NUMBER 13-15-00508-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

JOHN GARCIA, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 347th District Court of Nueces County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Garza and Longoria
Memorandum Opinion by Justice Longoria

By five issues, appellant John Eric Garcia challenges his conviction for assault involving family violence by means of strangulation, a second-degree felony enhanced to a first-degree felony by a prior felony conviction. *See* TEX. PENAL CODE ANN. § 22.01(a),

(b-1) (West, Westlaw through 2015 R.S.); *see also id.* § 12.42(b) (providing for enhanced punishments for habitual offenders) (West, Westlaw through 2015 R.S.). We affirm.

I. BACKGROUND

We take the following facts from the testimony introduced at trial. Gabriela Cerda ("Cerda") and appellant were in a dating relationship and had two children together. At the time of the alleged offense, Cerda, appellant, and their children lived in the upper floor of Cerda's parents' house with Rebeca Sierra ("Rebeca"), Cerda's sister.

In the evening of October 20, 2013, Cerda left a cousin's housewarming party, picked up appellant from a friend's house, and returned home. Cerda testified over appellant's objection that she was angry with appellant because earlier that day, he had pinched their son's thighs until he screamed. According to Cerda, appellant was angry because Cerda had consumed half a glass of wine at the party. An argument between the two escalated until appellant "got off the bed and he came towards me. He slapped me in my face, then he began to choke me." Cerda told the jury that appellant placed both hands around her neck and applied pressure to her throat with his thumbs. Cerda further testified that appellant lifted her off her feet but then released her, and she dropped to the floor. Appellant straddled her while continuing to apply pressure to her throat with his thumbs. Cerda testified that her vision became blurry, she felt dizzy, and her legs felt numb, but that she kicked at him until he released her. Appellant briefly resumed the assault but released her again. The children of appellant and Cerda had been sleeping in the same room during the time but woke during the assault and witnessed it.

Enedelia Sierra ("Enedelia"), Cerda's mother, arrived in the room after the end of the assault. She testified without objection that she asked appellant whether he attacked

Cerda and that he replied: "Yeah, I did. I did choke her"; "[s]he deserved it"; and "[t]hat fucking bitch deserved it." Enedelia then called 911 to report the assault. Enedelia further testified that she observed Cerda's neck was red after the assault. Enedelia noticed the next day that Cerda had markings on her neck.

Rebecca arrived upstairs soon after Enedelia "because it sounded like [Cerda] needed help." She testified that she asked appellant why he had choked Cerda and that he responded "because she would not shut up." Rebecca also testified that there were red markings on both sides of Cerda's neck. After this exchange, Rebecca went down the stairs with her nephew and met Officer Braden Tackett of the Corpus Christi Police Department who was responding to Enedelia's 911 call.

Officer Tackett testified that as he moved up the stairs he could hear a woman yelling "[y]ou should not have choked me. You should not have choked me." Once in the room, Officer Tackett placed appellant in handcuffs because he matched the description given by Enedelia in the call. Cerda gave a verbal statement to Officer Tackett regarding the assault but declined to make a recorded statement.

Officer Tackett also took three photographs of Cerda's throat and neck that were admitted without objection as State's Exhibits 1–3. Each of the photographs show redness and discoloration on Cerda's neck and throat. Enedelia testified that Officer Tackett's photographs accurately depicted how Cerda's neck looked on the night of the assault. Officer Tackett further testified that the marks he observed on her neck were consistent with Cerda's account: "[t]hey were around her throat, on each side of her throat, kind of like blood blisters, like if you were to squeeze something really tight and leave marks; like a pinching almost, like raised."

The defense called Officer Tackett to rebut Cerda's testimony that she told him at that time that appellant allegedly pinched her son's thighs until he screamed. Appellant exercised his right not to testify, and the defense rested its case. At this time, appellant stipulated that he was the person named in a judgment of conviction for assault involving family violence that the trial court had admitted earlier without objection.

