Opinion issued December 15, 2011.

In The
Court of Appeals
For The
First District of Texas

NO. 01-10-00684-CR

FRANK ANTHONY BENITEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 1241615

MEMORANDUM OPINION

Appellant, Frank Anthony Benitez, appeals a judgment convicting him of capital murder. *See* TEX. PENAL CODE ANN. § 19.03(a)(2) (West 2011). Benitez pleaded not guilty before the jury. The jury found Benitez guilty, and the trial court assessed his punishment at confinement for life. In four issues, Benitez

contends that the evidence was insufficient to sustain his conviction, that the trial court erred by allowing the State to present extraneous-offense evidence, that the trial court erred by admitting portions of a letter written by Benitez, and that the State's closing argument impermissibly commented on his failure to testify. We determine that the evidence was sufficient, the trial court did not err by admitting the alleged extraneous-offense evidence or the letter written by Benitez, and that the trial court did not err in refusing to declare a mistrial based on the State's allegedly improper jury argument. We therefore affirm.

Background

On the afternoon of November 13, 2009, Benitez and his friend, Keith Phillips, met outside the apartment complex where Benitez had been staying with his friend Ruben Vidale and Vidale's mother. That evening, Phillips saw a long black gun in Benitez's possession. Although the gun was unloaded, Benitez had a magazine for the gun in his backpack. When Phillips returned with Benitez to the apartment complex around midnight, Benitez left with the gun.

The next afternoon, Murial Todd, returned from the grocery store to the same apartment complex. While she was unloading her groceries from her SUV, Benitez approached her with a loaded gun tucked into the waistband of his pants. Benitez demanded Todd's purse and the key to her SUV. Todd hit Benitez with a bag of groceries. Benitez responded by retrieving his gun and shooting a single

bullet at Todd's neck. The bullet entered the right side of her neck and exited her upper back, resulting in her death. Without going through her purse or taking any of her property, Benitez fled to Vidale's apartment.

When Benitez approached, Vidale was standing outside his apartment, near a stairwell, smoking a cigarette. Without stopping or talking to Vidale, Benitez went into the apartment. Vidale followed Benitez into Vidale's bedroom and he asked Benitez what was wrong. At first, Benitez refused to say anything. Sensing that Benitez was nervous, Vidale became upset and again asked: "What's going on?" This time, Benitez confided that he had told Todd to give him the keys to her car, that she slapped him in response, and that he shot at her but did not know if the bullet had actually hit her. Vidale began yelling and told Benitez that he should leave.

Vidale's mother, who had been sleeping in her bedroom, awoke to the sound of her son arguing with Benitez. When she emerged from her bedroom, she asked them what was happening, but they would not say. Benitez, Vidale, and Vidale's mother left the apartment. Once they were outside, Vidale's mother again inquired as to what had happened. Benitez told her that Todd had hit him and that he pulled out a gun and "hit" her in the neck. Vidale's mother understood in light of his reference to the gun that by using the word "hit," Benitez was indicating that he

had shot at Todd. After hearing this story, Vidale's mother agreed with her son: Benitez could no longer stay at the apartment.

Benitez telephoned Phillips. Sounding as if he were in danger or trouble, Benitez told Phillips that Phillips needed to come pick him up. Phillips asked, "What happened? What's wrong?" Benitez answered, "I will tell you later. Just come and pick me up." Within fifteen minutes, Phillips arrived at the apartment complex. Phillips drove the car, and had two passengers: Clifford Loche was sitting in the front passenger's seat and another passenger was in the back. Benitez got in Phillips's car, carrying his backpack. Phillips asked Benitez what had happened, but Benitez said that he would tell Phillips later when they were alone. Phillips dropped the other passenger off at his home, and Benitez, Phillips, and Loche proceeded to Phillips's home.

