TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00468-CR

Matthew Devere Warfield, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF HAYS COUNTY, 274TH JUDICIAL DISTRICT
NO. CR-14-0882, THE HONORABLE GARY L. STEEL, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

A jury found appellant Matthew Devere Warfield guilty of three felony offenses—evading detention with a motor vehicle, *see* Tex. Penal Code § 38.04(a), (b)(2)(A), aggravated assault with a deadly weapon, *see id.* § 22.02(a)(2), and tampering with physical evidence, *see id.* § 37.09(a)(1), (c)—all arising out of a roadway encounter on the interstate. The jury assessed appellant's punishment, enhanced by a prior felony conviction pursuant to the repeat offender provision of the Penal Code, *see id.* § 12.42(a), (b), at confinement in the Texas Department of Criminal Justice for 20 years for the evading offense, *see id.* § 12.33, 40 years for the assault offense, *see id.* § 12.32, and 15 years for the tampering offense, *see id.* § 12.33. The trial court sentenced appellant in accordance with the jury's verdicts and ordered the three sentences to be served concurrently. *See id.* § 3.03(a). On appeal, appellant complains about the admission of

evidence, the denial of his motion for mistrial, and excessive punishment resulting from an illegal sentence. Finding no reversible error, we affirm the trial court's judgments of conviction.

BACKGROUND[1]

The instant charges arose out of a roadway encounter between two drivers going northbound on Interstate 35 between San Marcos and Austin, near Kyle. Jack Drewien, driving a red truck, was driving in the left of the three highway lanes. As he began to approach an 18-wheeler truck driving in the center lane, he saw a white car in his rearview mirror. As he passed the truck, he noted his speed, 75 miles per hour, and noticed that the white car was driving very closely behind him—"not just on [his] bumper, it was nearly under [his] bumper." Drewien sped up, attempting to separate from the car, but the car remained on his bumper. He then observed the driver of the white car lean over in the car with one hand on the wheel. The car remained on his bumper so Drewien continued accelerating, approaching 85 miles an hour. He cleared the 18-wheeler, moved to the center lane, and began to slow down, giving the white car clearance to go by. The white car pulled up alongside Drewien, and, according to Drewien, pointed a gun at him. Drewien braked, and the car passed. Drewien then called 911.

Officer Dago Pates, a traffic enforcement officer with the Kyle Police Department, was "clocking speeders" on Interstate 35. He clocked appellant's white Chevy Malibu travelling 83

[1] Because the parties are familiar with the facts of the case, its procedural history, and the evidence adduced at trial, we provide only a general overview of the facts of the case here. We provide additional facts in the opinion as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* Tex. R. App. P. 47.1, 47.4. The facts recited are taken from the testimony and other evidence presented at trial.

miles per hour in a 70 mph zone and initiated a traffic stop for speeding. As he was pulling appellant over, he noticed a vehicle driving behind him flashing its lights and he requested backup. Appellant pulled his vehicle onto the shoulder of the interstate. By this time, Officer Pates had been informed by dispatch that appellant possibly had a gun.[2] The officer drew his weapon and instructed appellant to exit the car. Appellant complied, and followed Officer Pates's subsequent instructions to move to the back of his car and then to pull his shirt up and turn in a circle to reveal whether he had a gun on his person. Officer Pates then told appellant not to move while he awaited backup. However, after about 45 seconds, appellant began drifting toward his open car door—ignoring the officer's repeated commands not to move—and got back into his car and drove off.

Officer Pates pursued appellant, and a high speed chase ensued. Ultimately, four police officers were involved in the chase,[3] which lasted approximately seven minutes and covered close to 14 miles. During the chase, appellant repeatedly changed lanes, weaved through traffic, and passed in no passing zones (both on the shoulder and against the retaining wall), all while traveling at high rates of speed—speeds exceeding 100 miles per hour and reaching up to 120 miles per hour. The chase ended when a police officer moved her patrol SUV in front of appellant and forced appellant to stop by blocking his way, slowing down in front of him, and eventually cutting him off. Appellant was then removed from the car at gunpoint. After that, the only passenger in the car,

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[2] As Drewien was on the phone to 911, he saw the police pursuing appellant's car. He followed behind the patrol car, flashing his headlights because he was concerned for the officer's safety. Drewien instructed the 911 operator to alert the officer pulling appellant over that the driver of the car had a gun.

[3] Two additional police officers were involved at the beginning but were called off early in the chase because they were motorcycle units.

Lamonika Davis, was also removed at gunpoint. Upon being apprehended, appellant told the officers that he did not want to get pulled over because he had an open beer in the car. He said that he "ran" because Officer Pates had pointed a gun at him.

After appellant and Davis were out of the car, the police officers on the scene searched for the gun Drewien reported. No gun was found on appellant, on Davis, or in appellant's car. Davis disclosed to the officers that appellant had given her the gun during the chase and told her to throw it out of the window, and she did. She was unable to recall precisely their location on the interstate when she threw it out. Subsequent efforts to locate the gun along the highway, even with Davis's assistance, were unsuccessful.

DISCUSSION

Appellant raises four points of error. In his first two points of error, appellant asserts that the trial court erred in admitting hearsay testimony from passenger Lamonika Davis and allowing an in-court demonstration by Officer Pates. In his third point of error, appellant contends that the trial court erred in denying his motion for mistrial. Finally, in his fourth point of error, appellant argues that he was subjected to excessive punishment as a result of an illegal sentence.

