COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

MANUEL ALEJANDRO VALMANA,	§	No. 08-18-00084-CR
Appellant,	§	Appeal from the
v.	§	210th District Court
THE STATE OF TEXAS,	§	of El Paso County, Texas
Appellee.	§	(TC# 20170D04663)

O P I N I O N

Appellant Manuel Alejandro Valmana appeals his conviction for aggravated assault with a deadly weapon. After the jury assessed punishment of two years' confinement and recommended that the sentence be probated, the trial court followed the recommendation and placed Appellant on community supervision for two years. In six issues, Appellant complains of: the legal sufficiency of the evidence to support his conviction, two evidentiary rulings, charge-related error, improper jury argument, and improper jury deliberation. We affirm the trial court's judgment.

FACTUAL SUMMARY

At about 12:30 p.m. on the afternoon of June 23, 2017, Daniel Rodriguez went to Craw Oyster Bar in El Paso. Appellant subsequently arrived at the bar with two other men. An hour or so later, after Rodriguez exited the restroom, Rodriguez and Appellant engaged in a verbal

encounter that did not become violent. After an hour or two had passed, Rodriguez again went to the restroom. According to Rodriguez, as he was returning from the restroom, Appellant yelled, "Hey, motherfucker," and struck Rodriguez on the head with a beer bottle, which cut Rodriguez's face and head and caused him to bleed. Appellant left the bar, but Rodriguez stayed and called the police.

DISCUSSION

I. Sufficiency of the Evidence

We first address Appellant's fourth issue challenging the sufficiency of the evidence to support his conviction. Appellant asserts that the evidence was legally insufficient to prove that Appellant assaulted Rodriguez with a beer bottle and that the manner of its use or intended use was capable of causing Rodriguez's death or serious bodily injury as alleged in the indictment.

A. Standard of Review

In assessing the sufficiency of the evidence to support a criminal conviction, reviewing courts "consider all the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational juror could have found the essential elements of the crime beyond a reasonable doubt." *Alfaro-Jimenez v. State*, 577 S.W.3d 240, 243–44 (Tex. Crim. App. 2019) (quoting *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979))). We determine whether the evidence presented at trial was sufficient to support a conviction by comparing it to "the elements of the offense as defined by the hypothetically correct jury charge for the case." *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). A hypothetically correct jury charge "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the

particular offense for which the defendant was tried." *See Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016); *Villarreal v. State*, 286 S.W.3d 321, 327 (Tex. Crim. App. 2009) (citing *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)). The law, as authorized by the indictment, means the statutory elements of the charged offense as modified by the charging instrument. *See Curry v. State*, 30 S.W.3d 394, 404 (Tex. Crim. App. 2000).

Each fact need not point directly and independently to guilt if the cumulative force of all incriminating circumstances is sufficient to support the conviction. *Nisbett v. State*, 552 S.W.3d 244, 262 (Tex. Crim. App. 2018) (citing *Hooper*, 214 S.W.3d at 13). It is not necessary that the evidence directly prove the defendant's guilt; circumstantial evidence is as probative as direct evidence in establishing a defendant's guilt, and circumstantial evidence alone can be sufficient to establish guilt. *Nisbett*, 552 S.W.3d at 262 (citing *Hooper*, 214 S.W.3d at 13).

The jury is free to accept or reject any or all evidence of either party. *Hernandez v. State*, 161 S.W.3d 491, 500 & n.28 (Tex. Crim. App. 2005). Our review does not intrude on the jury's role to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. TEX. CODE CRIM. PROC. ANN. art. 38.04; *Jackson*, 443 U.S. at 319; *Zuniga v. State*, 551 S.W.3d 729, 732 (Tex. Crim. App. 2018). We presume that the fact finder resolved any conflicting inferences in favor of the prosecution and defer to that resolution. *Cavazos v. Smith*, 565 U.S. 1, 7 (2011) (per curiam) (citing *Jackson*, 443 U.S. at 326).

B. Applicable Law

The Texas Penal Code provides that a person commits "aggravated assault" if the person commits an assault by intentionally, knowingly, or recklessly causing bodily injury to another and uses or exhibits a deadly weapon during the commission of the assault. TEX. PENAL CODE ANN. §§ 22.01(a)(1), 22.02(a)(2). "Bodily injury" means "physical pain, illness, or any impairment of

physical condition." TEX. PENAL CODE ANN. § 1.07(a)(8). A deadly weapon can be "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." TEX. PENAL CODE ANN. § 1.07(a)(17)(B). "Serious bodily injury" means "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." TEX. PENAL CODE ANN. § 1.07(a)(46).

C. Analysis

1. Aggravated Assault with a Bottle

The State's case against Appellant was based on the theory that Appellant had used a deadly weapon—to wit, a bottle, that in the manner of its use and intended use was capable of causing death and serious bodily injury—during his assault on Rodriguez. Appellant complains that no eyewitness testimony established that Rodriguez was struck with a beer bottle, that Rodriguez's testimony that Appellant had struck him with a beer bottle was "nothing more than speculation," and that Rodriguez did not testify that he saw Appellant exhibit a beer bottle in a threatening way or saw the manner in which Appellant used or intended to use it such that it was capable of causing serious bodily injury or death. In support of his contention, Appellant asserts that Rodriguez's testimony shows that he did not know in which hand Appellant was holding the beer bottle, did not know that he had been struck with a beer bottle due to the swiftness of the attack, and was unable to identify the brand of beer bottle used to strike him. Appellant contends that Rodriguez's testimony that Appellant struck him with a beer bottle is, therefore, purely speculative. A speculation-driven conclusion cannot support a finding beyond a reasonable doubt. *Winfrey v. State*, 393 S.W.3d 763, 771 (Tex. Crim. App. 2013); *see also McKay v. State*, 474 S.W.3d 266, 270 (Tex. Crim. App. 2015) (explaining that evidence is insufficient if it "creates

only a suspicion that a fact exists"); *Anderson v. State*, 416 S.W.3d 884, 888 (Tex. Crim. App. 2013) ("Speculation is mere theorizing or guessing about the possible meaning of the facts and evidence presented.").

The evidence here, however, is not as sparse as Appellant suggests. At trial, Rodriguez declared that he was one-hundred percent certain that Appellant had struck him with a bottle. He explained that he did not anticipate Appellant's actions as one to two hours had passed since their verbal encounter, and he had walked to the restroom and had passed by Appellant without incident. As Rodriguez walked to the bathroom, he observed that Appellant was holding a beer bottle in his right hand. When Rodriguez exited the restroom, he saw that "nobody" was standing or looking and everything appeared "okay," but as he walked past Appellant's table to return to his seat, Appellant yelled, "Hey, motherfucker[!]" Rodriguez testified that as he turned around, Appellant hit him "in the face" with a beer bottle. When asked to clarify which hand Appellant used to strike him, Rodriguez testified, "well, I assume it was his right hand because when I went to the bathroom, he was holding his beer in his right hand. So I would assume, you know, it was his right hand."

