Evans and Murphy were shot, testified that he heard gunshots immediately after Rice came into the room. Oleshia Brooks, who had left Room 332 just prior to the shooting, testified she passed Rice in the hallway and saw he had something long and black in his hand. She heard a gunshot as she walked down the hallway, turned around, and saw Rice shoot someone who was sitting in a chair. Tommy McKennis, who assisted Murphy prior to medical personnel arriving at the hotel, testified Murphy said that "Reggie" shot him.

[1] Rice has not challenged the sufficiency of the evidence to support the convictions. Accordingly, we recite only those facts necessary to address his complaints on appeal.

**Admission of Video Footage and Photographs**

In his first two points of error, Rice argues the trial court erred by admitting the footage from the video surveillance camera located in the hallway of the hotel and photographs that were extracted from that footage because the State failed to lay the proper predicate for establishing the evidence was admissible. *See* TEX. R. EVID. 901(a). We review a trial court's ruling on an authentication issue for abuse of discretion. *Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012). The trial court does not abuse its discretion by admitting evidence where it reasonably believes a reasonable juror could find that the evidence proffered is authentic. *Id.* We will affirm the trial court's ruling so long as it is within the "zone of reasonable disagreement." *Id.*

*Relevant Facts*

Detective Richard Lopez testified he assisted with the investigation of the shooting. Lopez had previously been to the Orange Extended Stay Hotel and was familiar with the interior layout. Lopez spoke with hotel management personnel and learned a digital surveillance system was in place which recorded video of the hotel hallways. The hotel management personnel took Lopez to "the place" to "get the download of the surveillance video." "They" downloaded the video "correctly" from the digital surveillance system to a flash drive. Lopez then downloaded the video to a DVD and made a copy for Detective Patricia Gamez, the lead investigator. Lopez viewed the video and responded affirmatively when asked at trial whether it "look[ed] and appear[ed] the same as the Orange Extended Stay Hotel." Further, there was a date and time stamp on the video that accurately reflected the date and time of the shooting.[2]

[2] The time stamp on the video is actually one hour later than the time of the shooting. Gamez subsequently testified that, in her experience, video recorders do not always compensate for daylight savings time.

Lopez testified he was not the custodian of the digital surveillance system that recorded the video and could not testify "from firsthand experience" that there had not been any kind of alterations to or deletions from the video. He also was unable to testify as to whether there had been any "kind of issues" with the digital surveillance system or whether it recorded the events on the date of the shooting correctly.

Rice objected the State had not laid the proper foundation and Lopez was "not the witness to offer this video in." The trial court overruled the objections and admitted the video as well as photographs extracted from the video.

Several witnesses were subsequently questioned about the video or the photographs extracted from the video. McCoy identified Rice as the person running down the hallway in one of the photographs and testified that was how Rice looked on the morning of the shooting. McCoy also viewed the video and identified the location of Room 332. At one point in the video, McCoy testified he believed he was the person who can be seen exiting the room. He also identified one of the women in the video as "Judy" and another as "Christina." Later in the video, he identified a man close to the elevator as Jackson, whose nickname was "Fat Baby." Running down the hallway behind Jackson was Rice. McCoy then identified Jackson as the man who exited and then returned to Room 332.

Jackson identified himself in one of the photographs extracted from the video that was taken "directly after the shooting." In the photograph, a man is seen running down the hallway toward Jackson. After viewing another photograph extracted from the video that was time-stamped three seconds after the first photograph, Jackson identified the man running toward him as Rice. Brooks also viewed one of the photographs extracted from the video which showed two women running toward the elevator "after the gunshots." Brooks testified she was one of the women in the photograph.

*Analysis*

Authentication of an item of evidence is a condition precedent to admissibility. *Tienda*, 358 S.W.3d at 638 (citing TEX. R. EVID. 901(a)). This condition precedent to admissibility "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." *Butler v. State*, 459 S.W.3d 595, 600 (Tex. Crim. App. 2015) (quoting TEX. R. EVID. 901(a)). Evidence may be authenticated in a number of ways, including through direct testimony from a witness with personal knowledge, by comparison with other authenticated evidence, or by circumstantial evidence. *Tienda*, 358 S.W.3d at 638; *see also Butler*, 459 S.W.3d at 600–01; *Druery v State*, 225 S.W.3d 491, 502 (Tex. Crim. App. 2007) (Evidence may be authenticated by showing "[d]istinctive characteristics and the like: [a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.'" (quoting TEX. R. EVID. 901(b)(4)).

