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COURT OF CRIMINAL APPEALS
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No. PD-1389-16

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

LUIS MIGUEL HERNANDEZ, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Tarrant County

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

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FILED IN
COURT OF CRIMINAL APPEALS

January 5, 2017

ABEL ACOSTA, CLERK

NAMES OF ALL PARTIES TO THE TRIAL COURT'S JUDGMENT

*The parties to the trial court's judgment are the State of Texas and Appellant, Luis Miguel Hernandez.

*The case was tried before the Honorable Louis Sturns, Presiding Judge of the 213th District Court in Tarrant County, Texas.

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No. PD-1389-16

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

LUIS MIGUEL HERNANDEZ, Appellant

v.

THE STATE OF TEXAS, Appellee

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now the State of Texas, by and through its State Prosecuting Attorney, 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

The State does not request oral argument.

STATEMENT OF THE CASE

Appellant was convicted of murder. The court of appeals reversed, holding that defense counsel did not have to request a mistrial to preserve his complaint that an improper jury argument involving a racial slur went uncured.

STATEMENT OF PROCEDURAL HISTORY

The court, in a published opinion written by Justice Dauphinot, reversed appellant's conviction on November 3, 2016.[1] Justice Walker concurred, and Justice Sudderth dissented. No motion for rehearing was filed, but a motion for extension of time to file the State's petition was granted on December 6, 2016. The State's petition is due January 4, 2017.

GROUNDS FOR REVIEW

1. **Is the "right" not to be subjected to improper jury argument forfeitable?**

2. **Is there a word so inflammatory that its mere mention in closing arguments incurably taints the entire trial?**

ARGUMENT AND AUTHORITIES

This Court has made it clear that an appellant may not complain about improper jury argument unless he obtains an adverse ruling at trial. The court of appeals disregarded this rule because the prosecutor argued that appellant called the victim and his family "niggas." Do the recognized rules for preservation cease to apply when someone uses a bad word?

At trial

Appellant was convicted for murdering Devin Toler. Toler, who lived upstairs

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[1] *Hernandez v. State*, No. 02-14-00498-CR, __S.W.3d__, (Tex. App.–Fort Worth 2016).

from appellant, was sleeping with appellant's wife.[2] After appellant found out, he was verbally hostile towards Toler on multiple occasions.[3] Appellant told a detective that, on the evening of the murder, he used "racial slurs" and "cuss words" towards Toler that "provoked" Toler into coming towards him.[4] A struggle ensued, and appellant fatally stabbed Toler with a knife.[5]

Self-defense and provocation were hotly contested issues. The defense argued that appellant did not provoke Toler; it was Toler who provoked the entire situation by sleeping with appellant's wife, and who confronted appellant and placed him in a choke hold.[6] The defense's final words to the jury were, "Not Luis' actions, Devin's actions."[7] The State immediately responded in rebuttal:

> Thank you, Judge, Counsel.
>
> What were the words of provocation? I'll tell you what the words of provocation were. Luis called Devin and his family "niggas." That's what it was.[8]

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2 3 RR 22. Toler also worked with appellant's wife at Subway. 3 RR 24.

3 3 RR 26-27.

4 3 RR 156.

5 3 RR 31-34, 128-29 (medical examiner's testimony).

6 4 RR 25-31.

7 4 RR 32.

8 4 RR 33. The entire exchange, from objection to jury instruction, is appended.

Defense counsel objected twice, saying this was outside the record.[9] His objection was overruled the second time.[10] After a further complaint was overruled and he expressed his exasperation, counsel was invited to the bench.[11] At the bench, defense counsel said "that word" was inflammatory and not in the record.[12] The State argued that it can be inferred from the fact that a "racial slur" was used and because Toler was black, but the trial court instructed her to say "racial slur" instead of "the actual word."[13] Once back in front of the jury, the trial court sustained the objection.[14] Upon request, and using the language requested, the trial court instructed the jury to, "Disregard the comment of Counsel."[15] Appellant did not object to the instruction or request additional relief.

On appeal

Appellant argued that, "There is no doubt that the kind and nature of the offensive term 'nigga' transcends anything that could be told to a jury hearing the

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[9] 4 RR 33.

[10] 4 RR 33.

[11] 4 RR 33.

[12] 4 RR 33-34.

[13] 4 RR 34.

[14] 4 RR 34.

[15] 4 RR 34.

same to disregard."[16] He compared it to "a most heinous and explosively emotional and discriminatory 'fighting word[,]'"[17] and concluded that preserving error was unnecessary under the circumstances.[18]

The court of appeals reversed in split opinions. Writing the court's opinion, Justice Dauphinot acknowledged that a defendant is required to obtain an adverse ruling to preserve a complaint about improper jury argument but concluded that, "Logically, this position makes no sense."[19] "[I]f the argument is so prejudicial that it has deprived the defendant of a fair trial, the injury is fundamental."[20] On the merits, she said that the trial court's ruling was unclear and that "defense counsel's request [to disregard] could equally be seen as an apology to the bench and a request that the jury be instructed to disregard defense counsel's exchange with the bench."[21] After viewing the improper argument "in the context of the political atmosphere at the time of trial[,]"—including officer-involved shootings and the Black Lives Matter movement—she concluded that the trial court's "perfunctory instruction to disregard"

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[16] App. Br. at 18.

[17] App. Br. at 18.

[18] App. Br. at 19.

[19] Slip op. at 8-9.

[20] Slip op. at 9-10 (citing *Marin v. State*, 851 S.W.2d 275, 281-82 (Tex. Crim. App. 1993)). This portion of *Marin* dealt with the inapplicability of harm analysis, not preservation.

[21] Slip op. at 13.

could not cure the harm caused by the prosecutor's statement.[22] As a result, appellant's complaint was "adequately preserved" without a request for a mistrial.[23]

Justice Walker concurred. In her view, the closing argument constituted prosecutorial misconduct that "directly undermined Appellant's sole defense by attributing the use of the racially inflammatory word 'niggas' to Appellant and by telling the jury that Appellant referred to the deceased's family as 'niggas,' when neither of these facts are in the record or inferable from the record."[24] She excused the "general rule" that appellant's failure to request a mistrial forfeited his complaint because prosecutorial misconduct that vitiates "fundamental fairness" need not be preserved.[25]

Complaints about improper argument are forfeitable.

As the dissent pointed out[26] and Justice Dauphinot acknowledged, this Court has been clear that "a defendant's 'right' not to be subjected to incurable erroneous jury arguments is one of those rights that is forfeited by a failure to insist upon it."[27]

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[22] Slip op. at 13-16. The dissent called the instruction "milquetoast." Dissent at 3.

