COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

OCTOBER 31, 2019

NO. 12-18-00349-CR

LESTER THOMAS BUTCHER,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 420th District Court
of Nacogdoches County, Texas (Tr.Ct.No. F1723232)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

James T. Worthen, Chief Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

NO. 12-18-00349-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

LESTER THOMAS BUTCHER, APPELLANT	§	*APPEAL FROM THE 420TH*
V.	§	*JUDICIAL DISTRICT COURT*
THE STATE OF TEXAS, APPELLEE	§	*NACOGDOCHES COUNTY, TEXAS*

MEMORANDUM OPINION

Lester Thomas Butcher appeals his conviction for murder. In one issue, he contends the trial court abused its discretion by denying his motion for a mistrial after the jury heard evidence that he previously had been to prison. We affirm.

BACKGROUND

Appellant was indicted for the capital murder of James Steitler. The indictment alleged that Appellant, on or about April 9, 2017, in Nacogdoches County, Texas, intentionally caused Steitler's death by shooting Steitler with a firearm, stabbing him with a knife, and striking him with a bat while in the course of committing or attempting to commit the offense of burglary. The State did not seek the death penalty. Appellant entered a plea of "not guilty" and the case proceeded to a jury trial.

At trial, the evidence showed that Appellant was at Ricky Butcher's home on April 8, the evening before Steitler's murder. Ricky, Appellant's brother, and Steitler were neighbors in a rural area near Trawick, Texas in Nacogdoches County. Appellant left Ricky's home in the late evening hours of April 8 and returned sometime after midnight on April 9. Ricky and Appellant's nephew, Alvin Blangger, testified that when Appellant returned, he was panicked. Blangger testified he heard Appellant tell Ricky "we don't have to worry about that [expletive] anymore because he's

dead." Blangger further testified to hearing Appellant say "if the cops come, I was never here." Blangger testified he observed Appellant and Ricky go outside and then heard Appellant leave in his vehicle.

After Appellant left, Ricky contacted the Nacogdoches Sheriff's Office and requested a welfare check on Steitler. Law enforcement arrived and located Steitler's dead body in his bedroom, laying in a pool of blood. Law enforcement discovered that the back window to Steitler's home had been broken and the door to his bedroom was cracked near the doorknob. Law enforcement learned about Appellant's statements regarding Steitler's murder, and began searching for him.

Appellant arrived at a residence in Chandler, Texas in the early morning hours of April 9. Waylon and Richard Barton, two brothers present at the Chandler residence, testified at trial that Appellant appeared scared, had blood on his person, and was carrying bloody clothes. Waylon testified that Appellant asked the brothers for clean clothes and help cleaning the blood out of his truck. Waylon testified that he observed Appellant pull a bat from the back of his truck and walk between the house and two sheds located on the property. Waylon testified that he then saw flames coming from that direction. Richard testified that Appellant asked him to help him dispose of a shotgun. Richard testified that he gave Appellant a pair of shorts, but refused to help him clean his car or dispose of the shotgun. Law enforcement located Appellant in the Chandler vicinity on April 10, and took him into custody. Appellant gave a recorded statement to law enforcement. In that statement, Appellant told the officer that Steitler sold methamphetamine and pills. According to Appellant, he took Richard to Steitler's residence on the evening of the murder so that Richard could buy some pills from Steitler. Appellant denied murdering Steitler, and blamed Richard for the murder.

Law enforcement searched the Chandler property and located a knife and bat from a burn barrel. Next to the burn barrel, law enforcement located a shotgun from under some debris. Forensic testing revealed that Appellant's DNA was present on the bat recovered from the burn barrel, and Steitler's DNA was present on the shotgun recovered next to the burn barrel. Steitler's mother, Darlene Bates, was able to identify the shotgun as Steitler's. She testified that she saw the shotgun in Steitler's room on April 8. Appellant's ex-girlfriend, Stacie Breeden, identified the knife found in the burn barrel as belonging to Appellant. Breeden told law enforcement that the knife was one of two from a set that Appellant kept in his bedroom at Ricky's home. Law

enforcement located the other knife, and a sheath capable of holding both knives, in Appellant's bedroom at Ricky's home.

Dr. Ami Murphy, a forensic pathologist, testified that Steitler's body showed forty blunt impact injuries, thirteen blade wounds, and a shotgun wound to the right forearm that also involved the right side of the chest, the chin, the jaw, and the left hand. She testified that Steitler's death was ruled a homicide and his cause of death was blunt impact trauma to the head, stab wounds to the face and neck, and a shotgun wound to the forearm.

At the conclusion of the trial, the jury found Appellant "guilty" of capital murder. Appellant was sentenced to life without parole.[1] This appeal followed.

DENIAL OF MOTION FOR MISTRIAL

In his sole issue, Appellant argues that the trial court abused its discretion by denying his motion for mistrial after the jury heard evidence that he had previously been to prison.