Video recordings without audio are treated as photographs and are properly authenticated when it can be proved that the images accurately represent the scene in question and are relevant to a disputed issue. *Huffman v. State*, 746 S.W.2d 212, 222 (Tex. Crim. App. 1988); *Cain v. State*, 501 S.W.3d 172, 174 (Tex. App.—Texarkana 2016, no pet.). The most common way to authenticate a photograph or video is through testimony from a witness who observed the scene that it is an accurate representation of the scene. *See Huffman*, 746 S.W.2d at 222; *Standmire v. State*, 475 S.W.3d 336, 344 (Tex. App.—Waco 2014, pet. ref'd). In this situation, the sponsoring witness is not required to be the person who operated the camera or video equipment. *Huffman*, 746 S.W.2d at 222. Another way to authenticate a photograph or video is through testimony the process or system that produced the photograph or video is reliable. *Standmire*, 475 S.W.3d at 344. This means of authentication is most often used when there is no witness that was present at the scene or event depicted in the photograph or video. *Id.* Under this

method of authentication, the sponsoring witness generally describes the type of system used for recording and whether it was working properly, and testifies that he reviewed the video or photograph, removed the video or device that stores the photographs, and the video or photographs have not been altered or tampered with. *Id.*

Rice argues the video and related photographs were not properly authenticated because Lopez "could not testify as to whether there had been any alterations or deletions on the video, whether the machine had any issues, or whether the machine correctly and accurately recorded the events of that day." However, even assuming Lopez's testimony was not sufficient to authenticate the video, "[e]vidence prematurely admitted in error may become admissible or be rendered harmless by subsequent evidence." *James v. State*, 102 S.W.3d 162, 175 (Tex. App.—Fort Worth 2003, pet. ref'd).[3] Here, McCoy, Jackson, and Brooks all testified about the video or the related photographs, identified themselves in the video and related photographs, and identified Rice as the man running in the hallway with a gun in his hand. This evidence was sufficient for a jury to reasonably find that the images in the video and related photographs were accurate representations of the scene and events at the hotel. *See Davis v. State*, 687 S.W.2d 78, 82 (Tex. App.—Dallas 1985, pet. ref'd) (any error in admitting photograph into evidence without proper authentication was "cured" when witness later testified she was present when the photograph was taken).[4] We resolve Rice's first two points of error against him.

**Admission of Opinion Evidence**

In his third point of error, Rice asserts the trial court erred by allowing Gamez to testify regarding her conclusion as to the shooter's identity. We review the trial court's decision on the

[3] *See also Mitchell v. State*, No. 05-16-00070-CR, 2016 WL 7163947, at *4 (Tex. App.—Dallas Nov. 30, 2016, pet. filed) (mem. op., not designated for publication).

[4] *See Jernigan v. State*, No. 05–13–00674–CR, 2014 WL 7171282, at *9 (Tex. App.–Dallas Dec. 16, 2014, no pet.) (mem. op., not designated for publication) (video recordings authenticated by subsequent testimony that the exhibits "fairly and accurately" depicted what occurred).

admissibility of evidence under an abuse of discretion standard. *Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016). The trial court abuses its discretion if its decision falls outside the zone of reasonable disagreement. *Id.*

*Relevant Facts*

Gamez testified she was the lead detective assigned to the case. She interviewed "about" six witnesses on the day of the shooting who identified Rice as the shooter. She reviewed the video of the hallway the following day, and it corroborated the information she had received. She also interviewed two of the victims at the hospital, and they both told her Rice was the shooter. The following exchange then took place:

> Prosecutor: After meeting with Mr. McCoy and Mr. Murphy at the hospital, did you formulate a suspect in this case?"
>
> Gamez: Yes, I did.
>
> Prosecutor: And that was who?
>
> Gamez: Reggie Rice.

Gamez testified Rice was not in custody and she created a "bulletin board" to advise other police officers to be on the "look out" for him. She also filed three charges against Rice.

Later in Gamez's testimony, the following exchange took place:

> Prosecutor: Detective, after interviewing all of the witnesses that you met with on the morning of the shooting and meeting with the victims that you were able to meet with the following day and looking at the physical evidence that was collected in this case as well as the surveillance video, did you form a conclusion as to who committed the shooting?
>
> Gamez: Yes, sir.
>
> Prosecutor: Who was that?
>
> Gamez: Reggie –
>
> Counsel: I'll object as –

Gamez: Rice.

Counsel: – it invades the province of the jury.

The trial court overruled the objection. Gamez then testified she obtained three arrest warrants for charges of aggravated assault with a deadly weapon.

