Opinion issued October 5, 2021

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00788-CR

MARIE KENDALE KIMANI, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 271st District Court
Wise County, Texas
Trial Court Case No. CR20995

MEMORANDUM OPINION

A Wise County jury convicted appellant, Marie Kendale Kimani, of the first-degree felony offense of murder and assessed her punishment at forty years'

confinement and a $10,000 fine.[1] *See* TEX. PENAL CODE §§ 19.02(b)(1), (b)(2), (c), 12.32. In three issues, Kimani argues that the trial court abused its discretion in overruling her three motions for mistrial after (1) the State elicited testimony regarding Kimani's death threats made to "any person"; (2) the State published an inadmissible portion of a video interrogation of Kimani; and (3) the State asked improper questions about an inadmissible exhibit. We affirm.

Background

Kimani met and began dating Jonathan Tumbo, the complainant, in high school while they lived in Kenya. The relationship ended and the two went their separate ways. Kimani moved to the United States and became a United States citizen while Tumbo moved to Dubai. They eventually rekindled a long-distance relationship and later married in Dubai. After their marriage, Kimani continued living in the United States while Tumbo remained in Dubai until 2011, when he moved to the United States to live with Kimani. While still living in Dubai after marrying Kimani, Tumbo fathered a son with another woman and maintained contact with that child. Kimani did not find out about Tumbo's child until later in their marriage.

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[1] The Texas Supreme Court transferred this appeal from the Court of Appeals for the Second District of Texas to this Court pursuant to its docket equalization powers. *See* TEX. GOV'T CODE § 73.001. We are unaware of any conflict between the precedent of the Second Court of Appeals and that of this Court on any relevant issue. *See* TEX. R. APP. P. 41.3.

Kimani also had a son, Jeremy Muchemi, before she rekindled her relationship with and married Tumbo. Muchemi was born in Kenya, where he lived with an aunt until he was ten years old. When he was ten, Muchemi moved to the United States and lived with Kimani and Tumbo, Muchemi's stepfather. While living with Kimani and Tumbo, Muchemi twice had to return to Kenya, where he stayed each time for five or six months before returning to live with Kimani and Tumbo.

Muchemi testified at trial that Kimani and Tumbo initially had a strong and stable relationship that became rocky at times. Kimani and Tumbo had normal disagreements and would argue, but Muchemi did not see any physical violence. However, sometimes Kimani and Tumbo both would throw things in the house when they argued. In 2017, Kimani and Tumbo began sleeping in separate bedrooms, although they would sometimes share a bedroom. Kimani set the ground rules in the house, but Muchemi felt more bonded to Tumbo. Muchemi heard from Kimani and others that Tumbo had an extramarital affair. Kimani believed that Tumbo had had numerous affairs with other women, although Muchemi did not know whether that was true.

In June 2018, Kimani filed for divorce from Tumbo, and Tumbo agreed to it. The divorce was finalized two months later in August 2018. Tumbo began dating another woman, Arlinda Davis, around the time the divorce became final.

Tumbo spent the few nights before his death sleeping at Davis's house. The afternoon before he died, Tumbo visited Davis at a restaurant where she was working as a bartender. Kimani showed up at the restaurant, and Davis met her for the first time. Davis served Kimani a glass of water, and Kimani told Davis that she and Tumbo were still married. Kimani and Tumbo spoke briefly before Kimani left the restaurant. Later, Tumbo and Davis left the restaurant together, and Tumbo stayed the night at Davis's house. He received several text messages from Kimani that evening.

The following morning, on the day he died, Tumbo told Davis that he was going to get some belongings and his dog from Kimani's house and then return to Davis's house.[2] Davis sent Tumbo text messages throughout the day, but Tumbo responded only sporadically. At 5:30 p.m., Davis called Tumbo on his cell phone. Kimani answered Tumbo's phone and asked Davis what she wanted. Davis could hear Tumbo in the background telling her not to say anything to Kimani, but Davis did not speak directly to Tumbo. The phone call was brief. After it ended, Davis tried calling Tumbo's cell phone numerous times, but no one answered.

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[2] Tumbo's mother and a friend testified that Tumbo was planning to move out of Kimani's house and into Davis's house. However, Davis testified that, while the two had talked about moving in together and even having children together, she had not planned on Tumbo moving in with her at that time, which was early in their relationship.

At 7:15 p.m., Kimani called 911 to report that Tumbo had been shot. According to the dispatcher's trial testimony, Kimani told dispatch, "[W]e were fighting, I effed up." Police and paramedics arrived at Kimani's house at 7:30 p.m. Paramedics pronounced Tumbo dead soon after they arrived. Tumbo was found lying on his back on the floor of a closet with a firearm near his body. He had been shot once with a pink 9-millimeter handgun owned by Kimani. The bullet pierced Tumbo's heart and a lung and exited his back.

