NUMBER 13-19-00068-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

ELOY DAVILA, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 36th District Court of San Patricio County, Texas.

MEMORANDUM OPINION

Before Justices Hinojosa, Perkes, and Tijerina
Memorandum Opinion by Justice Perkes

A jury convicted appellant Eloy Davila of first-degree manufacture or delivery of a controlled substance, penalty group one, and sentenced him to seventy-five years'

confinement.[1] *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(d); TEX. PENAL CODE ANN. §§ 12.32, 12.42(d). By two issues, Davila argues the trial court erred in denying his request for mistrial, and "the State violated its responsibilities under *Brady*."[2] We affirm.

I. BACKGROUND

Marcus Ismael Flores, a Drug Enforcement Administration agent, testified he was in Aransas Pass investigating "street-level narcotics trafficking," when he witnessed a "hand-to-hand transaction take place in the parking lot" of a convenience store. Flores testified he observed Davila exit his vehicle and walk over to a vehicle occupied by a single female, later identified as Kristen Rhines. "[Davila] stuck his hand inside of the driver's side window and handed the driver an item" before returning to his vehicle and driving away, said Flores.

Flores testified he opted to follow Rhines because he believed her to be the recipient of the drugs. Flores stopped Rhines for speeding and said he observed her quickly become "emotional." "She started breaking down. She started explaining that she had children[,] and she then also admitted that she had just purchased a 20 [sic] of heroin from Davila," testified Flores. A "baggie of heroin, some syringes, and a spoon" were found in Rhines's possession. Flores testified he then asked Rhines if "she was willing to cooperate."[3] Rhines agreed to text Davila and set up a heroin purchase.

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[1] Davila's punishment range was enhanced by two prior felony convictions. *See* TEX. PENAL CODE ANN. § 12.42(d) (providing that the punishment range for a habitual felony offender is 25 to 99 years).

[2] *See Brady v. Maryland*, 373 U.S. 83 (1963).

[3] The following exchange occurred between Flores and the State:

> [Flores]: I had a quick conversation with [Rhines][,] and I explained to her that we were more along the lines of looking for a dealer and looking for some cooperation. And I explained to her that we could go back to the police department and speak about it. And she was willing to cooperate in that sense and go back . . . to the [police department] there in Aransas Pass.

Rhines informed Flores that Davila was operating out of a hotel in Aransas Pass. Flores testified he arranged for another agent to begin surveillance at the hotel.[4] Once Davila confirmed via text that he was in route to their previously agreed upon location, Flores contacted a patrol officer to conduct a traffic stop of Davila's vehicle. Flores said he had just learned that Davila had an active parole warrant. Law enforcement did not find any narcotics in Davila's possession at the time of his arrest.

Davila objected to Flores's mention of the active parole warrant and argued the State violated the trial court's standing motion in limine orders. Davila requested a mistrial, and the trial court denied Davila's request. Davila did not ask for any curative instructions prior to or following the trial court's denial of his request for mistrial.

The State also called Rhines to testify. As soon as Rhines was sworn in, Davila objected. Davila argued that Flores testified "he had a very specific agreement with [Rhines] in place," which the State failed to disclose prior to trial in violation of *Brady*, and therefore, Rhines's testimony should be excluded. The State countered that "[t]here ha[d] been no formal deal made by anyone here." The trial court ruled in favor of the State and permitted Rhines to testify.

The jury returned a guilty verdict, and this appeal followed.

[State]:	So you indicated to her that if she cooperated, nothing would happen to her, something to that effect?
[Flores]:	Yes.
[State]:	And did she cooperate?
[Flores]:	Yes.