Loche waited outside Phillips's bedroom while Phillips and Benitez talked inside. Benitez told Phillips that, in the apartment's parking lot, he had asked Todd to hand over her purse and car keys and that, in response, she looked at him as if he were stupid and hit him with her grocery bag. Benitez said that after being hit, he pulled out the gun, which he had in his waistband, and he shot her in the neck. While telling Phillips what had happened, Benitez pulled out the gun from his backpack and showed it to Phillips. After hearing this story, Phillips informed Benitez that he could not stay at his house and that he would have to find

somewhere else to go. Benitez telephoned his cousin Omar Pimento, but Phillips could not understand the ensuing conversation because they conducted it in Spanish. After the call, Loche entered the room and Benitez related the story again.

Over the next few hours, Benitez, Phillips, and Loche played videos games. Loche went home but returned around 10:00 p.m. and drove Phillips and Benitez to Pimento's house. On the ride over, Benitez discussed how he needed to get rid of the gun. He telephoned Pimento again and told him, in English, that he needed to get rid of the gun. After hanging up, Benitez told Phillips that he should sell the gun, and Phillips agreed.

On November 17, police arrested Benitez pursuant to an arrest warrant. Two days later, the Harris County Grand Jury indicted Benitez for capital murder, alleging that on or about November 14, Benitez, while in the course of committing a robbery of Todd, intentionally caused her death by shooting her with a deadly weapon, namely a firearm.

The jury found Benitez guilty of capital murder. The court assessed his punishment at life in prison. This appeal followed.

Sufficiency of the Evidence

In his first issue, Benitez contends that the evidence is insufficient to sustain his conviction for capital murder because it failed to establish that he intentionally caused Todd's death.

A. Standard of Review

This Court reviews legal and factual sufficiency challenges using the same standard of review. *Ervin v. State*, 331 S.W.3d 49, 54 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd). Under this standard, evidence is insufficient to support a conviction if considering all record evidence in the light most favorable to the verdict, a factfinder could not have rationally found that each essential element of the charged offense was proven beyond a reasonable doubt." *Gonzalez v. State*, 337 S.W.3d 473, 478 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979)). Evidence is insufficient under this standard in four circumstances: (1) the record contains no evidence probative of an element of the offense; (2) the record contains a mere "modicum" of evidence probative of an element of the offense; (3) the evidence conclusively establishes a reasonable doubt; and (4) the acts alleged do not constitute the criminal offense charged. *Gonzalez*, 337 S.W.3d at 479; *see Jackson*, 443 U.S. at 314, 318 n.11, 320, 99 S. Ct. at 2786, 2789 n.11. If an

appellate court finds the evidence insufficient under this standard, it must reverse the judgment and enter an order of acquittal. *Gonzalez*, 337 S.W.3d at 479.

An appellate court "determine[s] whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence viewed in the light most favorable to the verdict." *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007) (quoting *Hooper v. State*, 214 S.W.3d 9, 16–17 (Tex. Crim. App. 2007)). When the record supports conflicting inferences, an appellate court presumes that the factfinder resolved the conflicts in favor of the verdict and defers to that resolution. *Id.* (citing *Jackson*, 443 U.S. at 326, 99 S. Ct. at 2793). "An appellate court likewise defers to the factfinder's evaluation of the credibility of the evidence and weight to give the evidence." *Gonzalez*, 337 S.W.3d at 479. In viewing the record, a court treats direct and circumstantial evidence equally: circumstantial evidence can be as probative as direct evidence, and "circumstantial evidence alone can be sufficient to establish guilt." *Clayton*, 235 S.W.3d at 778 (quoting *Hooper*, 214 S.W.3d at 13).

B. Applicable Law

A person commits capital murder if he intentionally or knowingly causes the death of an individual and intentionally commits the murder in the course of committing or attempting to commit robbery. *See* TEX. PENAL CODE ANN. §§ 19.02(b)(1) 19.03(a)(2) (West 2011); *Sholars v. State*, 312 S.W.3d 694, 695 n.1

