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COURT OF CRIMINAL APPEALS
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NO. 13-15-00514-CR

TO THE COURT OF CRIMINAL APPEALS

FILED
COURT OF CRIMINAL APPEALS
7/12/2017
DEANA WILLIAMSON, CLERK

OF TEXAS

THE STATE OF TEXAS **Appellant,**

v.

JOHN KENNETH LEE **Appellee.**

Appeal from Victoria County

STATE'S PETITION FOR DISCRETIONARY REVIEW

STEPHEN B. TYLER
Criminal District Attorney
Victoria County, Texas
Bar I.D. No. 24008186

BRENDAN W. GUY
Assistant Criminal District Attorney
Victoria County, Texas
Bar I.D. No. 24034895
205 N. Bridge St. Ste. 301,
Victoria, Texas 77901-6576
(361) 575-0468 (Telephone)
(361) 570-1041 (Fax)
bguy@vctx.org (E-mail)

Identity of Judge, Parties, and Counsel

Pursuant to Tex. R. App. P. 68.4(a) (2014), the Judge, parties, and counsel in this suit are:

TRIAL JUDGE:	**The Honorable Daniel Gilliam** **County Court at Law #2** **Victoria, Texas**
APPELLANT:	**The State of Texas**
APPELLEE:	**John Kenneth Lee**
TRIAL PROSECUTOR:	**Jesse Thomas Landes** **State Bar # 24094040** **Public Defender** **133 N. Riverfront Blvd., Suite C-1, LB-2** **Dallas, TX 75207** **James Pink Dickens** **State Bar # 05818800** **Assistant Criminal District Attorney** **205 N. Bridge St., Suite 301** **Victoria, TX 77901-6576**
TRIAL DEFENSE ATTORNEY:	**Patti Lea Hutson** **State Bar # 24032704** **110 E. Constitution St.** **Victoria, TX 77901-8137**
APPELLATE STATE'S ATTORNEY:	**Brendan Wyatt Guy** **State Bar #24034895** **Assistant Criminal District Attorney** **205 N. Bridge St., Suite 301** **Victoria, TX 77901-6576**

APPELLATE DEFENSE ATTORNEY:	**Arnold Keith Hayden, Jr.** **State Bar # 24065390** **P. O. Box 4967** **Victoria, TX 77903-4967**

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No. 13-15-00514-CR

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

THE STATE OF TEXAS, ... Appellant

v.

JOHN KENNETH LEE, ... …….Appellee

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now the State of Texas, by and through its Criminal District Attorney for Victoria County, and respectfully urges this Court to grant discretionary review of the above named cause, pursuant to the rules of appellate procedure.

Statement Regarding Oral Argument

Oral argument is waived.

Statement of the Case

Appellee was charged by information on June 16, 2014 in Cause Number 2-103764 with one count of driving while intoxicated. [CR-I-6]. On October 19, 2015, Appellant's case was called for trial. [RR-II-1]. During the trial, Appellant's

trial counsel requested a mistrial based on the State's opening argument. [RR-III-170-171, 176, 179, 208]. The trial court denied the Appellant's requests. [RR-III-188, 208]. The jury found the Appellant guilty and sentenced him to 180 days in the county jail and a $1,800 fine. [CR-I-32, 37]. On June 15, 2017, the Thirteenth Court of Appeals (hereafter Court of Appeals) reversed the trial court ruling and held that the trial court erred by not granting the Appellant's request for a mistrial. *Lee v. State,* No. 13-15-00514-CR, 2017 WL 2608304 (Tex. App.-Corpus Christi 2017)(pet. filed).

Statement of Procedural History

On June 15, 2017, the Thirteenth Court of Appeals reversed the trial court's ruling denying Appellant's motion for a new trial and remanded the case for a new trial. *Id.* at 15. No motion for rehearing was filed. The State's petition is due July 17, 2017.

Statement of the Facts

On June 16, 2014 the Appellant was charged by information with the offense of driving while intoxicated. [CR-I-6]. Appellant's case was called for trial on October 19, 2015. [RR-II-1].

