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Court of Criminal Appeals of Texas

November 25, 2020, Delivered

NOS. PD-1090-18, PD-1091-18

2020 WL 6930819

NATHAN RAY FOREMAN, Appellant

v.

THE STATE OF TEXAS

**Judges:** KEASLER, J., delivered the opinion for a unanimous Court.

### **Opinion**

### **ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTEENTH COURT OF APPEALS, HARRIS COUNTY**

Acting on evidence that two men had been tortured and robbed at a business in Houston, the police obtained a warrant to search the business. The warrant authorized the police to seize “any and all . . . surveillance video and/or video equipment” from the business—and that is precisely what they did. The problem, Appellant Nathan Foreman says, is that the affidavit supporting the warrant said not one word about “surveillance video and/or video equipment” possibly being at the business. In this opinion, we must decide whether the probable-cause magistrate was nevertheless justified in issuing a warrant authorizing the police to seize that equipment. We conclude that she was.

## I. BACKGROUND

As far as con men go, Richard Merchant and Moses Glekiah are not what most people would call luminaries of their profession. They had concocted a plan to swindle Appellant Nathan Foreman into buying a batch of “black money,”<sup>1</sup> allegedly valued at \$200,000, for \$100,000 in cash. Of course, the “black money” was not money at all—it was construction paper. And at first, it seemed like the scam was working; Foreman appeared to be on board. Foreman agreed to conduct the transaction at Dreams Auto Customs, an auto-body shop owned by his wife. But somewhere along the way, the scam went awry.

Not long after Merchant and Glekiah arrived at the shop, they were ambushed. Foreman and some accomplices captured both men, tied them up, and tortured them. Eventually, Merchant and Glekiah were forced into a van at gunpoint. Foreman ordered his accomplices to take the pair to “the spot” and said that he would “be there” when they arrived. Unfortunately for Foreman, Merchant and Glekiah managed to escape in transit. Glekiah eventually told the police what had happened to them and where it had happened.

Based on the information that Glekiah gave, the police applied for a warrant to search Dreams Auto Customs. In addition to providing the known details of

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<sup>1</sup> See *Foreman v. State*, 561 S.W.3d 218, 227 n.3 (Tex. App.—Houston [14th Dist.] 2018) (*en banc*) (explaining what a “black money” scam is).

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the alleged offenses, the warrant affidavit had this to say about the shop, produced here without alteration:

Said location of **2501-C #2 Central Parkway Houston, Harris County, Texas** is more particularly described as a single story building complex with a large sign facing Central Parkway that shows address 2501-C for all the businesses within the complex strip, this particular business is made of metal and brick with dark tinted glass windows and black painted aluminum; a sign attached to the front of the building over the door reads "Dreams Auto Customs"; the front door is dark tinted glass and faces parking lot; on the door is suite number C#2; the back of the business has an aluminum looking, gray in color bay door that opens into the business.

Later in the affidavit, this location is described as an "autoshop."

The hearing officer reviewing the affidavit, whom we shall hereinafter refer to as the "magistrate," found that it established probable cause. She issued a warrant for the police "to search for and seize any and all ITEMS CONSTITUTING EVIDENCE CONSTITUTING AGGRAVATED ASSAULT AND ROBBERY that may be found therein [at the listed location, Dreams Auto Customs] including," among other things, "audio/video surveillance video and/or video equipment." Pursuant to this warrant, the police seized three computer hard drives from Dreams Auto Customs. Upon analysis, one hard drive—the only hard drive at issue in this proceeding—was found to contain surveillance

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footage that depicted much of the incident at Dreams Auto Customs and Foreman’s involvement in that incident. Foreman was charged with aggravated kidnapping and aggravated robbery.

Foreman filed a motion to suppress the fruits of the search, invoking the Fourth Amendment to the United States Constitution, Article I, Section 9 of the Texas Constitution, and Chapter 18 of the Texas Code of Criminal Procedure. Specifically, Foreman argued that the warrant affidavit “fail[ed] to set forth sufficient facts to establish probable cause that audio and video surveillance equipment” could be found at Dreams Auto Customs. Through a winding procedural path that is not altogether relevant to this proceeding, the trial court denied Foreman’s motion as to the hard drive at issue here and allowed the surveillance footage that it contained in evidence. Foreman was convicted of both offenses as charged and sentenced to fifty years’ confinement.

On appeal, Foreman argued that the trial judge’s ruling violated each of the constitutional and statutory provisions he had invoked in his motion to suppress. Once again, Foreman asserted that the warrant affidavit failed to establish probable cause that surveillance equipment could be found at Dreams Auto Customs. A divided panel affirmed the trial judge’s ruling. Foreman then filed a motion for *en banc* reconsideration, which was granted.

The *en banc* court of appeals agreed with Foreman that the search warrant was issued in error because

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the supporting affidavit failed to establish probable cause that Dreams Auto Customs was equipped with a surveillance system.<sup>2</sup> It rejected the State's argument that it was "common knowledge" that most businesses nowadays have surveillance systems.<sup>3</sup> In so holding, it adopted the standard that "common knowledge" consists only of matters "so well known to the community as to be beyond dispute."<sup>4</sup> Applying that standard, the court of appeals regarded the "presence of surveillance video or equipment in an auto shop" to be insufficiently "well known to the community as to be beyond dispute."<sup>5</sup> It also rejected the State's argument that the police's seizure and subsequent analysis of the hard drive was justified under the "plain view" doctrine.<sup>6</sup> The court of appeals ultimately found that the trial judge's error in admitting the surveillance footage was harmful and so reversed Foreman's conviction.<sup>7</sup>

In this discretionary-review proceeding, the State advances three arguments. First, the State argues that the court of appeals erred when it held "that a magistrate could not infer from the warrant affidavit that an auto body shop would have a surveillance system." Second, the State argues that the court of appeals erred to hold that the seizure of the surveillance system was

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<sup>2</sup> *Id.* at 238.

<sup>3</sup> *Id.* at 239.

<sup>4</sup> *Id.* (citing *Cardona v. State*, 134 S.W.3d 854, 859 (Tex. App.—Amarillo 2004, pet. ref'd)).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 244.

<sup>7</sup> *Id.* at 245.

not justified by the plain-view doctrine. Third, the State argues that the court of appeals erred to find the trial judge's putative error in admitting the surveillance footage in evidence harmful. Based on our resolution of the first point, we need not reach the second or third points.

## II. LAW

There are three distinct legal provisions at issue in this proceeding: The Fourth Amendment to the United States Constitution; Article I, Section 9 of the Texas Constitution; and Chapter 18 of the Texas Code of Criminal Procedure.

“The cornerstone of the Fourth Amendment and its Texas equivalent is that a magistrate shall not issue a search warrant without first finding probable cause that a particular item will be found in a particular location.”<sup>8</sup> Under the Fourth Amendment, probable cause to support the issuance of a search warrant exists “where the facts submitted to the magistrate are sufficient to justify a conclusion that the object of the search is probably on the premises to be searched at the time the warrant is issued.”<sup>9</sup> The test is not whether the warrant affidavit proves beyond a reasonable doubt, or even by a preponderance of the evidence,

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<sup>8</sup> *Rodriguez v. State*, 232 S.W.3d 55, 60 (Tex. Crim. App. 2007) (internal quotation marks omitted) (citing U.S. Const. amend. IV; Tex. Const. art. I, § 9).

<sup>9</sup> *Davis v. State*, 202 S.W.3d 149, 154 (Tex. Crim. App. 2006) (citations omitted).

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that a search of the listed location would yield a particular item of evidence; a “fair probability” will suffice.<sup>10</sup> Neither does the test demand that the affidavit be read with hyper-technical exactitude.<sup>11</sup> While a magistrate may not baselessly presume facts that the affidavit does not support, the magistrate is permitted to make reasonable inferences from the facts contained within the affidavit’s “four corners.”<sup>12</sup> Ultimately, the test is whether the affidavit, read in a commonsensical and realistic manner and afforded all reasonable inferences from the facts contained within, provided the magistrate with a “substantial basis” for the issuance of a warrant.<sup>13</sup> This is a “flexible and nondemanding” standard.<sup>14</sup> “Thus, even in close cases we give great deference to a magistrate’s determination of probable cause,” in part because we seek to “encourage police officers to use the warrant process[.]”<sup>15</sup>

By contrast, we have held that Article I, Section 9 of the Texas Constitution “contains no requirement that a seizure or search be authorized by a warrant.”<sup>16</sup>

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<sup>10</sup> See *Rodriguez*, 232 S.W.3d at 60 (quoting *Illinois v. Gates*, 462 U.S. 213, 235, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)).

<sup>11</sup> See, e.g., *State v. Cuong Phu Le*, 463 S.W.3d 872, 877 (Tex. Crim. App. 2015) (citing *Bonds v. State*, 403 S.W.3d 867, 873 (Tex. Crim. App. 2013)).

<sup>12</sup> E.g., *State v. McLain*, 337 S.W.3d 268, 271-72 (Tex. Crim. App. 2011) (footnotes and citations omitted).

<sup>13</sup> See *id.*

<sup>14</sup> *Id.* at 272 (citations omitted).

<sup>15</sup> *Rodriguez*, 232 S.W.3d at 59.

<sup>16</sup> *Hulit v. State*, 982 S.W.2d 431, 436 (Tex. Crim. App. 1998).

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The inquiry is holistic and singular: Whether, under the totality of the circumstances and in light of the “public and private interests that are at stake,” the search or seizure was “reasonable.”<sup>17</sup> But on appeal, the only aspect of the instant search that Foreman has characterized as unreasonable happens to be the same aspect that he finds objectionable under the Fourth Amendment: The mismatch between what the search warrant expressly authorized (*i.e.*, the seizure of “surveillance video and/or video equipment”) and what the underlying affidavit described. Therefore, our analysis under Article I, Section 9 will mirror our Fourth-Amendment analysis. We will decide whether the warrant affidavit established probable cause for the search and seizure of surveillance equipment.

Finally, Article 18.01(b) of the Texas Code of Criminal Procedure says that “no search warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance.”<sup>18</sup> Article 18.01(c) elaborates:

A search warrant may not be issued under Article 18.02(a)(10) unless the sworn affidavit required by Subsection (b) sets forth sufficient facts to establish probable cause: (1) that a specific offense has been committed, (2) that the specifically described property or items

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<sup>17</sup> *Holder v. State*, 595 S.W.3d 691, 704 (Tex. Crim. App. 2020) (citing *Hulit*, 982 S.W.2d at 436).

<sup>18</sup> Tex. Code Crim. Proc. art. 18.01(b) (some capitalization altered).

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that are to be searched for or seized constitute evidence of that offense or evidence that a particular person committed that offense, and (3) that the property or items constituting evidence to be searched for or seized are located at or on the particular person, place, or thing to be searched.<sup>19</sup>

In turn, Article 18.02(a)(10) says that a search warrant may be issued “to search for and seize . . . property or items . . . constituting evidence of an offense.”<sup>20</sup> Other provisions of Article 18.02(a) authorize the issuance of warrants to search for and seize, for example, stolen property, arms and munitions, weapons, drugs, and instrumentalities of crime.<sup>21</sup>

Evidently believing that Article 18.01(c) demands greater specificity in probable-cause affidavits for search warrants issued pursuant to Article 18.02(a)(10), the court of appeals deemed it necessary to decide whether the only provision authorizing the instant search warrant was Article 18.02(a)(10).<sup>22</sup> It found that Article 18.02(a)(10) was not the only statute authorizing the issuance of the instant search warrant, and so concluded that “additional findings [were] not required under” Article 18.02(c).<sup>23</sup> The only “findings”

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<sup>19</sup> *Id.* art. 18.01(c).

<sup>20</sup> *Id.* art. 18.02(a)(10).

<sup>21</sup> *Id.* arts. 18.02(a)(1), (3), (4), (7), (9).

<sup>22</sup> See *Foreman*, 561 S.W.3d at 234-35 (citing *Jennings v. State*, 531 S.W.3d 889, 893 (Tex. App.—Houston [14th Dist.] 2017, pet. ref’d)).

<sup>23</sup> *Id.* at 235.

necessary to justify the issuance of the instant search warrant were those required by the Fourth Amendment.<sup>24</sup>

Foreman has not complained about this holding in a cross-petition. The court of appeals' decision in this regard going unchallenged, we decline to review it. So here again, our analysis under Chapter 18 of the Code of Criminal Procedure will mirror our Fourth Amendment analysis. We need only decide whether the affidavit in this case contained enough facts for a magistrate to reasonably conclude that, to the degree of certainty associated with probable cause, a search of the listed location would yield evidentiary video equipment.

### III. ANALYSIS

Before the court of appeals, the State argued that the probable-cause magistrate could infer that Dreams Auto Customs was equipped with a surveillance system because "magistrates are allowed to make inferences and presumptions based upon common knowledge." The court of appeals, while acknowledging that magistrates are "permitted to draw reasonable inferences from the facts and circumstances contained within the four corners of the affidavit,"<sup>25</sup> nevertheless rejected the State's invocation of "common knowledge." It held

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<sup>24</sup> See *id.* ("Nonetheless, the Fourth Amendment requires that a warrant affidavit establish probable cause to believe that a particular item is at a particular location.").

<sup>25</sup> *Id.*

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that only those matters that are “so well known to the community as to be beyond dispute” may be regarded as within the realm of “common knowledge.”<sup>26</sup>

Like the court of appeals, we look upon the State’s “common knowledge” rubric with some skepticism. Our research has revealed scant support for the idea that a magistrate, contemplating a probable-cause affidavit articulating a limited set of facts to justify the issuance of a search warrant, may supplement the articulated facts with unarticulated facts that the magistrate deems so obvious or widespread as to constitute “common knowledge.”<sup>27</sup> That is not to say that probable-cause magistrates lack any authority to take cognizance of “common knowledge” whenever they perceive it. It means only that it is not how established Fourth Amendment jurisprudence would generally frame the inquiry. Established Fourth Amendment jurisprudence would instead observe that a magistrate, contemplating a probable-cause affidavit articulating

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<sup>26</sup> *Id.* at 239 (internal quotation marks and citations omitted).

<sup>27</sup> See, e.g., *Spinelli v. United States*, 393 U.S. 410, 418, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969) (characterizing as “common knowledge” the fact that “bookmaking is often carried on over the telephone and from premises ostensibly used by others for perfectly normal purposes”); *Brinegar v. United States*, 338 U.S. 160, 167, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949) (characterizing as “common knowledge” the facts that “Joplin, Missouri was a ready source of supply for liquor and Oklahoma a place of likely illegal market”); cf. also *Cassias v. State*, 719 S.W.2d 585, 589 (Tex. Crim. App. 1986) (characterizing as outside the realm of “common knowledge” the fact that the “sale or ingestion of marihuana or cocaine calls for the use of” plastic tubs and tubing).

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a discrete set of facts to justify the issuance of a warrant, is allowed to draw all reasonable inferences from the articulated facts.<sup>28</sup> And that, we conclude, is the optimal way to address the probable-cause issue before us. So, rather than imposing upon the State's scantily supported probable-cause rubric an even-less-well supported limiting principle, we will sidestep those inquiries altogether and focus instead on what we perceive to be the proper Fourth Amendment inquiry. We will simply decide whether it was reasonable for the magistrate to infer from the facts actually articulated in the probable-cause affidavit that the business described in that affidavit was equipped with surveillance cameras.

Considering the totality of circumstances presented to the magistrate, we conclude that such an inference was reasonable. To support this conclusion, we will discuss each specific, articulated fact that we believe reasonably contributed to the magistrate's determination of probable cause. Though we will discuss each fact sequentially, we will analyze them in their totality.

- The affidavit described the target location as one "business" amongst other businesses within a "single story building complex." From the fact that the target location was a "business," the magistrate could reasonably infer

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<sup>28</sup> See, e.g., *Gates*, 462 U.S. at 240, 103 S.Ct. 2317 (reaffirming "the authority of the magistrate to draw such reasonable inferences as he will from the material supplied to him by applicants for a warrant").

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that the activities being conducted there involved money. From the fact that this business was located within a “single story building complex,” the magistrate could infer that this business dealt in (or at least contained) tangible goods, and possibly even cash. These facts would reasonably contribute to the conclusion, at least to the degree of certainty associated with probable cause, that the target location had a heightened need to keep its premises secure.

- The affidavit said that the target location was “made of metal and brick,” with “dark tinted glass windows and black painted aluminum.” From this, the magistrate could reasonably conclude that, not only did this business have a heightened need for security measures, it had already adopted at least one security measure: tinted windows. From there, it would not offend reason for a magistrate to infer that there was a fair probability of other security measures being employed there, as well.
- The affidavit explained that this business was called “Dreams Auto Customs” and was in fact an “autoshop.” From this, the magistrate could reasonably infer that the target business involved the customization of automobiles. Automobiles, the magistrate might reasonably conclude, are uniquely mobile and highly valuable tangible goods. And because the automobiles being worked upon at this business were customized items, the magistrate could reasonably infer that they

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warranted extra security. These things also contributed to a reasonable inference that, at least to the degree of certainty associated with probable cause, the target location was likelier to employ some means of keeping tabs on the comings and goings of the vehicles in its care.

- The affidavit said that there was a bay door in the back of the business that opened into the interior of the business. From this fact, the magistrate could infer that the automobiles upon which Dreams Auto Customs worked were brought directly into the business; they were not handled off-site. Consequently, either for security or liability purposes, the magistrate could reasonably infer that the business needed to be able to keep an eye on the interior of the business.