(Tex. App.—Houston [1st Dist.] 2009, pet. ref'd) *cert. denied*, *Sholars v. Texas*, 131 S. Ct. 156 (2010). A person commits robbery if, in the course of committing theft and with intent to obtain or maintain control of the property, he intentionally, knowingly, or recklessly causes bodily injury to another; or intentionally or knowingly threatens another with, or places another in fear of, imminent bodily injury or death. TEX. PENAL CODE ANN. § 29.02(a) (West 2011); *Sholars*, 312 S.W.3d at 703. "A person acts intentionally . . . with respect . . . to a result of his conduct when it is his conscious objective or desire to . . . cause the result." TEX. PEN. CODE ANN. § 6.03 (West 2011). A deadly weapon is a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury, or anything that in the manner of its use or intended use is capable of causing death or serious bodily injury. TEX. PENAL CODE ANN. § 1.07(17) (West 2011); *see Wright v. State*, 591 S.W.2d 458, 459 (Tex. Crim. App. 1979) (holding that evidence defendant pointed "gun," "pistol," or "revolver" at complainant was sufficient to prove use of "deadly weapon").

Capital murder requires an intent to kill. *See* TEX. PENAL CODE ANN. § 19.03(a)(2). Intent is most often proven through the circumstantial evidence surrounding the crime. *Hernandez v. State*, 819 S.W.2d 806, 810 (Tex. Crim. App. 1991), *overruled on other grounds*, *Fuller v. State*, 829 S.W.2d 191 (Tex. Crim. App. 1992); *Dominguez v. State*, 125 S.W.3d 755, 761 (Tex. App.—Houston [1st

Dist.] 2003, pet. ref'd). A jury may infer intent from any facts that tend to prove its existence, such as the acts, words, and conduct of the defendant. *Hernandez*, 819 S.W.2d at 810; *Beltran v. State*, 593 S.W.2d 688, 689 (Tex. Crim. App. 1980); *Dominguez*, 125 S.W.3d at 761. Additionally, intent to kill may be inferred from the use of a deadly weapon, unless it would not be reasonable to infer that death or serious bodily injury could result from the use of the weapon. *Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996); *Dominguez*, 125 S.W.3d at 762. When a deadly weapon is fired at close range, and death results, the law presumes an intent to kill. *See Sholars*, 312 S.W.3d at 703 (citing *Childs v. State*, 21 S.W.3d 631, 635 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd)).

C. Analysis

Benitez does not dispute that, while in the course of robbing Todd, he possessed a gun, which discharged, causing Todd's death. However, Benitez contends that the evidence was insufficient to show that he intentionally caused Todd's death. The State presented multiple witnesses who each testified that Benitez admitted that he shot Todd in the neck after she tried to thwart Benitez's attempt to take her keys and purse. Vidale's mother testified that, the day of the shooting, while indicating where he was holding a gun, Benitez told her that he "hit" Todd in the neck after she hit him. Phillips likewise testified that the day of the shooting Benitez admitted he had "shot an old lady" while trying to get some

money. Specifically, Phillips testified that Benitez said he shot her after he had asked her for her keys and purse, and she looked at him as if he was stupid and hit him with her grocery bag. Phillips also testified that he heard Benitez tell his cousin Pimento that Benitez shot a woman while trying to "hit a lick," or get money. Similarly, Vidale testified that Benitez told him that, after instructing Todd to give him the keys to her car, she slapped him and he shot at her one time, but was unsure whether the bullet had hit her. Loche testified that on the evening of the shooting, Benitez told Loche that he tried to rob a woman, and that he had shot her. While Benitez related the details of the shooting to multiple witnesses, none of the witnesses testified that Benitez claimed the shooting had been an accident. Additionally, Jill Dupree, a firearms examiner with the Harris County Sherriff's office, testified that the type of gun used to kill Todd had a safety lock, which required a person to disengage the lock manually before the weapon would fire.

We conclude that a rational jury could have inferred that Benitez intentionally caused Todd's death. The evidence showed that Benitez approached Todd with a loaded weapon in his waistband and demanded her keys and purse. After Todd hit Benitez, he pulled the gun from his waistband, pointed it towards Todd's neck, and fired a bullet at close range, causing her death. Based on the combined and cumulative force of all of the evidence viewed in a light most

favorable to the verdict, we find that the evidence is sufficient to support Benitez's conviction. *See Childs*, 21 S.W.3d at 635 (finding evidence sufficient to show intent to kill when witness testified he had seen appellant point a gun at complainant, and moments later witness heard two shots); *see Jones*, 944 S.W.3d at 647 (holding evidence was sufficient to find intent to kill where evidence showed appellant used a gun during a robbery and that appellant had to intentionally pull the trigger for the gun to fire); *see also Dominguez*, 125 S.W.3d at 762 (holding evidence was sufficient to find intent to kill when evidence showed, defendant, in course of attempted theft, retrieved loaded shotgun from car trunk and shot complainant in abdomen, resulting in complainant's death).