Alleged Hearsay Evidence

At trial, the State presented the testimony of Lamonika Davis, the passenger in appellant's car at the time of the incident. After describing how appellant removed a handgun from under his seat and then pointed it at the driver of the red truck "right in front of [her] face," Davis testified that appellant began driving faster because "an officer started to pull us over." She said that

she knew it was an officer trying to pull them over "[b]ecause of the lights and the sirens and the intercom." Then, the following exchange occurred:

PROSECUTOR :	Was there any doubt in your mind at this point that there was a police officer behind you guys?
MS. DAVIS:	No, sir.
PROSECUTOR:	Did [appellant] indicate that there was a doubt in his mind that there was a police officer trying to pull you guys over?
APPELLANT:	Objection, Your Honor. Hearsay.
THE COURT:	Overruled.
MS. DAVIS:	No, sir.

In his first point of error, appellant maintains that the trial court erred in allowing this testimony into evidence because "the question called for hearsay, and only hearsay."

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Henley v. State*, 493 S.W.3d 77, 82–83 (Tex. Crim. App. 2016); *Sandoval v. State*, 409 S.W.3d 259, 297 (Tex. App.—Austin 2013, no pet.). An abuse of discretion does not occur unless the trial court acts "arbitrarily or unreasonably" or "without reference to any guiding rules and principles." *State v. Hill*, 499 S.W.3d 853, 865 (Tex. Crim. App. 2016) (quoting *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990)). Further, we may not reverse the trial court's ruling unless the determination "falls outside the zone of reasonable disagreement." *Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016); *see Henley*, 493 S.W.3d at 83 ("Before a reviewing court may reverse the trial court's decision, 'it must find the trial court's ruling was so

clearly wrong as to lie outside the zone within which reasonable people might disagree.'") (quoting *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008)). An evidentiary ruling will be upheld if it is correct on any theory of law applicable to the case. *Henley*, 493 S.W.3d at 93; *Sandoval*, 409 S.W.3d at 297.

Generally, hearsay evidence is not admissible except as provided by statute or the Texas Rules of Evidence. Tex. R. Evid. 802. Hearsay is a statement, other than one made by the declarant while testifying at the current trial or hearing, that is offered to prove the truth of the matter asserted in the statement. Tex. R. Evid. 801(d); *see Sandoval*, 409 S.W.3d at 281. A statement includes both oral and written expressions as well as nonverbal conduct intended as a substitute for verbal expression. Tex. R. Evid. 801(a) (defining "statement").

Here, appellant complains of no "statement," as defined in Rule 801(a), but rather Davis's testimony about the absence of a statement, which is not hearsay. *See* Tex. R. Evid. 801(a); *see, e.g.*, *Garraway v. State*, No. 03-14-00595-CR, 2017 WL 1404726, at *5 (Tex. App.—Austin Apr. 11, 2017, no pet.) (mem. op., not designated for publication) (concluding that witness's testimony that none of burglary victims named in indictment had given defendant consent to enter their apartments or to take their property was not statement as defined by Rule 801(a)); *Morrow v. State*, 486 S.W.3d 139, 162–63 (Tex. App.—Texarkana 2016, pet. ref'd) (concluding that it was "doubtful" that defendant's online presence or activity on website could reasonably be considered nonverbal statement that would constitute statement for purposes of hearsay definition). The challenged portion of Davis's testimony was not evidence of a statement that appellant had made,

but rather evidence of the fact that appellant did not make a statement. "Because no out-of-court statement was offered, no hearsay was uttered." *See Morrow*, 486 S.W.3d at 162.

However, even if the absence of appellant's comment—or lack of indication—could somehow be considered a statement, *see, e.g.*, Tex. R. Evid. 801(a) ("statement" includes nonverbal conduct if conduct is intended as substitute for verbal expression); *Paredes v. State*, 129 S.W.3d 530, 535 (Tex. Crim. App. 2004) (recognizing silence as adoptive admission by party opponent); *Schaffer v. State*, 777 S.W.2d 111, 114 (Tex. Crim. App. 1989) (discussing concept of indirect or "backdoor" hearsay when content of statement is presented by implication), any such statement would nevertheless be admissible.

"[Texas Rule of] Evidence 801(e) identifies circumstances in which certain statements are not hearsay." *Paredes*, 129 S.W.3d at 534. Rule 801(e)(2) provides that a statement is not hearsay if it is offered against a party and is the party's own statement. Tex. R. Evid. 801(e)(2)(A); *see Trevino v. State*, 991 S.W.2d 849, 853 (Tex. Crim. App. 1999); *Ripstra v. State* 514 S.W.3d 305, 315 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). The only requirements for admissibility of a party opponent's statement under Rule 801(e)(2) is that the statement is the opponent's own statement and that it is offered against him. *Trevino*, 991 S.W.2d at 853; *Ripstra*, 514 S.W.3d at 315.

If the complained-of testimony is construed to include a statement, the testimony the State elicited from Davis encompassed appellant's own statement (or lack thereof) to Davis. Thus, Davis's testimony is not hearsay evidence. *See Trevino*, 991 S.W.2d at 853 ("Rule 801(e)(2)(A) plainly and unequivocally states that a criminal defendant's own statements, when being offered

against him, are not hearsay."). Accordingly, the trial court did not abuse its discretion in overruling appellant's hearsay objection and admitting the complained-of testimony. We overrule appellant's first point of error.