From these concrete indications that the target business had a unique need for security on its premises and had in fact deployed some security measures, it was logical for the magistrate to infer that to the degree of certainty associated with probable cause, the business was equipped with a video surveillance system. This does not mean that based on the articulated facts, we consider it more-than-fifty-percent probable that the target business was using surveillance equipment. That is not what probable cause demands.<sup>29</sup> It means only that based on the totality of the articulated facts, it was not unreasonable for the magistrate to

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<sup>29</sup> See *Rodriguez*, 232 S.W.3d at 60 (citations omitted).

discern a “fair probability” of such equipment being found.<sup>30</sup>

#### **IV. CONCLUSION**

We acknowledge that this is a close case. But even in close cases we must afford the magistrate’s determination of probable cause great deference, if for no other reason than that such deference is likelier to foster the constitutionally preferred warrant-application process.<sup>31</sup> In our estimation, invalidating this warrant would serve only to discourage the police from undertaking the warrant process in the future. Why go to all the effort if a reviewing court would likely invalidate the warrant anyway, for want of the right talismanic set of words? Reading the affidavit realistically and affording it all reasonable inferences consistent with the magistrate’s ruling, and with the understanding that the warrant process is to be fostered rather than discouraged, we find that the affidavit in this case was just detailed enough for the warrant to authorize what it did.

Because we find that the warrant affidavit articulated sufficient facts for the magistrate to reasonably conclude that a search of the target business would turn up evidentiary surveillance equipment, we hold that this warrant satisfied the Fourth Amendment. Furthermore, because of the way in which this warrant was challenged at trial and on appeal, this conclusion

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<sup>30</sup> See *id.* (citations omitted).

<sup>31</sup> See *id.* at 59-60.

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also suffices to dispose of the Article I, Section 9 and Chapter 18 claims that Foreman raised. That being the case, the trial judge did not err to admit the surveillance footage in evidence.

We reverse the court of appeals' contrary judgments and affirm Appellant's convictions and sentences.

Delivered: November 25, 2020

Publish

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Court of Appeals of Texas,  
Fourteenth District, Houston

August 31, 2018, Opinions Filed

NO. 14-15-01005-CR, NO. 14-15-01006-CR

2018 WL 4183718

NATHAN RAY FOREMAN, Appellant

v.

THE STATE OF TEXAS, Appellee

**Notice:** PUBLISH—*TEX. R. APP. P. 47.2(b)*

**Counsel:** For Appellant: Stanley G. Schneider, HOUSTON, TX.

For State: Clinton Morgan, HOUSTON, TX.

**Judges:** En Banc Court consists of Chief Justice Frost and Justices Boyce, Christopher, Jamison, Busby, Donovan, Brown, Wise, and Jewell. Chief Justice Frost and Justices Broyce, Christopher, Busby, Wise, and Jewell join the En Banc Majority Opinion authored by Justice Brown. Justice Jamison and Justice Donovan issue Dissenting Opinions.

**Opinion by:** Marc W. Brown

### **Opinion**

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#### **EN BANC MAJORITY OPINION**

Appellant Nathan Ray Foreman challenges his conviction for aggravated robbery and aggravated kidnapping. Foreman argues in a single issue that the trial court should have granted his motion to suppress

surveillance video evidence found on a computer hard drive pursuant to a search warrant because the warrant's supporting affidavit did not establish probable cause. Having granted appellant's motion for reconsideration en banc, we conclude the affidavit was not sufficient to support a finding of probable cause. This court's panel plurality, concurring, and dissenting opinions filed August 10, 2017, are withdrawn, and our judgment of that date is vacated. We reverse the trial court's denial of appellant's motion to suppress and remand for a new trial consistent with this opinion.

## **I. BACKGROUND**

On December 24, 2012, witnesses driving on the service road of Highway 290 observed complainants Moses Glekiah and Richard Merchant tumble from the rear of a van onto the road. Complainants were bound with zip ties and their mouths were taped shut with duct tape. Witnesses observed that complainants had been shot and were bleeding. One witness called 9-1-1. Police and paramedics arrived at the scene, and complainants were taken by ambulance to Ben Taub Hospital.

Both complainants were injured. Merchant was more seriously injured. In addition to gunshot wounds and injuries from falling out of a moving vehicle, Merchant's abdomen had been burned with an iron. Due to Merchant's injuries, officers could not initially interview him. However, officers were able to interview Glekiah at the hospital. Glekiah initially told Officers

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Arnold and Hufstedler that he went to an auto shop to work on some cars when he was robbed by several black males.

Glekiah had an outstanding arrest warrant<sup>1</sup> and was transferred to Houston Central Jail after his discharge from the hospital. After the transfer, Arnold and Hufstedler met with Glekiah at jail, and Arnold asked him to "Take to us [sic] where this happened." Glekiah accompanied the officers and directed them to a custom auto shop at 2501 Central Parkway, Dreams Auto Customs.

The officers researched the shop, looking for individuals tied to the business. They found Charese Foreman listed as the owner of Dreams Auto Customs on a filing with the county clerk's office. Marriage license records showed Charese was married to Nathan Foreman. Arnold and Hufstedler concluded Nathan and Charese Foreman were both owners of Dreams Auto Customs.

Arnold subsequently obtained a search warrant for Dreams Auto Customs. Arnold was the affiant in the affidavit for the search warrant. In the affidavit for search warrant, Arnold described the facts as he understood them at that time: Glekiah and Merchant had agreed to meet someone at Dreams Auto Customs to conduct "business." When the two men arrived, several suspects grabbed them, tied them up, beat them, poured gasoline on them, and threatened to set them

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<sup>1</sup> Glekiah had been indicted for armed robbery in Georgia.

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on fire. The suspects stole cash and other items from the men. The suspects then forced the men into the back of a van at gunpoint and drove the van away from the auto shop. The men jumped out of the moving van because they believed they were going to be killed. As the men jumped, they were shot by the suspects.

Arnold and Hufstedler executed the search warrant on January 8, 2013. At the shop, they found and seized three computer hard drives, zip ties, duct tape, a digital camera, a gas can, a computer skimmer, and an iron. They also swabbed for DNA. The computer hard drives were transferred to the police forensics lab, and forensic experts retrieved video surveillance from one of the hard drives. The video surveillance captured a portion of the offenses and appellant's involvement in the offenses.

In a pretrial motion to suppress, appellant objected to the seizure of the computer hard drives and/or video surveillance equipment. In support of the motion, appellant argued that the warrant did not list computers or computer hard drives as items to be seized. Appellant also argued that even if the computers were characterized as "audio/video surveillance" or "video equipment" (items that were listed in the warrant), the supporting affidavit was defective because it failed to set forth sufficient facts to establish probable cause that surveillance equipment was located at the auto shop. Initially, the trial court denied the motion with regard to the computer containing surveillance video but suppressed the other two computers. Appellant then moved for rehearing of the motion to

suppress and filed a second motion to suppress. Appellant asked the trial court to suppress “[a]ll computer hard drives and or audio/video surveillance video and or video equipment.” On rehearing, the trial court ruled that none of the computers should be suppressed. Appellant moved to suppress a third time at trial. The trial court addressed the motion to suppress in a hearing outside the presence of the jury.

In the hearing, the State indicated it did not intend to introduce contents of the two computers which did not contain surveillance video so only the computer containing surveillance video was at issue. Arnold testified that he became aware of surveillance equipment at Dreams Auto Customs before drafting his affidavit, when he initially visited the shop with Glekiah. He testified that he mentioned video surveillance equipment in his affidavit “[b]ased on the cameras that we saw outside the business. If there’s cameras, there’s going to be a video surveillance system. . . . [T]he cameras outside told us that there was a system.” Arnold reiterated, “Based on what we saw at that location when we drove by, we could see the video surveillance cameras mounted on the exterior. We surmised that there must be surveillance system on the inside as well possibly. So we included that in the search warrant.” Arnold also testified it was “not unusual” and “probably expected” that a business like a custom auto shop would have a surveillance equipment system. When asked, “[I]s that something that you typically look for when investigating homicide cases?” Arnold responded, “Every time.”

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The affidavit included “audio/video surveillance video and/or video equipment” in a list of items Arnold believed might be found at the auto shop:

I, D. Arnold, a peace officer employed by Houston Police Department do solemnly swear that I have reason to believe and do believe that on the property of 2501-C #2 Central Parkway Houston, Harris County, Texas (Target Location), with the authority to search for and to seize any and all ITEMS CONSITUTING [sic] EVIDENCE CONSTITUTING AGGRAVATED ASSAULT AND ROBBERY that may be found therein including, but not limited to all DNA and items that may contain biological material; fingerprints; hair fiber(s); audio/video surveillance video and/or video equipment; instrumentalities of the crime including firearm(s) and ballistics evidence; gasoline container(s), lighter(s), tap, zip tie(s), van; fruits of the crime including wallet(s), suitcase, briefcase, money, documents establishing identity of Complainant(s) and/or Suspect(s) such as paper(s), license(s), cell phone(s).

The affidavit also described the location:

Said location of **2501-C #2 Central Parkway Houston, Harris County, Texas** is more particularly described as a single story building complex with a large sign facing Central Parkway that shows address 2501-C for all the businesses within the complex strip, this particular business [sic] is made of metal and brick with dark tinted glass windows and

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black painted aluminum; a sign attached to the front of the building over the door reads "Dreams Auto Customs"; the front door is dark tinted glass and faces parking lot; on the door is the suite number C#2; the back of the business has an aluminum looking, gray in color bay door that opens into the business.

Arnold admitted, however, that there was no reference to surveillance equipment in the section of the affidavit which stated the facts upon which his belief was based. The affidavit did not reference the officers' observation of cameras outside the business. The affidavit did not reference the officers' experience with surveillance equipment in custom auto shops or homicide cases. The facts section stated:

### MY BELIEF IS BASED UPON THE FOLLOWING FACTS:

D. Arnold (Affiant) was assigned to investigate Aggravated Assault and reviewed offense report #161435712D written by Officer A. Deleon. Affiant was dispatched to 10500 Northwest Freeway, Houston, Harris County, Texas. Affiant learned from Officer A. Deleon that Cindy Davis (Witness) reported that on December 24, 2012 she observed two men (Complainants) lying injured on the side of the roadway with their hands tied and mouths duct taped. Affiant learned from HPD Officer A. Deleon that Complainants had apparent gunshot wounds to their bodies and had been transported to Ben Taub Hospital for treatment. Affiant spoke to Diane Deyoung who witnessed Complainants coming out of a white

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van license plate AV5-0784 before the [sic] continued down the road without stopping. Affiant learned from hospital personnel that Moses Glekiah (Complainant Glekiah) was recovering from gunshot wounds and Richard Merchant (Complainant Merchant) was in critical condition for his gunshot injuries.

Affiant spoke with Moses Glekiah (Complainant Glekiah) and learned he and his friend Richard Merchant (Complainant Merchant) had agreed to engage in [sic] business transaction at 2501-C #2 Central Parkway Houston, Harris County, Texas with a male known as "Jerry." When Complainants arrived on December 24, 2012 at the business that they describe as an autoshop, they are grabbed by several males and held against their will. Complainant Glekiah reported that Suspects also stole their cash money \$400 that Complainants had in their possession, wallets, cell phone and a suitcase/briefcase container belonging to Complainant Merchant. Suspect 1 poured gasoline on Complainants and held lighter near Complainants threatening to set them on fire. Suspect 1 then called two other Suspects who put Complainants in truck at gunpoint. Complainant Glekiah says that he felt in fear for their lives. Complainants jumped out of the van because they believed they were going to be killed. As Complainant [sic] leaped out of the vehicle they were shot by Suspects.

Complainant Glekiah directed Affiant to autoshop where this Aggravated Assault and

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Robbery occurred at 2501-C #2 Central Parkway Houston, Harris County, Texas. Affiant researched the location and found the owner to be Charese Foreman. Affiant review computer databases and discovered that Charese Foreman is married to Nathan Ray Foreman. Affiant reviewed criminal history of Nathan Ray Foreman and found that he had been charged with autotheft, possession of prohibited weapon and delivery of cocaine. Affiant showed Complainant Glekiah a known photograph of Nathan Ray Foreman along with five other photos of similar looking males. Complainant Glekiah positively identified Nathan Ray Foreman as Suspect 1 who participated in punching Complainants, told other suspects what to do, poured the gasoline on Complainants and contacted 2 suspects to drive Complainant away from business. Affiant knows that gasoline and lighter are deadly weapons that can kill a person.

Affiant believes that Complainants and Suspects DNA will be inside the Target Location along with property belonging to Complainant such as money, suitcase/briefcase, wallets, cell phone, identification cards. Also instrumentalities of the crime such as white van that transported Complainants, guns used to shoot Complainants, zip ties used to tie complainants may also be inside Target Location.

The trial court denied appellant's motion to suppress.

Trial resumed after the hearing, and the trial court admitted the surveillance video into evidence. The video was discussed by many witnesses and used to corroborate complainants' testimony. While there was independent evidence about complainants' rolling out of the van and the van being on fire,<sup>2</sup> the video was particularly significant in showing that appellant was involved in the robbery and the kidnapping. Other than complainants' testimony, the video was the only significant evidence showing appellant's involvement in the crimes, and evidence showed the credibility of complainants to be questionable.

Arnold testified that complainants had been running a black money scam<sup>3</sup> on appellant. Arnold testified Glekiah lied to him in his initial interview: “[P]ortions of what he told us were not true.” Arnold testified that Glekiah’s second interview took place at

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<sup>2</sup> At trial, the first five witnesses testified to the scene out on the highway where the two complainants tumbled out of the van while tied up. The sixth witness testified about visiting the hospital to check on complainants’ condition on the day of the incident. None of this testimony identified appellant as involved in any criminal activity. None of this testimony identified appellant as a driver or passenger in the van. None of this testimony even mentioned appellant.

<sup>3</sup> In a “black money” scam, a perpetrator defrauds an individual by persuading the individual that bundles of banknote-sized black paper are actually bundles of paper money that have been dyed black to avoid detection by authorities. Glekiah and Merchant represented to appellant that they would exchange smuggled dyed money for cash at a two-for-one rate and provide chemicals to remove the dye. On December 24, 2012, Glekiah and Merchant planned to exchange \$200,000 in “black money” (construction paper) for \$100,000 of appellant’s cash.

jail because Glekiah was in custody for an outstanding warrant on an unrelated matter. Arnold testified that he ultimately believed Glekiah because “the actual explanation of why they were here came out” over time.<sup>4</sup>

Arnold also testified about the search warrant, the supporting affidavit, and the search. With regard to the computer hard drive containing the surveillance video, Arnold testified that when he executed the search, he observed that the hard drive appeared to be connected to a flat screen TV showing surveillance, and he “had reason to believe that was actually a surveillance system that was hopefully going to depict what video was collected in there.”<sup>5</sup> Arnold testified that the video corroborated complainants’ story about what had happened to them before the scene on the highway.<sup>6</sup>

When Hufstedler was on the stand, the State extensively played the video and elicited testimony about what it showed. The first person Hufstedler identified in the video was appellant. Hufstedler then repeatedly identified appellant in different parts of the video. In all, Hufstedler identified appellant in the video at least

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<sup>4</sup> Arnold also testified regarding Glekiah’s injuries. Arnold and Hufstedler testified that Glekiah identified appellant in a photo array.

<sup>5</sup> Hufstedler similarly testified, “When we entered the shop on the search warrant, when you walked into an office back in the shop itself where the cars were being worked on, if you see the monitor, it’s actually just a large TV screen like you’re looking at right now. It had surveillance cameras attached to it, and that monitor was then attached to this Dell computer.”

<sup>6</sup> The next two witnesses explained how the video had been retrieved from the computer and saved to a file.

ten times. He testified that the video showed appellant walking in with duct tape in his hand. Hufstedler also testified that the video showed that one of the men at the body shop, Darren Franklin, had a gun, and later, was walking with an iron in his hand.<sup>7</sup> Hufstedler explained that some of what occurred happened off camera. He testified that the video showed the van being parked inside the body shop. Hufstedler testified that the video showed appellant open the doors to the van and lay out a sheet or a blanket before pushing the two tied-up complainants into the back of the van and closing its doors. Hufstedler testified that, after considering the video, he conducted multiple interviews and filed aggravated kidnapping and aggravated robbery charges on appellant.

On cross-examination, defense counsel questioned Hufstedler about the absence of DNA and fingerprint evidence on the duct tape, zip ties, and other items that were seized from the auto shop. Defense counsel questioned Hufstedler about the identities of co-defendants, pointing out that there were a total of six co-defendants in the case. Hufstedler testified that complainants were initially reluctant to discuss all the facts with the police. Hufstedler acknowledged that complainants were trying to con appellant in a black money scam.

On re-direct, Hufstedler testified that the video showed appellant and a co-defendant loading bags

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<sup>7</sup> That iron was seized in the search of the body shop and tagged into evidence. There was no DNA recovered.

complainants had brought to the shop into the rental car driven by complainants before another co-defendant drove the car out of the auto shop. Hufstedler testified the rental car was later discovered “burned.” Hufstedler testified that the video and the zip ties and tape recovered at the shop corroborated what complainants told him. Hufstedler also testified that complainants’ injuries corroborated their stories.<sup>8</sup>

When Glekiah and Merchant testified, they admitted they had been running a scam on appellant. Merchant admitted that he and Glekiah were using the scam to steal \$100,000 from appellant. Merchant admitted that he had run the same scam on a previous occasion. Glekiah and Merchant admitted they were not entirely honest with the police during the investigation. Glekiah testified that he had previously pled guilty to pandering and was under indictment for another offense in Georgia. Merchant testified that he had previously been convicted of family-violence battery in Georgia. During their testimony about the events that took place in Dreams Auto Customs, the video was played both to corroborate their testimony and also to show what was missing from the video.