Prior to the start of voir dire, prosecutor James Dickens informed the Appellant that the blood sample in the case had been destroyed and that he had just found out at noon. [RR-II-4]. The Appellant's attorney indicated she understood

and did not request a continuance. [RR-II-4-5].

During the State's opening argument, prosecutor Jesse Landes argued that the State anticipated it would introduce evidence showing the Appellant had a blood alcohol level of .169. [RR-III-10]. The Appellant did not object to this statement at this time. [RR-III-10]. Instead the Appellant's attorney, Ms. Patti Hutson, argued in her opening statement that she did not believe the State would be able to produce any blood evidence. [RR-III-14].

The State first called Carlos Vasquez to testify. [RR-III-16]. Mr. Vasquez testified that on October 11, 2013, he was stopped at a red light when his vehicle was struck from behind by another vehicle. [RR-III-18]. Mr. Vasquez also established he was injured in this incident, receiving a concussion that required him to receive medical treatment at a hospital, and that he has had ongoing back problems since the incident. [RR-III-21-22].

The State then called a series of witnesses, Mr. Javier Sanchez, Mr. Juan Sanchez, Sergeant Jason Seger, and Officer J.J. Houlton who provided testimony showing it was the Appellant who crashed into Mr. Vasquez's vehicle that night [RR-III-26-27, 29-30, 38-39, 48-49, 51, 76-77] and that the Appellant showed multiple indications of intoxication at the time he struck Mr. Vasquez. [RR-III-28, 40-41, 51-52, 58, 79, 80. 87, 89, 92, 94-96, 97, 101-102, 106].

Sergeant Sager also explained that because Mr. Vasquez had been injured

in the car accident, the police decided to pursue a mandatory blood draw at the hospital. [RR-III-59]. Sergeant Sager then further explained that after consulting with the Victoria County Criminal District Attorney it was also decided to pursue a search warrant for a blood draw. [RR-III-59]. Officer Houlton subsequently described transporting the Appellant to Citizens Medical Center for a blood draw. [RR-III-107-111].

The State next called Beatrice Salazar, the phlebotomist who took the Appellant's blood samples in this case. [RR-III-142, 145]. The Appellant immediately objected to Ms. Salazar's testimony, insisting that since the State did not have the blood vials this witness would have nothing about which to testify. [RR-III-143-144]. The Appellant also insisted the State would not be able to prove any chain of custody for the blood evidence in this case. [RR-III-144]. The trial court permitted the State to proceed with its questioning. [RR-III-144]. Ms. Salazar then testified to the procedures she utilizes to draw blood. [RR-III-146-150].

The State next called Sergeant Kelly Luther of the Victoria Police Department [RR-III-160]. Sergeant Luther confirmed that the blood samples for the Appellant had been destroyed. [RR-III-163].

The State next called Gene Hanson, section supervisor at the Texas Department of Public Safety in Weslaco. [RR-III-167]. The State attempted to

question Mr. Hanson about whether he received a blood sample from the Appellant and the Appellant objected. [RR-III-168]. The trial court then convened a hearing outside the presence of the jury concerning this testimony. [RR-III-168-169].

Once the jury was out of the room, the Appellant made a request for a mistrial based on the State's opening argument. [RR-III-170-171]. The Appellant did not request an instruction for the jury to disregard the portion of the State's opening argument concerning the blood test results. [RR-III-170-171]. The Appellant counsel also conceded she knew the State did not have the blood test evidence prior to the State's opening argument. [RR-III-171].

The State responded to this argument by explaining why it believed it would be able to get the blood test results admitted even without the blood samples. [RR-III-172-173].

The Appellant would twice more during this hearing request a mistrial. [RR-III-176, 179]. The Appellant never requested the jury be instructed to disregard the State's opening statement. [RR-III-170-179].

