Reversed and Remanded and Opinion filed May 18, 2021.

In The

Fourteenth Court of Appeals

NO. 14-19-00466-CR

DEREK NATHANIEL MOORE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 179th District Court
Harris County, Texas
Trial Court Cause No. 1586157

O P I N I O N

More than a century ago, the Court of Criminal Appeals of Texas noted that jurors "are prone to seize with alacrity upon any conduct or language of the trial judge which they may interpret as shedding light upon his view of the weight of the evidence, or the merits of the issues involved." *Lagrone v. State*, 209 S.W. 411, 415 (Tex. Crim. App. 1919) (quoted in *Brown v. State*, 122 S.W.3d 794, 798 (Tex. Crim. App. 2003)). Since 1879, the Code of Criminal Procedure has prohibited the trial court from commenting on the weight of the evidence or otherwise making

any remark calculated to convey its opinion of the case to the jury. Tex. Code Crim. Proc. Ann. art. 38.05 (current version).[1]

This case involves such prohibited comments. The case revolves around allegations of family-violence assault made by the complainant against appellant, her husband. At trial, both sides called this case a "he said/she said" case. She says he pinched her nose, covered her mouth, and pressed her face into a couch cushion, impeding her breathing for approximately 15 seconds; he says he did not. As there were no eyewitnesses and no conclusive physical evidence, the credibility of the complainant was essential to the State's case.

During the cross-examination of the complainant, however, the trial court injected its opinions into the fray. The trial court made a string of comments casting doubt on a particular line of impeachment questioning by appellant. Most egregiously, the trial court fabricated hypotheticals in support of the complainant's account. These comments clearly exceeded the bounds of article 38.05's prohibition on commenting on the weight of the evidence. Moreover, although the trial court gave a requested instruction to disregard, the comments were harmful. The error occurred during cross-examination of the State's key witness, the comments were repeated and egregious, and the instruction to disregard was vague and perfunctory. We conclude the trial court committed reversible error given the

[1] 1879 Penal Code and Code of Criminal Procedure, 16th Leg., R.S., § 2, art. 729, § 3, 1879 Tex. Crim. Stat. n.p. (Penal Code), n.p. (Code of Criminal Procedure), 87, 157 (repealer), *recodified and repealed by* 1895 Penal Code and Code of Criminal Procedure, 24th Leg., R.S., § 2, art. 767, § 3, 1895 Tex. Crim. Stat. 2 (Penal Code), 2 (Code of Criminal Procedure), 106, 182 (repealer), *recodified by* 1911 Penal Code and Code of Criminal Procedure, 24th Leg., R.S., § 2, art. 787, § 3, 1911 Tex. Crim. Stat. n.p. (Penal Code), n.p. (Code of Criminal Procedure), 228 (no repealer of 1895 Code of Criminal Procedure), *recodified and repealed by* 1925 Penal Code and Code of Criminal Procedure, 39th Leg., R.S., § 2, art. 707, § 3, art. 1, 1925 Tex. Crim. Stat. 2 (Penal Code), 2 (Code of Criminal Procedure), 107, 181 (repealer for both 1895 and 1911), *recodified and repealed by* Code of Criminal Procedure of the State of Texas, 59th Leg., R.S., ch. 722, § 1, arts. 35.08, 54.02, § 1(a), [2] 1965 Tex. Gen. Laws 317, 46, 563 (repealer).

specific facts of this case.

A jury convicted appellant of the third-degree felony of assaulting the complainant, his wife, by impeding her normal breathing. *See* Tex. Penal Code Ann. § 22.01(a)(1), (b)(2)(B). The trial court assessed punishment at ten-years imprisonment, which the trial court then suspended, placing appellant on community supervision for six years. Tex. Penal Code Ann. § 12.34; Tex. Code Crim. Proc. Ann. art. 42A.053. Appellant brings three issues on appeal. In issue one, appellant argues the trial court committed reversible error by impermissibly commenting on the weight of the evidence. We sustain issue one, reverse the trial court's judgment, and remand the case for a new trial.

I. BACKGROUND

Appellant and the complainant were a married couple in the process of divorcing. Appellant entered the family home early one morning in April 2018. The complainant was sitting on a couch on the first floor of the house.

