# Fourth Court of Appeals
## San Antonio, Texas

## MEMORANDUM OPINION

Nos. 04-15-00723-CR & 04-15-00724-CR

David **ZAVALA**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 25th Judicial District Court, Guadalupe County, Texas
Trial Court Nos. 14-1729-CR-A & 14-1730-CR-A
Honorable W.C. Kirkendall, Judge Presiding

Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: November 9, 2016

AFFIRMED

David Zavala was convicted by a jury of three counts of aggravated assault. On appeal, Zavala contends: (1) the State's elicitation of testimony of his prior incarceration constituted structural error; and (2) trial counsel was ineffective in failing to ask for a mistrial after the trial court sustained the objection to the testimony and gave a curative instruction. We overrule Zavala's contentions and affirm the trial court's judgments.

## BACKGROUND

Zavala was driving an automobile while intoxicated at approximately 93 miles per hour on a road with a speed limit of 35 miles per hour when he struck a utility pole. Zavala's step-son, who was in the front passenger seat, and one of the passengers in the back seat were seriously and permanently injured. The other passenger in the back seat died at the scene.

Zavala was charged with three counts of aggravated assault, and a jury found him guilty of all three counts. The trial court assessed punishment and sentenced Zavala to fifty years in prison for the aggravated assault that resulted in the passenger's death and twenty-five years in prison for the aggravated assaults that resulted in the serious bodily injury to the other two passengers, with the three sentences to run concurrently.

## EXTRANEOUS OFFENSE

In his first point of error, Zavala contends the State elicited testimony from his stepson regarding a prior incarceration. Zavala argues this constituted structural error and is not subject to a harm analysis. Zavala's brief references the law applicable when a defendant's motion for a mistrial is denied; however, defense counsel did not request a mistrial after the trial court sustained the objection to the testimony and instructed the jury to disregard the testimony. Zavala's brief also asserts the curative instruction given by the trial court was ineffective.

The State responds Zavala failed to preserve this issue for our consideration. The State further responds that if the issue was preserved, the curative instruction was sufficient to cure any harmful impression caused by the testimony.

A. Testimony in Question

Zavala's complaint is based on the following exchange between the prosecutor and Zavala's step-son:

> Q. Do you remember when law enforcement came to talk to you the first time [name of witness]?
> A. I remember bits and pieces.
> Q. Do you remember not wanting to say who was driving?
> A. Yes, ma'am.
> Q. Can you tell the Jury why you didn't want to tell the detectives who was driving that car?
> A. (Crying). Because David was like my dad, and I didn't want — (crying). Because David was like my dad, and **I didn't want him to get locked up again**.
> [Defense counsel]: Objection, your Honor.
> THE COURT: What's your objection?
> [Defense counsel]: 4.04 objection, your Honor.
> THE COURT: Sustained.
> [Prosecutor]: I'll move on, your Honor.
> THE COURT: All right.
> [Defense counsel]: I ask for an instruction to the Jury, your Honor.
> THE COURT: All right, Ladies and Gentlemen of the Jury, I sustain the objection. Please disregard the last answer that the witness gave.

(emphasis added).

B. Preservation of Error

"[T]he traditional and preferred procedure for a party to voice its complaint has been to seek them in sequence — that is, (1) to object when it is possible, (2) to request an instruction to disregard if the prejudicial event has occurred, and (3) to move for a mistrial if a party thinks an instruction to disregard was not sufficient." *Young v. State*, 137 S.W.3d 65, 69 (Tex. Crim. App. 2004). Although this procedure is preferred, the Texas Court of Criminal Appeals has instructed that "this sequence is not essential to preserve [all] complaints for appellate review." *Id*. For example, if a defendant is contending an instruction to disregard could not cure the objectionable occurrence, "the only suitable remedy is a mistrial, and a motion for mistrial is the only essential prerequisite to presenting the complaint on appeal." *Id*. at 70. "Faced with incurable harm, a defendant is entitled to a mistrial and if denied one, will prevail on appeal." *Id*.

In the instant case, Zavala's complaint on appeal is that the testimony resulted in incurable harm. Therefore, in order to preserve this complaint, Zavala was required to move for a mistrial.

Because no request for a mistrial was made following the trial court's curative instruction, we must conclude Zavala's first issue has not been preserved for our consideration.

C. Efficacy of Instruction to Disregard

Assuming Zavala's first issue had been preserved for our review, we would overrule the issue because we would hold the trial court's instruction to disregard was effective. "Unless clearly calculated to inflame the minds of the jury or of such damning character as to make it impossible to remove the harmful impression from the jurors' minds, a witness's reference to a defendant's criminal history or previous incarceration, standing alone, generally is cured by a prompt instruction to disregard." *Smith v. State*, 491 S.W.3d 864, 873 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (citing *Ladd v. State*, 3 S.W.3d 547, 571 (Tex. Crim. App. 1999) (instruction to disregard cured witness's improper reference to defendant's multiple juvenile arrests); *Kemp v. State*, 846 S.W.2d 289, 308 (Tex. Crim. App. 1992) ("We find the uninvited and unembellished reference to appellant's prior incarceration—although inadmissible—was not so inflammatory as to undermine the efficacy of the trial court's instruction to disregard."); *Nobles v. State*, 843 S.W.2d 503, 514 (Tex. Crim. App. 1992) (witness's statement that defendant "didn't want to go back to prison" cured by prompt instruction to disregard); *Gardner v. State*, 730 S.W.2d 675, 696–97 (Tex. Crim. App. 1987) (witness's statement that "[appellant] told me that even when he was in the penitentiary, that he had stomach problems" was cured by trial court's instruction to disregard); *Jackson v. State*, 287 S.W.3d 346, 354 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (complainant's two references to appellant's previous incarceration were cured by instruction to disregard)). We presume a jury will obey a trial court's instruction to disregard. *Archie v. State*, 340 S.W.3d 734, 741 (Tex. Crim. App. 2011). "[O]nly in the most egregious cases when there is an 'extremely inflammatory statement' is an instruction to disregard ... considered an insufficient

response by the trial court." *Williams v. State*, 417 S.W.3d 162, 176 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd) (citations omitted).

In this case, "[n]othing in the record indicates [Zavala's step-son's] reference to [Zavala's] previous incarceration clearly was calculated to inflame the minds of the jury." *Smith*, 491 S.W.3d at 873. Although Zavala contends the State elicited the reference, we hold the reference was spontaneous, uninvited, and mirrors references the courts have held to be cured by an instruction to disregard. *See id*. Therefore, we hold the trial court's instruction to disregard cured the reference to Zavala's previous incarceration.

## INEFFECTIVE ASSISTANCE OF COUNSEL

In his second issue, Zavala contends trial counsel was ineffective in failing to ask for a mistrial after the curative instruction. We overrule this issue for two reasons. First, because we have held the trial court's instruction to disregard was sufficient to cure any harmful impression caused by the reference to Zavala's prior incarceration, trial counsel could not be ineffective in failing to move for a mistrial. *See Casiano v. State*, 462 S.W.3d 174, 177-78 (Tex. App.—Houston [1st Dist.] 2015, no pet.); *Weinn v. State*, 281 S.W.3d 633, 641-42 (Tex. App.—Amarillo 2009), *aff'd*, 326 S.W.3d 189 (Tex. Crim. App. 2010). Second, because no record was developed regarding trial counsel's reasons for not moving for a mistrial, we assume a strategic motivation existed. *Ex parte Saenz*, 491 S.W.3d 819, 828 (Tex. Crim. App. 2016).

## CONCLUSION

The trial court's judgments are affirmed.

Sandee Bryan Marion, Chief Justice

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