Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-15-00770-CR

Noel Don **JUAN**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 290th Judicial District Court, Bexar County, Texas
Trial Court No. 2014CR2740
Honorable Melisa Skinner, Judge Presiding

Opinion by: Marialyn Barnard, Justice

Sitting: Marialyn Barnard, Justice
Patricia O. Alvarez, Justice
Irene Rios, Justice

Delivered and Filed: July 12, 2017

AFFIRMED

The State charged appellant Noel Don Juan with four counts of aggravated sexual assault of a child. They jury acquitted him of all but one count. Based on the jury's recommendation, the trial court sentenced Juan to twenty-five years' confinement. On appeal, Juan raises nine issues, alleging: (1) the trial court erred in excluding certain evidence, thereby depriving him of his right to confront witnesses and present a complete defense; (2) the trial court erred in denying two motions for mistrial; (3) ineffective assistance of trial counsel; (4) prosecutorial misconduct; and (5) cumulative error. We affirm the trial court's judgment.

BACKGROUND

According to the record, Juan moved in with his girlfriend Natasha and her children in 2008. After moving in and out several times over approximately four years, Juan moved out for the last time in 2012. Natasha testified that in July 2013, after she picked her daughter J.M. up after a sleepover at a friend's house, J.M. made an outcry, telling Natasha that Juan had sexually assaulted her. The assaults allegedly occurred from July 2011 to January 2012. According to Natasha, J.M. said Juan taught her to play a game called "the tasting game," which they played when Natasha was at work and J.M.'s brothers were otherwise engaged. Juan told J.M. not to tell anyone about the game. J.M. told her mother they played the game "maybe like 10 times." At the time they played the game, J.M. was "eight turning nine" years old.

When they played the game, Juan would blindfold J.M. and make her open her mouth. He would then put something in her mouth and J.M. had to guess what it was — she could taste it, but not "bite down on it." Usually, J.M. tasted some kind of syrup, but the last time they played the game, her blindfold slipped and she saw what she thought was pubic hair. As for what was in her mouth, she described it to her mother as something soft, not something she could bite down on. Natasha told investigators that J.M. said Juan put his penis in her mouth. Natasha subsequently admitted J.M. never told her it was Juan's penis; rather, she surmised the object was his penis based on J.M.'s description. According to Natasha, J.M. also described the rim of the penis head, but Natasha admitted she did not include this in her statement to police. During J.M.'s testimony at trial, she said Juan put his "boy part" — in her mouth. After this incident, which took place in the bathroom while J.M. was in the shower, J.M. told Juan she did not want to play the game anymore. After J.M. told her mother about the game, Natasha called police.

Juan's theory at trial was that Natasha coached J.M. into alleging Juan sexually assaulted her. Juan pointed to Natasha's past, allegedly false accusations against him, which she

subsequently recanted. Juan theorized that whenever he would try to leave Natasha or date other women, she would fabricate allegations against him. Juan presented evidence suggesting Natasha had done the same thing with regard to her daughter's accusations. Natasha continued to deny making false allegations against Juan and denied telling J.M. to fabricate allegations.

However, when the defense cross-examined Natasha, she admitted she had previously accused Juan — in separate instances — of sexual and physical assault. Police arrested Juan each time. Natasha recanted in both cases. She even wrote Juan a letter while he was in jail in which she admitted lying about the physical assault. Natasha also accused him of sexual assault, but later recanted and swore out an affidavit of non-prosecution. At trial, however, she claimed the affidavit was a lie and Juan had sexually assaulted her. Moreover, despite her daughter's outcry, Natasha admitted she continued to contact Juan. She even saw him "once or twice thereafter." She explained she never said anything to Juan about J.M.'s allegations because she was afraid he might retaliate. She claimed to have ended all communication with him a week or two after the outcry, but Juan presented evidence to the contrary, including a text message from Natasha in March 2014. Natasha denied sending the text.

Juan presented several witnesses in his defense. Most of the testimony provided by these witnesses concerned Natasha and her alleged extreme behavior when she was angry at Juan or jealous of his interactions with others. This testimony was presented to establish the defensive theory that Natasha instigated J.M.'s claims of sexual assault because Juan was leaving her and she was jealous and angry.

Juan's half-brother Carlos testified he spent time with Juan and Natasha. Carlos stated Natasha was jealous and her jealousy was out of hand. Juan's cousin Joel and another brother, Paul, provided similar testimony about Natasha's jealousy. These men also testified they saw Juan

when he was showering at a retreat in 2011 and he did not have any pubic hair, seemingly contradicting J.M.'s claim that she saw Juan's pubic hair.

Juan also testified. He described Natasha as jealous, unstable, and obsessive. He disagreed with her claim that they lived together for four consecutive years, stating he moved in and out over the course of the relationship. Juan specifically denied that he lived with Natasha and her children on the dates he allegedly assaulted J.M. He also claimed he only watched her children on three occasions and each time it was only for three or four hours. Juan claimed he was never alone with J.M. Moreover, Juan testified J.M.'s allegations were made in August 2013, after Natasha discovered he was dating another woman. He also asserted that at the time of the alleged sexual assaults, his pubic area was shaved.

As noted above, the jury acquitted Juan of three of the four sexual assault of a child counts, convicting him of a single count. Juan was ultimately sentenced to twenty-five years' confinement. Thereafter, he perfected this appeal.