Kimani gave a statement to police at her home that evening. The trial court admitted a video recording of this statement. Kimani told investigators that she had unintentionally shot Tumbo.

The physical evidence showed that the bullet indented the carpet, padding, and concrete foundation underneath Tumbo's body. In addition, blood spatter on a wall near Tumbo's body was only twenty inches from the ground and there was no blood below the waistline on his body. Investigators testified that, based on this physical evidence, Tumbo was lying on the ground when he was shot. Additionally, J. Jeffress, a forensic scientist in the firearms section of the Department of Public Safety Crime Lab, tested the trigger pull on Kimani's handgun. Jeffress testified that the handgun was double-action, which generally has a heavier trigger pull required to discharge the handgun than for a single-action firearm. Kimani's handgun in particular had a heavy trigger pull. He explained that to fire, the gun required the

equivalent of two five-pound bags of flour suspended from the trigger if the firearm was in an upright position.

A Wise County grand jury returned an indictment against Kimani for first-degree murder. During the State's opening statement, the prosecutor argued that Kimani would threaten Tumbo when she believed he was having an affair with another woman. The prosecutor further argued that Kimani would stand over Tumbo as he slept and "at least one time . . . she was standing over him with a gun pointed at him and said, you look so peaceful, I could just pull the trigger and end it all right now." Kimani did not object to these statements.

During the guilt-innocence phase of trial, defense counsel moved for a mistrial twice. The first time, the State asked Muchemi if he had ever heard Kimani threaten to kill "any person," to which Muchemi responded, "Yes." The State asked if he had heard the threats "on few or many occasions," and Muchemi responded, "I would say depending on just anger in general, . . . it would be said." Kimani made the threats "out of anger." After Muchemi answered these questions, defense counsel objected to the line of questioning, arguing that it falsely impressed upon the jury that Kimani had threatened to kill Tumbo, it was misleading, and it was "extremely prejudicial." The trial court sustained the objection and, upon defense counsel's request, instructed the jury to disregard and not consider the State's questions and Muchemi's responses "concerning whether or not the accused had threatened to kill

someone or something such as that." The court asked the jury if it understood the instruction, and the jury responded, "Yes, Judge." Defense counsel then requested a mistrial, which the trial court denied. No other evidence of threats by Kimani was admitted at the guilt-innocence phase of trial.

Defense counsel moved for a mistrial a second time after the State published Kimani's videotaped statement to investigators on the night Tumbo died. In the video, Kimani told the detectives that she had given up custody of her son to Child Protective Services ("CPS").[3] The trial court had previously ruled that the statement was inadmissible. The State had agreed with defense counsel to redact the statement from the video exhibit published to the jury. Due to an inadvertent error in editing the video, however, the jury heard the statement. The video was immediately stopped, and the jury was excused from the courtroom. The court sustained defense counsel's objection to the statement, and the State apologized to the court for the editing error. Defense counsel asked the court to instruct the jury to disregard the statement, and the State joined in the request, which the court granted. The court also prohibited the State from playing the remainder of the video. When the jury returned to the courtroom, the court instructed the jury to disregard the officers' questions

[3] The version of this video exhibit that appears in the record on appeal does not include this statement, which the State redacted prior to placing it into the record. Nevertheless, the parties agree that the version of the video heard by the jury included the statement.

and Kimani's responses concerning Kimani's son, Muchemi. The jury answered affirmatively when the court asked both whether the jury understood the court's instruction and whether the jury would follow the instruction. Defense counsel then requested a mistrial, which the trial court denied.

At the conclusion of the guilt-innocence phase of trial, the charge to the jury included instructions to disregard evidence of certain extraneous conduct and to disregard and not consider for any purpose whatsoever any statements or facts which the court had previously instructed the jury to disregard. The jury returned a verdict of guilty for the first-degree felony offense of murder.

During the punishment phase of trial, defense counsel moved for a mistrial a third time. The State offered into evidence a letter that investigators had found in Kimani's closet, but the State was ultimately unable to authenticate it. While attempting to do so, the State asked several questions about the contents of the letter, and the trial court sustained objections by defense counsel for asking about the contents of the unauthenticated letter. In one of its questions, the State asked if the letter mentioned Muchemi's name and whether it contained a threat from Kimani. Defense counsel again objected, and the trial court again sustained the objection. Defense counsel asked the court to instruct the jury to disregard the question, and the court did so. The court denied a subsequent motion for a mistrial.

