

**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-15-00532-CR**

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**Shane Fuller, Appellant**

**v.**

**The State of Texas, Appellee**

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**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 299TH JUDICIAL DISTRICT  
NO. D-1-DC-15-904040, HONORABLE WILFORD FLOWERS, JUDGE PRESIDING**

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**MEMORANDUM OPINION**

Appellant Shane Fuller appeals from his conviction for family-violence assault. *See* Tex. Penal Code § 22.01(b)(2)(A). He claims the trial court erred in denying his requests for a mistrial on the basis of introduction of inadmissible character evidence. We will affirm.

**BACKGROUND**

Fuller was in a romantic relationship with the complainant, Debra Garrison, with whom he had a child. On August 31, 2014, Fuller entered Garrison's motor home in an angry state and began yelling at her. He made statements regarding how she "wasn't going to leave him" and that they "weren't going to separate." The argument escalated, and Fuller grabbed Garrison, pushed her to the floor, and knocked her head against the corner of the wall. He grabbed her by the neck, turned her over, and twisted her head with his hands. He then covered her face with a gasoline-soaked cloth using substantial force.

Garrison fled her home, and Fuller pursued her across the street to her son's residence. Her son drove her to the house of her friend, James Mock. Mock went to Garrison's home where he encountered Fuller, who threatened Mock and anyone attempting to aid Garrison. Mock returned to his home, and Fuller arrived at Mock's home a short time later yelling threats at Garrison.

Mock and Garrison attempted to flee on Mock's motorcycle, but Fuller pulled Garrison off of the back of the motorcycle and proceeded to drag her across the ground until Mock intervened. Garrison then ran to a neighbor's home and called 911. Fuller left the scene but threatened to return for Garrison. Emergency personnel responded, and Garrison was treated for head injuries, contusions, and lung damage caused by gasoline inhalation.

Fuller was charged with family-violence assault and family-violence assault by strangulation, and he pled not guilty to both. *See* Tex. Penal Code § 22.01(b)(2)(A), (b-1)(3). The jury found him guilty of the former but acquitted him of the latter. The jury found the enhancement allegation true and assessed his punishment at 17 years' confinement. The trial court rendered judgment accordingly. This appeal followed.

## **DISCUSSION**

In his sole issue, appellant argues that the trial court erred when it denied his motion for mistrial after inadmissible character testimony was elicited during the guilt–innocence phase of trial. *See* Tex. R. Evid. 404(b)(1) (“Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.”). He asserts that the trial court's instructions to disregard the

testimony did not cure the error because the testimony “clearly deprived” him of his right to be tried upon only competent evidence.

### **I. Applicable law and standard of review**

A mistrial halts trial proceedings when error is so prejudicial that expenditure of further time and expense would be wasteful and futile. *Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009). It is an appropriate remedy in “extreme circumstances” for a narrow class of highly prejudicial and incurable errors. *Id.* Because it is an “extreme remedy,” a mistrial should be granted only when (1) residual prejudice remains after less drastic alternatives are explored and (2) the “reference was clearly calculated to inflame the minds of the jury or was of such damning character as to suggest it would be impossible to remove the harmful impression from the jurors’ minds.” *Id.* at 884-85; *Young v. State*, 283 S.W.3d 854, 878 (Tex. Crim. App. 2009) (internal quotations omitted).

A trial court’s denial of a mistrial is reviewed for an abuse of discretion. *Ocon*, 284 S.W.3d at 884. 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. *Id.* We must uphold the ruling if it was within the zone of reasonable disagreement. *Id.*

In determining whether the trial court abused its discretion in refusing to grant a mistrial, we consider (1) the severity of the misconduct (the prejudicial effect of the testimony), (2) the curative measures taken, and (3) the certainty of conviction absent the prejudicial event (the strength of the evidence supporting the conviction). *See Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998); *see also Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004).

A prompt instruction to disregard will ordinarily cure error associated with improper testimony, even testimony regarding extraneous offenses. *Ovalle v. State*, 13 S.W.3d 774, 783 (Tex. Crim. App. 2000). We presume that the jury obeyed the instruction and that the instruction was effective. *Archie v. State*, 340 S.W.3d 734, 741 (Tex. Crim. App. 2011).