ANALYSIS

On appeal, Juan raises nine issues. He complains about the exclusion of certain evidence, which violated his constitutional rights, the denial of two motions for mistrial, the ineffectiveness of his trial counsel, and prosecutorial misconduct. Juan also contends the errors complained of — if individually insufficient to entitle him to a reversal — were harmful in their cumulative effect.

Exclusion of Evidence — Right to Present Complete Defense & Confront Witnesses

In his first four issues, which he argues together, Juan contends the trial court erred when it prevented the jury from hearing "key pieces of the defense's case which would have exposed Natasha's bias, motive, and interest to be truthful in this case." More specifically, Juan complains he was erroneously denied the opportunity to advise the jury about the following: (1) specific examples of Natasha's alleged extreme behavior toward him when he attempted to leave her; (2)

Natasha's reputation for having her children lie to Child Protective Services for her own benefit; and (3) the State's dismissal of the prior assault cases filed against him by Natasha. According to Juan, the exclusion of this evidence violated his constitutional right to confront and cross-examine witnesses and denied him the right to present a complete defense. Juan asserts the trial court's errors in excluding the evidence were of constitutional magnitude and contributed to his conviction.

Standard of Review

An appellate court reviews a trial court's decision to admit or exclude evidence under an abuse of discretion standard. *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011); *Segovia v. State*, 467 S.W.3d 545, 549 (Tex. App.—San Antonio 2015, pet. ref'd). A trial court abuses its discretion when the decision lies outside the zone of reasonable disagreement. *Tillman*, 354 S.W.3d at 435; *Segovia*, 467 S.W.3d at 550. If the trial court's decision is correct on any theory of law applicable to the case, the decision will be upheld. *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009); *Winegarner v. State*, 235 S.W.3d 787, 790 (Tex. Crim. App. 2007). "This is so because 'trial courts . . . are usually in the best position to make the call on whether certain evidence should be admitted or excluded.'" *Winegarner*, 235 S.W.3d at 790 (quoting *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)).

Application

The Sixth Amendment to the United States Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." U.S. CONST. amend. VI. The right to confrontation includes the right to cross-examine a witness to attack her general credibility or to show her possible bias, self-interest, or motives in testifying. *Davis v. Alaska*, 415 U.S. 308, 316 (1974); *Hammer v. State*, 296 S.W.3d 555, 561 (Tex. Crim. App. 2009). However, the Supreme Court has recognized that states have broad latitude under the Constitution to

promulgate rules excluding certain evidence in criminal trials. *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). Additionally, "[t]he trial court maintains broad discretion to impose reasonable limits on cross-examination to avoid harassment, prejudice, confusion of the issues, endangering the witness, and the injection of cumulative or collateral evidence." *Henley v. State*, 493 S.W.3d 77, 95 (Tex. Crim. App. 2016); *see Holmes*, 547 U.S. at 326. Thus, a defendant has no constitutional right to present favorable evidence. *Potier v. State*, 68 S.W.3d 657, 659–60 (Tex. Crim. App. 2002) (quoting *United States v. Scheffer*, 523 U.S. 303, 308 (1998)). In other words, the Confrontation Clause does not guarantee examination "that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 205 (1985). Limitations on examination of a witness do not violate a defendant's Sixth Amendment right of confrontation as long as: (1) the possible bias and motive of the State's witness is clear to the trier of fact; and (2) the defendant has otherwise been afforded an opportunity for thorough and effective cross-examination. *Sansom v. State*, 292 S.W.3d 112, 119 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd).

Nevertheless, a state's latitude in promulgating rules and a trial court's discretion in restricting witness examination have limits and may not "infring[e] upon a weighty interest of the accused." *Holmes*, 547 U.S. at 324–25 (quoting *Scheffer*, 523 U.S. at 308). One of those "weighty interests" is the right to present a complete defense. *Id.* at 324; *see Easley v. State*, 424 S.W.3d 535, 540 (Tex. Crim. App. 2014). "A criminal defendant has a constitutional right to present a complete and meaningful defense at trial, and is denied that right when a 'trial court's clearly erroneous ruling results in the exclusion of admissible evidence that forms the vital core of a defendant's theory of defense and effectively prevents him from presenting that defense.'" *Easley*, 424 S.W.3d at 540 (quoting *Walters v. State*, 247 S.W.3d 204, 219 (Tex. Crim. App. 2007)). "Each Confrontation Clause issue must be weighed on a case-by-case basis, carefully taking into account

the defendant's right to cross-examine and the risk factors associated with admission of the evidence." *Lopez v. State*, 18 S.W.3d 220, 222 (Tex. Crim. App. 2000).

In this case, Juan's defensive theory at trial was that Natasha manipulated her daughter into fabricating the allegations of sexual assault. In an effort to support this defense, Juan sought to present evidence that Natasha had a history of fabricating criminal allegations against him, engaging in extreme behavior when he attempted to leave the relationship, and manipulating her children. Juan contends his Sixth Amendment rights were violated when the trial court refused to permit him to make certain inquiries in support of his defense. Specifically, Juan complains the trial court erred in excluding: (1) specific instances of conduct exhibited by Natasha when he would attempt to end the relationship, including testimony from family members who claimed they saw Natasha threaten Juan with a knife; testimony regarding incidents where Natasha attempted to cut her wrists or threatened to kill her own children; Esperanza's testimony that Natasha exhibited jealous behavior; photographs showing Juan was dating someone else when the sexual assault allegations arose; testimony that Natasha sent nude photographs of herself to Juan's new girlfriend; (2) evidence Natasha instructed her children to lie to CPS about her drug use; and (3) the State's dismissal of the physical and sexual assault charges asserted by Natasha against Juan.