We overrule Benitez's first issue.

Evidentiary Issues

In his second and fourth issues, Benitez contends that the trial court erred by admitting extraneous-offense or bad-act evidence and a letter written by Benitez to his friend.

A. Standard of Review

We review the admission of evidence by the trial court for an abuse of discretion. *McDonald v. State*, 179 S.W.3d 571, 576 (Tex. Crim. App. 2005). If the trial court's decision is within the zone of reasonable disagreement, we will not disturb it on appeal. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App.

1991). "Furthermore, if the trial court's evidentiary ruling is correct on any theory of law applicable to that ruling, it will not be disturbed even if the trial judge gave the wrong reason for his right ruling." *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009).

B. Benitez's possession of the gun on the day before the murder

In his second issue, Benitez contends that the trial court erred by allowing the State to present evidence that Benitez was in possession of a weapon the day before the crime, because Benitez was not given proper notice of the State's intent to use the evidence as required by Rule 404(b), and the evidence's risk of unfair prejudice substantially outweighed its probative value.

Because Benitez's motion in limine covered extraneous offenses, the State approached the bench during the guilt-innocence stage of the trial and informed the trial court that it was going to have Phillips testify that the night before the shooting, Benitez, while in possession of a gun, drove around with his friends looking for someone to rob. Benitez objected that this evidence would be "too prejudicial at this time." The trial court stated that it would allow the testimony that Benitez was in possession of a gun the night before the murder, but exclude the testimony that Benitez and his friends were looking for someone to rob. Benitez made no further objections. Phillips then testified, without objection, that he had seen Benitez with a long black gun the night before the shooting, and that

the gun was similar in appearance to the gun recovered by the State and entered into evidence.

Evidence of other crimes, wrongs, or acts is excludable if and to the extent that it is offered to prove the character of a person in order to show action in conformity therewith. TEX. R. EVID. 404(b). "It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon timely request by the accused in a criminal case, reasonable notice is given in advance of trial of intent to introduce in the State's case-in-chief such evidence other than that arising in the same transaction." *Id.*

On appeal, Benitez contends the trial court erred in admitting Phillip's testimony that Benitez had a gun the day before the murder because it runs afoul of Rule 404(b). Benitez claims he did not get proper notice of the State's intent to offer evidence of the extraneous offense or bad act. An objection at trial must comport with the complaint raised on appeal. *See Swain v. State*, 181 S.W.3d 359, 367 (Tex. Crim. App. 2005); *Lopez v. State*, 200 S.W.3d 246, 251 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd). Although Benitez objected that the testimony was too prejudicial, he failed to make an objection under Rule 404(b) and, therefore, waived these arguments. *See* TEX. R. APP. P. 33.1(a)(1)(A); *Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002); *Lopez*, 200 S.W.3d at

251 (an objection under Rule 403 alone is not sufficient to preserve error under Rule 404(b)).

Benitez did, however, preserve his objection that this testimony was inadmissible under Rule 403. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." TEX. R. EVID. 403. "[A] trial court, when undertaking a Rule 403 analysis, must balance (1) the inherent probative force of the proffered item of evidence along with (2) the proponent's need for that evidence against (3) any tendency of the evidence to suggest decision on an improper basis, (4) any tendency of the evidence to confuse or distract the jury from the main issues, (5) any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted." *Gigliobianco v. State*, 210 S.W.3d 637, 641–42 (Tex. Crim. App. 2006).

Evidence that Benitez, on the day before the shooting, possessed a gun similar to the one used to shoot Todd is probative in that it makes it more probable that Benitez used that gun to cause Todd's death. The State had a need to prove the elements of the offense, including that Benitez used the gun to shoot Todd.