Standard of Review and Applicable Law

A trial court's denial of a mistrial is reviewed under an abuse of discretion standard, and its ruling must be upheld if it was within the zone of reasonable disagreement. ***Coble v. State***, 330 S.W.3d 253, 292 (Tex. Crim. App. 2010). "Ordinarily, a prompt instruction to disregard will cure error associated with an improper question and answer, even one regarding extraneous offenses." ***Ovalle v. State***, 13 S.W.3d 774, 783 (Tex. Crim. App. 2000). "Only in extreme circumstances, where the prejudice is incurable, will a mistrial be required." ***Hawkins v. State***, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004). "A mistrial is 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). Whether an error requires a mistrial is determined by the particular facts of the case. ***Ladd v. State***, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999). "A mistrial is required only when the improper question is clearly prejudicial to the defendant and is of such character as to suggest the impossibility of withdrawing the impression produced on the minds of the jurors." ***Id.*** In determining whether the trial court abused its discretion in denying the

[1] In cases where the state does not seek the death penalty, an individual adjudged guilty of a capital felony shall be punished by imprisonment for life without parole if the individual committed the offense when eighteen years of age or older. TEX. PENAL CODE ANN. § 12.31(a)(2) (West 2019).

mistrial, we consider the severity of the misconduct (prejudicial effect), any curative measures taken, and the certainty of conviction absent the misconduct. ***Hawkins***, 15 S.W.3d at 77.

Appellant's Recorded Statement

Prior to trial, Appellant filed two motions in limine and a motion to exclude certain portions of his recorded statement given to law enforcement about the murder. The first motion in limine requested that the State's attorney refrain from mentioning or eliciting testimony regarding any extraneous offense, wrongs, or acts committed by Appellant until a ruling on the admissibility of the evidence could be made outside the jury's presence. The second motion in limine requested the same procedure in reference to Appellant's prior criminal record. Both motions were granted.

The motion to exclude portions of Appellant's statement requested the trial court exclude designated time periods of his recorded interview. Appellant argued that the designated portions contained inadmissible hearsay or references to inadmissible extraneous offenses. Prior to the beginning of voir dire, the State and the defense agreed to mute the time frames designated in Appellant's motion while playing the interview for the jury. The muted portions referenced in Appellant's motion and agreed upon by the parties were referenced in minutes and seconds.

During the State's case in chief, the State offered, and the court admitted Appellant's recorded statement as State's exhibit 357, subject to the agreement to mute the designated portions. While State's exhibit 357 was published to the jury, Appellant's counsel asked to approach the bench. The court took a recess and sent the jury out of the courtroom. On the record, but outside the presence of the jury, Appellant's counsel objected to the "portion of the tape that was played that stated briefly about [Appellant] going to prison" because it violated his motion in limine. The State maintained that it muted the portions designated in Appellant's motion, and Appellant's counsel clarified that he was not alleging that the State intentionally violated his motion in limine. Appellant asked the trial court to instruct the jury to disregard the statements and requested a mistrial. The trial court denied Appellant's motion for mistrial, but granted his request for an instruction to disregard.

The trial court clarified the objectionable statements as follows:

> And, I guess, so the record is clear, what I wrote down—or what I heard was there was a reference where I think Ranger Hicks said, was your mom upset when she found out you were going to prison, or words to that effect.

Appellant's counsel agreed that the foregoing was the objectionable statement played before the jury. Thereafter, the court took a recess so State's counsel and Appellant's counsel could reexamine exhibit 357 to ensure that, going forward, the designated time frames would exclude any inadmissible extraneous offense evidence. After the recess, State's counsel informed the court that the parties inadvertently wrote down the wrong ending time frame, which explained why the objectionable statement was published to the jury. Counsel for the State clarified that instead of muting exhibit 357 from 25:30 through 29:22, the exhibit should have been muted from 25:30 through 31:10 to exclude all references to Appellant previously having been to prison. Appellant's counsel requested the court instruct the jury to disregard the portion of the recording that was played at 29:22 through 31:10. Appellant's counsel clarified that he did not want the court to specifically mention the statement, to avoid further drawing the jury's attention to the fact that Appellant had previously been to prison. The court granted Appellant's request and instructed the jury to disregard the statements it heard from 29:22 to 31:10 of exhibit 357 and not consider them for any purpose whatsoever. Thereafter, the State resumed publishing exhibit 357, and no further references to Appellant's having been to prison were made.

Analysis

On appeal, Appellant argues that "the statement about [his] previously going to prison made it impossible to remove the harmful effects of the testimony from the minds of the jury, especially considering the nature of the allegations—capital murder." He further argues that, even though the trial court instructed the jury to disregard the statement, "the damage was done." Appellant cites no authority for his argument. *See* TEX. R. APP. P. 38.1(i).

Generally, when evidence comes in, deliberately or inadvertently, which has no relevance to any material issue in the case and carries with it some definite potential for prejudice to the accused, the courts rely on what amounts to an appellate presumption that an instruction to disregard the evidence will be obeyed by the jury. *See* ***Gardner v. State***, 730 S.W.2d 675, 696 (Tex. Crim. App. 1987). In this case, there was a brief, inadvertent, reference to Appellant having been to prison at some point before the trial of this case. There was no mention of what charge Appellant went to prison for, when he went to prison, or the circumstances that led to Appellant going to prison. After the statement was admitted, the court took a brief recess to discuss the matter outside the presence of the jury, and when the trial resumed, the court promptly instructed the jury to disregard the evidence.

