In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-16-00082-CR

ISAIAH CHRISTOPHER ROBERTS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 188th District Court
Gregg County, Texas
Trial Court No. 44,118-A

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Justice Burgess

M E M O R A N D U M O P I N I O N

A Gregg County jury found Isaiah Christopher Roberts guilty of capital murder for the shooting deaths of Kimberly Rayson and Chanda Martin. Roberts was sentenced to the mandatory punishment of life imprisonment without parole.[1]

On appeal, Roberts argues that (1) the jury's verdict of guilt is not supported by legally sufficient evidence, (2) the trial court erred in denying his motion to suppress evidence obtained as a result of an allegedly unlawful seizure of cell phones and other electronics, (3) the jury charge was erroneous because it failed to charge the jury on the lesser-included offense of murder or include an Article 38.36 limiting instruction, and (4) the trial court erred in overruling his various motions for a mistrial.

We conclude that legally sufficient evidence supported the jury's finding of Roberts' guilt for capital murder. We also conclude that (1) the trial court properly overruled Roberts' motion to suppress evidence obtained from the cell phones, (2) no harm can be shown from the failure to grant the motion to suppress evidence obtained from other electronics because no evidence gathered from them was admitted at trial, (3) there was no error in the jury charge, and (4) with respect to the only motion for a mistrial preserved for our review, the trial court did not abuse its discretion in overruling it. Accordingly, we affirm the trial court's judgment.

[1]*See* TEX. PENAL CODE ANN. §§ 12.31(a)(2), 19.03(a)(2), (b) (West Supp. 2016).

I. Legally Sufficient Evidence Supported the Jury's Finding of Guilt

A. The Evidence at Trial

Martin and Roberts were married in 2014 and were divorced the same year. After the divorce, Roberts began dating his long-time friend, Lakeitha Goss. Subsequently, Roberts called off his relationship with Goss because he was "going back to his . . . ex-wife." The evidence at trial demonstrated that the murders were a result of Roberts' anger and jealousy resulting from his belief that Martin was dating James Thomas while she was reconciling with Roberts.

1. The Two Days Before the June 15 Murders

On June 13, 2014, Martin and Roberts were seen shopping together for running shoes. The next day, Thomas attended a track meet with Martin and her daughters, and Martin posted a photograph and a digital recording of Thomas with her daughters on Facebook. Roberts' older brother, Carlos Roberts, testified that Martin and Roberts were in the process of getting back together when Roberts saw the photograph and a digital recording on Facebook.

Goss testified that Roberts had called her on the night before the murders and expressed his dismay over the Facebook posts. Carlos testified that he received a text message from Roberts stating, "I will never fall in love again. It's all about me now. I love you and daddy, just remember that. . . . Just know love about to go get rid of this N-I-G-G-A." When Carlos urged Roberts not to hurt Thomas, Roberts responded, "Not just him, her too."

2. The Day of the June 15 Murders

The following morning, Thomas testified that a man called him on the phone at 8:14 a.m. and asked if he was "talking to [Martin]." Thomas informed the man that he was dating Martin

and added, "If you got a problem you come see me like a man." Although Thomas testified that he was not sure who was calling him, he heard the man say that he was on his way over. According to Thomas, the morning telephone call woke Martin, who called her friend, Rayson.

Goss testified that she received a call from Roberts approximately one hour before the murders. According to Goss, Roberts said that he was threatened by "some guy" and was going to Martin's home in Longview, Texas. Roberts' statements prompted Goss to warn Roberts to turn around and return to his home in Tyler, Texas. Carlos testified that Roberts also told him that he was being threatened by Thomas, Martin, and Rayson and that he could not "ride around the rest of his life watching his back, waiting on somebody to kill him." When Roberts hung up the phone, Carlos called Rayson. According to Carlos, Rayson said, "[W]e told him to come down here. He's going to get dealt with. It's going to end today."

The evidence established that, after calling Rayson, Martin called her mother, Pauline Bridges, at 8:36 a.m. According to Bridges, Martin appeared upset and afraid and said Roberts was on his way to her house to "do something to her." Bridges advised Martin that she was on her way to the house and told her to hang up and call 9-1-1 in the meantime. By the time Bridges arrived at Martin's home, "[a]ll [she] could see was yellow tape."