This evidence does not suggest a decision on an improper basis, nor does it have a tendency to confuse or distract the jury from the main issues in the case, as it was directly related to the elements of the offense and was not difficult to understand. Finally, the testimony did not take up an inordinate amount of time or repeat evidence already admitted, as this was the only evidence from a witness who had observed Benitez in possession of a gun. Considering the *Gigliobianco* factors, we cannot say that the trial court abused its discretion in allowing Phillips's testimony. *See Andrade v. State*, 246 S.W. 3d 217, 228–29 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd) (photograph of appellant holding the same weapon as used in murder for which he was convicted was admissible under Rule 403); *see also M'Bowe v. State*, No. 03-09-00160-CR, 2010 WL 2133909 (Tex. App.—Austin, May 27, 2010, no pet.) (mem.op., not designated for publication) (appellant's possession of gun similar to one used in alleged offense was admissible under Rule 403).

We overrule Benitez's second issue.

C. Letter Written by Benitez

In his fourth issue, Benitez contends that the trial court erred by admitting excerpts from a letter Benitez wrote to his friend because the statements were hearsay not within an exception, irrelevant, and were substantially more prejudicial than probative.

The redacted letter, dated January 11, 2010, was addressed to Phillips. It read:

> Dear Keith [P]hillips January 11, 2010
>
> . . . .
>
> But on da cool I was setup[.] [Y]a dig where I[']m going with this b/c I wouldn't do anything like this[,] right[?]
>
> . . . .
>
> Well apparently they don't have enough evidence to prove nothing [sic], not even that I shot the gun.
>
> . . . .
>
> What exactly do they know brother? [N]ot a lot [sic]
>
> . . . .
>
> Even if they try to say or prove it was me witch [sic] it wasn't
>
> . . . .
>
> ! [Pimento's] in jail and if there are fingerprints on the gun they are not mines [sic] they my cousin[']s b/F. So I guess he's fucked or something.
>
> . . . .
>
> Nobody I mean <u>no body</u>! fucks over me or you. My rules[.] My game[.] My style.
>
> . . . .
>
> Much love + care <u>always</u> Frank Anthony Benitez

Benitez first argues that the statements are hearsay and do not qualify as statements against interest because Benitez's guilt could not be inferred from the statements. *See* TEX. R. EVID. 803(24), 801(e)(2)(A). But Rule 801 defines a party's own statements as "not hearsay." TEX. R. EVID. 801. We hold that the statements are admissible as admissions by a party-opponent, and that it was thus unnecessary for the State to demonstrate the applicability of an exception to the hearsay rule. *See Trevino v. State*, 991 S.W.2d 849, 853 (Tex. Crim. App. 1999) ("[P]arty admissions, unlike statements against interest, need not be against the interests of the party when made; in order to be admissible, the admission need only be offered as evidence against the party."); *see also Johnson v. State*, 208 S.W.3d 478, 510 (Tex. App.—Austin 2006, pet. ref'd) (letter shown to be written by appellant was not hearsay when offered against her at trial).

Benitez also argues that these statements should have been excluded under Rules 401 and 403. Evidence is excludable as irrelevant if it is not probative of any fact material to the action. TEX. R. EVID. 401, 402. Relevancy is determined by whether a reasonable person, with some experience in the real world, believes that the particular piece of evidence is helpful in determining the truth or falsity of any fact of consequence. *Montgomery v. State*, 810 S.W.2d 372, 376 (Tex. Crim. App. 1990) (op. on reh'g). The evidence does not have to prove or disprove a particular fact; it is sufficient if the evidence provides "a small nudge toward

proving or disproving some fact of consequence." *Stewart v. State*, 129 S.W.3d 93, 96 (Tex. Crim. App. 2004). Under Rule 403, relevant evidence may still be excludable if the probative value substantially outweighs the danger of unfair prejudice. TEX. R. EVID. 403.

