NUMBER 13-19-00280-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

MARTIN MELCHOR, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 379th District Court of Bexar County, Texas.

MEMORANDUM OPINION

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

A jury found appellant Martin Melchor guilty of family assault by choking/strangulation, a third-degree felony. *See* TEX. PENAL CODE ANN. § 22.01(b). Melchor pleaded true to the habitual offender enhancement and was sentenced to twenty-five years' imprisonment in the Texas Department of Criminal Justice—Institutional Division. On appeal, Melchor: (1) argues that the trial court erred when it failed to grant a

mistrial after the complaining witness twice violated a motion in limine, and (2) urges this court to reverse and render under the Double Jeopardy doctrine. We affirm.

I. BACKGROUND[1]

The State charged Melchor by indictment for assault family violence. *See* TEX. PENAL CODE ANN. § 22.01(b). Prior to trial, Melchor filed a motion in limine regarding the mention of extraneous acts under Texas Rule of Evidence 404(b). The motion requested that the State approach the bench if it planned to elicit testimony regarding "any extraneous offenses, wrongs, or acts" Melchor may have committed before, during or after the offense at issue during any stage of the trial. The purpose of this motion, Melchor claimed, was to "avoid prejudice by the jury and abuse of discretion by the court." The trial court granted this motion in limine on March 18, 2019.

Trial began on March 19, 2019. The complainant, Melchor's ex-girlfriend D.A.[2], testified first. D.A. stated that she and Melchor had an on-and-off relationship and that the two had an infant daughter together. D.A. recalled that on August 28, 2018, she attended a concert downtown with Melchor and his sister Jennifer. After the concert, the three decided to stop at a bar on the way home for a drink. When D.A. saw a former boyfriend at the bar, she pulled Jennifer aside and asked her whether she should tell Melchor about her ex-boyfriend's presence. Jennifer discouraged D.A. from sharing that information with

[1] This case is before this Court on transfer from the Fourth Court of Appeals in San Antonio pursuant to a docket-equalization order issued by the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001.

[2] We use initials to protect the names of complainants. *See Salazar v. State*, 562 S.W.3d 61, 63 n.1 (Tex. App.—Corpus Christi–Edinburg 2018, no pet.) (noting that the comment to Texas Rule of Appellate Procedure 9.8 does "not limit an appellate court's authority to disguise parties' identities in appropriate circumstances . . . ."); *Baez v. State*, 486 S.W.3d 592, 594 n.1 (Tex. App.—San Antonio 2015, pet. ref'd) (same).

her brother. D.A. approached Melchor and informed him she wanted to leave the bar, without giving him a reason. Eventually, though, she disregarded Jennifer's advice and told Melchor that she wanted to leave because her ex-boyfriend was there.

Upon learning about D.A.'s ex-boyfriend's presence at the bar, Melchor became "livid." The couple began arguing and decided to leave. Jennifer stayed at the bar. While in the bar parking lot, D.A. testified that Melchor began choking her as she attempted to start the vehicle. D.A. testified that she "couldn't breathe and . . . was telling him to stop, and [she]—prayed, basically tapping out and he continued, said he didn't care." According to D.A., Melchor stopped choking her, got out of the vehicle, and left walking.

After an undisclosed period of time, Melchor returned to the vehicle and the two drove to Melchor's mother's home, where they were living. Upon reaching the residence, though, Melchor and D.A. began fighting again. D.A. testified that Melchor assaulted her again:

> Q: So once you get back in the house, you say he choked you again. Are y'all arguing?
>
> A: Yes, we're arguing because I was telling him that it was bullshit that his sister didn't want me to tell him [that my ex-boyfriend was at the bar], that she wasn't loyal. I was being loyal telling him that there was a rivalry gang member that I knew.

At this point, Melchor's attorney asked to approach the bench. He objected that D.A.'s mention of a "rival[ ] gang member" violated the motion in limine regarding extraneous offenses, wrongs, or acts. The State responded that its question did not elicit that specific information, but that in the interest of caution, it would veer away from that line of questioning. The court ordered the State to privately admonish D.A. regarding her

testimony and also instructed the jurors to "completely disregard the last statement that was made by this witness." The State then continued D.A.'s direct questioning. Later in the trial, however, the following occurred:

STATE:	[D.A.], why didn't you call the police after the first time he assaulted you?
D.A.:	Because this ain't the first time.
MELCHOR:	Your Honor, may we approach?
COURT:	Yes.