We must presume that the jury followed the trial court's instruction to disregard the statement. *See* ***Coble***, 330 S.W.3d at 293. Furthermore, we conclude that a brief, inadvertent reference to Appellant having previously been to prison, without any further detail, was not so inflammatory that the trial court's instruction to disregard could not cure the harm. *See* ***Gardner***, 730 S.W.2d at 679; *see also, e.g.*; ***Francis v. State***, 445 S.W.3d 307, 320 (Tex. App.—Houston [1st Dist.] 2013), *aff'd*, 428 S.W.3d 850 (Tex. Crim. App. 2014). We further note that the evidence produced at trial to prove Appellant's guilt, as previously discussed at length, was substantial. ***Hawkins***, 15 S.W.3d at 77. Thus, we hold that the trial court did not abuse its discretion in denying Appellant's motion for mistrial. ***Coble***, 330 S.W.3d at 292. Appellant's sole issue is overruled.

DISPOSITION

Having overruled Appellant's sole issue, we ***affirm*** the judgment of the trial court.

JAMES T. WORTHEN
Chief Justice

Opinion delivered October 31, 2019.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)

No. 12-18-00349-CR

IN THE COURT OF APPEALS FOR THE
12TH JUDICIAL DISTRICT OF TEXAS AT TYLER

LESTER THOMAS BUTCHER,
APPELLANT

v.

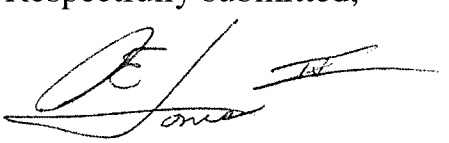
THE STATE OF TEXAS,
APPELLEE

APPELLEE'S BRIEF

FROM THE 420TH JUDICIAL DISTRICT COURT
NACOGDOCHES COUNTY, TEXAS
THE HONORABLE EDWIN A. KLEIN, PRESIDING

TRIAL CAUSE NUMBER F1723232

Respectfully submitted,



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Oral argument is not requested.

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IN THE COURT OF APPEALS FOR THE
12TH JUDICIAL DISTRICT OF TEXAS AT TYLER

LESTER THOMAS BUTCHER,
APPELLANT

v.

THE STATE OF TEXAS,
APPELLEE

APPELLEE'S BRIEF

TO THE HONORABLE COURT OF APPEALS:

COMES NOW, Appellee, the State of Texas, by and through the undersigned Assistant District Attorney, and respectfully submits this brief in response to Appellant, Lester Thomas Butcher, pursuant to Rule 38.2 of the Texas Rules of Appellate Procedure, urging the Court to overrule Appellant's alleged point of error and affirm the judgment and sentence of the trial court in the above-numbered cause.

STATEMENT OF THE CASE

On the 15th day of December, 2017, Lester Thomas Butcher, hereinafter Appellant, was indicted for Capital Murder in cause number F1723232 (1 C.R. 11).

Section 19.03(b) of the Texas Penal Code states that the offense of Capital Murder is a capital felony. Tex. Penal Code §19.03(b). Because the State of Texas did not seek the death penalty in this case, the only punishment for an individual adjudged guilty of this offense is life in prison without parole. Tex. Penal Code §12.31(a)(2).

On the 1st day of October, 2018, voir dire was conducted and a jury was selected (4 R.R. 9:15–141:25). The following day, Appellant pleaded Not Guilty to the charge of Capital Murder, evidence was opened, and the trial began (5 R.R. 14:25, 26:21). On the 11th day of October, 2018, the guilt/innocence portion of the trial concluded and the jury found Appellant guilty of Capital Murder (10 R.R. 89:12–17). Because Appellant was convicted of a capital felony and the State of Texas was not seeking the death penalty, there was no punishment phase of the trial: Appellant was sentenced by the trial court to life in prison without parole (10 R.R. 93:8–94:11).

Appellant's trial counsel, Dan Simmons, filed a Motion for New Trial and a Motion to Withdraw on the 31st day of October, 2018, which were denied and granted, respectively (1 C.R. 232–35). Appellant was appointed Dean Watts as counsel for appeal (1 C.R. 236). Appellant filed his Notice of Appeal on the 18th day of December, 2018 (1 C.R. 55). Appellant's Brief was filed with this Court on the 10th day of April, 2019.

ISSUE PRESENTED

1. Whether the trial court abused its discretion in denying Appellant's motion for mistrial after certain statements contained in law enforcement's interview with Appellant were played before the jury.

STATEMENT OF FACTS

Prior to jury selection and trial, the State of Texas filed its Notice of Intent to Introduce Extraneous Evidence and Notice of State's Intent to Use Prior Convictions for Enhancement (in case Appellant was convicted of the lesser-included offense of Murder) (1 C.R. 166–68, 171–72). Appellant filed two Motions in Limine, as well as a motion to exclude portions of a recording, seeking to exclude evidence of Appellant's prior convictions, extraneous offenses, and/or other bad acts, in the guilt/innocence phase of the trial (1 C.R. 183–88, 199–202). Those motions were granted by the trial court (1 C.R. 205–207). Appellant's motions were primarily aimed at excluding certain recorded statements made during the investigation and interrogation of Appellant, with both parties agreeing that Appellee would mute the recordings at specific times (4 R.R. 5:15–20; 6:11–16). Appellee stated, prior to trial, that they did not expect to get into any of Appellant's prior convictions (4 R.R. 8:6–7).

During Appellee's case-in-chief, three videos of the crime scene and initial investigation (St.'s Ex. 4, 5, 6), a 911 call (St.'s Ex. 52), and an audio recorded

statement of Appellant's interview (St.'s Ex. 357) were played for the jury. In addition to the aforementioned evidence, Appellee also produced testimony from 30 witnesses and walked approximately 375 exhibits into evidence, to include: photographs, evidence recovered from the crime scene in Nacogdoches, Texas, evidence recovered from Appellant's bedroom in Nacogdoches, Texas, evidence recovered from Chandler, Texas (where Appellant was apprehended), DNA reports, forensic reports, a death certificate, and an autopsy report (1 R.R. 3–15).