[23] Slip op. at 16.

[24] Concurrence at 6. Justice Walker said it was not rational to infer the term given the number of racial slurs for black people. Concurrence at 6 n.3.

[25] Concurrence at 7 n.4.

[26] Dissent at 2-3.

[27] *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996) (citing *Marin*, 851 S.W.2d at 279). *See also Threadgill v. State*, 146 S.W.3d 654, 670 (Tex. Crim. App. 2004) (reaffirming *Cockrell*); *Mays v. State*, 318 S.W.3d 368, 394 (Tex. Crim. App. 2010) (citing *Threadgill*, *Cockrell*,

The result is no different when the complaint is framed as prosecutorial misconduct.[28] Unlike the dissent, however, Justice Dauphinot chose to disregard this Court's clear precedent. Knowingly ignoring this Court's holdings to achieve a desired result is such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.[29]

In fact, this is the rare case in which summary remand is appropriate. Defense counsel insisted upon his objection and obtained a favorable ruling. The trial court then gave the exact instruction defense counsel requested. If counsel was dissatisfied with the instruction or, upon further consideration, believed a fair trial could no longer be had, he should have said something at a time when the trial court was in a position to do something about it.[30] There is no reason to entertain complaints about the inadequacy of the requested instruction or to spend precious resources on multiple levels of appeal when a simple request could have fixed everything or cut an unfair trial short. The dissent was correct that the law is clear.[31] If appellant wishes to

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and Rule 33.1).

[28] In *Estrada v. State*, this Court reiterated that 1) jury arguments require objection regardless of their characterization, and 2) the claim that such arguments are incurable requires a request for mistrial. 313 S.W.3d 274, 303 (Tex. Crim. App. 2010).

[29] TEX. R. APP. P. 66.3(f).

[30] *See Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992) (describing the standard for objections in plain language).

[31] TEX. R. APP. P. 66.3(e) (listing as a consideration for granting review "whether the justices of a court of appeals have disagreed on a material question of law necessary to the court's disposition").

change established precedent after it is followed by the court of appeals, he may file a petition for discretionary review.

Alternatively, Justice Dauphinot and Justice Walker both refer to the injury as being "fundamental" in some way. If either is an allusion to the fundamental error doctrine, *i.e.*, error that can be reviewed without objection,[32] this Court is currently considering whether that doctrine can coexist with *Marin*.[33] Of note, the alleged error in that case—a judge's participation in witness examination—has not been categorized under *Marin*. Whether the fundamental error doctrine, if it persists, can be used to circumvent an already-established *Marin* categorization, as in this case, is an important question of state law that should be settled by this Court.[34]

There is no magic word that renders a trial incurably unfair.

Criminal cases sometimes involve horrific or disgusting facts. In *Kansas v. Carr*, the perpetrators forced two women to perform sex acts on each other, forced male victims to have sex with both women, and raped the women before shooting all five victims in the head.[35] In *Estrada v. State*, the defendant choked a woman, stabbed her eight times in the back and five times in the back of the head and neck,

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[32] *See Saldano v. State*, 70 S.W.3d 873, 887 (Tex. Crim. App. 2002).

[33] Abraham Jacob Proenza v. State, PD-1100-15 (submitted April 13, 2016).

[34] TEX. R. APP. P. 66.3(b).

[35] 136 S. Ct. 633, 638-39 (2016).

and left her body for her father and siblings to find.[36] In *Miller v. State*, the defendant placed his penis on his three-month-old daughter's sexual organ.[37] Despite the evidence the jury must consider in such cases, it is presumed to follow the trial court's instructions and afford the defendant a fair trial.[38] Yet this court of appeals held that there was no coming back from a single mention of the word "niggas."

The court of appeals apparently does not consider its utterance, without more, to irrevocably taint a jury trial; that word (or a variation) appears in over twenty cases it has decided.[39] Given the strong presumption that juries follow instructions, the court of appeals should have explained why the prejudice from even an "exceptionally offensive and inflammatory"[40] racial slur could not be cured by the requested instruction to disregard. Was "niggas" incurably inflammatory because it was not in evidence? Assuming that the jury could not have rationally inferred the specific term, having already heard that appellant used a racial slur would have

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[36] 313 S.W.3d at 279.

[37] 457 S.W.3d 919, 920 (Tex. Crim. App. 2015).

[38] *Gardner v. State*, 730 S.W.2d 675, 696 (Tex. Crim. App. 1987) ("In essence, this Court puts its faith in the jury's ability, upon instruction, consciously to recognize the potential for prejudice, and then consciously to discount the prejudice, if any, in its deliberations.").

[39] *See, e.g.*, *Trotty v. State*, No. 02-12-00537-CR, 2014 Tex. App. LEXIS 6159, *7 (Tex. App.–Fort Worth June 5, 2014, no pet.) (authored by Justice Dauphinot) (note written by defendant saying, "Cuzz do not let that nigga come to trial on me. He tha only witness they got Without him they dont got no case."); *Hicks v. State*, No. 02-04-00393-CR, 2005 Tex. App. LEXIS 4388, *3 (Tex. App.–Fort Worth June 9, 2005, pet. ref'd) (explaining that the defendant, while in jail awaiting trial, at one time "wore a white hood with coke bottle eyes in it, stating, 'Fuck all you niggers.'").

[40] Concurrence at 6 n.3.

greatly reduced whatever shock the prosecutor's language might have caused. Was it incurable because of the "political atmosphere at the time of trial"?[41] Harm analysis should not vary with current events. Moreover, the court of appeals did not even try to determine whether the jury—the people whose sensitivities actually matter—was aware of the "racial conflicts" listed in the court's opinion.[42]

Other possible explanations for the incurability of the comment also fall short. The view that the trial court's ruling(s) and instruction did not obviously refer to the prosecutor's comment strains credulity. To the extent the problem lies with the prosecutor arguing that the slur was also directed at Toler's family, the evidence shows appellant did not reserve harsh language for Toler; when told not to fight in front of Toler's young daughter, appellant said, "Fuck that bitch, no one cares about her."[43] In context, nothing about the comment at issue suggests it was immune to the curative instruction requested by appellant.

Conclusion

If there is a word that renders a trial fundamentally unfair absent special instruction, lawyers on both sides need to know. And if an appellant may complain about it after he gets all the relief he requested, the courts of appeals need to know.

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[41] Slip op. at 13.

[42] Slip op. at 14-15.

[43] 3 RR 31.

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals grant this Petition for Discretionary Review and summarily remand the case for proper application of this Court's preservation law or, alternatively, review the merits and reverse the decision of the court of appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 2,976 words.