(Bench conference.)

MELCHOR:	That's the second violation. I have no choice but [to] ask for a mistrial in this matter.
COURT:	Any response?
STATE:	Judge I think it's a family violence case, we are entitled to go into previous context of their relationship. I don't think the question elicited that, but I do think that we are entitled to because it's a family violence case. I think the code allows that.
MELCHOR:	Your Honor, the order requires them to approach the bench and ask to go into those matters before going into them.
COURT:	It's a motion in limine, and the Court has reviewed the actual question that was requested of this witness. The witness did sort of answer the question beyond the scope of what the question was. Recognizing the relationship aspect, I'm going to instruct the State to re- —let me—I'm going to—
STATE:	Take the jury out?
COURT:	Yeah. I'm going to deny the motion for a mistrial. I'm going to instruct the jury, and then I'm going to have the jury leave the courtroom. We'll do it that way.

The trial court instructed the jury to "completely disregard the last statement" that D.A. made and excused the jury from the courtroom. Outside the presence of the jury, the court inquired whether the State had admonished the witness properly:

COURT: We're going to go back on the record. I want to ask the witness, when we just went off the record for the second time in this trial in front of the court, the State, the prosecutor approached you and gave you some instructions. Those instructions were to only ask [sic] the questions that are asked of you; is that correct?

D.A.: Yes.

The trial court further instructed D.A. to answer only the questions that were asked of her and to refrain from "making any reference to anything about what the defendant may have done to [her] in the past."

On cross-examination, Melchor's attorney asked D.A. whether she had "ever hit Mr. Melchor in the past." The State asked to approach the bench. Melchor explained that he wanted to pursue this line of questioning because he wanted to show that D.A., in fact, had been the aggressor in the relationship. The court explained, "[s]o defense, if you go into that particular line of questioning, then I think it would open up the door for the State to inquire regarding that entire relationship. So I'll leave that up to you." When the parties went back onto the record, Melchor asked, "Once again, ma'am, have you ever hit Mr. Melchor?" D.A. responded that yes, she had, whenever she had to defend herself.

The jury found Melchor guilty of the charged assaultive offense. After pleading true to two enhancements, the trial court sentenced Melchor to twenty-five years' incarceration in the Texas Department of Criminal Justice—Institutional Division. Melchor appeals.

II. THE MOTION FOR MISTRIAL

A. Standard of Review & Applicable Law

Appellate courts review a trial judge's denial of a motion for mistrial under an abuse of discretion standard. *Coble v. State*, 330 S.W.3d 253, 292 (Tex. Crim. App. 2010). A mistrial is only an "appropriate remedy in 'extreme circumstances' for a narrow class of highly prejudicial and incurable errors." *Ocon v. State,* 284 S.W.3d 880, 884 (Tex. Crim. App. 2009) (citing *Hawkins v. State,* 135 S.W.3d 72, 77 (Tex. Crim. App. 2004) (en banc)). The trial court's ruling must be upheld if it was within the zone of reasonable disagreement. *See Coble*, 330 S.W.3d at 292.

"[T]estimony referring to or implying extraneous offenses can be rendered harmless by an instruction to disregard by the trial judge, unless it appears the evidence was so clearly calculated to inflame the minds of the jury or is of such damning character as to suggest it would be impossible to remove the harmful impression from the jury's mind." *Kemp v. State*, 846 S.W.2d 289, 308 (Tex. Crim. App. 1992) (citing *Gardner v. State*, 730 S.W.2d 675, 696–97 (Tex. Crim. App. 1987)). An instruction by the trial judge to disregard a statement can cure an inadmissible reference to or the implication of an extraneous offense. *See Kemp,* 846 S.W.2d at 308. This is because we generally presume that the jury follows the trial court's instructions. *See Thrift v. State*, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005). To rebut this presumption, a defendant must set forth evidence demonstrating that the jury failed to follow the trial court's instruction to disregard. *See id.*