Rodriguez was injured and traumatized upon being struck. He stood "numb" for a while and tried to determine what had happened. When he wiped his eyes, Rodriguez discovered that his hand was full of blood and that a lot of blood was on his face. Although the blood stung Rodriguez's eyes and made it difficult for him to see, he was able to see Appellant leave, and he called the police.

Under cross-examination, Rodriguez admitted that, with the initial contact, he did not realize that he had been struck with a bottle until he subsequently felt pain and blood "rushing"

down his face. He also reaffirmed that he was certain that Appellant had struck him with a bottle because it was Appellant "that stood up and swung the bottle."

Assistant manager Juan Gabriel Mendoza testified he knew Appellant and Rodriguez and he had approached the two men to separate them during the initial verbal encounter. Mendoza had escorted Rodriguez back to his seat at that time. When Rodriguez was assaulted, Mendoza was outside the bar. A bar patron known to Mendoza as "Criss Cross"—who appeared to be in a hurry—ran from the bar's side door and said, "This fool just broke a bottle over this dude's head." Mendoza asked, "Who?" Cross yelled in response, "Alex," and then "jumped straight into his car" and left the premises. Wondering who had been hit, Mendoza reentered the bar and saw Rodriguez, whose face and shirt were bloody. Mendoza was unable to find Appellant. Mendoza testified that the bar had been at its full capacity of fifty-eight patrons and that approximately one-third of the patrons "took off" after the assault. Mendoza cleaned the broken glass and blood from the floor before police arrived.

After Rodriguez cleaned himself with a towel, Officers Alvaro Sepulveda and Daniel Lopez of the El Paso Police Department responded to the scene and photographed him. Sepulveda explained that he was not looking for glass on the floor because he and Lopez were focused on locating Appellant, who was not found within or outside of the bar. Lopez learned that the glass debris and blood had been cleaned from the area before he had arrived at the bar. Detective John Orona of the El Paso Police Department was later assigned to the case but was unsuccessful in his attempts to contact the person identified as Criss Cross or to speak with Appellant.

Having viewed the evidence in the light most favorable to the jury's verdict, and based on that evidence and the reasonable inferences from it, we conclude that a rational juror could have

found, beyond a reasonable doubt, that Appellant committed aggravated assault on Rodriguez by striking him with a beer bottle.

2. Bottle as a Deadly Weapon

Appellant also contends that the State did not prove by sufficient evidence that the manner of use or intended use of the bottle was capable of causing death or serious bodily injury. The legislature has determined that a weapon can be deadly by design or use. TEX. PENAL CODE ANN. § 1.07(a)(17)(A), (B); *Tucker v. State*, 274 S.W.3d 688, 691 (Tex. Crim. App. 2008). A beer bottle is not deadly by design. *See McCain v. State*, 22 S.W.3d 497, 502–03 (Tex. Crim. App. 2000) (recognizing that an object that has an obvious purpose apart from causing death or serious bodily injury cannot be a deadly weapon by design). Objects that are not usually considered dangerous weapons may become so, depending on the manner in which they are used during the commission of an offense. *Drichas v. State*, 175 S.W.3d 795, 798 (Tex. Crim. App. 2005) (citing *Thomas v. State*, 821 S.W.2d 616, 620 (Tex. Crim. App. 1991)); *Hill v. State*, 913 S.W.2d 581, 583 (Tex. Crim. App. 1996) (explaining that items that are not deadly weapons *per se* may be deemed deadly weapons by reason of their use or intended use).

To sustain a conviction for aggravated assault based on the use or exhibition of a deadly weapon, the State is not required to introduce the weapon into evidence, nor is it required to provide a description of the weapon or the manner in which it was used. *See Tucker*, 274 S.W.3d at 691; *Morales v. State*, 633 S.W.2d 866, 868 (Tex. Crim. App. 1982); *Limuel v. State*, 568 S.W.2d 309, 312 (Tex. Crim. App. 1978). The State is not required to show that the use or intended use of the alleged deadly weapon causes death or serious bodily injury; rather, it is required to show that the use or intended use is *capable* of causing death or serious bodily injury. *Tucker*, 274 S.W.3d at 691 (citing *McCain*, 22 S.W.3d at 503); *Dominique v. State*, 598 S.W.2d 285, 286 (Tex. Crim.

App. 1980) (stating that although the nature of inflicted wounds is a factor to be considered, wounds are not a necessary prerequisite for an object to be a deadly weapon) (citing *Denham v. State*, 574 S.W.2d 129, 130 (Tex. Crim. App. 1978).

"Even without expert testimony or a description of the weapon, the injuries suffered by the victim can by themselves be a sufficient basis for inferring that a deadly weapon was used." *Tucker*, 274 S.W.3d at 691–92 (citing *Morales v. State*, 633 S.W.2d 866, 868–69 (Tex. Crim. App. 1982) (explaining that photograph of the victim's injury can be sufficient to show that a deadly weapon was used)); *Limuel*, 568 S.W.2d at 312 (declaring that sufficient evidence established deadly weapon status of object without medical testimony regarding the nature of complainant's wounds and without introduction of the alleged weapon). Flight, too, is admissible "as a circumstance from which an inference of guilt may be drawn." *Devoe v. State*, 354 S.W.3d 457, 470 (Tex. Crim. App. 2011) (quoting *Alba v. State*, 905 S.W.2d 581, 586 (Tex. Crim. App. 1995)).

In this case, the trial court admitted a beer bottle as demonstrative evidence but instructed the jury that the bottle itself had not been used in the commission of the offense and was being admitted for the limited purpose of indicating "what the bottle may appear like or would have been." Rodriguez testified that he felt pain and knew that he was cut after wiping the blood from his eyes. He described his injuries as including cuts to both eyebrows, a cut to the left side of his head, and a cut to his forehead. Rodriguez testified that his cuts and lacerations from the assault were still visible, and he displayed them to the jury.