In-Court Demonstration

At trial, during the direct examination of Officer Dago Pates, the State had Officer Pates perform an in-court demonstration. During the demonstration, the officer first pointed his firearm at a document camera to provide a view of "looking down the barrel of a gun." Officer Pates then extended his middle finger to provide a view of someone making the gesture of "flipping someone off." The State's purpose of illustrating the difference between looking at a gun pointed in your direction and someone making that particular hand gesture was to negate appellant's claim, asserted in opening statement, that he did not point a gun at Drewien but only "[shot] him the bird."

During a hearing outside the presence of the jury, before Officer Pates testified, the State proffered a description of the proposed demonstration. In its proffer, the State indicated that after the officer displayed the firearm to the camera, the State intended to ask appellant to extend his middle finger to the camera so the jury could observe him "shooting the bird." When appellant's counsel objected to his client "flipping off the camera," the trial court did not allow the State to have appellant demonstrate the hand gesture but did indicate it would allow the gun demonstration. At that time, appellant complained about the demonstration as follows:

> Your Honor, furthermore though I just want to address something with the gun, actually. I don't know what the purpose of this is. We're talking about the gun

> that was potentially or allegedly used in the alleged aggravated assault with a deadly weapon. That's not the same gun.
>
> We don't know what kind of gun or if there was a one. It's not an accurate depiction of what actually could have happened that day because we don't know what or if there was a gun there, what kind of gun, or if there was one.

The trial court overruled his objection. After a brief discussion about the logistics of conducting the gun demonstration (with or without the gunlock on the weapon), the trial court denied the State's request to use the firearm in the gun demonstration without the gunlock on. Appellant then objected,

> And then, Your Honor, just one more for the record. I'm objecting to that being more prejudicial than probative. I feel it's going to inflame the jury. We don't have any indication of what that actual weapon is or what the weapon that day was. It would be like bringing just any pistol up here and pointing a barrel at the jury. I don't see how that relates to our case especially through this witness.

The trial court overruled that objection as well. In his second point of error, appellant contends that the trial court erred in permitting the in-court demonstration.

The trial court has the discretion to admit a relevant in-court demonstration that is substantially similar to the event it seeks to illustrate. *See Valdez v. State*, 776 S.W.2d 162, 168 (Tex. Crim. App. 1989); *Cantu v. State*, 738 S.W.2d 249, 255 (Tex. Crim. App. 1987); *Davis v. State*, No. 01-10-00539-CR, 2011 WL 5026403, at *4 (Tex. App.—Houston [1st Dist.] Oct. 20, 2011, pet. ref'd) (mem. op., not designated for publication); *Henricks v. State*, 293 S.W.3d 267, 277 (Tex. App.—Eastland 2009, pet. ref'd); *Wright v. State*, 178 S.W.3d 905, 919 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd). The proponent of the demonstration must show that the conditions under which the demonstration is conducted are sufficiently similar to the event in question. *Valdez*, 776 S.W.2d at 168; *Cantu*, 738 S.W.2d at 255; *Davis*, 2011 WL 5026403, at

*4; *Henricks*, 293 S.W.3d at 277; *Wright*, 178 S.W.3d at 919. The conditions of the demonstration need not be identical; dissimilarities go to weight and not to admissibility. *Valdez*, 776 S.W.2d at 168; *Cantu*, 738 S.W.2d at 255; *Wright*, 178 S.W.3d at 919.

We review the trial court's decision to allow an in-court demonstration for an abuse of discretion. *Valdez*, 776 S.W.2d at 168; *Cantu*, 738 S.W.2d at 255; *Wright*, 178 S.W.3d at 920; *see Henricks*, 293 S.W.3d at 277. Out of necessity, reviews of trial court rulings on demonstrations depend on the facts of the case. *Wright*, 178 S.W.3d at 920. All parts of the demonstration must be supported by the evidence. *Davis*, 2011 WL 5026403, at *4; *Wright*, 178 S.W.3d at 919; *see Cantu*, 738 S.W.2d at 255; *Henricks*, 293 S.W.3d at 277.

In this case, Lamonika Davis, the passenger in appellant's car, testified that as appellant was driving he reached underneath his seat to retrieve a gun. He then held the weapon in front of her face, pointing it out the window at the driver of the red truck. When asked to describe the gun, Davis said that it was "[a] standard black [gun] -- maybe a nine millimeter." She explicitly testified that it was not a revolver, reiterating that it looked like a nine millimeter but she could not say "for sure" that it was.

Jack Drewien, the driver of the red truck, testified that when appellant's car approached to pass he "looked over and [he was] staring at two pupils and the muzzle of a weapon in between those pupils pointed at [his] face." He explained that he had military experience, was familiar with firearms, and had experience with firearms being pointed at him. When asked to describe the gun, Drewien said it was a pistol but not a revolver, and the muzzle of the pistol was "rather large." He also described going to Academy Sporting Goods that evening after the incident

where he had the store clerk point both a .45 caliber pistol and .40 caliber pistol at him to see if he could determine the exact caliber of appellant's weapon. Drewien was unable to make the determination, but reiterated that he "knew [the gun] was bigger than a .22."

The record reflects the gun used in the demonstration was Officer Pates's service firearm, which was a .40 caliber Glock 22, equipped with a light feature to assist in searches. However, the State readily distinguished this feature, and nothing in the record suggests that the light feature impaired the view of the barrel when the gun was pointed at the camera.