At the end of the punishment phase of trial, the jury assessed Kimani's punishment at forty years' incarceration and a $10,000 fine. This appeal followed.

Analysis

In three issues, Kimani contends that the trial court abused its discretion in denying her three motions for mistrial—two made during the guilt-innocence phase and one made during the punishment phase—after various references to prejudicial or inadmissible evidence.

A. Standard of Review and Governing Law

A mistrial is "an appropriate remedy in 'extreme circumstances' for a narrow class of highly prejudicial and incurable errors" in which the "expenditure of further time and expense would be wasteful and futile." *Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009) (citation omitted); *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004) (citations omitted). Appellate courts review a trial court's ruling on a motion for mistrial under an abuse of discretion standard. *Coble v. State*, 330 S.W.3d 253, 292 (Tex. Crim. App. 2010); *Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007). In conducting our review, we consider only the arguments that were before the trial court at the time that it ruled. *Wead v. State*, 129 S.W.3d 126, 129 (Tex. Crim. App. 2004). We will uphold the trial court's ruling if it was within the zone of reasonable disagreement. *Coble*, 330 S.W.3d at 292; *Wead*, 129 S.W.3d at 129.

In determining whether a trial court abused its discretion in denying a motion for mistrial, we consider: (1) the severity or prejudicial effect of the underlying conduct; (2) any curative measures adopted; and (3) the certainty of the conviction absent the misconduct. *Hawkins*, 135 S.W.3d at 77; *Hernandez v. State*, 454 S.W.3d 643, 649 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd). When counsel asks for a particular instruction and the trial court grants the request by saying, "the jury is so instructed," such an instruction is effective in most cases to cure any harm from improper testimony. *See Hawkins*, 135 S.W.3d at 84. Furthermore, we presume that the jury will follow the court's instructions. *Colburn v. State*, 966 S.W.2d 511, 520 (Tex. Crim. App. 1998). Ordinarily, "a prompt instruction to disregard will cure error associated with an improper question and answer, even one regarding extraneous offenses." *Hernandez*, 454 S.W.3d at 649–50 (quoting *Ovalle v. State*, 13 S.W.3d 774, 783 (Tex. Crim. App. 2000)); *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999) ("The asking of an improper question will seldom call for a mistrial, because, in most cases, any harm can be cured by an instruction to disregard."). However, sometimes testimony may be so egregious or inflammatory that it renders an instruction to disregard ineffective in curing the prejudice. *Buentello v. State*, 512 S.W.3d 508, 520 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd).

B. Kimani's death threats to "any person"

In her first issue, Kimani argues that the trial court abused its discretion in denying her motion for mistrial after the State elicited testimony from Muchemi that Kimani had made death threats to "any person." Kimani argues that the questions and responses were inflammatory and did not clarify that the threats were not made towards Tumbo and were made years before Tumbo's death. Thus, Kimani argues, the trial court's instruction to disregard was inadequate and insufficient to cure a false impression left upon the jury, and the likelihood of conviction was not certain absent the challenged questions and responses.

The State responds that Kimani did not timely object, and therefore any error is waived or harmless. The State further contends that the evidence was admissible because it was relevant to Kimani's intent to kill Tumbo, it was not unduly prejudicial because it asked about threats made to anyone, and any harm was alleviated by the trial court's instruction to disregard and the jury charge.

At trial, the following exchange occurred between the State and Muchemi:

> Q. Did you ever hear her [Kimani] threaten to kill any person? Yes or no?
>
> A. Yes.
>
> Q. Did that happen on few or many occasions?
>
> A. I would say depending on just anger in general, it would be—it would be said.

Q. Whenever the anger arose something like that would be said?

A. Yes, sir, out of anger.

Following this exchange, defense counsel objected to "this entire line of questioning" because it "left a false impression with the jury that they think she [Kimani] threatened to kill Jonathan [Tumbo]. That's not the case." Counsel also objected to the questions and responses as misleading and "extremely prejudicial." The trial court told the State that its pretrial extraneous offense disclosures listed only one threat by Kimani "to kill him [Muchemi] after discovering he was homosexual." The State argued that the threat was by Kimani to kill "people in the household," which it argued was relevant to Kimani's state of mind and willingness to threaten members of her household. The trial court sustained the objection.[4] Defense counsel then asked the court to "instruct the jury to disregard the last two questions and answers from the witness." The trial court granted the request and told the jury:

> Ladies and gentlemen, there was a question and answer given by the witness concerning whether or not the accused had threatened to kill someone or something such as that. I'm instructing you, first of all, to disregard the question and also disregard the answer to that question

[4] After the trial court sustained the objection, defense counsel stated, "We also feel that that is improper character evidence . . . ," to which the trial court responded, "Well, I'm sustaining the objection." Kimani does not argue on appeal that the trial court abused its discretion in denying her motion for mistrial on the ground that Muchemi's testimony constituted improper character evidence.