Recalled to the stand, Arnold testified on direct examination that the video showed appellant with a gun

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<sup>8</sup> The next witness was an arson investigator who responded to a vehicle fire and found the burned out rental car with the driver’s licenses of the two complainants, fake money, a white powdery substance, some shoes, and a backpack. The arson investigator testified that, based on his investigation, he determined the fire was incendiary, meaning someone had set the fire.

and that appellant was the one directing the other co-defendants to bring the van into the body shop.

In the State's closing argument, the State emphasized the importance of the video. Although defense counsel had attempted to minimize the impact of the video by calling it a "silent movie" in its closing, the State disputed this characterization and repeatedly referenced the video as evidence of the alleged offenses. The State argued that the video corroborated the testimony given during trial:

You know that the testimony that you heard from this stand makes sense for a variety of reasons, not the least of which is the fact that what Defense counsel describes as a silent movie exists. It's not just a silent movie, folks. That is surveillance video footage that documents a horrible, horrible crime that occurred here in your county back on Christmas Eve of 2012.

That's not nothing. That is exactly the type of evidence that you-all told me during voir dire that you wanted because you said, "Video, yeah, that would help me make my mind up. It would be great if you could see it."

Yeah, you might not be able to see everything on the video, but you see enough. You see the perpetration of a crime, and you see its horrific aftermath.

The State argued that the video evidenced the involvement of appellant in the alleged offenses:

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There should be no doubt in your mind after having seen that video that Nathan Ray Foreman, that man, was the one driving the boat that day. It was his orders. It was his—it was his initial contact with our complainants that got this ball rolling. It was his orders that people come out with guns. It was his orders that they be bound, that they be gagged. It was his orders that they be burned. It was his orders that they be tossed into the back of a van to go someplace unknown to be shot and executed.

The State also argued that the video evidenced the “exhibiting a deadly weapon” element of aggravated robbery and aggravated kidnapping:

As for the exhibiting a deadly weapon, you know that there were deadly weapons used as part of the aggravated robbery in two ways. You know that there were—that there was a gun and/or guns, as the testimony as come out, used initially right after Richard Merchant brought in that construction paper and chemicals.

How do you know that there was a gun used? Well, first of all, you saw Darren Franklin walking in with a gun on video. So you know there was at least one gun. And testimony from Moses and Richard was that there were multiple guns there.

...

And, again, the deadly weapon, we talked about this before in aggravated—when we were discussing the elements of the aggravated

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robbery, that some of you could believe the gun was used initially as they were binding and blindfolding Richard and, you know, while they had them down there on the ground. Some of you could believe that, and some of you could believe that the deadly weapon was actually used in the van.

The State argued that the video showed appellant's intent, using detailed references to the video in the form of a timeline:

Actions speak louder than words. We talked about this because you can infer somebody's intentions from your actions. The defendant has an absolute right not to testify. So that puts me in a place where how do I prove what his intent is?

You have to look at the contextual evidence surrounding it. Some of it you know. You heard testimony from Moses Gbekiah that the defendant yelled out, "Guys come out," and people ran in with guns. So you can infer the defendant's intent from that. Absolutely. But you can also infer his intent by looking at his actions. The actions that he did over a four-hour period on December 24th of 2012.

So I want to look at it in terms of a timeline. First of all, at 9:54 a.m. on the surveillance video, Nathan Foreman puts an object consistent with a firearm in the back of his belt. That right there is evidence that he was in possession of a firearm.

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At 9:54, also, you see Darren Franklin on the surveillance video putting a gun into his waistband.

Folks, if they were just there for a friendly business deal, why are we putting weapons, why are we getting all weaponed up two hours before the incident actually occurs?

At 11:25, Moses Glekiah and Richard Merchant arrived at Dreams Auto Customs.

At 11:30, Richard Merchant brings the money and the chemicals inside of the Dreams Auto Customs garage.

At 11:37, mere minutes after Richard Merchant has peacefully entered the location with his suitcase and the backpack full of the items used to scam the defendant, Darren Franklin and Jason Cunningham enter the garage with objects in their hands—you can see it on the video—that are consistent with firearms.

At 11:45, Nathan Ray Foreman retrieves duct tape and then walks off camera with it to a location that is consistent to where the complainants are being held and tortured.

At noon, Nathan Ray Foreman is seen speaking on the phone, and then shortly thereafter Jason Washington, the Customs agent, enters in his uniform into the garage.

And you heard testimony that the agent then helped by looking at the GPS of the complainants and asking them where the money was. Folks, that's what this is really about. Nathan

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Ray Foreman knew he was being scammed. He figured it out. He saw that black money.

...

Don't you know that he saw that that [sic] money inside of that suitcase wasn't real money? Don't you know that he realized that he got scammed and he was pretty mad? He was really mad. He thought this was going to be a huge windfall for him. And when he realized that he was being scammed, he wasn't smart enough to pick up on the fact that the money didn't really exist.

And that's what this is really about. These two men were bound and tortured and terrified and ultimately they were sent to their deaths because that man— . . . That man wanted money. That's what this is about.

At 1:00 p.m. Darren Franklin retrieves an iron, an iron that was identified by Moses and Richard as the iron that was used to torture a screaming Richard Merchant. You heard testimony from Moses about how terrified he was during that moment, how it hurt him to see his friend being hurt.

At 1:05, Charles Campbell wipes down the complainants' car. If these men, including Nathan Foreman, thought that they were in the right, if they weren't doing something that was terrible and wrong and illegal, there would be no need for them to try and wipe down and tamper with the evidence like what you see on the camera at 1:05 p.m.

...

And, finally, at 3:30 p.m., Nathan Ray Foreman places a blanket or tarp in the back of a van, a van where Moses Glekiyah and Richard Merchant, without hope, believing that they were going to die that day, terrified, in pain, and alone, are loaded in.

And if what you see Nathan Foreman doing on this video isn't aiding, assisting, encouraging and planning, I don't know what is. He is literally the person who was shutting the doors on the hope of our complaining witnesses.

The State referenced the video again in its final plea to the jury:

And so I'm asking each and every one of you to do something, not because it's fun, but because it's right and each and every one of you know it's right. You've seen the video. You've heard the testimony. There's only one decision for you to make, and that's to find Nathan Ray Foreman guilty of aggravated robbery and aggravated kidnapping.

At the conclusion of trial, the jury found appellant guilty of aggravated robbery and aggravated kidnapping. The trial court assessed 50-year sentences to run concurrently. When the trial judge announced appellant's sentence, she explained, "What I saw on the videotape that was offered into evidence is disturbing, to say the least. Because of the severity of the injuries and because of what I witnessed on the videotape, I

assess your punishment at 50 years in the Texas Department of Criminal Justice Institutional Division in each case to run concurrently.” Appellant timely appealed.

## **II. ANALYSIS**

In appellant’s sole issue, he argues the trial court “erred in refusing to suppress the surveillance video evidence because the warrant affidavit failed to set forth facts sufficient to establish probable cause that surveillance video or surveillance equipment would be located at the place to be searched.” Appellant argues that because the police officer’s affidavit failed to establish probable cause, the officer’s search for surveillance video or surveillance equipment violated the Fourth Amendment of the United States Constitution, article I, section 9, of the Texas Constitution, and chapter 18 of the Texas Code of Criminal Procedure.

### **A. Standing**

As a threshold matter, we address whether appellant had standing to challenge the lawfulness of the search. In order to challenge a search and seizure under the United States Constitution, the Texas Constitution or the Texas Code of Criminal Procedure, a party must first establish standing. *Pham v. State*, 324 S.W.3d 869, 874 (Tex. App.—Houston [14th Dist.] 2010, pet. ref’d) (citing *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996)). The defendant who challenges

the search has the burden to establish standing. *See State v. Betts*, 397 S.W.3d 198, 203 (Tex. Crim. App. 2013); *Villarreal*, 935 S.W.2d at 138.

Standing is a question of law that may be raised by this court *sua sponte*. *Kothe v. State*, 152 S.W.3d 54, 60 (Tex. Crim. App. 2004). A “reviewing court may properly sustain the trial court’s denial [of a motion to suppress] on the ground that the evidence failed to establish standing as a matter of law, even though the record does not reflect that the issue was ever considered by the parties or the trial court.” *Wilson v. State*, 692 S.W.2d 661, 671 (Tex. Crim. App. 1984) (op. on reh’g). However, the State may forfeit standing issues “through its assertions, concessions, and acquiescence in the course of litigation.” *State v. Klima*, 934 S.W.2d 109, 110 n.1 (Tex. Crim. App. 1996); *see also Wilson*, 692 S.W.2d at 668 (citing *Steagald v. United States*, 451 U.S. 204, 101 S.Ct. 1642, 1646, 68 L.Ed.2d 38 (1981)). “Although we defer to the trial court’s factual findings and view them in the light most favorable to [appellant], we review the legal issue of standing *de novo*.” *Kothe*, 152 S.W.3d at 59.

A defendant may establish standing through an expectation of privacy approach or an intrusion-upon-property approach. *See State v. Bell*, 366 S.W.3d 712, 713 (Tex. Crim. App. 2012) (citing *United States v. Jones*, 565 U.S. 400, 132 S.Ct. 945, 949-50, 181 L.Ed.2d 911 (2012)); *Williams v. State*, 502 S.W.3d 254, 258 (Tex. App.—Houston [14th Dist.] 2016, pet. ref’d) (citing *Florida v. Jardines*, 569 U.S. 1, 133 S.Ct. 1409, 1414, 185 L.Ed.2d 495 (2013)); *Jones*, 132 S.Ct. at

949-51; and *State v. Huse*, 491 S.W.3d 833, 839-40 (Tex. Crim. App. 2016). The Court of Criminal Appeals has not yet addressed what legal standard should be applied in determining whether a defendant has standing to contest that a search was unreasonable under an intrusion-upon-property theory. *Williams*, 502 S.W.3d at 260. This court has analyzed standing under an intrusion-upon-property theory using the standard applicable to the reasonable-expectation-of-privacy theory.<sup>9</sup> *Id.* at 261. This court has alternatively analyzed standing using a narrower standard: “whether [a defendant] had a sufficient proprietary or possessory interest in the place or object searched.” *Id.*

In this case, evidence offered by the State demonstrated that appellant had a sufficient proprietary or possessory interest in Dreams Auto Customs to have

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<sup>9</sup> To demonstrate a legitimate expectation of privacy, a defendant must show: (1) he had a subjective expectation of privacy in the place invaded, and (2) that society is prepared to recognize that expectation as objectively reasonable. *Betts*, 397 S.W.3d at 203. In considering whether a defendant has demonstrated an objectively reasonable expectation of privacy, courts examine the totality of the circumstances surrounding the search, including: (1) whether the accused had a property or possessory interest in the place invaded; (2) whether he was legitimately in the place invaded; (3) whether he had complete dominion or control and the right to exclude others; (4) whether, before the intrusion, he took normal precautions customarily taken by those seeking privacy; (5) whether he put the place to some private use; and (6) whether his claim of privacy is consistent with historical notions of privacy. *Id.* at 203-04 (citing *Granados v. State*, 85 S.W.3d 217, 223 (Tex. Crim. App. 2002); and *Villarreal*, 935 S.W.2d at 138). This is a non-exhaustive list of factors, and no one factor is dispositive. *Id.* at 204 (citing *Granados*, 85 S.W.3d at 223).

standing to challenge the search. Arnold testified that he researched Dreams Auto Customs as part of his investigation and determined that appellant and his wife, Charese, were owners of the business. Arnold testified that when he was unable to identify information involving the owner of the van, he “focused on the next available lead, which was researching the owners of the business, Nathan Foreman.” The State introduced as evidence a filing with the county clerk’s office listing Charese as the owner of the business. The State also introduced as evidence the Texas marriage license of Charese and appellant. In a community property state such as Texas, a spouse is presumed to have an ownership interest in any business owned by his spouse during the marriage. Tex. Fam. Code Ann. § 3.003(a) (West 2018); *Marriage of O’Brien*, 436 S.W.3d 78, 85 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *see also U.S. v. Ghali*, 317 F. Supp. 2d 708, 713 (N.D. Tex. 2004) (“Defendant’s legal interest in the business arising from his marriage is sufficient to give Defendant standing under the Fourth Amendment to challenge searches of packages. . . .”). Hufstedler testified that a tote bag full of mail and papers was found in a storage room inside the auto shop, and that the mail was addressed to Nathan Foreman.

Evidence offered by the State also demonstrated that appellant had a sufficient proprietary or possessory interest in the computer to have standing to challenge the search. In the middle of trial, in a rehearing of appellant’s motion to suppress outside the presence

of the jury, Arnold testified that the computer systems belonged to Nathan Foreman:

Appellant's trial counsel: Okay. There is reference [in the search warrant affidavit] to the computer databases being searched for Foreman's—Foreman's connection to Dreams Auto, correct?

Officer Arnold: Yeah, they were Foreman's computer systems.

Under the narrower legal standard applicable to the intrusion-upon-property theory of standing, the State fulfilled appellant's burden to show that he had a sufficient proprietary or possessory interest in Dreams Auto Customs and the computer systems. *See Williams*, 502 S.W.3d at 261 ("[T]he standard would be whether the person had a sufficient proprietary or possessory interest in this place or object searched."); *Wilson*, 692 S.W.2d at 671 ("The prosecutor satisfied appellant's burden of producing evidence on the issue when he cross-examined appellant."). Consequently, we conclude that appellant has standing to challenge the search.

Even if this standard were not met, the State forfeited standing issues through its "assertions, concessions, and acquiescence in the course of litigation." *See Wilson*, 692 S.W.2d at 668. As noted above, Arnold testified appellant was the owner of the business and the computer. In addition, the prosecutor conceded appellant was the owner of the auto shop in opening argument at trial, stating, "You'll hear testimony that

Richard and Moses showed up at around 11:30 that morning to Dreams Custom Auto [sic], a body shop that's owned by Nathan Foreman." The State did not challenge or raise any fact issue concerning appellant's standing throughout the course of litigation. The State did not challenge appellant's standing at any of the three hearings on appellant's motion to suppress. The State did not argue that appellant was not the owner of Dreams Auto Customs or the computer at these hearings or at trial. There was no testimony or other evidence presented showing that appellant did not own the business or the computer. There is nothing in the record which makes it apparent that appellant did not have standing to contest the evidence. *Id.* Therefore, the State forfeited the issue through its "assertions, concessions, and acquiescence." *See id.*

Having concluded that appellant has standing to challenge the search, we consider his issue.

#### **B. Probable cause and reasonable inferences**

We normally review a trial court's motion-to-suppress ruling under a bifurcated standard of review, under which we give almost total deference to the trial court's findings as to historical facts and review *de novo* the trial court's application of the law. *State v. McLain*, 337 S.W.3d 268, 271 (Tex. Crim. App. 2011). But, when the trial court determines probable cause to support the issuance of a search warrant, there are no credibility calls; rather, the trial court rules based on what falls within the four corners of the affidavit. *Id.*

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When reviewing a magistrate’s decision to issue a warrant, appellate courts as well as trial courts apply a highly deferential standard of review because of the constitutional preference for searches conducted under a warrant over warrantless searches. *Id.* As long as the magistrate had a substantial basis for concluding that probable cause existed, we will uphold the magistrate’s probable-cause determination. *Id.* We are not to view the affidavit through hypertechnical lenses; instead, we must analyze the affidavit with common sense, recognizing that the magistrate may draw reasonable inferences from the facts and circumstances contained in the affidavit’s four corners. *Id.* When in doubt, we defer to all reasonable inferences that the magistrate could have made. *Id.* at 272.

Appellant argues the trial court “erred in refusing to suppress the surveillance video evidence because the warrant affidavit failed to set forth facts sufficient to establish probable cause that surveillance video or surveillance equipment would be located at the place to be searched.”

Article 18.02 of the Code of Criminal Procedure enumerates the types of items that may be searched for and seized pursuant to a search warrant. A video surveillance system falls under the general scope of article 18.02(a)(10): “property or items . . . constituting evidence of an offense or constituting evidence tending to show that a particular person committed an offense.” *See Tex. Code Crim. Proc. art. 18.02(a)(10)* (West 2018).

Property subject to seizure under article 18.02(a)(10) is often referred to as “mere evidence.” *Jennings v. State*, 531 S.W.3d 889, 893 (Tex. App.—Houston [14th Dist.] 2017, pet. ref’d). Mere evidence is evidence connected with a crime, but does not consist of fruits, instrumentalities, or contraband. *See id.* at 893 n.1. Accordingly, a warrant issued under article 18.02(a)(10) is known as an “evidentiary search warrant” or a “mere evidentiary search warrant.” *Id.* at 893. Generally, to obtain a search warrant for “mere evidence” under article 18.02(a)(10), there must be a sworn affidavit setting forth sufficient facts to establish probable cause that (1) a specific offense has been committed, (2) the specifically described property or items that are to be search for or seized constitute evidence of that offense or evidence that a particular person committed that offense, and (3) the property or items constituting evidence to be searched for or seized are located at or on the particular person, place, or thing to be searched. Tex. Code Crim. Proc. art. 18.01(c) (West 2018). However, “[i]f a warrant authorizes a search for both ‘mere evidence’ and items listed under another ground for search and seizure, the warrant is not a mere-evidentiary search warrant,” and “the additional findings under (a)(10) are not required.” *Jennings*, 531 S.W.3d at 893; *see Zarychta v. State*, 44 S.W.3d 155 (Tex. App.—Houston [14th Dist.] 2001, pet. ref’d).

