NUMBER 13-15-00470-CR
NUMBER 13-15-00471-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

SAMMY VALDEZ, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 221st District Court
of Montgomery County, Texas.

MEMORANDUM OPINION

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

Appellant Sammy Valdez challenges his convictions for two counts of first-degree aggravated robbery. *See* TEX. PENAL CODE ANN. § 29.03(a)(2) (West, Westlaw through

2015 R.S.). The punishment range for each offense was enhanced pursuant to the habitual offender statute by two allegations of prior offenses. *See id.* § 12.42(c)(1) (West, Westlaw through 2015 R.S.). We affirm as modified.

I. BACKGROUND[1]

The State alleged that on May 30, 2013, appellant and his friend Quincy Jones broke into a house occupied by Helen Blennerhassett and Lisa Winters and held them at gunpoint. Both women testified that they could not identify either of the men because they wore bandanas over their faces. The two men demanded the location of a safe they had been told was somewhere in the house but left after they were unable to find it. Before leaving, they stole two cellular phones, various items of jewelry, and approximately $800 in cash.

Appellant was arrested and indicted for the robbery of both women.[2] Marie Rios, a woman who occasionally dated appellant, testified for the State regarding what appellant later told her of the robbery. The following exchange occurred during her cross-examination by the defense:

> [Defense]: And back in around May of 2013, do you remember Mr. Valdez having a tattoo close to his right eye?
>
> [Rios]: That is correct.
>
> [Defense]: Do you know how long, approximately, he has had that tattoo right next to his eye?
>
> [Rios]: When he went to prison, I believe he got it there.

[1] This case is before this Court on transfer from the Ninth Court of Appeals in Beaumont pursuant to a docket-equalization order issued by the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001 (West, Westlaw through 2015 R.S.).

[2] The record reflects that Quincy Jones was arrested, but he is not a party to this appeal.

Appellant moved for a mistrial without first requesting an instruction to disregard. The trial court denied the motion for mistrial but offered to instruct the jury to disregard Rios's statement. The defense agreed, and the trial court instructed the jury to "[p]lease disregard that last comment from the witness." The trial court also instructed the prosecutor to remind Rios not to mention any extraneous offenses by appellant.

The jury returned a verdict of guilty on both counts. Following a punishment hearing, the jury assessed punishment at concurrent sentences of life imprisonment in the Institutional Division of the Texas Department of Criminal Justice and no fine. This appeal followed.

II. Discussion

Appellant argues in a single issue that the trial court abused its discretion by denying his motion for a mistrial.

A. Standard of Review and Applicable Law

We review the trial court's determination regarding whether an error warrants a mistrial for an abuse of discretion. *Gamboa v. State*, 296 S.W.3d 574, 580 (Tex. Crim. App. 2009). A mistrial is an appropriate remedy only in "extreme circumstances" when one of "a narrow class of highly prejudicial and incurable errors" has made continuing the trial futile and a waste of resources. *Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009). Whether an error warrants a mistrial must be determined based on the particular facts of the case. *Id.*

The preferred method for a party to raise a complaint in the trial court is to: (1) object when possible; (2) request an instruction to disregard if the prejudicial event occurred; and (3) move for a mistrial if the party believes the instruction to disregard was

insufficient. *Young v. State*, 137 S.W.3d 65, 69 (Tex. Crim. App. 2004). Relevant to this case, a prompt instruction to disregard will ordinarily cure the error in a question and answer that improperly revealed an extraneous act. *Tapia v. State*, 462 S.W.3d 29, 45 n. 20 (Tex. Crim. App. 2015); *Ovalle v. State*, 13 S.W.3d 774, 783 (Tex. Crim. App. 2000). Because we generally presume that such curative instructions are effective, it is only when the extraneous evidence is "so clearly calculated to inflame the minds of the jury or is of such a damning character as to suggest it would be impossible to remove the harmful impression from the jurors' minds" that a mistrial should be granted. *Hebert v. State*, 489 S.W.3d 15, 20 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

B. Analysis

Appellant argues that the trial court should have granted his motion for mistrial because Rios's statement made his tattoo into a reminder that he had gone to prison in the past. He asserts that a curative instruction could not remove the prejudice resulting from the jury seeing the tattoo for the rest of the trial. The State replies that there was no abuse of discretion because the trial court's instruction was sufficient to cure any error caused by the statement.