When Sepulveda arrived at the bar, he observed that Rodriguez, who was holding a towel "full of blood" to his forehead, was injured with cuts to his eyebrows and forehead. Similarly, Lopez saw a laceration to Rodriguez's head—to which a towel was continuously applied to prevent a large amount of blood loss—and called for fire medical services to respond. Rodriguez declined

emergency medical care and opted instead to receive medical care at home from his wife, a hospital employee. Sepulveda photographed Rodriguez's injuries, and those photographs were admitted in evidence. Detective Orona examined the demonstrative beer bottle and—based on his eighteen years of training and experience—testified that such a bottle is capable of causing serious bodily injury and death and is considered to be a deadly weapon. *See also Ferrel v. State*, 55 S.W.3d 586, 588 (Tex. Crim. App. 2001) (recognizing that defendant had indisputably caused serious bodily injury to decedent by striking the decedent in the face with a beer bottle, which caused decedent to fall and strike his head and die as a result of hemorrhaging on the barroom floor).

We have viewed the evidence in the light most favorable to the jury's verdict, and based on that evidence and the reasonable inferences drawn from it, we conclude that a rational juror could have found, beyond a reasonable doubt, that Appellant committed aggravated assault on Rodriguez by striking him with a deadly weapon—a bottle that in the manner of its use or intended use was capable of causing death or serious bodily injury.

We overrule Appellant's fourth issue.

II. Evidentiary Rulings

In his second and third issues, Appellant complains that the trial court abused its discretion regarding evidence when it excluded a prior conviction for impeachment purposes and allowed hearsay testimony.

A. Standard of Review

We review the trial court's decision to admit or exclude evidence, as well as its decision as to whether the probative value of evidence was substantially outweighed by the danger of unfair prejudice, under an abuse of discretion standard. *Gonzalez v. State*, 544 S.W.3d 363, 370 (Tex. Crim. App. 2018). "A trial judge abuses her discretion when her decision falls outside the zone of

reasonable disagreement." *Henley v. State*, 493 S.W.3d 77, 82–83 (Tex. Crim. App. 2016); *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). Before an appellate court may reverse the trial court's decision, "it must find the trial court's ruling was so clearly wrong as to lie outside the zone within which reasonable people might disagree." *Henley*, 493 S.W.3d at 83 (quoting *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008)). We may not substitute our own decision for that of the trial court. *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003). Moreover, "[i]f the ruling was correct on any theory of law applicable to the case, in light of what was before the trial court at the time the ruling was made, then we must uphold the judgment." *Page v. State*, 213 S.W.3d 332, 337 (Tex. Crim. App. 2006) (quoting *Sauceda v. State*, 129 S.W.3d 116, 120 (Tex. Crim. App. 2004)). We will uphold a trial court's ruling on the admissibility of evidence as long as the trial court's ruling was at least within the zone of reasonable disagreement. *Billodeau v. State*, 277 S.W.3d 34, 39 (Tex. Crim. App. 2009) (citing *Rodgers v. State*, 205 S.W.3d 525, 529 (Tex. Crim. App. 2006) (quoting *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000))); *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g).

Evidentiary errors generally constitute non-constitutional error which we review under rule 44.2(b). TEX. R. APP. P. 44.2(b); *Gonzalez*, 544 S.W.3d at 373; *Walters v. State*, 247 S.W.3d 204, 219 (Tex. Crim. App. 2007). An appellate court must disregard a non-constitutional error that does not affect a criminal defendant's "substantial rights." TEX. R. APP. P. 44.2(b); *Casey v. State*, 215 S.W.3d 870, 884-85 (Tex. Crim. App. 2007). Under that rule, an appellate court may not reverse for non-constitutional error if the court, after examining the entire record, has a fair assurance that the error did not have a substantial and injurious effect or influence in determining the jury's verdict. *Casey*, 215 S.W.3d at 884-85. In doing so, we consider (1) the character of the alleged

error and how it might be connected to other evidence; (2) the nature of the evidence supporting the verdict; (3) the existence and degree of additional evidence indicating guilt; and (4) whether the State emphasized the complained of error. *Gonzalez*, 544 S.W.3d at 373 (citing *Motilla v. State*, 78 S.W.3d 352, 356-58 (Tex. Crim. App. 2002)).

B. Exclusion of Prior Felony Conviction

In his second issue, Appellant asserts that the trial court abused its discretion when it ruled that Appellant could not use Rodriguez's 1983 federal conspiracy conviction for impeachment purposes because the conviction occurred more than ten years prior to trial.

1. Applicable Law

Rule 609(a) allows the impeachment of a witness by evidence of a prior conviction if the prior conviction was a felony or a crime of moral turpitude, regardless of punishment, the trial court determines that the probative value of the evidence outweighs the prejudicial effect, and the evidence is elicited from the witness or established by public record. TEX. R. EVID. 609(a). If more than ten years have elapsed since the witness's conviction or release from confinement, rule 609(b) provides that evidence of the conviction is not admissible unless the trial court determines that its probative value, supported by specific facts and circumstances *substantially* outweighs its prejudicial effect. TEX. R. EVID. 609(b). Evidence of a conviction is not admissible if probation has been satisfactorily completed for the conviction, and the person has not been convicted of a later crime that was classified as a felony or involved moral turpitude, regardless of punishment. TEX. R. EVID. 609(c).

The proponent seeking to introduce conviction evidence under rule 609 bears the burden of demonstrating that its probative value outweighs its prejudicial effect. *Theus v. State*, 845 S.W.2d 874, 880 (Tex. Crim. App. 1992). In weighing the probative value of a conviction against

its prejudicial effect, a court considers these non-exclusive factors: (1) the impeachment value of the prior crime, (2) the temporal proximity of the past crime relative to the charged offense and the witness's subsequent history, (3) the similarity between the past crime and the offense being prosecuted, (4) the importance of the defendant's testimony, and (5) the importance of the credibility issue. *Id*. at 880. In deciding whether, in the interests of justice, the probative value of a remote conviction substantially outweighs its prejudicial effect, a court may consider all relevant specific facts and circumstances, including whether intervening convictions dilute the prejudice of that remote conviction. *Meadows v. State*, 455 S.W.3d 166, 170 (Tex. Crim. App. 2015). A trial court has wide discretion in ruling on the admissibility of a prior conviction, and we will reverse only when the decision is outside the zone of reasonable disagreement. *Theus*, 845 S.W.2d at 881.

2. Analysis

Appellant asserts that the case should be remanded because the trial court failed to apply the *Theus* factors in determining whether Rodriguez's remote prior felony conviction should be admitted. As in the trial court, Appellant presents no argument analyzing how a proper application of the *Theus* factors shows that the probative value of a remote conviction substantially outweighs its prejudicial effect and favors its admissibility at trial. Rather, he summarily asserts on appeal that the trial court made an incorrect ruling and misapplied the law when it not only stated that any felony conviction more than ten years' old was clearly inadmissible, but also failed to consider the *Theus* factors in determining whether Rodriguez's conviction was admissible for impeachment purposes under rule 609(b). We disagree with Appellant's contentions.

a. Impeachment Value

While Appellant is correct in noting that the trial court initially declared that the remote felony conviction was "clearly" inadmissible, the record additionally shows that the trial court

asked Appellant to provide an explanation and further information to show why the conviction was admissible, and before ruling on Appellant's request to use Rodriguez's prior conviction, it discussed and made specific reference to rule 609(b).

