Affirmed in Part, Reversed and Remanded in Part, and Memorandum Opinion filed December 6, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00498-CR
NO. 14-15-00499-CR

SCOTT NILES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from County Criminal Court at Law No. 14
Harris County, Texas
Trial Court Cause Nos. 2018917 & 2018918

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

Appellant Scott Niles appeals his two convictions for terroristic threat. Appellant challenges his convictions on the grounds that: (1) the trial court abused its discretion in denying a mistrial after the prosecutor improperly struck at appellant over the shoulders of defense counsel; (2) in cause no. 2018918, the evidence was insufficient to prove appellant intended to place the complainant in

fear of imminent serious bodily injury; and (3) the judgments in both causes improperly state appellant was convicted of Class A misdemeanors, instead of Class B misdemeanors, rendering his sentences illegal. We agree with appellant that his convictions are Class B misdemeanors and, therefore, reform the judgments to reflect the correct offense level and affirm the convictions. Because the sentences assessed are illegal, we must reverse the trial court's judgments and remand for a new punishment hearing in each case.

BACKGROUND

Appellant was charged by information with two offenses of terroristic threat against a public servant. Trial to a jury commenced on May 12, 2015.

During its case-in-chief, the State called ten witnesses to the stand. Junior Captain Bradley Maddin testified that in April 2014, appellant had been employed as a firefighter with the Houston Fire Department's Station 64 for approximately four months. On April 29, 2014, Maddin became aware that appellant did not have a valid driver's license. Maddin brought concerns over appellant's lack of a license to his senior captain, Andrew Haygood. Subsequently, Maddin and Haygood summoned appellant into Maddin's office and asked if appellant had a driver's license. Appellant responded in the negative; however, appellant revealed a license for a concealed handgun. Maddin explained to appellant that fire department regulations and state law required employees to have a driver's license at all times and that any suspension or revocation of a license must be reported to him. In response, appellant made a remark to the effect of: "Forget the law." Maddin informed appellant that his attitude was unacceptable.

Because appellant did not have his license, he was removed from the rotation list for driving the ambulance, and Haygood assigned him to performing patient care in the back of the ambulance. According to Maddin, appellant was

"visibly upset" by his assignment and questioned his superiors as to why he was being punished. Because the role of driver is a higher pay classification, appellant was paid less when he was removed from driving duty.

Maddin testified as to the department's chain of command for making or reporting complaints. According to Maddin, it was very important – and well known – that all complaints must be reported up the chain of command in order of seniority. Although appellant never made any threatening remarks to Maddin, Maddin and Haygood became aware of threats made by appellant on May 5, 2014, when Engine Operator Stephen Coogler reported an incident to them. Appellant was allowed to continue working his full shift that day. Two days later, on May 7, 2014, an investigation into appellant commenced. Investigators from the arson division arrived at the station to take statements. Once charges were filed against appellant, he was told not to return to the station. However, Maddin testified that the firefighters were worried appellant might still return. As a result of appellant's threats, the arson division sent officers to man the front and rear entrances of the station, and the Houston Police Department sent a marked unit.

Robert Gordon was working as an engine operator at Station 64 when appellant joined the station. Gordon testified that he was on duty on April 29, 2014. Gordon spoke with appellant following his meeting with Maddin and Haygood, at which time appellant stated that he was upset over no longer receiving his higher classification pay. Approximately an hour later, Gordon, along with fellow firefighter, Mark Keelen, approached appellant who was sitting on a couch on the apparatus floor and mumbling inaudibly. When Keelen asked appellant what was wrong, appellant responded, "I'm going to start shooting people, I just need to figure out who I'm going to take out first." Appellant reiterated that he did not understand why he was being punished for not having a driver's license.

Because they had the next five days off from work, Gordon told appellant to get his license during that time. Appellant stated that he had to "go make a buy." Because appellant had previously made references to purchasing weapons, Gordon assumed appellant was referring to buying a weapon. Although Gordon did not believe appellant was singling out any one specific individual at that time, he was under the impression appellant was developing a plan on how he would execute his feelings of anger or resentment. Gordon further testified that he felt appellant was trying to "create a level of uneasiness" with his statements.