**II. The trial court did not abuse its discretion in denying Fuller’s motions for mistrial**

**A. Error not preserved as to testimony regarding “family disturbance” call**

Fuller’s complaints pertain to three lines of testimony. We first conclude that Fuller failed to preserve error as to one such line of testimony that was elicited by the State from Deputy Anthony McCauley, who responded to Garrison’s 911 call:

Q. Deputy, I want to direct your attention to August 31st, 2014. On that date, were you dispatched to 418 Hickory Ridge Road?

A. Yes, ma’am, I was.

Q. And is that an address in Travis County, Texas?

A. Yes, it is.

Q. What was the nature of the call?

A. *The dispatch coded this call as a family disturbance.*

[Defense counsel]: Your Honor, I object. I think that that’s hearsay, the response to that.

The Court: Okay. Sustained.

(Emphasis added). Fuller moved for a mistrial, which the trial court denied, but he lodged no additional objections.

Fuller failed to preserve his complaint as to that testimony because the basis of his objection at trial was hearsay, which does not comport with his argument on appeal that the testimony constituted prohibited character evidence. *See Barnes v. State*, 876 S.W.2d 316, 325 (Tex. Crim. App. 1994) (where trial objection did not comport with issue raised on appeal, nothing preserved for review); *Camacho v. State*, 864 S.W.2d 524, 533 (Tex. Crim. App. 1993) (holding that appellant's hearsay and relevancy objections at trial did not preserve his extraneous-offense argument on appeal). Because Fuller did not object at trial that the testimony constituted prohibited character evidence, he waived his complaint.<sup>1</sup>

**B. Other objectionable testimony cured by instructions to disregard**

Fuller also complains of testimony offered by Garrison during the State's direct examination:

Q. Now, you said that you've known the defendant since high school and that you guys started dating, you said, about 2008?

A. December 2008.

Q. Okay. So approximately seven years ago?

A. Correct.

Q. At some point in time did you-all separate?

A. Yes.

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<sup>1</sup> Furthermore, the record shows that the testimony did not concern prior misconduct, as the disturbance call pertained to the offense for which Fuller was charged. Consequently, even had Fuller properly preserved the issue, the record does not demonstrate that the trial court abused its discretion in refusing to grant a mistrial on that basis.

Q. When did you separate?

A. *Well, he was incarcerated –*

Q. Excuse –

[Defense counsel]: Your Honor, I object.

A. He –

The Court: Sustained.

(Emphasis added). Fuller’s third complaint concerns another line of testimony elicited by the State from Deputy McCauley:

Q. What were the names of the complainants that you came in contact with?

A. Debra Garrison and James Mock.

Q. And did you – had you met these two before?

A. *Yes, I met Debra on a previous occasion, on another call.*

[Defense counsel]: Your Honor, I would object to that. That’s –

The Court: Sustain the objection.

(Emphasis added). Immediately following both Garrison’s and Deputy McCauley’s testimony, the trial court sustained Fuller’s objections, granted his requests to strike the testimony from the record, and instructed the jury to disregard the testimony. The trial court, however, denied both of Fuller’s requests for a mistrial.

In reviewing the record in light of the requisite considerations—the severity of the misconduct, the curative measures taken, and the certainty of conviction absent the complained-of

testimony—we conclude that the trial court did not abuse its discretion in denying Fuller’s requests for a mistrial. *See Mosley*, 983 S.W.2d at 259.

Regarding Garrison’s testimony that Fuller had been previously incarcerated, the court of criminal appeals has held that “[a] witness’s inadvertent reference to an extraneous offense is generally cured by a prompt instruction to disregard.” *Young*, 283 S.W.3d at 877-78. That court has also specifically held in a case where a witness “gratuitously alluded to the fact . . . that appellant had previously been to the penitentiary,” that reversal was not warranted because a curative instruction was given. The court stated the following:

That appellant had been to the penitentiary was undoubtedly inadmissible and prejudicial testimony, having no relevance to any issue at the guilt stage of trial. However, that bare fact, unembellished, was not so inflammatory as to undermine the efficacy of the trial court's instruction to disregard it.

