NUMBER 13-15-00514-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

JOHN KENNETH LEE, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the County Court at Law No. 2
of Victoria County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Benavides, and Longoria
Memorandum Opinion by Justice Benavides

By one issue, appellant John Kenneth Lee challenges his conviction for driving while intoxicated, a Class B misdemeanor. *See* TEX. PENAL CODE ANN. § 49.04 (West, Westlaw thorough Ch. 34 2017 R.S.). Lee argues that the trial court abused its discretion by denying his motion for mistrial. We reverse and remand.

I. BACKGROUND

In October 2013, Lee was charged with DWI after Victoria police were called out to the scene of a traffic accident where Lee had rear-ended the vehicle in front of him. After smelling what he believed to be alcohol on Lee's breath, Officer J.J. Houlton administered standardized field sobriety tests (SFSTs) on Lee at the scene and arrested him following the tests. Lee was taken to Citizens Medical Center in Victoria for a mandatory blood draw, pursuant to Texas Transportation Code section 724, based on the accident.[1] *See* TEX. TRANSP. CODE ANN. § 724.012(b)(1)(c) (West, Westlaw through Ch. 34 2017 R.S.) (allowing for a mandatory blood draw following an accident where an injury occurred.). A second blood draw was later performed on Lee after Officer Houlton received a search warrant authorizing the blood draw. Officer Houlton testified he collected the blood samples and secured them in the evidence vault at the Victoria Police Department.

Prior to the beginning of jury selection at Lee's DWI trial, the State informed the trial court and Lee in open court that all the blood evidence collected during Lee's DWI arrest had been destroyed by the Victoria police. No additional arguments or pre-trial motions relating to the blood evidence were raised at that time.[2]

The following day, during opening statements, the State referenced two blood draws performed on Lee, one of which was sent to the Texas Department of Public Safety (DPS) crime laboratory for analysis, and told jurors the results of the tested blood were

---

[1] Lee's case was tried following the issuance of *State v. Villarreal* which held that mandatory blood draws without a search warrant or exigent circumstances were not valid. 475 S.W.3d 784, 814 (Tex. Crim. App. 2014), *reh'g denied,* 475 S.W.3d 817 (Tex. Crim. App. 2015) (per curiam).

[2] Lee filed no pre-trial motion in limine regarding the blood evidence.

determined to be a .169 blood alcohol content (BAC), which is over double the legal limit. Lee did not object to the State's opening argument regarding the BAC, but told the jury in his opening statement that the State had informed him that it did not have the blood evidence, and the State had nothing more than its word regarding the blood tested and the results.

The State called eyewitnesses Carlos Vasquez, Jr., who was the driver of the vehicle Lee rear-ended, and Javier and Juan Sanchez, who witnessed the accident. All testified that they saw Lee cause the accident and that they smelled alcohol on his breath when speaking with him.

Officer Houlton testified that he arrived on scene and conducted two of the SFSTs, the horizontal gaze nystagmus test and the walk and turn test. After performing the two tests, Lee just told Officer Houlton to arrest him. After arresting Lee for suspicion of DWI, Houlton transported Lee to the local hospital to conduct a mandatory blood draw performed based on the accident. Officer Houlton spoke with the Victoria County District Attorney's Office, who recommended obtaining a search warrant for Lee's blood. Following the Victoria County District Attorney's advice, Houlton obtained a search warrant for Lee's blood and was present for the collection of the second blood sample from Lee based on the search warrant. Houlton stated he was the officer who obtained two blood evidence samples at the hospital and placed them in the evidence locker at the Victoria Police Department.

The State next called Beatrice Salazar, the phlebotomist at Citizens Medical Center Hospital. Lee objected to her testimony based on the destruction of the blood evidence, stating Salazar had nothing about which she could testify. The trial court

overruled the objection. Lee objected a second time to Salazar's continued testimony without the blood evidence, and the trial court overruled that objection also. Salazar spoke about the procedures employed by the hospital with regard to blood draws, but she could not recall drawing blood from Lee specifically. Salazar offered no testimony regarding the results of the blood evidence.

Kelly Luther, a Victoria Police Department sergeant, was the officer in charge of the crime scene unit. Luther admitted that she was the one who mistakenly authorized the destruction of Lee's blood evidence because she thought the case had been disposed. Luther also explained that the chain of custody information regarding the blood evidence would have been labeled on the blood evidence itself and that the chain of custody information had also been destroyed.