The incident in question was recorded by an in-home camera system. At the start of the video, appellant and the complainant are talking with a light on. Appellant then turned the light off, after which the actions of appellant and the complainant are not visible, though the audio continued. The complainant screamed, followed by a mostly silent period lasting approximately 15 seconds. The complainant then screamed again, after which the complainant is heard breathing heavily. During the video, a small, sometimes-moving light is seen at times in the area where appellant and the complainant were located before that area went dark.

The complainant testified that, in the darkness, appellant came over to the couch she was sitting on and pinched her nose shut and covered her mouth with his

hands. He held her against the couch cushions such that she was unable to breathe. The complainant testified that the first scream heard on the video occurred when appellant began obstructing her breathing, and her heavy breathing occurred after he let go approximately 15 seconds later.

On cross-examination, appellant's trial counsel asked the complainant numerous questions about the light that is seen moving in the video. The complainant agreed that it appeared to be a cell-phone light[2] and stated that she had been holding a cell phone at the start of the incident. Appellant's trial counsel then questioned the complainant about the movement patterns of the cell-phone light, attempting (as he later explained to the trial court) to show that the movement of the light was inconsistent with the complainant's account of appellant impeding her breathing. The following exchange occurred in the presence of the jury:

> [DEFENSE COUNSEL:] And again, 6:28:46 [a.m. on the video], here we go again, light is—
>
> [THE STATE]: Objection, Your Honor, to the relevance of where the cell phone light is.
>
> THE COURT: I'm hoping you're going to go somewhere with this. Where is the relevance?
>
> [DEFENSE COUNSEL]: The relevance, Your Honor, is if she's being attacked from behind by [appellant] and she's presumably the only one holding the cell phone and it's remaining in relatively the same place, it's inconsistent.
>
> THE COURT: It could be on a table or something over there.
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> [DEFENSE COUNSEL]: Well, but it does move, Your Honor. It does move in the video.
>
> THE COURT: Maybe shook the room or the table or something—
>
> [DEFENSE COUNSEL]: Judge, I object to the commentary on the

[2] The complainant later clarified on redirect-examination that she did not know what the light was. For purposes of the questions discussed here, however, the complainant did not contest that the light moving in the video was a cell-phone light.

evidence—

THE COURT: I'm just saying, I don't understand where you're going with this.

[DEFENSE COUNSEL]: I object on the Court's commentary as it comments on the weight of the evidence.

THE COURT: You—you keep asking her that. You've asked her this question so many times.

[DEFENSE COUNSEL]: Well, I understand the Court's position; but I object to what the Court has now said to the jury. I object to it and I ask that it be stricken from the record.

THE COURT: It will be stricken from the record. It's just rhetorical. But please ask a question and get an answer and let's move on.

[DEFENSE COUNSEL]: And I ask that the jury be instructed to disregard.

THE COURT: And please disregard my statement.

[DEFENSE COUNSEL]: Thank you, Your Honor.

During a break in the complainant's testimony, and outside of the presence of the jury, appellant's trial lawyer moved for a mistrial based on the trial court's comments. The trial court denied the motion.

Appellant later testified. He denied that he placed his hands on the complainant's nose and mouth or that he had impeded her breathing. Rather, appellant testified that, after the video went dark, he picked up the complainant's cell phone to see if it was unlocked (and to look through it if it were), after which he and the complainant struggled over the phone.

II. ANALYSIS

In issue one, appellant complains that the trial court's comments during appellant's cross-examination of the complainant were improper comments on the

weight of the evidence in violation of Code of Criminal Procedure article 38.05.[3] Tex. Code Crim. Proc. Ann. art. 38.05. Article 38.05 provides:

> In ruling upon the admissibility of evidence, the judge shall not discuss or comment upon the weight of the same or its bearing in the case, but shall simply decide whether or not it is admissible; nor shall he, at any stage of the proceeding previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the case.

Id. In evaluating a claimed violation of article 38.05, we first determine whether the trial court's comments were, in fact, improper under the article. *Simon v. State*, 203 S.W.3d 581, 590 (Tex. App.—Houston [14th Dist.] 2006, no pet.). If so, we must then decide whether the comments were material. *Id.* at 592. If the comments were both improper and material, we address harm, using the standard for non-constitutional harm set forth in Texas Rule of Appellate Procedure 44.2(b). Tex. R. App. P. 44.2(b); *Proenza v. State*, 541 S.W.3d 786, 801 (Tex. Crim. App. 2017).