At issue before this Court is a portion of the audio recorded statement of Appellant in his interview with Texas Ranger Jim Hicks (St.'s Ex. 357), which was played before the jury on the 9th day of October, 2018, with Ranger Hicks on the stand, wherein Appellee was to mute a portion of the recording discussing Appellant's prior time in prison (4 R.R. 5:15–20; 6:11–16). During the second time frame—the 25:30–29:22 times—mentioned in the Appellant's Motion to Exclude (1 C.R. 199–202), Appellee unmuted the audio just after the 29:22 time stamp, as previously agreed upon by the parties (9 R.R. 17:24–18:1). From 29:22 to 31:10, a portion of the discussion between Appellant and Ranger Hicks concerned Appellant's criminal history and was played in the presence of the jury (9 R.R. 21:20–22:12). Upon review of Appellant's Motion to Exclude, specifically the second time frame noted in the list, the range was found to be incorrect, as the time should have been extended to the 31:10 mark. *Id.*

Outside the presence of the jury, Appellant objected to the inclusion of remarks concerning Appellant's mother being upset that he was going to prison, which was a reference to a prior prison trip (9 R.R. 18:19–19:7). Appellant stated that, because the aforementioned audio was played before the jury, Appellee violated the trial court's order on the second Motion in Limine and requested an instruction to disregard. *Id.* Appellee explained to the trial court that (1) Appellee comported with the times that were mentioned in Appellant's motion, (2) the audio was muted during those times, (3) that Appellee wished to go back through all of the timeframes in Appellant's motion to ensure they were correct and no further issues occurred, and (4) noted that Appellee did not intentionally violate either the order excluding certain times or the motions in limine that were granted (9 R.R. 19:13–25). Appellant also indicated that he did not believe Appellee had intentionally violated any of the orders, but that the times may have been out of sync (9 R.R. 20:1–4). Appellant confirmed with the trial court that his objection was sustained, which the trial court confirmed (9 R.R. 20:23–21:3). Appellant then requested an instruction to disregard, and moved for mistrial. *Id.* The trial court informed the parties that the court would instruct the jury to disregard the statements played by Appellee, but denied the motion for mistrial. *Id.*

Both parties and the trial court discussed how best to instruct the jury without repeating what was played, in order to prevent further harm (9 R.R. 22:16–

24:6). The trial court noted that the brevity of the statement and the error was "really not that bad," and the instruction to disregard would cure any error that existed (9 R.R. 25:1–8). Upon return of the jury to the courtroom, the trial court then instructed the jury to disregard by stating: "[Y]ou briefly heard statements being published on State's Exhibit 357, the audio interview. You briefly heard statements from the time frame of 2922 to 3110 of the exhibit. You are to disregard those statements and not consider them for any purpose whatsoever." (9 R.R. 25:14–20).

Appellee concluded publishing the recording (9 R.R. 33:13), Ranger Hicks then provided additional testimony and was excused (9 R.R. 33:14–73:17). Two more witnesses gave testimony: the victim's mother, Mary Bates, was recalled (9 R.R. 74:22) and Appellant's nephew, Alvin Blangger, provided his testimony (9 R.R. 77:12–84:3). At the conclusion of Blangger's testimony, Appellee rested its case-in-chief; Appellant rested immediately thereafter (9 R.R. 84:6–12).

The following morning, on the 10th day of October, 2018, the trial court read the court's charge and jury instructions (10 R.R. 5:18–24:23) and both parties provided closing arguments (10 R.R. 25:2–85:12). The jury deliberated for 97 minutes and returned a unanimous verdict of guilty on the charge of Capital Murder, having been individually polled subsequent to the trial court reading the verdict (10 R.R. 88:11; 89:9–92:2).

SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion in denying Appellant's motion for mistrial. The proper means to cure violations of a motion in limine—wherein evidence of an extraneous offense or bad act have inadvertently been presented before a jury—is a timely objection, an instruction to disregard, and moving for a mistrial. The instruction to disregard is sufficient to cure the harm of a brief, inadvertent reference to an extraneous offense. Appellant is not entitled to have his conviction overturned by this Court. Appellant's conviction and sentence should be upheld.

ARGUMENT

To determine whether the trial court erred, this Court must review the action under an abuse of discretion standard. *Coble v. State*, 330 S.W.3d 253, 292 (Tex. Crim. App. 2010). The trial court's ruling must be upheld if it was within the zone of reasonable disagreement. *Id.* To preserve error regarding the admission of evidence in violation of a motion in limine, the preferred procedure is: (1) a timely, specific objection; (2) a request for an instruction to disregard; and (3) a motion for mistrial. *Young v. State*, 137 S.W.3d 65, 69 (Tex. Crim. App. 2004). All of which was done in this case (9 R.R. 20:23–21:3). Generally, a prompt instruction to disregard will cure inadvertent reference to an extraneous offense. *Ovalle v. State*, 13 S.W.3d 774, 783 (Tex. Crim. App. 2000). The trial court in this case did that

very thing when it instructed the jury "to disregard those statements and not consider them for any purpose whatsoever." (9 R.R. 25:18–20).