The crux of Juan's complaint is the excluded evidence was significant to his defensive theory that Natasha — an angry and jealous woman — manipulated her daughter into making false allegations of sexual assault against him because he left her and began another relationship. According to Juan, the evidence of specific instances of conduct would have allowed him to demonstrate to the jury Natasha's lack of credibility as well as her propensity for attacking him — physically or through the criminal justice system — whenever he attempted to end their relationship and move on with someone else.

We agree the possible animus, motive, ill will, or bias of a prosecution witness is relevant and a defendant is entitled under the Sixth Amendment — as well as the Texas Rules of Evidence — subject to reasonable restrictions, to produce evidence that might establish the same. *See Billodeau v. State*, 277 S.W.3d 34, 42–43 (Tex. Crim. App. 2009); TEX. R. EVID. 613(b). However, in this case we need not decide whether the trial court erred in refusing to admit the evidence referenced by Juan because even if the trial court erred, we hold Juan was not harmed.

The erroneous exclusion of evidence under the Texas Rules of Evidence generally constitutes non-constitutional error, and any alleged harm is therefore reviewed under Rule 44.2(b) of the Texas Rules of Appellate Procedure. *Walters*, 247 S.W.3d at 219; TEX. R. APP. P. 44.2(b) (stating that any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded). The only exception is when the excluded evidence "forms such a vital portion of the case that exclusion effectively precludes the defendant from presenting a defense." *Walters*, 247 S.W.3d at 219 (quoting *Potier*, 68 S.W.3d at 665). Erroneous exclusion of evidence might amount to a constitutional violation "if it results in the exclusion of admissible evidence that form the vital core of a defendant's theory of defense and effectively prevents him from presenting that defense." *Id.* In that case, any harm would be reviewed under Rule 44.2(a), which is applicable to constitutional errors. *Id.*; *see* TEX. R. APP. P. 44.2(a) (stating that constitutional error requires reversal of judgment or punishment unless reviewing court determines beyond reasonable doubt that it did not contribute to conviction or punishment).

Here, the evidence specified by Juan was relevant to his theory that Natasha was angry and jealous when Juan left her, prompting her to retaliate by manipulating J.M. into making false allegations of sexual assault — a twist on her prior conduct. However, we hold the exclusion of the specified evidence did not prevent Juan from presenting his chosen defense. Rather, the excluded evidence would have only "incrementally" furthered Juan's defensive theory, and

therefore, any error in excluding it was not of constitutional dimension. *See Walters*, 247 S.W.3d at 222 (quoting *Ray v. State*, 178 S.W.3d 833, 836 (Tex. Crim. App. 2005)). Thus, we will review the trial court's presumed error in excluding the evidence under Rule 44.2(b).

Under Rule 44.2(b), we must disregard any non-constitutional error that does not affect an appellant's substantial rights. *See* TEX. R. APP. P. 44.2(b). Substantial rights are not affected if, after examining the record as a whole, we have fair assurance the error did not influence the jury, or had but a slight effect. *Petetan v. State*, No. AP-77,038, 2017 WL 915530, at *32 (Tex. Crim. App. Mar. 8, 2017) (citing *Barshaw v. State*, 342 S.W.3d 91, 93–94 (Tex. Crim. App. 2011)); *Hines v. State*, 383 S.W.3d 615, 625 (Tex. App.—San Antonio 2012, pet. ref'd). In considering the potential to harm, the focus is not on whether the outcome of the trial was proper despite the error, but whether the error had a substantial or injurious effect or influence on the jury's verdict. A conviction must be reversed for non-constitutional error only if we have "grave doubt that the result of the trial was free from the substantial effect of the error." *Hines*, 383 S.W.3d at 625 (quoting *Barshaw*, 342 S.W.3d at 94). "Grave doubt" exists when the matter is so evenly balanced the judge feels "in virtual equipoise as to the harmlessness of the error.'" *Id.* Applying this standard, we conclude any error in excluding the evidence specified by Juan did not influence the jury or had only a slight effect. *See id.*

Juan elicited evidence from family members regarding the toxic nature of his relationship with Natasha and her jealous behavior. Juan's mother, Esperanza, testified there was always "drama" between her son and Natasha, and most of their fights or arguments were instigated by Natasha. Esperanza stated she saw Natasha act violently toward Juan. Esperanza testified Natasha admitted she made false assault allegations against Juan because he was going to leave her. Natasha told Esperanza she would "fix it." With regard to the allegations of sexual assault of J.M., Esperanza testified that several times after J.M.'s outcry, Natasha attempted to contact Juan

numerous times by calling or texting his cell phone, which was in Esperanza's possession while Juan was in jail. Juan suggested this continued contact belied any suggestion he actually assaulted J.M. because what mother would continue to contact the man who assaulted her daughter?

