NUMBER 13-16-00492-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

DAVID ALTON LEACH JR., **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 139th District Court of Hidalgo County, Texas.

MEMORANDUM OPINION

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

Appellant David Alton Leach Jr. appeals his conviction for aggravated assault with a deadly weapon, a second degree felony. *See* TEX. PENAL CODE ANN. § 22.02(a)(2), (b) (West, Westlaw through Ch. 49, 2017 R.S.). By a single issue, appellant complains of the denial of his motions for mistrial. He argues that the State deliberately elicited

prejudicial testimony from the alleged victim of the assault on two occasions during his trial and that the prejudice from this testimony could not be cured by instruction. We affirm.

I. BACKGROUND

Appellant's conviction arose from an altercation between appellant and his wife, Jessica Leach. On September 13, 2015, police were dispatched to a home in Edinburg. They found appellant in the driveway. Appellant explained that he had been trying to arrange a visit with the couple's son D.L. when Jessica began hitting him in the face. Police then spoke with Jessica, who reported that appellant had choked her and pulled a knife. Police observed red marks around Jessica's throat. Appellant was arrested and, shortly thereafter, indicted for aggravated assault with a deadly weapon.

Prior to trial, appellant filed a motion in limine concerning several topics, including any mention of appellant's prior extraneous offenses or acts of misconduct. *See* TEX. R. EVID. 404(b)(1). The State agreed to approach the bench before eliciting any such testimony.

During trial, Jessica testified that the couple moved around Texas frequently during their marriage, and her explanation triggered a relevance objection from appellant:

> [THE STATE]: Okay. And what other locations have y'all lived at?
>
> [JESSICA]: We have lived in Willis, Texas and that's about an hour north of Houston. We also lived in the Woodlands. And we've also lived in Cotulla, Texas. We've also lived in Sullivan City. I think, that's pretty much it.
>
> Q: Now, what is the reason y'all move so frequently? Is it because of your work or his work?
>
> A: Because of his work.

Q: His work?

A: I was trying to accommodate so he could be able to get a job due to his background.

Q: What type of job does he have or what type of work does he normally look for?

A: He would like to go into the oil field—

Q: Okay.

A: —side because they really don't check background.

[APPELLANT]: Your Honor, I'm going to object, Your Honor, as to relevance.

The trial court sustained the objection and instructed the jury to disregard Jessica's statement concerning background checks. Appellant moved for a mistrial, which the trial court denied.

The State then asked Jessica about her decision to leave Cotulla and also about the present location of her two children, R.L. and D.L. Jessica explained that she decided to separate from appellant and move to Hidalgo County with D.L., but R.L. did not come with her. Jessica's explanation led to a second relevancy objection and motion for mistrial by appellant:

[THE STATE]: Just you and your child?

[JESSICA]: Uh-huh.

Q: So [D.L.]?

A: [D.L.], yes, sir.

Q: Where is [R.L.]?

A: [R.L.] lives in Willis, Texas.

Q: Okay. With who?

A: He is with [D.L.'s] maternal aunt.

Q: [D.L.'s] maternal aunt?

A: Maternal aunt, yes.

Q: Okay. And was he removed from you guys? Did CPS get involved or what happened there?

A: We had a CPS case opened and I finished the whole thing and he didn't. So I had—

[APPELLANT]: Judge, I'm going to object as to relevance.

THE COURT: Sustained.

[APPELLANT]: We would ask the Court to instruct the jury to disregard.

THE COURT: The jury will disregard that last statement.

[APPELLANT]: We appreciate the Court's ruling but we feel that prejudice and error has attached and we would therefore ask for a mistrial.

THE COURT: That will be denied.

[THE STATE]: So—

THE COURT: Okay. Hold on. Mrs. Leach, do not volunteer information. Just answer the question.

[JESSICA]: Yes, sir.

THE COURT: Okay. That's twice that you've done it.

[JESSICA]: Okay.

THE COURT: Just answer the question.

Jessica further testified that on the day of the offense, appellant visited her brother's house and tried to convince her to resume their relationship. When she resisted, appellant became enraged and began choking her. Appellant drew a knife from his pocket and asked Jessica to stab him. Jessica believed that appellant in fact intended

to stab her, and she screamed for help. Jessica's brother emerged from his house, and appellant relented. Jessica called the police.

Following the close of evidence, the jury convicted appellant of second-degree aggravated assault with a deadly weapon and assessed punishment at five years' confinement. *See* TEX. PENAL CODE ANN. § 22.02(a)(2), (b). This appeal followed.

II. DISCUSSION

In his sole issue on appeal, appellant argues that the trial court erred in denying both of his motions for mistrial concerning Jessica's testimony. Appellant contends that the State elicited this testimony deliberately and that the testimony had a highly prejudicial effect that could not be cured by any instruction from the trial court.