"[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." See *Kemp v. State*, 846 S.W.2d 289, 308 (Tex. Crim. App. 1992) (holding that "uninvited and unembellished reference to appellant's prior incarceration" was cured by instruction to disregard); *see also Hudson v. State*, 179 S.W.3d 731, 738 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (holding that harm of testimony of "repeated beatings in the days preceding the incident" was cured by instruction to disregard); *Drake v. State*, 123 S.W.3d 596, 603–04 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (holding reference to extraneous bad acts harmless because trial court instructed jury to disregard). The brief, inadvertent reference to Appellant's prior incarceration was not so inflammatory as to undermine the trial court's instruction to disregard. *See Gardner v. State*, 730 S.W.2d 675, 696–97 (Tex. Crim. App. 1987) (witnesses statement that "[appellant] told me that even when he was in the penitentiary..." was cured by trial court's instruction to disregard).

Again, assuming without deciding that the recording violated the motion in limine, an instruction to disregard is the proper means to cure the harm. *See Kemp*, 846 S.W.2d at 308. Because an instruction to disregard cured the prejudicial effect, if any, of the mention of the extraneous offense or bad act, the trial court did not abuse its discretion by denying Appellant's motion for mistrial. *See Young*, 137 S.W.3d at 72.

Only in extreme circumstances, where the prejudice is incurable, will a mistrial be required. *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004). In reviewing the efficacy of the trial court's curing instruction, we may look at, among other things, (1) the nature of the error, (2) the persistence of the prosecution in committing the error, (3) the flagrancy of the violation, (4) the particular instruction given by the trial court, and (5) the weight of the incriminating evidence. *Waldo v. State*, 746 S.W.2d 750, 754 (Tex. Crim. App. 1988).

In this case, the complained-of evidence had little, if any, context, but it also did not have material relevance to the charged offense (9 R.R. 25:1–8). The audio recording briefly discussed that Appellant's mother was upset about him going to prison (9 R.R. 18:19–19:7). To the extent the evidence may have had context or relevance; the trial court instructed the jury that it was to disregard the statements "and not consider them for any purpose whatsoever." (9 R.R. 25:18–20). The

evidence at issue was a very small part of this (almost) two-week trial. The trial court promptly instructed the jury and Appellant points to no evidence that the jury failed to follow the trial court's instruction to disregard. *Id.* This Court should, then, presume the jury followed the trial court's admonition to disregard the improper evidence. *Hinojosa v. State*, 4 S.W.3d 240, 253 (Tex. Crim. App. 1999).

As to the persistence of Appellee in committing the error, this was the only portion of the recording where Appellant's extraneous acts came before the jury and Appellant objected and requested an instruction (9 R.R. 18:19–19:7); *Waldo*, 746 S.W.2d at 754. These acts were not discussed with testifying witnesses, nor were they argued by Appellee in closing. Moreover, courts of appeal have found that a trial court does not abuse its discretion by denying a motion for mistrial, even when there are multiple references to prior offenses committed by the defendant: because the curative jury instruction was sufficient to correct any harm. *Lusk v. State*, 82 S.W.3d 57, 63 (Tex. App.—Amarillo 2002, pet. ref'd).

The error, if any, was clearly accidental (9 R.R. 19:13–25); *Waldo*, 746 S.W.2d at 754. Appellee had complied with the time frames noted in Appellant's Motion to Exclude. (9 R.R. 19:13–25). The audio was muted during those times. *Id.* Appellee went back through all of the timeframes in Appellant's motion to ensure they were correct, other than the second time listed, so no further issues would occur. *Id.* Appellee also made it clear on the record that they did not

intentionally violate either the order excluding certain times or the motions in limine that were granted. *Id.* Even Appellant did not believe the violation was intentional (9 R.R. 20:1–4).

The trial court was clear when it instructed the jury to disregard the extraneous evidence "and not consider them for any purpose whatsoever." (9 R.R. 25:18–20); *Waldo*, 746 S.W.2d at 754. The court was careful not to repeat to the jury what was played on the recording, at the request of Appellant, so as to not risk causing additional harm by bringing what was played to the attention of the jurors (9 R.R. 22:16–24:6; 25:18–20).

The recording that is the subject of this appeal, was not the sole source of evidence in this case. In fact, Appellee presented overwhelming evidence of Appellant's guilt. *Waldo*, 746 S.W.2d at 754. Appellant had been present in Nacogdoches, next door to the victim's house, on the evening of the murder (5 R.R. 59:19–23; 9 R.R. 79:5–25). The victim was identified as James "Bubba" Steitler (5 R.R. 29:4–10, 106:21–24). The back window to the victim's home had been broken out (9 R.R. 8:9–14). The door to the victim's room had been busted in (5 R.R. 183:18–24, 9 R.R. 7:4–10). Just after the murder, Appellant was overheard coming back into his brother's house (where Appellant had been staying in a bedroom), stating that "We don't have to worry about that [expletive] because he's dead." (9 R.R. 81:3–83:19). Appellant was also overheard saying "If the cops