Juan's brothers, Carlos and Paul, also testified about Juan's relationship with Natasha, as did his cousin Joel. Carlos stated he met Natasha when she and Juan began dating in 2008. According to Carlos, he saw them at numerous functions. Initially, the couple would have fun, but "shortly there was just argument." He described Natasha as "real combative and toxic," arguing and making scenes. Carlos testified the arguments got out of hand "a lot of times," and were often related to Natasha's jealousy. He told the jury Juan and Natasha broke up in 2011, and Juan began dating someone else. Carlos confirmed that even after J.M.'s outcry, Natasha attempted to contact Juan. Juan's brother Paul provided similar testimony about the couple's relationship and Natasha's jealous behavior.

Cousin Joel also testified about Juan's relationship with Natasha. He too stated they had problems and characterized those problems as based on Natasha's jealousy. According to Joel, Natasha was jealous of Juan's relationship with his family as well as any interactions he had with other women. Joel stated that when Juan would leave Natasha she would "act out," "lose it," become "very upset," "depressed," and "out of control." He opined the relationship was unhealthy.

Juan also produced evidence from a woman named Gloria, who testified she began dating Juan in 2011. This contradicted Natasha's testimony that she and Juan were still living together in 2011. Gloria stated she and Juan were together until December 2012, a few months before the alleged outcry by J.M. After Gloria and Juan ended their relationship, he began dating a woman named Celeste. In July or August 2013, Natasha saw a picture of Celeste on Juan's cell phone. According to Juan, Natasha was hurt, "then got upset." Around that same time, he "completely cut [Natasha] off[,] [i]ncluding the texting." Thereafter, he was accused of sexually assaulting

J.M. According to Juan, and given Natasha's past behavior, J.M.'s allegations were a result of Natasha's manipulation of J.M. and J.M.'s desire to please her mother. Juan testified J.M. would do anything to please Natasha. Juan was able to elicit testimony from Natasha that J.M. had, in 2009, changed grades on her school papers because she wanted to make Natasha happy. Juan followed up by having Natasha admit J.M. was aware of the heartache her mother suffered while dating Juan, suggesting J.M. fabricated allegations of sexual assault against Juan to help her mother get back at Juan for leaving her and dating other women. Juan's testimony suggested Natasha led J.M. to make the allegations because Natasha knew authorities were unlikely to believe any criminal allegation Natasha might make given her prior recantations. Juan believed that if Natasha told her to, J.M. would lie in court in order to please her mother. Juan also testified he witnessed Natasha instructing her children to lie to a government agency. This permitted him to argue to the jury that past portends future — if Natasha would manipulate her children into lying to a governmental agency, she would do the same to retaliate against him.

Juan extensively cross-examined Natasha about her prior allegations of physical and sexual assault. Natasha admitted she alleged Juan physically assaulted her. Juan was arrested and jailed. Thereafter, Natasha again recanted, admitting to several people she lied about the assault. In a separate incident, Natasha claimed Juan sexually assaulted her. The police filed sexual assault charges against Juan, naming Natasha as the victim. Natasha acknowledged she subsequently executed an "affidavit of nonprosecution" at the office of Juan's attorney in which she swore her claim of sexual assault was untrue. Natasha further admitted she told Juan's attorney she made up the allegation because she was mad at Juan. Natasha even admitted helping Juan's mother raise money to bail Juan out of jail. The women prepared plate dinners to sell in an effort to secure the necessary funds. Thus, the jury was made aware of her allegation and subsequent recantation.

Natasha was forced to admit that while Juan was in jail based on her allegation of sexual assault, she wrote to him often, "[s]ometimes every day[,]" professing her love for him. Juan's counsel asked Natasha if she remembered a particular letter in which she admitted the assault allegation was false. Natasha claimed she could not remember the letter or its contents. When confronted with the actual letter, Natasha admitted she had written to Juan, telling him authorities wanted her to pursue the prosecution, but she did not want to because it was a lie. In the letter, she stated the authorities did not want to hear the truth, and asked her to lie. Although Natasha admitted writing the letter, she said she did it at Juan's behest, knowing authorities read inmate mail. In a separate letter, she wrote that knowing she hurt Juan made her hate herself so much that she wanted to kill herself. She wrote in the same letter she could not picture herself moving on without Juan. She also referred to herself in the letter as a "crazy deranged bitch," advising Juan to run away from her. In yet another letter, Natasha wrote she was sorry Juan had to put up with her, admitting she was difficult when she did not get her way. She also wrote that if she could not be happy, Juan would not be happy. On the stand, she described their love for each other as "angry love."

Natasha acknowledged that around the time of J.M.'s outcry, she discovered a picture of a woman on Juan's phone. She then admitted that despite her daughter's claim of sexual assault, she continued to have contact with Juan. Juan produced evidence showing that in November 2013, after J.M.'s outcry in July of that year, Natasha entered a post on Facebook stating she cleaned the toilet with Juan's toothbrush and then replaced it in the holder because he ate the last Pop Tart. This suggested Juan was still staying, at least at times, in the home, although Natasha claimed the post was "fantasy" and she did it out of anger. She denied she and Juan were still together at that time. Natasha admitted she communicated with Juan almost immediately after J.M.'s outcry, but could not recall if she continued to text Juan almost a year after the outcry.