At the outset of cross-examination, Rodriguez denied that he had used cocaine or marijuana on the evening of the assault. Later, out of the jury's presence, Appellant sought permission from the trial court to ask Rodriguez about his federal conviction for conspiracy to distribute marijuana and cocaine. Initially, after learning that Rodriguez had been convicted in federal court in 1983 and had received five years' probation as punishment, the trial court stated that Appellant could not use the conviction. The trial court asked Rodriguez about his 1983 felony conviction as well as a misdemeanor conviction that had occurred in 2001 or 2002 and learned from him that he had completed his probated sentences in both cases.

The trial court asked Appellant to explain why Rodriguez's remote felony conviction was relevant. Defense counsel explained that it would be promoting the defense of provocation and suggested that Rodriguez may have been under the influence of alcohol and marijuana or cocaine. The trial court noted that Rodriguez had testified that he was not under the influence of anything other than alcohol and wanted to know how Appellant's defensive posture was not speculative. Defense counsel then claimed that the conviction went to the truthfulness of Rodriguez's character. Relying on rule 609, the trial court stated, "But it has to be within ten years . . . [a]nd the Court makes a determination. That's why I'm trying to find out. Where are you coming up with the idea that he was under the influence of cocaine or marijuana?" Defense counsel claimed, "Well, Judge, I'm trying to explore that because people just don't go up and start bar fights for no reason." The trial court remarked, "Well, I don't know that. I don't know that[,]" and asked Defense counsel to

state his good faith basis for asserting that Rodriguez was under the influence of cocaine or marijuana at the time of the assault. The trial court continued:

> Now, as to what happened 20, 30 years ago, that's a different battle. You know, but just because he was convicted – and under the Rule, if it's over ten years, it's clearly not admissible. But, you know, that's why I'm trying to find out[.] . . . If it's just based on the fact that he was convicted in 1983, over 30 years ago, I don't understand it. That's why I'm asking, where are you coming up with -- what's the good faith basis for you . . . getting into the fact that he was under the influence of cocaine and/or marijuana at the time of this offense?

Responding to the court, defense counsel asserted that bar employees had informed him that Rodriguez seemed to be "under the influence of something other than alcohol when he goes to the bar." The trial court replied, "Well, that's speculative. . . . So it's not coming in. So that's why I'm trying to find out." The trial court continued to seek Appellant's good-faith basis for using the prior remote conviction before it declared that it would not allow the conviction to be used to impeach Rodriguez. Reciting rule 609(b) and (c), the trial court explained to counsel that evidence of a conviction is not admissible if the person satisfactorily completed probation for the conviction and the person has not been convicted of a later crime that was classified as a felony or involves moral turpitude, regardless of punishment. It further declared, "[I]t's been past ten years and I think the evidence concerning the impeachment by prior conviction of 1983 on a felony level offense on the federal side fits in under 609. And the Court is going to sustain the objection and not allow the parties to get into it."

When considering the probative effect of evidence versus its possible prejudicial effect, we may presume that the trial judge conducted the rule 609 balancing test, which need not be shown in the record. *Chitwood v. State*, 350 S.W.3d 746, 749 (Tex. App.—Amarillo 2011, no pet.) (explaining that a trial court need not inform parties of its balancing analysis); *Bryant v. State*, 997 S.W.2d 673, 676 (Tex. App.—Texarkana 1999, no pet.) (citing *Stern v. State*, 922 S.W.2d 282, 287 (Tex. App.—Fort Worth 1996, pet. ref'd)). Moreover, although not overt, the record indicates

that the trial court repeatedly attempted to obtain information from Appellant to properly rule on his request to use Rodriguez's prior felony conviction. It explicitly shows that the trial court examined and considered rule 609(b) before rejecting Appellant's request and, by seeking out further argument from counsel, implicitly indicates that the trial court performed a rule 609(b) balancing test.

The trial court's ruling reflects its determination that Appellant had failed to satisfy his burden of demonstrating that the probative value of Rodriguez's conviction substantially outweighed its prejudicial effect. We agree with that determination. The impeachment value of the remote felony conviction for a drug-related offense—which is generally not a crime of moral turpitude, deception, or violence—was not supported by any facts related to the underlying offense, and therefore—under the first *Theus* factor—has low impeachment value. *Theus*, 845 S.W.2d at 881 ("[W]hen a party seeks to impeach a witness with evidence of a crime that relates more to deception than not, the first factor weighs in favor of admission."); *Denman v. State,* 193 S.W.3d 129, 136 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (recognizing that the impeachment value of crimes that involve deception or moral turpitude is higher than crimes that involve violence, which has a higher potential for prejudice, and declining to find that the crime of delivery of cocaine is a crime of moral turpitude).

b. Temporal Proximity of Past Offense

The second factor—the passage of time between the prior conviction and date of trial—weighs only very slightly in favor of admission. Rodriguez's remote conviction occurred more than thirty-three years before he testified. In that period, Rodriguez had a single misdemeanor conviction for the offense of driving while intoxicated, which had occurred approximately fifteen years before Appellant's trial and is not a crime of moral turpitude. *Theus*, 845 S.W.2d at 881

("[T]he second factor will favor admission if the past crime is recent and if the witness has demonstrated a propensity for running afoul of the law."); *see Shipman v. State*, 604 S.W.2d 182, 184 (Tex. Crim. App. 1980) (declaring that the offense of driving while intoxicated is not a crime of moral turpitude). Therefore, the second factor does not tend to remove the taint of remoteness from his 1983 conviction.

c. Similarity of Crimes

The third factor, which militates against the admission of a conviction for impeachment purposes if the past crime and the crime charged are similar, does not in this instance bar admission of Rodriguez's remote conviction because Rodriguez was not a defendant in this case and his 1983 drug-related conviction is dissimilar to the offense for which Appellant was charged. *See Theus*, 845 S.W.2d at 881 (explaining that the rationale for the third factor is that the admission of a similar crime would subject a defendant to a situation where a jury may convict on the perception of past conduct rather than on the facts of the charged offense).

d. Importance of Testimony and Credibility

The fourth and fifth factors are related to the importance of testimony and credibility. *Id.* As the importance of the defendant's credibility escalates, so will the need to allow the State an opportunity to impeach the defendant's credibility. *Id.* Although Rodriguez's testimony and credibility were important to the case, his testimony that he and Appellant engaged in a verbal encounter one or two hours before the assault was corroborated by other witnesses in the bar. Mendoza's testimony that a bar patron had informed him that "Alex" had broken a bottle on someone's head, that he had found Rodriguez injured and bleeding, and he had cleaned up broken glass and blood, also corroborated Rodriguez's testimony that Appellant had struck him with a beer bottle and cut him, causing him to bleed. This corroborative testimony lessened the

importance of Rodriguez's testimony and lessened the need to impeach his testimony by means of a conviction which occurred over ten years prior. *Id*. Thus, these final *Theus* factors do not favor admission of Rodriguez's conviction.