> and do not during your deliberations refer to any testimony about that question and answer from this witness.

The court asked if everyone understood, and the jury responded, "Yes, Judge."

We first address the State's argument that Kimani did not timely object in the trial court and therefore any error is waived. To preserve error for appellate review, the record must show that the complaint was made to the trial court by a timely objection stating the grounds of the complaint with sufficient specificity to make the trial court aware of the complaint, and that the trial court ruled on the request. TEX. R. APP. P. 33.1(a). An objection is timely when it is "made at the earliest possible opportunity." *Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002). Although Kimani did not object after Muchemi answered the first two questions, she objected to the line of questioning after the third question, and the trial court sustained the objection and instructed the jury to disregard all of the statements. In doing so, the trial court granted Kimani all the relief she sought, and she does not challenge these rulings on appeal. Rather she challenges the denial of her motion for mistrial. We conclude that Kimani timely moved for a mistrial.

The parties dispute the prejudicial effect of the State's questions and Muchemi's responses regarding Kimani's threats to "any person." The State argues that the testimony was relevant to Kimani's intent to kill Tumbo. *See* TEX. R. EVID. 401, 402. However, the State did not ask Muchemi whether Kimani had threatened to kill Tumbo, but rather whether she had threatened to kill "any person." The

colloquy at the bench indicated that the only threat previously disclosed by the State was Kimani's threat to kill Muchemi years earlier for a reason wholly unrelated to Tumbo or Kimani's intent to kill him. This threat was not made towards Tumbo and was not made near the time of his death. Thus, the testimony was not relevant to Kimani's intent to kill Tumbo. *See* TEX. R. EVID. 401 (providing that evidence is relevant if it has any tendency to make fact of consequence more or less probable).

Moreover, the jury could have interpreted Muchemi's responses to the State's ambiguous questions as threats made against Tumbo near the time of his death—the exact opposite of what the threats were. Prior to testifying that he had heard Kimani threaten to kill someone, Muchemi testified that he lived with Kimani and Tumbo. The jury reasonably could have inferred that Kimani issued death threats to Tumbo near the time of his death. The State made no attempt to limit or clarify its questions in this regard. Thus, the questions and responses had some prejudicial effect.

However, the trial court took measures to cure any prejudicial effect of the testimony. *See Brown v. State*, 505 S.W.2d 850, 855 (Tex. Crim. App. 1974) (stating that trial court's prompt instruction to jury to disregard witness's remark about defendant's death threats towards witness made it unnecessary to determine whether witness's remark was admissible). After Muchemi responded to the State's questions, the trial court instructed the jury to disregard the question and response concerning whether Kimani had threatened to kill someone. Such a prompt

instruction to disregard ordinarily will cure any prejudicial effect associated with an improper question and answer. *Ovalle*, 13 S.W.3d at 783. The trial court's instruction went further than simply telling the jury that it was "so instructed" by specifying the information that the jury was instructed to disregard and not consider during its deliberations. *See Hawkins*, 135 S.W.3d at 84 (stating that trial court's accession to counsel's request for particular instruction by stating "the jury is so instructed" will in most cases effectively cure any harm from improper argument). The court also asked the jury if it understood the instruction, and the jury responded affirmatively. *See Colburn*, 966 S.W.2d at 520 (stating appellate courts presume jury followed court's instruction to disregard).

Moreover, the jury charge in this case contained a substantially similar instruction. *See Hawkins*, 135 S.W.3d at 84 (stating that jury charge with correct instruction on parole eligibility law was curative measure of State's earlier misstatement of that law). The charge stated,

> As to any offer of evidence that has been rejected by the Court, you, of course, must not consider the same; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection. Certain facts or statements have been tendered in this case which the Court has instructed you to disregard. You are not to consider such statements or facts for any purpose whatsoever in your deliberations.

Thus, the jury was instructed again in the jury charge—at the end of the guilt-innocence phase of trial and before deliberations—that it must disregard and not

consider for any purpose whatsoever any facts or statements the jury had previously been instructed to disregard. Kimani cites to no part of the record indicating that the jury did not follow the instructions in this case.