[4] Davila denied staying at the hotel, and the hotel room was rented under a female's name. However, the hotel manager testified that he observed Davila staying there, Davila paid the daily fee in person for the preceding two weeks, agents observed Davila departing from the hotel, and a hotel key was found in Davila's possession. Following a search of the hotel room, agents recovered a backpack with mail addressed to Davila and a black, leather bag with the words "Eloy loves Mary" written on it containing fifteen grams of heroin, lactose, which is a "cutting agent used with heroin," syringes, a spoon, and a lighter. After Davila's arrest, Davila's brother contacted the hotel in an attempt to collect Davila's belongings.

II. MOTION FOR MISTRIAL

In his first issue, Davila contends that the trial court erred by denying his motion for mistrial made after the State violated the trial court's motion in limine orders.

A. Standard of Review and Applicable Law

We review the trial court's denial of a motion for mistrial for an abuse of discretion, and we must uphold a trial court's ruling if it is within the zone of reasonable disagreement. *Archie v. State*, 340 S.W.3d 734, 738 (Tex. Crim. App. 2011); *Stahmann v. State*, 548 S.W.3d 46, 68 (Tex. App.—Corpus Christi–Edinburg 2018), *aff'd*, 602 S.W.3d 573 (Tex. Crim. App. 2020). "A mistrial is an appropriate remedy in 'extreme circumstances' for a narrow class of highly prejudicial and incurable errors" and should only be granted when less drastic alternatives fail to cure the prejudice. *Ocon v. State*, 284 S.W.3d 880, 884–85 (Tex. Crim. App. 2009) (quoting *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004)). "The determination of whether a given error necessitates a mistrial must be made by examining the particular facts of the case." *Wood v. State*, 18 S.W.3d 642, 648 (Tex. Crim. App. 2000) (quoting *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999)); *Guerrero v. State*, 528 S.W.3d 796, 801 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd).

B. Analysis

The complained-of statement here took place during the State's direct examination of agent Flores. In response to the State's question, "When [Davila] sent [Rhines] that text message, what did you do at that point," Flores responded, "I had contacted one of the patrol officers in a marked unit to conduct a traffic stop for me. I had r[u]n Mr. Davila through [the Texas Crime Information Center] [(]TCIC[)] and [National Crime Information Center] [(]NCIC[)][,] and he had come back with an active parole warrant." Davila objected and asked to approach the bench.

[DAVILA]: The Limine said no prior criminal record. We specifically went over this yesterday with Judge Johnson. I specifically asked the State to encourage the witnesses to relay that agreement.

[STATE]: I tried, Judge.

[COURT]: All right.

[DAVILA]: I ask at this point for a mistrial.

[STATE]: The Court doesn't think we can cure it?

[DAVILA]: I don't know how we are going to cure that.

(End of Bench Conference.)

The trial court excused the jury and proceeded to ask Flores questions to determine the reason for Davila's traffic stop. The trial court ultimately reasoned that "if there was no new violation, . . . it is proper for a jury to know why the defendant was pulled over," overruled Davila's request for a mistrial, and admonished the witness to "not bring up the defendant's past or anyone's past." The State did not proceed to ask questions regarding the parole warrant, and there was no mention of the warrant moving forward.

A mistrial is only necessitated where a reference to an extraneous offense 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.'" *Young v. State*, 283 S.W.3d 854, 878 (Tex. Crim. App. 2009) (quoting *Rojas v. State*, 986 S.W.2d 241, 250 (Tex. Crim. App. 1998)). An uninvited statement regarding a defendant's outstanding parole warrant, in isolation and lacking embellishment, does not rise to the level of inflammatory, lasting impressionability. *See id.*; *see, e.g.*, *Kemp v. State*, 846 S.W.2d 289, 308 (Tex. Crim. App. 1992) (finding that an "uninvited and unembellished reference to appellant's prior incarceration—although inadmissible—was

not so inflammatory as to undermine the efficacy of the trial court's instruction to disregard."); *Crawford v. State*, 595 S.W.3d 792, 804 (Tex. App.—San Antonio 2019, pet. ref'd) (finding the same).