3. Witness Testimony About the Murders

Thomas testified that he was in the back of Martin's house when he heard a gunshot. He immediately decided to break out the back window and escape the home. When he heard a car speeding off, he returned to the house to find Martin and Rayson dead. Although Thomas testified

that he never saw the shooter, several of Martin's neighbors, including Kenneth Hays, Wilma Morgan, and Sharon Cole, witnessed the execution-style murders.

Hays testified that he was outside at the time Roberts arrived and, from twenty-five yards away, watched as Rayson was shot in the head in Martin's driveway. Hays told the jury that he was so close to the scene that the shooter looked up and noticed him, prompting Hays to retreat into his house to call 9-1-1. Hays identified the shooter as Roberts and testified that he also saw Roberts enter Martin's house and heard gunshots inside of the house. Hays also testified that Roberts was chasing a man, but soon jumped into his black truck and fled. Hays described the gun that Roberts was carrying as a silver .40 or .45 caliber weapon.

Morgan testified that she heard gunshots, looked out of the window, and saw "a tall black guy, long dreadlock hair, standing in the driveway." She dialed 9-1-1 as soon as she saw that Roberts was holding a gun. While on the phone with the dispatcher, Morgan witnessed Roberts enter Martin's home, and she testified that he soon jumped in his black truck and fled the scene. Morgan told the jury that she had seen the shooter on many occasions and pointed to Roberts as the shooter during an in-court identification.[2]

Cole also called 9-1-1 to report the gunshots. She reported that she had seen the shooter at Martin's home regularly in the past, but had not recently noticed him there. She described the man she had seen as a black male with dreadlocks. Cole testified that Thomas, who initially had run away, returned to the scene, "very emotional . . . shaking, very upset." According to Cole, Thomas said that Roberts was the shooter. Cole's husband, Mickey Ray Cole, testified that he looked out

[2]Morgan also identified Roberts' truck as the one that exited the scene after the shooting.

of the window after hearing the gunshots and saw someone run past his window holding a weapon. Mickey, who had seen the man "300" times, identified him as Roberts.

Goss testified that Roberts called her and said, "I shot her and her friend," and hung up. She received a text message from Roberts stating, "I'm on 271 with the laws." Dispatchers from the Longview Police Department[3] issued a warning to patrol officers to be on the lookout for "a black male with dreadlocks wearing a black or dark shirt and driving a black truck." Officer Amy Works spotted a black truck driven by a person matching the suspect's description and initiated pursuit of the vehicle. The truck led Works and other officers who joined the pursuit on a high-speed chase. Officer Luke Altman testified that the truck ran red lights, "evading" all the way from Longview to Tyler. Officer Andrew Allison described the chase as "very scary."

Eventually, officers were able to apprehend and arrest Roberts, who was wearing a black t-shirt with the lettering "Only God can judge me." Altman testified that he saw a gun wedged between the driver's seat and the center console and a .40 caliber "Hi-Point" pistol openly sitting in the passenger seat. Altman testified that he saw these weapons and "a short AK 47 style pistol" in the backseat. Roberts' truck was towed to the Longview Police Department lot, and a warrant was obtained for its search.

Detectives Travis Prew and Chris Taylor testified that, in addition to the weapons found in the truck, officers confiscated a Crown Royal bag containing .40 caliber live rounds with Smith & Wesson head stamps, a black iPhone located near the center console of the vehicle, an iPad mini,

[3]Unless otherwise specified, all law enforcement personnel mentioned in this opinion were employed by the Longview Police Department at the time of the shooting.

and another black and silver iPhone. Taylor testified that no relevant data was found on the iPad or black and silver iPhone. However, telephone logs recovered from Roberts' black iPhone showed, in addition to many phone calls, 149 text messages exchanged between Martin and Roberts during the day of and the day before the murders.[4]

Prew testified that he had located .40 caliber Smith & Wesson shell casings at the crime scene which matched the bullets recovered from Roberts' truck. Nathan Tunnell, a firearms and toolmarks examiner for the Texas Department of Public Safety, testified that his examination revealed that a bullet submitted to him from the crime scene was fired from the .40 caliber Hi-Point pistol found in Roberts' truck.

At the close of the evidence, the jury concluded that Roberts had committed capital murder.