Appellant did not satisfy his burden of showing that the probative value of Rodriguez's prior remote conviction substantially outweighed its prejudicial effect as required by rule 609(b), and we conclude the trial court's exclusion of the conviction was within the zone of reasonable disagreement. *Henley*, 493 S.W.3d at 83; *Taylor*, 268 S.W.3d at 579.

Because the trial court did not abuse its wide discretion, we overrule Appellant's second issue.

C. Admission of Hearsay Evidence

In his third issue, Appellant contends that the trial court abused its discretion by allowing Mendoza to present the hearsay testimony of Criss Cross under the present sense impression exception to the hearsay rule. Appellant argues that Cross's statements "were not a product of a reflective event" as the event was occurring and were made after the assault had occurred inside the bar. He complains that the fact that the statements were made after Appellant had purportedly assaulted Rodriguez renders them inadmissible. On these bases, he concludes that the statements were not admissible under the present-sense impression exception to the hearsay rule.

1. Applicable Law

"Hearsay" means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement. TEX. R. EVID. 801(a–b). Hearsay is not admissible unless otherwise permitted by statute, the rules of evidence, or other rules prescribed under statutory authority. TEX. R. EVID.

802. Inadmissible hearsay admitted without objection may not be denied probative value merely because it is hearsay. *Id*.

The rules of evidence contain exceptions to the rule against hearsay. TEX. R. EVID. 803, 804. The twenty-four hearsay exceptions listed in rule 803 may be roughly categorized into (1) unreflective statements, (2) reliable documents, and (3) reputation evidence. *Fischer v. State*, 252 S.W.3d 375, 379 (Tex. Crim. App. 2008). The rationale for all of the exceptions is that, over time, experience has shown that these types of statements are generally reliable and trustworthy. *Id.* The first set of hearsay exceptions, unreflective statements, are "street corner" utterances made by ordinary people before any thoughts of litigation have crystallized. *Id.*

Under rule 803(1), a statement describing or explaining an event or condition that is made while or immediately after the declarant perceived it—a present sense impression—is not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness. TEX. R. EVID. 803(1). The person who made the statement is the declarant. TEX. R. EVID. 801(b). "Matter asserted" means: (1) any matter a declarant explicitly asserts; and (2) any matter implied by a statement, if the probative value of the statement as offered flows from the declarant's belief about the matter. TEX. R. EVID. 801(c).

The rationale for the present-sense impression exception is that the contemporaneity of the statement with the event that it describes eliminates all danger of faulty memory and virtually all danger of insincerity. *Fischer*, 252 S.W.3d at 380. Rule 803(1) is predicated on the notion that "the utterance is a reflex product of immediate sensual impressions, unaided by retrospective mental processes." *Id*. at 381. The utterance is instinctive, rather than deliberate. *Id*. The Court of Criminal Appeals has explained:

> The rule is predicated on the notion that "the utterance is a reflex product of immediate sensual impressions, unaided by retrospective mental processes." It is

> "instinctive, rather than deliberate." If the declarant has had time to reflect upon the event and the conditions he observed, this lack of contemporaneity diminishes the reliability of the statements and renders them inadmissible under the rule. Once reflective narratives, calculated statements, deliberate opinions, conclusions, or conscious "thinking-it-through" statements enter the picture, the present sense impression exception no longer allows their admission. "Thinking about it" destroys the unreflective nature required of a present sense impression.

Id. (internal citations omitted); *see also Rabbani v. State*, 847 S.W.2d 555, 560 (Tex. Crim. App. 1992).

2. Analysis

To admit hearsay evidence as a present sense impression, three principal requirements must be met: (1) the declarant must have personally perceived the event described; (2) the declaration must be an explanation or description of the event rather than a narration; and (3) the declaration must be contemporaneous with the event. *Russo v. State*, 228 S.W.3d 779, 808 (Tex. App.—Austin 2007, pet. ref'd) (citing *United States v. Mitchell*, 145 F.3d 572, 576 (3d Cir. 1998); *accord United States v. Ruiz*, 249 F.3d 643, 646 (7th Cir. 2001)). Contemporaneity of the event— which may be inferred circumstantially—and the declaration by itself should be a sufficient guarantee for admissibility. *Russo*, 228 S.W.3d at 808 (internal citations omitted).

The declaration, if not simultaneous with the event, must be made immediately thereafter, that is, after only a slight lapse of time. *Id*. at 809. No bright-line rule exists for determining whether a lapse of time is too long for a statement to be considered as being made "immediately after" the declarant perceived the event. *Castillo v. State*, 517 S.W.3d 363, 378 (Tex. App.—Eastland 2017, pet. ref'd) (holding that five-minute lapse of time did not destroy the contemporaneity of present-sense statement and citing *Kubin v. State*, 868 S.W.2d 394, 396 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd); *U.S. v. Cain*, 587 F.2d 678, 681 (5th Cir. 1979) (holding that fifteen-minute lapse of time is too long); *Harris v. State*, 736 S.W.2d 166, 167 (Tex.

App.—Houston [14th Dist.] 1987, no pet.) (holding thirty-minute lapse of time is not too long); *Beauchamp v. State*, 870 S.W.2d 649, 653 (Tex. App.—El Paso 1994, pet. ref'd) (declaring that no *per se* rule exists for determining whether too much time has passed between the making of the statement and the occurrence of the events or conditions which precipitated the comment and holding that ten– to nineteen–minute timespan was too remote for present sense impression exception to apply). We have determined that a functional test should be applied, namely, whether the proximity in time is sufficient to reduce the hearsay dangers of faulty memory and insincerity. *Beauchamp*, 870 S.W.2d at 653.