The State's last witness was Gene Hanson of the DPS crime lab. Lee objected to Hanson's testimony based on: (1) the lack of chain of custody of the blood evidence; (2) that Hanson stated he was a forensic scientist, not a chemist; (3) the State had prejudiced the jury during their opening statement by disclosing the blood evidence results; and (4) Lee had a right to examine the evidence brought against him.

Following his objections, Lee argued the jury had been prejudiced by the testimony previously presented and requested a mistrial, stating there was no way the jury could disregard the State disclosing the results of the blood evidence in its opening statement. Lee argued that the chain of custody could not be established and if Hanson could not testify as to his results, then the State's disclosure of the results in opening statements was highly prejudicial and warranted a mistrial. Lee stated that he was entitled to examine the evidence and the chain of custody forms, all of which had been destroyed,

thereby preventing him from viewing the evidence against him. Lee explained that it was the State's burden to prove chain of custody and by stating the results in opening arguments, without laying a proper foundation, the jury was already prejudiced causing him to be entitled to a mistrial. Lee also argued to the trial court that he would have filed a pre-trial motion to suppress the blood evidence had he known the evidence had been destroyed, and by the State not notifying him until immediately prior to the beginning of jury selection, it prevented him from filing such a motion.

The State responded to Lee's objections and request for a mistrial by stating that a mistrial should only be granted in extreme circumstances, and in this trial, an instruction to disregard was sufficient to cure any prejudice. Additionally, the State argued that Hanson was qualified to testify as a chemist and any breaks in the chain of custody go to the weight given to the evidence, not to its admissibility. *See Druery v. State*, 225 S.W.3d 491, 503–04 (Tex. Crim. App. 2007). The evidence had been available prior to its destruction, and the State told the trial court the defense counsel never requested to inspect the evidence prior to trial. The State intended to prove the blood evidence was Lee's based on agency case numbers contained in law enforcement reports that were in the State's possession.

Lee was allowed to voir dire Hanson prior to any ruling by the trial court. Hanson testified he was a chemist and that the term "forensic scientist" is a term used by DPS. Hanson also reviewed his case notes and stated he received and tested one blood vial submitted to the DPS crime lab by Victoria Police Department. The trial court allowed the State to proceed with Hanson regarding the chain of custody, but reserved its ruling on admissibility of the blood evidence to a later time. The trial court also warned the

State to approach before attempting to admit the results of the blood alcohol content.

During Hanson's testimony, the State attempted to introduce Hanson's notes into evidence to prove the chain of custody of the blood vial tested. Lee argued the notes were not admissible because there was no evidence to inspect, therefore denying him his right to confront and inspect the evidence against him. Lee also challenged the blood evidence based on the fact there were two samples drawn from Lee that evening and he does not know which sample was tested. The trial court finally sustained Lee's objection and ruled that the blood evidence results were inadmissible.

At this point, the State rested, and Lee re-urged his motion for a mistrial based on the State's opening argument. Lee argued that the jury had been tainted due to hearing the State specifically disclose the results of the inadmissible blood alcohol testing, and believed that even with instructions from the trial court, the jury would use that reference in their deliberations. The trial court denied the motion.

The jury found Lee guilty, sentenced him to 180 days confinement in the Victoria County jail, and assessed a fine of $1800.00. Lee filed a motion for new trial, which was overruled by operation of law. *See* TEX. R. APP. P. 21.8(c). The appeal followed.

II. A MISTRIAL WAS APPROPRIATE

By his sole issue, Lee argues that trial court abused its discretion in denying his motion for mistrial.

A. Standard of Review

The standard of review used to evaluate a trial court's denial of a motion for mistrial is abuse of discretion. *Jenkins v. State*, 493 S.W.3d 583, 612 (Tex. Crim. App. 2016); *see Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999). An appellate court views

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. *Wead v. State*, 129 S.W.3d 126, 129 (Tex. Crim. App. 2004). The ruling must be upheld if it was within the zone of reasonable disagreement. *Id.*

"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). "Although a reviewing court may be required to accord great deference to the ruling of a trial court granting a mistrial, that trial court's ruling is not insulated from appellate review." *Pierson v. State*, 426 S.W.3d 763, 774 (Tex. Crim. App. 2014). We will find that a trial court's denial of a motion for mistrial is an abuse of discretion "only when no reasonable view of the record could support the trial court's ruling." *Webb*, 232 S.W.3d at 112; *see Chavez v. State*, No. 13-14-00384-CR, 2016 WL 287307, *2 (Tex. App.—Corpus Christi 2016, no pet.) (mem. op., not designated for publication).