The trial court asked the State how it intended to prove that the blood that was tested at the forensic laboratory came from the Appellant. [RR-III-180]. The prosecutor answered that Officer Houlton testified to the Victoria Police Department case number and that case number would match the number on the Department of Public Safety laboratory results and that there would also be other

identifiers on the laboratory report that would match up with the Appellant. [RR-III-180].

The Appellant then proceeded with the voir dire examination of Mr. Hanson. [RR-III-182]. During that examination, the Appellant asked Mr. Hanson how he would be able, without the actual blood vials, to establish that the blood he tested came from the Appellant. [RR-III-186]. Mr. Hanson answered this question by explaining that part of his case notes includes documenting that he verified that the name on the submission form matches the name on the blood tube, and that the laboratory case number is the same case number that is on the blood tube kit box. [RR-III-187]. Mr. Hanson also noted that he would have noted any such discrepancies if the name or number had not matched. [RR-III-187].

After hearing Mr. Hanson's testimony, the trial court ruled it would allow the State to continue with trying to prove the chain of custody. [RR-III-188]. The trial court also issued a motion in limine against the State asking any question concerning the actual blood results without first getting clearance from the court. [RR-III-188-189].

At no time during the voir dire hearing for Mr. Hanson did the Appellant make any objection against the blood test evidence based on a claim that its collection might have been unconstitutional due to at least one of the blood samples being drawn pursuant to the mandatory blood draw statute. [RR-III-169-

189].

Upon trial resuming, Mr. Hanson testified as to how he knew the blood he had tested came from the Appellant. [RR-III-193-194]. The State then approached the trial court in compliance with the motion in limine and informed the trial court of its intent to enter the laboratory report into evidence. [RR-III-200]. The trial court then convened another hearing outside the presence of the jury. [RR-III-200-201].

The Appellant then renewed his objections on the grounds he had not been permitted to inspect the blood evidence and to the lack of adequate chain of custody in this case. [RR-III-201-202]. The Appellant counsel also argued that she did not know if the blood that had been tested came from the first or second blood draw. [RR-III-202-203]. The Appellant did not make any objection based on a blood draw done pursuant to the mandatory blood draw statute being impermissible. [RR-III-201-203].

After hearing all of the arguments, the trial court sustained the Appellant's objection and ruled the blood test results would be inadmissible. [RR-III-205]. The Appellant did not renew his request for a mistrial at this point. [RR-III-205]. The Appellant again did not ask for an instruction to disregard the portion of the State's opening argument concerning the blood tests results. [RR-III-205].

After both sides had rested a charge conference was held, and the Appellant

again asked for a mistrial due to the State's opening argument. [RR-III-208]. The trial court denied that request. [RR-III-208]. The Appellant again did not request any sort of instruction to disregard. [RR-III-208].

The charge of the court instructed the jury that the evidence in this case was the testimony presented and the exhibits admitted in open court. [CR-I-29; RR-III-212]. The charge further instructed the jury that the argument and statements of the attorneys are not evidence and cannot be considered in the jury's determination of the disputed facts in the case. [CR-I-29; RR-III-212]. The charge also instructed the jury that they could only find the Appellant guilty of the charged offense if they found it proven by the evidence beyond a reasonable doubt. [CR-I-29; RR-III-212]. The charge did not define "Intoxicated" in regards to alcohol concentration [RR-I-28] and did not authorize the jury to convict under any theory of intoxication related to having an alcohol concentration greater than .08. [CR-I-28-30].

The State's closing argument made no references to the blood test evidence. [RR-III-215-220, 224-226].

The jury found the Appellant guilty of the charged offense. [CR-I-32]. The jury subsequently sentenced the Appellant to 180 days in the county jail and a $1,800 fine. [CR-I-37].

On October 23, 2015 the Appellant filed a motion for new trial. [CR-I-3, 51-

60]. Amongst other grounds, that motion alleged that the trial court had committed reversible error by not granting Appellant's motion for a mistrial [CR-I-51] and also included an allegation of prosecutorial misconduct in claiming that the prosecutors on the case mentioned the blood test results in the State's opening argument despite knowing the State would not be able to get the blood test results admitted at trial. [CR-I-52].