/s/ John R. Messinger
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CERTIFICATE OF SERVICE

The undersigned certifies that on this 4th day of January, 2017, the State's Petition for Discretionary Review was served electronically on the parties below.

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APPENDIX

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-14-00498-CR

LUIS MIGUEL HERNANDEZ	APPELLANT
V.	
THE STATE OF TEXAS	STATE

FROM THE 213TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1331780D

OPINION

A jury convicted Appellant Luis Miguel Hernandez of murder and assessed his punishment at fourteen years' confinement. The trial court sentenced him accordingly. In three points, Appellant challenges the sufficiency of the evidence to support the verdict and argues that the trial court reversibly erred by including a jury instruction on provoking the difficulty and by overruling his objection to the State's use of a racial slur in final argument. Although the evidence is sufficient

to support Appellant's conviction, the trial court reversibly erred by overruling his objection to the State's final argument. We, therefore, reverse the trial court's judgment and remand this case to the trial court.

Brief Facts

Quionecia Barber was visiting Devin Toler, the complainant, and their nineteen-month-old daughter in an upstairs apartment at the Wildwood Branch apartment complex. Toler was engaged in a sexual relationship with Mary, his boss at the Subway Shop where he worked. Mary lived downstairs with her husband, Appellant, and their children. Mary and Toler's relationship had become common knowledge, and Appellant reacted with growing anger toward Toler, yelling at him whenever he saw him. Toler was taller than Appellant. But Toler's mother was concerned and told him to call the police and not to go outside alone.

On the day Toler was killed, Appellant took a small bag of trash to the dumpster. When he saw Toler on the basketball court, Appellant started yelling at him. Toler got upset and started to walk toward Appellant. Quionecia yelled at the men to stop because her daughter was there. At trial, Quionecia testified that Appellant said, "Fuck that bitch, no one cares about her." While Quionecia testified that she remembered telling the police what Appellant had said about her daughter, she also admitted that the audiotape of her interview with the police recorded on the night Toler was killed did not include that information.

Toler left the basketball court, ran toward Appellant, and started to fight.

When the fight began, the little girl ran off, and Quionecia went to get her. When Quionecia came back to the men, from her angle, it looked like Toler was hitting more. When the fight ended, Appellant walked toward his apartment, and Toler fell to the ground. Quionecia ran to him and saw a gash above his left chest.

Appellant came back outside and said, "This is what happens when you mess with me." His children and Mary got in the car and left. Then Appellant went over to Toler and Quionecia, knelt and put water from a water bottle on Toler's face, and asked him to get up. Appellant said he was sorry and that it should not have gone that far. He said, "I'm sorry, he was choking me. I didn't have a choice."

Appellant had a knife during the offense. Although it is referred to as a *butter knife* in the record, it was actually a *place knife* or *table knife*. "A **table knife** is an item of cutlery with a single cutting edge, and a blunt end—part of a **table setting**. Table knives are typically of moderate sharpness only, designed to cut prepared and cooked food."[1]

A butter knife, on the other hand, is much smaller.

> [A] butter knife (or *master butter knife*) is a sharp-pointed, dull-edged knife, often with a sabre shape, used only to serve out pats of butter from a central butter dish to individual diners' plates. Master butter knives are not used to spread the butter onto bread . . . . Individual butter knives have a round point, so as not to tear the bread, and are

[1] *Table knife*, Wikipedia, The Free Encyclopedia, https://en.wikipedia.org/wiki/Table_knife (last visited Oct. 21, 2016)

sometimes termed **butter spreaders**.[2]

State's Exhibit 8 is a photograph of the knife. It is clearly a table knife or place knife. To avoid confusion, we shall refer to it simply as a knife.

Sufficiency of the Evidence

In his first point, Appellant argues that the evidence is insufficient to support the jury's verdict because the evidence of self-defense precluded his conviction.[3] A defendant has the burden of producing some evidence to support a claim of self-defense.[4] The State has the burden of persuasion in disproving self-defense.[5] This burden does not require the State to produce evidence refuting the self-defense claim; rather, the burden requires the State to prove its case beyond a reasonable doubt.[6] Self-defense is an issue of fact to be determined by the jury.[7] A jury verdict of guilty is an implicit finding rejecting the defendant's self-defense theory.[8]

In reviewing the sufficiency of the evidence to support the jury's rejection of

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[2]*Butter knife*, Wikipedia, The Free Encyclopedia, https://en.wikipedia.org/wiki/Butter_knife (last visited Oct. 21, 2016).

[3]*See* Tex. Penal Code Ann. §§ 9.31–.32 (West 2011).

[4]*Zuliani v. State*, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003).

[5]*Saxton v. State*, 804 S.W.2d 910, 913 (Tex. Crim. App. 1991).

[6]*Id.*

[7]*Id.* at 913–14.

[8]*Id.* at 914.

Appellant's self-defense theory, we examine all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of murder and also could have found against him on the self-defense issue beyond a reasonable doubt.[9]

The State argues that the evidence of self-defense is inadequate because Appellant did not testify but relied on the testimony of others who did not support his self-defense claim. Appellant was not required to testify in order to rely on a self-defense justification.[10] Quionecia told the police that Appellant had told her that Toler had been choking him and that he had had no choice but to stab Toler. Appellant sufficiently raised the issue of self-defense.[11] But the fact that he sufficiently raised the issue so that he could rely on that issue does not mean he will necessarily prevail.[12]

The State relied, at least in part, on evidence provoking the difficulty to defeat Appellant's self-defense claim. When a defendant has spoken words reasonably calculated to provoke the complainant's attack on the defendant, the provocation doctrine may preclude the assertion of the self-defense justification

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[9] *See id.*

[10] *See Smith v. State*, 676 S.W.2d 584, 586–87 (Tex. Crim. App. 1984); *Stoffregen v. State*, Nos. 02-03-00022-CR, 02-03-00023-CR, 2004 WL 362272, at *1 (Tex. App.—Fort Worth Feb. 26, 2004, no pet.) (mem. op., not designated for publication).

[11] *See Zuliani*, 97 S.W.3d at 594.

[12] *See Saxton*, 804 S.W.2d at 913–14.

or may support a jury's finding defeating the self-defense claim.[13]

The jury, as trier of fact, was free to believe that Appellant's words were insufficient to provoke the difficulty, that Toler's response was excessive in light of the provocation, that Appellant's words were sufficient to provoke the difficulty, that Toler's response was not excessive in light of the provocation, or that Appellant's response to Toler's attack was excessive because he met non-deadly force with deadly force. The jurors were also free to consider that Appellant had a knife on his person.[14]

Applying the appropriate standard of review, we hold the evidence sufficiently supported the jury's verdict. We overrule Appellant's first point.

