NUMBERS 13-14-00457-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

VICTOR HERNANDEZ, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 357th District Court of Cameron County, Texas.

MEMORANDUM OPINION

Before Justices Garza, Perkes and Longoria
Memorandum Opinion by Justice Perkes

Appellant Victor Hernandez pleaded guilty to the offense of aggravated assault against a person with whom he had a dating relationship, a first-degree felony. *See* TEX. PENAL CODE ANN. § 22.02(b)(1) (West, Westlaw through 2015 R.S.). A jury assessed punishment of fifty years' imprisonment in the Texas Department of Criminal Justice's Institutional Division, and the trial court sentenced appellant accordingly. By fifty-one

issues, which we treat as five, appellant argues the trial court erred by: (1) failing to sustain challenges for cause to eighteen venirepersons who purportedly stated they could not consider probation as punishment; (2) denying appellant's motion for a mistrial when the prosecuting attorney asked the jury to send a message to the community with their sentence; (3) denying appellant's motion for a mistrial due to the prosecuting attorney's comment concerning appellant's post-arrest silence; (4) overruling appellant's objection to improper victim-impact testimony; and (5) overruling appellant's objection to hearsay testimony. We affirm, as modified.

I. BACKGROUND

Appellant was charged by indictment for causing serious bodily injury to Yazmin Reyes by shooting her with a firearm. The indictment further alleged that appellant had a prior dating relationship with Reyes. Appellant pleaded guilty and elected to have a jury assess his punishment.

A. Jury Selection

During voir dire, appellant's counsel explained to the panel that the range of punishment is "five to 99 or life [in prison] and probation." He further explained that "under our law, if someone is eligible for probation, you all have to be able to consider probation[.]" Appellant's counsel asked, "Is there anybody who says . . . I know what he has pled guilty to, and really, truly, I cannot consider probation? That's just out of the question." Thirty-four panel members indicated that they could not consider probation as punishment. Appellant later moved to strike each of the thirty-four venirepersons for cause because they "[were] not able to consider the full range of punishment[.]"

The trial court instructed the challenged jurors concerning the range of punishment for the charged offense. The trial court then asked each panel member individually if they could set aside their personal beliefs and consider the full range of punishment, including probation. Seven of the challenged venirepersons still maintained that they could not consider the full range of punishment, and were struck for cause by the trial court. The trial court denied appellant's motion to strike the remaining venirepersons, each of whom indicated that they could set aside their personal feelings and consider probation. After both sides exercised their peremptory strikes, appellant offered the following objection:

> I've been provided with a copy of the jury that has been chosen, and I'd like to impose an objection to the panel . . . and I'll ask the Court consider the same objection after [the jury] is impaneled . . . But the ones that I wish to object to on the panel include each of those jurors who had originally stated that they were unable to consider the full range of punishment, including probation, and then after rehabilitation by the Court would state that they would in fact do so. And what I would urge is that . . . those people were improperly rehabilitated and they should remain stricken.

The trial court overruled appellant's objections and denied appellant's motions for additional strikes and "that [the] panel be stricken."

B. Punishment Hearing

The jury was empaneled, and the following evidence was presented at the punishment hearing. The victim, Yazmin Reyes, met appellant while they both attended the same college, and she dated appellant over the course of two years. Reyes eventually ended the relationship because appellant was being possessive and exhibiting violent behavior. Following their breakup, Reyes rejected appellant's multiple attempts to revive their relationship. Approximately four months after their relationship ended,

Reyes drove to her house in Brownsville and parked her car on the street. As she exited her vehicle, Reyes saw appellant in his car across the street. Appellant called out to Reyes, but Reyes ignored him and walked toward her house. Appellant approached the edge of the front-yard on foot while holding a firearm. He then fired multiple shots at Reyes before fleeing in his vehicle. Video footage of the incident was captured from a camera affixed to Reyes's house and was admitted into evidence.

An ambulance transported Reyes to the hospital where she remained for a week and a half. Six bullets struck Reyes, resulting in injuries to her stomach, right arm, and her hand. Reyes's kidney and a significant portion of her small intestine were removed. Metal pins were inserted in Reyes's right arm to repair the shattered bone. Reyes later visited a specialist in Houston to repair the damage to her finger. The injuries and resulting surgeries caused significant scarring to Reyes's stomach, arm, and hand.