B. Applicable Law

"A mistrial is an appropriate remedy in 'extreme circumstances' for a narrow class of highly prejudicial and incurable errors." *Ocon v. State*, 283 S.W.3d 880, 884 (Tex. Crim. App. 2009) (citing *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004)). "A mistrial halts trial proceedings when error is so prejudicial that expenditure of further time and expense would be wasteful and futile." *Id.*

"Because it is an extreme remedy, a mistrial should be granted 'only when residual prejudice remains' after less drastic alternatives are explored." *Id.* at 884–85. "Though requesting lesser remedies is not a prerequisite to a motion for mistrial, when the movant

does not first request a lesser remedy, we will not reverse the court's judgment if the problem could have been cured by the less drastic alternatives." *Id.*; *see Young v. State*, 137 S.W.3d 65, 70 (Tex. Crim. App. 2004) (en banc).

"A defendant's complaint may take three forms: (1) a timely, specific objection, (2) a request for an instruction to disregard, and (3) a motion for a mistrial." *Young*, 137 S.W.3d at 69. An objection serves as a preemptive measure because "it informs the judge and opposing counsel of the potential for error" and "conserves judicial resources by prompting the prevention of foreseeable, harmful events." *Id.* "An instruction to disregard attempts to cure any harm or prejudice resulting from events that have already occurred." *Id.* "Where the prejudice is curable, an instruction eliminates the need for a mistrial, thereby conserving the resources associated with beginning the trial process anew." *Id.* "Like an instruction to disregard, a mistrial serves a corrective function." *Id.* "A grant of a motion for mistrial should be reserved for those cases in which an objection could not have prevented, and an instruction to disregard could not cure the prejudice stemming from an event at trial—i.e., where an instruction would not leave the jury in an acceptable state to continue the trial." *Id.*

Although the traditional method to voice a complaint has been to: (1) object when possible; (2) request an instruction to disregard; and (3) then to move for a mistrial, "this sequence is not essential to preserve complaints for appellate review." *Id.* "The essential requirement is a timely, specific request that the trial court refuses." *Id.* "If an objectionable event occurs before a party could reasonably have foreseen it, the omission of an objection will not prevent appellate review." *Id.* at 70. An instruction to disregard is essential only when it would enable the continuation of the trial by an impartial jury.

Id. "But if the instruction could not have had such an effect, the only suitable remedy is a mistrial, and a motion for a mistrial is the only essential prerequisite to presenting the complaint on appeal." *Id.* "Faced with incurable harm, a defendant is entitled to a mistrial and if denied one, will prevail on appeal." *Id.*

"When a party's first action is to move for mistrial . . . the scope of appellate review is limited to the question whether the trial court erred in not taking the most serious action of ending the trial . . . ." *Id.* A mistrial is the appropriate remedy when the "objectionable events are so emotionally inflammatory that curative instructions are not likely to prevent the jury from being unfairly prejudiced against the defendant." *State v. Cabrera*, 24 S.W.3d 528, 529 (Tex. App.—Corpus Christi 2000, pet. ref'd).

C. Discussion

Whether an error requires a mistrial must be determined by the particular facts of the case. *Jenkins*, 493 S.W.3d at 612.

1. Opening Statement

During the State's opening argument, the prosecutor told the jury that a blood sample was taken from Lee and showed a result of .169, nearly two times the legal limit. Although Lee did not object at this point, he told the jury in his own opening statement that the State would be unable to bring the blood evidence to them. The State argues in its brief that there was no harm in disclosing the blood results during opening arguments because the State can explain to the jury what it expects the evidence to show during trial. *See* TEX. CODE CRIM. PROC. ANN. art. 36.01 (West, Westlaw through Ch. 34 2017 R.S.). The State also claims that the prosecutor disclosed the blood results in good faith, anticipating its admission into evidence through an attempt to prove chain of custody.