The jury returned a verdict of guilty. Appellant elected for the trial court to assess his punishment. The court found the enhancement paragraph to be true and sentenced appellant to seventy-five years' imprisonment in the Institutional Division of the Texas Department of Criminal Justice and no fine. This appeal followed.

II. Discussion

A. Sufficiency of the Evidence

Appellant argues under his first issue that the evidence is insufficient to support his conviction.[1]

1. Standard of Review and Applicable Law

We review whether sufficient evidence supports a conviction by considering all of the evidence introduced at trial in the light most favorable to the verdict and deciding whether any rational trier of fact could have found the State proved all of the essential elements of the offense beyond a reasonable doubt. *McKay v. State*, 474 S.W.3d 266, 269 (Tex. Crim. App. 2015) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). This standard tasks the factfinder, the jury in this case, with resolving conflicts in the testimony, weighing the evidence, and drawing reasonable inferences from it. *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015). Our role on appeal is limited to determining

[1] We have reordered appellant's issues so that we address the sufficiency of the evidence first.

whether the necessary inferences drawn by the jury are reasonable based upon the cumulative force of all the evidence when viewed in the light most favorable to the verdict. *Id.* If the record supports conflicting inferences, we presume that the jury resolved the conflict in favor of its verdict and defer to that determination. *Id.* at 448–49; *Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014).

We measure the sufficiency of the evidence against the essential elements of the offense defined by the hypothetically correct jury charge for the case. *Anderson v. State*, 416 S.W.3d 884, 889 (Tex. Crim. App. 2013). The hypothetically correct jury charge is one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict its theories of liability, and adequately describes the particular offense for which the defendant was tried. *Id.* (citing *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)). The hypothetically correct jury charge for this case required the State to prove that: (1) appellant intentionally, knowingly, or recklessly caused bodily injury to Cerda; (2) Cerda was a person "whose relationship to or association with [appellant] is described by Section 71.0021(b), 71.003, or 71.005, Family Code"; (3) appellant committed the offense by "intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of the person by applying pressure to the [Cerda]'s throat or neck or by blocking [Cerda]'s nose or mouth"; and (4) appellant was previously convicted of an offense involving family violence. *See* TEX. PENAL CODE ANN. § 22.01(a)(1), (b-1).

2. Analysis

Appellant asserts that the evidence is insufficient because the only real evidence of the assault is Cerda's testimony, which appellant argues is not credible. The State

responds that the evidence is sufficient and appellant is essentially asking us to reevaluate Cerda's credibility.

We agree with the State. Appellant dismisses Officer Tackett's photographs because he believes that an assault such as she described in her testimony would have left more severe injuries in the area of her neck and throat. Appellant reasons that her testimony itself is not credible because she showed a tendency to exaggerate during her testimony by overstating the importance of the positions she held at her jobs. Appellant essentially asks us to reweigh the evidence and resolve conflicting inferences arising from it, but resolving such issues is the exclusive role of the jury. *See McKay*, 474 S.W.3d at 269–70; *Murray*, 457 S.W.3d at 448–49. Furthermore, appellant analyzes pieces of evidence separately, but we must measure whether the evidence is sufficient by the combined force of all of the evidence. *See Murray*, 457 S.W.3d at 448 (observing that courts may not employ a "divide and conquer strategy" when analyzing the sufficiency of the evidence). Appellant does not address why a reasonable jury could not conclude that the State proved all elements of the offense when the evidence is viewed in this manner. And, based on our review of all of the evidenced admitted at trial, we conclude that a rational trier of fact could conclude that the State proved all the essential elements of the offense beyond a reasonable doubt. *See* TEX. PENAL CODE ANN. § 22.01(a)(1), (b-1). We overrule appellant's first issue.