Shortly after the shooting, Officers with the Brownsville Police Department discovered appellant's abandoned vehicle near the Mexico border bridge. More than a year later, appellant turned himself in to the legal authorities at the bridge as he returned from Mexico. After appellant pleaded guilty, the jury assessed punishment at fifty years' imprisonment. This appeal followed.

II. CHALLENGES FOR CAUSE

By his first issue, appellant argues that "the trial court erred by denying [appellant's] challenge for cause to [eighteen venirepersons] who could not consider the full range of punishment[.]" Appellant maintains that the trial court improperly rehabilitated those prospective jurors who stated that they could not consider the full range of punishment.

Finally, appellant argues that as a result of the trial court's error, he was denied a fair and impartial jury because the jury consisted of eight unqualified jurors.

A. Standard of Review and Applicable Law

A prospective juror is subject to challenge for bias under the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 35.16, §§ 9, 11 (West, Westlaw through 2015 R.S.). Further, the United States and Texas Constitutions provide a constitutional right to an impartial jury. *See* U.S. CONST. amend. VI; TEX. CONST. art I, § 10; *State v. Morales*, 253 S.W.3d 686, 697 (Tex. Crim. App. 2008); *Jones v. State*, 982 S.W.2d 386, 391 (Tex. Crim. App. 1998) (noting that the Texas constitutional right to an impartial jury affords no greater protection than that provided by the Sixth Amendment). We review a trial court's decision to deny a challenge for cause by looking at the entire record to determine whether sufficient evidence supports the ruling. *Davis v. State*, 329 S.W.3d. 798, 807 (Tex. Crim. App. 2010) (citing *Feldman v. State*, 71 S.W.3d. 738, 744 (Tex. Crim. App. 2002)). "The test is whether a bias or prejudice would substantially impair the panel member's ability to carry out the juror's oath and judicial instructions in accordance with the law." *Id*. (citing *Gardner v. State*, 306 S.W.3d. 274, 295 (Tex. Crim. App. 2009)). In applying this test, we must afford considerable deference to the trial court's ruling because the trial judge is in the best position to evaluate a panel member's demeanor and responses. *Id*. A trial court's ruling on a challenge for cause may be reversed only for a clear abuse of discretion. *Id*. (citing *Gardner*, 306 S.W.3d. at 296). "When a panel member's answers are vacillating, unclear, or contradictory, we accord particular deference to the trial court's decision." *Id*.

Before a panel member can be excused for cause, the court must explain the law and ask the panel members whether they can follow that law irrespective of their personal views. *Id*. The burden of establishing that a challenge is proper rests with its proponent. *Castillo v. State*, 913 S.W.2d. 529, 534 (Tex. Crim. App. 1995) (citing *Hernandez v. State*, 757 S.W.2d. 744, 753 (Tex. Crim. App. 1988)). That burden is not met until the proponent shows that the panel member understood the law and could not overcome his prejudice well enough to follow the law. *Davis*, 329 S.W.3d. at 807.

To establish harm for an erroneous denial of a challenge for cause, the defendant must show on the record: (1) he asserted a clear and specific challenge for cause; (2) he used a peremptory challenge on the complained-of venire member; (3) his peremptory challenges were exhausted; (4) his request for additional strikes was denied; and (5) an objectionable juror sat on the jury. *Comeaux v. State*, 445 S.W.3d 745, 749 (Tex. Crim. App. 2014).

B. Analysis

Appellant argues that the trial court should have granted his motions to strike eighteen jurors who stated they could not consider probation as punishment. A juror must be able to consider the full range of punishment for an offense. *Cardenas v. State*, 325 S.W.3d 179, 184 (Tex. Crim. App. 2010); see TEX. CODE CRIM. PROC. ANN. art. 35.16(c)(2) (West, Westlaw through 2015 R.S.). If a juror cannot consider an offense's full range of punishment, the juror is subject to a challenge for cause. *Cardenas*, 325 S.W.3d at 184–85; *see also Standefer v. State*, 59 S.W.3d 177, 181 (Tex. Crim. App. 2001); *Banda v. State*, 890 S.W.2d 42, 55 (Tex. Crim. App. 1994) (holding that a "person

who testifies unequivocally that he could not consider the minimum sentence as a proper punishment for [an] offense . . . is properly the subject of a challenge for cause"). However, such a juror may be further examined by the opposing party or the trial court "to ensure that he fully understands and appreciates the position that he is taking." *See Cardenas*, 325 S.W.3d at 185. We further note that "a trial judge has the inherent authority to question prospective jurors regarding their qualifications and ability to serve as fair and impartial jurors." *Woodall v. State*, 350 S.W.3d 691, 695 (Tex. App.—Amarillo 2011, no pet.) (citing *Gardner v. State*, 733 S.W.2d 195, 210 (Tex. Crim. App. 1987)).