We cannot say that Kimani would not have been convicted of murder absent Muchemi's responses. Kimani does not challenge the sufficiency of the jury's verdict. Kimani admitted to unintentionally killing Tumbo, and both parties agree on appeal that the primary issue at trial was Kimani's intent to kill. *See* TEX. PENAL CODE § 19.02(b)(1)–(2) (providing that person commits offense of murder if she "intentionally or knowingly" causes another person's death or if she "intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual"); *see also Walter v. State*, 581 S.W.3d 957, 969–70 (Tex. App.—Eastland 2019, pet. ref'd) (stating mens rea under subsection (b)(1) requires that accused intentionally or knowingly caused victim's death, while mens rea under subsection (b)(2) requires only that accused intended to cause serious bodily injury).

Intent to kill or to cause serious bodily injury may be shown by circumstantial evidence. *Ex parte Weinstein*, 421 S.W.3d 656, 668 (Tex. Crim. App. 2014); *Gilbert v. State*, 494 S.W.3d 758, 762 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). A jury may infer intent to kill from the accused's use of a deadly weapon in a deadly manner. *Adanandus v. State*, 866 S.W.2d 210, 215 (Tex. Crim. App. 1993) (stating

that "[i]f a deadly weapon is used in a deadly manner, the inference is almost conclusive that [the defendant] intended to kill"); *Walter*, 581 S.W.3d at 973 (citing *Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996)); *Reyes v. State*, 480 S.W.3d 70, 77 (Tex. App.—Fort Worth 2015, pet. ref'd).

The physical evidence in this case showed that Tumbo was shot through the heart at close range while lying on the ground in the closet. In a videotaped interview, Kimani admitted that she had shot Tumbo, albeit unintentionally. From this evidence, the jury reasonably could have inferred that Kimani intended to kill Tumbo by pointing a firearm at his chest, which is use of a deadly weapon in a deadly manner and, at the very least, shows an intent to cause serious bodily injury. *See Adanandus*, 866 S.W.2d at 215; TEX. PENAL CODE § 19.02(b)(2).

Other circumstances surrounding Tumbo's death also support an inference that Kimani intentionally or knowingly caused Tumbo's death. *See* TEX. PENAL CODE § 19.02(b)(1). They had recently divorced but were still living together. Tumbo had begun dating Davis shortly after the divorce, and Kimani told Davis the day before Tumbo died that she and Tumbo were still married. Kimani also answered Tumbo's phone when Davis called it shortly before his death and refused to allow Tumbo to speak to Davis. There was also testimony that Kimani believed Tumbo had had extramarital affairs, including fathering a child with another woman. When Kimani called 911 after Tumbo's death, she told the dispatcher that she and Tumbo

were fighting and she "effed up." A firearms analyst testified that Kimani's handgun had a heavy trigger pull rather than a hair trigger, which the jury could have inferred made the weapon less susceptible to an unintentional discharge. From this evidence, the jury reasonably could have determined that Kimani intentionally or knowingly killed Tumbo or intended to cause him serious bodily injury after Tumbo began dating a new woman. *See id.* § 19.02(b)(1)–(2). We therefore cannot say that the verdict would have been different had the jury not heard the questions and responses regarding Kimani's threats to kill "any person," which the jury was promptly and repeatedly instructed to disregard and to not consider for any purpose whatsoever. *See Davis v. State*, 329 S.W.3d 798, 806 (Tex. Crim. App. 2010) ("'Unfair prejudice' refers to a tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.") (citation omitted).

Muchemi's testimony about Kimani's threats to kill "any person" does not fall into the "narrow class of highly prejudicial and incurable errors" warranting a mistrial because the "expenditure of further time and expense would be wasteful and futile." *See Ocon*, 284 S.W.3d at 884. Therefore, the trial court did not abuse its discretion in denying the first motion for mistrial. We overrule Kimani's first issue.

C. Kimani's videotaped statement regarding CPS

In her second issue, Kimani argues that the State inadvertently played a portion of her videotaped interview with police in which she stated that she had given

custody of her son to CPS, which the court previously had ruled was irrelevant and highly prejudicial, and which Kimani and the State had agreed not to play. She contends that although the State did not engage in "misconduct per se," her only adequate remedy was a mistrial, particularly considering the cumulative effect of the questions and responses raised in her first issue.

The State responds that the videotape was immediately stopped and curative action taken, including an apology by the State, and that the CPS matter was not mentioned again. The State further argues that any prejudicial effect was limited because the statement was not that CPS took custody of her child and because other testimony about "issues" between Kimani and Muchemi cured any prejudicial effect of the statement.