The warrant in this case is not a “mere evidence” warrant because in addition to authorizing a search for evidence, it also authorized a search for the “instrumentalities of the crime including firearm(s) and

ballistics evidence; gasoline container(s), lighter(s), tape, zip tie(s), van. . . ." As such, additional findings are not required under 18.02(a)(10). *See Jennings*, 531 S.W.3d at 893.

Nonetheless, the Fourth Amendment requires that a warrant affidavit establish probable cause to believe a particular item is at a particular location. *See id.* at 892. The core of the Fourth Amendment's warrant clause and article I, section 9, of the Texas Constitution is that a magistrate may not issue a search warrant without first finding probable cause that a particular item will be found in a particular location. *State v. Duarte*, 389 S.W.3d 349, 354 (Tex. Crim. App. 2012); *see* U.S. Const. amend. IV; Tex. Const. art. I, § 9. Under the Fourth Amendment, probable cause exists when, under the totality of the circumstances, there is a fair probability or substantial chance that contraband or evidence of a crime will be found at a specified location. *Bonds v. State*, 403 S.W.3d 867, 873 (Tex. Crim. App. 2013); *Rodriguez v. State*, 232 S.W.3d 55, 60 (Tex. Crim. App. 2007) (citing *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)); *Long v. State*, 525 S.W.3d 351, 366 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd) (citing *Gates*, 462 U.S. at 238, 103 S.Ct. 2317). The facts stated in a search-warrant affidavit must be related so closely to the time of the warrant's issuance that a finding of probable cause is justified. *McLain*, 337 S.W.3d at 272.

This standard is "flexible and nondemanding." *Bonds*, 403 S.W.3d at 873; *Rodriguez*, 232 S.W.3d at 60. Because of the flexibility in this standard, neither

federal nor Texas law defines *precisely* what degree of probability suffices to establish probable cause. *Rodriguez*, 232 S.W.3d at 61.

Probable cause must be found within the “four corners” of the affidavit supporting the search warrant affidavit. *McLain*, 337 S.W.3d at 271. Magistrates are permitted to draw reasonable inferences from the facts and circumstances contained within the four corners of the affidavit. *Davis v. State*, 202 S.W.3d 149, 154 (Tex. Crim. App. 2006). However, “[w]hen too many inferences must be drawn, the result is a tenuous rather than substantial basis for the issuance of a warrant.” *Id.* at 157. Probability cannot be based on mere conclusory statements of an affiant’s belief. *Rodriguez*, 232 S.W.3d at 61. A reviewing court’s assessment of the affidavit’s sufficiency is limited to “a reasonable reading” within the four corners of the affidavit while simultaneously recognizing the magistrate’s discretion to draw reasonable inferences. *Duarte*, 389 S.W.3d at 354.

The Court of Criminal Appeals has held that inferences were reasonably made in several different contexts:

- **Instrumentalities of the crime.** In *Ramos v. State*, 934 S.W.2d 358, 363 (Tex. Crim. App. 1996), the Court explained that in a murder case, a magistrate could reasonably infer that a weapon could be found at the residence where the murder took place.
- **Possession of contraband.** In *Rodriguez*, 232 S.W.3d at 62-63, the Court held that a

magistrate could reasonably infer that a garage contained drugs based on information that a man went to the garage, walked out with a package, threw the package in his car, and was later stopped with a package containing drugs. *See also Moreno v. State*, 415 S.W.3d 284, 288 (Tex. Crim. App. 2013) (involving similar inference based on information from confidential informant).

- **Skills and training.** In *Davis*, 202 S.W.3d at 155-57, the Court held that a magistrate could reasonably infer an officer was qualified to recognize the odor of methamphetamine, even though the affidavit was silent as to the officer's skills and training.
- **Time.** In *State v. Jordan*, 342 S.W.3d 565, 571 (Tex. Crim. App. 2011), a case involving a warrant to seize blood in connection with a suspected DWI, the officer did not indicate the precise time of his observations, but the Court held that a magistrate could reasonably infer that the officer's observations occurred on the same date that the offense was alleged to have occurred, and that this information was not stale because the affidavit was presented less than four hours after midnight. *See also Crider v. State*, 352 S.W.3d 704, 710-11 (Tex. Crim. App. 2011) (reaching different conclusion where window of time was much greater); *McLain*, 337 S.W.3d at 273 (holding that trial and appellate courts should have deferred to magistrate's implied finding that ambiguous phrase in affidavit referred to time that informant made his observations).

- **Credibility of an anonymous informant.**

In *Flores v. State*, 319 S.W.3d 697, 703 (Tex. Crim. App. 2010), the Court held that a magistrate could reasonably conclude an anonymous informant had some familiarity with the defendant based on corroborating evidence and the “doctrine of chances.” *See also Duarte*, 389 S.W.3d at 359-60 (tip from first-time confidential informant was not reliable where there was no detail or corroboration).

- **Personal knowledge.** In *Jones v. State*, 568 S.W.2d 847, 855 (Tex. Crim. App. 1978), the Court held that a magistrate could reasonably infer that information conveyed in the passive voice was information within the personal knowledge of the affiant.

The parties have not cited, nor have we found, a case in which the Court of Criminal Appeals has determined under what circumstances a magistrate could reasonably infer that an electronic device exists in a particular location. This court has required specific facts to support an inference that those devices exist before we have allowed seizure or search of electronic devices pursuant to a warrant. This is demonstrated by our jurisprudence surrounding the searches of computers/cameras and cellphones.

Many of these cases address the second requirement of article 18.01(c), whether “the specifically described property or items that are to be searched for or seized constitute evidence of that offense or evidence that a particular person committed that offense,” *see Tex. Code Crim. Proc. art. 18.01(c)*, rather than whether a particular item will be found in a

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particular location. However, both considerations require that the property or items at issue exist. In this case, appellant's issue centers around whether probable cause existed that the surveillance video or surveillance equipment was located at the auto shop, not whether probable cause existed that the surveillance video or surveillance equipment constituted evidence of the charged offenses or evidence that appellant committed the offenses. Nonetheless, the magistrate inferred not only that the surveillance video and surveillance equipment was at a specific location (inside of the auto shop); it also inferred that the surveillance video and surveillance equipment existed. Therefore, to the extent cases addressing the second requirement of article 18.01(c) involve inferences regarding the existence of property or items subject to search, we find them persuasive.

Generally, to support a search warrant for a computer, we have held there must be some evidence that a computer was directly involved in the crime. *See Ex parte Jones*, 473 S.W.3d 850, 856-57 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (defendant subscribed to commercial child pornography website); *Ryals v. State*, 470 S.W.3d 141, 143, 146 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (defendant told undercover officer that he would use computer to make fake IDs); *Porath v. State*, 148 S.W.3d 402, 409 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (defendant met complainant in internet chat room).

When there is no evidence that a computer was directly involved in the crime, more is generally needed

to justify a computer search. For example, in *Checo v. State*, 402 S.W.3d 440 (Tex. App.—Houston [14th Dist.] 2013, pet. ref’d), the defendant kidnapped a child and took her to a house, where he showed her adult pornography on a desktop computer. *Id.* at 444. The defendant then took the complainant to another room, where he attempted to assault her. *Id.* The complainant observed a laptop in that room that was set up to take pictures and videos. *Id.* The affiant obtained a warrant to search for child pornography (which the complainant had not been shown), and the defendant moved to suppress the results of the search, arguing that there was no information in the officer’s affidavits that the defendant photographed or videotaped the complainant, or other information independently linking him to child pornography. *Id.* at 449. We rejected that argument, noting affidavit testimony from the officer that those who engage children in a sexually explicit manner often collect child pornography on their computers. *Id.* Given this level of factual specificity, we held that the search warrant was valid. *Id.* at 449-50.

Another illustrative case is *Aguirre v. State*, 490 S.W.3d 102 (Tex. App.—Houston [14th Dist.] 2016, no pet.). There, a child complainant described how the defendant would photograph her while they had sex. *Id.* at 106-07. The complainant’s mother stated that the defendant had a laptop that he did not allow anyone to use. *Id.* at 107. The police officer’s affidavit testimony set forth that, based on her training and expertise, child molesters will often use their computers to store and exchange sexually explicit images of children. *Id.*

We held that the affidavit was sufficient to support a search of the defendant's computer. *Id.* at 113-14.

Likewise, an affidavit offered in support of a warrant to search the contents of a cellphone must usually include facts that a cellphone was used during the crime or shortly before or after. In *Aguirre*, we also held that the affidavit was sufficient to search all of the defendant's cellphones where the complainant said that a particular cellphone was used to photograph her and that the defendant had used instant messenger to send her a photograph of his penis. *Id.* at 116-17. Based on opinion testimony included in the affidavit that pedophiles share pornography through electronic media, we concluded that all of the cellphones could be searched. *Id.*

In *Walker v. State*, 494 S.W.3d 905, 908-09 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd), we concluded that there was probable cause to search a defendant's cellphone when the affidavit stated that the defendant admitted to shooting the complainant, and there was other information that the defendant and the complainant knew each other, communicated by cellphone, and exchanged messages and phone calls around the time of the shooting.

In *Humaran v. State*, 478 S.W.3d 887, 893-94 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd), the defendant made a "disturbance" call to police and there was evidence that she and a co-defendant had murdered a person and set the body on fire. We concluded

that the facts were sufficient to support a search of her cellphone. *Id.* at 899-900.

With these general principles in mind, we turn to the affidavit in this case. We review the affidavit realistically and with common sense; “a reviewing court must uphold the magistrate’s decision so long as the magistrate had a substantial basis for concluding that probable cause existed.” *Duarte*, 389 S.W.3d at 354. Our focus cannot be on what other facts “could or should have been included in the affidavit,” but rather must be “on the combined logical force of facts that actually are in the affidavit.” *Id.* at 354-55. “The Supreme Court has repeatedly reminded reviewing courts that they should ‘not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner.’” *Rodriguez*, 232 S.W.3d at 59. The allegations in the affidavit are sufficient if they would “justify a conclusion that the object of the search is probably on the premises.” *Ramos*, 934 S.W.2d at 363 (quoting *Cassias v. State*, 719 S.W.2d 585, 587 (Tex. Crim. App. 1986)). We defer to all reasonable inferences that the magistrate could have made. *Duarte*, 389 S.W.3d at 354.

We conclude that the affidavit in this case failed to establish probable cause that surveillance video or surveillance equipment existed and would be located at Dreams Auto Customs. The affiant also provided no facts that a computer containing surveillance video was involved in the crime, directly or indirectly, such that the existence of surveillance video or surveillance

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equipment could be reasonably inferred.<sup>10</sup> The affidavit did not reference any computers or computer hard drives. “[A]udio/video surveillance video and/or video equipment” was mentioned in the introductory paragraph of the affidavit, but no facts were described to support the conclusion that a video surveillance system existed at the body shop.<sup>11</sup> Nor were facts included from which it could reasonably be inferred that surveillance video or equipment would probably be found at the shop.<sup>12</sup>

The State argues that surveillance cameras are part of “everyday life,” and as such, the magistrate could have reasonably inferred the existence of surveillance equipment in Dreams Auto Customs. Courts

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<sup>10</sup> The State cites *Eubanks v. State*, 326 S.W.3d 231 (Tex. App.—Houston [1st Dist.] 2010, pet. ref’d), a child sexual assault case where the First Court of Appeals held that a magistrate could infer that a computer was used in a crime based on the child complainant’s testimony that she was photographed. We have not followed *Eubanks* for that proposition. Nonetheless, compared to the instant case, even *Eubanks* contained more facts from which the magistrate could infer the existence of a computer. In *Eubanks*, the affidavit recited the statement by the child complainant that she had been photographed, and the magistrate inferred that a computer was used to store the photographs. *Id.* at 247-48. In the instant case, the affidavit did not refer to any statement by complainants that the crimes against them had been videotaped.

<sup>11</sup> For example, the affidavit did not state that surveillance cameras were visible on the exterior of the body shop, nor did it state that cameras had been spotted inside the building.

<sup>12</sup> Arnold and Hufstedler testified that they observed cameras mounted on the exterior of the strip center where the auto shop was located; however, this observation was not included in the affidavit for the search warrant.

have held that magistrates may rely on matters of common knowledge in finding probable cause. *Rodriguez*, 232 S.W.3d at 64 (“As reviewing courts, we are obliged to defer to the magistrate and uphold his determination based upon all reasonable and commonsense inferences and conclusions that the affidavit facts support.”). For example, in *Manuel v. State*, the affiant did not need to describe special training or experience to support the conclusion that specific clothing worn by a murder suspect would probably be found at his residence, in part, because the court determined that it was common knowledge that the defendant’s clothing would be at a defendant’s home. 481 S.W.3d 278, 284-86 (Tex. App.—Houston [1st Dist.] 2015, pet. ref’d) (“[C]ommon experience tells us that there is a ‘fair probability’ that clothing worn ‘a lot’ over a period of years will be kept at a person’s residence.”).

The State asserts that “[a]n Amazon search or a visit to Costco” will “reveal” that sophisticated surveillance systems are inexpensive. The State also offers a chart of Westlaw search hits for “security camera” or “surveillance camera” to demonstrate “[t]he ubiquity of surveillance cameras in ordinary life.” But matters that are common knowledge (i.e., that a person takes his clothes off at home) do not need to be evidenced through Amazon searches or charts of Westlaw search hits. “Common knowledge consists of matter[s] ‘so well known to the community as to be beyond dispute.’” *Cardona v. State*, 134 S.W.3d 854, 859 (Tex. App.—Amarillo 2004, pet. ref’d) (quoting *Ritz Car Wash, Inc. v. Kastis*, 976 S.W.2d 812, 814 (Tex. App.—Houston [1st

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Dist.] 1998, pet. denied)). The presence of surveillance video or equipment in an auto shop is not so well known to the community as to be beyond dispute.

Moreover, if a magistrate is permitted to infer that a video surveillance system was located in the auto body shop without any facts supporting the existence of that item, a magistrate could make those same inferences for a variety of items in any business.<sup>13</sup> This reasoning could lead to all computers and cellphones being searchable for any type of video or picture that could have recorded a crime, even though the affiant provided no facts suggesting that a computer or cellphone existed. Such an inference goes too far and is contrary to our cases requiring specific facts before a search warrant is issued.

The State further argues that Dreams Auto Customs probably had a surveillance camera because it was an auto shop that “from time to time” may be burgled by its own customers. As the State explains, the shop “would ordinarily be in possession of its customers’ property, with each piece of property worth thousands or tens of thousands of dollars.” The State avers that “the way a mechanic shop ensures that it is paid for its work is to keep possession of cars until the customer pays” and an “owner might seek to surreptitiously recover it without the business’s knowledge.”

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<sup>13</sup> And, in this day and age, where a security system is cheaply available for personal use, a magistrate could make those same inferences for any home, too. Indeed, the State argues “that *people* and businesses are increasingly likely to have surveillance equipment” (emphasis added).

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None of this information was included in the affidavit. None of this information is “everyday life” knowledge. While it may be reasonable to infer that a custom auto shop contained expensive property, the additional inferences the State attributes to the magistrate are not common knowledge and cannot be reasonably inferred.

The affidavit contains no facts from which it can be inferred that customers of custom auto shops attempt to steal their own cars “from time to time.” We cannot say that it is common knowledge or well known in the community that customers of custom auto shops attempt to steal their own cars “from time to time.” The affidavit contains no facts from which it can be inferred that auto shops run surveillance to prevent customers from recovering their own vehicles. Common experience does not suggest that auto shops run surveillance to prevent customers from recovering their own vehicles. This is not a commonsense reading of the affidavit.

Courts allow magistrates to make reasonable inferences that often center on certain types of assumptions, but none of those assumptions has been the existence of a video surveillance system or surveillance video. None of the cases cited above or by the State supports the inferential leap the State asks us to make. Precedent from our own court with respect to computers and cellphones requires specific evidence that a computer or cellphone was present during the commission of the crime, or that the facts of the type of crime itself lead to the conclusion that a computer or cellphone was connected to the crime. The State has not

presented any reason, and we see no reason, why we should treat a case involving video surveillance systems and surveillance video differently.

The affidavit in this case did not establish any nexus between the criminal activity and the surveillance system. *Cf. Bonds*, 403 S.W.3d at 873. It cannot be reasonably inferred from the face of the affidavit that surveillance equipment would be found in the auto shop. *See Rodriguez*, 232 S.W.3d at 62. Consequently, the affiant provided insufficient facts to support finding probable cause that a video surveillance system was located at the body shop. *See Cassias*, 719 S.W.2d at 590 (“It is one thing to draw reasonable inferences from information clearly set forth within the four corners of an affidavit,” but a reviewing court may not “read material information into an affidavit that does not otherwise appear on its face.”). For this reason, and for the reasons discussed below, the trial court erred in denying appellant’s motions to suppress.

### **C. Plain view**

In further support of his argument that officers lacked probable cause to seize the computer hard drive containing video surveillance, appellant argues the plain-view doctrine does not apply. Although commonly classified as an exception to the warrant requirement, the plain-view doctrine is not truly an exception because the seizure of property in plain view involves no invasion of privacy and is presumptively reasonable. *Walter v. State*, 28 S.W.3d 538, 541 (Tex.

Crim. App. 2000). If an item is in plain view, then neither its observation nor its seizure involves any invasion of privacy. *Id.* The rationale of the plain-view doctrine is that, if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no “search” within the meaning of the Fourth Amendment. *See Illinois v. Andreas*, 463 U.S. 765, 771, 103 S.Ct. 3319, 77 L.Ed.2d 1003 (1983).