*Analysis*

Generally, to preserve a complaint for appellate review, a party must make a timely request, objection, or motion stating the specific grounds for the desired ruling, if those grounds are not apparent from the context, and must obtain a ruling. TEX. R. APP. P. 33.1(a); *Douds v. State*, 472 S.W.3d 670, 674 (Tex. Crim. App. 2015), *cert. denied*, 136 S.Ct. 1461 (2016). A party must object each time the objectionable evidence is offered or obtain a running objection to the evidence. *Lane v. State*, 151 S.W.3d 188, 193 (Tex. Crim. App. 2004); *see also Martinez v. State*, 98 S.W.3d 189, 193 (Tex. Crim. App. 2003). "An error [if any] in the admission of evidence is cured where the same evidence comes in elsewhere without objection." *Lane*, 151 S.W.3d at 193 (quoting *Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003)).

Rice contends "Gamez's testimony decided an ultimate fact for the jury to decide, whether [Rice] committed the shooting in these cases." However, Gamez had previously testified, without objection, that she determined Rice was the suspect in the shooting, created a bulletin board so other officers would be on the "look out" for Rice, and filed three charges against Rice. Accordingly, Rice failed to preserve this issue for appeal. *See Lane*, 151 S.W.3d at 193; *Valle*, 109 S.W.3d at 509. We resolve Rice's third point of error against him.

**Confrontation Clause and Hearsay**

In his fourth and fifth points of error, Rice alleges the trial court erred by allowing Gamez to testify about a statement made by a non-testifying witness. Rice specifically argues Gamez's

testimony violated his constitutional right to confront the witness against him and was inadmissible hearsay.

*Relevant Facts*

After Gamez testified her initial role in the investigation was to interview witnesses and the complainants, Rice's counsel conducted a voir dire examination and questioned Gamez about whether she took notes of her conversations with McCoy and Murphy at the hospital. He provided Gamez with the notes she had produced in the case and asked Gamez to find her notes of the conversations. Gamez responded, "The complainants' statements are not in there," and that she did not take any notes during the interviews.[5] Gamez also conceded she took only cursory notes during her interviews of the witnesses.

Under examination by the prosecutor, Gamez testified that she created a prosecution report for the case which contained a summary of her investigation. The report indicated that she spoke to McCoy in the hospital. According to Gamez, McCoy told her he jumped out of the window because he was scared and was "being shot at." Gamez testified that McCoy said, "D" shot him. When asked who "D" was, Gamez responded, "Reggie." Gamez continued that everybody was saying it was "D," and "D" was a nickname for Reggie. She then stated that she could not recall if McCoy said it was "D" or Rice who shot him, and she was not sure if "D" was a nickname for Rice.

During cross-examination, Gamez conceded it was important to memorialize a witness's statement so that she could testify about exactly what the witness said. She agreed she had not done so in this case. Rice counsel's asked Gamez to review her prosecution report and determine whether it included the name "Dee-Skeet." Gamez responded her report did not reference "Dee-Skeet." Rice's counsel continued, "So you just told them that this is – and you

[5] Gamez later testified that, because her recorder was not working, the interviews at the hospital were not recorded.

used the word 'Dee-Skeet' and said it was based off of your review of the prosecution report, but it's not mentioned in your prosecution report, right?" Gamez responded it was mentioned in her notes. Rice's counsel had Gamez confirm again that her prosecution report did not reference "Dee-Skeet." The following exchange then occurred:

> Counsel: But you just gave them information and told them paragraphs or sentences about what was relayed as far as what Dee-Skeet's role in the incident was, right?
>
> Gamez: Correct.
>
> Counsel: But there's – that's nowhere mentioned in your prosecution report or, other than his name, nothing mention in your notes, correct?
>
> Gamez: Well, Dee-Skeet is Reggie Rice.
>
> Counsel: Oh, okay. So Reggie Rice is Dee-Skeet?
>
> Gamez: D. Dee-Skeet.
>
> Counsel: Okay. All right. And you also said that one of the witnesses told you that Dee shot him, right?
>
> Gamez: Yes.
>
> Counsel: Is that in your prosecution report?
>
> Gamez: I don't have Dee on my prosecution report.
>
> Counsel: But you relayed that to the members of the jury, right?
>
> Gamez: That Dee is Reggie?
>
> Counsel: Yes.
>
> Gamez: Yes.

Gamez testified both Evans and McCoy told her that Reggie shot them, but she did not have any documentation of the statements.