Finally, Juan testified in his own defense. He said that as he spent more time with her, he discovered Natasha was obsessive and jealous. After living with her approximately six months, he decided to move out. When he did, Natasha called the police and he was arrested for assault. After Natasha recanted, Juan moved back in with her. However, after another six months, he left her. She again called authorities and this time he was charged with sexually assaulting Natasha. Again, Natasha recanted. According to Juan, Natasha called the police every time he tried to leave her — and it was more than twice. Despite the two arrests and multiple reports, he ultimately moved back in with her.

Juan testified he decided to move out for a third a final time. The couple argued in front of Natasha's children, including J.M. Juan stated he did not like the way Natasha acted, describing her as "too obsessive and just too crazy." He left the relationship and the home, even leaving his "stuff" behind. Juan said he left knowing that each time he told Natasha he was ending the relationship, she made some sort of allegation.

Applying the standard for non-constitutional error as set forth in Rule 44.2(b), we hold Juan's substantial rights were not affected by the trial court's refusal to allow Juan to solicit and admit evidence relating to specific instances of conduct exhibited by Natasha, evidence Natasha instructed her children to lie to CPS about her alleged drug use, or the State's dismissal of the physical and sexual assault charges asserted by Natasha against Juan. As previously noted, the thrust of Juan's defense was that Natasha — out of jealousy and anger over Juan's decision to leave her and date another woman — manipulated J.M. into make false allegations of sexual assault against Juan. Juan was able to question Natasha's credibility, ill will, and motive in front of the jury. He was able to show that in the past Natasha may have made false allegations of abuse against him in retaliation for his decision to leave her. He was permitted to present evidence that on occasion, J.M. lied to make her mother happy. Juan was permitted to develop his defense before

the jury; the trial court excluded only certain specific instances of conduct and details. Thus, after reviewing the record, we are convinced the exclusion of the complained of evidence did not affect Juan's substantial rights, and we overrule his first four issues.

Motions for Mistrial

Juan next complains about the denial of two motions for mistrial. In his fifth issue, Juan contends the trial court erred in denying his motion for mistrial after the State improperly elicited testimony that Juan's mother had a prior felony conviction from more than ten years ago. In issue six, Juan contends he was entitled to a mistrial when Natasha told the jury he was on probation for an assault case.

Standard of Review

We review a trial court's denial of a motion for mistrial for an abuse of discretion. *Coble v. State*, 330 S.W.3d 253, 292 (Tex. Crim. App. 2010); *Lopez v. State*, 261 S.W.3d 103, 106 (Tex. App.–San Antonio 2008, pet. ref'd). Under this standard, a trial court's ruling must be upheld unless it is outside the zone of reasonable disagreement. *Coble*, 330 S.W.3d at 292. Because a mistrial is a drastic remedy, it is only required when an "error is so prejudicial that expenditure of further time and expense would be wasteful and futile." *Wood v. State*, 18 S.W.3d 642, 648 (Tex. Crim. App. 2000) (quoting *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999)).

Application — Esperanza's Prior Felony Conviction

When the State cross-examined Juan's mother, Esperanza, it asked her if she had previously been convicted of a felony DUI. Juan did not object, and Esperanza admitted to the prior conviction. This was the second question asked of Esperanza by the State; the State did not revisit the issue in its subsequent examination. In its brief, the State admits this was improper

impeachment.[1] *See* TEX. R. EVID. 609(b) (prohibiting impeachment with prior conviction if more than ten years have passed since witness's conviction or release from confinement, whichever is later). Nevertheless, the State argues Juan has failed to preserve this issue because his motion for mistrial was untimely and he failed to seek an instruction to disregard. We agree.

The State asked the question of Esperanza on the third day of the trial — November 4th. When the State asked its question, there was no objection, no request for an instruction to disregard, and no motion for mistrial by Juan. Then, on the fifth day of the trial — November 6th — after the jury returned a verdict of guilt, Juan's counsel advised he had discovered Esperanza's conviction was more than ten years old. He then moved for a mistrial based on "prosecutorial misconduct." Counsel claimed he believed the State knew the conviction was remote and the question was asked in "bad faith." The State admitted the conviction was remote under Rule 609, but denied the allegation of bad faith, stating, "It was simply a question that was asked with incomplete information at the time." The prosecutor explained Esperanza was a defense witness and she did not know Esperanza would be testifying until she was called. The prosecutor quickly ran a search for any prior convictions and discovered the DUI, but because of the time constraints, was unable to determine the date of the offense before she asked the question.

Rule 33.1 provides that before presenting a complaint for appellate review, the record must show the complaint was made to the trial court in a timely and specific manner. TEX. R. APP. P. 33.1. Thus, a motion for mistrial must be timely. *Griggs v. State*, 213 S.W.3d 923, 927 (Tex. Crim. App. 2007). "A motion for mistrial is timely only if it is made as soon as the grounds for it become apparent." Esperanza was a defense witness and Juan's mother. Once Juan's counsel heard the question about the prior conviction and Esperanza's response, he was on notice of the

[1] At trial, the State also admitted the impropriety of its question, stating it asked the question with "incomplete information."

prior conviction. Although counsel stated on November 6th he had "since investigated and determined that it was a conviction that was remote in time," we fail to see how it could have taken trial counsel more than a day to discover the date of Esperanza's prior conviction. Certainly, he could have asked Esperanza — his own witness, which he did when the trial court permitted Juan to reopen his case and procure testimony from Esperanza regarding the date of her prior conviction. We see no legitimate reason to justify the delay from the time the question was asked on November 4th to the time when Juan finally moved for a mistrial on November 6th. *See Lagrone v. State*, 942 S.W.2d 602, 618 (Tex. Crim. App. 1997) (en banc) (holding that if appellant can show no legitimate reason to justify delay in making objection, objection is untimely and error is waived). Accordingly, we hold the motion for mistrial based on Esperanza's prior conviction was untimely and therefore, not preserved for our review.