On October 28, 2015 the State filed an answer to the Appellant's motion for new trial. [CR-I-67-85]. The State's answer included sworn affidavits from the two prosecutors on the case, Mr. Jesse Landes and Mr. James Dickens where both explained why they believed the blood test evidence would be admissible in the case. [CR-I-79-80; 82-83]. The trial court did not rule on Appellant's motion for new trial. [CR-I; SCR-I].

On June 15, 2017, the Thirteenth Court of Appeals found that the trial court abused its discretion in denying Appellant's motion for a mistrial and reversed and remanded the case for a new trial. *Lee,* 2017 WL 2608304 at 15.

Ground for Review

I. The Court of Appeals decided an important question of state law in a way that conflicts with applicable decisions of the Court of Criminal Appeals when it found the State's opening argument to constitute error.

II. The Court of Appeals decided an important question of state law in a way that conflicts with applicable decisions of the Court of Criminal Appeals when it found the Appellant did not have to make a timely objection in order to preserve a claim of error related to the State's opening argument.

III. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings in finding that an instruction to disregard would not have cured any potential prejudice in this case as to call for an exercise of the Court of Criminal Appeals' power of supervision

Argument and Authorities

I. The Court of Appeals decided an important question of state law in a way that conflicts with applicable decisions of the Court of Criminal Appeals when it found the State's opening argument to constitute error.

Article 36.01 of the Texas Code of Criminal Procedure establishes that the purpose of the State's opening argument is to "state to the jury the nature of the accusation and the facts which are expected to be proved by the State in support thereof." Furthermore, this Honorable Court has consistently held that it is not error for a prosecutor to tell the jury in opening statement what they expect to prove, even if the prosecutor does not later offer such proof at trial. See *Matamoros v. State*, 901 S.W. 2d 470, 475 (Tex. Crim. App. 1995); *Marini v. State*, 593 S.W. 2d 709, 715 (Tex. Crim. App. 1980). Logically if it is not error to reference in the prosecution's opening statement evidence that the State ultimately does not even try to submit to the jury then it cannot be error for a prosecutor to

reference evidence in their opening statement that the State makes a good faith effort to get admitted into evidence even if the State is ultimately unsuccessful at obtaining the admissibility of that evidence.

Unfortunately, the Court of Appeals disregarded this long established precedent by finding that it was reversible error for the trial court not to grant a mistrial after the State mentioned the Appellant's blood test results in its opening argument and was ultimately unable to get the blood test results admitted into evidence. See *Lee*, 2017 WL 2608304 at 11. Instead the Court of Appeals concluded it is only when evidence is admissible that there is no error when the prosecution refers to that evidence during its opening statement. *Id.* at 12. Essentially the Court of Appeals changed the standard for evaluating the legality of an opering argument from whether the prosecutor had a good faith belief that the referenced evidence would be admissible to whether the evidence actually was admissible.

The Court of Appeals holding thus represents a radical departure from established Court of Criminal Appeals precedent concerning what is permissible argument in opening statements. Far from the generous standard this Honorable Court has heretofore permitted (a standard that is necessary to enable the State to comply with the mandate of Article 36.01 to explain what facts it expects to prove), the Court of Appeals approach means that the State makes an opening

argument at its own risk, with the threat of a mistrial hanging over the State's head should the State be unable to prove anything that it mentioned in its opening argument. Such a highly restrictive and punitive approach will, if allowed to stand, inevitably have a chilling effect on the ability of prosecutors to provide proper opening statements since prosecutors will be forced to choose between giving extremely guarded opening statements where they only reference the evidence they are absolutely certain will be admitted (and thus end up producing rather banal opening statements that do little to explain the contested facts of the case to the jury) or risk mistrial if they try to fully comply with Article 36.01 by mentioning evidence that might not ultimately be admitted. Either way the prosecutor's ability to present their case is unfairly impeded, an intolerable result that should not be allowed to stand.