In his brief, appellant complains that the State's demonstration "used a large weapon" "despite [the] lack of evidence showing the gun's size, and despite [evidence of] direct knowledge that the gun was not a large gun." However, Drewien explicitly testified that the gun "was definitely a pistol and the muzzle of that pistol was rather large." Further, the testimony at trial reflected that the gun appellant wielded was thought to be a nine millimeter handgun, a .40 or .45 caliber pistol, or possibly a .38 caliber gun, which have barrels that are of comparable size to the barrel of Officer Pates's .40 caliber firearm.[4] Assuming it was not the same, any dissimilarity goes to the weight, not the admissibility, of the evidence. *See Valdez*, 776 S.W.2d at 168; *Cantu*, 738 S.W.2d at 255; *Wright*, 178 S.W.3d at 919.

Appellant also argues that the gun demonstration was flawed because of dissimilarity between the viewing distance in the demonstration and the distance from which Drewien saw appellant point the gun as they were driving on the interstate. However, appellant did not object to

[4] We note that Drewien's testimony indicated that the gun appellant pointed at him could have been a .40 caliber gun, making the gun used in the demonstration an exact match.

the gun demonstration at trial because the distance was not accurately portrayed. *See* Tex. R. App. P. 33.1(a)(1) (requiring that complaint be made to trial court by timely specific objection in order to preserve issue for appeal); *see also Smith v. State*, 499 S.W.3d 1, 7–8 (Tex. Crim. App. 2016) ("There are two main purposes behind requiring a timely and specific objection. First, the judge needs to be sufficiently informed of the basis of the objection and at a time when he has the chance to rule on the issue at hand. Second, opposing counsel must have the chance to remove the objection or provide other testimony."). Moreover, the perspective of the view of the gun barrel is not reflected in the record—that is, whether the camera perspective depicted a distance view of the barrel or a close up view. Thus, based on the record before us, we cannot say that the trial court erred in finding this aspect of the demonstration "substantially similar" to the view Drewien had during the incident.

Appellant further asserts that the gun demonstration was dissimilar because it lasted longer than "the blur of events" as the incident happened. However, appellant did not object to the gun demonstration at trial because the viewing time was not accurately portrayed. *See* Tex. R. App. P. 33.1(a)(1); *see also Smith*, 499 S.W.3d at 7–8. Furthermore, the record does not reflect how long the gun demonstration lasted. The demonstration with the gun appears in the record as follows:

> Q. Will you place the gun to where the muzzle is pointing up to the camera where we are looking straight down the muzzle on the video.
>
> A. (Complies.)
>
> Q. That's what -- that's what the barrel of a gun looks like, huh?
>
> A. Yes, sir.

Q. All right. Okay. Thank you.
Well, stay here.

A. (Complies.)

The prosecutor then immediately led the officer through a demonstration of the "flipping off" hand gesture. Thus, the record does not indicate that the timing of the demonstration view was not comparable to Drewien's observation of the weapon during the incident. Thus, once again, based on the record before us, we cannot say that the trial court erred in finding this aspect of the demonstration "substantially similar" to the incident.

In his brief, appellant also criticizes the "flipping off" portion of the demonstration as well, complaining about the lack of similarity between the skin tones of the officer, who is Hispanic, and appellant, who is African-American. However, appellant raised no objection at all to this portion of the demonstration at trial. *See* Tex. R. App. P. 33.1(a)(1); *see also Smith*, 499 S.W.3d at 7–8. Moreover, the State addressed this dissimilarity, pointing out the racial differences between the officer and appellant and noting that there was "a different complexion of skin color" "[b]ut a substantially similar shape." This is the type of dissimilarity that goes to weight and not to admissibility. *See Valdez*, 776 S.W.2d at 168; *Cantu*, 738 S.W.2d at 255; *Wright*, 178 S.W.3d at 919.

The record in this case shows that the officer's firearm was of similar type, color, size, and caliber as the handgun described by Davis and Drewien, who both testified to facts describing the gun and appellant's use of it based on their personal observations of the weapon. Thus, the complained-of gun demonstration was supported by the evidence and reasonable inferences from the

evidence. *See Valdez*, 776 S.W.2d at 168–69 (upholding in-court demonstration of six disarming techniques by which person might take police officer's weapon when sufficient evidence supported inference that defendant was able to disarm officer and use his weapon to shoot him); *Davis*, 2011 WL 5026403, at *4 (upholding in-court demonstration in which State had defendant execute twenty stabbing motions to negate claims of self-defense and sudden passion when supported by evidence and reasonable inferences from evidence); *Henricks*, 293 S.W.3d at 267–77 (upholding in-court demonstration of investigator's theory on how victim was murdered as it was supported by facts in evidence); *Wright*, 178 S.W.3d at 919–21 (upholding in-court demonstration in which State re-created how defendant stabbed her husband while he was tied to bed when demonstration was supported by reasonable inferences from physical evidence at crime scene). Because Officer Pates's demonstration was supported by facts in evidence and his firearm was shown to be substantially similar to the actual gun as described by witnesses, we conclude that the trial court did not abuse its discretion in allowing the in-court demonstration. We overrule appellant's second point of error.

