

Concurring opinion issued December 29, 2011



**In The
Court of Appeals
For The
First District of Texas**

NO. 01-10-00989-CR

JOSEPH RENE HERNANDEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 10th District Court
Galveston County, Texas
Trial Court Case No. 09CR3387**

CONCURRING MEMORANDUM OPINION

I concur in the judgment. I do not agree that it is appropriate to engage in the panel majority's invited-argument analysis, which was not argued by the State in the trial court or on appeal, and which is not necessary to decide the appeal.

In her closing argument, the prosecutor told the jury that “we spared y’all some of the gory details of what happened.” Hernandez objected that the prosecutor was “[a]rguing outside the record of what they could or could not have put on.” The trial judge, who had presided over the entire trial, and who personally observed the closing arguments and heard the prosecutor’s argument in that context, sustained the objection. Then, at Hernandez’s request, the trial judge instructed the jury to “[d]isregard that last statement.” Such an instruction usually cures any error arising from improper jury argument. *See, e.g., Shannon v. State*, 942 S.W.2d 591, 597 (Tex. Crim. App. 1996); *Bryant v. State*, 340 S.W.3d 1, 13 (Tex. App.—Houston [1st Dist.] 2010, pet. ref’d).

A mistrial is warranted when a verdict of conviction would have to be reversed on appeal due to an obvious procedural error. *See Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999). Improper jury argument does not warrant a mistrial unless an instruction to disregard would not cure any resulting harm. *See Lucero v. State*, 246 S.W.3d 86, 101 (Tex. Crim. App. 2008). Harm could arise from jury-argument error based upon the interplay of several factors, including the severity of the misconduct, the measures adopted to cure the misconduct, and the certainty of conviction absent the misconduct. *See Berry v. State*, 233 S.W.3d 847, 858–59 (Tex. Crim. App. 2007). None of these factors suggest an irreparable harm in this case, when the improper argument was confined

to a single isolated instance, the trial judge immediately instructed the jury to disregard the statement, and the complainant personally testified as to all of the elements of the offense.

The trial court's denial of a mistrial is reviewed for abuse of discretion. *See Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007). The ruling in this circumstance must be upheld because it was within the zone of reasonable disagreement. I would not seek out some other justification for affirming that is inconsistent with the trial court's unchallenged ruling sustaining the objection.

Michael Massengale
Justice

Panel consists of Justices Keyes, Higley, and Massengale.

Justice Massengale, concurring in the judgment.

Do not publish. TEX. R. APP. P. 47.2(b).