On redirect, the prosecutor stated he wanted "to clear up one thing in terms of who you identified as Dee or Dee-Skeet" and requested that Gamez review any information in her

interview notes about the identity of "Dee-Skeet." Gamez noted the only thing she had written under the name "Dee-Skeet" was "what occurred to [Murphy]." The prosecutor asked Gamez what information she had about "Dee-Skeet" in the notes of her interview of Jessica Soland, a witness who had not testified at trial. Rice's counsel objected that the question called for hearsay and violated Rice's right to confront the witness against him. The prosecutor responded that, "It's fair reply[.]" The trial court requested the prosecutor repeat the question, and the following exchange occurred:

> Prosecutor: You were asked by [Defense counsel] about your interview notes. Do you remember that?
>
> Gamez: Yes, sir.
>
> Prosecutor: He asked you about in all of these interview notes, that you had your handwritten notes and you said that you didn't mention anything attributed to Dee-Skeet. Do you remember that?
>
> Gamez: Yes, sir.
>
> Prosecutor: Now that you've had a chance to refresh your recollection with your interview notes with Jessica Soland, do you have any notes attributed to Dee or Dee-Skeet?
>
> Gamez: Yes, sir.

The trial court overruled Rice's objections, and Gamez testified the notes from her interview of Soland indicated that "Dee jumped out the window."

*Analysis*

Hearsay is a statement, other than one made by the declarant while testifying at trial, that a party offers to prove the truth of the matter asserted. TEX. R. EVID. 801(d). Hearsay statements are inadmissible, except as provided by statute or other rule. *Id.* R. 802. A statement that is not offered to prove the truth of the matter asserted, but rather is offered for some other reason, does not constitute hearsay. *Guidry v. State*, 9 S.W.3d 133, 152 (Tex. Crim. App. 1999); *Dinkins v. State*, 894 S.W.2d 330, 347 (Tex. Crim. App. 1995) (extrajudicial statement offered

for purpose of showing what was said rather than for truth of matter stated does not constitute hearsay).[6]

Here, Rice's counsel extensively cross-examined Gamez on her interviews of McCoy and Murphy and the lack of information in her notes pertaining to Dee or Dee-Skeet. Rice's counsel also effectively cross-examined Gamez on the lack of documentation of her investigation and the lack of information concerning Dee or Dee-Skeet's role in the incident. The prosecutor sought to respond to that testimony by establishing Gamez's notes included information on Dee-Skeet. Accordingly, the relevance of the statement was not to establish "Dee jumped out the window," a fact already testified to by McCoy himself, but that Gamez obtained information about Dee or Dee-Skeet and his role in the incident during her investigation and documented that information in her notes. Because the statement was not offered to prove the truth of the matter asserted, it did not constitute inadmissible hearsay. *See Guidry*, 9 S.W.3d at 152; *Dinkins*, 894 S.W.2d at 347; *Parker v. State*, 192 S.W.3d 801, 807 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd).

We next turn to Rice's complaint that his right to confront the witness against him was violated by the admission of Gamez's testimony about the statement that Soland made during her interview. The Confrontation Clause of the Sixth Amendment of the United States Constitution provides that, in all criminal prosecutions, the accused has the right to be confronted with the witnesses against him. U.S. CONST. VI; *Crawford v. Washington*, 541 U.S. 36, 42 (2004).[7] An accused's right to confront the witnesses against him is violated by the admission of an out-of-court statement by a non-testifying declarant if the statement was testimonial and the accused did

[6] *See also Armijo v. State*, No. 05-15-00820-CR, 2016 WL 3356965, at *3 (Tex. App.—Dallas June 10, 2016, no pet.) (mem. op., not designated for publication).

[7] The Sixth Amendment's right of an accused to confront the witnesses against him is a fundamental right made obligatory on the States by the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

not have a prior opportunity to cross-examine the declarant. *Crawford*, 541 U.S. at 59; *Paredes v. State*, 462 S.W.3d 510, 514 (Tex. Crim. App.), *cert. denied*, 136 S.Ct. 483 (2015).