Once Gordon became aware that appellant had automatic weapons in his possession, he went to discuss the situation with Coogler, who is of the same rank as Gordon but worked directly for the chief. Gordon continued to work with appellant for the rest of their shift on April 29, 2014, as well as during their subsequent shift on May 5, 2014, without reporting appellant's statements to anyone else. However, Gordon believed that once he reported the incident to Coogler, that upper management was handling the situation.

Following the events of April 29, 2014, Gordon feared for his safety both at the fire station and at home. Gordon took precautionary measures to protect himself against any retaliation by appellant, which included placing a spare mattress against the dormitory door to delay entry by appellant.

Steve Conroy was employed as an investigator with the Harris County District Attorney's Office. Conroy testified as to the multiple weapons confiscated from appellant following his arrest.

Robert Sadler worked as an EMT with Station 64. Sadler testified that appellant would often bring guns to the station in the back of his car. According to Sadler, appellant was trying to sell the guns. On April 29, 2014, Sadler was assigned to drive the ambulance after appellant was removed from that duty for not

having a driver's license. Sadler testified that when appellant got into the ambulance for their first call, he appeared upset. When Sadler asked him if everything was okay, appellant responded, "that if [sic] he was going to kill everybody in the fire station." Then he told Sadler the order in which he was going to do it. According to Sadler, appellant said he was going to kill Captain Haygood, Robert Gordon, and Sadler first because they were gun owners. Appellant then stated he would follow with the officers and then everyone else. When he made these statements, Sadler said appellant's face was red, and he kind of stared off in one direction. Appellant did not raise his voice, but there was a sense of anger in his tone. Sadler testified that he kept waiting for appellant to smile or say he did not mean it, but that never happened. Sadler then asked if appellant would spare him because he had a wife and children, to which appellant offered no response. Sadler further suggested that appellant transfer to a different station if he was so unhappy at Station 64, to which appellant responded that he was not going anywhere.

Later that same day, after completing their emergency run, Sadler testified that he was sitting at a table in the station talking to another firefighter when appellant approached him. Again, with no hint of a smile, appellant said, "if y'all piss me off, I will just come out and kill everyone." Sadler testified that the comment "struck a little bit of fear in me." Sadler believed that at the time appellant made those threats, he was trying to put Sadler and Captain Haygood in fear. Sadler testified that he was afraid appellant would shoot him.

Sadler continued to work with appellant for the rest of their shift on April 29, 2014, without reporting appellant's threats. It was not until Sadler spoke with other firefighters during their next shift on May 5, 2014, that he learned of

appellant making the same threat to other people. The captains were made aware of appellant's threats that day.

Sadler further testified that appellant planned to use a knife to stab Captain Maddin in the neck, instead of shooting him, because Maddin "talks with his hands a lot."

Engine Operator Coogler testified that Robert Gordon brought to his attention the statements made by appellant. According to Coogler, appellant's statements were perceived as threats against the entire station. Coogler immediately reported the threats to Maddin and Haygood. Coogler testified that when Mark Keelen reported appellant's threats he "looked frightened." Coogler stated, "I could see the fear in his eyes that he was scared." Coogler also testified that he had discussed and seen a couple of appellant's guns.

Samuel Feris also worked as a firefighter at Station 64. He was away on vacation on April 29, 2014, so was unaware of appellant's statements when he returned to duty on May 5, 2014. Feris testified that he was reading a book inside the station when appellant walked up to him and started talking. According to Feris, appellant said something to the effect of "if I was going to kill everybody at the station, I would kill you last because you – it would take you longer to get away." Although Feris was alarmed by the comment, he did not necessarily believe appellant meant anything serious. It was not until the following shift on May 7, 2014, that Feris grew concerned when he learned that appellant had made similar statements to multiple people. At that time, Feris testified that he became afraid for his own safety as well as for the safety of his fellow firefighters. Feris stated he felt an obligation to write an official statement because "there was an immediate threat that needed to be addressed."

Captain Haygood, one of the two complainants, also testified. When Haygood first met appellant, Haygood was the district training officer. The fire academy asked Haygood to report to the academy to evaluate appellant as to whether or not he was prepared to return to the fire station as a firefighter. According to Haygood, appellant did not pass all training requirements and appeared irritated when Haygood reviewed appellant's evaluation with him. Appellant informed Haygood that some of his training difficulties were the result of having been injured on the job previously. Although Haygood recommended that appellant remain at the academy for a few more weeks, appellant joined Station 64 in order to train under Haygood.

