COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00195-CR

HERMAN FLOREZ JR. APPELLANT

V.

THE STATE OF TEXAS STATE

FROM THE 371ST DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1424449D

MEMORANDUM OPINION[1]

I. INTRODUCTION

Appellant Herman Florez Jr. appeals his convictions for insurance fraud and for fraudulent use or possession of identifying information. *See* Tex. Penal Code Ann. §§ 32.51(c)(1), 35.02(c)(5) (West 2016). In three issues, Florez argues that the trial court committed reversible error by denying two of his

[1]*See* Tex. R. App. P. 47.4.

requested jury instructions, that he was denied his right to confront the witnesses against him, and that the State's violations of the motion in limine constituted harmful error. For the reasons set forth below, we will affirm.

II. FACTUAL BACKGROUND[2]

Florez and his wife Jennifer moved in with her mother in August or September 2014 while their new home was being built. While they lived with Jennifer's mother, they kept all of their jewelry in a safe in her mother's house because, according to Jennifer, it "[j]ust felt like a safe place to keep it because [they] knew [they] were going to move." Florez and Jennifer moved to their new house (hereinafter "the marital home") at the end of January 2015, and Jennifer moved out on February 24, 2015.

Approximately two weeks later, on March 6, 2015, Jennifer filed for divorce. That same day, Florez made a claim against their homeowners' insurance for six pieces of jewelry that he alleged had mysteriously disappeared—either due to loss or theft—during the move to the marital home on February 1, 2015.[3] The items that Florez reported as missing included Jennifer's diamond dinner ring, which was insured for $12,900; Jennifer's engagement ring,

[2]The pertinent procedural background is set forth under our analysis of each issue.

[3]Florez told Allstate that the move occurred on the first weekend in February, which was February 1, 2015. Allstate therefore used this as the date of the loss. Other evidence at trial revealed that the date of the move was January 30, 2015.

which was insured for $25,875; Jennifer's tennis bracelet, which was insured for $4,200; and three of Florez's rings, two of which were insured for $925 each and one of which was insured for $2,780.[4] The missing insured items totaled $47,605.

Allstate claims representative Maureen McGurk recorded a phone interview with Florez on March 10, 2015, during which she obtained the initial information about the claim. McGurk informed Florez that Allstate required him to file a police report, which Florez did that same day.

The insurance claim was assigned to Kelli Cheek, who worked as an adjuster/investigator in the Special Investigations Department at Allstate Insurance. On March 13, 2015, Cheek sent a letter acknowledging the claim to the address on file, which was the address for Jennifer's mother. Cheek contacted Florez on March 16, 2017, and informed him that she would be taking a statement from him and from his wife Jennifer because they were both listed as insureds on the policy.

On March 17, 2015, Cheek recorded an interview with a woman who identified herself as Jennifer, and Cheek recorded an interview with Florez the following day. Florez told Cheek that before he and his wife moved to the marital home, the missing jewelry was in a jewelry box; after they moved, they could not

[4]Florez reported other items of jewelry as missing, but those items were not specifically listed on the policy. Florez did not pursue an insurance claim for the other items that he alleged were missing.

find the jewelry box. Florez told Cheek that he used Asbell Moving, which he found on Craig's List, but he was not able to provide the contact information for the moving company.

On or about March 22, 2015, Cheek received a call from a female who identified herself as Jennifer Florez and stated that she had received the acknowledgement letter and that she did not know anything about the claim. Jennifer also did not know anything about the March 17 recorded statement.

The next day, Florez contacted his insurance agent and stated that he wanted to close the claim because Jennifer had all the jewelry.