However, a statement is not objectionable under the Confrontation Clause to the extent it is offered for some evidentiary purpose other than the truth of the matter asserted. *Crawford*, 541 U.S. at 59 n.9; *Langham v. State*, 305 S.W.3d 568, 576 (Tex. Crim. App. 2010). "When the relevance of an out-of-court statement derives solely from the fact it was made, and not from the content of the assertion it contains, there is no constitutional imperative that the accused be permitted to confront the declarant." *Langham*, 305 S.W.3d at 576. In this situation, the witness against the accused is not the out-of-court declarant, but the witness who testifies the statement was made. *Id.* at 576–77 (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985) ("The *nonhearsay* aspect of [the out-of-court declarant's] confession—not to prove what happened at the murder scene but to prove what happened when respondent confessed—raises no Confrontation Clause concerns. The Clause's fundamental role in protecting the right of cross-examination . . . was satisfied by [the interrogating officer's] presence on the stand.")).

We have already determined the State did not offer the statement made by Soland during her interview with Gamez to establish that "Dee jumped out the window." Rather, it was admitted to establish Gamez obtained information about Dee or Dee-Skeet during her investigation and included that information in her notes. Thus, the relevance of the out-of-court statement derives solely from the fact that Gamez documented the statement and not from its content. *See Langham*, 305 S.W.3d at 576.[8] Gamez, not Soland, was the person "bearing witness" as to her investigation of the shooting and was available for confrontation and cross-

[8] *See also Boykin v. State*, No. 05-13-00839-CR, 2015 WL 2250115, at *7 (Tex. App.—Dallas May 12, 2015, pet. ref'd) (mem. op., not designated for publication).

examination at trial.[9] Thus, Rice's rights under the Confrontation Clause were not violated by the admission of Soland's statement. We resolve Rice's fourth and fifth points of error against him.

**Mistrial**

In his sixth point of error, Rice contends the trial court erred by denying his motion for mistrial following improper jury argument from the State during the closing arguments in the punishment phase of the trial. Rice specifically argues there was no evidence he "murdered anyone in the instant cases or on any previous occasion." As relevant to this complaint, the prosecutor stated during closing argument of the punishment phase:

> The facts of this crime in these two cases before you are enough for you to reach the right decision on a sentence. Make no doubt about it that this was a cold blooded, premediated shooting. The only thing standing in front of that defendant in [sic] multiple capital murder charges is luck.
>
> Is there any doubt what the defendant intended to do when he got up and knocked on that door, 332, with his loaded 40-caliber semi-automatic gun? He shot 14 times in 15 seconds into a room full of people. He shot two of them twice. He caused another man who began to run full speed through a window and fell three stories onto the concrete. He's not legally a convicted murderer, but he is a murderer.

Rice's counsel objected "to this part as far as this argument." The trial court sustained the objection and instructed the jury to disregard the statement, but denied Rice's motion for mistrial. The prosecutor then argued, based on Rice's prior criminal history, that Rice "hasn't learned yet" and needed to be incarcerated for life.

We review the denial of a motion for mistrial for an abuse of discretion. *Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007). A trial court abuses its discretion if its decision is outside the zone of reasonable disagreement. *Id.* "Only in extreme circumstances, where the

[9] *See Stuart v. State*, No. 10-13-00043-CR, 2014 WL 1269262, at *3–4 (Tex. App.—Waco Mar. 27, 2014, no pet.) (mem. op., not designated for publication) (testifying officer was person bearing witness against defendant because out-of-court statement was admitted to explain investigation made by officer and how defendant became suspect in burglary).

prejudice is incurable, will a mistrial be required." *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004). In determining whether improper jury argument during the punishment phase of a trial warrants a mistrial, we balance three factors: (1) the severity of the misconduct (prejudicial effect); (2) curative measures; and (3) the certainty of the punishment assessed absent the misconduct (likelihood of the same punishment being assessed). *Id.* at 77.[10] This analysis is "conducted in light of the trial court's curative instruction." *Id.*

In determining the severity of the misconduct, we look at the magnitude of the prejudicial effect and whether the misconduct was extreme or manifestly improper. *Id.* at 77; *see also Brown v. State*, 270 S.W.3d 564, 573 (Tex. Crim. App. 2008).[11] Here, taken in context, the prosecutor's argument was that Rice's conduct would have constituted murder if any of the victims had died. This argument was neither extreme nor manifestly improper. *See Porter v. State*, 601 S.W.2d 721, 723 (Tex. Crim. App. [Panel Op.] 1980) (concluding argument that "people can be killed in armed robberies" was proper because defendant was armed; argument constituted plea for law enforcement and was reasonable deduction from evidence of use of firearm); *Cosino v. State*, No. 10-14-00221-CR, 2016 WL 6134461, at *8–10 (Tex. App.—Waco Oct. 19, 2016, pet. ref'd) (concluding argument during punishment phase that defendant convicted of driving while intoxicated did "what he needed to do to kill" other driver, if other driver had not been wearing seatbelt or had been driving smaller car, prosecutor would be "standing here talking to you today about a murder," and defendant's conduct was sufficient "to make that happen" properly centered on facts of case and possible ramifications of defendant's behavior). Further, the complained-of statement was brief and not repeated. *See Archie*, 221 S.W.3d at 700.