While the challenged venirepersons initially indicated an inability to consider probation as punishment, after further instruction by the trial court each of them individually stated they could set aside their personal beliefs and consider probation. Accordingly, appellant failed to demonstrate that the challenged venirepersons could not overcome their prejudice and follow the law. *See Davis*, 329 S.W.3d. at 807.

We conclude the trial court did not abuse its discretion in denying appellant's challenges for cause. *See id.* Absent an abuse of discretion, we need not address whether appellant was harmed by the trial court's ruling. *See Comeaux*, 445 S.W.3d at 749. We overrule appellant's first issue.

III. CLOSING ARGUMENT

By his second issue, appellant argues he "was denied a fair and impartial trial . . . [when] the trial court denied appellant's motion for mistrial after the state attorney committed reversible error in final argument." Specifically, appellant maintains that the

State made improper comments regarding "community expectations" during its closing argument.

A. Standard of Review and Applicable Law

When the trial court sustains an objection to an improper jury argument and instructs the jury to disregard the argument, but denies a motion for mistrial, the appellate court must determine whether the trial court abused its discretion by denying the mistrial. *Hawkins v. State*, 135 S.W.3d 72, 76–77 (Tex. Crim. App. 2004). In making this determination, we balance: (1) the severity of the misconduct (the magnitude of the prejudicial effect of the prosecutor's remarks); (2) the measures adopted to cure the misconduct (the efficacy of any cautionary instruction by the judge); and (3) the certainty of conviction absent the misconduct (the strength of the evidence supporting the conviction). *Archie v. State*, 221 S.W.3d 695, 700 (Tex. Crim. App. 2007) (discussing *Mosley v. State*, 983 S.W.2d 249, 259–60 (Tex. Crim. App. 1998)). A mistrial is the remedy for improper conduct that is so prejudicial that expenditure of further time and expense would be wasteful and futile. *Hawkins*, 135 S.W.3d at 77. A mistrial is an appropriate remedy in "extreme circumstances" for a narrow class of highly prejudicial and incurable errors. *Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009).

Proper jury argument includes four areas: (1) summary of the evidence presented at trial; (2) reasonable deductions drawn from that evidence; (3) answers to opposing counsel's arguments; and (4) pleas for law enforcement. *Jackson v. State*, 17 S.W.3d 664, 673 (Tex. Crim. App. 2000). In order to constitute reversible error, a jury argument must have been manifestly improper or injected new, harmful facts into the proceedings.

Id. at 673–74; *see also Borjan v. State*, 787 S.W.2d 53, 56–57 (Tex. Crim. App. 1990) (holding that improper argument constitutes reversible error when, in light of the record as a whole, it is extreme or manifestly improper, violates a mandatory statute, or injects new facts harmful to the accused into the trial proceedings).

B. Analysis

Appellant complains of the following statements made during the State's closing argument:

[Prosecution]:	Ladies and gentlemen, today you represent the citizens of Cameron County. Today you speak for all of us, and you can send a strong message. We are not going to tolerate this type of thing. Okay. When these sort of things happen—
[Appellant's Counsel]:	I will object to message-setting arguments. They are improper, Your Honor.
[Trial Court]:	Sustained.
. . . .	
[Prosecution]:	[L]adies and gentlemen, speak for us and send the message we're not going to tolerates [sic] people like this.
[Appellant's Counsel]:	I object to send a message argument, previously objected, previously sustained.
. . . .	
[Trial Court]:	I am sustaining the objection.
[Appellant's Counsel]:	I'd ask the jury be instructed to disregard.
[Trial Court]:	The jury is instructed to disregard send a message.

[Appellant's Counsel]: And move for a mistrial.

[Trial Court]: It's denied.