B. Standard of Review

In evaluating legal sufficiency, we review all the evidence in the light most favorable to the trial court's judgment to determine whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt. *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *Hartsfield v. State*, 305 S.W.3d 859, 863 (Tex. App.—Texarkana 2010, pet. ref'd). Our rigorous legal sufficiency review focuses on the quality of the evidence presented. *Brooks*, 323 S.W.3d at 917–18 (Cochran, J., concurring). We examine legal sufficiency under the direction of the *Brooks* opinion, while giving deference to the responsibility of the jury "to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Hooper v. State*,

[4]According to Taylor, Rayson never contacted Roberts' phone during the relevant time period.

214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson*, 443 U.S. at 318–19); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

Legal sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). The "hypothetically correct" jury charge is "one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Id*.

Section 19.03(a)(7) of the Penal Code provides that a person commits capital murder if "the person commits murder under Section 19.02(b)(1) and . . . the person murders more than one person . . . during the same criminal transaction." TEX. PENAL CODE ANN. § 19.03(a)(7)(A) (West Supp. 2016). "A person commits [murder] if he intentionally or knowingly causes the death of an individual." TEX. PENAL CODE ANN. § 19.02(b)(1) (West 2011). "Intent can be inferred from the acts, words, and conduct of the accused." *Patrick v. State*, 906 S.W.2d 481, 487 (Tex. Crim. App. 1995).

Here, the State's indictment, configured from Section 19.03(a)(7) of the Texas Penal Code, alleged that

> ISAIAH CHRISTOPHER ROBERTS . . . did then and there intentionally and knowingly cause the death of an individual, namely, Kimberly Rayson, by shooting Kimberly Rayson with a firearm, and did then and there intentionally and knowingly cause the death of another individual, namely, Chanda Martin, by

shooting Chanda Martin with a firearm, and both murders were committed during the same criminal transaction.[5]

C. Analysis

On appeal, Roberts argues the evidence is legally insufficient to prove two of the required elements, namely (1) that he was the person who committed the murders and (2) that both murders occurred during the same criminal episode. We disagree.

Ample evidence established Roberts was the person who murdered Martin and Rayson, including testimony from Goss, Carlos, and Martin's neighbors. Shortly after dispatchers were informed of the shooting, Roberts was caught fleeing the scene. Evidence recovered from both the crime scene and his truck further supported the jury's finding on the element of identity. Additionally, Carlos' testimony that Roberts was threatened by Rayson and planned to harm Martin, and the close proximity of the two murders established that the murders occurred during the same criminal episode.

[5]The trial court correctly charged the jury on the elements of the offense. The jury was instructed as follows:

> You must determine whether the state has proved, beyond a reasonable doubt that:
>
> 1. on or about the 15th day of June, 2014,
> 2. in Gregg County, Texas,
> 3. the defendant,
> 4. intentionally or knowingly,
> 5. caused the death of an individual, Kimberly Rayson,
> 6. by shooting her with a firearm, and
> 7. intentionally or knowingly,
> 8. caused the death of an individual, Chanda Martin,
> 9. by shooting her with a firearm, and,
> 10. both murders were committed during the same criminal transaction.
>
> If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, 4, 5, 6, 7, 8 ,9, and 10 listed above, you must find the defendant "not guilty" of Capital Murder.
>
> If you all agree the state has proved each of the ten elements above, you must find the defendant "guilty" of Capital Murder.

In sum, we find the evidence legally sufficient to support the jury's finding of guilt. Accordingly, we overrule Roberts' first point of error.

II. The Trial Court Did Not Err in Overruling a Motion to Suppress the Evidence

Roberts filed a motion to suppress evidence obtained as a result of an allegedly illegal seizure of two cell phones and other electronics. Specifically, Roberts argued that the warrant allowing the search of his car failed to specify that these items could be seized.

A. Standard of Review

We review a trial court's ruling on a motion to suppress under a bifurcated standard of review, giving almost total deference to the trial court's determination of historical facts that turn on credibility and demeanor while reviewing de novo other application-of-law-to-fact issues. *Johnson v. State*, 68 S.W.3d 644, 652–53 (Tex. Crim. App. 2002); *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000). Appellate courts should also afford nearly total deference to trial court rulings on application-of-law-to-fact questions, also known as mixed questions of law and fact, if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). Appellate courts may review mixed questions of law and fact not falling within this category on a de novo basis. *Id.* We must affirm the decision if it is correct on any theory of law that finds support in the record. *Osbourn v. State*, 92 S.W.3d 531, 538 (Tex. Crim. App. 2002).