At the outset, we note that the video included in the record on appeal has redacted the statement, and the court reporter did not transcribe the video as it played before the jury.[5] Nevertheless, the parties agree to the substance of the statement, and we presume for purposes of our decision that the parties have accurately represented Kimani's statement concerning CPS.

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[5] The record does include the State's representation of the statement: "The part that was to be redacted that was left in after that question was (Reading) 17. Where does he live? She says, I gave him up. And the question, Gave him up to? And she answers, CPS." Defense counsel responded, "That's my recollection of the events, how they unfolded."

After the challenged statement was played to the jury, defense counsel objected that publishing the statement violated the court's prior ruling that the statement was inadmissible and also violated the parties' agreement not to play it. Outside the presence of the jury, the State explained that it believed it had redacted the CPS statement from the video. The State apologized to the court three times for playing the unredacted video. Defense counsel asked the court to instruct the jury to disregard the statement and not consider it for any purpose, and the State joined in the request. The court granted the request and sua sponte prohibited the State from playing the remainder of the video. Kimani argued that no instruction to disregard would adequately cure the prejudicial effect of the statement and requested a mistrial. The court told defense counsel to ask for a mistrial in front of the jury.

When the jury returned, the trial court stated:

> Members of the jury, I need to instruct you to disregard at the very end of the video that you have been played—that's just been played to you as—as a jury—to disregard any questions asked by any of the officers that were asking questions in the video that concerns the Defendant's son, Jeremy Muchemi.
>
> I'm also instructing you to disregard any responses that Marie—that Ms. Kimani may have made, if she did, in response to those questions. I'm instructing you to disregard any of those questions and responses that were made by the Defendant in this case, and you are not to consider them, discuss them or in any way refer to them at any time when you go into your deliberations.
>
> Does everyone understand that?
>
> The Jury: Yes, sir.

The Court: All right. And will everyone follow my instructions?

The Jury: Yes.

After the court issued these instructions, defense counsel requested a mistrial, which the trial court denied.[6] The video was not played again to the jury.

Kimani's relinquishment of custody of her son to CPS was not relevant to the issue of Kimani's intent to kill Tumbo. To the extent the statement was prejudicial to the defense, we disagree with the State that such prejudice was cured by testimony about other "issues" between Kimani and Muchemi. *See Lane v. State*, 151 S.W.3d 188, 193 (Tex. Crim. App. 2004) ("An error [if any] in the admission of evidence is cured where the same evidence comes in elsewhere without objection.") (quoting *Leady v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998)).

While Muchemi responded that Kimani is his "biological mother" when asked how he knew Kimani, that response does not necessarily imply that Kimani did not have custody of Muchemi. Muchemi did not testify, for example, that he had an adoptive mother. Furthermore, Muchemi testified that he had lived in Kenya with an aunt until he was ten years old, at which point he moved to the United States and lived with Kimani and Tumbo. And although he travelled back to Kenya twice for

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[6] Defense counsel also requested that the court instruct the court reporter to transcribe the challenged part of the video for inclusion in the record, which the trial court granted. But, as stated above, the record on appeal does not include a transcription of any part of the video.

five or six months each time, there is no evidence that he returned to Kenya due to custody issues. He testified that when he moved to the United States, Kimani had only recently become a citizen, which also afforded him some rights and privileges. The more reasonable inference is that Muchemi had to return to Kenya for immigration reasons, not custody reasons. And finally, although Muchemi testified he was more bonded with Tumbo, a fellow male and an authority figure in his household, he also said that Kimani set the ground rules in the house, which is the type of behavior one would expect of a custodial parent. Even the State argued at times that Muchemi was a member of Kimani's household. Thus, we disagree with the State that error in the admission of Kimani's CPS statement was cured because the same evidence "[came] in elsewhere without objection." *See id.*

We also disagree with the State that we should give weight to its apology for the editing error as a curative measure. In *Hawkins*, the case on which the State relies, the Court of Criminal Appeals did state that the lower court "erred in failing to give any weight to the prosecutor's apology and retraction" in considering curative measures when denying a motion for mistrial. 135 S.W.3d at 84. There, the prosecutor had misstated the law of parole to the jury during the punishment phase of trial, and the trial court sustained Hawkins's objection and instructed the jury to disregard the comment but denied Hawkins's motion for mistrial. *Id.* at 74. In the jury's presence, the prosecutor asked for clarification of the misstatement and, after

the court clarified it, the prosecutor stated, "That was a misstatement. I did not mean to say that. . . . I'm sorry for that. . . . " *Id.* The court stated that a prosecutor's self-corrective action is relevant to the harm analysis and that, although such action may not carry the same weight as the trial court's instruction to disregard, it can render an improper comment harmless. *Id.* at 84.