Further, the State argues that the case law was not settled regarding mandatory blood draws, which is why the prosecutor in good faith could introduce the blood test results. However, the State was unable to introduce the blood results into evidence, because there was no chain of custody ever properly established.

Prior to the trial, the Texas Court of Criminal Appeals had issued its decision in *State v. Villarreal*. 475 S.W.3d 784, 814 (Tex. Crim. App. 2014), *reh'g denied,* 475 S.W.3d 817 (Tex. Crim. App. 2015) (per curiam)[3]. In *Villarreal*, the Court held that mandatory blood draws under the Texas Transportation Code section 724 were not valid without a search warrant or exigent circumstances present. *Id.*; s*ee* TEX. TRANSP. CODE ANN. § 724.012(b)(1)(c). Therefore, the first blood sample taken from Lee under the mandatory blood draw provision of the Texas Transportation Code was a violation of Lee's rights and not admissible evidence against him. *See* TEX. TRANSP. CODE ANN. § 724.012(b)(1)(c).

Hanson stated he received only one blood vial and since the evidence was destroyed prior to trial, the State had no way of knowing or proving which blood sample DPS tested. Without physical evidence to determine which blood sample was submitted, the State attempted to introduce evidence that it knew was inadmissible during its opening statement. The law regarding mandatory blood draws was firmly established

---

[3] The court of criminal appeals had issued its original decision in *State v. Villarreal* in 2014, but granted a motion for rehearing in early 2015. *See* 475 S.W.3d 784, 814 (Tex. Crim. App. 2014). The State claims that the granting of the motion for rehearing meant the Court could reverse *Villarreal*, therefore causing Lee's first blood draw to be admissible evidence and why it chose to disclose the results in opening. However, *Villarreal* is controlling authority because it had been decided by this Court in 2014 and affirmed by the court of criminal appeals in 2015. *See* 476 S.W.3d 45 (Tex. App.—Corpus Christi 2014), *affirmed*, 475 S.W.3d 784 (Tex. Crim. App. 2015). We also note that the court of criminal appeals denied rehearing. *See* 475 S.W.3d 817 (Tex. Crim. App. 2015) (per curium). Therefore, it was still binding precedent in this district.

at the time of trial. The holding in *Villarreal* was binding and the State should not have disclosed the blood results during its opening statement. *See* 475 S.W.3d at 814.

2. Trial on the Merits

Lee also challenged the blood evidence's chain of custody multiple times during trial. The State had notified Lee immediately prior to the start of trial that the blood evidence had been destroyed and was unavailable. The State attempted, however, to prove up the chain of custody of the destroyed evidence through the phlebotomist, the arresting officer, and the DPS crime lab technician, over objections and requests for mistrials from Lee.

As previously stated, Officer Houlton testified about the arrest and blood draws. Salazar also testified as to the hospital procedures associated with a blood draw, but admitted she did not remember Lee specifically. Sergeant Luther testified that she had mistakenly authorized all of the evidence in this case to be destroyed and that everything associated with the blood evidence was destroyed, including any documentation regarding chain of custody. Hanson also testified about the testing protocol but could not establish the chain of custody.

3. Analysis

"Whether a mistrial should have been granted involves most, if not all, of the same considerations that attend a harm analysis." *Hawkins*, 135 S.W.3d at 77. We apply the test articulated in *Mosley v. State*. 983 S.W.2d 249 (Tex. Crim. App. 1998), where the *Mosley* court balanced three factors:

(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) (quoting *Ramon v. State*, 159 S.W.3d 927, 929 (Tex. Crim. App. 2004)).

a. First *Mosely* Factor

When evaluating the first *Mosley* factor, we consider the initial incident of misconduct, the opening statement. Generally an opening statement by the State shall inform the jury of "the nature of the accusation and the facts which are expected to be proved by the State in support thereof." TEX. CODE CRIM. PROC. ANN. art 36.01(a)(3) (West, Westlaw through Ch. 34 2017 R.S.). "When evidence is admissible, no error occurs when the prosecution refers to that evidence during opening statement." *Campos v. State*, 458 S.W.3d 120, 136 (Tex. App.—Houston [1st Dist.] 2015), *rev'd on other grounds*, 466 S.W.3d 181 (Tex. Crim. App. 2015). The problem with the State's disclosure of the blood test results is that the blood evidence was destroyed, and by that destruction, the parties were unable to determine which blood vial was submitted to DPS and tested. By being unable to determine if the illegal or legal sample of blood was tested, the evidence was inadmissible, and therefore should have never been disclosed to the jury.[4]

[4] Based on the destruction of the blood evidence vials, it was unknown which vial was tested at the DPS crime lab. However, based on the testimony of Hanson, only one of the two vials was submitted to the lab and tested.