Moreover, Juan never asked the trial court to instruct the jury to disregard the testimony. Rather, he simply moved for a mistrial two days after the testimony was elicited. When, as in this case, a party requesting a mistrial does not first seek a lesser remedy, a reviewing court cannot reverse the trial court's judgment if the alleged error could have been cured by a less drastic alternative. *See Ocon v. State*, 284 S.W.3d 880, 884–87 (Tex. Crim. App. 2009). In other words, if the defendant failed to request an instruction to disregard prior to moving for a mistrial and the error could have been cured by such instruction, the defendant has forfeited appellate review. *Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007) (citing *Young v. State*, 137 S.W.3d 65, 69–70 (Tex. Crim. App. 2004)). Juan contends a motion to disregard was unnecessary because it could not cure the prejudice created by the improper solicitation of evidence in violation of Rule 609(b). In support of this contention, Juan argues that requesting a motion to disregard would have drawn more attention to the issue, particularly given that the request would have been made two days later, after the jury had already found him guilty. However, as noted above, it was Juan

who waited until November 6th to challenge evidence admitted on November 4th, and therefore, if it can be said an instruction on November 6th would have been insufficient to cure the error because the jury had already returned its verdict, the fault lies with Juan for failing to raise the issue at a time when a cure was possible. In addition, we hold that if an instruction had been timely given to the jury, cure was possible. Esperanza's prior DWI offense was not a crime involving credibility — such as perjury, theft, etc. — and it was a non-violent offense. Moreover, to the extent Juan's defense was based on his family's credibility, three other family members, whose credibility was not impeached, also testified on Juan's behalf, providing testimony similar to that provided by Esperanza with regard to Natasha's character.

Accordingly, we hold Juan has forfeited his right to appellate review of his motion for mistrial with regard to the admission of Esperanza's prior offense because (1) his motion was untimely, (2) any ineffectiveness of an instruction to disregard was based on Juan's failure to seek an instruction before the jury returned its verdict of guilt; and (3) an instruction to disregard would have been sufficient to cure any error. We overrule Juan's fifth issue.

Application — Juan on Probation

Juan also requested a mistrial based on testimony provided by Natasha. As Juan's trial counsel was cross-examining Natasha about her contact with Juan when he was in jail based on charges she filed against him, Natasha referenced an assault case for which Juan was currently on probation:

> Q: About the same time when Noel Don Juan was in jail and trying to get out on bond you wrote to him several times, did you not?
>
> A: Every time.
>
> Q: Every time. So what would you say, maybe once a week, twice a week, how often did you write to him?
>
> A: Sometimes every day.

> Q: And some of those letters you professed your love to him, didn't you?
>
> A: Yes.
>
> Q: Okay. And you also talked about the fact that there was this pending assault cases [sic] that he had to deal with, remember that?
>
> ***A: The other assault case that he's on probation for already?***
>
> Q: No, no. I'm talking about the assault case. No, you got to listen to my question.

(emphasis added). Juan's counsel objected, arguing the assault case referenced by Natasha involved an aggravated assault charge against an unknown male — apparently a reference to the improper admission of evidence under Rule 404(b) of the Texas Rules of Evidence. *See* TEX. R. EVID. 404(b). Juan's counsel claimed Natasha referenced the assault on purpose. However, the trial court disagreed, noting that during counsel's examination of Natasha he previously asked her whether this was the first time Juan has been accused of a violent offense. When Natasha hesitated, counsel clarified that he was talking about offenses against Natasha and her family. The trial court noted that counsel's question regarding prior violent offenses confused the witness. And, from the exchange above, it appears the confusion continued. Counsel asked Natasha about a pending assault case without specifically referencing the particular case about which he was asking. Natasha responded with a question, asking whether he was referencing the assault for which Juan was currently on probation. Out of the jury's presence, Natasha stated she was unsure about which assault counsel was referring to and "was trying to clarify." Thus, the record reflects confusion by the witness based on an inartful question by counsel. The trial court recognized this, cautioning Juan's counsel about the nature of his questions, specifically stating he was "not very specific as to which assault" he was referencing.

Thereafter, Juan's counsel lodged a formal objection, reiterating his belief that Natasha — given her familiarity with the criminal justice system — purposefully referenced the prior assault

to inflame the jury. Counsel moved "to strike her testimony" and asked for a mistrial. The trial court denied the motion for mistrial, noting it had admonished Natasha that she was not to reference other offenses relative to Juan.