Motion for Mistrial

In his third point of error, appellant argues that the trial court erroneously denied his motion for mistrial based on an unsolicited response from a State's witness purportedly referring to appellant's previous guilty plea.[5] During the State's direct examination of Jack Drewien, the driver

[5] The record reflects that four months prior to trial, appellant pled guilty pursuant to a plea-bargain agreement: in exchange for pleading guilty to the offenses of evading arrest or detention with a vehicle and aggravated assault with a deadly weapon, the State agreed to recommend a punishment cap of 15 years' imprisonment. However, during the pre-sentence investigation, which was ordered prior to sentencing, appellant refused to admit his guilt. The trial judge rejected the plea agreement, appellant withdrew his guilty plea, and the case proceeded to trial.

of the red truck, the prosecution attempted to explain Drewien's two-year delay in submitting a written statement to the police:

> Q. Okay. Why -- why didn't you turn it in?
>
> A. I didn't want to get involved.
>
> Q. Why not?
>
> A. I just didn't want to get involved. I had been down -- I had been through an Article 32 investigation in the military. And I -- I filled the form out the same day that I got it because I knew I needed to, you know, get the facts down. But I held on to it and I held on to it because I kept pressing the Kyle police about one thing in the case.
>
> Q. So tell me what made you come around?
>
> A. I think what's been going on in this country. I think that's what it is. There have been a lot of police officers shot. There's been a lot of innocent people shot. And I think -- I think that had an affect [sic] on me. I felt that it was time, so then I was told -- I guess it was in March -- that this case was going to the penalty phase and I --
>
> Q. Hang on right there.
>
> A. Thank you.
>
> Q. We're coming -- we're coming to trial. Let's stop right there. Do you remember talking to the prosecutor?

At this point, appellant objected and asked to approach the bench. At the bench, appellant complained,

> If we start getting into how that -- or why there was an agreement and that he pled guilty -- he said it was going into the penalty phase. I think he's already -- he had pled guilty to this offense.

The trial court then had a discussion with the prosecutor about whether the witness had been instructed "regarding those issues." Following that dialog, appellant moved for a mistrial, which the trial court denied.

In his brief, appellant asserts that a mistrial was required because Drewien's comment about "[the] case going to the penalty phase" "informed the jury that Appellant had entered a plea of guilty and the case was going to be all about punishment." This information, he contends, tainted appellant's right to be presumed innocent.

We review the trial court's denial of a mistrial for an abuse of discretion. *Jenkins v. State*, 493 S.W.3d 583, 612 (Tex. Crim. App. 2016); *Coble v. State*, 330 S.W.3d 253, 292 (Tex. Crim. App. 2010). We view the evidence in the light most favorable to the trial court's ruling, considering only those arguments before the court at the time of the ruling. *Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009); *Wead v. State*, 129 S.W.3d 126, 129 (Tex. Crim. App. 2004); *see Jenkins*, 493 S.W.3d at 612. We do not substitute our judgment for that of the trial court, but rather we decide whether the trial court's decision was arbitrary or unreasonable. *Webb v. State*, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007). We must uphold the ruling if it was within the zone of reasonable disagreement. *Coble*, 330 S.W.3d at 292; *Ocon*, 284 S.W.3d at 884.

A mistrial ends trial proceedings when error is so prejudicial that expenditure of further time and expense would be wasteful and futile. *Ocon*, 284 S.W.3d at 884; *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999). Accordingly, "[a] mistrial is an appropriate remedy only in 'extreme circumstances' for a narrow class of highly prejudicial and incurable errors." *Ocon*, 284 S.W.3d at 884 (citing *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004)). Whether

an error requires a mistrial must be determined by the particular facts of the case. *Jenkins*, 493 S.W.3d at 612; *Ocon*, 284 S.W.3d at 884; *Ladd*, 3 S.W.3d at 567.

The "traditional and preferred procedure" for a party to present a complaint and preserve error at trial is to (1) object in a timely manner, (2) request an instruction to disregard if the prejudicial event has occurred, and (3) move for a mistrial if the instruction to disregard seems insufficient. *Unkart v. State*, 400 S.W.3d 94, 98–99 (Tex. Crim. App. 2013); *Cruz v. State*, 225 S.W.3d 546, 548 (Tex. Crim. App. 2007). Such a sequence—which "seek[s] judicial remedies of decreasing desirability for events of decreasing frequency," *see Young v. State*, 137 S.W.3d 65, 69 (Tex. Crim. App. 2004)—is not essential to preserve complaints for appellate review; the only essential requirement to ensure preservation is a timely, specific request that is refused by the trial court. *Cruz*, 225 S.W.3d at 548; *Young*, 137 S.W.3d at 69; *see* Tex. R. App. P. 33.1(a).

Nevertheless, because it is an "extreme remedy," a mistrial should be granted only when residual prejudice remains after less drastic alternatives have been explored. *Jenkins*, 493 S.W.3d at 612; *Ocon*, 284 S.W.3d at 884–85; *Barnett v. State*, 161 S.W.3d 128, 134 (Tex. App—Fort Worth 2005)*, aff'd*, 189 S.W.3d 272 (Tex. Crim. App. 2006); *see Unkart*, 400 S.W.3d at 99 ("A party may skip the first two steps and request a mistrial, but he will be entitled to one only if a timely objection would not have prevented, and an instruction to disregard would not have cured, the harm flowing from the error."). Thus, though requesting lesser remedies is not a prerequisite to a motion for mistrial, when the movant does not first request a lesser remedy, an appellate court will not reverse the trial court's judgment if the problem could have been cured by the less drastic alternative. *Ocon*, 284 S.W.3d at 885; *see Pierson v. State*, 426 S.W.3d 763, 778 (Tex. Crim. App.