We agree with the State. Appellant's argument is that Rios's testimony "wiped away" any doubt the jury may have had regarding his guilt, but her statement informed the jury only that appellant was sent to prison at some point before the alleged robberies. Rios's brief statement contained no mention of appellant's prior offense and did not connect it with the offense in this case. *See Mayreis v. State*, 462 S.W.3d 569, 576 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (holding that any prejudice was mitigated by the brief and inconclusive nature of the objectionable testimony). Furthermore,

appellant does not explain why Rios's statement was so inflammatory that a curative instruction would not be sufficient to cure any harm caused by the statement. We conclude that appellant has not demonstrated that Rios's brief statement during her testimony was so clearly calculated to inflame the minds of the jury or was of such a damning character that the instruction to disregard was ineffective. *See Hebert*, 489 S.W.3d at 20.

Appellant further argues that the curative instruction itself was insufficient because the trial court did not provide even a minimal explanation of the reason why the jury must disregard Rios's statement. However, appellant has not cited us to any authority that a curative instruction must include such an explanation, and we find none. To the contrary, courts often approve of concise instructions to the jury not to consider a particular statement by a witness. *See, e.g.*, *Marshall v. State*, 210 S.W.3d 618, 628–29 (Tex. Crim. App. 2006) (holding that an instruction "[t]he jury will disregard the last response of the witness" was sufficient to cure error).

In sum, we hold the trial court did not abuse its discretion in denying appellant's motion because Rios's statement was not so inflammatory or calculated to prejudice the minds of the jury that an instruction to disregard it would have been futile. *See Hebert*, 489 S.W.3d at 20. We further hold that the instruction was sufficient to cure the harm, if any, caused by Rios's statement. *See Marshall*, 210 S.W.3d at 628–29. We overrule appellant's sole issue.

III. MODIFICATION

The State has drawn our attention to the fact that the judgments of conviction ordered appellant to reimburse the county $8,839 for the cost of his appointed attorney.

Appellant does not challenge the order on appeal, but the State mentions in its prayer for relief that the order was "erroneous" and asks us to modify the judgment to delete it.

This Court has the authority to address unassigned error—a claim that was preserved in the trial court but not raised on appeal. *Pfeiffer v. State*, 363 S.W.3d 594, 599 (Tex. Crim. App. 2012); *Pena v. State*, 191 S.W.3d 133, 136 (Tex. Crim. App. 2006). Preservation of error was unnecessary here because no objection is required to preserve a challenge to the sufficiency of the evidence supporting an order to reimburse an appointed attorney's fees. *See Mayer v. State*, 309 S.W.3d 552, 556 (Tex. Crim. App. 2010). In the exercise of our discretion, we will address as unassigned error the sufficiency of the evidence supporting the assessment of attorneys' fees.

A defendant found by the trial court to be indigent cannot be required to repay the cost of the legal services provided to him unless "a material change in the defendant's financial circumstances occurs." *Id.* at 557; *see* TEX. CODE CRIM. PROC. ANN. art. 26.04(p) (West, Westlaw through 2015 R.S.). The evidence is insufficient to support an order to reimburse attorneys' fees if the record contains no evidence of a material change in the defendant's financial circumstances. *See Mayer*, 309 S.W.3d at 556; *Johnson v. State*, 405 S.W.3d 350, 354 (Tex. App.—Tyler 2013, no pet.).

The trial court in this case determined that appellant was indigent and appointed an attorney to represent him. We have reviewed the record, and found no evidence of a material change in appellant's financial circumstances. Accordingly, we conclude that the evidence is insufficient to support a finding that appellant must pay $8,839 to reimburse the cost of the legal services provided to him. *See Mayer*, 309 S.W.3d at 556; *Johnson*, 405 S.W.3d at 354; *see also* TEX. CODE CRIM. PROC. ANN. art. 26.04(p).

IV. CONCLUSION

We modify the judgments to delete the order that appellant reimburse the county $8,839 in attorneys' fees, and affirm the judgments as modified. *See* TEX. R. APP. P. 43.2(b).

NORA LONGORIA,
Justice

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

Delivered and filed the
8th day of September, 2016.