**In The**

***Court of Appeals***

***Ninth District of Texas at Beaumont***

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**NO. 09-14-00328-CR**

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**ROBERT LANCE FOUNTAIN, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 221st District Court**
**Montgomery County, Texas**
**Trial Cause No. 13-10-10858 CR**

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## MEMORANDUM OPINION

Robert Lance Fountain appeals his conviction for the felony offense of assault, family violence. *See* Tex. Penal Code Ann. § 22.01 (West Supp. 2015). Following Fountain's punishment hearing, and based on the jury's findings that established Fountain to be a habitual felony offender, the jury assessed a life sentence. *See* Tex. Penal Code Ann. § 12.42(d) (West Supp. 2015). In his appeal, Fountain contends the trial court erred by denying his motion for mistrial, a motion that Fountain raised in jury selection after the State mentioned Fountain's criminal

history. Second, Fountain also contends the trial court erred by overruling his objection to a police officer's testimony, which indicated that the officer thought the victim's hair had been pulled. Third, Fountain argues that the trial court's cumulative errors require that he receive a new trial. We affirm the trial court's judgment.

## Motion for Mistrial

In issue one, Fountain complains the trial court committed reversible error by failing to grant his motion for mistrial. In seeking a mistrial, Fountain complained that the prosecutor, during jury selection, had discussed his criminal history. However, Fountain's criminal history for assaulting another family member was not irrelevant to the indictment charging Fountain with assault in the case in which he was being tried.

Ordinarily, the offense of assault is a class A misdemeanor, but it becomes punishable as a third-degree felony if the offense is committed against a family member and the defendant was previously convicted of having assaulted a family member. Tex. Penal Code Ann. § 22.01(b)(2) (West Supp. 2015). When a conviction is based on a crime that is classified as a third-degree felony, the punishment for the third-degree felony may be enhanced to life if the State proves the defendant was previously convicted of two sequenced felonies, as provided

under section 12.42(d) of the Penal Code. Tex. Penal Code Ann. § 12.42(d). Based on the enhancements alleged by the State in Fountain's indictment, the State had the burden of proving that Fountain had been previously convicted of assaulting a family member and proving that he had been convicted of at least two prior sequenced felonies. *See generally* Tex. Penal Code Ann. §§ 12.34 (West 2011), 12.42(d), 22.01(b)(2)(A).

Before jury selection began, Fountain stipulated that he had previously been convicted of assault, family violence. During jury selection, without objection, the prosecutor informed the jury that "this is an assault family violence enhanced, which means because it is in felony court, we are alleging that [Fountain] has committed the offense one time in the past, one prior conviction of assault family violence." The prosecutor also informed the array that they could consider a prior family violence conviction solely for the purpose of enhancing Fountain's punishment from a misdemeanor to a felony, asked the array if they could consider it for that purpose, and asked if they would have a problem assessing a felony punishment under such a circumstance. Without objection, the prosecutor also informed the array that a felony conviction carried a possible range of punishment from two years to life, asked the members of the array if they could keep an open mind on the available range of punishment until they heard the evidence, and asked

whether they could consider the entire range of punishment. After the parties submitted their challenges for cause and made their peremptory strikes, Fountain moved for a mistrial, complaining for the first time about the prosecutor's statements, which he contends reference his prior criminal conduct. Fountain asked the trial court to grant a mistrial because the prosecutor had "talked about the prior family violence conviction during the voir-dire stage of this case."

The rules of error preservation require that a party make a *timely* complaint about the alleged error to preserve the complaint for review on appeal. Tex. R. App. P. 33.(a)(1) (emphasis added). A motion for mistrial must be made as soon as the grounds for a mistrial become apparent. *Griggs v. State*, 213 S.W.3d 923, 927 (Tex. Crim. App. 2007). "A grant of a motion for mistrial should be reserved for those cases in which an objection could not have prevented, and an instruction to disregard could not cure, the prejudice stemming from an event at trial[.]" *Young v. State*, 137 S.W.3d 65, 69 (Tex. Crim. App. 2004). Therefore, "[t]he party who fails to request an instruction to disregard will have forfeited appellate review of that class of events that could have been 'cured' by such an instruction." *Id.* at 70.

In his appeal, Fountain complains that the prosecutor improperly informed the panel of his criminal history by mentioning that the State had to prove Fountain had a prior conviction for family violence, and by mentioning that he could not

discuss the evidence that could affect Fountain's punishment. However, Fountain's request for mistrial was not timely, as the complaints he makes about the prosecutor's questions should have been raised when the questions about which he complained in his motion for mistrial were asked. We hold that Fountain failed to preserve his complaints about the prosecutor's questions in voir dire for the purpose of raising them for our review on appeal. *Griggs*, 213 S.W.3d at 927; Tex. R. App. P. 33.1(a)(1). We overrule issue one.

Objection to Officer's Testimony

In issue two, Fountain contends the trial court erred when it overruled his objection to testimony from the investigating officer, Chris Delk, who testified that he thought the hair he saw on the victim's clothing the night of the assault was consistent with hair "being pulled out." Fountain objected that Officer Delk's testimony about the reason he thought loose hairs were found on the victim's clothing, arguing that Officer Delk's answer was speculative and exceeded his training. However, the record shows that Officer Delk explained that he had observed "hair pulling cases on many occasions[.]" Based on his training and experience, including his experience investigating assaults and his personal experience observing his wife's hair, Officer Delk stated that he thought the substantial amount of loose hair he saw on the victim's shirt, and the redness he

observed on the victim's neck were consistent with the victim's hair being pulled out. Officer Delk explained that he took the photographs on the night of the assault, and these were introduced into evidence during the trial. According to Officer Delk, the photos captured some, but not all, of the hair that he saw on the victim when he was at the scene.

The fact that Officer Delk may not be a hair follicle expert does not mean he cannot testify to his impression about the source of the hairs that he personally observed on the victim's clothes. Lay witness opinion testimony is admissible if it is rationally based on the witness's perception and it is helpful to clarify the witness's testimony or to determine a fact in issue. Tex. R. Evid. 701. "[T]he witness's testimony can include opinions, beliefs, or inferences as long as they are drawn from his or her own experiences or observations." *Osbourn v. State*, 92 S.W.3d 531, 535 (Tex. Crim. App. 2002).

In this case, Officer Delk established his personal knowledge of the events because he photographed the victim and personally observed the redness on the back of the victim's neck. He personally observed what he characterized as a large amount of loose hair on the victim's shirt. Officer Delk's experience observing hair loss on other assault victims and on his wife allowed the jury to understand the basis for his conclusion that the hair he saw came from the victim's head. We

conclude the trial court could reasonably view the testimony as testimony that would be helpful in allowing the jury to understand the reason Officer Delk thought the victim's hair was pulled in the course of the alleged assault. Because the trial court did not abuse its discretion by admitting Officer Delk's opinion about the victim's hair, we overrule issue two.

Cumulative Error

In issue three, Fountain argues the cumulative impact of the errors asserted in issues one and two was so great that reversal is required. We have held that Fountain did not preserve his complaint of error in issue one, and we have overruled issue two. We hold that Fountain has not shown the trial court committed cumulative errors. *See Rayford v. State*, 125 S.W.3d 521, 532 (Tex. Crim. App. 2003) (citing *Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex. Crim. App. 1999)). We overrule issue three, and we affirm the trial court's judgment.

AFFIRMED.

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HOLLIS HORTON
Justice

Submitted on June 23, 2015
Opinion Delivered March 2, 2016
Do Not Publish

Before McKeithen, C.J., Horton and Johnson, JJ.