Jury Instruction on Provoking the Difficulty

In his second point, Appellant contends that the trial court erred by overruling his requested charge and applying the law of provocation. In our review of a jury charge, we first determine whether error occurred; if error did not occur, our analysis ends.[15]

When the evidence raises, and the jury is charged on, self-defense, a charge on provocation is also required when there is sufficient evidence that (1)

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[13]*See Elizondo v. State*, 487 S.W.3d 185, 196–204 (Tex. Crim. App. 2016); *Smith v. State*, 965 S.W.2d 509, 512–14 (Tex Crim. App. 1998); *Dyson v. State*, 672 S.W.2d 460, 463–65 (Tex. Crim. App. 1984).

[14]*See* Tex. Penal Code Ann. §§ 9.31–.32.

[15]*Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012).

the defendant provoked the attack on him, (2) the defendant's actions or words were reasonably calculated to provoke the attack, and (3) the defendant's actions or words were a pretext for inflicting harm on the other person.[16]

For the reasons discussed in our consideration of the sufficiency of the evidence, we hold that there was sufficient evidence from which a rational juror could find all the elements of provocation beyond a reasonable doubt, viewing the evidence in the light most favorable to giving the provocation instruction.[17] We therefore hold that the trial court did not err by instructing the jury on provoking the difficulty. We overrule Appellant's second point.

Racial Slur in the State's Final Argument

In his third point, Appellant argues that

> the trial court judge reversibly erred and abused its discretion in overruling . . . Appellant's objection to the prosecutor's inflammatory use of the racial slur "niggas[,]" which was outside the record of the case and had been urged intentionally and was manifestly designed to deny the appellant a fair jury trial during the State's closing jury argument at the end of the guilt-innocence phase of the appellant's trial.

After the police arrived, Appellant told Detective Pate that he had confronted Toler and had used "racial slurs . . . and cuss words" toward him because of "a prior altercation and prior confrontations they had had." Toler

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[16] *Smith*, 965 S.W.2d at 513; *see also* Tex. Penal Code Ann. § 9.31(b)(4); *Reeves v. State*, 420 S.W.3d 812, 816–20 (Tex. Crim. App. 2013) (analyzing preserved error in provocation instruction within the "six-page impenetrable forest of legal 'argle-bargle'").

[17] *Smith*, 965 S.W.2d at 514.

moved toward Appellant and hit him two, three, or four times in the face. Then, according to Appellant, Toler began choking him. Appellant admitted that he had then pulled a knife out of his front left pocket, a knife he claimed he had taken out of the trash, and he began to swing the knife backwards over his left shoulder, stabbing Toler.

In final argument, the prosecuting attorney said,

> What were the words of provocation? I'll tell you what the words of provocation were. [Appellant] called Devin and his family "niggas." That's what it was.

Proper jury argument falls into one of four areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) an answer to the argument of opposing counsel; and (4) a plea for law enforcement.[18] Generally, error resulting from improper jury argument is subject to a harm analysis.[19]

To preserve a complaint about improper jury argument for appellate review, the defendant should (1) make a timely and specific objection, (2) request an instruction to disregard if the objection is sustained, and (3) move for a mistrial if the instruction to disregard is granted.[20] Appellant made a timely objection, and the trial court overruled the objection before the jury twice. After a bench

[18] *Davis v. State*, 329 S.W.3d 798, 821 (Tex. Crim. App. 2010), *cert. denied*, 132 S. Ct. 128 (2011).

[19] *See Freeman v. State*, 340 S.W.3d 717, 728 (Tex. Crim. App. 2011), *cert. denied*, 132 S. Ct. 1099 (2012).

[20] *Cruz v. State*, 225 S.W.3d 546, 548 (Tex. Crim. App. 2007); *see* Tex. R. App. P. 33.1(a).

conference, the trial court sustained the objection and instructed the jury, "Disregard the comment of Counsel." The trial court did not specify which comment of counsel he referred to and gave no further instruction. The prosecuting attorney immediately resumed argument, and Appellant failed to request a mistrial. Appellant raised the improper argument in his motion for new trial, which was denied.

In the past, our courts recognized that some jury arguments are so inflammatory that the harm and prejudice they cause cannot be cured by an instruction.[21] Then our courts, still recognizing the incurable nature of the prejudice, nonetheless declared that the injury could be waived by failure to move for a mistrial.[22]

Logically, this position makes no sense. An incurably prejudicial argument requires a mistrial.[23] If the trial court does not grant the mistrial, the court has committed error that requires setting aside the conviction and re-trying the case.[24] Respectfully, if the argument is so prejudicial that it has deprived the

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[21] *See Willis v. State*, 785 S.W.2d 378, 385 (Tex. Crim. App. 1989), *cert. denied*, 498 U.S. 908 (1990), *overruled by Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996), *cert. denied*, 520 U.S. 1173 (1997); *cf. Phillips v. Bramlett*, 288 S.W.3d 876, 883 (Tex. 2009).

[22] *Cockrell*, 933 S.W.2d at 89.

[23] *Pierson v. State*, 426 S.W.3d 763, 774–75 (Tex. Crim. App.), *cert. denied*, 135 S. Ct. 206 (2014).

[24] *Id.*

defendant of a fair trial, the injury is fundamental.[25] If the case is a civil case, denial of a fair trial results in setting aside the verdict, even if the complaint is not properly preserved at trial and raised for the first time in a motion for new trial.[26] Yet, a civil case does not involve loss of life or liberty. An unfair trial, even in a criminal case, does not become fair just because the request for a new trial comes on appeal rather than at trial. The reason for preservation of a complaint is to allow the trial court to assuage the harm—to correct the problem.[27] But when the injury is of such magnitude that the trial court cannot correct it, how can we find waiver because the trial court was not given the opportunity to "fix" the unfixable problem? Our courts, however, seem to insist that it is not the incurable prejudice that requires reversal of a conviction; rather, only an improper trial court ruling mandates reversal:

> The other two methods of complaint [besides objecting] are corrective measures. An instruction to disregard attempts to cure any harm or prejudice resulting from events that have already occurred. Where the prejudice is curable, an instruction eliminates the need for a mistrial, thereby conserving the resources associated with beginning the trial process anew. Like an instruction to disregard, a mistrial serves a corrective function. However, the class of events that require a mistrial is smaller than that for which a sustained objection or an instruction to disregard will suffice to prevent or correct the harm. A grant of a motion for mistrial should

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[25] *Marin v. State*, 851 S.W.2d 275, 281–82 (Tex. Crim. App. 1993).

[26] *Phillips*, 288 S.W.3d at 883 (citing Tex. R. Civ. P. 324(b)(5)).