A seizure of an object is lawful under the plain-view doctrine if three requirements are met. *Keehn v. State*, 279 S.W.3d 330, 334 (Tex. Crim. App. 2009). First, police officers must lawfully be where the object can be “plainly viewed.” *Betts*, 397 S.W.3d at 206 (citing *Keehn*, 279 S.W.3d at 335). Second, the “incriminating character” of the object in plain view must be “immediately apparent” to the police officers. *Id.* Third, the officials must have the right to access the object. *Id.*

Appellant challenges only the second prong. This immediacy prong requires a showing of probable cause that the item discovered is incriminating evidence; actual knowledge of the incriminating evidence is not required. *Goonan v. State*, 334 S.W.3d 357, 361 (Tex. App.—Fort Worth 2011, no pet.) (citing *Joseph v. State*, 807 S.W.2d 303, 308 (Tex. Crim. App. 1991)); *see State v. Dobbs*, 323 S.W.3d 184, 185, 189 (Tex. Crim. App. 2010). Probable cause exists when the known facts and circumstances are sufficient to cause a reasonable person to believe that contraband or evidence of a crime will be found. *Wiede v. State*, 214 S.W.3d 17, 24 (Tex.

Crim. App. 2007). Probable cause requires more than a hunch and must be supported by facts. *See id.* If an additional and unjustified search is required to develop probable cause, then the “incriminating character” of the object in plain view is not “immediately apparent.” *See Dobbs*, 323 S.W.3d at 189. If an officer must manipulate, move, or inspect an object to determine whether it is associated with criminal activity, then the “incriminating character” of the object could not be said to be immediately apparent. *See Arizona v. Hicks*, 480 U.S. 321, 324-28, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987).

Appellant analogizes the facts of this case to the facts of *Arizona v. Hicks*. In *Hicks*, police investigated a shooting at the defendant’s apartment. 480 U.S. at 323, 107 S.Ct. 1149. In the process, they discovered stereo equipment that they suspected was stolen. *Id.* One officer recorded the serial numbers of the equipment, but had to move some of the equipment in order to do so. *Id.* The United States Supreme Court held that moving the stereo equipment to view the serial numbers constituted a warrantless search. *Id.* at 327-28, 107 S.Ct. 1149.

The State contends that the plain-view exception does apply. The State points out that officers executing the warrant “observed an external hard drive connected to a monitor that was showing a live surveillance feed from six cameras throughout the garage.” The State argues that “anyone seeing a device capable of recording and storing data connected to a surveillance system at a location where a crime occurred recently would have probable cause to believe the device

would be evidence of a crime.” The State emphasizes that the plain-view doctrine does not require certainty that an object is evidence, only probable cause. In support of its argument, the State summarizes *Arrick v. State*, 107 S.W.3d 710 (Tex. App.—Austin 2003, pet ref’d).

In *Arrick*, police believed that the defendant had killed a former girlfriend and disposed of her body. *Id.* at 719. Police obtained and executed a warrant to search the appellant’s residence for, among other things, the victim’s bloodstains. *Id.* at 716-17. The Third Court of Appeals explained that the magistrate who issued the warrant could have reasonably inferred (1) that the appellant got blood on his clothing when he shot the deceased and disposed of her body, and (2) that bloodstained clothing might be found at the appellant’s residence. The following month, police conducted a second search of the appellant’s residence with consent. During this search, officers seized two pairs of the appellant’s shoes. The Third Court concluded the plain-view doctrine applied to the seizure of the shoes, explaining:

We have already held in our discussion of the search warrants that the

police had probable cause to believe that appellant fatally shot [his former girlfriend] and disposed of her body. They also had probable cause to believe that [her] blood might be found on appellant’s clothing in [appellant’s residence]. Because the police had probable cause to believe that [the deceased’s] blood

might be found on appellant's shoes, their value as evidence was immediately apparent.

*Id.* at 719. The State points out that this was "despite the fact that police did not see blood on the shoes . . . [or] conduct a blood test on the shoes until after they were seized." *Arrick* is distinguishable as it involved reasonable inferences applied to clothing.<sup>14</sup> It is common knowledge that shoes are worn like other clothing.

We conclude that, in this case, the "incriminating character" of the computer hard drive containing video surveillance was not "immediately apparent" under the plain-view doctrine because the State did not establish that, at the time of the seizure, sufficient facts and circumstances existed to warrant a person of reasonable prudence to believe the computer hard drive contained evidence. Nothing in the record suggests that the incriminating surveillance video was playing at the time the search warrant was executed. It did not become "immediately apparent" that the computer contained evidence of the crime until after further search of appellant's computer hard drive. The hard drive was taken to police forensics for inspection to determine whether it was associated with criminal activity.

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<sup>14</sup> Even if *Arrick* did present analogous facts, as an opinion of our sister court, *Arrick* is not controlling authority. *See Jankowiak v. Allstate Prop. & Cas. Ins. Co.*, 201 S.W.3d 200, 207-08 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

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The fact that the computer hard drive appeared to be connected to a surveillance screen in the shop where the offenses took place was not enough to formulate a probable cause determination. No other facts or circumstances linked the computer hard drive to the charged offenses. Trial testimony of the officers who executed the warrant, Arnold and Hufstedler, may have established that the officers believed the computer hard drive contained a surveillance system and surveillance video was stored on the computer hard drive. It did not establish they believed the video stored would probably evidence the offenses (which had taken place two weeks prior to the search).

At the first hearing on appellant's motion to suppress, Hufstedler testified on direct that his "assumption was that [the computer hard drive at issue] was attached to a surveillance system. . . . My assumption was that the [hard drive] was recording or at one time been used to record video in the location." At trial, Arnold testified that he had reason to believe the hard drive contained surveillance and he "hope[d]" the surveillance would constitute evidence: "we had reason to believe that [particular hard drive] was actually a surveillance system that was hopefully going to depict what video was collected in there."

The fact that officers seized two other computer hard drives even though they could not tell what those hard drives were being used for further undermines a probable cause determination. Appellant's counsel questioned Hufstedler about the seizure of the other two computers:

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Q. And then why did you seize 2 and 3? They weren't connected to any audio video information.

A. I would not know whether they had audio video information on it, until it was seized and examined by the forensics lab.

Q. Right. You had no information that there was any audio video information on any three of those hard drives, correct?

A. I didn't know if the hard drive on the floor that was connected to the monitor was actually recording at that time, but my assumption [sic] that it was.

Q. You're saying you assumed. But my specific question to you is that on the day you asked for this warrant you did not have information to believe that there were any hard drives with audio video information in this office.

A. Well, there were cameras on the back of the building. So we knew that there were cameras in the location.

...

Q. So, it's not in your warrant. So, in your warrant you didn't state that you had information about audio surveillance cameras, correct?

A. We didn't know if those cameras were hooked up to that particular building. It's a long strip center.

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Q. And the question is you didn't say anything about it?

A. We didn't say anything about it. No, sir.

Q. Because you didn't know if it existed, correct?

A. We weren't sure if it existed or not.

...

Q. In fact, you didn't have any information about what was on there. You previously stated you had no idea what was on them.

A. Correct.

On re-direct, the State questioned Hufstedler broadly about whether he had a reasonable belief that there "might be" surveillance video on "any of" the hard drives, and Hufstedler responded that he and Arnold determined there "might be a possibility":

Q. Officer Hufstedler, did you have a reasonable belief that there might be surveillance video on any of those hard drives?

A. Yes.

Q. What was that based on?

A. Based on the fact there was a monitor when we walked in and we could see actual video of live feed of what was going on at the location. There were cameras, obviously, there since we were seeing that, so we determined that there might be a possibility that video had been taken.

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When the officers viewed the computer hard drives, they believed that the hard drives contained a surveillance system. The officers also “assumed” that surveillance system “might” have recorded video at one time. None of the officers’ testimony indicated that the officers believed the hard drive at issue would contain video surveillance from the time of the offenses or otherwise constitute evidence of the offenses.

Rather, this case is akin to *Nicholas v. State*, 502 S.W.2d 169 (Tex. Crim. App. 1973).<sup>15</sup> In *Nicholas*, police arrested the defendant in his home after being informed that he was wanted on a fugitive warrant in New Mexico. *Id.* at 170. In the defendant’s home, the officers observed several photography negatives, which depicted the defendant having intercourse with an eleven-year-old girl. *Id.* at 171. The Texas Court of Criminal Appeals held that the negatives were not properly seized because the officers had to pick up the negatives and hold them to the light before being able to determine their incriminating character. *Id.* at 171-72. The Court explained, “the officers had, prior to

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<sup>15</sup> *Nicholas* was decided before *Texas v. Brown*, 460 U.S. 730, 741-43, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983), wherein a plurality of the United States Supreme Court reinterpreted the phrase “immediately apparent” to mean not an unduly high degree of certainty as to the incriminating character of the evidence, but rather probable cause to associate the property with criminal activity. However, *Nicholas* was also cited with approval by the Court of Criminal Appeals in *Joseph*, a case applying the reinterpreted plain-view standard. See *Joseph*, 807 S.W.2d at 309 (relying on *Nicholas* in support of its conclusion that officer had no probable cause to search contents of letter where search warrant authorized seizure of marijuana).

examining the negatives, neither knowledge nor mere suspicion of an offense related to the film. What was in ‘plain view’ in the apartment was not evidence of any crime or criminal behavior.” *Id.* at 172.

Because an additional and unjustified search was required to develop probable cause with respect to the computer hard drive at issue, the “incriminating character” of the hard drive was not “immediately apparent.” *See Dobbs*, 323 S.W.3d at 185, 189. Consequently, the plain-view doctrine did not apply to the seizure of appellant’s computer. We sustain appellant’s sole issue on appeal.

#### **D. Harm analysis**

We next consider whether the trial court’s error is reversible. Constitutional errors are reversible unless the appellate court determines the error did not contribute to the conviction or punishment beyond a reasonable doubt. Tex. R. App. P. 44.2(a). Non-constitutional errors are reversible if they affected a defendant’s substantial rights. Tex. R. App. P. 44.2(b). Appellant contends the error violated the Fourth Amendment of the United States Constitution and article I, section 9, of the Texas Constitution, and therefore is constitutional error. The State contends that this court should apply the non-constitutional error harm standard because, according to the State, the good-faith exception articulated in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984),

applies such that the admission of the surveillance video was not barred by the Fourth Amendment.<sup>16</sup>

We need not decide whether *Leon* applies in this case or whether its application requires this court to apply the less stringent harm standard.<sup>17</sup> Even assuming that *Leon* applies and this required application of the harm standard for non-constitutional error, harm is established.

“A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury’s verdict.” *Thomas v. State*, 505 S.W.3d 916, 926 (Tex. Crim. App. 2016) (quoting *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997)). An error

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<sup>16</sup> The State concedes that Texas’s statutory exclusionary rule, Texas Code of Criminal Procedure article 38.23, requires exclusion where a warrant lacks probable cause. Tex. Code Crim. Proc. Ann. art. 38.23(b) (West 2018). Therefore, even if *Leon*’s good-faith exception applied, the video surveillance in this case should have been excluded pursuant to article 38.23 because the warrant was lacking probable cause with regard to surveillance. The State argues that even if article 38.23 required exclusion, the application of *Leon* means this court should apply the harm standard for non-constitutional error rather than the standard for constitutional error.

<sup>17</sup> We note that the State does not address the alleged violation of the Texas Constitution. In addition, the United States Supreme Court has indicated the *Leon* exception may not apply where, as here, the officer who executed the invalid warrant also prepared the warrant. *Groh v. Ramirez*, 540 U.S. 551, 564, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004) (“[B]ecause petitioner himself prepared the invalid warrant, he may not argue that he reasonably relied on the Magistrate’s assurance that the warrant contained an adequate description of the things to be seized and was therefore valid.”).

had a substantial and injurious effect or influence if it substantially swayed the jury's judgment. In determining whether error had a substantial and injurious effect or influence on the verdict, we must review the error in relation to the entire proceeding. *Haley v. State*, 173 S.W.3d 510, 518 (Tex. Crim. App. 2005). “[I]f the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight effect,” the error is harmless. *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998). If the appellate court is unsure whether the error affected the outcome, that court should treat the error as harmful. *Webb v. State*, 36 S.W.3d 164, 183 (Tex. App.—Houston [14th Dist.] 2000, pet ref'd).

Given the record before us, we cannot say with fair assurance that the erroneous admission of the surveillance video did not affect appellant's substantial rights. The surveillance video was a central piece of evidence in the case. Other than information provided by complainants, admitted con artists, the video was the only strong evidence showing appellant's involvement in the offenses. Although the State presented other compelling evidence of the scene on the highway and of complainant's injuries, none of this evidence showed appellant's involvement in the aggravated robbery and aggravated kidnapping of complainants. The State relied primarily on the video in making its closing arguments. In addition, the trial court explicitly stated that the video evidence impacted appellant's sentencing.

Under these circumstances, we must reverse the convictions.

We reverse appellant's convictions and remand the case for a new trial.

### **III. CONCLUSION**

The trial court erred in denying appellant's motion to suppress the surveillance video found on the computer hard drive seized from Dreams Auto Customs. Because this evidence strongly implicated appellant, we conclude that the trial court's error had a substantial and injurious effect or influence in determining the jury's verdicts and the trial court's sentences. We reverse the trial court's judgments and sentences and remand for further proceedings consistent with this opinion.

/s/ Marc W. Brown

Justice

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### **Dissent**

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### **EN BANC DISSENTING OPINION**

Ubiquitous. Surveillance cameras inside commercial properties have become ubiquitous. Convenience stores. Doggy daycare facilities. Casinos. Retail check-out lines. Interior commercial video surveillance systems, designed to prevent internal theft, vandalism, and other forms of criminal activity from occurring on

an owner's property or to catch those responsible for the activity, are everywhere.

Yet, the majority holds that it was unreasonable for a magistrate to conclude that surveillance video or equipment had been installed inside the Dreams Auto Customs building. Because I find that this inference, supported by the facts and circumstances articulated in the search warrant affidavit, is reasonable, I respectfully dissent. I would hold that the trial court did not err in denying appellant's motion to suppress and affirm the trial court's judgment.

The Code of Criminal Procedure allows the issuance of a search warrant to seize property or items that constitute evidence of an offense. *State v. Dugas*, 296 S.W.3d 112, 115 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd) (citing Tex. Code Crim. Proc. art. 18.02(10)). Before a search warrant may issue, a sworn affidavit must be filed setting forth sufficient facts to show probable cause that (1) a specific offense has been committed; (2) the specifically described property or items to be searched for or seized constitute evidence of that offense or evidence that a particular person committed that offense; and (3) the property or items constituting such evidence are located at or on the particular person, place, or thing to be searched. *Id.* at 115-16 (citing Tex. Code Crim. Proc. art. 18.01(c)). Probable cause exists, when under the totality of the circumstances, there is a fair probability or substantial chance that evidence of a crime will be found at the specified location. *Flores v. State*, 319 S.W.3d 697, 702 (Tex. Crim. App. 2010).

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The duty of a reviewing court, including a reviewing trial court, is simply to ensure that a magistrate had a substantial basis for concluding that probable cause existed. *Id.* Under the “substantial basis” standard of review, the reviewing court is not a “rubber stamp” for the magistrate’s ruling, but “the magistrate’s decision should carry the day in doubtful or marginal cases, even if the reviewing court might reach a different result upon de novo review.” *Id.* (internal quotation marks & citation omitted).

A magistrate may interpret an affidavit in a non-technical, common-sense manner, drawing reasonable inferences solely from the facts and circumstances contained within its four corners. *Bonds v. State*, 403 S.W.3d 867, 873 (Tex. Crim. App. 2013). We do not invalidate a warrant by interpreting the affidavit in a technical, rather than a common-sense, manner. *See id.* Indeed, when in doubt, we defer to all reasonable inferences that the magistrate could have made. *See id.*

In this case, the affiant stated that he “ha[d] reason to believe and [did] believe” that evidence of the offenses would be found at Dreams Auto Customs, including, among other things, audio/video surveillance equipment. The affidavit describes in detail a number of facts about Dreams Auto Customs, such as the windows and front door of the business were dark tinted glass, and the back of the business had an aluminum bay door opening into the business.

The affidavit also sets forth specific facts regarding the alleged offenses. The complainants had agreed to meet a person named “Jerry” at the specifically-described custom auto shop to conduct business. When the complainants arrived, several suspects grabbed them, tied them up, beat them, poured gasoline on them, and threatened to set them on fire. After stealing cash and other items from them, the suspects then forced the complainants into the back of a van at gunpoint and drove away from the auto shop. The complainants jumped out of the van as it was moving, and the suspects shot them and continued to drive without stopping.

A witness reported that she observed the complainants lying injured on the side of a road with their hands tied and mouths duct-taped. They had suffered multiple gunshot wounds. Another witness had seen the complainants exiting a van while it was moving down the road.

One of the complainants directed the affiant to Dreams Auto Customs, which the affiant determined was owned by appellant’s wife. When shown appellant’s photograph, the complainant identified appellant as the suspect who punched the complainants, poured gasoline on them, held a lighter near them, threatening to set them on fire, and ordered the other suspects to take them away in the van.

Based upon this information, the affiant believed that DNA from the complainants and the suspects, as well as property belonging to the men and

“instrumentalities of the crime such as the white van . . . , guns . . . , [and] zip ties” used to tie the men, would be found inside the auto shop. The affiant also believed surveillance equipment “may be found” there.