Jennifer testified that the statements Florez made to Allstate regarding the jewelry were false and that he knew that their jewelry was kept in the safe at her mother's house.[5] Jennifer explained that from February 1 through 24, she had in her possession her dinner ring, engagement ring, and tennis bracelet and that she wore her engagement ring and her dinner ring every day from February 1 until February 24. On February 24, she left the rings in a ceramic dish in the master bedroom because she no longer wanted to be married to Florez and was in a hurry to move out. Jennifer testified that she later asked Florez for the rings several times over the phone and in text messages. Screenshots of Jennifer's

[5]Jennifer testified that her jewelry box, as well as Florez's jewelry box, made the move to the marital home in Fort Worth and were placed in the master bedroom.

text messages to Florez on March 2, 2015, were admitted into evidence, showing that she texted Florez, "Where are my rings?" He responded, "With me. Why?"

On March 9, 2015, Jennifer met with Florez and gave him all his jewelry that had been in her mother's safe, which included his wedding bands. Florez, however, did not bring Jennifer's rings.

Jennifer testified that she went back to the marital home on March 25, 2015, and removed some furniture and her personal belongings. Jennifer found some of the jewelry that had been reported as stolen, including Florez's wedding ring, and took it with her. Jennifer also found a piece of paper on the center island in the kitchen that contained her personal information—her Social Security number, date of birth, and driver's license number—written in Florez's handwriting. The paper also states, "Confirmed jewelry was missing at the end of February, around 27th, 28th time frame. Wanted to get boxes unpacked and get everything done before we confirmed jewelry missing. Moved in house February 1st, 9832 Amaranth Drive, Fort Worth, Texas, 76177." When Jennifer met with Cheek the following day, she gave Cheek the piece of paper and showed her the tennis bracelet and Florez's wedding ring—both of which he had claimed were missing.

Jennifer testified that she had listened to the March 17 recording of Cheek's interview with someone who claimed to be her and that the voice on the recording was Carmella Vivona, Florez's mother. Jennifer also testified that she

never gave Florez permission to use her personal information to make a claim to Allstate on her behalf.

Detective Stephan Hodges with the Fort Worth Police Department testified about the police report that Florez made regarding the missing jewelry. Florez implicated Asbell Movers for the missing jewelry, but he did not provide their website or phone number or proof that he had paid Asbell Movers. Detective Hodges could not find an Asbell Movers or an Asbell's Moving Company that conducted business in Tarrant County and ultimately concluded that the moving company did not exist. Florez told Detective Hodges that he was not interested in proceeding with an investigation and that he and Jennifer just wanted to move on.

On March 23, after Detective Hodges spoke with Cheek, who shared with him the information that she had learned from Jennifer, he interviewed Jennifer and obtained the name of the movers that they had used: Veterans United. Detective Hodges then spoke with Florez again, and he explained that he had used "a bunch of marine guys and some Spanish guys," that he did not trust the Spanish guys, and that he did not mention the marines (Veterans United Movers) because he is a marine and marines do not steal from other marines.[6] Florez said that he did not have the jewelry as of March 25 and that Jennifer told him that she did not have it; Florez said that Jennifer did not admit to having the

[6]The owner of Veterans United Movers testified that he was a marine and that he gave Florez a discounted hourly rate because he was a fellow veteran.

jewelry until "recently." Florez also admitted that his mother had pretended to be Jennifer during the March 17 phone interview with Cheek. Detective Hodges asked Florez about the piece of paper with Jennifer's identifying information on it, and he admitted that he had given Jennifer's identifying information to his mother to use to make the claim. When Detective Hodges asked Florez about the text message he had sent Jennifer stating that he had possession of her rings, Florez said that he would not have sent that text because he did not have her rings. When Detective Hodges mentioned that he might download text messages, Florez stated that if he had sent the text to Jennifer saying that he had her rings, he had sent it out of spite because he did not have her rings.

After hearing the above evidence, the jury found Florez guilty of insurance fraud of $20,000 but less than $100,000 and of fraudulent use or possession of identifying information. The trial court sentenced Florez to ten years' confinement for insurance fraud and to two years' confinement for the fraudulent use or possession of identifying information conviction, suspended the sentences, and placed Florez on five years' community supervision. Florez then perfected this appeal.