B. The Suppression Hearing

At the suppression hearing, Allison recalled the events leading to Roberts' arrest. He testified that he received a notice from dispatchers that a "black male with dreadlocks in a black

truck" had shot people and fled the scene. After Works had initiated pursuit of Roberts' vehicle, Allison joined the chase. Allison testified that, after the chase had ended, he opened the driver side door of Roberts' vehicle and spotted a handgun in the passenger seat, an "assault-style pistol in the back seat," and "a handgun that was shoved down between the driver side seat and the center console." Photographs taken at the scene demonstrated that a weapon was clearly visible to officers from outside of Roberts' truck window.

The vehicle was then towed to a secure lot at the Longview Police Department. The affidavit supporting the search warrant authorizing the search of Roberts' truck was executed by Reeves and stated that she believed that the vehicle contained "ammunition, weapons, and evidence from involvement in a Murder." The relevant facts supporting Reeves' belief, which were contained in the affidavit, were:

- Neighbor Wilma Morgan said she heard gunshots, looked out of her front window, and identified Roberts as he exited the house and left the scene in a black truck.
- "[Thomas, who was found at the scene of the crime, stated] that Isaiah Roberts, Suspect, called Thomas twice this morning and Roberts stated Roberts was going to 'beat his ass.'" "Detective Davis confirmed two incoming calls from Suspect's number to Thomas' number at 8:13AM and 8:14AM on 6/15/2014. Thomas told Davis [that he] told Roberts, 'I'm here' meaning Thomas was at 300 Thelma."
- Neighbor Kenneth Hayes identified the shooter as "a black male with dreadlocks."
- Neighbor Randolph Linwood said he saw "a black male with dreadlocks exit the house on 300 Thelma and drive away in a black truck."
- Officer Amy Works saw "a black truck driven by a black male with dreadlocks" that was speeding and "swerving from lane to lane." When Works initiated a traffic stop, Roberts initiated a high-speed chase.
- Roberts caused an accident, continued to flee, but was eventually apprehended and arrested.
- Detective Terry Davis informed Reeves that he "was able to see two pistols through the window of the Suspect's Vehicle."

The signed warrant incorporated Reeves' affidavit "as if written verbatim within the confines of this Warrant," made a finding that probable cause existed to search Roberts' vehicle, and commanded officers to "seize . . . tools used in the commission of a Murder to wit: ammunition, weapons and/or other items used in the commission of said offense that may be found."

Detective Travis Prew testified that a cell phone, iPhone, laptop, and Verizon tablet were found during the search of Roberts' vehicle. Prew further stated that, once these items were seized, officers then applied for a second warrant so that they could search these items.

C. Analysis

The Fourth Amendment provides individuals "[t]he right . . . to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. We initially note that the evidence taken from the items seized was obtained only after a search warrant was secured. Thus, Roberts does not complain of the search of the contents of the cell phones or other electronics. Instead, Roberts takes issue with the seizure of those items. Although the seizure of those items was the result of a lawful search of the automobile pursuant to a warrant, Roberts argues that the affidavit and search warrant only allowed for the seizure of "tools used in the commission of a Murder to wit: ammunition, weapons and/or other items used in the commission of said offense that may be found." Because Roberts argues that the warrant failed to specifically describe the cell phones and electronics, he contends that it was an evidentiary search

warrant that required officers to have probable cause that evidence relating to the murders would be found on the cell phone.[6]

First, nothing from the laptop, tablet, or the black and silver iPhone was admitted into evidence. Thus, no harm can be shown from the trial court's decision not to suppress evidence obtained from those electronics. Accordingly, we discuss the failure to suppress evidence from Roberts' black iPhone.

The Texas Court of Criminal Appeals has explained that, "[i]n some instances[,] 'mere evidence' which is not specifically listed in the warrant may be discoverable." *Joseph v. State*, 807 S.W.2d 303, 307 (Tex. Crim. App. 1991) (quoting *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 307 (1967)). "Mere evidence is evidence connected with a crime, but does not consist of fruits, instrumentalities, or contraband." *Id.* "Officers may seize mere evidence when the objects discovered and seized are reasonably related to the offense under investigation and the discovery is made in the course of a good faith search conducted within the parameters of a valid search warrant." *Id*.