B. Notice of Extraneous Bad Act

Appellant argues in his second issue that the trial court erred when it permitted the State to introduce evidence of an extraneous act—that appellant allegedly harmed their son on the day of the assault—even though the State did not give appellant the

"reasonable notice" required by rule. *See* TEX. R. EVID. 404(b)(2). The State responds that appellant did not preserve the issue of improper notice. In the alternative, the State argues that no notice was required because Cerda's testimony was same-transaction contextual evidence. *See id.* (exempting evidence of extraneous acts "arising in the same transaction" from the notice requirement).

We agree with the State to the extent that appellant did not preserve this issue. To preserve a complaint for appellate review a party must make a timely and specific objection on the record and obtain a ruling on the objection. TEX. R. APP. P. 33.1(a). Furthermore, an issue on appeal must correspond with an objection lodged at trial. *Bekendam v. State*, 441 S.W.3d 295, 300 (Tex. Crim. App. 2014). When there is a question whether an objection preserved a particular issue, we consider the context in which the objection was made and the shared understanding of the parties at the time. *Pena v. State*, 285 S.W.3d 459, 464 (Tex. Crim. App. 2009).

In this case, Cerda testified that she was angry with appellant when they returned to the house after the party because of what he "did to my son" earlier that day. She then explained that appellant had "hurt him earlier that day." Appellant's counsel then said: "Judge, I object. This is 404(b). I also move to strike the previous testimony [and I] move for a mistrial." A bench conference followed in which the trial judge asked the State whether it had notified appellant of its intent to use this extraneous act. The State replied that appellant "never asked." While the judge mentioned the issue of notice in passing, appellant never objected that the lack of notice was unreasonable. Furthermore, neither party mentioned the issue of notice in the remainder of the arguments during the bench conference. The parties focused instead on whether Cerda's testimony was "very

prejudicial" and whether it warranted a mistrial for that reason. The trial court denied appellant's motion for mistrial but made no mention of the notice issue. We hold that the notice issue was not preserved by appellant's objection because it was not explicitly raised and was not obvious from the context or part of the parties' common understanding. *See Pena*, 285 S.W.3d at 464. We overrule appellant's second issue.

C. Motion for Mistrial

By his third issue, appellant argues the trial court was wrong to deny his motion for a mistrial because admitting the same evidence violated Texas Rule of Evidence 404(b). *See* TEX. R. EVID. 404(b).

1. Applicable Law and Standard of Review

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.* We review the trial court's determination whether an error warrants a mistrial for an abuse of discretion. *Gamboa v. State*, 296 S.W.3d 574, 580 (Tex. Crim. App. 2009).

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). A party's failure to request an instruction to disregard before moving for a mistrial does not preclude renewing the objection on appeal, but the party "will have forfeited appellate review of

that class of events that could have been 'cured' by such an instruction." *Id.* at 70. As 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. *Ovalle v. State*, 13 S.W.3d 774, 783 (Tex. Crim. App. 2000). 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*, No. 14-13-00370-CR, ___ S.W.3d ___, ___, 2016 WL 552148, at *3 (Tex. App.—Houston [14th Dist.] Feb. 11, 2016, no pet.).

2. Analysis

Appellant argues the trial court should not have permitted Cerda to mention the injury he allegedly inflicted on their son on the day of the assault because it "necessarily tainted the trial." The State responds that appellant's motion for mistrial was untimely and, alternatively, there was no error because it was admissible same-transaction contextual evidence.

Assuming without deciding that appellant's motion for mistrial was timely, we conclude that the trial court did not abuse its discretion by denying a mistrial. Appellant argues generally that admitting the evidence was unnecessary because the trial court "knew of the strong testimonial evidence about the alleged crime [a]ppellant was on trial for" and that appellant was not on trial for injury to a child. Therefore, according to appellant, the trial court should have exercised its discretion to exclude the extraneous-act evidence.