2014) (Price, J., concurring) ("A defendant who requests a mistrial without first seeking an instruction that the jury disregard some objectionable matter that has made its way into evidence has only preserved error for appeal if the appellate court can say that the instruction to disregard would not, in any event, have had the desired effect on the facts of the particular case."); *Young*, 137 S.W.3d at 70 ("[T]he request for an instruction that the jury disregard an objectionable occurrence is essential only when . . . such an instruction could have had the desired effect, which is to enable the continuation of the trial by a[n] impartial jury. 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."); *see, e.g.*, *Wood v. State*, 18 S.W.3d 642, 648 (Tex. Crim. App. 2000) (concluding that trial court did not abuse discretion in denying appellant's motion for mistrial when appellant had not requested less drastic remedy of continuance).

Here, the alleged ground for mistrial arose from Drewien's unsolicited and unanticipated comment that he had been informed that "this case was going to the penalty phase." However, improperly admitted evidence will seldom call for a mistrial, because in most cases any harm can be cured by an instruction to disregard. *See Gamboa v. State*, 296 S.W.3d 574, 580 (Tex. Crim. App. 2009) (trial court's instructions to disregard generally considered sufficient to cure improprieties that occur during trial because it is presumed that jury will follow those instructions). As the Court of Criminal Appeals has explained,

> In the vast majority of cases in which . . . testimony comes in, deliberately or inadvertently, which has no relevance to any material issue in the case and carries with it some definite potential for prejudice to the accused, this Court has relied upon what amounts to an appellate presumption that an instruction to disregard the evidence will be obeyed by the jury. In essence this Court puts its faith in the jury's

> ability, upon instruction, consciously to recognize the potential for prejudice, and then consciously to discount the prejudice, if any, in its deliberations. Thus we say the harm deriving from the unresponsive answer has been "cured." This is true except in extreme cases where it appears that the evidence 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.

Ladd, 3 S.W.3d at 567 (quoting *Gardner v. State*, 730 S.W.2d 675, 696 (Tex. Crim. App. 1987)); *see, e.g.*, *Archie v. State*, 340 S.W.3d 734, 742 (Tex. Crim. App. 2011) (curative instruction sufficient where prosecutor made improper jury argument commenting on defendant's failure to testify); *Gamboa*, 296 S.W.3d at 580 (trial court's instructions to disregard cured any harm from shouted outburst of family member during testimony of prosecution witness); *Young v. State*, 283 S.W.3d 854, 877–78 (Tex. Crim. App. 2009) (instruction sufficient to cure any harm from officer's testimony that appellant used stolen firearm during offense); *Ladd*, 3 S.W.3d at 567, 571 (instructions to disregard sufficient to cure any harm caused by prosecutor questioning witness about defendant's prior bad act and from witness's improper reference to defendant's multiple juvenile arrests); *Kemp v. State*, 846 S.W.2d 289, 308 (Tex. Crim. App. 1992) (trial court's instruction to disregard sufficient to cure any harm from "uninvited and unembellished" reference to defendant's prior incarceration).

Thus, as a general rule, an instruction to disregard is sufficient to cure harm from a nonresponsive answer given by a State's witness. *See Coble*, 330 S.W.3d at 292; *see also Williams v. State*, 643 S.W.2d 136, 138 (Tex. Crim. App. 1982) (discussing State witness's unresponsive answer, which inadvertently placed prejudicial information before jury, and noting general rule that instruction to disregard is sufficient to cure harm from nonresponsive answer given by State's

witness). "[O]nly in the most egregious cases when there is an 'extremely inflammatory statement' is an instruction to disregard . . . considered an insufficient response by the trial court." *Williams v. State*, 417 S.W.3d 162, 176 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd) (citations omitted). Such was not the case here.

Appellant characterizes Drewien's unresponsive testimony as a statement that informed the jury that he had previously pled guilty, which tainted his presumption of innocence. However, the testimony did not actually assert that appellant had pled guilty. At best, the comment was an allusion that allowed for the inference of possible plea negotiations or a plea bargain. The comment could just as easily have been interpreted as an imprecise reference to the trial proceeding itself. Further, the unresponsive testimony was only one brief isolated comment, which was not emphasized by the State.[6] Given the vague nature of the testimony, and its brevity, any harm caused by Drewien's "penalty phase" comment could have been cured by an instruction to disregard.

Appellant has offered no persuasive basis for concluding that a prompt instruction would have been insufficient to cure any harm that resulted from Drewien's objectionable testimony. Relying primarily on *Hayes v. State*, 484 S.W.3d 554 (Tex. App.—Amarillo 2016, pet. ref'd) and *Blue v. State*, 41 S.W.3d 129 (Tex. Crim. App. 2000), appellant asserts that Drewien's testimony was so prejudicial it vitiated the presumption of innocence. We disagree and find these cases distinguishable.

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[6] In fact, the State interrupted Drewien and tried to correct the error with a follow-up question directing the testimony away from the comment.

In *Hayes*, the court bailiff informed the jurors, during trial, that the trial proceedings were delayed because the parties were discussing a plea bargain. *Hayes*, 484 S.W.3d at 556. The record reflected that the jury discussed the bailiff's comments during deliberations. *Id.* at 559. The court of appeals applied Rule 21.3(f) of the Texas Rules of Appellate Procedure, which provides that a defendant must be granted a new trial "when, after retiring to deliberate, the jury has received other evidence," *see* Tex. R. App. P. 21.3(f), and concluded that the trial court erred in denying appellant's motion for new trial because the record demonstrated that the jury received "other evidence" that was detrimental or adverse to appellant. *Hayes*, 484 S.W.3d at 559.