III. JURY-CHARGE ISSUES

In his first issue, Florez argues that the trial court committed reversible error by denying two of his requested jury instructions. During the charge conference, Florez requested a jury instruction under Texas Penal Code section 35.02(g), which provides for an offset that reduces the value of a claim that is

fraudulent by the the amount of the claim that is valid. Florez argued during the charge conference that the jury could determine the value of the claim to be zero because some of the property that was reported as missing or stolen—Jennifer's wedding bands—was allegedly still missing and because Florez's wedding band was not returned to him until after he filed the claim. Similarly, Florez requested a jury instruction on the lesser-included offense of insurance fraud totaling $0 to $50 under Texas Penal Code section 35.02(c)(1), arguing that the jury could find that at the time he filed the claim, all the jewelry was in Jennifer's possession and that she was deceiving him. We discuss each of the complained-of jury-charge omissions below.

A. Standard of Review

In our review of a jury charge, we first determine whether error occurred; if error did not occur, our analysis ends. *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012). If error occurred, whether it was preserved determines the degree of harm required for reversal. *Id.*

B. Affirmative Defense

In the first part of his first issue, Florez argues that the trial court committed reversible error by denying his requested instruction on the affirmative defense found in Texas Penal Code section 35.02(g).

A defendant is entitled to an instruction on any defensive issue raised by the evidence, whether that evidence is weak or strong, unimpeached or uncontradicted, and regardless of how the trial court views the credibility of the

defense. *Celis v. State*, 416 S.W.3d 419, 429 (Tex. Crim. App. 2013). If the evidence, viewed in the light most favorable to the defendant's requested submission, does not establish the defensive issue, an instruction is not required. *See Bufkin v. State*, 207 S.W.3d 779, 782 (Tex. Crim. App. 2006); *Dyson v. State*, 672 S.W.2d 460, 463 (Tex. Crim. App. 1984).

A person commits the offense of insurance fraud if, with intent to defraud or deceive an insurer, the person, in support of a claim for payment under an insurance policy (1) prepares or causes to be prepared a statement that the person knows contains false or misleading material information and is presented to an insurer or (2) presents or causes to be presented to an insurer a statement that the person knows contains false or misleading material information. Tex. Penal Code Ann. § 35.02(a). The insurance fraud statute also provides an affirmative defense: If the actor proves by a preponderance of the evidence that a portion of the claim for payment under an insurance policy resulted from a valid loss, injury, expense, or service covered by the policy, the "value of the claim" is equal to the difference between the total claim amount and the amount of the valid portion of the claim. *Id.* §§ 35.02(g), 35.025(c) (West 2016). In other words, the "value of the claim" means the fraudulent portion of the claim. *Logan v. State*, 89 S.W.3d 619, 630 (Tex. Crim. App. 2002).

Here, Florez presented no evidence at trial raising the affirmative defense that a *portion* of his claim resulted from a valid loss. Florez's defensive theory at trial was that the *entire* claim was valid at the time he made it and that once he

learned that Jennifer had the missing jewelry, he attempted to cancel the claim because he had made a mistake. If that had been the case—that the entire claim was valid rather than fraudulent—then an instruction on the section 35.02(g) affirmative defense was not warranted because the jury charge allowed the jury the option to find Florez not guilty.[7] Moreover, the requested instruction was not warranted because, even viewing the evidence in the light most favorable to Florez, the record demonstrates that at the time Florez made the claim, he knew that the entire claim was fraudulent because he provided the name of a nonexistent moving company, gave the impression that he and Jennifer were still living together as a married couple, and convinced his mother to impersonate Jennifer when Allstate needed a statement from Jennifer in order to initiate a claim against the homeowners' policy that was held in both of their names.