comes, I was never here." *Id.* Appellant then sped off in his truck. *Id.* Appellant arrived in Chandler, Texas, in the early morning hours after the murder had occurred (6 R.R. 19:1–21:12, 34:7–36:6). Appellant was observed to be covered in blood (6 R.R. 36:7–13, 39:22–25). Appellant requested help cleaning the blood out of his truck (6 R.R. 44:6–11, 52:15–17, 58:21–22). Appellant was observed to take some items, one of which was believed to be a bat, out of the back of his truck and carry them over to a burn barrel and light a fire (6 R.R. 36:7–37:12). A bat and a knife were subsequently recovered from the burn barrel by law enforcement (6 R.R. 104:1–9). A shotgun was recovered under some debris, right next to the burn barrel (6 R.R. 105:7–17, 106:9–22, 126:11–127:22). The shotgun recovered in Chandler, Texas was identified as the shotgun belonging to the victim, where it was last seen the day of the murder next to his bed in his room in Nacogdoches County, prior to the murder (5 R.R. 189:22–190:22). DNA results confirmed Appellant's DNA was present on the bat that was in the burn barrel in Chandler, Texas (St.'s Ex. 355; 7 R.R. 130:6–15). DNA results confirmed the victim's DNA was present on the shotgun that was next to the barrel in Chandler, Texas (St.'s Ex. 356; 7 R.R. 134:2–19). The knife recovered from the burn barrel in Chandler, Texas was matched to another knife and a sheath capable of holding two knives that were located in Appellant's bedroom in Nacogdoches County (9 R.R. 38:1–24, 40:15–41:23). The knife from the burn barrel in Chandler, Texas fit the sheath

located in Appellant's bedroom in Nacogdoches County. *Id.* The autopsy report confirmed the victim died as a result of homicide caused by blunt-force trauma to the head—consistent with being struck with a baseball bat, stab wounds to the head and neck—consistent with being cut with a knife, and a gunshot wound to the arm—consistent with being shot with a shotgun at close range (St.'s Ex. 351; 7 R.R. 143:21–153:9). Finally, Appellant was apprehended in or near Chandler in Henderson County, Texas, where the bat, knife, and shotgun were recovered (7 R.R. 30:3–11; 9 R.R. 14:6–14).

CONCLUSION

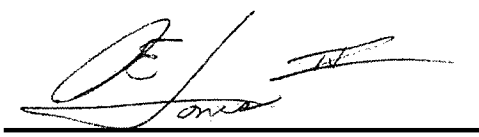
Taking into consideration the totality of the circumstances—the brevity of the recording error, the minor role it may have played, if any, the sole objection as to erroneous disclosure of extraneous incidents, the accidental nature of the disclosure, the curative effect that the instruction would have on the jury, and the established evidence that overwhelming proves Appellant's culpability in this case—the trial court could have reasonably concluded that the complained-of error was not so inflammatory as to be incurable by an instruction to disregard. The error was minor. Therefore, there is no abuse of discretion in the trial court's denial of Appellant's motion for mistrial. The jury's unanimous decision in this case and Appellant's conviction should not be disturbed.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the undersigned counsel for the State of Texas respectfully requests and prays that this Honorable Court overrule the Appellant's Point of Error and affirm the judgment and sentence of the 420th Judicial District Court of Nacogdoches County, Texas.

Respectfully submitted,

ANDREW E. JONES IV
Assistant District Attorney
Nacogdoches County, Texas



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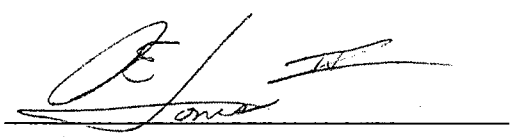
CERTIFICATE OF SERVICE

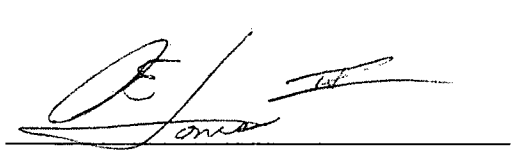
A true copy of the State's brief has been served via hand delivery/e-mail/electronic filing to counsel for Appellant, Dean Watts, on this, the 10th day of June, 2019.



Andrew E. Jones IV

CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4, I hereby certify that this brief contains 3,084 words—excluding the caption, identity of parties, table of contents, index of authorities, signature, proof of service, certification, and certificate of compliance. This is a computer-generated document created in Microsoft Word, using 14-point typeface for all text. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.



Andrew E. Jones IV

IN THE COURT OF APPEALS
TWELFTH APPELLATE DIVISION
STATE OF TEXAS

LESTER THOMAS BUTCHER	§	
APPELLANT	§	
	§	
v.	§	**No. 12-18-00349-CR**
	§	
THE STATE OF TEXAS,	§	
APPELLEE	§	

APPELLANT'S BRIEF

On appeal from Cause Number F1723232
in the 420th District Court, Nacogdoches County, Texas
Honorable Judge Edwin Klein Presiding

Respectfully submitted,

Dean Watts
Attorney for Appellant
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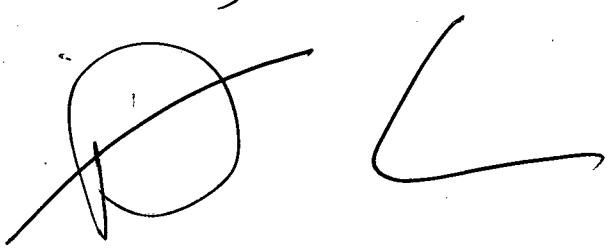
LB



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Appellee ..... The State of Texas

Andrew Jones
Trial & Appellate Counsel
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Nacogdoches, Texas 75961

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TO THE HONORABLE JUSTICES OF THE COURT OF APPEALS:

COMES NOW the Appellant in this cause, by and through his attorney of record, Dean Watts, and pursuant of the provisions of TEX.R.APP.PRO. 38, *et seq.*, files this brief on appeal.