According to Haygood, appellant did not react well to any criticism during training. After about two months at Station 64, however, Haygood and appellant discovered a common interest as sporting firearms enthusiasts which allowed them to "begin building a working relationship." Appellant showed Haygood several firearms in the trunk of his car, and they had "very pleasant" conversations about the weapons. Haygood testified, however, that appellant continued to display irritation and defensiveness when corrected during training and accused Haygood of singling him out and not requiring other firefighters to perform the same training exercises.

Haygood also testified that appellant became "very, very mad" and "irritated" when he was removed from the duty of driving the ambulance. After appellant left Maddin's office, Maddin and Haygood walked out of the office and overheard appellant "mouthing off" to other firefighters about Maddin and Haygood. Maddin and Haygood spoke privately with appellant again and informed him that he needed to remain professional. Haygood testified that appellant responded to this reprimand rudely.

When everyone returned to work on May 5, 2014, following five days off according to schedule, Haygood had a conversation with Coogler and learned about the statements that had been made by appellant. Haygood testified that he was concerned for his personal safety because he knew what types of firearms appellant possessed, knew that appellant had military experience, and believed that appellant was "definitely irritated" with him. Haygood was specifically concerned that appellant would shoot him. Although Haygood did not hear the threats directly, it was his understanding that he "was going to be one of the first ones taken out."

Haygood testified that he later contacted his superior, Chief Gutierrez, and explained there was an issue with threats being made at the station and that they needed to launch an investigation by meeting with the firefighters involved during the next shift. Haygood and Gutierrez called Gordon and Keelen into the chief's office to discuss what had happened. Haygood testified that he immediately knew the situation was serious because Keelen's face and demeanor showed that he was scared. Haygood believed that Keelen was in fear of serious imminent bodily injury, and Haygood testified that he was in fear of serious imminent bodily injury.

Gutierrez subsequently contacted his superiors who ordered appellant to report to the downtown office of Chief Casey. Appellant eventually got into his personal vehicle and departed from Station 64.

Haygood also testified to the security precautions the station took immediately following appellant's departure, including having armed arson investigators with bullet proof vests staked out in both the front and rear of the station for the rest of their shift. Haygood stated that he never called the police to report his concerns. However, Haygood testified that investigations are conducted internally when a criminal allegation is made against a firefighter.

Scott Clements worked as an investigator in the internal affairs division of the Houston Fire Department. In May 2014, Clements was sent to Station 64 to investigate the statements made by appellant and to obtain information for an official report. During the investigation, Clements met individually with the firefighters to discuss what happened. According to Clements, he believed everyone at the station took appellant's statements seriously; however, some of the firefighters had not heard the threats firsthand.

Robert Gutierrez was employed as a district chief with the Houston Fire Department. Gutierrez testified that he received a telephone call from Haygood on May 6, 2014, regarding a problem that needed to be addressed when they returned to work on May 7, 2014. According to Gutierrez, he did not learn the specific details about appellant's threats until May 7, 2014. This was the first time in his more than thirty years with the Department that Gutierrez had to handle allegations of terroristic threats made by a firefighter.

Finally, the State called complainant Mark Keelen to the stand. Keelen testified that on April 29, 2014, he was out on the apparatus floor at the station, along with Gordon, and began having a typical conversation with appellant, just talking about general things. Eventually, however, "out of the blue" appellant says that he is going to shoot everybody. Keelen responded by asking if appellant was going to shoot everyone including him to which appellant did not respond. Keelen immediately felt uneasy and was in fear for his life. Because Keelen was in fear of bodily harm not only to himself but to his fellow firefighters, he immediately took action and reported appellant's threats to his superior, Coogler.

Keelen further testified that he had never had any problems with appellant prior to that day. Keelen was also familiar with appellant's gun collection, having gone out to view some of the weapons in the trunk of appellant's car. Based on

appellant's demeanor at the time he made the threats, Keelen believed appellant was trying to strike fear of serious imminent bodily harm in him, as well as everyone else at the station.