The search of Roberts' car was conducted within the parameters of a valid search warrant. Reeves' affidavit stated that Thomas had received threatening messages from Roberts, including

[6]The State argues that the automobile exception authorized the seizure of the cell phone. "The 'automobile exception' permits officers to conduct a warrantless search of a motor vehicle if the officer has probable cause to believe that the vehicle contains evidence of a crime." *Dahlem v. State*, 322 S.W.3d 685, 689 (Tex. App.—Fort Worth 2010, pet. ref'd) (citing *Chambers v. Maroney*, 399 U.S. 42, 48 (1970); *Powell v. State*, 898 S.W.2d 821, 827 (Tex. Crim. App. 1994)). "Accordingly, where there is probable cause to search a vehicle, exigent circumstances to justify a warrantless search are not required." *Id.* (citing *State v. Guzman*, 959 S.W.2d 631, 634 (Tex. Crim. App. 1998)). "An officer's observation of contraband or evidence of a crime in plain view inside an automobile can be used to establish probable cause to seize the contraband or evidence." *Id.* (citing *Colorado v. Bannister*, 449 U.S. 1, 4, (1980) (per curiam)). "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *Id.* (citing *United States v. Ross*, 456 U.S. 798, 825 (1982)). Because a warrantless search is not at issue here, we need not consider the automobile exception.

a message that Roberts had arrived at Martin's home. Assuming that probable cause was required, we conclude that Thomas' statements to Davis, as set forth in Reeves' affidavit, supplied officers with probable cause to conclude that evidence of Roberts' threatening messages to Thomas, which could link Roberts to the murders, could be found on the cell phone. Thus, we conclude that the seizure of the cell phone was lawful.[7] Accordingly, we overrule Roberts' second point of error.

III. There Was No Error in the Jury Charge

"[T]he jury is the exclusive judge of the facts, but it is bound to receive the law from the court and be governed thereby." TEX. CODE CRIM. PROC. ANN. art. 36.13 (West 2007). "A trial court must submit a charge setting forth the 'law applicable to the case.'" *Lee v. State*, 415 S.W.3d 915, 917 (Tex. App.—Texarkana 2013, pet. ref'd) (quoting TEX. CODE CRIM. PROC. ANN. art. 36.14 (West 2007)). "The purpose of the jury charge . . . is to inform the jury of the applicable law and guide them in its application. It is not the function of the charge merely to avoid misleading or confusing the jury: it is the function of the charge to lead and prevent confusion." *Id*. (quoting *Delgado v. State*, 235 S.W.3d 244, 249 (Tex. Crim. App. 2007)).

[7]Reeves testified that Goss stated that Roberts called her on the day before the murder "upset and crying" because he had seen a digital recording on Facebook of Martin and Thomas. According to Reeves, Goss also said that Roberts informed her that "someone's boyfriend" and Rayson had threatened to harm him. Roberts called Goss at about 8:51 a.m. to inform her that he was on his way to Longview. Reeves testified that Roberts called Goss at 9:02 a.m. to tell her that he "shot [Martin] and her friend." In discussing a series of text messages between Goss and Roberts, Reeves testified,

> the first message from [Goss] to [Roberts], which said, "Tell me you're playing." And the response message from [Roberts] said, "No." The next message from [Goss] said, "You need to stay and do the right thing." And [Roberts'] next message said, "On 271 with the laws." [Goss'] last text message to [Roberts] was, "Please tell me you're kidding." And then there was no response after that.

Reeves did not speak with Goss until after the search.

We employ a two-step process in our review of alleged jury charge error. *See Abdnor v. State*, 871 S.W.2d 726, 731 (Tex. Crim. App. 1994). "Initially, we determine whether error occurred and then evaluate whether sufficient harm resulted from the error to require reversal." *Wilson v. State*, 391 S.W.3d 131, 138 (Tex. App.—Texarkana 2012, no pet.) (citing *Abdnor*, 871 S.W.2d at 731–32).

A. The Trial Court Did Not Err in Failing to Charge the Jury on the Lesser-Included Offense of Murder

During the charge conference, Roberts asked the trial court to include an instruction on the lesser-included offense of murder.[8] The trial court denied the request, adding, "I don't think that's been raised by the evidence." We agree.