Here, the affidavit established a sufficient nexus between criminal activity, the things to be seized, and the place to be searched. *See Bonds*, 403 S.W.3d at 873-74. From the face of the affidavit, it is a fair inference that surveillance equipment found in the auto shop, if any, would have recorded evidence of the criminal activity. *See Rodriguez v. State*, 232 S.W.3d 55, 62 (Tex. Crim. App. 2007).

There is fair probability that the offenses occurred in a building where the windows were blacked-out and a bay door that opened directly into the premises and where valuable property (vehicles) belonging to customers, along with other expensive custom auto equipment, presumably was housed. Even the name of the business, “Dreams Auto Customs,” supports the inference that expensive custom equipment would be there. From these facts, a magistrate reasonably could have inferred that a business owner interested in obscuring the view into his windows and providing secure access to the building within which such property is housed also would have a security system in place, including surveillance equipment, and such surveillance equipment probably recorded evidence of the criminal activity occurring there. *See, e.g., Walker v. State*, 494 S.W.3d 905, 909 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (holding magistrate reasonably could have inferred that evidence probably would be on the defendant's cell

phone when the defendant had been communicating with the complainant and planning robberies around the time the complainant was robbed and killed); *Eubanks v. State*, 326 S.W.3d 231, 248 (Tex. App.—Houston [1st Dist.] 2010, pet. ref’d) (holding magistrate reasonably could have inferred that defendant had pornographic photographs stored on a computer when he allegedly made the complainants pose for nude or partially nude photographs, even though the complainants did not mention the use of a digital camera or a computer).

Appellant’s only issue concerns whether the affidavit was sufficient to establish probable cause that the surveillance video or equipment would be located at the place to be searched. The majority, however, relies on computer/camera and cellphone cases, which address the second element of article 18.01(c)—whether “the specifically described property or items that are to be searched for or seized constitute evidence of that offense or evidence that a particular person committed that offense.” Tex. Code Crim. Proc. art. 18.01(c). The majority acknowledges that those cases do not involve the third element—whether evidence is located at the place to be searched. *Id.* Although the majority acknowledges that those cases do not concern the element that is at issue in this case, it nonetheless finds those cases persuasive in analyzing whether it was reasonable for the magistrate to infer that the surveillance system existed.

The majority recites the general proposition that to support a search warrant for a computer, this court

has held that there must be some evidence that a computer was directly involved in the crime. *See Ex parte Jones*, 473 S.W.3d 850, 856-57 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd); *Ryals v. State*, 470 S.W.3d 141, 143, 146 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd); *Porath v. State*, 148 S.W.3d 402, 409 (Tex. App.—Houston [14th Dist.] 2004, no pet.). The majority is correct that this court has held that there must be some evidence that a computer was directly involved in the crime when addressing the second element.

However, the majority misses the mark in this case. Had appellant challenged whether the affidavit was sufficient to establish probable cause that the surveillance equipment is evidence that appellant committed the charged offense, then those cases would be applicable. But that is not the element appellant expressly placed at issue in this appeal. Instead, the majority is attempting to replace one element with another that has no relevance to the issue presented. Stated differently, to explain how the affidavit is purportedly not sufficient to establish probable cause that the surveillance equipment is located at the place to be searched, the majority seeks to support its position by arguing that authority from this court requires that the affidavit be sufficient to specifically establish probable cause that the surveillance equipment is evidence that appellant committed the offense.

The majority recognizes that a magistrate may rely on matters of common knowledge in finding probable cause as the magistrate may interpret an affidavit

in a non-technical and common-sense manner. Surveillance systems have permeated nearly every aspect of society. It is not necessary to run a Westlaw search for confirmation of the vast presence of surveillance systems. One need only enter any store, restaurant, parking garage, or any other commercial property and look over head to note visible surveillance cameras.

The magistrate could have inferred that a custom auto shop would have costly equipment and expensive vehicles belonging to the shop's customers. With valuable property located on its premises, it is a reasonable inference that the auto shop would take measures necessary to protect its business from theft or vandalism. Such measures included dark tinted glass in its front door and windows and a bay door that opened directly into the premises, and the magistrate could have inferred that the shop would take other actions to secure the property with a security system, which would include surveillance equipment to record any criminal activity occurring on the premises.

Deferring to all reasonable inferences the magistrate could have made, I would uphold the finding of probable cause, and affirm the judgment of the trial court.

/s/ Martha Hill Jamison

Justice

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## **DISSENTING OPINION**

Appellant raises a single issue on appeal—the denial of his motions to suppress video surveillance. The video surveillance was found on the hard drive of a computer that was seized from Dreams Auto Customs Shop, the business wherein the two complainants were assaulted and from which they were kidnapped. For the reasons stated herein, I respectfully dissent to the majority’s decision to reverse appellant’s conviction.

## **STANDING**

To challenge a search and seizure under either the United States or Texas Constitutions and article 38.23, a party must first establish standing. *See Kothe v. State*, 152 S.W.3d 54, 59 (Tex. Crim. App. 2004); *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996); *Martinez v. State*, 236 S.W.3d 361, 367 (Tex. App.—Fort Worth 2007, pet. dism’d). Standing is a question of law that we review *de novo* and may be raised by this court *sua sponte*. *Kothe*, 152 S.W.3d at 59-60; *State v. Millard Mall Servs., Inc.*, 352 S.W.3d 251 (Tex. App.—Houston [14th Dist.] 2011, no pet.).<sup>18</sup> It is the defendant’s burden to provide facts that establish standing. *See Villarreal*, 935 S.W.2d at 138; *see also Millard Mall Svcs.*, 352 S.W.3d at 253. Failure to meet that burden and to establish standing may result in

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<sup>18</sup> *See also State v. Sepeda*, 349 S.W.3d 713 (Tex. App.—Houston [14th Dist.] 2011, no pet.); *State v. Simon Prop. Group, Inc.*, 357 S.W.3d 687 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (accord).

the denial of the motion to suppress. *State v. Klima*, 934 S.W.2d 109, 110 (Tex. Crim. App. 1996). That decision will not be disturbed on appeal even in cases in which the record does not reflect that the issue was ever considered by the parties or the trial court. *Id.*

The majority holds the State has forfeited the standing issue “through its assertions, concessions, and acquiescence in the course of litigation” and cites *State v. Klima*, 934 S.W.2d 109, 110 n.1 (Tex. Crim. App. 1996); *Wilson v. State*, 692 S.W.2d 661, 668 (Tex. Crim. App. 1984) (op. on reh’g) (citing *Steagald v. United States*, 451 U.S. 204, 101 S.Ct. 1642, 1646, 68 L.Ed.2d 38 (1981)), in support. In *Wilson*, the Texas Court of Criminal Appeals recognized that *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), “put defendants on notice that the privacy interest in the premises searched is an element of their Fourth Amendment claim, which they bear the burden of establishing” and that *Sullivan v. State*, 564 S.W.2d 698 (Tex. Crim. App. 1978), “put defendants on notice that the State would be allowed to raise the issue of standing for the first time on appeal.” 692 S.W.2d at 669. The Court then considered whether the record had the necessary facts to determine whether the defendant had standing. *Id.* The Court found in that case the evidence satisfied the defendant’s burden of production. *Id.* at 671. In doing so, the Court answered in the affirmative that a trial court’s denial of a motion to suppress can be sustained on the ground that the defendant failed to meet his burden. *Id.* (citing *Lewis v. State*, 664 S.W.2d 345 (Tex. Crim. App. 1984)). *Wilson* did not

reverse the trial court's denial of the defendant's motion to suppress on the basis that the State conceded or acquiesced to standing. *Id.*

In *Klma*, the Texas Court of Criminal Appeals rejected the lower court's holding that the State was procedurally barred from raising standing for the first time on appeal. 934 S.W.2d at 111. The Court reiterated that the defendant "by bringing the motion to suppress, bore the burden of establishing all of the elements of her Fourth Amendment claim." *Id.* (citing *Rawlings v. Kentucky*, 448 U.S. 98, 105, 100 S.Ct. 2556, 2561, 65 L.Ed.2d 633, 642 (1980)). "Part of that proof included establishing her own privacy interest in the premises searched." *Id.* (citing *Wilson*, 692 S.W.2d at 666-67; *Rakas v. Illinois*, 439 U.S. at 149-50, 99 S.Ct. at 433, 58 L.Ed.2d at 404-05)). The Court held that raising standing for the first time on appeal did not present a new issue and reasoned that from the outset the defendant bears the burden of proving the extent of his Fourth Amendment rights. *Id.* Because standing was an element of the defendant's Fourth Amendment claim, she was on notice that it was her obligation to allege and prove standing. *Id.* (citing *Wilson*, 692 S.W.2d at 669). As in *Wilson*, the Court in *Klma* did not hold the State conceded or acquiesced to standing.

Because neither *Wilson* nor *Klma* support the proposition for which they are cited, I would not conclude the State conceded or acquiesced to standing. Moreover, the majority's position is inconsistent with authority from the Texas Court of Criminal Appeals and this court that standing may be raised by this

court *sua sponte*. *Kothe*, 152 S.W.3d at 59-60; *Millard Mall Svcs., Inc.*, 352 S.W.3d at 251. And this court has recently done so in *Costin v. State*, No. 14-16-00470-CR, 2018 WL 1278515, at \*1 (Tex. App.—Houston [14th Dist.] Mar. 13, 2018, no pet.) (mem. op., not designated for publication); *Costin v. State*, 550 S.W.3d 217, 218 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (mem. op., not designated for publication) (Donovan, J., dissenting).

As to the question of whether appellant met his burden, the majority utilizes only the intrusion-upon-property-approach. *See Williams v. State*, 502 S.W.3d 254, 261 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). In *Williams*, this court addressed standing under that theory after having already concluded that the defendant lacked standing to challenge the search under a reasonable-expectation-of-privacy theory. *Id.* at 260. Likewise, in *Castillo v. State*, No. 14-16-00296-CR, 2017 WL 4844481, at \*4 (Tex. App.—Houston [14th Dist.] Oct. 26, 2017, no pet.) (mem. op., not designated for publication), we considered both theories. In this case, the majority chooses not to address the reasonable-expectation-of-privacy theory.

Under the intrusion-upon-property-approach, the majority considers whether appellant “had a sufficient proprietary or possessory interest in the place or object searched.” *Williams*, 502 S.W.3d at 261; *Castillo*, 2017 WL 4844481, at \*5. The majority holds “evidence offered by the State demonstrated that appellant had a sufficient proprietary or possessory interest in Dreams Auto Customs to have standing to challenge the

search.” *Williams*, 502 S.W.3d at 260; *Castillo*, 2017 WL 4844481, at \*5. The evidence relied upon by the majority is:

1. testimony from Arnold that appellant was an owner of the business;
2. testimony from Arnold that “they were Foreman’s computer systems;”
3. and mail in a storage room inside the auto shop was addressed to appellant.

The majority concludes this evidence establishes the computer in question was appellant’s personal property. The majority cites no authority applying the intrusion-upon-property theory to confer standing for Fourth Amendment purposes on the business owner for company equipment on commercial premises. Without more, I would not hold that company equipment is the business owner’s “own personal ‘effects’” such that a search of it constitutes a trespass upon the business owner. *See Ford v. State*, 477 S.W.3d 321, 328 (Tex. Crim. App. 2015) (recognizing that a Fourth Amendment claim may be based on a trespass theory of search (one’s own personal “effects” have been trespassed), or a privacy theory of search (one’s own expectation of privacy was breached)). I would conclude that appellant failed to show his own personal effects were trespassed and therefore under the intrusion-upon-property theory failed to meet his burden to establish standing. *See Ford*, 477 S.W.3d at 328.

I would further analyze standing under the privacy theory and conclude appellant has not met his

burden to show (1) that he had a subjective expectation of privacy in the place or property searched and (2) that society would recognize that expectation of privacy as being objectively reasonable. *State v. Betts*, 397 S.W.3d 198, 203 (Tex. Crim. App. 2013); *Lown v. State*, 172 S.W.3d 753, 759 (Tex. App.—Houston [14th Dist.] 2005, no pet.). Photographs admitted into evidence show the computer for the audio surveillance system was in an office with two desks. Although there was a lock on the door, it was not locked and no keys were required for entry. The testimony of Officer Douglas Ertoms was that the computer was not password protected. There is no evidence that appellant ever used the computer, much less that he had dominion or control over it, or the right to exclude others from its use. There is no evidence as to whether appellant primarily occupied and controlled the office in which the computer was located or had the right to exclude others from it. The computer itself was not password protected. Considering all of these facts, appellant failed to show that he had a subjective expectation of privacy in the computer seized or that any expectation of privacy he had was one society would recognize as being objectively reasonable. See *Granados v. State*, 85 S.W.3d 217, 222-23 (Tex. Crim. App. 2002); *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996).

Because appellant did not meet his burden to show that he had standing to complain of the seizure under either privacy theory, I would conclude the trial court did not err by denying the motion to suppress. See *Betts*, 397 S.W.3d at 203-04 (listing the *Granados*

factors); *see also Myrick v. State*, 412 S.W.3d 60, 66 (Tex. App.—Texarkana 2013, no pet.).

## **HARM**

Furthermore, I would conclude the alleged error is not reversible. The error, if any, in admitting the videotape does not automatically merit reversal. Constitutional errors are reversible unless the appellate court determines the error did not contribute to the conviction or punishment beyond a reasonable doubt. Tex. R. App. P. 44.2(a). Non-constitutional errors are reversible if they affected a defendant’s substantial rights. Tex. R. App. P. 44.2(b).

Assuming, without deciding, appellant is correct that the alleged error is constitutional, it is subject to harmless-error analysis. *See Rubio v. State*, 241 S.W.3d 1, 3 (Tex. Crim. App. 2007). In other words, this Court will reverse the conviction unless we determine beyond a reasonable doubt that the error did not contribute to appellant’s conviction. *Id.* If there is a reasonable likelihood that the error materially affected the jury’s deliberations, then the error was not harmless beyond a reasonable doubt. *Id.* In making this determination, we should not focus on the propriety of the outcome of the trial but should instead calculate the probable impact of the error on the jury, in light of all other evidence available. *Id.* We consider evidence of the defendant’s guilt as a factor in our analysis but the ultimate question is whether we are able to determine

beyond a reasonable doubt that the error complained of did not contribute to the jury's verdict. *Id.*

The majority determines the erroneous admission of the video is reversible error because it was "the only strong evidence showing appellant's involvement in the offenses." I disagree.

Merchant testified that "Junior" introduced him to his father at a garage. Merchant identified appellant in-court as the man Junior identified as his father. Merchant and Glekiah had a second meeting with appellant and Junior at the garage. It was on the occasion of the third meeting with appellant and Junior that the actions underlying these cases occurred. Merchant met appellant three times before identifying him in-court as having been involved in the offenses.

Merchant testified that appellant told "the guy that was stepping on [his] head" to pick him up. Appellant had a gun and threatened Merchant with it. Appellant "gave the order" to bring a clothes iron and said, "Plug it in and burn his side." The record reflects that in open court Merchant stood up, pulled up his shirt, and showed a burn mark on his skin. A clothes iron was found at the garage and was introduced into evidence as State's Exhibit No. 31. Merchant testified that appellant told the others to put them in the van. According to Merchant, everyone in the auto shop was receiving their instructions from appellant. Appellant was in the van when Merchant and Glekiah tried to escape and someone said to shoot them; Merchant was shot multiple times.

During cross-examination, Merchant testified that appellant told Merchant that he, appellant, would bring \$100,000.

Glekiah testified the police showed him a photospread four days after the incident. He selected a person out of the photospread and signed it. The photospread was admitted into evidence and the jury was able to compare the photograph of the man that Glekiah identified to appellant.

Glekiah identified appellant in-court as the person at the garage where he and Merchant were going to “switch the money.” Appellant used a remote to close the garage door and said, “guys” and other men came toward Merchant and Glekiah. Glekiah testified that appellant had a gun. Gasoline was poured on Glekiah and appellant said, “You going to burn.” He had a lighter and lit it. Glekiah testified appellant was “the boss” and he told the others “what to do.” Glekiah asked to leave but appellant would not let him. Glekiah testified that appellant gave the order to get the iron. Appellant took Glekiah’s driver’s license. Appellant told someone to get the van and to “[t]ake them to the spot and I will be there.” Appellant said he was going to kill them. According to Glekiah, appellant was “in charge.”

This is “strong evidence” of appellant’s involvement in the offenses. Generally, admission of evidence that was cumulative is harmless beyond a reasonable doubt. *See Estrada v. State*, 313 S.W.3d 274, 302 n. 29 (Tex. Crim. App. 2010) (noting that any preserved error

with respect to admission of complained-of evidence was harmless in light of “very similar evidence” admitted without objection); *McNac v. State*, 215 S.W.3d 420, 424-25 (Tex. Crim. App. 2007) (in harm analysis, concluding that the “unchallenged evidence [was] essentially cumulative” of the challenged evidence); *Davis v. State*, 203 S.W.3d 845, 855 (Tex. Crim. App. 2006) (holding harmless beyond a reasonable doubt admission of “important” evidence that was cumulative); *Dowthitt v. State*, 931 S.W.2d 244, 263 (Tex. Crim. App. 1996) (evidence harmless beyond a reasonable doubt where other physical evidence strongly connected defendant to murders); *Jeffley v. State*, 38 S.W.3d 847, 859-60 (Tex. App.—Houston [14th Dist.] 2001, pet. ref’d) (determining that jury did not place a great deal of weight on potentially inadmissible confession because appellant had also made an admissible confession). The testimony of Merchant and Glekiah established that both complainants had met appellant prior to the night in question. They both identified appellant and gave detailed testimony about his involvement in the offenses. Thus the video was cumulative of trial testimony establishing appellant’s identity. *See Meggs v. State*, 438 S.W.3d 143, 147 (Tex. App.—Houston [14th Dist.] 2014, pet. ref’d) (concluding admission of the evidence sought to be suppressed did not materially affect the jury deliberations admission in light of other evidence establishing the defendant was present at the murder scene).