Keelen also stated that he was aware appellant had a history of blurting out strange things during conversations. According to a statement signed by Keelen during the investigation, he did not witness any behavior from appellant that was outside of his normal behavior following appellant's threat.

After the State rested, appellant moved for directed verdicts, arguing that the evidence was wholly insufficient. The trial court denied the requests.

The defense called Doctor Sam Buser as their first witness. Buser was employed as the clinical staff psychologist for the Houston Fire Department. At the time of trial, Buser had met with appellant twice in a professional capacity. The first time was approximately one year before the incident at issue in this case, following the suicide of one of appellant's family members. The second time was on May 7, 2014, when Chief Casey referred appellant following the incident at Station 64. Prior to meeting with appellant, Buser was unaware of the circumstances surrounding the referral.

According to Buser, appellant denied any allegations that he was planning to hurt anyone. Buser testified that, following his conversation with appellant, Buser "did not form the opinion that he was a danger to someone else or himself." Buser further stated that had he been concerned appellant was a danger to himself or someone else, he would have felt obligated to report it. Instead, Buser noted that appellant seemed to struggle with social skills and did not fit in well at the station. Buser encouraged appellant to work on socializing with his co-workers.

Although appellant shared his version of what happened at the station,

including that he had threatened to stab his junior captain in the neck with a knife, appellant neglected to tell Buser that he had made multiple threats to shoot his fellow firefighters. Buser stated that he might have determined appellant was a threat had he known about these other statements.

The defense then called five character witnesses, including former coworkers of appellant as well as his wife, who all testified as to appellant's non-violent character generally and his dry sense of humor. None of these witnesses had any personal knowledge of the threats made by appellant.

At the conclusion of the trial, the jury returned verdicts of guilty in both causes. On May 14, 2015, the trial court sentenced appellant to concurrent terms of one year in county jail, probated for two years. Subsequently, appellant filed a motion for new trial in each cause, contending that the prosecutor improperly struck at appellant over the shoulders of counsel during closing argument. The trial court denied the motions. Appellant timely appealed.

ANALYSIS

In four issues, appellant contends the trial court erred in failing to grant a mistrial after the prosecutor made improper remarks during closing argument, there was insufficient evidence to prove appellant placed Haygood in fear of imminent serious bodily injury, and the judgments in both cases improperly state appellant was found guilty of a Class A misdemeanor.

I. Trial Court Error

In his first issue, appellant alleges the trial court erred in failing to grant a mistrial. Specifically, appellant contends a mistrial was warranted after the prosecutor struck at appellant over the shoulders of counsel during closing arguments by accusing defense counsel of being paid to twist the facts while

claiming she was paid to tell the truth.

The State argues appellant failed to preserve this complaint for appellate review because he did not object to substantially similar remarks made by the prosecutor both immediately preceding and following the challenged statement. Alternatively, the State contends the trial court did not abuse its discretion in refusing to grant a mistrial because any potential harm was cured by the court's instruction to disregard.

A. Preservation of error

"To preserve error in prosecutorial argument, a defendant must pursue to an adverse ruling his objections to jury argument." *Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007). When complaining about improper jury argument, the proper method of pursuing an objection to an adverse ruling is to (1) object, (2) request an instruction to disregard, and (3) move for a mistrial. *Sawyers v. State*, 724 S.W.2d 24, 38 (Tex. Crim. App. 1986), *overruled on other grounds by Watson v. State*, 762 S.W.2d 591, 599 (Tex. Crim. App. 1988). The failure to request an instruction for the jury to disregard forfeits appellate review of errors that could have been cured by such an instruction. *See Young v. State*, 137 S.W.3d 65, 70 (Tex. Crim. App. 2004). If such an instruction could not have "cured" the objectionable event, a motion for mistrial is the only essential prerequisite to presenting the complaint on appeal. *Id*. Here, the record reflects the following. During closing argument, the prosecutor stated, in relevant part:

> You know, with all due respect to the defense attorney in this case, both of them, I don't get paid to come in here and twist the facts. I don't get paid to come in here and tell you the testimony that you heard from the witness stand. I don't get paid to come in here and twist what each one of these fine gentlemen standing – sitting in front of you said. That's not my job. My job is not to come in here and read you one sentence from a statement, and then upon further questioning