[3] While we note that appellant objected to the comments and later moved for a mistrial, preservation of error is not at issue, given that the court of criminal appeals has identified the right to an impartial judge under article 38.05 as "at least" a category-two *Marin* right that cannot be waived by inaction. *Proenza v. State*, 541 S.W.3d 786, 801 (Tex. Crim. App. 2017); *see also Marin v. State*, 851 S.W.2d 275, 278–79 (Tex. Crim. App. 1993). The fact that article 38.05 issues are not analyzed under the preservation-of-error framework also dictates the focus of our review. Take, for example, a case involving improper comments by the prosecution during closing argument, which fall into *Marin*'s third category and must be preserved. *See Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996). In a case involving such comments, if the defendant objected, obtained a limiting instruction, and moved for a mistrial, our focus would be on whether the trial court erred in denying a mistrial, on the grounds that the denial of the mistrial would be the trial court's first potential "mistake." *See Hawkins v. State*, 135 S.W.3d 72, 76–77 (Tex. Crim. App. 2004). Here, however, the issue is not whether the trial court erred in denying the mistrial, but whether the trial court's comments constitute reversible error under article 38.05 regardless of whether an objection was made or a mistrial was requested. This makes sense, as in cases involving article 38.05, the error originates with the trial court; the trial court's first "mistake" is not in overruling an objection or denying a mistrial, but in making the prohibited comments.

A. Were the comments improper?

We first address whether the trial court's statements were improper comments on the weight of the evidence. Here, the trial court made a series of comments questioning the relevance of appellant's impeachment attempt, including stating, "I don't know where you're going with this," "I don't understand where you're going with this," and "You've asked her this question so many times." More egregiously, the trial court twice suggested scenarios corroborating the complainant's account. After appellant's trial counsel explained his theory that the movement (or lack thereof) of the cell-phone light was inconsistent with the complainant's testimony that appellant was assaulting her, the trial court stated, "It [the cell phone] could be on a table or something over there." When appellant's trial counsel explained that the light moved at other times, the trial court again conjectured, "Maybe shook [sic] the room or the table or something[.]"[4]

These comments, particularly the comments in which the trial judge argues hypothetical scenarios on the complainant's behalf with appellant's trial counsel, go well beyond article 38.05's mandate that the judge "shall simply decide whether or not [evidence] is admissible" without further comment. Moreover, our court has explained that the trial court improperly comments on the weight of the evidence under article 38.05 if it (1) makes a statement that implies approval of the State's argument, (2) indicates disbelief in the defense's position, or (3) diminishes the credibility of the defense's approach to the case. *Simon*, 203 S.W.3d at 590. The trial court's repeated questioning of the relevance of appellant's line of cross-examination strongly indicated disbelief in the defense's position.[5] Given

[4] Appellant later testified there was no table in the relevant area of the house.

[5] The State describes this case as comparable to *Hoang v. State*, in which the trial court made a comment to defense counsel to "[q]uit being repetitious." 997 S.W.2d 678, 680 (Tex. App.—Texarkana 1999, no pet.). The quality and quantity of the trial court's comments in the

that the complainant's credibility was key to the case, and impeaching her credibility central to the defense, these comments also diminished the credibility of the defense's approach. And when the trial court presented its own invented factual scenarios that might corroborate the complainant's account, it did more than simply "imply" approval of the State's argument. Instead, the trial court became, in essence, an advocate for the State, abdicating its assigned role as an impartial arbiter. *See Proenza*, 541 S.W.3d at 802 (trial court "should not need the litigants to remind her that hers is not the task of producing the evidence and arguing its significance" (quotation omitted)).

We conclude the trial court's statements were improper comments on the weight of the evidence in violation of article 38.05.

B. Were the comments material?

We next address whether the improper comments were material. *Simon*, 203 S.W.3d at 592. A comment is material if the jury was considering the same issue. *Id.* It is the province of the jury to pass on the credibility of the witnesses and the weight to be given their testimony. *Easley v. State*, 478 S.W.2d 539, 540 (Tex. Crim. App. 1972). The trial court's comments, which denigrated appellant's attempts to impeach the complainant and supported the complainant's testimony with its own hypotheticals, invaded this province of the jury, and did so during the testimony of the State's key witness on whose credibility the State's case rested. *See Florio v. State*, 626 S.W.2d 189, 190 (Tex. App.—Fort Worth 1981, no pet.)