Because there was no proof that any portion of Florez's claim resulted from a valid loss, the section 35.02(g) affirmative defense was not raised by the evidence and was therefore not available to Florez. The trial court thus did not err by refusing to instruct the jury on the section 35.02(g) affirmative defense. *See* Tex. Penal Code Ann. § 35.02(g); *Sanders v. State*, 675 S.W.2d 343, 346 (Tex. App.—Fort Worth 1984) ("[I]t is not error to fail to submit a charge on an

[7]The trial court attempted to explain this on the record, stating that "[i]f they [the jury] find the underlying claim is not fraudulent, then he didn't commit an offense. . . . I don't think [the affirmative defense] applies in this particular case in that fashion as a zero fraudulent claim[] because that is a not guilty."

affirmative defense [that] is not raised by the evidence."), *aff'd*, 707 S.W.2d 78, 81 (Tex. Crim. App. 1986); *see also Chambers v. State*, No. 02-13-00301-CR, 2014 WL 2922338, at *2 (Tex. App.—Fort Worth June 26, 2014, pet. ref'd) (mem. op., not designated for publication) (holding that trial court did not err by refusing to instruct the jury on an affirmative defense that was not raised by the evidence). Accordingly, we overrule the first portion of Florez's first issue challenging the trial court's denial of his requested instruction on the section 35.02(g) affirmative defense.

C. Lesser-Included Offense

In the second part of his first issue, Florez argues that the trial court committed reversible error by denying his requested instruction on the lesser-included offense of insurance fraud punishable as a Class C misdemeanor.

In order for an appellant to be entitled to a lesser-included offense instruction, some evidence must exist in the record that would permit a jury to rationally find that if the appellant is guilty, he is guilty only of the lesser offense. *Hall v. State*, 225 S.W.3d 524, 536 (Tex. Crim. App. 2007); *Salinas v. State*, 163 S.W.3d 734, 741 (Tex. Crim. App. 2005); *Rousseau v. State*, 855 S.W.2d 666, 672–73 (Tex. Crim. App.), *cert. denied*, 510 U.S. 919 (1993). The evidence must be evaluated in the context of the entire record. *Moore v. State*, 969 S.W.2d 4, 8 (Tex. Crim. App. 1998). There must be some evidence from which a rational jury could acquit the appellant of the greater offense while convicting him of the lesser-included offense. *Id.* The court may not consider whether the evidence is

credible, controverted, or in conflict with other evidence. *Id.* Anything more than a scintilla of evidence may be sufficient to entitle a defendant to a lesser charge. *Hall*, 225 S.W.3d at 536.

The "value of the claim" is used to classify the punishment level for the offense of insurance fraud. *See* Tex. Penal Code Ann. § 35.02(c). In 2015, if the value of the claim was less than $50, the offense was classified as a Class C misdemeanor;[8] if the value of the claim was at least $20,000 but less than $100,000—which is the range of amounts for which Florez was indicted—the offense was classified as a third-degree felony. *See* Act of May 30, 2005, 79th Leg., R.S., ch. 1162, § 4, 2005 Tex. Gen. Laws 3802, 3805 (amended 2015) (current version at Tex. Penal Code § 35.02(c)(1), (5)).[9]

Here, the record contains no evidence from which a rational trier of fact could have concluded that the jewelry Florez fraudulently claimed as missing had a value of less than $50. The record demonstrates that the least expensive item of jewelry had an insured value of $925, which exceeds the amount necessary to support a conviction for a Class C misdemeanor. Moreover, as discussed above,

[8]Florez argues on appeal that he was entitled to a lesser-included instruction under section 35.02(c)(1)–(7), but he requested a lesser-included instruction solely on (c)(1)—the punishment level for a Class C misdemeanor—during the charge conference. Florez therefore failed to preserve for appeal his complaints regarding other punishment levels available under section 35.02(c).