Benitez contends that the statements in the letters are not relevant because they do not tend to establish any fact that is of consequence to the case. We disagree. The statements were relevant because, in them, Benitez does not make the claim, as he did at trial, that the shooting was an accident or mistake. Benitez's claim that he was "set up," his suggestion that the State lacks evidence that he shot the gun, and his claim that his cousin may be implicated, are all inconsistent with his claim at trial that he shot Todd but did so accidentally or by mistake.

Similarly, weighing the factors from *Gigliobianco*, we find that the trial court did not abuse its discretion in admitting the statements over Benitez's Rule 403 objection. *See Gigliobianco*, 210 S.W.3d at 641–42; TEX. R. EVID. 403. The statements in the letter were probative; they provide a nudge toward proving the State's contention that Benitez intended to kill Todd by demonstrating that Benitez failed to assert at any time prior to the trial that the shooting was an accident. The State had a need to discredit Benitez's contention that the shooting was accidental in order to meet its burden to prove that he intended to commit the murder. Benitez asserts the expletives in the letter were unfairly prejudicial, but the trial

court could have reasonably concluded that the expletives in the letter written by Benitez do not suggest a decision on an improper basis in a trial for capital murder. The trial court could have also reasonably concluded that the letter would not confuse or distract the jury from the main issues in the case because the letter relates to Benitez's state of mind, which was a central issue at trial. In addition, there is no evidence showing that the jury was not equipped to weigh the probative value of the letter and, in any event, the letter did not refer to any act or extraneous offense to which the jury might have given undue weight as it evaluated the probative force of the evidence. A reasonable trial court could have concluded that the evidence was not time consuming as the letter consisted only of brief excerpts for the jury to consider. Finally, testimony about the letter was brief, and was not cumulative as the letter was the only evidence showing Benitez still had not asserted his theory of the shooting as an accident, even after he was arrested and imprisoned. We cannot say that the trial court abused its discretion in admitting the letter over Benitez's Rule 403 objection. *See Gigliobianco*, 210 S.W.3d at 641–42.

We overrule Benitez's fourth issue.

Closing Argument

In his third issue, Benitez contends that in closing argument, the State impermissibly commented on Benitez's failure to testify. Although Benitez argues

that the trial court erred when it overruled his objection to the State's jury argument, the trial court actually sustained the objection but overruled Benitez's motion for a mistrial. We therefore construe Benitez's complaint as a complaint about the trial court's denial of his request for a mistrial. *See Crocker v. State*, 248 S.W.3d 299, 303 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (when appellant incorrectly asserts trial court erred in overruling an objection it in fact sustained, "we construe his complaint to be one as to the adverse ruling against him—namely, the trial court's denial of his request for an instruction to the jury to disregard the prosecutor's statement and a mistrial").

A comment on a defendant's failure to testify offends the Texas and United States Constitutions, as well as Texas statutory law. U.S. CONST. amend. V; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 38.08 (West 2005). A prosecutor's comment amounts to an impermissible comment on a defendant's failure to testify only if, when viewed from the jury's standpoint, the comment is manifestly intended to be, or is of such character that a typical jury would naturally and necessarily take it to be, a comment on the defendant's failure to testify. *Cruz v. State*, 225 S.W.3d 546, 548 (Tex. Crim. App. 2007); *Bustamante v. State*, 48 S.W.3d 761, 765 (Tex. Crim. App. 2001).

During the defense's closing argument, Benitez's counsel argued that Benitez fired only one bullet out of a magazine of eight and that Benitez did not intend to kill Todd. During its closing argument, the State countered:

> [Benitez] didn't count on the fact that [the persons whom he told about the shooting] were going to come in . . . and tell you exactly what he told them that day. And he did not tell one of those people that it was an accident. He did not tell one of those people that the gun just went off. He did not tell one of those people that he didn't mean it.
>
> . . . .
>
> [Benitez's counsel] stood up here [during opening arguments] and promised you that he was going to prove to you [the killing] was an accident. And the State brought you 17 witnesses and he was not able through one of those to prove to you that this was an accident. Not one. Not one shred of evidence. And I want you to remember that what [Benitez's counsel] said to you when he stood up here is not evidence. You did not hear one thing from the witness stand, you did not see one piece of evidence that supported—

Benitez's counsel then objected that this was "getting into the Fifth amendment area." The trial court sustained the objection and instructed the jury "Ladies and gentlemen, what the lawyers say on both opening statements and closing statements is not evidence. And that applies to both sides."[1] Benitez moved for a mistrial, which the trial court denied.