*Gardner v. State*, 730 S.W.2d 675, 696-97 (Tex. Crim. App. 1987).

Here, Garrison’s testimony was devoid of any details regarding the incarceration, such as when the period of incarceration occurred, for how long, and for what offense. It was not elicited by the State and was merely incidental to Garrison’s testimony regarding her and Fuller’s separation. Although inadmissible, we conclude that any prejudice Fuller may have suffered was cured by the court’s curative instruction. *See id.*

We also conclude that Deputy McCauley’s testimony regarding “another call” was cured by the trial court’s instruction to disregard. That testimony conveyed no details as to the nature of the “call.” In fact, the testimony in no way alluded to Fuller and was in reference only to how Deputy McCauley had previously met the complainant and another witness on a different occasion.

To the extent that it constituted improper testimony, nothing in the record suggests that the trial court's instruction was not effective in curing any prejudice.

Fuller argues that the instructions were insufficient because the testimony was elicited by the State's attorney and, in part, from law enforcement, but he cites no authority in support of that proposition. We conclude that those considerations do not warrant reversal. *See, e.g., Archie*, 340 S.W.3d at 742 (curative instruction sufficient where prosecutor made improper jury argument); *Young*, 283 S.W.3d at 877-78 (instruction sufficient to cure officer's testimony that appellant used stolen firearm); *Hawkins*, 135 S.W.3d at 84-85 (curative instruction sufficient where prosecutor made improper jury argument); *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999) (instruction sufficient to cure any prejudice caused by prosecutor questioning witness regarding appellant's prior bad act). Fuller has failed to demonstrate that the complained-of testimony was "so emotionally inflammatory that curative instructions are not likely to prevent the jury from being unfairly prejudiced against the defendant." *Archie*, 340 S.W.3d at 739 (internal quotations omitted).

Finally, the record contains substantial evidence establishing that Fuller would have been convicted absent the improper testimony. *See Mosley*, 983 S.W.2d at 259. Several witnesses testified as to Fuller's assault of Garrison and provided details as to his violent behavior and the nature of Garrison's injuries, including eyewitnesses to the offense as well as medical personnel and supporting records.

Garrison described the assault in detail. She explained how Fuller pushed her to the floor and knocked her head against the corner of the wall repeatedly with "[a] lot of force." She testified that Fuller twisted her head with such force that she felt like her head "was on the other side



of [her] body.” She said that when he covered her face with the gasoline-soaked cloth, it burned her eyes, nose, and throat. She stated that he tried to force it down her throat, which prevented her from being able to breathe, and that he did so with “so much pressure” that she “thought it had broken [her] jawbone.” She testified that she believed she lost consciousness at some point.

Mock testified that Fuller threatened to “take care of everybody that’s involved” in helping Garrison. He said that when Fuller arrived at Mock’s house, Fuller “was mad” and was yelling threats at Garrison such as, “if you like what I did this morning, you’re really going to like this.” He described how Fuller pulled Garrison off of Mock’s motorcycle, which caused Mock and the motorcycle to fall to the ground. Mock’s neighbor corroborated Garrison’s and Mock’s testimony regarding the events that occurred at Mock’s house.

Deputy McCauley testified as to Garrison’s injuries, which he observed when he responded to the call. Cheryl Bakhtiari, a field paramedic who responded to the scene, also testified regarding Garrison’s injuries. Both witnesses’ testimony and the medical records admitted into evidence described injuries throughout Garrison’s body that were consistent with Garrison’s testimony regarding the injuries she received from Fuller.

Reviewing the record in light of the requisite considerations, we conclude that the trial court did not abuse its discretion in denying a mistrial. We overrule Fuller’s sole issue.

## **CONCLUSION**

We affirm the judgment of the trial court.

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Cindy Olson Bourland, Justice

Before Chief Justice Rose, Justices Field and Bourland

Affirmed

Filed: April 21, 2017

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