According to Mendoza, approximately twenty of the bar's fifty-eight patrons "took off" after the assault. Cross, a regular patron, ran out of the bar through the side door and, as he "jumped straight into his car," he stated to Mendoza: "This fool just broke a bottle over this dude's head." Mendoza asked, "Who?" and Cross yelled, "Alex." Cross's statement explains a startling or shocking event, essentially that Alex had broken a bottle on someone's head. Cross made his statement immediately after the event, just as he and other patrons were fleeing from the establishment. Cross used the term "just" when he described the event of the assault as he ran out of the bar and hurried to his vehicle.

As an adverb, "just" is defined as "within a brief preceding time" or "but a moment before." *Just*, WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1040 (2003); *Just*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 679 (2014) (defining "just" as "very recently"). In the context of Cross's statement, the term "just" describes that the act of breaking a bottle on someone's head had occurred very recently or but a moment before.

Such an occurrence—that is, the breaking of a bottle on a person's face and head—is within the realm of a shocking or startling event that would produce excitement in an observer. Although

no timeframe between the assault and Cross's statement is identified in the record, a trial court could reasonably conclude from the evidence that Cross made his statement immediately after he perceived the startling or shocking event. Cross's declaration, made soon after Cross fled from the bar, is admissible as a present sense impression because it is sufficiently contemporaneous with the event Cross described. *Fischer*, 252 S.W.3d at 379; *Russo*, 228 S.W.3d at 808 (declaring that contemporaneity of the event and the declaration by itself, should be a sufficient guarantee for admissibility) (internal citations omitted). Accordingly, the statement is a present sense impression and is not excluded by the rule against hearsay. TEX. R. EVID. 803(1). Because the statement was admissible as an exception to the hearsay rule, the trial court did not abuse its wide discretion in admitting the statement in evidence.

We overrule Appellant's third issue.

III. Charge-Related Error

In his sixth issue, Appellant complains that the trial court failed to comply with article 36.14 of the Code of Criminal Procedure because "the reporter's record fails to reveal that the trial court provided Appellant and his counsel . . . a reasonable time to examine the charge before it was read to the jury." He asserts that this is reversible error.

A. Applicable Law

Article 36.14 provides that before the trial court's charge is read to the jury, the defendant or his counsel shall have a reasonable time to examine the same and he shall present his objections thereto in writing, distinctly specifying each ground of objection. TEX. CODE CRIM. PROC. ANN. art. 36.14.

B. Analysis

Appellant asserts that the requirement of reasonable time to review the court's charge under article 36.14 is a waivable right, that is, one that must be implemented and is not relinquished without a litigant's express waiver on the record. *See Marin v. State*, 851 S.W.2d 275, 279, 280 (Tex. Crim. App. 1993) (explaining that of the three kinds of rules, a litigant's waivable right is one that must be implemented unless the litigant expressly waives it and is never deemed to have been waived in the absence of the litigant's declaration on the record that he has so waived it). However, Appellant does not complain that the trial court failed to provide him a reasonable time to examine its charge to the jury in compliance with article 36.14. Nor does he assert that he otherwise requested but was denied an instruction or had objected to any portion of the charge that were unrecorded. He does not assert that the court's charge, in fact, contains any error. Rather, he complains only that the record itself does not show that he was given a reasonable time to examine the charge.

The State asserts that Appellant has waived his complaint regarding this issue. We agree. We recognize that, in Texas, most charge conferences are conducted during bench conferences. The Texas Court of Criminal Appeals has held that even if the court's reporter is required to record bench conferences, it remains incumbent upon a party to object if the bench conferences are not recorded. *Valle v. State,* 109 S.W.3d 500, 508-509 (Tex. Crim. App. 2003). The record does not show that Appellant objected to the court reporter's failure to record any bench conference nor does Appellant allege that he made such objection at trial. Therefore, under *Valle*, Appellant has not preserved his complaint for our review on appeal. *Id.*; *see State v. Herndon*, 215 S.W.3d 901, 910 (Tex. Crim. App. 2007) (recognizing *Valle*'s holding).

Even if this complaint was properly preserved, the record shows that after the State and Appellant had closed their cases in the afternoon, the trial court informed the jury that it would be

released and explained, "[W]e're going to be working on the charge and discussing the charge so we can prepare it for you so that hopefully it will be done by tomorrow morning. You'll show up at 9:00 a.m. Once the charge is ready, you'll have a copy of the charge and at that point the Court will read the charge to you."

The reporter's record shows that trial recommenced at 9:02 a.m. the following morning. The trial court recognized that the jury had received the charge of the court. It then provided preliminary explanations and proceeded to read the charge to the jury. This is some evidence that Appellant was provided a reasonable opportunity to review the charge—arguably overnight in the period after the jury was released and before the charge was read—and to voice any objections to it. Even if error existed, Appellant has neither claimed nor shown any harm.

We overrule Appellant's sixth issue.

IV. Improper Jury Argument

In his fifth issue, Appellant contends that the State's prosecutor engaged in improper jury argument and violated Appellant's Fifth Amendment right to remain silent when the State argued that, before his arrest, Appellant had refused to submit to police questioning about the alleged assault.

A. Applicable Law

The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself[.]" U. S. CONST. amend. V. Proper jury argument generally falls within one of four areas: (1) summation of the evidence, (2) reasonable deduction from the evidence, (3) answer to an argument of opposing counsel, and (4) plea for law enforcement. *Milton v. State*, 572 S.W.3d 234, 239 (Tex. Crim. App. 2019) (citing *Freeman v. State*, 340 S.W.3d 717, 727 (Tex. Crim. App. 2011)).

B. Analysis

Under cross-examination, when Detective Orona was questioned about his investigation, he explained that he had attempted to speak with Appellant at his workplace. Orona was directed to a main building, but when he arrived, he was informed that Appellant had "just walked out." That afternoon, Appellant's attorney contacted Orona and advised him that Appellant would not be providing a statement to police.

During closing jury arguments, defense counsel asserted that a number of people at the bar could have been the one to have struck Rodriguez other than Appellant. Counsel criticized the work of the officers who initially responded to the scene of the assault stating, "I'm tired of police officers and police detectives in El Paso doing a shoddy job." Undercutting the testimony of Rodriguez, counsel argued that the earlier, verbal altercation between Rodriguez and Appellant had simply caused Rodriguez to focus his attention on describing Appellant to the responding officers. Counsel also complained that officers failed to speak with the patron identified as Criss Cross after he failed to answer one of their phone calls. To this argument, the State countered that Rodriguez had testified with certainty that it was Appellant who had assaulted him on the occasion, that the bar's assistant manager, Mendoza, had testified that another patron (Cross) excitedly uttered to him that Appellant had just broken a bottle on Rodriguez's head, and that Rodriguez had fled the scene. While acknowledging that Appellant had a Fifth Amendment right to not testify for which the jury could not use against him, the State urged that Appellant's flight from the scene could be considered. The State further noted that Appellant had not spoken with officers when they called and visited his workplace, from which he had also departed. The State argued that Appellant had not returned phone calls from police and informed the jury that it could use those facts as consciousness of Appellant's guilt.