Here, although the State apologized to the court for the redaction error, it did so outside the jury's presence, which does nothing to cure the statement made before the jury. *See id.* at 74. The State's apology bolstered its explanation to the court that it believed the inadmissible statement had been redacted from the video, and neither party disputes that the error was unintentional. But the State did not take any self-corrective action before the jury, and thus we need not consider the State's apology to the trial court as any curative measure.

Nevertheless, like the challenged questions and responses in Kimani's first issue, the trial court's instruction to disregard the challenged portion of the video was prompt. The court also obtained the jury's acknowledgement that the jury could not consider Kimani's statement for any purpose and that the jury would follow the court's instruction. And as quoted above, the jury charge further instructed the jury not to consider any statements that it previously had been instructed to disregard "for any purpose whatsoever in your deliberations." *See Orr v. State*, 306 S.W.3d 380, 403, 404–05 (Tex. App.—Fort Worth 2010, no pet.) (holding that court's instruction

to disregard cured prosecutor's highly prejudicial comment about timing of defendant's abortion at criminal trial for first-degree arson that killed appellant's husband); *Reed v. State*, 497 S.W.3d 633, 638–40 (Tex. App.—Fort Worth 2016, no pet.) (holding that court's instruction to disregard cured police officer's question to defendant in videotaped interview about whether defendant would take polygraph test, which is generally inadmissible for any purpose). We conclude that, in this case, the trial court's instruction to disregard Kimani's CPS statement, as well as the instruction in the jury charge, cured any prejudice from the statement.

Furthermore, for the reasons discussed above, the record on appeal contains evidence from which the jury could conclude that Kimani intentionally or knowingly caused Tumbo's death or intentionally caused him serious bodily injury. *See* TEX. PENAL CODE § 19.02(b)(1), (b)(2). We presume that the jury followed the instruction to disregard Kimani's CPS comment and did not consider it in returning its guilty verdict. *See Colburn*, 966 S.W.2d at 520.

Finally, the cumulative effect of the challenged evidence in Kimani's first two issues do not render the prejudice from the evidence incurable. The court promptly instructed the jury to disregard each comment, and each time the jury verbally affirmed that it understood the trial court's instruction. The jury charge included another instruction to disregard at the end of the guilt-innocence phase of trial, specifically instructing the jury not to consider facts or statements subject to prior

instructions to disregard. Kimani points to no record evidence showing that the cumulative effects of the statements were so extreme that they could not be cured by the trial court's prompt, repeated, extensive efforts to ensure that the jury disregarded the evidence. *See Ocon*, 284 S.W.3d at 884; *Hawkins*, 135 S.W.3d at 77. We therefore conclude that the trial court's denial of Kimani's second request for a mistrial was within the zone of reasonable disagreement, and that the court did not abuse its discretion in denying Kimani's second motion for mistrial. We overrule Kimani's second issue.

D. Questions about threats in an unauthenticated letter

In her third issue, Kimani argues that during the punishment phase of trial, while trying to authenticate a letter, the State improperly attempted to elicit testimony about the contents of the letter, particularly testimony that the letter contained a threat from Kimani. Kimani contends that the misconduct was severe because the trial court had already sustained her objections to the State's prior questions about the contents of the letter. She further contends that the prejudice was compounded and could only be cured by a mistrial because it was the second threat that the jury improperly heard and because the jury improperly heard the videotaped CPS comment.

The State responds by referencing its arguments to Kimani's first issue, as well as by arguing that the harm was not severe because the trial court had already

instructed the jury to disregard the previous questions and responses regarding a threat as well as the threat in the letter. The State also argues that the contents of the letter were Kimani's own statements and were therefore otherwise admissible but for the State's failure to establish a proper predicate to admit the letters in the first place.

During the punishment phase, the State called Investigator B. Yaro to authenticate a letter that Yaro found in Kimani's closet:

> Q. [P]art of your testimony—you testified about a box of letters that was recovered out of the top of the closet of the home of Marie Kimani, correct?
>
> A. Yes, sir.
>
> Q. And then . . . you took those letters and took photographs of them individually, correct?
>
> A. Yes, sir.
>
> * * * *
>
> Q. And I'm going to show you specifically State's Exhibit No. 232. Does that appear to be one of the letters that was taken out of that box—
>
> A. Yes, it is.
>
> Q. —that you took the photograph of?
>
> A. Yes, it is.
>
> Q. And, contextually, does it appear to be a letter written from—

[Defense Counsel]: Your Honor, I'm going to object to any contents of a document that has not been admitted into evidence.