STATEMENT OF THE CASE

Appellant was charged by indictment with the offense of capital murder. The Appellant entered a plea of not guilty before a jury on October 2, 2018 (RR 5, 14). On October 11, 2018 the jury found him guilty and sentenced him to life without parole (RR 10, 93-94). A motion for new trial was filed on October 31, 2018, but was not ruled upon by the court. The Appellant filed notice of appeal on December 17, 2018.

ISSUE PRESENTED

The trial court abused its discretion in denying Appellant's motion for mistrial after the State allowed the jury to hear prejudicial extraneous offense statements contained in the Appellant's recorded interview with law enforcement.

STATEMENT OF FACTS

During the Appellant's trial for capital murder, the Court granted an agreed order on two motion in limines for which the State was to approach the bench before introducing any extraneous offense to the jury (RR 4, 7). However, during the trial Appellant's videotaped statement to law enforcement was played to the jury, in which it was revealed that the Appellant had previously been to prison (RR 9, 20, Exhibit 357,

2922-3110). The Appellant objected, the trial court sustained the objection, and gave the jury an instruction to disregard the evidence (RR 9, 20-25). The Appellant asked for a mistrial, and this request was denied (RR 9, 21).

SUMMARY OF THE ARGUMENT

The trial court abused its discretion in denying Appellant's motion for mistrial after the jury heard about the Appellant having been previously incarcerated in prison.

ARGUMENT

A trial court must exercise its discretion to grant a mistrial if an impartial verdict cannot be reached. *Ladd v. State*, 3 S.W.3d 547, 567 (Tex.Crim.App.199). Generally, "[w]hen objectionable testimony is elicited, inadvertently or deliberately, an appellate court presumes the jury will follow instructions to disregard the evidence." *Drake v. State*, 123 S.W.3d 596, 604 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd). However, a trial court's instruction to disregard does not render such testimony harmless if "'it appears the evidence was so clearly calculated to inflame the minds of the jury or is such damning character as to suggest it would be impossible to remove the harmful impression from the jury's mind.'" *Id.* (quoting *Kemp v. State*, 846 S.W.2d 289, 308 (Tex. Crim. App. 1992)); *accord Bauder v. State*, 921 S.W.2d 696, 698 (Tex. Crim. App. 1996) ("[W]hen it is apparent that an objectionable event at trial is so emotionally inflammatory that curative instructions are not likely to prevent the jury being unfairly prejudiced against the defendant . . . a motion for mistrial may be granted."). An appellate court's review of the propriety of a mistrial is based on the particular facts of

each case and is reviewed under the abuse of discretion standard. *Drake*, 123 S.W.3d at 604.

At trial, the statement about the Appellant previously going to prison made it impossible to remove the harmful effects of the testimony from the minds of the jury, especially considering the nature of the allegations – capital murder. Although the trial court instructed the jury to disregard the testimony, the damage was done.

Therefore, the trial court abused its discretion in failing to grant Appellant's motion for mistrial. Denying Appellant's motion without question affected his substantial rights under TEX. R. APP. PROC. 44.2(b). As result, the trial court committed error in denying Appellant's motion for mistrial.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Appellant prays the Court of Appeals to uphold the point of error, reverse the judgment, and remand the case for a new trial.

Respectfully submitted,

-s- Dean Watts
Dean Watts
Attorney for the Appellant
SBN 24003143
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Fax (936) 559-0959

CERTIFICATE OF SERVICE

A true copy of the Appellant's brief has been provided by hand delivery to the Attorney for the State at 101 West Main Street, Nacogdoches, Texas 75961, and by e-delivery and to the Appellant Lester Butcher, TDCJ# 02223373 at 2101 FM 369 North; Iowa Park, TX 76367 on this, the 10th day of April, 2019.

-s- Dean Watts
Dean Watts
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

This foregoing Appellant's brief has 1019 words, which is in accordance with the provisions of Tex.R.App. 9.4 (i) (3).

-s- Dean Watts
Dean Watts
Attorney for Appellant

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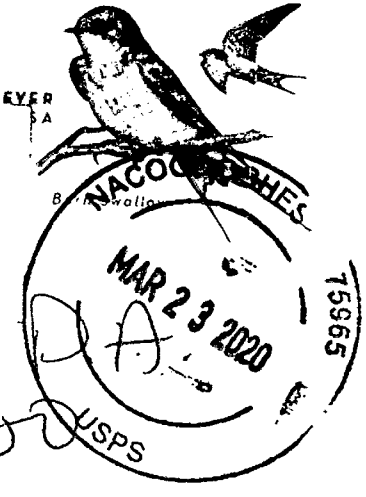

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75961

Andrew Jones

7596134807 C001

No. PD-1322-19

In the Court of Criminal Appeals Texas

LESTER THOMAS BUTCHER, Petitioner

V.