[9]The indictment states that Florez committed the offense of insurance fraud on or about March 6, 2015. The current version of section 35.02(c), which reflects increased dollar amounts for each level of punishment, did not take effect until September 1, 2015. *See* Tex. Penal Code Ann. § 35.02(c).

there is no evidence that any portion of Florez's claim resulted from a valid loss. Because there is no evidence that if Florez was guilty, he was guilty only of insurance fraud of less than $50, the trial court did not err by refusing to give an instruction on the lesser-included offense of Class C misdemeanor insurance fraud. *See Rousseau*, 855 S.W.2d at 675 (holding that appellant was not entitled to a charge on the lesser-included offense because there was no evidence that if appellant was guilty, he was guilty only of the lesser-included offense); *cf. Benefield v. State*, 389 S.W.3d 564, 574–77 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd) (holding that no evidence in the record permitted a jury to rationally find that if appellant was guilty, she was guilty only of the lesser-included offense of misdemeanor misapplication of fiduciary property valued at less than $1,500). We therefore overrule the remainder of Florez's first issue.

IV. CONFRONTATION CLAUSE VIOLATIONS

Florez complains of the admission of two recorded interviews. The first is a recording of an interview between Allstate claim representative Maureen McGurk and Florez. During the interview, McGurk asked Florez questions to elicit biographical information and to obtain information about his claim for missing jewelry. Florez objected "to hearsay and [C]onfrontation [C]lause as to any statements made by Maureen McGurk on this, ... We're only objecting as to Maureen McGurk, and I don't believe there's an exception for the hearsay on there, and also [C]onfrontation [C]lause applies on this as well." The trial court overruled Florez's objections.

The second is a recording of an interview between Allstate Special Investigator Kelli Cheek and Florez's mother. During the interview, Florez's mother purported to be Jennifer for purposes of discussing the claim. Florez objected to the recording on the grounds of hearsay and Confrontation Clause, and the trial court overruled his objections.

In his second issue, Florez argues that the State and the trial court violated his constitutional right to confront the witnesses against him by admitting the two recorded interviews. Florez argues that both interviews are testimonial.

A. Law on Confrontation Clause and Standard of Review

In all state and federal prosecutions, the accused has the right "to be confronted with the witnesses against him." U.S. Const. amend. VI; *Crawford v. Washington*, 541 U.S. 36, 42, 124 S. Ct. 1354, 1359 (2004). In *Crawford*, the Supreme Court drew a distinction between testimonial and nontestimonial statements, holding that the Confrontation Clause bars the admission of an out-of-court testimonial statement of a declarant who does not testify at trial unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant. 541 U.S. at 59, 124 S. Ct. at 1369.

"[T]estimonial statements are those 'that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Burch v. State*, 401 S.W.3d 634, 636 (Tex. Crim. App. 2013). In determining whether a statement is testimonial, we review the objective purpose of the statement, not the declarant's expectations.

Coronado v. State, 351 S.W.3d 315, 324 (Tex. Crim. App. 2011). Statements are testimonial when the circumstances objectively indicate that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Id*. Applying a de novo standard of review, we examine whether the recorded interviews were testimonial and therefore violated Florez's Confrontation Clause rights. *See Wall v. State*, 184 S.W.3d 730, 742 (Tex. Crim. App. 2006).

B. Analysis

Here, neither of the recorded interviews were made pursuant to police questioning or interrogation; they were not made to police at all but to Allstate employees. Florez acknowledges that the Confrontation Clause is typically applied to police interrogations but argues that the recorded interviews at issue here are similar to police interrogations because the insurance agents "cease[d] to be [agents of] a private entity acting in [its] own best interests but [became] an extension of the State's prosecutorial reach—conducting a criminal investigation and collecting evidence for a future prosecution." Florez, however, cites no authority for this proposition, and we have found none.