[State]: I didn't ask him the contents.

The Court: All right. Then if you're just asking questions that don't concern the contents, then you may proceed.

Q. Do you believe that this—this photograph would be helpful for the jury to determine the proper punishment for Marie Kimani in this murder trial?

A. Yes, I do.

[State]: I will offer State's Exhibit No. 232 into evidence.

[Defense Counsel]: We're going to object to lack of proper predicate, and we'd like to take the witness on voir dire, your Honor.

The Court: Well, at this point I will sustain the objection. I don't think there's any need to take him on voir dire.

Q. Is this a true and accurate copy of the letter taken out of the top of the closet of Marie Kendale Kimani?

A. Yes, it is.

Q. Does it mention the name Jeremy?

A. Yes, it does.

[Defense Counsel]: I'm going to object to any evidence about what is in this alleged letter without it being admitted into evidence and without a proper predicate being laid.

[State]: If I can't ask him contextually what's in the letter, how do I lay a proper predicate, [Y]our Honor?

The Court: I sustain the objection.

Q. Does the letter contain a threat from the Defendant in this case?

[Defense Counsel]: Again, [Y]our Honor, I object.

The Court: Sustained.

[Defense Counsel]: We request the Court instruct the jury to disregard that question by the prosecutor.

The Court: Ladies and gentlemen of the jury, I'm instructing you to disregard the last question in this case. I've sustained the objection, so do not consider the question or the answer at this point in your deliberations.

[Defense]: We respectfully request a mistrial due to the cumulative effects here.

The Court: That's denied.

The State continued attempting to authenticate the letter, and the trial court eventually excused the jury from the courtroom and allowed defense counsel to question Yaro on voir dire. Yaro denied that the letter was signed or that it mentioned Kimani, denied that he personally saw Kimani write the letter, and denied that the letter was tested for Kimani's fingerprints or that a handwriting expert had compared the writing in the letter to a known sample of Kimani's handwriting. *See* TEX. R. EVID. 901(a), (b)(1)–(3) (providing examples of ways in which evidence can be authenticated). The State argued that, because "the letter is written from a mother to a son named Jeremy and talking to him about things out of her makeup bag," it was

"contextually" self-authenticating. The trial court disagreed and ruled that the letter was inadmissible. *See* TEX. R. EVID. 901(a), 902.

We agree with Kimani that the State's conduct at issue here was more severe than the references to threats in the guilt-innocence phase. The record on appeal does not show that Kimani made the statements in the letter. And the State repeatedly asked questions about the contents of the unauthenticated letter despite the trial court sustaining defense counsel's objections to the contents.

However, the court promptly instructed the jury to disregard and to not consider the question and answer. *See Hernandez*, 454 S.W.3d at 649–50 (stating prompt instruction to disregard will cure error associated with improper question and answer). And although the jury charge on punishment did not include an instruction to disregard as the jury charge on guilt-innocence had contained, we nevertheless presume that the jury followed the trial court's instruction to disregard during the punishment phase of trial. *See Colburn*, 966 S.W.2d at 520.

Kimani points to no part of the record on appeal showing that the instruction to disregard was ineffective such that her punishment would have been different had the conduct not occurred. *See Archie*, 221 S.W.3d at 700 (stating that, since alleged misconduct occurred during punishment phase, "we analyze the third factor with regard to the certainty of the punishment assessed"). The jury had already convicted Kimani of the first-degree felony offense of murder, which carries a punishment

range of five to ninety-nine years or life imprisonment and up to a $10,000 fine. *See* TEX. PENAL CODE §§ 19.02(c), 12.32. The jury's assessment of Kimani's punishment at forty years' imprisonment and a $10,000 fine is within the range of punishment for first-degree murder. *See id.* Kimani's punishment is also less than the State's requested punishment of life imprisonment. *See Orr*, 306 S.W.3d at 405 (concluding that jury's assessment of punishment within statutory range, which was less than life sentence requested by prosecutor, and jury's "considerable latitude in assessing punishment" did not show jury failed to follow instruction to disregard). Thus, the record does not show that Kimani's punishment would have been different but for the challenged questions about the statement in the inadmissible letter. Nor is there any record evidence showing that Kimani's punishment would have been different absent the cumulative effect of the trial court's denial of Kimani's three motions for mistrials.

We conclude that the trial court did not abuse its discretion in denying Kimani's motion for mistrial during the punishment phase of trial. We overrule Kimani's third issue.

Conclusion

We affirm the judgment of the trial court.

April L. Farris
Justice

Panel consists of Chief Justice Radack and Justices Goodman and Farris.

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