The State responds that appellant's argument on appeal does not comport with his argument before the trial court. The State further argues that any prejudice from Jessica's testimony was cured by the trial court's timely instructions to disregard her statements.

A. Standard of Review & Applicable Law

A trial court's decision to deny a mistrial is reviewed under an abuse of discretion standard. *Archie v. State*, 340 S.W.3d 734, 738–39 (Tex. Crim. App. 2011). An abuse of discretion does not occur unless the trial court acts "arbitrarily or unreasonably" or "without reference to any guiding rules and principles." *State v. Hill*, 499 S.W.3d 853, 865 (Tex. Crim. App. 2016). The ruling must be upheld if it was within the zone of reasonable disagreement. *Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009).

A witness's inadvertent reference to an extraneous offense is generally cured by a prompt instruction to disregard. *Young v. State*, 283 S.W.3d 854, 878 (Tex. Crim. App.

2009) (per curiam). A mistrial should be granted only in cases where 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.*

To preserve error, the complaining party must let the trial judge know what he wants and why he thinks he is entitled to it, and do so clearly enough for the judge to understand and at a time when the trial court is in a position to do something about it. *Bekendam v. State*, 441 S.W.3d 295, 300 (Tex. Crim. App. 2014). "We are not hyper-technical in examination of whether error was preserved, but the point of error on appeal must comport with the objection made at trial." *Id.*; *see* TEX. R. APP. P. 33.1(a).

B. Analysis

The State first asserts that appellant's argument does not comport with any objection he made before the trial court. On appeal, appellant argues that a mistrial was required because Jessica's testimony was highly prejudicial and intentionally elicited by the State. *See Young*, 283 S.W.3d at 878. In the trial court, appellant did not object to prejudice, but instead only objected on relevance grounds. *See* TEX. R. EVID. 401. The State maintains that any error is therefore waived. We agree. "[A] relevancy objection . . . does not preserve error concerning a Rule 404 extraneous offense claim." *Medina v. State*, 7 S.W.3d 633, 643 (Tex. Crim. App. 1999) (en banc); *see Bekendam*, 441 S.W.3d at 300.

Nonetheless, even assuming that appellant preserved error, his claim would be without merit. In his first motion for mistrial, appellant challenged Jessica's statements concerning appellant's "background" and that appellant sought jobs on oil fields because

employers in that industry "really don't check background." Jessica did not elaborate on what appellant's "background" might entail—a poor credit history, an inability to verify educational status, or appellant's criminal record. Instead, she made only a "vague reference" to appellant's extraneous offenses and did not offer the particulars or "any facts giving credence thereto." *See Kipp v. State*, 876 S.W.2d 330, 339 (Tex. Crim. App. 1994) (plurality op.); *see also Rojas v. State*, 986 S.W.2d 241, 250 (Tex. Crim. App. 1998) (upholding denial of mistrial where witness did not make a "concrete reference" to any particular extraneous offense and was prevented from elaborating, and trial court timely instructed jury to disregard); *Doucette v. State*, No. 03-10-00176-CR, 2011 WL 832129, at *2 (Tex. App.—Austin Mar. 9, 2011, no pet.) (not designated for publication) (holding that even if appellant had preserved error, a witness's "vague reference" to a prior offense did not require a mistrial; an instruction to disregard sufficed). Moreover, the State's questions were not "clearly calculated" to draw out appellant's criminal history. *See Young*, 283 S.W.3d at 878. Rather, as the trial court stated, Jessica "volunteer[ed]" this information in response to three benign questions from the State. *See id.* And following her statements, the trial court promptly instructed the jury to disregard her testimony on appellant's background. Thus, even assuming preservation of error, we agree with the State that the trial court did not abuse its discretion in overruling appellant's first motion for a mistrial, since the instruction to disregard cured any prejudice. *See id.*

The second motion for mistrial concerned Jessica's testimony that appellant was the subject of a child protective services case. Again, even assuming preservation of error, any prejudice was cured by the trial court's prompt instruction to disregard Jessica's

testimony; indeed, the trial court went so far as to chastise Jessica, further impressing upon the jury the trial court's disapproval of this evidence. *See id.*; *see also Gilliard v. State*, No. 05-98-01056-CR, 1999 WL 462163, at *4 (Tex. App.—Dallas July 8, 1999, pet. ref'd) (not designated for publication) (concluding that timely instruction to disregard cured any prejudice from witness's testimony that robbery defendant's children had been removed by CPS: "Even assuming appellant preserved error, we would still conclude, after reviewing the record before us, that the trial judge's instruction to disregard cured any harm created by the testimony.").

Accordingly, we overrule appellant's sole issue on appeal.

III. CONCLUSION

We affirm the judgment of the trial court.

NELDA V. RODRIGUEZ
Justice

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

Delivered and filed the
20th day of July, 2017.