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case before us, however, are materially different, so *Hoang* offers us little guidance.

The State also characterizes the trial court's comments as a proper exercise of the trial court's authority under Texas Rule of Evidence 611(a). Tex. R. Evid. 611(a). While Rule 611(a) allows the trial court to "exercise reasonable control over the mode and order of examining witnesses," it does not allow the trial court to comment on the weight of the evidence as prohibited by article 38.05.

(reversing due to improper comments by trial court regarding credibility of police officers and observing that "[t]he jury was to have been the sole judge of the weight and credibility of the testimony given by the law enforcement officers").

We conclude the trial court's comments were material. *See Simon*, 203 S.W.3d at 592.

C. Were the comments harmful?

We turn next to harm. To constitute reversible error under article 38.05, the trial court's improper comments must be reasonably calculated to benefit the State or prejudice the defendant's rights. *Proenza*, 541 S.W.3d at 791 (collecting cases). We review statutory error under article 38.05 under the non-constitutional-harm standard of Texas Rule of Appellate Procedure 44.2(b), which states, "Any [non-constitutional] error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Tex. R. App. P. 44.2(b); *Proenza*, 541 S.W.3d at 801. "A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict." *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997) (citing *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). "[A]n error had a substantial and injurious effect or influence if it substantially swayed the jury's judgment." *Thomas v. State*, 505 S.W.3d 916, 926 (Tex. Crim. App. 2016). The proper inquiry is "whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Kotteakos*, 328 U.S. at 765. But if "the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand." *Id.* at 764.

1. The trial record

From the start, it was clear that this case would hinge on the testimony of the

complainant and whether the jury believed her version of events instead of appellant's. During voir dire, both the State and appellant questioned the venire as to whether the prospective jurors would favor a man or a woman in a case involving domestic violence, with appellant's trial counsel specifically asking, "in a 'he said/she said' case involving a family violence assault, would you be more inclined to believe a woman versus a man?"

During opening statements, the State focused on the complainant and her account. At the end of opening statement, the State said:

> I want you to pay particular attention to all of the evidence that you receive. See whose testimony it corroborates. Does it corroborate everything that the complainant said? Does the officers' testimony corroborate the complainant's testimony? Does it make sense to you? We don't have to have all the puzzle pieces filled in. We talked about that. You just have to believe the testimony beyond a reasonable doubt. Thank you.

By the State's own account, the primary question for the jury was whether the jury believed the complainant's testimony. Appellant likewise focused on the complainant's credibility during opening statements. Referring to the screams heard on the audio recording of the incident, appellant's counsel characterized the screams as a "fabrication," "tantrum," and "performance." In other words, appellant's case, like the State's, hinged on whether the jury believed the complainant's story or thought she was lying. Accordingly, by the end of voir dire and opening arguments—and well before the trial court's statements—the jury would have had a clear sense of the centrality of the complainant's testimony to the resolution of the case.

The evidence presented at trial did not change the situation. While numerous other witnesses testified during trial, there were no eyewitnesses to the incident in question or anyone with personal knowledge about whether appellant assaulted the

complainant, other than the complainant and appellant.[6] Likewise, the video of the incident is inconclusive. As the events in question occurred in the dark, the video neither proves nor negates the testimony of the complainant or appellant.

Closing arguments continued in the same vein. As the State put it in closing, "it was only him and her in the room that day," and, "This case is a 'he said/she said.'" Appellant agreed with this characterization, stating, "At the end of the day, as the prosecution has told you, this case is still a 'he said/she said.'"[7]

Against this backdrop, the trial court's comments stand in sharp relief. In a case where the State could not prove its case if the jury did not find the complainant's testimony credible, the trial court weighed in on that issue, strongly suggesting by its comments that the complainant was credible. While we do not

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[6] In addition to the complainant, the State called three other witnesses, none of whom had any personal knowledge of the incident of alleged assault. Spring Valley Village police department Peace Officers Justin Lane and Brian Baldwin testified about their post-incident investigations of the complainant's report. Elizabeth Batten, a caseworker with the Harris County district attorney's office, testified about her post-incident interview of the complainant and characteristics of abusive relationships.