[10] *See also Cruz-Garcia v. State*, No. AP-77,025, 2015 WL 6528727, at *26 (Tex. Crim. App. Oct. 28, 2015) (not designated for publication), *cert. denied*, 136 S.Ct. 1518 (2016).

[11] *See also Cruz-Garcia*, 2015 WL 6528727, at *26

Second, we examine curative measures taken by the trial court. In this case, the trial court sustained Rice's objection and immediately instructed the jury to disregard the prosecutor's statement. Ordinarily, an instruction to disregard will sufficiently relieve harm, except with respect to the most inflammatory statements *Freeman v. State*, 340 S.W.3d 717, 727–28 (Tex. Crim. App. 2011) (instruction to disregard will generally cure any error from prosecutor mentioning facts outside record during argument).[12] Taken in context, we cannot conclude the prosecutor's statement was so inflammatory that the trial court's instruction to the jury did not ameliorate any potential harm from the argument. *See Martinez v. State*, 17 S.W.3d 677, 691 (Tex. Crim. App. 2000) (trial court's instruction to disregard cured any error from prosecutor's argument that victim did not call police because she was afraid defendant would kill her); *Corwin v. State*, 870 S.W.2d 23, 36 (Tex. Crim. App. 1993) (prosecutor's argument that defendant had likely killed other people was not so inflammatory that jury "could not consciously discount it in its deliberations in accordance with the trial court's timely instruction to disregard").[13] Further, nothing in the record suggests the jury failed to follow the trial court's instruction.

Finally, we examine the certainty of the punishment assessed absent the complained-of argument. The evidence showed Rice went to Room 332 with a loaded handgun and, when McCoy opened the door, shot fourteen times into a small hotel room. Rice shot both Murphy and Evans multiple times and caused McCoy to jump out of a third-story window. Due to Rice's extensive criminal history, he faced a punishment range of a term of imprisonment between twenty-five and ninety-nine years, or life. Rice requested that the jury sentence him to the

[12] *See also Cruz-Garcia*, 2015 WL 6528727, at *27.

[13] *See also Aubrey v. State*, 624 S.W.2d 291, 293 (Tex. App.—Dallas 1981, no pet.) (prosecutor's argument that defendant accused of driving while intoxicated "came close this time to killing someone. Is he going to kill another before he comes back into court . . ." was not so prejudicial that it could not be cured by instruction to disregard).

minimum term, while the prosecutor requested the jury assess punishment of life in prison. The jury assessed punishment on each offense of seventy years' imprisonment. Considering the nature of the offense of aggravated assault and the strength of the evidence against him, we are unable to attribute the punishment Rice received to the prosecutor's remark.

We conclude the prosecutor's argument was "not so extreme as to render ineffective an instruction to disregard," *Martinez*, 17 S.W.3d at 691, and was cured by the trial court's immediate and specific instruction to the jury to disregard the statement. *See Freeman*, 340 S.W.3d at 727–28. Accordingly, the trial court did not abuse its discretion by denying Rice's motion for mistrial. We resolve Rice's sixth point of error against him.

**Improper Jury Argument**

In his seventh point of error, Rice asserts the trial court erred by overruling his objection to improper jury argument by the State during the punishment phase of the trial.

*Relevant Facts*

The indictments filed on February 6, 2015, alleged one enhancement paragraph based on a March 7, 2001 conviction for possession of a controlled substance with intent to deliver. The State filed a notice of extraneous offenses on September 10, 2015. One of the alleged prior acts was that, "On May 15, 2007, [Rice] was convicted of Failure to Stop and Render Aid in an Accident Resulting in Death and sentenced to the Texas Department of Corrections in Case Number 3668313506 in Collin County, Texas." On October 22, 2015, the State filed a notice of its intent to enhance punishment based on Rice's prior convictions for "Failure to Stop and Render Aid Resulting in Death on or about the 3rd day of May, 2012, A.D., in Case Number 366-83135-06 on the docket of the [sic] Collin County, Texas." The State also amended its notice of extraneous offenses by removing the May 15, 2007 conviction and adding the May 3, 2012 conviction.