In *Blue*, the trial judge apologized to the jurors on the venire panel about the delay in starting the case, telling them that the defendant was still deciding whether to accept the State's plea offer or go to trial. *Blue*, 41 S.W.3d at 130. The trial judge further told the jurors that he would "prefer the defendant to plead," and they "were all trying to work toward that and save you time and cost of time." *Id.* A plurality of the Court of Criminal Appeals decided that the trial judge's remarks vitiated the defendant's presumption of innocence.[7] *Id.* at 132.

We find appellant's reliance on *Hayes* and *Blue* to be misplaced as the circumstances here differ significantly in several respects from the circumstances in those cases. First, the complained-of remark in this case was not a comment directly to the jury from the trial judge or court personnel but was instead unresponsive testimony from a witness on the stand. Second, the comments in those cases were explicit and unmistakable references to plea-bargain negotiations

[7] We note that the Court of Criminal Appeals has since held that the plurality decision in *Blue* has no precedential value, although the opinions may nevertheless be considered for persuasive value. *See Unkart v. State*, 400 S.W.3d 94, 101 (Tex. Crim. App. 2013).

demonstrating that the defendant was considering pleading guilty. Here, as noted above, Drewien's unresponsive testimony was an ambiguous comment that was only a vague reference from which one might possibly infer that appellant had engaged in plea negotiations. It was not an unequivocal statement that he had or, as in *Hayes* and *Blue*, that he was in fact doing so. Because of these differences, we are not persuaded that these cases support reversal here. Given the vague nature of the comment, appellant has failed to demonstrate that the complained-of testimony was so extreme or inflammatory that a curative instruction was not likely to prevent the jury from being unfairly prejudiced against him. *See Archie*, 340 S.W.3d at 739.

We conclude that Drewien's testimony—to the extent one could infer a comment about plea negotiations or appellant's prior guilty plea—was not incurable. The testimony was unsolicited and minimal, and only a vague reference possibly alluding to plea negotiations. Given its character, we cannot conclude that this brief statement was so extreme or so inflammatory that it would have been impossible for the jury to withdraw its impression from their minds. Thus, any harm could have been cured by an instruction to disregard. *See Unkart*, 400 S.W.3d at 102 ("[I]f there were any residual harm, it would have been cured by a timely instruction to disregard the specific comment [that the] appellant found objectionable.").

Appellant, however, did not ask the trial court to instruct the jury to disregard the testimony. Accordingly, because appellant forfeited a lesser remedy by failing to request an instruction to disregard, he is not entitled to reversal. *See Brewer v. State*, 367 S.W.3d 251, 253 (Tex. Crim. App. 2012) ("The appellant did not request a curative instruction before moving for a mistrial—a choice that forfeited appellate relief for an error that could have been cured by such an

instruction."); *Ocon*, 284 S.W.3d at 886–87 ("An appellant who moves for a mistrial without first requesting a less drastic alternative forfeits appellate review of that class of events that could have been cured by the lesser remedy."); *Batalla v. State*, No. 14-13-00810-CR, 2015 WL 1778951, at *2 (Tex. App.—Houston [14th Dist.] Apr. 16, 2015, pet. ref'd) (mem. op., not designated for publication) ("The failure to request an instruction for the jury to disregard forfeits appellate review of errors that could have been cured by such an instruction."). We overrule appellant's third point of error.

Legality of Sentence

In his fourth point of error, appellant contends that his sentence of 20 years' imprisonment is illegal. He argues that the offense of evading detention that he was charged with and convicted of—evading detention with a vehicle—is a state jail felony. As such, he maintains, his punishment was not subject to enhancement with the prior felony conviction alleged by the State for enhancement purposes, and his sentence exceeds the applicable punishment range.

The offense of evading detention is codified in section 38.04 of the Penal Code. Subsection (a) defines the offense: "A person commits an offense if he intentionally flees from a person he knows is a peace officer or federal special investigator attempting lawfully to arrest or detain him." Tex. Penal Code § 38.04(a). Subsection (b) establishes the offense level as a Class A misdemeanor, except under certain circumstances, such as when the accused has been previously convicted of evading arrest or detention or uses a vehicle or watercraft while in flight. *See id.* § 38.04(b). It is the application of those circumstances that is at issue in this case.

In the 2011 regular session, the Legislature passed three bills amending the evading arrest or detention statute: Senate Bill 496 (SB 496), House Bill 3423 (HB 3423), and Senate Bill 1416 (SB 1416). *See* Act of May 23, 2011, 82d Leg., R.S., ch. 391, § 1, sec. 38.04, 2011 Tex. Gen. Laws 1046, 1046–47 (current version at Tex. Penal Code § 38.04); Act of May 24, 2011, 82d Leg., R.S., ch. 839, § 4, sec. 38.04, 2011 Tex. Gen. Laws 2010, 2011 (current version at Tex. Penal Code § 38.04); and Act of May 27, 2011, 82d Leg., R.S., ch. 920, § 3, sec. 38.04, 2011 Tex. Gen. Laws 2321, 2322 (current version at Tex. Penal Code § 38.04). Senate Bill 496 and House Bill 3423 both provide that evading detention is a state jail felony if the actor uses a vehicle while in flight, unless the actor also has a prior conviction for evading arrest or detention (in which case it is a third degree felony). However, the third bill, Senate Bill 1416, provides that evading detention is a third degree felony if the actor uses a vehicle while in flight, regardless of whether the actor has a prior conviction for evading arrest or detention. These two differing punishment schemes are both codified in section 38.04(b). Thus, one portion of section 38.04(b) now classifies the offense as a state jail felony when the actor uses a motor vehicle or watercraft in fleeing law enforcement and has not previously been convicted of the offense. *See* Tex. Penal Code § 38.04(b)(1)(B). Another part of the statute makes evading detention a third degree felony when the actor uses a vehicle, regardless of the actor having been previously convicted of the offense. *See id.* § 38.04(b)(2)(A).