In order to be entitled to a lesser-included offense instruction, the record must "contain some affirmative evidence that would permit a jury rationally to find that, if a defendant is guilty, he is guilty only of the lesser-included offense." *Nguyen v. State*, 506 S.W.3d 69, 81 (Tex. App.—Texarkana 2016, pet. ref'd) (citing *Schmidt v. State*, 278 S.W.3d 353, 362 (Tex. Crim. App. 2009)). Thus, "[t]he evidence must establish the lesser-included offense as a valid rational alternative to the charged offense." *Id.* (citing *Wesbrook v. State*, 29 S.W.3d 103, 113–14 (Tex. Crim. App. 2000)).

[8]On appeal, Roberts argues, "The jury here heard evidence that two persons were shot and killed. There were, therefore, two murders. There was evidence of at least one murder under §19.02(b)(1), TEX. PENAL CODE. How could there not be?" Though lacking in clarity, we assume that Roberts contends that the trial court was required to submit the lesser-included offense of murder because there was proof of at least one murder. However, as explained in this opinion, Roberts' argument misses the mark on when an instruction on lesser-included offenses is required.

"Anything more than a scintilla of evidence is sufficient to entitle a defendant to an instruction on the lesser charge." *Id*. (citing *Ferrel v. State*, 55 S.W.3d 586, 589 (Tex. Crim. App. 2001)). "However, if a defendant . . . presents no evidence and there is no affirmative evidence otherwise showing he is guilty only of a lesser-included offense, then a charge on a lesser-included offense is not required." *Id.* (citing *Bignall v. State*, 887 S.W.2d 21, 22–24 (Tex. Crim. App. 1994); *Aguilar v. State*, 682 S.W.2d 556, 558 (Tex. Crim. App. 1985)).

Here, the evidence firmly established that Martin and Rayson were murdered in the same criminal episode. There was no evidence in the record suggesting that only one murder occurred or that Roberts only committed one of the murders. Therefore, we conclude that Roberts was not entitled to the lesser-included offense of murder. We overrule Roberts' third point of error.

B. The Charge Was Not Required to Contain an Article 38.36 Limiting Instruction

At the charge conference, Roberts argued, unsuccessfully, for the inclusion of a limiting instruction that tracked the language of Article 38.36 of the Texas Code of Criminal Procedure. Article 38.36 permits parties to introduce evidence of " all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense." TEX. CODE CRIM. PROC. ANN. art. 38.36(a) (West 2005). Roberts argued that the trial court's decision to omit an Article 38.36 instruction was erroneous.

In support of his argument, Roberts cites to *Milner v. State*, 262 S.W.3d 807 (Tex. App.—Houston [1st Dist.] 2008, no pet.). However, the *Milner* holding is in direct opposition to Roberts' position. In fact, in deciding *Milner*, the court wrote:

> Many courts have held that the rule stated in Article 38.36 and its predecessors is a rule of evidence and that the trial court is not required to give an instruction on it to the jury. *Huizar v. State*, 720 S.W.2d 651, 654 (Tex. App.—San Antonio 1986, pet. ref'd); *Gold v. State*, 691 S.W.2d 760, 764 (Tex. App.—El Paso 1985), *aff'd* 736 S.W.2d 685 (Tex. Crim. App. 1987); *see also Roberson v. State*, 144 S.W.3d 34, 42 (Tex. App.—Fort Worth 2004, pet. ref'd) (holding that giving an instruction on Article 38.36 is not mandatory). It is not improper to give such an instruction. *Valentine v. State*, 587 S.W.2d 399, 401–02 (Tex. Crim. App. 1979). However, it is not reversible error to refuse to do so. *Roberson*, 144 S.W.3d at 42; *Huizar*, 720 S.W.2d at 654; *see also Gold*, 691 S.W.2d at 764.

Id. at 808 (footnotes omitted). Because inclusion of an Article 38.36 instruction is not required, the trial court did not err in omitting it. Therefore, we overrule Roberts' fourth point of error.