In addition to his own testimony, appellant presented the testimony of character witnesses Sammy Shbeeb and Carl Shaw, neither of whom had any personal knowledge of the April 2018 incident.

[7] After closing arguments, the jury submitted the following questions, the first three of which are requests for readback of trial testimony:

> QUESTION: Review his account of April 4 incident. Prosecution went step by step through the 18 seconds of the event. From when Derek turns out light to final scream.
>
> QUESTION: Portion of testimony regarding injury and pain. Portions where she mentions nasal pain, went to doctor, Indian rub on cheeks.
>
> QUESTION: Review his account of the April 4 incident. Defense walk through the event, Mr. Moore turned out light, picked up phone from couch, struggled, he slammed phone on table.
>
> DOES IMPEDING ~~BREAT~~ NORMAL BREATHING REPRESENT AN IMPAIRMENT OF PHYSICAL CONDITION?

These questions reveal little about the effect of the trial court's comments on jury deliberations.

ascribe a particular intent to the trial court, we conclude its comments were reasonably calculated to benefit the State and to prejudice appellant's rights to a fair trial before an impartial court. *See Proenza*, 541 S.W.3d at 791; *see also Simon*, 203 S.W.3d at 592 (explaining that article 38.05 analysis is undertaken "[w]ithout judging the trial court's intention in making these comments"), 593 ("One of the most fundamental components of a fair trial is a neutral and detached judge." (quotation omitted)).

2. Was any harm cured?

We next address whether the trial court's instruction to disregard cured any harm arising from the improper comments. A trial court's instruction to disregard generally cures error stemming from the trial court's improper comments. *See Marks v. State*, 617 S.W.2d 250, 252 (Tex. Crim. App. 1981). There are, however, circumstances in which the trial court's conduct is so egregious that an instruction to disregard is insufficient. In the context of admissibility of evidence, the court of criminal appeals recognizes the "well settled" rule that error "may be generally corrected by a withdrawal and an instruction to disregard it except in extreme cases where it appears that the evidence is clearly calculated to inflame the minds of the jury and is of such character as to suggest the impossibility of withdrawing the impression produced on their minds." *Waldo v. State*, 746 S.W.2d 750, 752 (Tex. Crim. App. 1988) (quoting *Harris v. State*, 375 S.W.2d 310, 311 (Tex. Crim. App. 1964)). This and other courts have applied a similar exception for extreme or egregious errors in the context of article 38.05.[8] *See Rankin v. State*, 872 S.W.2d

[8] In *Joung Youn Kim v. State*, this court observed, "As an appellate court, we are bound to presume judicial instructions to the jury are effective unless evidence shows the jury did not follow the directive." 331 S.W.3d 156, 161 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd) (overruling article-38.05 issue in absence of evidence that jury did not follow instruction to disregard). While *Joung Youn Kim* articulates the general rule that we presume the jury follows the trial court's instructions, we do not read that case to require evidence in the exceptional

279, 284 (Tex. App.—Houston [14th Dist.] 1994) (trial court's improper comments not "so egregious" that they could not be cured by instruction to disregard), *vacated on other grounds*, 974 S.W.2d 707 (Tex. Crim. App. 1996); *Strong v. State*, 805 S.W.2d 478, 490 (Tex. App.—Tyler 1990, pet. ref'd) (same); *see also Tennison v. State*, 814 S.W.2d 484, 486 (Tex. App.—Waco 1991, no pet.) ("Unless the comment is so inflammatory or the manner in which the trial judge instructed the jury to disregard is insufficient to remove the taint from the minds of the jurors, the comment will be deemed to have been harmless."); *Florio*, 626 S.W.2d at 190 ("The manner in which the trial judge instructed the jury to disregard was insufficient to remove the taint on the minds of the jurors.").

As above, the trial court made a string of five comments imparting the impression that appellant's attempts to impeach the complainant's credibility were baseless. On three of these occasions, the trial court questioned the relevance of appellant's attempts to impeach the complainant. More egregiously, on two occasions the trial court made up facts that could potentially bolster the complainant's account.