With regard to the recorded interview between Florez and McGurk, Florez objected at trial solely to McGurk's statements during the interview. The recorded interview, however, demonstrates that McGurk's questions did not

implicate Florez but rather that Florez implicated himself.[10] The Confrontation Clause is not implicated when a criminal defendant's own incriminating statements are used against him. *See, e.g.*, *Vasquez v. Kirkland*, 572 F.3d 1029, 1037 (9th Cir. 2009) (noting that the Fifth Amendment's right against self-incrimination and not the Sixth Amendment's right to confront witnesses is implicated by use of a defendant's own statement), *cert. denied*, 558 U.S. 1126 (2010); *United States v. Lafferty*, 387 F. Supp. 2d 500, 511 (W.D. Pa. 2005) ("Inherent in Justice Scalia's analysis in the *Crawford* opinion was the idea that the right of confrontation exists as to accusations of third parties implicating a criminal defendant, not a criminal defendant implicating herself."). Because Florez's rights under the Confrontation Clause were not violated by the admission of his own statements recorded by Allstate, we overrule this portion of his second issue. *See Contreras v. State*, No. 02-11-00252-CR, 2012 WL 3737714, at *3 (Tex. App.—Fort Worth Aug. 30, 2012, pet. ref'd) (mem. op., not designated for publication) (holding that appellant's rights under the Confrontation Clause were not violated by the admission of his own statements recorded on co-defendant's cell phone).

[10]During the interview, Florez claimed that the items were missing as of their move on February 1, but he did not report the loss until March 6, 2015; he made it sound as if Jennifer was still living in the marital home even though she had moved out two weeks prior; and he provided the name of a nonexistent moving company.

With regard to Florez's mother's statements to Cheek, the record demonstrates that the statements were not offered for the truth of the matter asserted. The State offered Florez's mother's statements to show that she impersonated Jennifer. Because Florez's mother's statements to Cheek were not offered for the truth of the matter asserted, they do not run afoul of the Confrontation Clause. *See Langham v. State*, 305 S.W.3d 568, 576 (Tex. Crim. App. 2010) ("[A]n out-of-court statement, even one that falls within its definition of "testimonial" statements, is not objectionable under the Confrontation Clause to the extent that it is offered for some evidentiary purpose other than the truth of the matter asserted."); *Del Carmen Hernandez v. State*, 273 S.W.3d 685 (Tex. Crim. App. 2008) (holding that witness's statement that was properly offered and admitted, not to prove the truth of the matter, but rather for the nonhearsay purpose of impeaching witness constituted nonhearsay and thus did not implicate appellant's confrontation rights).[11] Accordingly, we overrule the remainder of Florez's second issue.

V. MOTION-IN-LIMINE VIOLATIONS

Prior to trial, the trial court signed a written order granting Florez's motion in limine requiring the State not to mention, refer to, allude to, or bring to the

[11]Because we have found no error, we need not address the remaining arguments in Florez's second issue contending that he suffered harm pursuant to rule 44.2(a). *See* Tex. R. App. P. 44.2(a); *Hawkins v. State*, 135 S.W.3d 72, 76 (Tex. Crim. App. 2004) ("A harm analysis is employed only when there is error, and ordinarily, error occurs only when the trial court makes a mistake.").

jury's attention two previous insurance claims filed by Florez without first approaching the bench and obtaining a ruling concerning their admissibility. Florez complains of two violations of the motion in limine by the State.

During the direct examination of Cheek, the State asked why the claim was referred to Cheek from McGurk, who had taken Florez's initial statement. Cheek responded, "It was referred to me due to -- there was two prior theft claims." Defense counsel objected to Cheek's response as a violation of the motion in limine. The prosecutor stated that he did not recall warning Cheek not to refer to the prior insurance claims, and the trial court advised the State to tell Cheek about the motion in limine "right now." The prosecutor complied. The trial court sustained the objection, and defense counsel did not request an instruction to disregard or other relief.

Later during Cheek's testimony, the State played a recording of a phone interview that Cheek had conducted with Florez. The recording mentioned the prior theft claims. After the recording was played for the jury, defense counsel asked to approach the bench and told the trial court that he had been informed by a prosecutor that the recording did not contain references to the prior claims; defense counsel admitted that he had not personally listened to the recording. The prosecutor responded that he had also not personally listened to the recording but had relied on his investigator's statement that he had reviewed the tape and that there were no references to the prior claims. The trial court admonished the prosecutor and defense counsel of the need to have "firsthand

knowledge" of whether the evidence being offered violated the motion in limine. After further discussion outside the jury's presence, the trial resumed, and a redacted version of the recording was played for the jury. Defense counsel did not object further, nor did he request an instruction to disregard or seek other relief.