"The right to a trial untainted by improper jury argument is forfeitable." *Hernandez v. State*, 538 S.W.3d 619, 622 (Tex. Crim. App. 2018) (citing *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App 1996)). To preserve a complaint for appellate review, "the record must show that . . . the complaint was made to the trial court by a timely request, objection, or motion[.]" TEX. R. APP. P. 33.1(a)(1). To cure erroneous jury argument, "the defendant must object and pursue his objection to an adverse ruling." *Hernandez*, 538 S.W.3d at 622. Appellant did not object to any of the arguments about which he now complains on appeal. Consequently, Appellant has failed to preserve this point of error for our review.

Even if Appellant had preserved this issue, we observe that the Fifth Amendment only protects a defendant against compulsory self-incrimination *after* a defendant has been arrested or when he is the subject of custodial interrogation. *Salinas v. State*, 369 S.W.3d 176, 178–179 (Tex. Crim. App. 2012), *aff'd,* 570 U.S. 178 (2013). The Fifth Amendment does not prohibit the State from introducing evidence of a defendant's pre-arrest, pre-*Miranda* silence. *Salinas*, 369 S.W.3d at 178–79. To the contrary, the Fifth Amendment right against compulsory self-incrimination is "simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak." *Id.* Consequently, the prosecutor's closing argument regarding Appellant's prearrest silence was not entitled to Fifth Amendment protection. *Id.* at 179.

We overrule Appellant's fifth issue.

V. Sequestration Comment

In his first issue—the last that we address, Appellant complains that the trial court's sequestration comments to the jury were calculated to coerce or entice jurors to reach a unanimous verdict during the guilt-innocence phase of trial.

During its first day of deliberations, the jury issued a note to the trial court at 5:12 p.m.:

> Judge,
>
> We still have not come to an [sic] unanimous decision. We will need more time to deliberate. We all are concerned about family issues. [Its] getting late and we are wondering what is next? Please advise.

In response, the trial court advised the jury, in part:

> Now, ladies and gentlemen of the jury, I have a question that you've all sent out concerning what to do in case you do not arrive at a verdict today. What I find encouraging in your note is that you will – "Have not come to [a] unanimous decision, we will need more time to deliberate.["]
>
> And I understand you're working hard, okay? And that's encouraging…[.] What happens is this: In a criminal case, as I mentioned before, the jury cannot separate. You will be sequestered in a hotel room tonight if you are not able to reach a verdict within a reasonable time from now, say in about another hour or so because we need to make arrangements ourselves. We need to call hotels. We need to allow you to call people to get you clothes and things of that nature—change of clothes. We need you to let your family know. We need to make arrangements for the parking garage to house the vehicles. We need to make arrangements with the hotel so they can come and pick you up and transport you-all.
>
> Because once— like I mentioned, you cannot separate, okay? And that's by law. So[,] we'll—you know, you're still deliberating, which is encouraging, as I said. But that's what will happen. So, I mean, if you want to set up a deadline by 6:30, if you still haven't reached a verdict, then we can call it quits for the day. I know you've been working kind of hard. Maybe you need a rest.
>
> But at that time—it will give you at least a half hour or so to call family and try to get clothes and things of that nature over here. You can't go over there, okay? They're going to have to bring them to you or bring them to the hotel, whichever is easier. But that's basically what will happen, okay?

Appellant did not object to these instructions.

After the jury resumed its deliberations, it issued another note to the trial court at 6:02 p.m.: "We have come to the realization that no extra amount of time will yield a unanimous decision. Please advise." The trial court issued an *Allen* instruction, which is a supplemental charge sometimes given to a deadlocked jury that emphasizes the importance of reaching a verdict. *Allen*

v. United States, 164 U.S. 492, 501–02 (1896); *Traylor v. State*, 567 S.W.3d 741, 744 (Tex. Crim. App. 2018). The trial court then instructed, in part:

> Now, with this additional instruction, you're instructed to continue deliberating in an effort to arrive at a verdict which is acceptable to all the members of the jury. But what I'm going to do is, you will still be deliberating with this instruction in mind. But I'm going to stop for the evening. You're going to be sequestered tonight. You're going to be in a hotel. You'll reconvene tomorrow morning at 9:00 a.m. and continue deliberating.
>
> And then after tomorrow morning, we'll see what happens, okay? But I'll put it in writing, and I'll give it to the bailiff for the morning when you-all arrive, so you can have that instruction about the continuing deliberating with regards to, you know, the issues being the same as to any other jury. The evidence is not going to be any different than basically what it is today, okay?
>
> So with that in mind, I'll go ahead and just stop your deliberations. Let's make arrangements to get you to the hotel. Make your calls that you need to make and start making— putting the cars in where they're supposed to be. And the bailiff will coordinate all that with you, okay?

Appellant did not object to these instructions.

Appellant argues that the trial court's instructions failed to comport with article 35.23 and "had a coercive effect . . . because the jury was expressly informed . . . that they had better hurry up and arrive at a verdict or else they would be kept overnight and not allowed to go home to their spouses, children, and/or other family members."

A. Applicable Law

After the trial court has given its charge to the jury, article 35.23 permits the court on its own motion to order that the jury not be allowed to separate until a verdict has been rendered or the jury has been finally discharged. TEX. CODE CRIM. PROC. ANN. art. 35.23. Any person who makes known to the jury which party made the motion not to allow separation of the jury shall be punished for contempt of court. *Id.*

B. Analysis

Claims that jury coercion has occurred often arise when a trial court attempts to encourage a deadlocked jury to reach a verdict. *See Hollie v. State,* 967 S.W.2d 516, 518 (Tex. App.—Fort Worth 1998, pet. ref'd). In those situations, the trial court—administering what is known as an *Allen* charge—informs the jury, among other things, that if the jury is unable to reach a verdict, a mistrial will result, the indictment will still be pending, and there is no guarantee that a subsequent jury will find the questions easier to answer. *Barnett v. State*, 161 S.W.3d 128, 133 (Tex. App.—Fort Worth 2005), *aff'd*, 189 S.W.3d 272 (Tex. Crim. App. 2006). An *Allen* charge is a generally accepted method of securing jury unanimity; however, a court must be careful to administer the charge in a manner that does not have an improperly coercive effect on jury deliberation. *See Lowenfield v. Phelps,* 484 U.S. 231, 237 (1988); *Howard v. State,* 941 S.W.2d 102, 123 (Tex. Crim. App. 1996).