The trial of this case began on October 27, 2015, and the jury found Rice guilty of both aggravated assault with a deadly weapon offenses on October 29, 2015 at 3:52 p.m. At approximately 4:20 p.m. on October 29, 2015, the State filed an amended notice of its intent to enhance punishment range that included the May 3, 2012 conviction for failure to stop and render aid in an accident "resulting in death" and the March 7, 2001 conviction for possession of a controlled substance with intent to deliver. At 8:04 a.m. on October 30, 2015, the State filed a second amended notice of its intent to enhance punishment range that changed the description of the May 3, 2012 offense to "Accident Resulting in Injury/Death."

Rice objected to the timing and sufficiency of the State's notice to enhance the punishment range. In a hearing outside the presence of the jury, the prosecutor represented to the trial court that when Rice was originally convicted of failure to stop and render aid, the judgment stated "Failure to stop to render aid and death."[14] However, the court of criminal appeals set aside the conviction and the case was remanded.[15] The May 3, 2012 judgment of conviction shows that, after the case was remanded, Rice pleaded guilty to "Accident involving inj/death," and was sentenced to five years' confinement in the institutional division of the Texas Department of Corrections with credit for the time he had already served. The prosecutor argued, "It's the same cause number, same date of conviction, certainly the same county. The only thing that changed was the language due to the penal code and the legislation changing the name of the offense." The trial court overruled Rice's objections to the State's second amended

[14] Section 550.021(a) of the transportation code prohibits a person from leaving the scene of an accident resulting in injury or death. TEX. TRANSP. CODE ANN. § 550.021(a) (West Supp. 2016). Rice failed to stop and render aid following an accident that occurred on September 12, 2006. At that time, the penalty for the offense was imprisonment in the institutional division of the Texas Department of Criminal Justice for not more than five years or confinement in the county jail for not more than one year; a fine not to exceed $5,000; or both the fine and the imprisonment or confinement. Act of Apr. 21, 1995, 74th Leg., R.S., ch. 165, § 1, 1997 Tex. Gen Laws 1025, 1692. Effective September 1, 2007, section 550.021(c), the penalty provision of the statute, was amended to provide that leaving the scene of an accident resulting in death or serious bodily injury was a third degree felony, but did not change the punishment range for leaving the scene of an accident resulting in injury. Act of May 3, 2007, 80th Leg., R.S., ch. 97, § 2(c), 2007 Tex. Gen. Laws 105, 105. The offense of leaving the scene of an accident resulting in death was increased to a second degree felony on September 1, 2013. Act of May 4, 2013, 83rd Leg., R.S., ch. 70, § 1, 2013 Tex. Gen. Laws 138, 138–39 (codified at TEX. TRANSP. CODE ANN. § 550.021).

[15] *See Ex parte Rice*, No. AP-76688, 2011 WL 5578943, at *1 (Tex. Crim. App. Nov. 16, 2011) (per curiam).

notice of intent to enhance the punishment range. Rice pleaded true to the both alleged enhancements and stipulated to the admission of evidence of his prior convictions.

During closing arguments in the punishment phase, Rice's counsel noted the jury had heard about "the priors" and stated the "accident involving injury or death, it was injury." He noted Rice had stipulated to evidence of his prior convictions so as not to waste the time of the jurors. He then argued that most of Rice's prior convictions were drug related and Rice had struggled with substance abuse for most of his life. Rice's counsel requested, based on Rice's age and the fact he took responsibility for his prior conduct, that the jury sentence Rice to the minimum punishment of twenty-five years' imprisonment.

The prosecutor argued Rice's actions and choices had brought him to this point and "the facts of this crime in these two cases before you are enough for you to reach the right decision on a sentence." The prosecutor summarized Rice's conduct, pointed to his age, and stated he was a "42-year old grown man" and had not "learned yet." The prosecutor then discussed Rice's prior convictions beginning in 1987 and specifically mentioned Rice's conviction for "an accident involving injury or death. We know what that's commonly known as, it's hit-and-run. He hit-and-run on someone and left them seriously injured. He left the scene." Rice's counsel objected there was "no evidence of any sort of serious injury." The trial court overruled the objection. The prosecutor turned to some of Rice's other prior convictions and then argued:

> He's not going to get it. He doesn't get it now, didn't get it then, didn't get it in 1987.
>
> None of us are going to be safe as along [sic] as this defendant is out on the streets. Because of that, because of the facts of this case, it's time to fill in the blanks and complete Reggie Rice's resume and sentence him to life on both of these cases.

The jury sentenced Rice to seventy years' imprisonment on each offense.