[27] *Hull v. State*, 67 S.W.3d 215, 217 (Tex. Crim. App. 2002); *see also Grado v. State*, 445 S.W.3d 736, 743 (Tex. Crim. App. 2014) (Keller, P.J., dissenting).

> 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. Therefore, a mistrial conserves the resources that would be expended in completing the trial as well as those required for an appeal should a conviction occur.
>
> Because the objection, the request for an instruction to the jury, and the motion for mistrial seek judicial remedies of decreasing desirability for events of decreasing frequency, the traditional and preferred procedure for a party to voice its complaint has been to seek them in sequence—that is, (1) to object when it is possible, (2) to request an instruction to disregard if the prejudicial event has occurred, and (3) to move for a mistrial if a party thinks an instruction to disregard was not sufficient. However, this sequence is not essential to preserve complaints for appellate review. The essential requirement is a timely, specific request that the trial court refuses.[28]

In 2007, courts recognized that some arguments are so prejudicial and so inflammatory that an instruction to disregard is inadequate:

> We have previously said that while the "traditional and preferred procedure" for a party to preserve error is to (1) object in a timely manner, (2) request an instruction to disregard, and (3) move for mistrial if the instruction to disregard seems insufficient, such a sequence is not essential to preserve complaints for appellate review. The only essential requirement to ensure preservation is a timely, specific request that is refused by the trial court.
>
> A request for an instruction to disregard is essential to the preservation of error only when such an instruction could have had the effect desired by the requesting party. If such an instruction would not be sufficient—that is, if the harm caused by the objectionable statements is incurable—then the defendant is entitled to a mistrial, and the denial of the motion for mistrial is sufficient by itself to preserve error for appellate review. When, as in this case, the appellant moved for mistrial without delay, even though the

[28] *Young v. State*, 137 S.W.3d 65, 69 (Tex. Crim. App. 2004) (footnotes omitted).

> motion was not preceded by an instruction to disregard, appellate review is limited to whether the trial court erred in denying the motion for mistrial.[29]

Here, there was no mention of the word "nigga" or any variation thereof in any of the testimony. Yet, the prosecutor argued that Appellant had called both Toler and his family "niggas." A prosecutor may not use closing arguments to present evidence that is outside the record.[30] Improper references to facts that are neither in evidence nor inferable from the evidence are generally designed to arouse the passion and prejudice of the jury and, as such, are inappropriate.[31]

The unique nature of the record before us is important to the analysis of this issue. During the State's final argument on guilt, the prosecuting attorney argued,

[Prosecutor]:	Thank you, Judge, Counsel. What were the words of provocation? I'll tell you what the words of provocation were. Luis called Devin and his family "niggas." That's what it was.
[Defense Counsel]:	Your Honor, objection. That is certainly outside the record. That is not in the record at all.
THE COURT:	The jury will recall the testimony.
[Defense Counsel]:	No, Your Honor. That is not in the record. It is simply not there.

[29] *Cruz*, 225 S.W.3d at 548 (footnotes omitted).

[30] *Freeman*, 340 S.W.3d at 728.

[31] *Id.*

THE COURT:	Overruled.
[Defense Counsel]:	Can I ask where that is in the record?
THE COURT:	Overruled.
[Defense Counsel]:	Wow.
THE COURT:	Come up, [Defense Counsel]. Come up.

A bench conference followed this exchange. The jury was not privy to the discussion at the bench. Then, the proceedings switched to open court.

THE COURT:	All right. Ladies and gentlemen, I will sustain the objection.
[Defense Counsel]:	Ask the jury be instructed to disregard the comment of Counsel.
THE COURT:	Disregard the comment of Counsel.

The last thing the jury heard before the lengthy discussion at the bench was defense counsel's testy responses to the trial court. Whose objection did the jury believe the trial court sustained? Although defense counsel requested the instruction to disregard the comment of counsel, and it seems logical that it was the prosecutor's comment that the jury was instructed to disregard, defense counsel's request could equally be seen as an apology to the bench and a request that the jury be instructed to disregard defense counsel's exchange with the bench. And by the time the jury was instructed, there had been numerous comments by both lawyers.

The impact of the improper statement by the prosecuting attorney must be viewed in the context of the political atmosphere at the time of trial. The trial took

place in early December 2014. On February 26, 2012, George Zimmerman, whose mother was from Peru, killed Trayvon Martin. Emotional discussions of Zimmerman's ethnicity filled news commentary.[32] Other killings made headlines. Among them was the death of Eric Garner while he was selling loose cigarettes in New York on July 17, 2014. The officer who killed him was Daniel Pantaleo.[33] On August 9, 2014, Michael Brown was killed in Ferguson, Missouri.[34] On August 11, 2014, Ezell Ford was killed in Los Angeles by two police officers, one of whom was Hispanic.[35] And on November 23, 2014, twelve-year-old Tamir Rice was killed in Cincinnati, Ohio.[36] Additionally, the Black Lives Matter organization was formed in 2013 in response to the acquittal of George Zimmerman in his trial for the murder of Trayvon Martin and was actively

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[32] *CNN's "White Hispanic" Label for George Zimmerman Draws Fire*, Huffington Post (July 12, 2013, 5:59 p.m.), http://www.huffingtonpost.com/2013/07/12/cnn-white-hispanic_n_3588744.html (last visited Oct. 25, 2016).

[33] *Death of Eric Garner*, Wikipedia, The Free Encyclopedia, https://en.wikipedia.org/wiki/Death_of_Eric_Garner (last visited Oct. 25, 2016).

[34] *Shooting of Michael Brown*, Wikipedia, The Free Encyclopedia, https://en.wikipedia.org/wiki/Shooting_of_Michael_Brown (last visited Oct. 25, 2016).

[35] *Shooting of Ezell Ford*, Wikipedia, The Free Encyclopedia, https://en.wikipedia.org/wiki/Shooting_of_Ezell_Ford (last visited Oct. 25, 2016).

[36] *Shooting of Tamir Rice*, Wikipedia, The Free Encyclopedia, https://en.wikipedia.org/wiki/Shooting_of_Tamir_Rice (last visited Oct. 25, 2016).

involved in protests nationwide.[37]

Appellant's statement that he had used a racial slur toward Toler was vague. Quionecia gave no indication that she had heard anything that she considered a racial slur. The prosecutor's addition to the dialogue that Appellant had called Toler and his family "niggas", in the context of the racial conflicts throughout the country, was particularly inflammatory. The trial judge was obligated to provide clear, unequivocal instruction to the jury: to clearly state what objection he had sustained and to clearly and specifically instruct the jury to disregard the prosecutor's unsupported statement that Appellant had called both Toler and his family "nigga."[38]

Although the trial judge twice overruled Appellant's objection to the prosecutor's statement outside the record that injected inflammatory and prejudicial speculation into the record as fact, when the objection was made clear in a bench conference, the conscientious trial judge sustained it. Unfortunately,

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[37]Julia Craven, *Black Lives Matter Co-Founder Reflects on the Origins of the Movement*, Huffington Post (Sept. 30, 2015, 3:19 p.m.), http://www.huffingtonpost.com/entry/black-lives-matter-opal-tometi_us_560c1c59e4b0768127003227 (last visited Oct. 25, 2016).