A prosecutorial argument is improper if it induces the jury to reach a particular verdict based upon the demands, desires, or expectations of the community. *See Cortez v. State*, 683 S.W.2d 419, 421 (Tex. Crim. App. 1984) (holding improper the argument, "Now, the only punishment that you can assess that would be any satisfaction at all to the people of this county would be life."); *Mata v. State*, 952 S.W.2d 30, 33 (Tex. App.—San Antonio 1997, no pet.) (holding improper the argument, "So I ask you, this is a hard decision that you have to make, but I will tell you on behalf of the State of Texas, an aggravated sexual assault such as this, probation is not what this community and what the State would want"). However, a mere reference to "the community" does not constitute an improper appeal to community expectations. *Rodriguez v. State*, 90 S.W.3d 340, 365 (Tex. App.—El Paso 2001, pet. ref'd).

An argument constitutes a proper plea for law enforcement if it urges the jury to be the voice of the community, rather than asking the jury to lend its ear to the community. *Cortez*, 683 S.W.2d at 421. Therefore, a prosecutor's request that the jury "represent the community" and "send a message" falls within the parameters of proper argument as a plea for law enforcement. *See Goocher v. State*, 633 S.W.2d 860, 864 (Tex. Crim. App. [Panel Op.] 1982) (holding proper the argument, "I'm asking you to enforce it. I am asking you to do what needs to be done to send these type of people a message to tell them we're not tolerating this type of behavior in our county."); *Harris v. State*, 122 S.W.3d 871, 888 (Tex. App.—Fort Worth 2003, pet. ref'd); *Barcenes v. State*, 940 S.W.2d 739,

749 (Tex. App.—San Antonio 1997, pet. ref'd) (holding proper the argument, "You know, you're here because you have been chosen by the community to make the decision"); *Caballero v. State*, 919 S.W.2d 919, 924 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd) (holding proper the argument, "[J]urors are sick and tired of this. Jurors are tired of crime because jurors such as yourself are members of the community you represent. You represent the community.")

Here, the prosecutor's argument did not pressure the jury to reach a particular verdict based upon the demands, desires, or expectations of the community. Rather, the prosecutor argued that the jury represented the community and asked the jury to send a message by its verdict. Therefore, the argument constitutes a proper plea for law enforcement. *See Goocher*, 633 S.W.2d at 864; *Harris*, 122 S.W.3d at 888; *Barcenes*, 940 S.W.2d at 749; *Caballero*, 919 S.W.2d at 924. Because we observe no misconduct on the part of the State, we conclude that the trial court did not abuse its discretion by denying appellant's motion for mistrial. *See Hawkins*, 135 S.W.3d at 76–77. We overrule appellant's second issue.

IV. RIGHT TO REMAIN SILENT

By his third issue, appellant argues that he "was denied the protection [of his] right to remain silent when the prosecutor asked the appellant 'when you turned yourself over to the police at the bridge, you never gave a statement?'" While the trial court sustained appellant's timely objection and instructed the jury to disregard the comment, appellant argues that the trial court erred in denying his motion for mistrial.

A. Standard of Review and Applicable Law

As stated above, in determining whether the trial court abused its discretion by denying the mistrial, we balance: (1) the severity of the misconduct (the magnitude of the prejudicial effect of the prosecutor's remarks); (2) the measures adopted to cure the misconduct (the efficacy of any cautionary instruction by the judge); and (3) the certainty of conviction absent the misconduct (the strength of the evidence supporting the conviction). *Archie*, 221 S.W.3d at 700.

"A comment on a defendant's post-arrest silence violates the Fifth Amendment prohibition against self-incrimination." *Dinkins v. State*, 894 S.W.2d 330, 356 (Tex. Crim. App. 1995) (citing *Doyle v. Ohio*, 426 U.S. 610, 617–618 (1976); *Miranda v. Arizona*, 384 U.S. 436, 468 n.37 (1966)). "A comment on a defendant's post-arrest silence is akin to a comment on his failure to testify at trial because it attempts to raise an inference of guilt arising from the invocation of a constitutional right." *Id*. "Thus, impeachment of an arrestee by the use of post-arrest, post-*Miranda* silence violates the arrestee's privilege against self-incrimination and his right to due process under the federal constitution." *Sanchez v. State*, 707 S.W.2d 575, 577 (Tex. Crim. App. 1986).