*Analysis*

"It is the duty of trial counsel to confine their arguments to the record; reference to facts that are neither in evidence nor inferable from the evidence is therefore improper." *Alejandro v. State*, 493 S.W.2d 230, 231 (Tex. Crim. App. 1973); *see also Brown*, 270 S.W.3d at 570. Thus, proper jury argument is generally limited to: (1) summation of the evidence presented at trial; (2) reasonable deductions drawn from that evidence; (3) answers to opposing counsel's argument; and (4) pleas for law enforcement. *Brown*, 270 S.W.3d at 570. "[E]rror exists when facts not supported by the record are interjected in the argument, but such error is not reversible unless, in light of the record, the argument is extreme or manifestly improper." *Id.* Such error is non-constitutional in nature and must be disregarded if it does not affect the defendant's substantial rights. *Id*. at 572; *see also* TEX. R. APP. P. 44.2(b).

In determining whether the error affected the defendant's substantial rights, we balance the severity of the misconduct, or its prejudicial effect, any curative measures, and the certainty of the punishment absent the argument. *See Brown*, 270 S.W.3d at 572–73 In evaluating the severity of the misconduct, we "look at the entire record of final arguments to determine if there was a willful and calculated effort on the part of the State to deprive [the defendant] of a fair and impartial trial." *Cantu v. State*, 939 S.W.2d 627, 633 (Tex. Crim. App. 1997); *see also Brown*, 270 S.W.3d at 573.

There is no evidence in the record that a person was seriously injured in the 2006 accident. However, the prosecutor used the word "serious" only once while discussing Rice's prior conviction for failing to stop and render aid and, after Rice's objection, immediately turned to discussing Rice's other numerous prior offenses. The prosecutor also argued the egregious facts of the current offenses combined with Rice's criminal history demonstrated Rice had not been rehabilitated and should be sentenced to life imprisonment. Viewing the closing argument

as a whole, we cannot conclude the prosecutor's use of the word "serious" was a willful and calculated effort to deprive Rice of a fair and impartial trial. Further, viewing the record as a whole, we cannot conclude that Rice was prejudiced by the prosecutor's inclusion of the word "serious" when referring to the injury suffered in the accident. Therefore, any error by the trial court in overruling Rice's objection did not affect Rice's substantial rights and must be disregarded. *See* TEX. R. APP. P. 44.2(b); *Brown*, 270 S.W.3d at 573. We resolve Rice's seventh point of error against him.

**Modification of Judgments**

The trial court's judgments incorrectly reflect "N/A" as Rice's plea and as the jury finding to the first enhancement paragraph. The record reflects the State alleged two enhancements, Rice pleaded true to both enhancements, and the jury found both enhancements to be true. Accordingly, in each of the trial court's judgments, we modify the section titled "Plea to 1st Enhancement Paragraph" and "Findings on 1st Enhancement Paragraph" to state "True." *See* TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993); *Asberry v. State*, 813 S.W.2d 526, 529–30 (Tex. App.—Dallas 1991, pet. ref'd).

As modified, we affirm the trial court's judgments.

/Robert M. Fillmore/
ROBERT M. FILLMORE
JUSTICE

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TEX. R. APP. P. 47

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# Court of Appeals
# Fifth District of Texas at Dallas

## JUDGMENT

| | |
|---|---|
| REGINALD DONELL RICE, Appellant | On Appeal from the 265th Judicial District Court, Dallas County, Texas, |
| No. 05-15-01427-CR V. | Trial Court Cause No. F-1476788-R. Opinion delivered by Justice Fillmore, |
| THE STATE OF TEXAS, Appellee | Justices Francis and Stoddart participating. |

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

> The sections of the trial court's judgment titled "Plea to 1st Enhancement Paragraph" and "Findings on 1st Enhancement Paragraph" are modified to state "True."

As **MODIFIED**, the judgment is **AFFIRMED**.

Judgment entered this 19th day of January, 2017.

# Court of Appeals
# Fifth District of Texas at Dallas

## JUDGMENT

REGINALD DONELL RICE, Appellant

No. 05-15-01428-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 265th Judicial District Court, Dallas County, Texas,
Trial Court Cause No. F-1476789-R.
Opinion delivered by Justice Fillmore,
Justices Francis and Stoddart participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

> The sections of the trial court's judgment titled "Plea to 1st Enhancement Paragraph" and "Findings on 1st Enhancement Paragraph" are modified to state "True."

As **MODIFIED**, the judgment is **AFFIRMED**.

Judgment entered this 19th day of January, 2017.