IV. Roberts' Various Motions for a Mistrial

A. Any Issue Concerning Motion for a Mistrial Regarding "Justice for Kim" T-Shirts Worn by Spectators Was Not Preserved

After both sides rested and closed, Roberts made the following motion for a mistrial:

> As the Court knows, we had a discussion at the Bench, there were some members in the gallery that had shirts on that had some photographs, you know, white shirts, and on the back it had hash tag justice for Kim, things of that nature on the back. I acknowledged we didn't see them come in. I believe they did come in late, and members of the DA's office . . . brought it to our -- and the Court's attention. And, obviously, the record shows the Court did respond when we had the gallery remain seated so they wouldn't be -- they wouldn't stand up and the jury could potentially see what was on the shirt.
>
> The shirts were white with photographs on the front. And admittedly I couldn't, from this perspective, when they did stand up, identify the pictures and what was on them. But when they did turn around I did see the hash tag and the justice writing on the back. I could identify that.
>
> It puts us in a spot with asking the jurors, did you see this, or, did you see anything, because they may wonder, what did I miss, and it gets them thinking. So

> it really puts [the defense] . . . in a quandary as to how to respond to that, as well as the Court bringing anything out if they didn't see it. Given that, there's no real way to address it. We would move for mistrial . . . .

The State responded by stating that the five individuals wearing the t-shirts were seated in the third row of the audience, that the distance between the third row and the prosecutor made it difficult for the State to see the writing on the t-shirts, that the State approached the bench as soon as the State's investigator brought the matter to the State's attention, that the jury was removed while the audience was seated, and that all individuals wearing t-shirts were removed from the courtroom before the jury was brought back in. The trial court overruled Roberts' motion for a mistrial, which Roberts contends was error.

Initially, we must decide whether Roberts has preserved this point of error for our review. "[T]he traditional and preferred procedure for a party to voice its complaint has been to seek them in sequence—that is, (1) to object when it is possible, (2) to request an instruction to disregard if the prejudicial event has occurred, and (3) to move for a mistrial if a party thinks an instruction to disregard was not sufficient." *Young v. State*, 137 S.W.3d 65, 69 (Tex. Crim. App. 2004). "A party may skip the first two steps and request a mistrial," but error on appeal is only preserved if an "instruction to disregard would not have cured [. . .] the harm flowing from the error." *Unkart v. State*, 400 S.W.3d 94, 99 (Tex. Crim. App. 2013); *see Brewer v. State*, 367 S.W.3d 251, 253 (Tex. Crim. App. 2012). If "[t]he appellant [does] not request a curative instruction before moving for a mistrial," he "forfeit[s] appellate relief for an error that could have been cured by such an instruction." *Brewer*, 367 S.W.3d at 253.

Here, although Roberts' motion for a mistrial was overruled, he failed to either object on the record or request the intermediate remedy of providing an instruction for the jury to disregard the objectionable matter. The record demonstrates that the failure to object or request an instruction to disregard the t-shirt was the result of trial strategy because it appeared that the jury may not have actually seen the t-shirts.

An instruction to disregard is presumed to cure the harm from almost any improper question, remark, or argument, and it is presumed that a jury will follow an instruction to disregard. *See Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000); *see Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999). Based on the record, we find nothing which would overcome those presumptions. Accordingly, we presume that an instruction to disregard the t-shirts would have been sufficient to cure any harm or prejudice they caused, and therefore, Roberts' failure to request such an instruction results in the forfeiture of his appellate complaint on this point. Because Roberts' fifth point of error is not preserved, we overrule it.

B. The State's Comment About Roberts' Smirk Did Not Require Declaration of Mistrial

A mistrial is appropriate only when the objectionable event is so inflammatory or pervasive that a curative instruction is not likely to prevent the jury from being unfairly prejudiced against the defendant. *See Bauder v. State*, 921 S.W.2d 696, 698 (Tex. Crim. App. 1996), *overruled on other grounds by Ex parte Lewis*, 219 S.W.3d 335 (Tex. Crim. App. 2007). We review a trial court's denial of a mistrial under an abuse-of-discretion standard. *Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009); *Sanders v. State*, 387 S.W.3d 680, 687 (Tex. App.—Texarkana 2012, pet. struck).

We consider "the evidence in the light most favorable to the trial court's ruling, considering only those arguments before the court at the time of the ruling." *Ocon*, 284 S.W.3d at 884 (citing *Wead v. State*, 129 S.W.3d 126, 129 (Tex. Crim. App. 2004)). If the ruling was within the zone of reasonable disagreement, it must be upheld. *Id.*; *Sanders*, 387 S.W.3d at 687.