> from me you find out that Keelen actually said two sentences from his statement, that when he said I was a little uneasy, you find out that he actually said, I took this very seriously because I was afraid. You see, I don't get paid to do that. My job is to come in here and to tell you the truth. I represent the State of Texas, and I take great pride in that. I get no paycheck from anyone to come in here and make you think that we colluded together, that Station 64 and the D.A.'s Office and the upper management of the fire department all got together, colluded so that Scott Niles can get fired. Think about how ridiculous that is. If this were an H.R. issue, the only thing they would need to do in H.R., being that they are H.R., is fire him. It's ridiculous.
>
> And don't you hear the same thing over and over and over. Poor Scott, poor, poor, Scott. He got picked on by his captains because he didn't have a driver's license to drive an ambulance on emergency runs, mind you, around the city, dealing with victims. Poor Scott. Let's cry for poor Scott because the captains wouldn't allow him to do that. Poor Scott. Poor Scott couldn't get along with his fellow colleagues. He was isolated. Or at least that's the version - - the paid version that you heard from the defense attorneys in this case.

At this point, appellant objected for the first time, arguing that the prosecutor was striking at the defendant over the shoulder of his counsel. The trial court did not explicitly rule on the objection. However, appellant requested the jury be instructed to disregard the prosecutor's last comment, and the trial court obliged, instructing the jury to "disregard the prosecutor's last statement and consider it for no purpose whatsoever." Appellant then moved for a mistrial, which the trial court denied. Thus, based on the record before us, we conclude appellant preserved error with regard to the prosecutor's statement that defense counsel was paid to provide a specific version of the case.

However, to the extent appellant challenges additional comments made by the prosecutor before and after the statement at issue, we conclude appellant failed to preserve error. *See Falfan v. State*, No. 05-13-01124-CR, 2014 WL 2583768, at *6 (Tex. App.—Dallas June 10, 2014, no pet.) (mem. op., not designated for

publication) (citing *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996), in holding that appellant's contention that prosecutor's continuation of argument could not be cured by jury instruction was not preserved for appellate review because appellant did not object to the continuation of argument). Appellant did not object to the prosecutor's opening statements. Nor did appellant object when the prosecutor repeated her statement that she did not get paid to give the jury "any version but the truth" immediately following the court's denial of a mistrial. Thus, any challenge to these statements was not preserved for appellate review.

B. Denial of mistrial

We review a trial court's ruling on a motion for mistrial for an abuse of discretion. *See Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004). When the refusal to grant a mistrial follows an objection for improper jury argument, we evaluate the trial court's decision using the following factors: (1) severity of the misconduct (the magnitude of the prejudicial effect of the prosecutor's remarks); (2) measures adopted to cure the misconduct (the efficacy of any cautionary instruction by the judge); and (3) the certainty of conviction absent the misconduct (the strength of the evidence supporting the conviction). *Jones v. State*, 38 S.W.3d 793, 797 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) (citing *Martinez v. State*, 17 S.W.3d 677, 692–93 (Tex. Crim. App. 2000); *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998), *cert. denied*, 526 U.S. 1070, 119 S.Ct. 1466, 143 L.Ed.2d 550 (1999)).

When assessing the severity of an improper jury argument, our primary focus is the prejudicial effect of the misconduct. *Hawkins*, 135 S.W.3d at 77 (citing *Mosley*, 983 S.W.2d at 259). In deciding whether prejudice was incited, we examine the improper conduct "in light of the facts adduced at trial and in the context of the entire argument." *See McGee v. State*, 774 S.W.2d 229, 239 (Tex.

Crim. App. 1989); *Gaddis v. State*, 753 S.W.2d 396, 398 (Tex. Crim. App. 1988); *see also Wood v. State*, 18 S.W.3d 642, 648 (Tex. Crim. App. 2000) (stating that a mistrial is appropriate for a "narrow class of highly prejudicial and incurable errors").