[38]S*ee, e.g.*, *Austin v. State*, 222 S.W.3d 801, 813–16 (Tex. App.—-Houston [14th Dist.] 2007, pet. ref'd) (holding trial court did not abuse its discretion in trial of mother for felony injury to child when, after grandmother testified that she had been concerned about leaving a child with mother or suspicious of her when another of mother's young children had died—evidence which had been the subject of a motion in limine, the trial court strongly instructed the jurors three times that day and polled them individually the next day about whether they could follow the instruction to disregard), *cert. denied*, 552 U.S. 1191 (2008).

so much had occurred outside the presence of the jury that it was unclear to the jury what objection had been sustained. Additionally, the experienced trial judge gave a perfunctory instruction to disregard, rather than a clear and forceful instruction to disregard the prosecutor's inflammatory statement that was outside the record. The conscientious trial judge may not have wanted to call more attention to the improper argument. But, under the facts of this case, it was important that the instruction be clear, rather than vague, and forceful, rather than perfunctory.

For these reasons, we hold that Appellant's complaint was adequately preserved, both at trial and in his motion for new trial, and we further hold that the harm caused by the prosecutor's inflammatory statement outside the record could not be cured by the vague and perfunctory instruction to disregard. We, therefore, sustain Appellant's third point.

Conclusion

Having overruled Appellant's first two points but having sustained his third point, we reverse the trial court's judgment and remand this case to the trial court for proceedings consistent with this opinion.

/s/ Lee Ann Dauphinot
LEE ANN DAUPHINOT
JUSTICE

PANEL: DAUPHINOT, WALKER, and SUDDERTH, JJ.

WALKER, J., filed a concurring opinion.

SUDDERTH, J., filed a dissenting opinion.

PUBLISH

DELIVERED: November 3, 2016

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-14-00498-CR

LUIS MIGUEL HERNANDEZ APPELLANT

V.

THE STATE OF TEXAS APPELLEE

FROM THE 213TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1331780D

CONCURRING OPINION

Because Appellant Luis Miguel Hernandez's third issue is framed as an issue of prosecutorial misconduct—an issue that need not be strictly preserved in light of the resulting due process violation of Appellant's right to a fair trial—I concur with the Majority's disposition of this appeal. Appellant's third issue asserts that "[t]he trial court judge reversibly erred and abused its discretion in overruling the Appellant's objection to the prosecutor's inflammatory use of the

racial slur 'Niggas' which was outside the record of the case and had been urged intentionally and was manifestly designed to deny the Appellant a fair jury trial during the State's closing jury argument at the end of the guilt-innocence phase of the Appellant's trial."

At trial, Appellant claimed he did not commit murder but acted in self-defense. The jury was charged on self-defense. The State requested, and the trial court submitted, a jury charge on provocation.[1]

The evidence established that the deceased, who was an African American male, physically initiated the confrontation with Appellant by running at

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[1]The trial court's instruction on provocation provided, in pertinent part:

> You are further instructed as part of the law of this case, and as a qualification of the law on self-defense, that the use of force by a defendant against another is not justified if the Defendant provoked the other's use or attempted use of unlawful force, unless the Defendant abandons the encounter, or clearly communicates to the other person his intent to do so reasonably believing he cannot safely abandon the encounter and the other person, nevertheless, continues or attempts to use unlawful force against the Defendant.
>
> So, in this case, if you find and believe from the evidence beyond a reasonable doubt that the Defendant, immediately before the difficulty, if any, then and there did some act, or used some language or did both, with the intent on the Defendant's part to produce the occasion and to bring on the difficulty with [the deceased], and that such words or conduct on the Defendant's part, if there was such, were reasonably calculated to, and did, provoke a difficulty, and that on such occasion [the deceased] attacked the Defendant with deadly force, or reasonably appeared to the Defendant to so attack the Defendant, and that the Defendant then cut [the deceased] with a knife in pursuance of his original design, if you find there was such, then you will find the Defendant guilty.

Appellant. The State asserted that the deceased ran at Appellant because Appellant "used racial slurs and cuss words."[2] The sole witness to the altercation was the deceased's wife. She recounted that the deceased ran at Appellant because, when she asked Appellant to stop yelling at the deceased in the presence of her daughter, Appellant said, "F--- that b----, no one cares about her."

During the State's initial closing argument, the prosecutor explained to the jury:

> It is not in dispute that the Defendant killed [the deceased]. I mean, that's pretty much been admitted here in the courtroom.
>
> What you next have to consider is whether or not he gets to claim self-defense. And remember in jury selection when [another prosecutor] was talking to you-all about the term -- the legal term "provoking the difficulty." I can't go pick a fight with someone and then decide to claim self-defense after I do something bad.

No witness testified that Appellant uttered the word "niggas" to provoke the fight with the deceased; no witness testified that Appellant called the deceased "and his family" "niggas." The decedent's wife testified that the deceased ran at Appellant after Appellant said, regarding the deceased's young daughter, "F--- that b----, no one cares about her." Nonetheless, during final closing argument, the prosecutor told the jury, "What were the words of provocation? I'll tell you

[2]Fort Worth Police Detective Ernie Pate testified that Appellant had "admitted to [him] that when [Appellant] first spoke to [the deceased] that [Appellant] used racial slurs to [the deceased] and cuss words because of a prior altercation and prior confrontations they had had."

what the words of provocation were. [Appellant] called [the deceased] and his family 'niggas.' That's what it was."

Prosecutors are constitutionally prohibited from making racially or ethnically inflammatory remarks during closing argument. *See McCleskey v. Kemp*, 481 U.S. 279, 309 n.30, 107 S. Ct. 1756, 1770 n.30 (1987); *Bains v. Cambra*, 204 F.3d 964, 974 (9th Cir.), *cert. denied*, 531 U.S. 1037 (2000). Such comments "violat[e] a criminal defendant's due process and equal protection rights." *Bains*, 204 F.3d at 974. Because racial fairness is an indispensable ingredient of due process and racial equality a hallmark of justice, appeals to racial passion can distort the search for truth and drastically affect a juror's impartiality. *United States v. Doe*, 903 F.2d 16, 25 (D.C. Cir. 1990).