I disagree with the majority’s reliance upon the corroborating effect of the video as it is based upon an

assessment of the complainants' lack of credibility. Credibility is a matter solely for the jury to decide. *Criff v. State*, 438 S.W.3d 134, 138 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd) (citing *Cain v. State*, 958 S.W.2d 404, 408-09 (Tex. Crim. App. 1997)).

The video does corroborate some of complainant's testimony but it was not the only corroborative evidence of what happened:

[W]itnesses driving on the service road of Highway 290 observed complainants Moses Glekiah and Richard Merchant tumble from the rear of a van onto the road. Complainants were bound with zip ties and their mouths were taped shut with duct tape. Witnesses observed that complainants had been shot and were bleeding.

Because those same complainants gave eyewitness accounts at trial as to appellant's involvement, I would conclude beyond a reasonable doubt that the error, if any, in admitting the video tape did not contribute to appellant's conviction. *Id.*

## **CONCLUSION**

For these reasons, I respectfully dissent.

/s/ John Donovan

Justice

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Court of Appeals of Texas, Fourteenth District, Houston

August 10, 2017, Plurality, Concurring, and  
Dissenting Opinions Filed

NO. 14-15-01005-CR, NO. 14-15-01006-CR

2017 WL 3445356

NATHAN RAY FOREMAN, Appellant

v.

THE STATE OF TEXAS, Appellee

**Notice:** PUBLISH—*TEX. R. APP. P. 47.2(b)*.

**Counsel:** For APPELLANT: Stanley G. Schneider,  
HOUSTON, TX.

For STATE: Clinton Morgan, HOUSTON, TX.

**Judges:** Panel consists of Justices Christopher,  
Jamison, and Donovan (Christopher, dissenting) (Do-  
novan, concurring).

**Opinion by:** Martha Hill Jamison

## Opinion

### PLURALITY OPINION

In one issue, appellant Nathan Ray Foreman challenges the denial of his motions to suppress surveillance video evidence found on a computer hard drive.<sup>1</sup>

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<sup>1</sup> Appellant filed a motion to suppress evidence obtained from three hard drives seized from his business. Before trial, a visiting judge granted appellant's pretrial motion to suppress evidence found on two of the hard drives because they were not part of the surveillance system. Appellant then filed a motion for rehearing seeking again to suppress the evidence on the third hard drive,

A jury found appellant guilty of aggravated robbery and aggravated kidnapping, and the trial court assessed 50 year sentences to run concurrently.

The offenses occurred in part in a custom auto shop. A video surveillance system captured a portion of the offenses on video. At trial, the trial judge admitted the surveillance video, which was obtained from a computer tower seized from the shop. Appellant argues that the police officer's affidavit in support of the issuance of the search warrant "failed to set forth facts sufficient to establish probable cause that surveillance video or surveillance equipment would be located at the place to be searched" in violation of the Fourth Amendment of the United States Constitution, article I, section 9 of the Texas Constitution, and chapter 18 of the Texas Code of Criminal Procedure.

The cornerstone of the Fourth Amendment and article I, section 9 is that a magistrate shall not issue a search warrant without first finding "probable cause" that particular evidence of a particular crime will be found in a particular location. *Rodriguez v. State*, 232 S.W.3d 55, 60 & n.15 (Tex. Crim. App. 2007) (citing U.S. Const. amend. IV and Tex. Const. art. I, § 9); *see also Bonds v. State*, 403 S.W.3d 867, 872-73 (Tex. Crim. App. 2013). The Code of Criminal Procedure allows the issuance of a search warrant to seize property or items that constitute evidence of an offense. *State v. Dugas*, 296

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which was heard and denied by the sitting trial judge. Appellant reurged the motion during trial before a third trial judge. She noted that the matter already had been heard by two judges and admitted the surveillance video over appellant's objections.

S.W.3d 112, 115-16 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd) (citing Tex. Code Crim. Proc. art. 18.02(a)(10)). Before a search warrant may issue, a sworn affidavit must be filed setting forth sufficient facts to show probable cause that (1) a specific offense has been committed; (2) the specifically described property or items to be searched for or seized constitute evidence of that offense or evidence that a particular person committed that offense; and (3) the property or items constituting such evidence are located at or on the particular person, place, or thing to be searched. *Id.* (citing Tex. Code Crim. Proc. art. 18.01(c)).

Probable cause exists when, under the totality of the circumstances, there is a fair probability or substantial chance that contraband or evidence of a crime will be found at a specified location. *Bonds*, 403 S.W.3d at 873; *Rodriguez*, 232 S.W.3d at 60. This standard is “flexible and nondemanding.” *Bonds*, 403 S.W.3d at 873; *Rodriguez*, 232 S.W.3d at 60. Because of the flexibility in this standard, neither federal nor Texas law defines *precisely* what degree of probability suffices to establish probable cause, but that probability cannot be based on mere conclusory statements of an affiant’s belief. *Rodriguez*, 232 S.W.3d at 61.

An affiant must present an affidavit that allows the magistrate to determine probable cause independently: the magistrate’s actions cannot be a mere ratification of the bare conclusions of others. *Id.* However, when reviewing a magistrate’s decision to issue a warrant, trial and appellate courts apply a highly deferential standard in keeping with the constitutional

preference for a warrant.<sup>2</sup> *Id.* Thus, when reviewing an issuing magistrate's determination, we interpret the affidavit in a commonsensical and realistic manner, recognizing that the magistrate may draw reasonable inferences. *Id.* We defer to all reasonable inferences that the magistrate could have made. *Id.*

The issue is not whether there are other facts that could have, or even should have, been included in the affidavit: we focus on the combined logical force of facts that are in the affidavit, not those that are omitted from the affidavit. *Rodriguez*, 232 S.W.3d at 62. Comitantly, our review is restricted solely to the four corners of the affidavit. *Bonds*, 403 S.W.3d at 873; *Walker v. State*, 494 S.W.3d 905, 907 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). We are not to invalidate a warrant by interpreting the affidavit in a hyper-technical rather than a commonsense manner. *Bonds*, 403 S.W.3d at 873; *Walker*, 494 S.W.3d at 907.

With these general principles in mind, we turn to the affidavit in this case. Applying a commonsense reading, we conclude that the affidavit contained sufficient facts from which the trial court could find probable cause based on a fair probability that surveillance

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<sup>2</sup> We typically review a trial judge's motion to suppress ruling under a bifurcated standard, but when reviewing a magistrate's decision to issue a warrant, both appellate courts and trial courts instead apply this standard of review. *Walker v. State*, 494 S.W.3d 905, 907 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd).

equipment would be found at the auto shop containing evidence of the offenses.

The affiant stated that he “ha[d] reason to believe and [did] believe” that evidence of the offenses would be found at the auto shop, including, among other things, audio/video surveillance equipment.<sup>3</sup> The affidavit described a number of facts about the auto shop. The windows and front door of the business were dark tinted glass, and the back of the business had an aluminum bay door opening into the business. The affidavit also describes a number of facts regarding the specific offenses. Two men had agreed to meet someone named “Jerry” at the specifically-described custom auto shop, Dreams Auto Customs, to conduct business. When the two men arrived, several suspects grabbed them, tied them up, beat them, poured gasoline on them, and threatened to set them on fire. The suspects stole cash and other items from the men. The suspects then forced the men into the back of a van at gunpoint, only then leaving the auto shop. The men jumped out of the moving van because they believed they were going to be killed. As the men jumped, they were shot by the suspects.

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<sup>3</sup> Appellant argues that this statement, standing alone, is conclusory and does not support an inference that the auto shop would have surveillance equipment. We, however, review the affidavit in its entirety, deferring to all reasonable inferences, to determine whether probable cause existed. *See Bonds*, 403 S.W.3d at 873 (noting probable cause is reviewed “under the totality of the circumstances”); *see also Rodriguez*, 232 S.W.3d at 60 (same).

A witness reported she observed the men lying injured on the side of a road with their hands tied and mouths duct-taped. They had suffered multiple gunshot wounds. Another witness had seen the men exiting a van while it was moving down the road.

One of the injured men directed the affiant to the auto shop, which he determined was owned by appellant's wife. The affiant showed appellant's photograph to the man, who identified appellant as a suspect who punched the men, ordered other suspects around, poured gasoline on the men, and told other suspects to take the men away in the van.

Based upon this information, the affiant believed that DNA from the men and the suspects, as well as property belonging to the men and "instrumentalities of the crime such as the white van . . . , guns . . . , [and] zip ties" used to tie the men, would be found inside the auto shop. The affiant also believed surveillance equipment "may be found" there. The affidavit established a sufficient nexus between criminal activity, the things to be seized, and the place to be searched. *Bonds*, 403 S.W.3d at 873. From the face of the affidavit, it is a reasonable inference that surveillance equipment found in the auto shop, if any, would have recorded evidence of the criminal activity. See *Rodriguez*, 232 S.W.3d at 62. However, appellant argues that it is not a reasonable inference that surveillance video or surveillance equipment would be inside the shop.<sup>4</sup> The State argues,

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<sup>4</sup> Appellant complains that the affiant does not mention seeing cameras at the shop. The State counters that such specificity

to the contrary, that there is a reasonable probability that “more or less every business” would have surveillance equipment and thus the magistrate fairly could infer that surveillance equipment would be located on the premises.

We do not ask whether or not surveillance equipment was actually seen by the affiant. The proper inquiry is whether there are sufficient facts, coupled with inferences from those facts, to establish a fair probability or substantial chance that surveillance equipment containing evidence of the offenses would be found inside the auto shop. *See Bonds*, 403 S.W.3d at 873; *Rodriguez*, 232 S.W.3d at 62. We conclude that the facts in the affidavit and reasonable inferences drawn therefrom support a finding of a fair probability that surveillance equipment containing evidence of the offenses would be inside the auto shop.

A fair probability rests in the allegation that the offenses occurred in a building where the windows were blacked-out and a bay door opened directly into the premises and where valuable property (vehicles) belonging to customers, along with other expensive custom auto equipment, presumably was housed. Even the name of the business, “Dreams Auto Customs,” supports the inference that expensive custom equipment would be there. From these facts, a magistrate reasonably could have inferred that a business owner interested in obscuring the view into his windows and

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is not required and notes that the affidavit does not mention whether anyone left DNA or other items at the shop.

providing secure access to the building within which such property is housed also would have a security system in place, including surveillance equipment, and such surveillance equipment probably recorded evidence of the criminal activity occurring there.<sup>5</sup> *See, e.g., Walker*, 494 S.W.3d at 909 (holding magistrate reasonably could have inferred that evidence probably would be on the defendant's cell phone when the defendant had been communicating with the complainant and planning robberies around the time the complainant was robbed and killed); *Eubanks v. State*, 326 S.W.3d 231, 248 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (holding magistrate reasonably could have inferred that defendant had pornographic photographs stored on a computer when he allegedly made the complainants pose for nude or partially nude photographs, even though the complainants did not mention the use of a digital camera or a computer).

The dissent agrees that the only element of article 18.02(c) at issue here is whether the affidavit sets forth sufficient facts to establish probable cause that the property is located at the place to be searched. *See Tex. Code Crim. Proc. art. 18.01(c)(3)*. The dissent says that “[t]he affidavit did not mention any facts to support the conclusion that a video surveillance system existed at the body shop.” Dissent at 2. This is simply incorrect. The affidavit includes multiple facts supporting that

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<sup>5</sup> Appellant further argued at trial that the State failed to secure a second warrant before searching the contents of the surveillance tapes. Appellant does not make that argument on appeal.

conclusion. *Supra* at 4-6. The dissent fails to credit all of the facts in the affidavit and cherry-picks only the fact that the offense occurred in a business to conclude that our holding would be applicable to any business. But our holding is not based solely on that one fact: it is based on all the relevant specific facts in the affidavit discussed above. We focus on the *combined* logical force of facts that are in the affidavit to determine whether the magistrate's inference was reasonable. *See Rodriguez*, 232 S.W.3d at 62.

The “computer/camera” and cellphone cases on which the dissent relies are distinguishable because they all address the second element of article 18.02(c), whether “the specifically described property or items that are to be searched for or seized constitute evidence of that offense or evidence that a particular person committed that offense,” not the third element involving whether evidence is located at the place to be searched: only the latter is at issue here.<sup>6</sup> *See Tex. Code Crim. Proc. art. 18.01(c)(2)*.

Considering the facts contained in the four corners of the affidavit and the reasonable inferences therefrom under the totality of the circumstances, we conclude that the facts submitted to the magistrate demonstrated a fair probability that surveillance equipment revealing evidence of the offenses would be

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<sup>6</sup> Neither appellant nor the dissent contests that the facts in this affidavit establish probable cause of the second element of article 18.02(c): the property constitutes evidence of a crime, which is a significant factor in this case. *See Tex. Code Crim. Proc. art. 18.01(c)(2)*.

inside the auto shop when the warrant was issued. *See Eubanks*, 326 S.W.3d at 249. Accordingly, the trial judges did not err in denying appellant's motions to suppress. We overrule appellant's sole issue on appeal.

We affirm the judgment of the trial court.

/s/ Martha Hill Jamison

Justice

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**Concur**

**CONCURRING OPINION**

Appellant raises a single issue on appeal—the denial of his motions to suppress video surveillance. The video surveillance was found on the hard drive of a computer that was seized from Dreams Auto Customs Shop, the business wherein the two complainants were assaulted and from which they were kidnapped. Because I would affirm the trial court's judgment on the basis that appellant failed to meet his burden to establish standing to challenge the seizure, I concur.

In order to challenge a search and seizure under either the United States or Texas Constitutions and article 38.23, a party must first establish standing. *See Kothe v. State*, 152 S.W.3d 54, 59 (Tex. Crim. App. 2004); *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996); *Martinez v. State*, 236 S.W.3d 361, 367 (Tex. App.—Fort Worth 2007, pet. dism'd). Standing is a question of law that we review *de novo* and may be raised by this court *sua sponte*. *Kothe*, 152 S.W.3d at

59-60; *State v. Millard Mall Svcs., Inc.*, 352 S.W.3d 251 (Tex. App.—Houston [14th Dist.] 2011, no pet.).<sup>1</sup> It is the defendant’s burden to provide facts that establish standing. *See Villarreal*, 935 S.W.2d at 138; *see also Millard Mall Svcs.*, 352 S.W.3d at 253. Failure to meet that burden and to establish standing may result in the denial of the motion to suppress. *State v. Klima*, 934 S.W.2d 109, 110 (Tex. Crim. App. 1996). That decision will not be disturbed on appeal even in cases in which the record does not reflect that the issue was ever considered by the parties or the trial court. *Id.*

In determining whether appellant has established standing, we consider both the expectation of privacy approach and the property-based approach. *See State v. Bell*, 366 S.W.3d 712, 713 (Tex. Crim. App. 2012) (citing *United States v. Jones*, 565 U.S. 400, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012)).<sup>2</sup> “A Fourth Amendment claim may be based on a trespass theory of search (one’s own personal “effects” have been trespassed), or a privacy theory of search (one’s own expectation of privacy was breached).” *Ford v. State*, 477 S.W.3d 321, 328 (Tex. Crim. App. 2015).

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<sup>1</sup> *See also State v. Sepeda*, 349 S.W.3d 713 (Tex. App.—Houston [14th Dist.] 2011, no pet.); *State v. Simon Prop. Group, Inc.*, 357 S.W.3d 687 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (same). Thus the dissent’s point that the State did not challenge standing in the trial court is of no moment.

<sup>2</sup> On remand, the appeals brought by Mark Steven Bell were dismissed in accordance with the parties’ agreement. *State v. Bell*, NO. 14-10-00771-CR, 2013 WL 328952, at \*1 (Tex. App.—Houston [14th Dist.] Jan. 29, 2013, no pet.).

To establish standing under the latter privacy theory, the defendant must show (1) that he had a subjective expectation of privacy in the place or property searched and (2) that society would recognize that expectation of privacy as being objectively reasonable. *State v. Betts*, 397 S.W.3d 198, 203 (Tex. Crim. App. 2013); *Lown v. State*, 172 S.W.3d 753, 759 (Tex. App.—Houston [14th Dist.] 2005, no pet.). In considering the latter, we examine the totality of the circumstances surrounding the search, including “(1) whether the accused had a property or possessory interest in the place invaded; (2) whether he was legitimately in the place invaded; (3) whether he had complete dominion or control and the right to exclude others; (4) whether, before the intrusion, he took normal precautions customarily taken by those seeking privacy; (5) whether he put the place to some private use; and (6) whether his claim of privacy is consistent with historical notions of privacy.” *Id.* (citing *Granados v. State*, 85 S.W.3d 217, 223 (Tex. Crim. App. 2002); *Villarreal*, 935 S.W.2d at 138); *Lown* 172 S.W.3d at 759. This is a non-exhaustive list and no one factor is dispositive. *Betts*, 397 S.W.3d at 203-04; *Lown* 172 S.W.3d at 759. An expectation of privacy in commercial premises is less than a similar expectation in a home. *See New York v. Burger*, 482 U.S. 691, 700, 107 S.Ct. 2636, 2642, 96 L.Ed.2d 601 (1987).