When a prosecutor makes uninvited and unsubstantiated accusations of improper conduct directed toward defense counsel in an attempt to prejudice the jury against the defendant, the State "strik[es] a defendant over the shoulders of his counsel." *Acosta v. State*, 411 S.W.3d 76, 93 (Tex. App.—Houston [1st Dist] 2013, no pet.) (citing *Gomez v. State*, 704 S.W.2d 770, 771–72 (Tex. Crim. App. 1985); *Phillips v. State*, 130 S.W.3d 343, 355 (Tex. App.—Houston [14th Dist.] 2004), *aff'd*, 193 S.W.3d 904 (Tex. Crim. App. 2006). When the State argues about defense counsel personally rather than the merits of the case or when it explicitly impugns defense counsel's character, it risks striking at a defendant over counsel's shoulders. *Acosta*, 411 S.W.3d at 93 (citing *Mosley*, 983 S.W.2d at 259). This type of argument is improper. *Acosta*, 411 S.W.3d at 93 (citing *Fuentes v. State*, 664 S.W.2d 333, 335 (Tex. Crim. App. 1984)).

Here, the prosecutor's comment that appellant's defense attorneys presented a paid version of the case arguably impugns defense counsel's character by suggesting they were paid to present only a particular (perhaps untrue) version of the case. Appellant contends the prosecutor's argument is "the most egregiously severe argument a prosecutor can make" and cites multiple cases where the Court of Criminal Appeals found reversible error based on the egregious nature of the prosecutor's argument attacking defense counsel. *See Gomez*, 704 S.W.2d at 771–73 (reversing conviction based on cumulative effect of prosecutor's arguments that defense counsel used witnesses to "manufacture evidence," or suborn perjury, and that defense counsel was paid to get his defendant "off the hook"); *Fuentes*, 664

S.W.2d at 335–38 (reversing conviction following numerous instances of improper comments by the State in the presence of the jury); *Lewis v. State*, 529 S.W.2d 533, 534 (Tex. Crim. App. 1975) (finding reversible error where effect of prosecutor's argument was to instruct jury that only prosecutors seek to uphold truth and justice, while defense counsel may use any means available to mislead the jury); *Bell v. State*, 614 S.W.2d 122, 123 (Tex. Crim. App. 1981) (same).

The State argues the instant case is distinguishable from those relied upon by appellant because the prosecutor's argument does not rise to the level of an accusation that defense counsel manufactured evidence or suborned perjury and further contends appellant's reliance on the foregoing cases is misplaced because they preceded the harmless error rule. *See Dinkins v. State*, 894 S.W.2d 330, 357 (Tex. Crim. App. 1995) (noting that prior to the enactment of Rule 81(b)(2)'s harmless error analysis, comments which struck at defendant over the shoulder of counsel amounted to automatic reversible error, despite an instruction to disregard). Although we agree those cases are distinguishable and the accusations of misconduct more severe, we nevertheless hold that the severity of the accusation in this case weighs against the State. The State argued defense counsel was paid to twist and selectively present evidence. Accordingly, we cannot conclude the magnitude of any prejudicial effect was inconsequential. This factor weighs in favor of appellant.

We next consider the effect of the trial court's curative measures. Under this second factor, we generally presume that a prompt instruction to disregard will cure any error associated with improper jury argument. *See Phillips*, 130 S.W.3d at 356. However, the court's instruction to disregard has no curative effect when the argument is extreme, manifestly improper, injects new and harmful facts into the case, or violates a mandatory statutory provision and is thus so inflammatory that

its prejudicial effect cannot reasonably be removed from the minds of the jurors by the instruction given. *Tucker v. State,* 15 S.W.3d 229, 237 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (citing *Hernandez v. State*, 819 S.W.2d 806, 820 (Tex. Crim. App. 1991)). In this case, the trial court promptly instructed the jury to disregard the prosecutor's statement. The statement, though inappropriate, did not rise to the level of rendering the curative instruction ineffective. *Cf. Wesbrook v. State*, 29 S.W.3d 103, 115–16 (Tex. Crim. App. 2000) (concluding that improper remarks did not warrant reversal where prosecutor accused the defendant of fabricating his story during closing argument). The prosecutor's comments "were not so highly inflammatory that a jury could not ignore them." *Phillips*, 130 S.W.3d at 356. We conclude the curative measure was effective and the second factor weighs in favor of the State.