Appellant's arguments are not convincing because they are equally applicable to any extraneous-act evidence, which by its nature often involves conduct that constitutes

a separate crime. *See* TEX. R. EVID. 404(b) (providing that evidence "of a *crime*, wrong, or other act" is inadmissible to prove a person's character to show that the person acted in accordance with that character on a particular occasion (emphasis added)). Appellant makes no effort to explain how Cerda's general testimony that appellant "hurt [her son] earlier that day" is so prejudicial that an instruction to disregard would not have cured the harm.[2] *See Ovalle*, 13 S.W.3d at 783. Without more, we conclude that appellant has not demonstrated that this portion of Cerda's testimony was so clearly calculated to inflame the jury minds or was of such a damming character that an instruction to disregard would be ineffective. *See Hebert*, ___ S.W.3d at ___, 2016 WL 552148, at *3. We overrule appellant's third issue.

D. Improper Argument

Appellant argues in his fourth issue that the State's argument at the close of sentencing was improper. He cites to a portion of the argument where the prosecutor argued for a life sentence for appellant because "I can almost guarantee it, his next victim will likely die." The State responds that appellant waived any error in the argument by failing to object. In the alternative, the State argues that the prosecutor's argument was permissible.

Assuming without deciding that the same rules that restrict jury argument apply to a bench trial on punishment, we agree that appellant waived this issue by failing to object. Appellant admits that he did not object but relies on an exception to the preservation rules recognized in *Romo v. State*. *See* 631 S.W.2d 504, 505 (Tex. Crim. App. [Panel Op.]

[2] Cerda testified more specifically regarding what appellant allegedly did to their son after the trial court overruled appellant's objection and denied the motion for mistrial.

1982), *overruled by Cockrell v. State*, 933 S.W.2d 73 (Tex. Crim. App. 1996). However, in *Cockrell*, the Texas Court of Criminal Appeals expressly overruled *Romo* and held that "a defendant's failure to object to a jury argument or a defendant's failure to pursue to an adverse ruling his objection to a jury argument forfeits his right to complain about the argument on appeal." 933 S.W.2d at 89. We hold that appellant has waived any error in the prosecutor's argument by failing to object to it. *See Johnson v. State*, 68 S.W.3d 644, 655 (Tex. Crim. App. 2002); *Cockrell*, 933 S.W.2d at 89. We overrule appellant's fourth issue.

E. Cruel and Unusual Punishment

Appellant argues in his fifth issue that his sentence of seventy-five years' imprisonment is "grossly disproportionate" to his crime in violation of the Eighth Amendment. *See* U.S. CONST. amend. VIII. The State replies that (1) appellant waived error by failing to object and (2) his sentence was constitutional in any event.

We agree with the State that appellant waived error by failing to object. Both the Texas Court of Criminal Appeals and this Court have held that failure to lodge a specific objection to a sentence that allegedly violates the Eighth Amendment waives error. *See Rhoades v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996); *Trevino v. State*, 174 S.W.3d 925, 927–28 (Tex. App.—Corpus Christi 2005, pet. ref'd); *see also Houston v. State*, No. 13-14-00677-CR, 2015 WL 5136179, at *4 (Tex. App.—Corpus Christi Aug. 31, 2015, no pet.) (mem. op., not designated for publication).[3] We conclude that appellant

[3] Appellant argues that we should evaluate whether he suffered egregious harm by the length of this sentence under *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh'g). However, appellant cites to no authority that the *Almanza* harm analysis is applicable to preservation of error in this context, and we can find none. *See Tong v. State*, 25 S.W.3d 707, 710 (Tex. Crim. App. 2000) (holding that a party who raises a novel issue "must ground his contention in analogous case law or provide the Court with the relevant jurisprudential framework for evaluating his claim"). We reject appellant's

waived this issue because he did not object to his sentence in the trial court. *See Rhoades*, 934 S.W.2d at 120; *Trevino*, 174 S.W.3d at 927–28. We overrule appellant's fifth issue.

III. CONCLUSION

We affirm the trial court's judgment.

Nora L. Longoria
Justice

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

Delivered and filed the
28th day of July, 2016.

argument.