B. Analysis

Melchor argues that the trial court should have granted a mistrial because D.A. twice violated the motion in limine regarding the mention of any extraneous offenses, wrongs, or acts. First, with regard to D.A.'s initial violation of the motion in limine where she made mention of a "rival[ ] gang member," we note that the trial court immediately ordered the jurors to "completely disregard the last statement that was made by this witness." Texas courts have held that instructions to disregard are sufficient to cure any harm or prejudice regarding objectionable statements about gang affiliations or gangs. *See Bridgewater v. State*, 905 S.W.2d 349, 354 (Tex. App.—Fort Worth 1995, no pet.) (holding that any possible error from witness' statement that "[h]e's already said that I can't say the thing about gangs" was cured by trial court's instruction to disregard); *Villarreal v. State,* 821 S.W.2d 682, 686 (Tex. App.—San Antonio 1991, no pet.) (stating that the prosecutor's reference that the defendant was in a gang during the guilt/innocence phase of trial was cured by the court's instruction to disregard the statement). Here, because an instruction to disregard was given, and because we presume that the jurors followed the court's instructions, we conclude that this reference was cured. *See Kemp*, 846 S.W.2d at 308; *Thrift*, 176 S.W.3d at 224.

D.A.'s second violation of the motion in limine occurred when she testified that it was "not the first time" Melchor had assaulted her. The State argued that this evidence was permissible under Texas Code of Criminal Procedure article 38.371. This statute provides that, in the prosecution of assaults against family members or between those in dating relationships,

> [E]ach party may offer testimony or other evidence of all relevant facts and circumstances that would assist the trier of fact in determining whether the actor committed the offense . . . including testimony or evidence regarding the nature of the relationship between the actor and the alleged victim.

See TEX. CODE CRIM. PROC. ANN. art. 38.371.

We note, again, that the trial court instructed the jurors to "completely disregard the last statement." Furthermore, Melchor did not offer any evidence demonstrating that the jury failed to follow the trial court's instruction to disregard. *See Thrift*, 176 S.W.3d at 224. Because an instruction to disregard can cure an inadmissible extraneous reference, and because we presume that jurors follow the trial court's instructions, we conclude this error, if any, was also cured. *See Kemp,* 846 S.W.2d at 308; *Thrift,* 176 S.W.3d at 224.

Melchor also argues that D.A.'s violations of the motion in limine were a result of "prosecutorial misconduct." In Texas, prosecutorial misconduct occurs when a prosecutor is aware that his "manifestly improper misconduct is likely to result in a mistrial, but he nonetheless consciously ignores that likelihood and commits the misconduct." *Robinson v. State*, 139 S.W.3d 748, 751 (Tex. App.—Corpus Christi–Edinburg 2004, pet. ref'd). In his brief, Melchor urges that, "there is no evidence in the record that the State instructed its witness to 'be careful' as instructed by the court and agreed to by the State, or to otherwise admonish its witness in any way in conformity with the [c]ourt[']s instructions and admonitions." The record shows otherwise. After D.A.'s second violation of the motion in limine, the trial court asked D.A. whether the State had instructed her to only answer the questions that were being asked. D.A. responded "yes." Accordingly, we hold that there was no evidence to substantiate the allegation of prosecutorial misconduct.

In light of the foregoing analysis, we conclude that the trial court did not abuse its discretion when it denied Melchor's request for a mistrial after D.A.'s second violation of the motion in limine. *Coble*, 330 S.W.3d at 292. We overrule this issue.

Melchor's second issue contends that, if we held that the trial court abused its discretion in denying the motion for mistrial, we should reverse and render because any subsequent trial would be barred by the doctrine of double jeopardy. We need not address the issue of double jeopardy, however, because it is moot having overruled Melchor's first issue. *See* TEX. R. APP. P. 47.1 ("The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal.").

III. CONCLUSION

We affirm the judgment of the trial court.

LETICIA HINOJOSA
Justice

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

Delivered and filed the
25th day of June, 2020.