Although Juan's counsel objected and moved for a mistrial, he failed to ask the trial court to instruct the jury to disregard Natasha's reference to the assault. Thus, as noted above, unless Natasha's statement was incurable by an instruction to disregard, Juan has waived his right to appellate review of this issue. *See Archie*, 221 S.W.3d at 699. Given the inartful question, we hold Natasha's response was nothing more than an attempt to obtain clarification about the assault referenced by Juan's counsel. There is nothing in the record to suggest Natasha acted purposefully in light of the question — particularly given that counsel had previously posed questions that were subject to various interpretations. There was merely an inquiry as to which assault counsel was referring to — though Natasha did mention probation — brought about by counsel's own examination. There was no detail provided about the assault and no further references until it was properly admitted during the punishment phase. We hold the reference by Natasha was not such that its implication could not have been cured by a prompt instruction. *See id.* Accordingly, by failing to request an instruction to disregard, Juan has failed to present anything for our review. *See id.*

Ineffective Assistance of Counsel

In his seventh issue, Juan challenges the effectiveness of his trial counsel. Specifically, he argues his trial counsel was ineffective when he failed to object when the State improperly solicited information about Esperanza's remote felony DUI conviction. In conjunction with this allegation, Juan contends counsel should have investigated to determine whether any defense witnesses, including Esperanza, had prior convictions that might be used to challenge their credibility.

Standard of Review

To prevail on an ineffective assistance of counsel claim, an appellant must establish both prongs of the test set forth by the Supreme Court in *Strickland v. Washington*. 466 U.S. 668, 687 (1984). Under the *Strickland* test, an appellant must prove by a preponderance of the evidence that (1) his counsel's performance was deficient, i.e., it was outside "the range of competence demanded of attorneys in criminal cases as reflected by prevailing professional norms; and (2) he was prejudiced by the deficient performance, i.e., there is a reasonable probability that but for counsel's deficient performance, the outcome would have been different. *Nava v. State*, 415 S.W.3d 289, 307–08 (Tex. Crim. App. 2013) (citing *Strickland*, 466 U.S. at 687, 689, 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691.

According to the Texas Court of Criminal Appeals, the first prong need not be addressed first. *Cox v. State*, 389 S.W.3d 817, 819 (Tex. Crim. App. 2012). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed." *Id.* (quoting *Strickland*, 466 U.S. at 697). This is such a case.

Assuming Juan's trial counsel was deficient for failing to investigate Esperanza's criminal history and based thereon, object to the existence of the remote felony conviction elicited by the State, we hold Juan has failed to prove that but for this error, the outcome would have been different or that confidence in the outcome has been undermined. *See Strickland*, 466 U.S. at 691. First, Esperanza was not a fact witness as it related to the offense. Rather, she was a positive character witness for her son and a negative character witness as to Natasha. Her trial testimony centered on Natasha's behavior during Juan and Natasha's relationship — focusing on her belief

that Natasha made false allegations against Juan whenever he attempted to end the relationship. This same testimony was presented through three other family members who were not impeached with prior convictions. *See Ex parte White*, 160 S.W.3d 46, 53–54 (Tex. Crim. App. 2004) (holding that even if trial counsel's failure to object accident investigator's testimony that defendant deliberately ran over victims and detective's testimony that defendant intentionally committed murder constituted deficient performance, record did not support second prong of *Strickland* because there was other evidence to that effect). Moreover, Juan was able to present the same evidence by impeaching Natasha with her own words through a letter and her affidavit of non-prosecution. Thus, Esperanza's testimony was largely cumulative. Finally, we agree with the State that Juan's conviction was not a result of the jury's credibility determination as to Esperanza, but its credibility determination as to the child victim, Natasha, and Juan.

Second, the reference to Esperanza's prior conviction resulted from a single question and response. The State never revisited the issue. The jury heard she had a prior DUI conviction — an offense involving neither violence nor credibility. The evidence did not suggest, as asserted by Juan on appeal, that "Appellant's entire family were criminals."

Finally, Juan contends he has established prejudice because Esperanza declined to testify at punishment because she was afraid the State would again raise the issue of her prior conviction. Juan argues that if she had testified during the punishment phase, she would have talked about an incident in which Natasha allegedly threatened Juan with a knife when he attempted to leave. However, the record establishes the trial court permitted Juan to reopen his defense during the punishment phase — before the case went to the jury — to allow Esperanza to testify the prior DUI conviction occurred approximately twenty years before. She also testified about the alleged altercation with the knife. Thus, the evidence was before the jury before it returned its recommended sentence.

Given that Esperanza's testimony was essentially character evidence cumulative of other evidence presented by Juan in his defense, we hold Juan did not prove by a preponderance of the evidence the State's single reference undermined confidence in the jury's guilty verdict. In addition and with regard to punishment, Juan was permitted to reopen his case and advise the jury that his mother's prior conviction was twenty-years-old. She was also allowed to testify about the altercation with the knife before the jury retired to consider punishment. Thus, we also hold Juan failed to establish by a preponderance of the evidence that but for trial counsel's failure to object to the admission of Esperanza's prior conviction, the jury would have recommended a different sentence.

Prosecutorial Misconduct

Juan next contends that when the State improperly impeached Esperanza with her prior conviction, the State's action amounted to prosecutorial misconduct. Because the question and response was not of such character that its impression on the jury, if any, could not have been withdrawn, we disagree.