Therefore since the Court of Appeals ruling effectively and improperly overrules established Court of Criminal Appeals precedent in *Marini* and *Matamoros* and largely renders Article 36.01 a nullity, this petition should be granted so that the Thirteenth Court of Appeals' approach to evaluating the legality of opening argument can be brought back in line with the rest of the State.

II. The Court of Appeals decided an important question of state law in a way that conflicts with applicable decisions of the Court of Criminal Appeals when it found the Appellant did not have to make a timely objection in order to preserve a claim of error related to the State's opening argument.

Even more troubling though is that the Court of Appeals also deviated from established Court of Criminal Appeals precedent when it allowed the Appellant to appeal on the issue of the denial of Appellant's motion for mistrial despite the Appellant failing to make a timely objection at trial to the State's opening argument.

To preserve error for appellate review, the complaining party must make a timely, specific objection. See Tex.R. App. P. 33.1(a); *Dixon v. State,* 2 S.W. 3d 263, 265 (Tex. Crim. App. 1998). The requirement of timeliness means the objection must be made at the earliest possible opportunity. *Marini*, 593 S.W. 2d at 714. If possible this should be done before the objectionable evidence is actually admitted, but if that is not possible than the objection must occur as soon as the objectionable nature of the evidence becomes apparent. See *Ethington v. State,* 819 S.W. 2d 854, 858 (Tex. Crim. App. 1991).

In this case the Appellant knew prior to the start of trial that the blood test evidence had been destroyed. [RR-II-4-5]. And since Appellant's entire basis for objecting to the reference to the blood test evidence is based around the fact that the blood test evidence had been destroyed, that in turn means that the Appellant

already had the basis to know to object when the State mentioned the blood test results. (The fact that the Appellant subsequently mentioned in her own opening argument that the State would not be able to get the blood test results admitted into evidence also makes clear that the Appellant already knew enough to be able to object at the time of the State's opening argument.) [RR-III-14]. But despite the Appellant being fully aware that the blood test evidence had been destroyed, the Appellant did not make any sort of objection when the State mentioned the blood test results in its opening argument. [RR-III-10].

Since Appellant failed to object at the first opportunity to the reference to the blood test results, Appellant plainly waived any claim of error related to the State's opening argument (which would obviously include waiving any claim of error related to the trial court denying a motion for mistrial since the Appellant's only justification for a mistrial was based on the State's opening argument.) But in spite of that clear waiver, the Court of Appeals inexplicably allowed the Appellant's appeal to go forward on this issue. The Court of Appeals opinion offers no explanation as to why it permitted the Appellant to appeal an issue for which the Appellant did not make the required timely objection at trial. The opinion acknowledges that the Appellant did not object at the time of the State's opening argument but then otherwise completely ignores the State's waiver argument. See *Lee*, 2017 WL 2608304 at 13. Thus it appears that the Court of Appeals simply

decided to ignore established Court of Criminal Appeals precedent concerning the obligation to make a timely objection to preserve error. See *Dixon,* 2 S.W. 3d 263, 265 (Tex. Crim. App. 1998).

The requirements for a timely objection exist for a good reason. They insure that both the trial court and the opposing party have the opportunity to cure any possible defect as soon as it occurs and before such a defect can do irreparable damage to the trial process. See *Garza v. State,* 126 S.W. 3d 79, 82 (Tex. Crim. App. 2004). And indeed the Court of Appeals' own opinion helps demonstrate why timely objections are of such importance. The Court of Appeals opinion specifically mentions the fact that the State called multiple witnesses to try and get the blood test evidence admitted as a factor that increased the prejudice against the Appellant during this trial. See *Lee,* 2017 WL 2608304 at 13. But if the Appellant had made a timely, specific objection at the beginning of the trial, then it is entirely possible that those witnesses would never have been called (or at least that they would not have testified before the jury). Thus the Court of Appeals' own opinion highlights just why it is essential to require timely, specific objections at the first opportunity, which makes it all the more troubling that the Court of Appeals did not hold the Appellant to that long standing obligation but instead allowed the Appellant to pursue an appeal even after the Appellant failed to make the required timely objection.