Here, Appellant does not complain that it was improper to sequester the jury or that the *Allen* instruction was improper. Rather, he complains that the trial court's comments regarding sequestration were sufficient to coerce the jury to quickly render a verdict.

Appellant concedes that article 35.23 allows the trial court to sequester jurors. However, without citation to authority, Appellant then argues that the contempt-of-court punishment provision embodied within article 35.23—applicable when the identity of the party who requests sequestration is disclosed—constitutes a manifestation of the legislature's recognition that sequestration is coercive and that jurors dislike being separated from their homes and families. TEX. CODE CRIM. PROC. ANN. art. 35.23. He contends that the trial court erred by "telling the jury that [it] must reach a verdict in order to be released," and asserts that many jurors likely perceived the trial court's message to mean that they would be sequestered indefinitely and unable to see their families unless they reached a unanimous verdict.

Appellant asserts that it was futile to object to the sequestration comments in the trial court because the trial court possessed the authority to sequester the jury. According to Appellant, the harm caused by the trial court's sequestration comments was already done, "an instruction might have placed Appellant or his counsel in a contempt situation," and there was no corrective action that defense counsel could have taken. The coercive effect, he argues, is obvious because after the jury reconvened the next morning, its deliberations were brief, and its verdict was unanimous. Appellant contends that the jury should have been informed that it would be sequestered and nothing more because informing them that—in the absence of a unanimous verdict—they would be sequestered coerced them to render a unanimous verdict.

The State contends that Appellant has forfeited our review of this issue because Appellant did not object to the trial court's initial sequestration comments and did not complain that the act of sequestering the jury would coerce the jury to render a quick guilty verdict. We agree. To preserve an issue for appeal, the complaining party must make an objection or request as soon as the grounds for doing so become apparent in order to provide the trial court an opportunity to correct any error before it results in the need for a retrial. *See* TEX. R. APP. P. 33.1(a)(1); *Buchanan v. State*, 207 S.W.3d 772, 775 (Tex. Crim. App. 2006). Appellant voiced no objection in the trial court regarding the matters about which he now complains on appeal, and in this regard, he has failed to preserve his complaints.

Even if Appellant had preserved this issue, it would not merit relief. Jury coercion has been found when the trial court continues to poll the jury after a lack of unanimity is revealed. *Barnett*, 161 S.W.3d at 134 (internal citations omitted). A trial court may also coerce a jury by identifying dissenting jurors and instructing them to reexamine their viewpoints. *Barnett*, 161 S.W.3d at 134 (citing *Howard v. State*, 941 S.W.2d 102, 124 (Tex. Crim. App. 1996) (en banc), *overruled on*

other grounds by Easley v. State, 424 S.W.3d 535, 538 n.23 (Tex. Crim. App. 2014), *and modified by Simpson v. State*, 119 S.W.3d 262, 266 (Tex. Crim. App. 2003)). In this instance, the trial court did not poll the jury or identify dissenting jurors and instruct them to reexamine their viewpoints. Consequently, the record lacks evidence of these types of coercion.

The trial court informed the jurors that they could not be permitted to separate "by law." This was an erroneous statement but a harmless one. We observe that the initial purpose behind the prohibition against jury separation during deliberations was to prevent jury tampering. *Chavez v. State*, 134 S.W.3d 244, 246 (Tex. App.—Amarillo 2003, pet. ref'd) (citing *Hood v. State* 828 S.W.2d 87, 93 (Tex. App.—Fort Worth 1992, no pet.)). After its amendment in 1989, article 35.23 no longer requires juror sequestration. *Sanchez v. State*, 906 S.W.2d 176, 178 (Tex. App.—Fort Worth 1995, pet. ref'd) (explaining that sequestration is no longer mandated and that the defendant must either timely file a motion to sequester or timely object to a request to separate to preserve for appeal a complaint that the trial court deprived the defendant of the right to have the jury sequestered). The trial court's statement to the jury that sequestration was mandatory was harmless because article 35.23 authorized the trial court to sequester the jury, and the trial court exercised its discretion as allowed. TEX. CODE CRIM. PROC. ANN. art. 35.23.

Appellant's suggestion that many jurors perceived the trial court's sequestration comments to mean that indefinite sequestration would occur if no unanimous verdict was reached is speculative. The record shows otherwise. While the trial court acknowledged that the jury's continuing deliberations, the court informed the jurors it had the ability to establish a deadline such as 6:30 p.m., and informed the jurors that if they had not reached a verdict by that time, they could recess for the evening to rest. The court also explained that the jurors would be permitted to contact family members and make arrangements for themselves and their families.

In response, the jury did not rush to return a unanimous verdict. Rather, the jury continued its deliberations for the day before later advising the trial court that it had reached an impasse. Consequently, the record shows that there was no rush to a unanimous verdict after the jury learned that it could be sequestered.

The record does not support a conclusion that the jury rushed to judgment after being sequestered. The jury did not render its unanimous verdict until 11:05 a.m. the next morning, after it had received the *Allen* instructions and the court's charge and had the charge read to it, after it had recommenced deliberations, after it had requested to hear—and heard— testimony read back, and after it had deliberated yet again. Moreover, after the guilty verdict was returned, the jury was polled, and each juror affirmed his or her verdict.

Appellant has presented no evidence that any juror was pressured into returning a guilty verdict because he or she did not wish to be sequestered. Rather, the record establishes that the jury continued to deliberate and did not establish that it rushed to judgment. *See Balderas v. State*, 517 S.W.3d 756, 791 (Tex. Crim. App. 2016).

We overrule Appellant's first issue.

VI. Certification of Right to Appeal

We note that the trial court certified Appellant's right to appeal in this case, but the certification does not bear Appellant's signature indicating that he has been informed of his rights to appeal and to file a pro se petition for discretionary review with the Texas Court of Criminal Appeals. *See* TEX. R. APP. P. 25.2(d). We thus find that the certification is defective and has not been corrected either by Appellant's attorney or the trial court.

To remedy this defect, the Court ORDERS Appellant's attorney, pursuant to TEX. R. APP. P. 48.4, to send Appellant a copy of this opinion and this Court's judgment, to notify Appellant of

his right to file a pro se petition for discretionary review, and to inform Appellant of the applicable deadlines. *See* TEX. R. APP. P. 48.4, 68. Appellant's attorney is further ORDERED, to comply with all the requirements of TEX. R. APP. P. 48.4.

CONCLUSION

We affirm the trial court's judgment.

GINA M. PALAFOX, Justice

July 17, 2020

Before Alley, C.J., Rodriguez, and Palafox, JJ.

(Publish)