STATE OF TEXAS, Respondent

From the 12th District Court of Appeals, Tyler, Texas

In Cause No. 12-18-00349

Affirming Conviction from the 420th Judicial District Court

Nacogdoches, County, Texas

MOTION FOR REHEARING ON PETITION FOR DISCRETIONARY REVIEW

LESTER THOMAS BUTCHER, Pro Se by Mary Butcher

#02223373 Allred Unit

2101 FM 369 N

Iowa Park, Texas 76367

IDENTITY OF JUDGE, PARTIES AND COUNSEL

Trial Court Judge	The Honorable Judge Klein 101 W. Main St. Nacogdoches, Texas 75961 Telephone: 936-560-7848
Appellant	Lester Thomas Butcher #02223373 Allred Unit TDCJ 2101 FM 369 N Iowa Park, Texas 76367
Appellee	State of Texas Andrew Jones Trial and Appellant Counsel 101 W. Main St. Nacogdoches, Texas 75961 Telephone: 936-560-7766
Appellant Trial Counsel	Dan Simmons 119 North St. Suite B Nacogdoches, Texas 75961 Telephone: 936-234-0795

Appellant Appeal Counsel Dean Watts
120 East Pilar St.
Nacogdoches, Texas 75961
Telephone: 936-559-9288

MOTION FOR REHEARING OF PETITION FOR DISCRETIONARY REVIEW

I, Mary Elizabeth Butcher am drafting this motion at the request of my husband, Lester Thomas Butcher. Mr. Butcher has a reading level of 3.4 out of 12.9 and he was in special education as a child. Mr. Butcher is also diagnosed with dyslexia. Mr. Butcher does not have an attorney and he knows that I am not presenting myself as an attorney or legal professional at all for Mr. Butcher. I am only drafting this document as his wife and at his request. I currently have Power of Attorney over Mr. Butcher and he has asked that I also sign the document on his behalf so that it will reach the Court of Criminal Appeals or by the due date of March 26, 2020.

The Texas Court of Criminal Appeals REFUSED Mr. Butcher's Petition for Discretionary Review on March 11, 2020. The Motion for a Rehearing is due on March 26, 2020. (TRAP 79.1)

Ground for Review

Mr. Butcher is requesting a Rehearing due to the fact and the circumstances that the 12th Circuit Court Appeals affirmed the trial court's decision in part due to the Prosecutor making a false statement in the State's Brief which in turn resulted in the 12th Circuit Court of Appeals making a false statement in their opinion. These statements were in regards to the original error that was addressed in the Appeal to begin with.

Argument

From the Appellee's Brief page 10: "As to the persistence of Appellee in committing the error, this was the only portion of the recording where Appellant's extraneous acts came before the jury and Appellant objected and requested an instruction (9 R.R. 18:19–19:7). This is false. In exhibit

357: Mr. Butcher was asked how long he had done in prison and his response was 17.5 yrs. The jury heard this, therefore that statement is false.

From the 12th Circuit Court of Criminal Appeals Opinion page 5: Thereafter, the State resumed publishing exhibit 357, and no further references to Appellant's having been to prison were made. Once again, this statement is false.

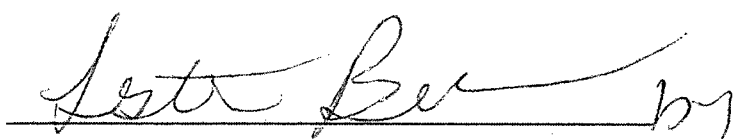
Mr. Butcher is requesting a Rehearing in regards to the Petition for Discretionary Review, given the fact that decisions were made by the 12th Circuit Court of Appeals after they were provided with false information.

This motion is not being filed to delay any time frames

PRAYER FOR RELIEF

Petitioner therefore respectfully requests that the Court of Criminal Appeals grant a rehearing and remand the case back to the trial court to conduct a new trial. Petitioner requests that the court grant any relief, in law or in equity, to which the Petitioner has shown himself justly entitled.

Respectfully submitted,



LESTER THOMAS BUTCHER, Pro Se
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CERTIFICATE OF SERVICE

A true copy of the foregoing document has been delivered via US Postal Service to the Texas Court of Criminal Appeals and to the Nacogdoches County, District Attorney's office.

Lester Butcher

LESTER BUTCHER
#02223373 Allred Unit
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OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS FILE COPY
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

4/23/2020

BUTCHER, LESTER THOMAS Tr. Ct. No. F1723232 PD-1322-19

The Court has this day received the Pro Se Motion for Rehearing. The rehearing is untimely. The rehearing has been received and placed in your file. No action will be taken on this matter.

Deana Williamson, Clerk

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4/23/2020

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Deana Williamson, Clerk

12TH COURT OF APPEALS CLERK
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4/23/2020

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Deana Williamson, Clerk

DISTRICT ATTORNEY NACOGDOCHES COUNTY
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3/11/2020 **COA No. 12-18-00349-CR**
BUTCHER, LESTER THOMAS * Tr. Ct. No. F1723232 **PD-1322-19**

On this day, the Appellant's Pro Se petition for discretionary review has been refused.

Deana Williamson, Clerk

12TH COURT OF APPEALS CLERK
KATRINA MCCLENNY
1517 W. FRONT, ROOM 354
TYLER, TX 75701
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3/11/2020 **COA No. 12-18-00349-CR**
BUTCHER, LESTER THOMAS * Tr. Ct. No. F1723232 **PD-1322-19**

On this day, the Appellant's Pro Se petition for discretionary review has been refused.

Deana Williamson, Clerk

DISTRICT ATTORNEY NACOGDOCHES COUNTY
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3/11/2020 **COA No. 12-18-00349-CR**
BUTCHER, LESTER THOMAS Tr. Ct. No. F1723232 **PD-1322-19**

On this day, the Appellant's Pro Se petition for discretionary review has been refused.

Deana Williamson, Clerk

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