This departure from established Court of Criminal Appeals precedent by the Court of Appeals is dangerous. The integrity of the trial process depends on timely objections to give the parties a chance to cure any errors as soon as possible, and timely objections will only occur if there is a consequence for failing to timely object. There is no justification in law or if fact for the Court of Appeals' departure from established Texas law and thus this petition should be granted on this ground as well so that the Court of Appeals approach to error preservation can be brought back in line with established Texas law.

III. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings in finding that an instruction to disregard would not have cured any potential prejudice in this case as to call for an exercise of the Court of Criminal Appeals' power of supervision

The Court of Appeals holding not only overturned a jury verdict but also found that the trial court abused its discretion in denying the Appellant's motions for a mistrial. *Lee*, 2017 WL 2608304 at 15. That is an extremely serious claim to make against a trial judge as an abuse of discretion only occurs if a trial court's ruling was arbitrary or unreasonable. See *Webb v. State*, 232 S.W. 3d 109, 112 (Tex. Crim. App. 2007). There is insufficient basis in law or in facts to support the Court of Appeals holding that the trial court abused its discretion and as such the Court of Appeals ruling constitutes a severe departure from the accepted and usual course of judicial proceedings that necessitates the exercise of the Court of

Criminal Appeals' power of supervision to correct.

A mistrial is a severe remedy that is only appropriate in extreme circumstances for a narrow class of highly prejudicial and incurable errors. See *Ocon v.State,* 283 S.W. 3d 880, 884 (Tex. Crim. App. 2009). Furthermore, if an instruction to disregard would have cured the alleged error, then the failure to seek such an instruction forfeits appellate review for the class of events that could have been cured by the instruction. See *Young v. State,* 137 S.W. 3d 65, 70 (Tex. Crim. App. 2004). In this case when the Appellant finally did make their untimely objection to the State's opening argument, the Appellant did not request an instruction to disregard or any other less curative measure but instead immediately sought a mistrial. [RR-III-170-171, 176, 179, 208]. Nevertheless, the Court of Appeals found the Appellant did not waive their claim of error because the Court of Appeals held that only a mistrial could cure the alleged error in this case. *Lee,* 2017 WL 2608304 at 14. Such a holding is plain error.

The presumption is that instruction to disregard will be effective unless unless the specific facts of the case suggest the impossibility of its effectiveness. See *Waldo v. State,* 746 S.W. 2d 750, 754 (Tex. Crim. App. 1988). And in this case the specific facts of the case do not support that an instruction to disregard would have been ineffective. The alleged error was a single isolated reference by the prosecutor at the start of trial. [RR-III-10]. The State never again mentioned the

alcohol concentration level or made any argument that the Appellant had an alcohol concentration above the legal limit. [RR-III]. The State also freely acknowledged that the blood evidence was destroyed by agents of the State. [RR-III-163]. The trial court subsequently gave the jury a specific instruction that they could only decide the case based on the evidence and that the arguments of the attorney's were not evidence [CR-I-29; RR-III-212], and the jury charge also did not contain any sort of definition of intoxication related to alcohol concentration or authorize conviction based on the Appellant's alcohol concentration. [CR-I-28-29].

To believe that the prosecutor's opening statement permanently and irrevocably tainted the jury, it would be necessary to conclude that the jury ignored the trial court's instructions and convicted the Appellant under a theory of intoxication that was not even presented to them based on a single unsubstantiated statement that the prosecutor made in their opening argument and despite the fact that it was agents of the State that were responsible for the Appellant' blood evidence not being before the court. Such a tortured sequences of events is much too far-fetched as to be sufficient basis to conclude the trial court abused its discretion in denying the Appellant's request for a mistrial.

Nor is it plausible that the State's subsequent efforts to lay the foundation for the blood test evidence would have unduly heightened the prejudicial effect of

the State's opening argument. Dry technical testimony concerning how blood samples are collected and analyzed is hardly the kind of inflammatory testimony that will stir the hearts of jurors and compel them to ignore their oaths to obey the instructions of the trial court.