The United States Supreme Court has held that "prosecutorial misconduct may so infect the trial with unfairness as to make the resulting conviction a denial of due process." *Greer v. Miller*, 483 U.S. 756, 765, 107 S. Ct. 3102, 3109 (1987) (internal quotation omitted). To constitute a due process violation, the prosecutorial misconduct must be of such significance that it would result in the denial of a defendant's right to a fair trial. *Id.* at 765, 107 S. Ct. at 3109; *see Burwell v. Teets*, 245 F.2d 154, 163 (9th Cir.), *cert. denied*, 355 U.S. 896 (1957). An analysis of whether prosecutorial misconduct resulted in a due process violation of the defendant's right to a fair trial focuses on the effect of the misconduct—whether it infected the trial with unfairness—not on the prosecutor's motive, subjective intent, or culpability.

The United States Supreme Court has "clearly indicated that the state courts have substantial breathing room when considering prosecutorial misconduct claims because 'constitutional line drawing in [prosecutorial misconduct cases] is necessarily imprecise.'" *Slagle v. Bagley*, 457 F.3d 501, 516 (6th Cir. 2006), *cert. denied*, 551 U.S. 1134 (2007) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S. Ct. 1868, 1872 (1974)). Under Texas law, we are to resolve allegations of prosecutorial misconduct on a case by case basis and determine whether the prosecutor's conduct requires reversal on the basis of the probable effect on the minds of the jurors. *Bautista v. State*, 363 S.W.3d 259, 263 (Tex. App.—San Antonio 2012, no pet.). To warrant reversal, the prosecutor's question or comment must be harmful to the defendant and of such a character so as to suggest the impermissibility of withdrawing the impression produced. *Id.*; *see also Berger v. United States*, 295 U.S. 78, 84, 55 S. Ct. 629, 631 (1935) (reversing judgment of conviction and granting new trial because of due process violation resulting from prosecutorial misconduct).

No witness testified that Appellant "called [the deceased] and his family 'niggas'" as stated by the prosecutor. The prosecutor's statement during final closing argument that Appellant called the deceased and the deceased's family "niggas" was outside the record and was a racially inflammatory remark. *See McCleskey*, 481 U.S. at 309 n.30, 107 S. Ct. at 1770 n.30; *Bains*, 204 F.3d at 974. Because the statement was made by the prosecutor during final closing argument, Appellant had no opportunity to respond to it or to correct it. The

prosecutor's statement directly impacted the sole issue in the case—whether Appellant acted in self-defense or, in fact, by words provoked the difficulty. The prosecutor told the jury: "What were the words of provocation? I'll tell you what the words of provocation were. [Appellant] called [the deceased] and his family 'niggas.' That's what it was."[3] The prosecutor thus not only attributed use of the word "niggas" to Appellant, but also stated that Appellant had used the word to refer to the decedent's family, which no witness testified to. And finally, the prosecutor expressly told the jury that these words supposedly uttered by Appellant—calling the deceased and his family "niggas"—constituted "words of provocation" that defeated Appellant's claim of self-defense.

In my view, the prosecutor's statement here directly undermined Appellant's sole defense by attributing the use of the racially inflammatory word "niggas" to Appellant and by telling the jury that Appellant referred to the deceased's family as "niggas," when neither of these facts are in the record or inferable from the record. To me, the prosecutor's statement during final closing

[3]The State argues that the prosecutor's statement that Appellant provoked the fight by calling the deceased and his family "niggas" was a reasonable inference from Officer Pate's testimony that Appellant admitted he had used racial slurs when he first spoke to the deceased. I cannot agree. First, Officer Pate did not testify that "niggas" was the racial slur Appellant used. Unfortunately, many ethnophaulisms exist but most people consider this one exceptionally offensive and inflammatory. Appellant's concession that he used racial slurs does not support an inference that he used this particular one. Second, neither Officer Pate nor any other witness testified that Appellant directed racial slurs at the deceased's family, as opposed to at the deceased. The record supports no inference that Appellant directed racial slurs at the deceased's family.

argument—the very last words the jury heard before retiring to deliberate—was of such significance that it resulted in the denial of Appellant's right to a fair trial, and thus, deprived Appellant of due process. *See Greer*, 483 U.S. at 765, 107 S. Ct. at 3109; *Burwell*, 245 F.2d at 163; *see also Coleman v. Ohio Adult Parole Auth.*, 118 Fed. Appx. 949, 951–52 (6th Cir. 2004) (holding prosecutor's reference in closing argument to defendant's prior conviction constituted an introduction of evidence so extremely unfair as to violate fundamental conceptions of justice and thus a deprivation of defendant's right to due process); *see also Elizondo v. State*, 487 S.W.3d 185, 209 (Tex. Crim. App. 2016) ("It is relevant to the harm analysis that the provocation instruction undermined Elizondo's sole defense."). Accordingly, we must reverse and remand for a new trial.[4] *See Berger*, 295 U.S. at 89, 55 S. Ct. at 663 ("[S]uch misconduct was

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[4]Although the general rule is that a timely and specific objection, a request for an instruction to disregard the matter improperly placed before the jury, and a request for a mistrial are required to preserve a complaint of prosecutorial misconduct, when "prosecutorial misconduct that undermines the reliability of the factfinding process . . . result[s] in deprivation of fundamental fairness and due process of law, the defendant is entitled to a new trial even though few objections have been perfected." *See Penry v. State*, 903 S.W.2d 715, 764 (Tex. Crim. App. 1995) (recognizing general rule); *Johnson v. State*, 432 S.W.3d 552, 561 (Tex. App.—Texarkana 2014, pet. ref'd) (same); *Jimenez v. State*, 298 S.W.3d 203, 214 (Tex. App.—San Antonio 2009, pet. ref'd) (recognizing exception); *see Rogers v. State*, 725 S.W.2d 350, 358 (Tex. App.—Houston [1st Dist.] 1987, no pet.) ("*[B]ecause fundamental fairness was vitiated*, the present case is an exception to the general rule that improper questions and arguments by a prosecutor cannot constitute reversible error unless the error is properly preserved.").

Because of the prosecutorial misconduct that occurred, and the resulting deprivation of Appellant's rights to due process and a fair trial, I would hold that

pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded."); *Bautista*, 363 S.W.3d at 263 ("To warrant reversal, the question or comment must be harmful to the defendant and of such a character so as to suggest the impermissibility of withdrawing the impression produced") (internal quotation omitted). Because the Majority reaches this disposition, albeit for different reasons, I respectfully concur.