Assuming, without deciding, that the trial court erred in admitting testimony regarding Davila's parole warrant, our scope of review is nonetheless limited to "whether the trial court erred in not taking the most serious action of ending the trial" because Davila's first and only request was to move for a mistrial, and mistrials are a drastic remedy of last resort. *See Ocon*, 284 S.W.3d at 884–85 ("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."); *see also Liscotti v. State*, No. 13-17-00056-CR, 2018 WL 4140451, at *2 (Tex. App.—Corpus Christi–Edinburg Aug. 29, 2018, no pet.) (mem. op., not designated for publication) (providing the same). Texas courts, including this Court, have repeatedly held that testimony disclosing that a defendant is or has been incarcerated can be cured by the less drastic remedy of an instruction to disregard. *See, e.g.*, *Crawford*, 595 S.W.3d at 804; *see also Kennedy v. State*, No. 12-18-00216-CR, 2019 WL 4126615, at *5 (Tex. App.—Tyler Aug. 30, 2019, pet. ref'd) (mem. op., not designated for publication); *Oliver v. State*, No. 13-13-00402-CR, 2014 WL 4402232, at *4 (Tex. App.—Corpus Christi–Edinburg Sept. 2, 2014, no pet.) (mem. op., not designated for publication) (providing that the State was entitled to elicit testimony to explain that the defendant's arrest was not based solely on a complainant's accusations but also because there existed an outstanding out-of-state arrest warrant for the defendant).

A lesser, un-requested alternative would have cured any error in this case. *See Ocon*, 284 S.W.3d at 887; *Young*, 283 S.W.3d at 878. Therefore, the trial court did not

abuse its discretion in its decision to deny Davila's request for mistrial. *See Ocon*, 284 S.W.3d at 887; *State v. Doyle*, 140 S.W.3d 890, 893–94 (Tex. App.—Corpus Christi–Edinburg 2004, pet. ref'd) ("It is an abuse of discretion to grant a mistrial where less drastic means are available."). We overrule issue one.

III. *BRADY*

By his second issue, Davila argues "the State violated its responsibilities under *Brady*" by failing to disclose that an agreement had been made "with the State's principal witness, Ms. Rhines, in exchange for her cooperation." *See Brady v. Maryland*, 373 U.S. 83 (1963).

A. Standard of Review and Applicable Law

Under United States Supreme Court precedent beginning with *Brady,* the State is required to disclose evidence known to it that is favorable or material to a defendant's guilt or punishment, whether or not the defendant requests it. *See id.* at 87; *Fears v. State*, 479 S.W.3d 315, 327 (Tex. App.—Corpus Christi–Edinburg 2015, pet. ref'd). Generally, in order for a defendant to succeed with a *Brady* claim against the State, he must prove three requirements: "(1) the State suppressed evidence; (2) the suppressed evidence is favorable to the defendant; and (3) the suppressed evidence is material." *Ex parte Lalonde*, 570 S.W.3d 716, 724 (Tex. Crim. App. 2019) (citing *Harm v. State*, 183 S.W.3d 403, 406 (Tex. Crim. App. 2006)); *see also Brady*, 373 U.S. at 87 (holding "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"). "'Incorporated into the third prong, materiality, is a requirement that [the] defendant must be prejudiced by the state's failure to disclose the favorable evidence.'" *Id.* (quoting *Harm*, 183 S.W.3d at 406).

"[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985); *Ex parte Adams*, 768 S.W.2d 281, 291 (Tex. Crim. App. 1989) (adopting *Bagley* standard of materiality); *see Ex parte Lalonde*, 570 S.W.3d at 725 ("The mere possibility that the undisclosed information might have helped the defense or affected the trial's outcome does not establish materiality.").