The following transpired during the State's closing argument:

> So what does [Roberts] deserve? What justice does [Roberts] deserve? Do you really think he's sorry? I think I would have reacted the same way James Thomas did when he was on the stand. I don't know if you had the opportunity to see [Roberts] when James testified. I'll tell you what I saw. Isaiah Roberts sat there smirking and staring at him the whole time.
>
> [BY THE DEFENSE]: Your Honor, we object. It's improper comment on the demeanor of the defendant.
>
> THE COURT: I'll sustain.
>
> [BY THE DEFENSE]: Your Honor, we would ask for an instruction to disregard the comments of the prosecutor.
>
> THE COURT: Please disregard the comments of the prosecutor.
>
> [BY THE DEFENSE]: We move for a mistrial.
>
> THE COURT: Overruled.

"The approved general areas of argument are: (1) summation of the evidence, (2) reasonable deduction from the evidence, (3) answer to argument of opposing counsel, and (4) plea for law enforcement." *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000) (citing *Hathorn v. State*, 848 S.W.2d 101, 117 (Tex. Crim. App. 1992)). An argument outside the scope "of these approved areas . . .will not constitute reversible error unless, in light of the record as a whole, the argument is extreme or manifestly improper, violative of a mandatory statute, or

injects new facts harmful to the accused into the trial proceeding." *Id.* (citing *Todd v. State*, 598 S.W.2d 286, 296–97 (Tex. Crim. App. [Panel Op.] 1980)). "The remarks must have been a willful and calculated effort on the part of the State to deprive appellant of a fair and impartial trial." *Id.* (citing *Cantu v. State*, 939 S.W.2d 627, 633 (Tex. Crim. App. 1997).

"In most instances, an instruction to disregard the remarks will cure the error." *Id.* (citing *Wilkerson v. State*, 881 S.W.2d 321, 327 (Tex. Crim. App. 1994)). "[T]he prosecutor's comment [in this case] was quickly followed by an instruction to disregard from the trial court which we presume was complied with by the jury." *Id.* Here, we cannot say that the trial court abused its discretion in concluding that the State's remark was not so "offensive or flagrant" as to render the instruction ineffective or automatically warrant reversal. *See id.* at 116. Accordingly, we overrule Roberts' sixth point of error.

C. Any Issue Concerning Roberts' Motion for a Mistrial Based on Reeve's Testimony Was Not Preserved

In response to a question by the State, Detective Reeves testified, "The first place . . . I went to, was . . . Smith County Jail in an attempt to get a statement from [Roberts]. We weren't able to do that." While there was no objection to Reeves' testimony at the time, Roberts raised the issue in a motion for a mistrial made after both parties had rested. Roberts argued that Reeves' comment constituted "a comment on his Fifth Amendment right to remain silent," and he moved for a mistrial on that basis. In his last point of error, Roberts argues that the trial court erred in overruling that motion for a mistrial.

The Texas Rules of Appellate Procedure require an objection to be made in a timely manner in order to preserve error. TEX. R. APP. P. 33.1(a)(1). "To be timely, a motion for mistrial must

be 'raised at the earliest [possible] opportunity' or 'as soon as the ground . . . becomes apparent.'" *Russell v. State*, 146 S.W.3d 705, 716 (Tex. App.—Texarkana 2004, no pet.) (quoting *Martinez v. State*, 867 S.W.2d 30, 35 (Tex. Crim. App. 1993); *Ponce v. State*, 127 S.W.3d 107, 110 (Tex. App.—Houston [1st Dist.] 2003, no pet.)).

In *Griggs v. State*, the Texas Court of Criminal Appeals held that Griggs failed to preserve his complaint regarding the overruling of his motion for a mistrial where (1) the ground first became apparent during a witnesses' testimony and (2) Griggs failed to move for a mistrial until after the conclusion of the testimony. *Griggs v. State*, 213 S.W.3d 923, 927 (Tex. Crim. App. 2007). "If a party delays [his] motion for mistrial, . . . the party [can] no more rely on the untimely motion for mistrial than on an untimely objection." *Id.* (quoting *Young*, 137 S.W.3d at 70).

As in *Griggs*, Roberts' failure to object to Reeves' testimony when the grounds for the objection were apparent, coupled with the delay in seeking a mistrial, leads us to the conclusion that error is unpreserved. Accordingly, we overrule Roberts' last point of error.

V. Conclusion

We affirm the trial court's judgment.

Ralph K. Burgess
Justice

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