We finally address the certainty of conviction absent the prosecutor's misconduct. The jury heard testimony from multiple witnesses, including both complainants, who stated that appellant had threatened to shoot them. These witnesses also testified that appellant generally did not fit in well at the fire station and that he was an avid gun collector. The defense called several witnesses to testify as to appellant's non-violent character generally. However, the psychologist, Dr. Buser, also testified that at the time he assessed appellant and determined he was not a threat to others, appellant had neglected to mention the threats he had made to his co-workers. Buser stated his opinion might have been different had he been aware of the threats. Considering the strength of the State's case, we conclude that appellant's convictions were more certain than not, and that appellant would have been convicted in the absence of the prosecutor's statement. Thus the third factor also weighs in favor of the State.

On balance, we conclude the strength of the evidence supporting the

convictions and the trial court's instruction to disregard outweigh the prosecutor's misconduct. We therefore hold the trial court did not abuse its discretion by denying appellant's motion for mistrial. We overrule appellant's first issue.

II. Sufficiency of the Evidence

In his second issue, appellant contends the evidence was insufficient to prove appellant intended to place Haygood in fear of imminent serious bodily injury in cause number 2018918 because appellant never made the threat directly to Haygood nor took any action to ensure Haygood learned of the threat.

When determining whether evidence is legally sufficient to support the verdict, we view all of the evidence in the light most favorable to the verdict and determine, based on that evidence and any reasonable inferences therefrom, whether any rational fact finder could have found the elements of the offense beyond a reasonable doubt. *Gear v. State*, 340 S.W.3d 743, 746 (Tex. Crim. App. 2011) (citing *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979)). We do not sit as a thirteenth juror and may not substitute our judgment for that of the fact finder by re-evaluating the weight and credibility of the evidence. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). Rather, we defer to the responsibility of the fact finder to fairly resolve conflicts in testimony, weigh the evidence, and draw reasonable inferences from basic facts to ultimate facts. *Id*. We "determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict." *Hooper v. State*, 214 S.W.3d 9, 16–17 (Tex. Crim. App. 2007); *Pearson v. State*, 431 S.W.3d 733, 734–35 (Tex. App.—Houston [14th Dist.] 2014), pet. ref'd).

We measure evidentiary sufficiency against the "elements of the offense as defined by the hypothetically correct jury charge for the case." *Fuller v. State*, 73 S.W.3d 250, 252 (Tex. Crim. App. 2002). That 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." *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). This standard "ensures that a judgment of acquittal is reserved for those situations in which there is an actual failure in the State's proof of the crime rather than a mere error in the jury charge submitted." *Id.*; *Atkins v. State*, 402 S.W.3d 453, 457 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd).

The information in cause number 2018918 alleged that appellant

> did then and there unlawfully threaten to commit an offense involving violence, namely aggravated assault upon a public servant, namely Andrew Haygood a Houston Fire Department firefighter, hereafter styled the Complainant with the intent to place the Complainant in fear of imminent serious bodily injury.

A person makes a terroristic threat if he threatens to commit any offense involving violence to any person or property with the intent to place any person in fear of imminent serious bodily injury. Tex. Pen. Code. Ann. § 22.07(a)(2). Imminent means "[n]ear at hand; mediate rather than immediate; close rather than touching; impending; on the point of happening; threatening; menacing; perilous." *In re A.C.*, 48 S.W.3d 899, 904 (Tex. App.—Fort Worth 2001, pet. denied) (quoting BLACK'S LAW DICTIONARY 750 (6th ed. 1990)). The accused's threat of violence, made with the intent to place the victim in fear of imminent serious bodily injury, is what constitutes the offense. *Dues v. State*, 634 S.W.2d 304, 305 (Tex. Crim. App. 1982). It is not necessary for the victim to actually be placed in fear of imminent serious bodily injury or for the accused to have the capability or the intention to actually carry out the threat. *Id.* The offense is completed if the accused, by his threat, sought as a desired reaction, to place a person in fear of imminent serious bodily injury. *Id.* at 306.