By contrast, "[a]n accused's right to be free from compelled self-incrimination under the Texas Constitution arises at the moment an arrest is effectuated." *Id*. at 579–80. Accordingly, the United States Constitution protects post-arrest silence after the defendant has received his warnings required by *Miranda*, while the Texas Constitution protects post-arrest silence regardless of whether the *Miranda* warnings have yet been administered. *See Heidelberg v. State*, 144 S.W.3d 535, 537 (Tex. Crim. App. 2004).

B. Analysis

Appellant complains of the following exchange occurring during the State's cross-examination of appellant:

[Prosecution:]	So, and just to be clear that when you and your lawyer turned you over to the police at the bridge, you never gave a statement?
[Appellant's Counsel]:	I'll object, Your Honor. That's—we've previously discussed that. It's a violation of 38.22, the right not to testify. It's completely improper.
. . . .	
[Trial Court]:	I am sustaining the objection.
[Appellant's Counsel]:	And I ask that the jury be instructed to disregard.
[Trial Court]:	Jury is instructed to disregard.
[Appellant's Counsel]:	And I move for a mistrial.
[Trial Court]:	It's denied.

We agree that any inquiry into appellant's post-arrest silence was improper. *See Heidelberg*, 144 S.W.3d at 537. However, an improper comment does not lead to automatic reversal, and an effective instruction to disregard will ordinarily cure the prejudicial effect. *Perez v. State*, 187 S.W.3d 110, 113 (Tex. App.—Waco 2006, no pet.). An instruction to disregard will be presumed effective unless the facts of the case suggest the impossibility of removing the impression produced on the minds of the jury. *Waldo v. State*, 746 S.W.2d 750, 754 (Tex. Crim. App. 1988). The effectiveness of a curative instruction is determined on a case-by-case basis. *Johnson v. State*, 83 S.W.3d 229, 232 (Tex. App.—Waco 2002, pet. ref'd).

Texas courts have looked to several factors to determine whether an instruction to disregard cured the prejudicial effect: (1) the nature of the error; (2) the persistence of the prosecution in committing the error; (3) the flagrancy of the violation; (4) the particular instruction given; (5) the weight of the incriminating evidence; and (6) the harm to the accused as measured by the severity of sentence. *Id*.

Although the nature of the constitutional right affected was serious, its prejudicial effect is limited for several reasons. Appellant never answered the question. The State did not persist in questioning appellant about his silence or mention it during closing argument. The trial court timely instructed the jury to disregard the question. Finally, there was strong evidence supporting the jury's sentence, which fell midway within the range of punishment. There was extensive evidence showing the pain and suffering experienced by Reyes and her family as a result of appellant's actions. We conclude that the trial court's instruction cured any prejudicial effect. Accordingly, the trial court did not abuse its discretion by denying appellant's motion for mistrial. We overrule appellant's third issue.

V. VICTIM IMPACT TESTIMONY

By his fourth issue, appellant argues that the trial court erred by overruling appellant's relevance objection to testimony concerning the impact the crime has had on Reyes's family.

A. Standard of Review and Applicable Law

We review the admission of victim-impact testimony under an abuse of discretion standard. *DeLarue v. State*, 102 S.W.3d 388, 403 (Tex. App.—Houston [14th Dist.]

2003, pet. ref'd). When considering the admissibility of victim impact testimony, trial courts must consider such factors as: (1) how probative is the evidence; (2) the potential of the evidence to impress the jury in some irrational, but nevertheless indelible way; (3) the time the proponent needs to develop the evidence; and (4) the proponent's need for the evidence. *Salazar v. State*, 90 S.W.3d 330, 336 (Tex. Crim. App. 2002). The decision to admit victim impact testimony does not follow a bright line rule; therefore, the decision requires heightened judicial supervision and careful selection of such evidence to maximize its probative value and minimize the risk of unfair prejudice. *Id*.

Victim impact evidence may be admissible at the punishment phase when that evidence has some bearing on the defendant's personal responsibility or moral culpability. *Id*. at 335. Victim impact evidence is designed to remind the jury of the foreseeable consequences the crime has on the community and the victim's family and friends. *Id*. Relevant victim impact evidence may include the physical, psychological, or economic effects of a crime on the victim or the victim's family. *See Stavinoha v. State*, 808 S.W.2d 76, 79 (Tex. Crim. App. 1991); *Miller–El v. State*, 782 S.W.2d 892, 895 (Tex. Crim. App. 1990).

B. Analysis

During the State's examination of the victim's father, Adrian Reyes Sr., the following exchange occurred:

> [Prosecution]: What about emotional scars? Are—do you have any still there?
>
> . . . .