Although Benitez did not request an instruction to disregard, the trial court *sua sponte* instructed the jury that what lawyers say in opening and closing

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[1] The jury charge instructed the jury that it could not consider for any purpose, Benitez's decision not to testify.

arguments is not evidence. This was the functional equivalent of an instruction to disregard. Thus, Benitez's subsequent request for a mistrial preserved this issue for review. *See Archie v. State*, 221 S.W.3d 695, 698–99 (Tex. Crim. App. 2007). (trial court's *sua sponte* instructions to "[i]nstruct the jury that they will—I sustain the objection and instruct the jury they will follow the Court's instruction" was functionally equivalent to motion to disregard and therefore denial of appellant's motion for mistrial was proper issue for review). We thus turn to the trial court's denial of Benitez's motion for a mistrial.

In reviewing a trial court's ruling on a motion for mistrial, an appellate court must uphold the trial court's ruling if it was within the zone of reasonable disagreement. *Wead v. State*, 129 S.W.3d 126, 129 (Tex. Crim. App. 2004). "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). The standard of review is abuse of discretion. *Archie*, 221 S.W.3d at 699.

To determine whether a trial court abused its discretion by denying a mistrial, we apply the *Mosley* test. *Ramon v. State*, 159 S.W.3d 927, 929 (Tex. Crim. App. 2004) (citing *Mosley v. State*, 983 S.W.2d 249 (Tex. Crim. App. 1998)). We balance three factors: (1) the severity of the misconduct or the magnitude of the prejudicial effect, (2) the measures adopted to cure the misconduct, and (3) the certainty of conviction absent the misconduct. *Id.*

Here, the State's comment directly followed the State's summary of its own evidence and did not highlight Benitez's failure to testify at trial. Rather, the State's comment pointed out Benitez's failure to claim—*on the day of the shooting* when he described the details of the incident to various witnesses—that the shooting was accidental. In addition, the State's comment was brief. We do not view this as severe misconduct under *Mosley*.

As to the second factor, we find the trial court correctly instructed the jury that the State's comment was not evidence, and that the trial court gave this curative instruction without bringing unnecessary attention to the comment. The jury instructions likewise informed the jury that the defendant had elected not to testify and the jury "cannot and must not refer to or allude to that fact through [their] deliberations or take it into consideration for any purpose whatsoever as a circumstance against him." We view these curative measures as sufficient to ameliorate any harm that resulted from the State's comment. *See Dukes v. State*, 239 S.W.3d 444, 451 (Tex. App.—Dallas 2007, pet. ref'd) (charge that stated jury could not take appellant's decision not to testify under consideration for any purpose was a curative factor to consider under *Mosley*); *Longoria v. State*, 154 S.W.3d 747, 763–64 (Tex. App.—Houston [14th Dist.] 2004, pet ref'd) (noting that reference to failure to testify was not so blatant as to render instruction to disregard ineffective where trial court sustained defense counsel's objection,

instructed jury to disregard the statement, and jury charge instructed jury that it could not consider for any purpose appellant's decision not to testify).

As to the third factor, we find Benitez's admissions to several witnesses on the day of the shooting to be strong evidence supporting the conviction. In light of this, we cannot say that the trial court abused its discretion in denying Benitez's motion for mistrial. *See Mosley*, 983 S.W.2d at 260; *see also Dukes*, 239 S.W.3d at 451 (trial court did not err in denying motion for mistrial following State's comment to jury that it "get[s] to decide whether or not somebody does what they're supposed to and said you know what, I made a mistake" because comment was brief, curative instructions were given during trial and in jury instructions, and there was strong enough evidence that appellant's conviction was certain).

We overrule Benitez's third issue.

Conclusion

We affirm the judgment of the trial court

Rebeca Huddle
Justice

Panel consists of Chief Justice Radack and Justices Bland and Huddle.

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