The record reflects that appellant informed multiple individuals in the fire station that he was going to shoot and/or kill everyone. EMT Sadler testified that appellant stated he was going to kill Sadler and Haygood first. Sadler further testified that he believed appellant was trying to put him and Haygood in fear at the time appellant made his threats. Although appellant never directly threatened Haygood, there was evidence that the firefighters strictly adhered to protocol requiring them to report any threats up the chain of command and, therefore, the jury could infer that appellant knew Haygood would almost certainly learn of appellant's threats. There was also evidence that Haygood in fact learned of the threats the same day. Haygood testified that upon learning of appellant's threats, he was in fear of imminent serious bodily injury. Haygood testified that he was concerned for his safety based upon his knowledge of appellant's firearms collection and appellant's previous military experience as well as his belief that appellant was irritated with him. Haygood further testified that although he did not hear the threats directly, he was concerned appellant would shoot him because he understood appellant's intention was to kill Haygood first.

Viewing the evidence in the light most favorable to the verdict, and drawing reasonable inferences therefrom, a rational jury could have determined beyond a reasonable doubt that appellant committed the offense of terroristic threat against Haygood. *See Jackson*, 443 U.S. at 319. Therefore, we hold the evidence sufficient to support appellant's conviction in cause number 2018918 and overrule appellant's second issue.

III. Judgments

In his remaining two grounds for relief, appellant contends that although he was charged by information in both cases with committing the offense of terroristic threat against a public servant, the jury charges only authorized convictions for the

lesser included offense of terroristic threat. Therefore, it was error for the trial court to render judgments convicting him of Class A misdemeanors and to sentence him accordingly. The State concedes these points of error.

A person commits the offense of terroristic threat if he threatens to commit any offense involving violence to any person or property with the intent to place any person in fear of imminent serious bodily injury. Tex. Pen. Code. Ann. § 22.07(a)(2). An offense under subsection (a)(2) is a Class B misdemeanor. *Id.* at § 22.07(c). However, if the offense is committed against a public servant, it becomes a Class A misdemeanor. *Id.* at § 22.07(c)(2). Here, the jury charge in each case included the following relevant language:

> Our law provides that a person commits the offense of terroristic threat if he/she threatens to commit any offense involving violence to any person or property with intent to place any person in fear of imminent serious bodily injury.
>
> Our law further provides that in order to prove that the defendant is guilty of terroristic threat, the State must prove, beyond a reasonable doubt, three elements. The three elements are:
>
> 1. The defendant threatened to commit an offense; and
> 2. The offense the defendant threatened to commit involved violence to a person or property; and
> 3. The defendant made the threat with the intent to place a person in fear of imminent serious bodily injury.

The trial judge is required to deliver to the jury a "written charge distinctly setting forth the law applicable to the case." Tex. Code Crim. Proc. Art. 36.14; *Margraves v. State*, 56 S.W.3d 673, 681 (Tex. App.—Houston [14th Dist.] 2001, no pet.). The purpose of the charge is to inform the jury of the applicable law and to guide it in applying the law to the facts of the case. *Margraves*, 56 S.W.3d at 681.

Here, the jury charges track the language of the statute for the offense of terroristic threat, a Class B misdemeanor, but fail to include any instruction on the

public servant element of the offense as a Class A misdemeanor. Accordingly, we conclude the trial court erred in rendering judgments against appellant for terroristic threat as Class A misdemeanors. *See Musgrove v. State*, 425 S.W.3d 601, 612–14 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd).

Appellant further contends both sentences are illegal because he was sentenced to one year in county jail, probated for two years, in each cause and the maximum punishment for a Class B misdemeanor is confinement of not more than 180 days. A sentence outside the prescribed punishment range is void and illegal. *Baker v. State*, 278 S.W.3d 923, 926 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd). When reversible error occurs in the punishment phase of trial, the appellant is entitled to a new punishment trial. Tex. Code Crim. Proc. Art. 44.29(b); *see also Baker*, 278 S.W.3d at 927. Because appellant was convicted of Class B misdemeanors, the trial court could not assess a punishment exceeding confinement in jail for a maximum of 180 days. Tex. Penal Code Ann. § 12.22. Accordingly, we sustain appellant's third and fourth issues.

CONCLUSION

We reform appellant's convictions to reflect the degree of offense is "CLASS B MISDEMEANOR." As reformed, the convictions are affirmed. In each case, we reverse the judgment and remand the case for a new punishment hearing.

/s/ John Donovan
Justice

Panel consists of Justices Busby, Donovan, and Wise.
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