When evidence allegedly withheld in violation of *Brady* is disclosed during trial, we must also inquire whether the defendant was prejudiced by the tardy disclosure. *Little v. State*, 991 S.W.2d 864, 866 (Tex. Crim. App. 1999); *Fears*, 479 S.W.3d at 327. To demonstrate prejudice, a defendant must show a reasonable probability that, if the evidence had been disclosed to the defense earlier, the result of the proceeding would have been different. *Little*, 991 S.W.2d at 866. "If the defendant received the material in time to use it effectively at trial, his conviction should not be reversed just because it was not disclosed as early as it might have and should have been." *Id.*; *see Fears*, 479 S.W.3d at 327. Moreover, "[w]hen *Brady* material is disclosed at trial, the defendant's failure either to object to the admission of the evidence on this basis or to request a continuance waives error or at least indicates that the delay in receiving the evidence was not truly prejudicial." *Rubio v. State*, 534 S.W.3d 20, 27 (Tex. App.—Corpus Christi–Edinburg 2017, pet. ref'd) (quoting *Perez v. State*, 414 S.W.3d 784, 790 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (internal quotations omitted)); *see also Lindley v. State*, 635 S.W.2d 541, 544 (Tex. Crim. App. 1982) ("The failure to request a postponement or seek a continuance waives any error urged in an appeal on the basis of surprise.").

B. Analysis

Here, Flores confirmed that he "indicated to [Rhines] that if she cooperated, nothing would happen." Davila objected, arguing the State violated *Brady* right after Rhines was sworn in to testify. The trial court overruled Davila's objection and allowed Rhines to testify. Davila did not request a continuance, and instead, he cross-examined Rhines on the issue of cooperation. Rhines confirmed she believed that if she cooperated, "charges wouldn't be pressed."

Assuming, without deciding, the State suppressed evidence favorable to the defendant in failing to disclose any cooperation discussion between Flores and Rhines, Davila cites no evidence that the delay in receiving the evidence was prejudicial. *See Little*, 991 S.W.2d at 866; *Fears*, 479 S.W.3d at 327. Davila was permitted to cross-examine Rhines and Flores regarding any alleged assurances made in exchange for Rhines's cooperation; thus, Davila made effective use of the information at trial. *See Fears*, 479 S.W.3d at 327 ("When information is disclosed mid-trial, the prejudice inquiry involves determining whether the disclosure came in time to make effective use of it at trial."); *see, e.g.*, *Little*, 991 S.W.2d at 865–67 (holding State's failure to inform the defendant regarding lost paperwork from the defendant's blood alcohol test until after expert testified, but before the defendant cross-examined expert, did not constitute a *Brady* violation because the defendant received information in time to use it effectively at trial); *Marshall v. State*, 210 S.W.3d 618, 636 (Tex. Crim. App. 2006) (holding that, where the State allegedly failed to disclose the statement of an inmate that the defendant did not really assault him, but the defense called the inmate to testify to that effect, any *Brady* violation was harmless); *Kulow v. State*, 524 S.W.3d 383, 388 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd) (holding no *Brady* violation where the defendant was not prevented

from cross-examining the witness on the delayed disclosure issue). We further note that Davila's failure to request a continuance when *Brady* evidence was disclosed at trial, at minimum, suggests that the tardy disclosure of the evidence was not prejudicial to him. *See Rubio*, 534 S.W.3d at 27; *State v. Fury*, 186 S.W.3d 67, 73–74 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd); *see also Williams v. State*, No. 11-12-00335-CR, 2015 WL 1501702, at *6 (Tex. App.—Eastland Mar. 31, 2015, pet. ref'd) (mem. op., not designated for publication) (holding the defendant waived a *Brady* complaint where he objected but failed to request a continuance).

In sum, Davila has not demonstrated that he was prejudiced by the allegedly tardy disclosure, and he, therefore, does not succeed with his *Brady* claim. *See Fears*, 479 S.W.3d at 329. We overrule his second point of error.

III. CONCLUSION

We affirm the trial court's judgment.

GREGORY T. PERKES
Justice

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

Delivered and filed the
27th day of August, 2020.