Furthermore, instructions to disregard have repeatedly been deemed adequate to cure error under far more inflammatory circumstances than those at issue in the present case. See *Adams v. State,* 156 S.W. 3d 152, 157-158 (Tex. App.-Beaumont 2005, no pet)(holding a reference to a Portable Breath Test having a result above .08 was cured by an instruction to disregard); *Hollier v. State,* 14-99-01348-CR, 2001 WL 951014 at 5 (Tex. App.-Houston [14th Dist] 2001, no pet)(mem. op. not designated for publication)(holding that an instruction to disregard cured the improper testimony correlating HGN test results with blood-alcohol levels); *Berry v. State,* 13-01-241-CR, 2002 WL 406978 at 2 (Tex. App.-Corpus Christi 2002, no pet.)(not designated for publication)(holding that an instruction to disregard was sufficient to cure any error from the improper admission of a defendant's prior convictions); *Johnson v. State,* 83 S.W. 3d 229, 232 (Tex. App.-Waco 2002, pet. ref'd)(holding that an instruction to disregard was sufficient to cure error from the prosecutor commenting on a defendant's post-arrest silence); *Decker v. State,* 894 S.W. 2d 475, 477 (Tex. App.-Austin 1995, pet. ref'd)(holding that an instruction to disregard was sufficient to cure any error from

the prosecutor's voir dire implying the defendant might have molested other children.) If an instruction to disregard can cure something as extremely inflammatory as a prosecutor implying that a defendant might be a serial child sex offender then an instruction to disregard is certainly sufficient to cure a statement about blood test results.

An instruction to disregard would have been sufficient to have cured the alleged error from the State's opening argument. As such the Appellant waived any claim of error by seeking a mistrial without first requesting an instruction to disregard. For the Court of Appeals to rule otherwise and hold that the trial court abused its discretion in denying the Appellant's motions for a mistrial constitutes a severe departure from the accepted and usual course of judicial proceedings in this state that warrants the Court of Criminal Appeals exercising its power of supervision.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, the State prays that this Honorable Court grant this Petition for Discretionary Review and reverse the decision of the Court of Appeals.

Respectfully submitted,

STEPHEN B. TYLER
CRIMINAL DISTRICT ATTORNEY

/s/ Brendan W. Guy
Brendan W. Guy
Assistant Criminal District Attorney
SBN 24034895
205 North Bridge Street, Suite 301
Victoria, Texas 77902
Telephone: (361) 575-0468
Facsimile: (361) 576-4139
E-mail: bguy@vctx.org

ATTORNEYS FOR THE APPELLANT,
THE STATE OF TEXAS

CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(3), I certify that the number of words in Appellant's Petition for Discretionary Review submitted on July 12, 2017, excluding those matters listed in Rule 9.4(i)(3) is 4,407.

/s/ Brendan W. Guy
BRENDAN W. GUY
Assistant Criminal District Attorney
SBN 24034895
205 N. Bridge St., Suite. 301
Victoria, TX 77901
Telephone: (361) 575-0468
Facsimile: (361) 576-4139
E-mail:bguy@vctx.org

ATTORNEY FOR APPELLANT,
THE STATE OF TEXAS

CERTIFICATE OF SERVICE

I certify that a true and correct copy of Appellant's Petition for Discretionary Review has been served on Arnold Hayden, Attorney for the Appellee by electronic mail, and on Stacey Soule, State Prosecuting Attorney, by depositing same in the United States Mail, postage prepaid on the day of July 12, 2017.

/s/ Brendan W. Guy
BRENDAN W. GUY
Assistant Criminal District Attorney
SBN 24034895
205 N. Bridge St., Suite 301
Victoria, TX 77901
Telephone (361) 575-0468
Facsimile: (361) 576-4139
E-mail: bguy@vctx.org

ATTORNEY FOR APPELLANT,
THE STATE OF TEXAS

APPENDIX

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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

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[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). This 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.*; *see* 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

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[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. *See 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.