In response to appellant's request for an instruction to disregard following these statements, the trial court simply stated to the jury, "And please disregard my statement." While there are times when an unadorned instruction to disregard cures

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"extreme cases" that "suggest the impossibility of withdrawing the impression produced on [the jurors'] minds" despite a limiting instruction. *Waldo v. State*, 746 S.W.2d 750, 752 (Tex. Crim. App. 1988) (quoting *Harris v. State*, 375 S.W.2d 310, 311 (Tex. Crim. App. 1964)). The court of criminal appeals has dated this non-evidentiary exception back to 1901, with similar language used in even earlier cases. *See id.* at 752 n.3 (discussing *Hatcher v. State*, 65 S.W. 97 (Tex. Crim. App. 1901) and collecting cases). Indeed, in support of our observation in *Joung Youn Kim*, we cited *Ladd v. State*, in which the court of criminal appeals recognized the non-evidentiary exception for extreme circumstances in the context of a mistrial. 3 S.W.3d 547, 567 (Tex. Crim. App. 1999) (mistrial is required even following instruction to disregard when "the improper question is clearly prejudicial to the defendant and is of such character as to suggest the impossibility of withdrawing the impression produced on the minds of the jurors").

harm, the instruction here does not suffice. Although the trial court made a series of troubling statements, the instruction references only a single "comment," leaving the jury without direction as to which "comment" to disregard. Likewise, the instruction does not remind the jurors that it is their province to judge the credibility of witnesses, or otherwise provide guidance as to the reason to disregard the trial court's numerous statements. Under the circumstances presented here, the trial court's pro forma instruction to disregard, referencing a single unspecified "statement," was insufficient to "remove the taint on the minds of the jurors." *Florio*, 626 S.W.2d at 190 (instruction to disregard did not cure harm from trial court's comment suggesting that police officers were more credible than other witnesses).[9]

This conclusion reflects the importance of the trial court's compliance with article 38.05. As the court of criminal appeals observed in *Proenza*,

> *Marin* described the trial judge as an "institutional referee;" she is not, to continue the metaphor, just another player on the field. Knowing this, litigants in our system do not—and should not—expect the judge to stand in open opposition to their desired verdicts, as they should with their opponents. And the trial judge, for her part, should not need the litigants to remind her that hers is not the task "of producing the evidence [and] arguing its significance[.]" She should know without being prompted that any divulgence to the jury of her opinion in the case would, if nothing else, make her seem "involved in the fray."

541 S.W.3d at 802 (footnotes omitted). Here, the trial court "stood in opposition" to appellant, "argued the significance" of evidence and even "produced" its own,

[9] We note that, in *Florio*, the trial court's instruction to disregard was even less effective than the instruction given here, given the obvious reluctance of the trial court in that case. 626 S.W.2d 189, 190 (Tex. App.—Fort Worth 1981, no pet.) ("Don't pay any attention to what I say. It's what [defense counsel] wants from me to tell you that, so I'll tell you that."). We also note the *Florio* court reversed the conviction based on a single comment from the trial court during voir dire, and accordingly we find it instructive as highlighting the care the trial court must take under article 38.05 and the limits of an instruction to disregard in curing such errors. *See id.*

and in so doing involved itself irrevocably "in the fray," all during the pivotal testimony of the case. In sum, the trial court abandoned its responsibilities under article 38.05 to such an extent that, despite the limiting instruction, we harbor "grave doubt" that the trial court's improper comments substantially influenced the jury's decision to convict appellant, doubt we cannot disregard.[10] *Kotteakos*, 328 U.S. at 765.

We sustain issue one.

III. CONCLUSION

Having sustained issue one, we do not reach issues two and three, as they would not entitle appellant to additional relief. Tex. R. App. P. 47.1. We reverse the trial court's judgment and remand for a new trial. Tex. R. App. P. 43.2(d); *see* Tex. Code Crim. Proc. Ann. art. 44.29(a).

/s/ Charles A. Spain
Justice

Panel consists of Justices Wise, Bourliot, and Spain.

Publish—Tex. R. App. P. 47.2(b).

[10] *Cf. Veteto v. State*, 8 S.W.3d 805, 812 (Tex. App.—Waco 2000, pet. ref'd) ("Because of the flagrance and persistence by the State in pursuing this line of questioning, and because of the simplicity of the trial court's instructions when constitutional guarantees were at stake, we conclude the instructions did not effectively cure the prejudice caused by the State to the extent that we can be certain the impression produced on the minds of the jury was withdrawn."), *abrogated on other grounds by State v. Crook*, 248 S.W.3d 172 (Tex. Crim. App. 2008).