In his third issue, Florez argues that the State's violations of the motion in limine constitute harmful error. Florez argues that despite his trial counsel's failure to request a curative instruction or move for a mistrial, "the State's conduct was so inflammatory as to place itself in the 'narrow class of highly prejudicial and incurable errors' that requires a mistrial."

It is well settled that the granting or denial of a motion in limine does not preserve error. *See Fuller v. State*, 253 S.W.3d 220, 232 (Tex. Crim. App. 2008), *cert. denied*, 555 U.S. 1105 (2009). Once the motion in limine is violated, counsel must obtain an adverse ruling to preserve the complaint. *Westmoreland v. State*, 174 S.W.3d 282, 290 (Tex. App.—Tyler 2005, pet. ref'd). To preserve error regarding the admission of evidence in violation of a motion in limine, the preferred procedure is (1) a timely, specific objection; (2) a request for an instruction to disregard; and (3) a motion for mistrial. *Young v. State*, 137 S.W.3d 65, 69 (Tex. Crim. App. 2004). Generally, a prompt instruction to disregard will cure a witness's inadvertent reference to an extraneous offense. *Ovalle v. State*, 13 S.W.3d 774, 783 (Tex. Crim. App. 2000). Unless the extraneous offense is so calculated to inflame the minds of a jury or is of such a

nature as to suggest the impossibility of withdrawing the impression produced, an instruction to disregard can cure any improper impression. *Kemp v. State*, 846 S.W.2d 289, 308 (Tex. Crim. App. 1992), *cert. denied*, 508 U.S. 918 (1993). "The 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." *Young*, 137 S.W.3d at 70.

Here, with regard to the first violation that occurred during Cheek's testimony on direct examination, the record demonstrates that defense counsel failed to request an instruction to disregard. With regard to the second violation that occurred when the unredacted recording was played for the jury, the record demonstrates that defense counsel never objected; instead, defense counsel asked to approach the bench, the trial court took up the issue outside the presence of the jury and ordered the recording to be redacted, and defense counsel sought no further relief. Although Florez argues that his trial counsel's failures to pursue either motion-in-limine violation to an adverse ruling should be excused because of the State's alleged "inflammatory" conduct, Florez cites no case for his proposition that the trial court was required to sua sponte declare a mistrial, and we have found authority to the contrary. *See, e.g.*, *Morris v. State*, 565 S.W.2d 534, 535 (Tex. Crim. App. [Panel Op.] 1978) (holding that trial court did not abuse its discretion by not granting a mistrial sua sponte after sustaining objection to prosecutor's argument; no request for an instruction or motion for mistrial was requested); *Foley v. State*, No. 08-13-00039-CR, 2015 WL 4572123,

at *7 (Tex. App.—El Paso July 29, 2015, pet. ref'd) (not designated for publication) (deferring to trial court and overruling issue because "Appellant has failed to cite to any case in which these facts support a finding of manifest necessity by the trial court mandating a mistrial").

Because defense counsel failed to pursue either motion-in-limine violation to an adverse ruling, Florez's complaints have not been preserved for appeal. *See Brewer v. State*, 367 S.W.3d 251, 253 (Tex. Crim. App. 2012) (holding that none of appellant's three complaints met the requirements for preservation); *Swilley v. State*, 465 S.W.3d 789, 796 (Tex. App.—Fort Worth 2015, no pet.) ("A mistrial is not required on the basis of an unpreserved evidentiary complaint."). Accordingly, we overrule Florez's third issue.

VI. CONCLUSION

Having overruled Florez's three issues, we affirm the trial court's judgments.

/s/ Sue Walker
SUE WALKER
JUSTICE

PANEL: WALKER, GABRIEL, and SUDDERTH, JJ.

SUDDERTH, J., concurs without opinion.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: June 8, 2017