Standard of Review

There is no general test for determining when a prosecutor's actions rises to the level of prosecutorial misconduct. *See Bautista v. State*, 363 S.W.3d 259, 263 (Tex. App.—San Antonio 2012, no pet.). Rather, allegations of prosecutorial misconduct are resolved on a case-by-case basis. *Id.* (citing *Stahl v. State*, 749 S.W.2d 826, 830 (Tex. Crim. App. 1988); *Hernandez v. State*, 219 S.W.3d 6, 13 (Tex. App.—San Antonio 2006), *aff'd*, 273 S.W.3d 685 (Tex. Crim. App. 2008)). In reviewing allegations of prosecutorial misconduct, we reverse the conviction only when the comment or question at issue is harmful to the defendant and "of such a character as to suggest the impermissibility of withdrawing the impression produced." *Id.* (quoting *Hernandez*, 219 S.W.3d at 14 (quoting *Huffman v. State*, 746 S.W.2d 212, 218 (Tex. Crim. App. 1988 (en banc))).

Application

We begin by addressing whether Juan preserved the issue of prosecutorial misconduct for our review. As noted above, Juan did not make a timely objection, nor did he ask the trial court to instruct the jury to disregard. Thus, it could be argued he did not preserve this complaint for our review. *See Hernandez*, 219 S.W.3d at 14 (holding that to preserve error for prosecutorial misconduct, appellant must make timely objection, request instruction to disregard, and move for mistrial). However, when Juan raised the issue — albeit two days after the question was posed — he moved for a mistrial alleging prosecutorial misconduct. *See id.* Therefore, assuming without deciding that this complaint has been preserved for our review, we will analyze the issue to determine whether the State's question warrants reversal.

Juan's claim of prosecutorial misconduct is based on the single question posed to Esperanza regarding her prior DUI conviction. The Texas Court of Criminal Appeals has held that merely asking an improper question is generally insufficient to warrant reversal based on prosecutorial misconduct "unless the question results in obvious harm to the accused." *Brown v. State*, 692 S.W.2d 497, 501 (Tex. Crim. App. 1985) (en banc). The court reasoned such errors are not generally reversible because any error is usually cured or rendered harmless by withdrawal of the question or an instruction to disregard. *Id.* However, in extreme cases, if "it appears that the question alone is clearly calculated to inflame the minds of the jury and is of such a character as to suggest the impossibility of withdrawing the impression produced on their minds," it may constitute reversible error. *Id.*

We hold that if Juan had lodged a timely objection and requested an instruction to disregard, any error produced by the posed question could have been rendered harmless — any impression it might have created in the minds of the jurors could have been withdrawn. The State's question regarding Esperanza's prior DUI offense was not clearly calculated to inflame the minds

of the jury or of such a character as to suggest the impermissibility of withdrawing the impression produced." *See id.*; *see Bautista*, 363 S.W.3d at 263. Jurors are presumed to obey a trial court's instruction to disregard. *Archie v. State*, 340 S.W.3d 734, 742 (Tex. Crim. App. 2011). Even improper references to a defendant's inadmissible prior criminal history has been held to be curable by instruction. *E.g.*, *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.) (holding complainant's two references to appellant's previous incarceration were cured by instruction to disregard)). We see no reason the rule should be any different with regard to a witness's prior criminal history. Moreover, as noted, the offense at issue was a DUI as opposed to a violent offense or an offense involving matters of credibility, and the State explained — as set out above — that the decision to ask the question was born out of incomplete information — negligence at best. As the prosecutor explained, "It was simply a question that was asked with incomplete information at the time." The prosecutor advised she was unaware Esperanza would be testifying until the moment she was called. The search of Esperanza's background discovered the DUI conviction, but the information — specifically the date — was not immediately available.

Moreover, Juan's counsel raised the issue and was allowed to advise the jury about the remoteness of the offense.

Based on the foregoing, we hold any prosecutorial misconduct in this case relating to the question about Esperanza's remote DUI offense does not constitute reversible error. Accordingly, we overruled Juan's eighth appellate issue.

Cumulative Error

In his ninth and final issue, Juan contends the cumulative effect of the alleged errors raised in issues one through eight have resulted in harmful error requiring reversal. An allegation such as this falls under the "cumulative error doctrine," which recognizes that while individual error, when analyzed separately, may be harmless, the combined effect of multiple errors could result in harmful, reversible error. *Gamboa v. State*, 296 S.W.3d 574, 585 (Tex. Crim. App. 2009) (citing *Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex. Crim. App. 1998)); *Gallegos v. State*, 340 S.W.3d 797, 805 (Tex. App.—San Antonio 2011, no pet.) (same); *see United States v. Bell*, 367 F.3d 452, 472 (5th Cir. 2004) ("The cumulative error doctrine provides relief only when constitutional errors so 'fatally infect the trial' that they violated the trial's 'fundamental fairness'"). However, if there are no errors, there can be no cumulative error. *Gamboa*, 296 S.W.3d at 585; *Gallegos*, 340 S.W.3d at 805. In other words, before errors can be cumulated, they must first be shown to exist. Because we have determined Juan either failed to preserve error, no error existed, or a single error was harmless, we hold there is no cumulative error. We therefore overrule this issue.

CONCLUSION

We hold Juan has either failed to preserve his issues for our review or they are without merit. We therefore overrule his issues and affirm the trial court's judgment of conviction.

Marialyn Barnard, Justice

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