The prejudice of the blood results being disclosed in evidence was heightened as the State was allowed to continue to draw attention to the inadmissible evidence by attempting to prove up the blood results, knowing the chain of custody documentation had been destroyed. In other words, in order for Hanson to be allowed to testify regarding the scientific tests and results, "the State is required to establish a proper chain of custody for the tested specimen." *Mitchell v. State*, 419 S.W.3d 655, 660 (Tex. App.—San Antonio 2013, pet. ref'd). The State bears the burden to establish that the blood drawn from Lee was the same blood delivered to be tested at the DPS crime lab. *See id*. Since establishing chain of custody without documentation was not possible, the trial court's allowance of Salazar and Hanson to testify regarding the blood evidence ensured the blood results were being reinforced to the jury despite being inadmissible, and therefore, any lesser remedy than a mistrial would have been futile. *See Young*, 127 S.W.3d at 69. The severity of the harm due to the continued reminder of the blood evidence was overwhelmingly prejudicial.

b. Second *Mosley* Factor

Next, with regard to the second *Mosley* factor, the measures adopted to cure the misconduct were taken too late in the trial. S*ee Archie*, 221 S.W.3d at 700. Although Lee did not object during opening statements to the State's disclosure, Lee objected multiple times throughout the remainder of the trial as the State attempted to introduce the blood evidence through multiple witnesses. Each objection Lee made regarding Salazar and Hanson's testimony was overruled by the trial court until the final objection was sustained when the State attempted to introduce the blood results. By then, the jury had heard extensive testimony regarding the blood draw procedures at the hospital, the

collection by Officer Houlton, and the testing procedures utilized by the DPS crime lab. Lee requested a mistrial four times throughout the proceedings, and each request was denied. The trial court did, however, include an instruction paragraph in the jury charge that stated the arguments of the attorneys were not to be considered evidence, but by the time the jury received the charge, the damage was done. Lee argued the jury would not be able to disregard hearing that he had a BAC of .169 after having it referenced multiple times by multiple witnesses due to the State's failed attempt to introduce the blood evidence. An instruction to disregard each and every time the blood evidence was referred to would have lost the intended effect of the instruction. Based on these facts, the second factor analysis shows prejudice, and a mistrial was the only remedy available to the trial court.

c. Third *Mosley* Factor

The final *Mosley* factor to consider is the certainty of conviction absent the misconduct. *See id*. It would be hard to believe that the disclosure of Lee's blood alcohol results being almost two times the legal limit would not have affected the jury's decision. Basically, the State introduced the end result of the results of the blood test and then tried to prove it up throughout trial, ultimately being unsuccessful. The State first committed misconduct by specifically stating the BAC results during its opening statement, knowing that this evidence was destroyed. Furthermore, the State's continued attempts to introduce the blood results into evidence elevated the level of prejudice in this case. The State had other evidence to use to attempt to prove Lee committed a DWI offense: the accident; smell of alcohol of Lee's breath; the failed SFSTs; and a half-consumed bottle of liquor in Lee's vehicle. However, the crux of the

trial focused on the blood evidence and the State's multiple attempts to admit the blood evidence. Because the State introduced evidence without laying any type of foundation or proper predicate which was determined to be inadmissible, we cannot find there is a certainty that Lee would have been convicted without the disclosure of the blood evidence based on the facts of this case.

Analyzing the three *Mosley* factors, due to the prejudice experienced by the disclosure of the blood results and repeated attempts to introduce inadmissible evidence, we conclude that the trial court abused its discretion by denying Lee's repeated requests for a mistrial. We sustain Lee's sole argument.

III. CONCLUSION

We reverse and remand for a new trial.

GINA M. BENAVIDES,
Justice

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

Delivered and filed the
15th day of June, 2017.