[Appellant's Counsel]: I will object to the relevance of that with this witness.

. . . .

[Trial Court]: All right. It's overruled. He can answer.

[Prosecution]: You can answer the question. Are there any emotional scars that live with you today?

[Reyes Sr.]: Yes, sir, they are. They will be there.

. . . .

[Reyes Sr.]: Well, that changed our lives forever. It was the effect of this cause. Like I said before, we were —we were a happy family. Trying to get there, okay? You know, but it's— it hasn't been the same since then. Right now we're— we kind of know who, because we know where he is right now he can't reach her. So, but the flashbacks are there every day personally. It's there every day. And I saw the video and I don't want to see the video ever again.

Reyes Sr.'s testimony clearly falls within the realm of proper victim impact testimony because it concerns the impact of the crime on the family. *See Salazar*, 90 S.W.3d at 335 (holding jury should hear testimony about the impact of a crime on the victim's family members and friends); *Richardson v. State*, 83 S.W.3d 332, 360–61 (Tex. App.—Corpus Christi 2002, pet. ref'd) (holding a doctor may testify about the impact of the crime on the children of their murdered mother). The evidence was probative of the foreseeable impact of appellant's crime and the State took very little time to present the testimony. *See Salazar*, 90 S.W.3d at 336. Further, we do not believe the testimony was of such a nature that it would impress the jury in some irrational way. *See id.* We

conclude that he trial court did not abuse its discretion in overruling appellant's objection. *See DeLarue*, 102 S.W.3d at 403. We overrule appellant's fourth issue.

VI. HEARSAY

By his fifth issue, appellant argues the trial court erred in allowing hearsay testimony concerning statements that appellant's mother made to law enforcement.

Assuming arguendo that the complained of evidence was inadmissible, we conclude that any error was harmless. Error in the admission of evidence is non-constitutional error. See TEX. R. APP. P. 44.2(b); *Barshaw v. State*, 342 S.W.3d 91, 93 (Tex. Crim. App. 2011); *Jabari v. State*, 273 S.W.3d 745, 754 (Tex. App.—Houston [1st Dist.] 2008, no pet.). If an evidentiary error "does not affect [the defendant's] substantial rights," it "must be disregarded." TEX. R. APP. P. 44.2(b). A trial court's error in admitting evidence is harmless error when similar facts are presented by properly admitted evidence. *See Bourque v. State*, 156 S.W.3d 675, 676–77 (Tex. App.—Dallas 2005, pet. ref'd) (even if therapist's testimony was not admissible as hearsay exception under Texas Rule of Evidence 803(4), any error was harmless because considerable, substantially-similar evidence was presented during trial); *Duncan v. State*, 95 S.W.3d 669, 672 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd) (improper admission of outcry testimony was harmless because similar testimony was admitted through complainant, pediatrician, and medical records).

Officer Julian Ramirez with the Brownsville Police Department testified, over appellant's hearsay objection, that appellant's mother admitted she visited appellant in Mexico and provided him with money prior to his arrest. The State was able to elicit the

same facts during its cross-examination of appellant. Because similar facts were presented by appellant's testimony, any error relating to Officer Ramirez's testimony is harmless. *See Bourque*, 156 S.W.3d at 676–77. We overrule appellant's fifth issue.

VII. REFORMATION OF JUDGMENT

The trial court orally pronounced a sentence of fifty years' imprisonment and a $10,000 fine in accordance with the jury's assessment of punishment. The written judgment, however, does not include the fine.

When there is a variance between the oral pronouncement of sentence and its written memorialization, the oral pronouncement controls. *Coffey v. State*, 979 S.W.2d 326, 328 (Tex. Crim. App. 1998); *Abron v. State*, 997 S.W.2d 281, 282 (Tex. App.—Dallas 1998, pet. ref'd). Therefore, it appears the judgment contains a clerical error.

An appellate court may reform a trial court's judgment to make the record speak the truth when it has the necessary data and information to do so. *See* TEX. R. APP. P. 43.2(b); *Torres v. State*, 391 S.W.3d 179, 185 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd); *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd). We modify the trial court's judgment to reflect that the trial court imposed a $10,000 fine.

VIII. CONCLUSION

We affirm the trial court's judgment, as modified.

GREGORY T. PERKES
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
21st day of December, 2016.