We are not the first appellate court to address this issue of conflicting statutory provisions regarding the offense level for this crime when the accused uses a vehicle in flight. The Fort Worth Court of Appeals has previously analyzed the apparent statutory conflict. *See Adetomiwa*

v. State, 421 S.W.3d 922, 924–27 (Tex. App.—Fort Worth 2014, no pet.). As the Fort Worth Court noted, the Code Construction Act informs us that "if amendments to the same statute are enacted at the same session, one making no reference to the other, they shall be harmonized if possible to give effect to each." *Id.* at 926 (citing Tex. Gov't Code § 311.025(b)). In *Adetomiwa*, the Fort Worth Court determined that the statutory amendments were capable of being "harmonized" pursuant to the Code Construction Act. *See id.* (citing Tex. Gov't Code §§ 311.001, .002(2), .025).

Our sister court observed that each of the 2011 amendments to section 38.04 makes a substantive change that the other does not: Senate Bill 496 amends subsections (b) and (c) to add "watercraft" to the type of transportation an actor may use "in flight"; House Bill 3423 amends subsections (a) and (b) to add "federal special investigator" to the type of individual a person may be fleeing from for purposes of the offense; and Senate Bill 1416 amends subsections (b) and (c) to alter the punishment scheme to provide, among other things, that evading detention is a third degree felony if the actor uses a vehicle in flight. *Id.* As the Fort Worth Court explained, the 2011 amendments could be reconciled because each amendment acted specifically: two added new terms to the statute, and the final amendment "made more extensive amendments, altering the punishment scheme." *Id.* Because the three amendments can be read together in harmony—that is, there is no direct conflict in the amendments themselves—each should be given effect. *See* Tex. Gov't Code § 311.025(b); *Adetomiwa*, 421 S.W.3d at 926. Furthermore, as the Fort Worth Court also pointed out, even if the amendments were irreconcilable, the amendment altering the punishment scheme was the final amendment of the legislative session and would be the prevailing amendment under section 311.025 of the Texas Code Construction Act, which provides that if

amendments are irreconcilable, "the latest in date of enactment prevails." *See Adetomiwa*, 421 S.W.3d at 927 (citing Tex. Gov't Code § 311.025(b), (d)). For these reasons, the Fort Worth Court concluded that the offense of evading arrest or detention is a third degree felony when the defendant uses a vehicle in the flight, irrespective of prior convictions. *Id.*

We agree with our sister court and note that a number of other courts of appeals have addressed this issue and reached the same conclusion. *See Jackson v. State*, No. 05-15-00414-CR, 2016 WL 4010067, at *7 n.1 (Tex. App.—Dallas July 22, 2016, no pet.) (mem. op., not designated for publication); *Whitfield v. State*, No. 01-15-00336-CR, 2016 WL 3221298, at *3 (Tex. App.—Houston [1st Dist.] June 9, 2016, no pet.) (mem. op., not designated for publication); *Moorhead v. State*, 483 S.W.3d 246, 247–48 (Tex. App.—Texarkana 2016, no pet.); *Salazar v. State*, 474 S.W.3d 832, 839–40 (Tex. App.—Corpus Christi 2015, no pet.); *State v. Sneed*, No. 09-14-00232-CR, 2014 WL 4755502, at *4 (Tex. App.—Beaumont, Sept. 24, 2014, pet. ref'd) (mem. op., not designated for publication); *Thompson v. State*, No. 12-13-00264-CR, 2014 WL 3662239, at *2 (Tex. App.—Tyler July 23, 2014, no pet.) (mem. op., not designated for publication); *Wise v. State*, No. 11-13-00005-CR, 2014 WL 2810097, at *5 (Tex. App.—Eastland Jun. 19, 2014, pet. ref'd) (mem. op., not designated for publication); *Mims v. State*, 434 S.W.3d 265, 270 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *Scott v. State*, No. 10-13-00159-CR, 2014 WL 1271756, at *3 (Tex. App.—Waco Mar. 27, 2014, no pet.) (mem. op., not designated for publication); *Peterson v. State*, No. 07-13-00155-CR, 2014 WL 546048, at *2 (Tex. App.—Amarillo Feb. 10, 2014, pet. ref'd) (mem. op., not designated for publication).

Because the offense of evading arrest or detention, when the accused uses a motor vehicle in his or her flight, is a third degree felony, regardless of whether the accused has a prior conviction for evading arrest or detention, appellant's complaint that his punishment range was improperly elevated to that of a second degree felony is without merit. Appellant was convicted of a third degree felony. When the State proved appellant's prior felony conviction, appellant was properly subjected to a second degree felony range of punishment of not less than two and not more than 20 years under the repeat offender enhancement provisions of the Penal Code. *See* Tex. Penal Code § 12.42(b). Appellant's sentence of 20 years was within the allowed, enhanced range of punishment. We overrule appellant's fourth point of error.

CONCLUSION

Having overruled appellant's four points of error, we affirm the trial court's judgments of conviction.

Melissa Goodwin, Justice

Before Justices Puryear, Goodwin, and Field

Affirmed

Filed: June 14, 2017

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