/s/ Sue Walker
SUE WALKER
JUSTICE

PUBLISH

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Appellant's failure to request a mistrial does not constitute a waiver of his right to raise the issue of prosecutorial misconduct on appeal. *See Berger*, 295 U.S. at 89, 55 S. Ct. at 663; *Jimenez*, 298 S.W.3d at 214; *Rogers*, 725 S.W.2d at 358.

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-14-00498-CR

LUIS MIGUEL HERNANDEZ APPELLANT

V.

THE STATE OF TEXAS STATE

FROM THE 213TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1331780D

DISSENTING OPINION

Of all of the words in modern American English usage, including the slang and the vulgar, the "n-word" is of such infamy that it is generally referenced and understood only by its first letter. And with very few exceptions, such racially-charged inflammatory language has no place in jury argument.

This is certainly the case when a prosecutor, using that language to secure a conviction, goes outside of the record to introduce it. Therefore, I agree with

the majority that the prosecutor's behavior was improper. It was inexcusable. It cannot be condoned. And the trial judge committed error in permitting it. Nevertheless, because we are constrained by precedent of the court of criminal appeals requiring preservation of this type of error, I am compelled to dissent.

At one point in the jurisprudence of the court of criminal appeals, complaints about incurable jury argument did not have to be raised and ruled upon during trial to preserve error for appeal. *See Willis v. State*, 785 S.W.2d 378, 385 (Tex. Crim. App. 1989), *cert. denied*, 496 U.S. 908 (1990), *overruled by Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996), *cert. denied*, 520 U.S. 1173 (1997). In 1996, however, the court of criminal appeals revisited the idea and held that a defendant's "'right'" not to be subjected to incurable erroneous jury argument is one that is forfeited by a failure to insist upon it. *Cockrell*, 933 S.W.3d at 89.[1] Therefore, absent pursuing his objection to an adverse ruling, an appellant forfeits the complaint even if the argument is egregious and an instruction to disregard could not have cured the harm. *Mathis v. State*, 67 S.W.3d 918, 926–27 (Tex. Crim. App. 2002); *see Threadgill v. State*, 146 S.W.3d 654, 666–67 (Tex. Crim. App. 2004); *see also Cruz v. State*, 225 S.W.3d 546, 548 (Tex. Crim. App. 2007); *Young v. State*, 137 S.W.3d 65, 69 (Tex. Crim. App. 2004).

[1]In 2010, the court of criminal appeals recognized that it had overruled *Willis*'s improper-jury-argument exception to the preservation requirement more than a decade before. *See Estrada v. State*, 313 S.W.3d 274, 303 (Tex. Crim. App. 2010), *cert. denied*, 562 U.S. 1142 (2011).

The record reflects that the trial court never expressly or implicitly ruled on Appellant's inflammatory-language objection. *Cf.* Tex. R. App. P. 33.1(a)(2). And although Appellant requested an instruction to disregard "the comment of Counsel," he did not direct the trial court to which comment he referred, did not request a more specific or comprehensive instruction when the trial court gave a general instruction to disregard, and did not request a mistrial before the prosecutor continued her argument. *See Freeman v. State*, 340 S.W.3d 717, 727–28 (Tex. Crim. App. 2011), *cert. denied*, 132 S. Ct. 1099 (2012). Because the error here has not been identified by the court of criminal appeals as either absolute or waivable-only and given that the trial court gave an—albeit milquetoast—instruction to disregard in response to Appellant's request for same, in order to complain of error on appeal, it was incumbent upon Appellant to pursue the matter further at the trial court level. The rules require Appellant to pursue his complaint to an adverse ruling[2] in order to preserve the error for our review. *See Clark v. State*, 365 S.W.3d 333, 340 (Tex. Crim. App. 2012); *Mays v. State*, 318 S.W.3d 368, 393–94 (Tex. Crim. App. 2010), *cert. denied*, 562 U.S. 1274 (2011). Because Appellant did not, I must dissent, despite my

[2]A deficient instruction to disregard does not equate to an adverse ruling because the party who thinks the instruction to disregard was not sufficient must move for a mistrial to preserve the complaint unless the error is either absolute or waivable-only. *See Unkart v. State*, 400 S.W.3d 94, 98–99 (Tex. Crim. App. 2013); *see also Grado v. State*, 445 S.W.3d 736, 741 & n.29 (Tex. Crim. App. 2014).

wholehearted agreement with the majority that the prosecutor's conduct in this case went well beyond the bounds of acceptable advocacy.

/s/ Bonnie Sudderth
BONNIE SUDDERTH
JUSTICE

PUBLISH

DELIVERED: November 3, 2016

1 MR. ROACH: The appropriate verdict is not
2 guilty. Thank you.
3 THE COURT: Ms. Foster?
4 STATE'S CLOSING ARGUMENT
5 MS. FOSTER: Thank you, Judge, Counsel.
6 What were the words of provocation? I'll
7 tell you what the words of provocation were. Luis called
8 Devin and his family "niggas." That's what it was.
9 MR. ROACH: Your Honor, objection. That is
10 certainly outside the record. That is not in the record
11 at all.
12 THE COURT: The jury will recall the
13 testimony.
14 MR. ROACH: No, Your Honor. That is not in
15 the record. It is simply not there.
16 THE COURT: Overruled.
17 MR. ROACH: Can I ask where that is in the
18 record?
19 THE COURT: Overruled.
20 MR. ROACH: Wow.
21 THE COURT: Come up, Mr. Roach. Come up.
22 (BENCH CONFERENCE PROCEEDINGS:)
23 THE COURT: What testimony --
24 MR. ROACH: That word was not there, Judge.
25 That's inflammatory --

1 THE COURT: Excuse me --
2 MR. ROACH: It's inflammatory and decidedly
3 inflammatory.
4 MS. FOSTER: They can infer that. He said
5 he called him a racial slur. What other racial slur are
6 you going to call a black person? You can infer from the
7 evidence that that's what he said.
8 MR. ROACH: That's --
9 THE COURT: Hold on.
10 All right. Tell you what. You can say the
11 word "racial slur." You can say, "racial slur" and not
12 the actual word.
13 MS. FOSTER: Okay.
14 (OPEN COURT PROCEEDINGS:)
15 THE COURT: All right. Ladies and
16 gentlemen, I will sustain the objection.
17 MR. ROACH: Ask the jury be instructed to
18 disregard the comment of Counsel.
19 THE COURT: Disregard the comment of
20 Counsel.
21 MS. FOSTER: What were the words of
22 provocation? You heard the evidence. You listened to
23 every witness. You heard Detective Pate tell you that he
24 talked to the Defendant, and the Defendant admitted to
25 him that on the day of this offense, this Defendant