There is scant evidence in the record pertinent to the standing issue. Officer Arnold averred that he “researched the location and found the owner to be Charese Foreman . . . married to Nathan Ray Foreman.”

The record includes a copy of Nathan and Charese's marriage license. It also includes a copy of a "WITHDRAWAL NOTICE OF ASSUMED NAME" on which Charese Foreman is listed as the sole owner. The motion to suppress refers to the shop as "his business" and similar references were made by counsel during trial.<sup>3</sup> Photographs admitted into evidence show the computer for the audio surveillance system was in an office with two desks. Although there was a lock on the door, it was unlocked and no keys were required for entry. The testimony of Officer Douglas Ertoms was that the computer was not password protected. Considering these facts, there was no evidence appellant had a subjective expectation of privacy in the computer seized. *See Villarreal*, 935 S.W.2d at 138.

Next, appellant did not show that any expectation of privacy he had was one society would recognize as being objectively reasonable. *See Granados*, 85 S.W.3d at 222-23; *Villarreal*, 935 S.W.2d at 138. The record does not reflect the shop was community property but even assuming appellant's status as the owner's spouse gave him a possessory interest, the totality of the circumstances do not establish his standing to challenge the seizure. There is no evidence that

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<sup>3</sup> The dissent overstates the importance I place upon this fact. Were the business in appellant's name, it would support his claim to an expectation of privacy on the commercial property—but the facts are otherwise. The case cited by the dissent, *Parker v. State*, 182 S.W.3d 923 (Tex. Crim. App. 2006), is clearly distinguishable because the record reflected Parker had permission to drive the car, and was, in fact, driving the car when it was stopped and searched. There is no analogous evidence in this case.

appellant ever used the computer, much less that he had dominion or control over it, or the right to exclude others from its use. There is no evidence as to whether appellant primarily occupied and controlled the office in which the computer was located or had the right to exclude others from it. The computer itself was not password protected. Thus, under the property-based approach, there was also no evidence that appellant's own personal effects were trespassed. *See Ford*, 477 S.W.3d at 328. *See also Williams v. State*, 502 S.W.3d 254, 258-61 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (holding defendant lacked standing to challenge the search of the home under both theories of privacy).

Because appellant did not meet his burden to show that he had standing to complain of the seizure under either privacy theory, I would find the trial court did not err by denying the motion to suppress. *See Betts*, 397 S.W.3d at 203-04 (listing the *Granados* factors); *see also Myrick v. State*, 412 S.W.3d 60 (Tex. App.—Texarkana 2013, no pet.). I therefore respectfully concur in this court's judgment.

/s/ John Donovan

Justice

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**Dissent**

**DISSENTING OPINION**

In what appears to be a case of first impression, we are asked to decide whether a magistrate can infer

that a video surveillance system is present in the interior of an auto body shop and would have recorded any crime that took place inside the shop without any facts indicating as such in the affidavit in support of a search warrant. The opinion by Justice Jamison concludes that a magistrate could have inferred that valuable property (vehicles) along with other “expensive custom auto equipment” is in the building and that a business owner could have had a security system in place, including video surveillance equipment. If this holding stands, a magistrate could make those same inferences for any business. And in this day and age, where a security system is cheaply available for personal use, a magistrate could make those same inferences for any home too. I think the inference in this case goes too far and is contrary to our cases requiring specific facts before a search warrant is issued.

### **Standing**

Before reaching Justice Jamison’s plurality opinion on the sufficiency of the affidavit, I briefly address Justice Donovan’s concurring opinion on standing, with which I respectfully disagree.

A defendant has standing to contest a search if he has a legitimate expectation of privacy in the place invaded. *See Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996). To prove that he had a legitimate expectation of privacy, the defendant must show (1) that by his conduct, he exhibited an actual subjective expectation of privacy; and (2) that circumstances existed

under which society was prepared to recognize his subjective expectation as objectively reasonable. *Id.*

The State did not challenge appellant's standing in the trial court. Appellant asserted in his motion to suppress that the body shop was his, and at the hearing on the motion, the State even referred to the seized computer as "his computer." The trial court also granted appellant's motion in part, which suggests that the trial court believed that there were facts establishing appellant's standing.

Justice Donovan appears to conclude that appellant lacked standing because there is evidence that appellant's wife was the record owner of the body shop where he conducted his business. Even if true, this evidence is not dispositive. A person can have standing to contest a search even if record title in the place searched is in the name of a third party. *Cf. Parker v. State*, 182 S.W.3d 923 (Tex. Crim. App. 2006) (boyfriend had standing to contest the search of a rental car that he borrowed from his girlfriend, even though the girlfriend was the only authorized driver under the rental agreement).

I would conclude that appellant established that he at least had a possessory interest in the body shop, and that society would be prepared to recognize as reasonable his expectation of privacy in the body shop. *See Villarreal*, 935 S.W.2d at 138 (holding that the accused may have standing whether he had a property or possessory interest in the place invaded).

## **General Law**

Article 18.02 of the Code of Criminal Procedure enumerates the types of items that be searched for and seized pursuant to a search warrant. A video surveillance system falls under the general scope of Article 18.02(a)(10): “property or items . . . constituting evidence of an offense or constituting evidence tending to show that a particular person committed an offense.” *See Tex. Code Crim. Proc. art. 18.02(a)(10).*

To obtain a search warrant under Article 18.02(a)(10), there must be a sworn affidavit setting forth sufficient facts to establish probable cause that (1) a specific offense has been committed, (2) the specifically described property or items that are to be search for or seized constitute evidence of that offense or evidence that a particular person committed that offense, and (3) the property or items constituting evidence to be searched for or seized are located at or on the particular person, place, or thing to be searched. *Id.* art. 18.01(c).

This case involves the third requirement—were there facts in the affidavit from which a magistrate could reasonably infer that a video surveillance system was located at the body shop? The answer to that question is clearly no. The affidavit did not mention any facts to support the conclusion that a video surveillance system existed at the body shop. For example, there was no mention that surveillance cameras were visible on the exterior of the body shop, nor was there a mention that cameras had been spotted inside the

building. Lacking that information, Justice Jamison still infers that such a system existed.

### **Reasonable Inferences**

Magistrates are permitted to draw reasonable inferences from the facts and circumstances alleged in the affidavit. The following are a few of the more common themes that have developed in our case law:

- **Instrumentalities of the crime.** In *Ramos v. State*, 934 S.W.2d 358, 363 (Tex. Crim. App. 1996), the court explained that in a murder case, a magistrate could reasonably infer that a weapon could be found at the residence where the murder took place. (Of course, a surveillance video is not an instrumentality of the crime.)
- **Possession of contraband.** In *Rodriguez v. State*, 232 S.W.3d 55, 62-63 (Tex. Crim. App. 2007), the court held that a magistrate could reasonably infer that a garage contained drugs based on information that a man went to the garage, walked out with a package, threw the package in his car, and was later stopped with a package containing drugs. *See also Moreno v. State*, 415 S.W.3d 284, 288 (Tex. Crim. App. 2013) (involving similar inference based on information from a confidential informant).
- **Skills and training.** In *Davis v. State*, 202 S.W.3d 149, 155-57 (Tex. Crim. App. 2006), the court held that a magistrate could reasonably infer that an officer was qualified to recognize the odor of methamphetamine, even though the

affidavit was silent as to the officer's skills and training.

- **Time.** In *State v. Jordan*, 342 S.W.3d 565, 571 (Tex. Crim. App. 2011), a case involving a warrant to seize blood in connection with a suspected DWI, the officer did not indicate the precise time of his observations, but the court held that a magistrate could reasonably infer that the officer's observations occurred on the same date that the offense was alleged to have occurred, and that this information was not stale because the affidavit was presented shortly after midnight. *See also Crider v. State*, 352 S.W.3d 704, 710-11 (Tex. Crim. App. 2011) (reaching a different conclusion where the window of time was much greater); *State v. McLain*, 337 S.W.3d 268, 273 (Tex. Crim. App. 2011) (holding that the trial and appellate courts should have deferred to the magistrate's implied finding that an ambiguous phrase in an affidavit referred to the time that an informant made his observations).

- **Credibility of an anonymous informant.** In *Flores v. State*, 319 S.W.3d 697, 703 (Tex. Crim. App. 2010), the court held that a magistrate could reasonably conclude that an anonymous informant had some familiarity with the defendant based on corroborating evidence and the "doctrine of chances." *See also State v. Duarte*, 389 S.W.3d 349, 359-60 (Tex. Crim. App. 2012) (tip from a first-time confidential informant was not reliable where there was no detail or corroboration).

- **Personal knowledge.** In *Jones v. State*, 568 S.W.2d 847, 855 (Tex. Crim. App. 1978), the court

held that a magistrate could reasonably infer that information conveyed in the passive voice was information within the personal knowledge of the affiant.

None of the cases cited above would support the inferential leap made by Justice Jamison. Nor do the cases that are cited in her opinion.

To support my opinion, I look to two different types of cases: computer/camera cases and cellphone cases. Before we allow a search of either of those electronic devices, we have required specific facts to support an inference that those devices probably exist and that the evidence of the crime will be found on those devices.

### **Computer/camera cases**

Generally, to support a search warrant for a computer, there must be some evidence that a computer was directly involved in the crime. *See Ryals v. State*, 470 S.W.3d 141, 143, 146 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (defendant told an undercover officer that he would use a computer to make fake IDs); *Ex parte Jones*, 473 S.W.3d 850, 856 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (defendant subscribed to a commercial child pornography website); *Porath v. State*, 148 S.W.3d 402, 409 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (defendant met the complainant in an internet chat room).

When there is no evidence that a computer was directly involved in the crime, more is generally needed

to justify a computer search. An opinion authored by Justice Jamison illustrates my point. In *Checo v. State*, 402 S.W.3d 440 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd), the defendant kidnapped a little girl and took her to a house, where he showed her adult pornography on a desktop computer. The defendant then took the complainant to another room, where he attempted to assault her. The complainant observed a laptop in that room that was set up to take pictures and videos. The affiant obtained a warrant to search for child pornography (which the complainant had not been shown), and the defendant moved to suppress the results of the search, arguing that there was no information in the officer's affidavits that the defendant photographed or videotaped the complainant, or other information independently linking him to child pornography. We rejected that argument, noting affidavit testimony from the officer that those who engage children in a sexually explicit manner often collect child pornography on their computers. Given this level of factual specificity, we held that the search warrant was valid.

Another illustrative case is *Aguirre v. State*, 490 S.W.3d 102 (Tex. App.—Houston [14th Dist.] 2016, no pet.), which was authored by Justice Donovan, and which I joined. There, a child complainant described how the defendant would photograph her while they had sex. The complainant's mother stated that the defendant had a laptop that he did not allow anyone to use. The police officer affiant testified that based on her training and expertise, child molesters will often use

their computers to store and exchange sexually explicit images of children. We held that the affidavit was sufficient to support a search of the defendant's computer.

But in this case, the affiant provided no facts that a computer or camera was involved in the crime, directly or indirectly.<sup>1</sup>

### **Cellphone cases**

Similarly, an affidavit offered in support of a warrant to search a cellphone must usually include facts that a cellphone was used during the crime or shortly before or after. In *Walker v. State*, 494 S.W.3d 905 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd), we concluded that there was probable cause to search a defendant's cellphone when the affidavit stated that the defendant admitted to shooting the complainant, and there was other information that the defendant and the complainant knew each other, communicated by cellphone, and exchanged messages and phone calls around the time of the shooting.

In *Aguirre*, mentioned earlier, we also held that the affidavit was sufficient to search all of the

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<sup>1</sup> Justice Jamison cites *Eubanks v. State*, 326 S.W.3d 231 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd), a child sex assault case where the First Court of Appeals held that a magistrate could infer that a computer was used in a crime based on the child complainant's testimony that she was photographed. I would note that our court has never gone that far in making such an inference, nor have we ever followed *Eubanks* for that proposition. Cases from our court have certainly had more evidentiary support.

defendant's cellphones when the complainant said that a particular cellphone was used to photograph her and that the defendant had used instant messenger to send a photograph of his penis. Based on the affiant's opinion testimony that pedophiles share pornography through electronic media, we concluded that all of the cellphones could be searched.

In *Humaran v. State*, 478 S.W.3d 887 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd), the defendant made a “disturbance” call to police and there was evidence that she and a codefendant had murdered a person and set the body on fire. We concluded that the facts were sufficient to support a search of her cellphone.

### **The conclusion from these cases**

Courts allow magistrates to make reasonable inferences that often center on certain types of assumptions, but none of those assumptions has been the existence of a video surveillance system. Precedent from our own court with respect to computers and cellphones requires specific evidence that a computer or cellphone was used in the crime, or that the facts of the type of crime itself lead to the conclusion that a computer or cellphone was used. I see no reason to treat a case involving video surveillance systems any differently.

Justice Jamison's stacking of inferences could lead to all computers and cellphones being searchable for any type of video or picture that could have recorded a

crime, even though the affiant provided no facts suggesting that a computer or cellphone even existed. If a crime took place at your home, is it reasonable to assume that you have a security system that links to either your computer or cellphone, subjecting them both to a search?

I would conclude that the affiant provided insufficient facts to support a finding that a video surveillance system was located at the body shop, and that the trial court erred by denying the motion to suppress.

### **Harm**

This error is constitutional, and therefore, this court must reverse the conviction unless we determine “beyond a reasonable doubt that the error did not contribute to the conviction.” *See Tex. R. App. P. 44.2(a); Taunton v. State*, 465 S.W.3d 816, 823-24 (Tex. App.—Texarkana 2015, pet. ref’d). This standard for determining harmful error “should ultimately serve to vindicate the integrity of the fact-finding process rather than simply looking to the justifiability of the fact-finder’s result.” *See Snowden v. State*, 353 S.W.3d 815, 819 (Tex. Crim. App. 2011). Accordingly, we must focus not on whether the jury verdict was supported by legally sufficient evidence, but rather, on whether “the error adversely affected the integrity of the process leading to the conviction,” *Langham v. State*, 305 S.W.3d 568, 582 (Tex. Crim. App. 2010), or on whether “the error at issue might possibly have prejudiced the jurors’ decision-making.” *Harris v. State*, 790 S.W.2d

568, 586 (Tex. Crim. App. 1989), *overruled on other grounds by Snowden*, 353 S.W.3d at 821-22.

An error is not harmless “simply because the reviewing court is confident that the result the jury reached was objectively correct.” *See Snowden*, 353 S.W.3d at 819. Error is not harmless “if there is a reasonable likelihood that it materially affected the jury’s deliberations.” *See Neal v. State*, 256 S.W.3d 264, 284 (Tex. Crim. App. 2008). Nor is error harmless if it “disrupted the jury’s orderly evaluation of the evidence.” *See Walker v. State*, 180 S.W.3d 829, 835 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (citing *Harris*, 790 S.W.2d at 588).

To determine whether constitutional error was harmless, we must “calculate, as nearly as possible, the probable impact of the error on the jury in light of the other evidence.” *See Neal*, 256 S.W.3d at 284. Accordingly, the presence of “overwhelming evidence of guilt is a factor to be considered.” *See Motilla v. State*, 78 S.W.3d 352, 357 (Tex. Crim. App. 2002). Other factors to consider may include the nature of the error, whether it was emphasized by the State, the probable implications of the error, and the weight the jury would likely have assigned to it in the course of its deliberations. *See Snowden*, 353 S.W.3d at 822. These are not exclusive considerations or even necessary considerations in every case. *Id.* “At bottom, an analysis for whether a particular constitutional error is harmless should take into account any and every circumstance apparent in the record that logically informs an appellate determination whether ‘beyond a reasonable

doubt [that particular] error did not contribute to the conviction or punishment.” *Id.* We examine the entire record “in a neutral, impartial and even-handed manner and do not make our examination in the light most favorable to the prosecution.” *See Harris*, 790 S.W.2d at 586; *Daniels v. State*, 25 S.W.3d 893, 899 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

Turning now to the evidence, I recognize that the complainants are not the most sympathetic victims. They both had criminal convictions and were allegedly trying to take advantage of appellant in a scam. I also recognize that appellant claimed that he was not the shooter or a party to any kidnapping, but the video was particularly significant in showing that appellant was involved.

The first seven witnesses testified to the scene out on the highway where the two complainants jumped out of the van while tied up. The video had no bearing on this testimony at all. Appellant was not identified as a driver or passenger in the van.

The next witness was Officer Arnold who retrieved the video from the body shop. Officer Arnold testified that the video corroborated the complainants’ story about what had happened to them before the scene on the highway.

The next two witnesses explained how the video had been retrieved from the computer and saved to a file.

Officer Hufstedler testified next about the search of the body shop. When he was on the stand, the State played parts of the video and elicited testimony about what the video showed. Officer Hufstedler testified that the video showed that one of the men at the body shop, Darren Franklin, had a gun. He also testified that the video showed both of the complainants at the body shop, along with appellant. He explained that some of what occurred happened off camera. He testified that the video showed appellant walking in with duct tape in his hand. He also said it showed Darren Franklin walking in with an iron in his hand. That iron was seized in the search of the body shop and tagged into evidence. There was no DNA recovered. The video also showed the complainants' rental van being parked inside the body shop, and the two tied-up complainants being pushed into the back of the van.

On cross-examination, defense counsel focused on the fact that many things happened off camera and that there were a total of six codefendants in the case. He also emphasized that the complainants were initially reluctant to discuss all of the facts with the police.

On redirect, Officer Hufstedler testified that the video corroborated what the complainants told him.

The next witness responded to a vehicle fire and found the burned out rental van with the driver's licenses of the two complainants and fake money.

The next three witnesses were the two complainants and a brief recall of Officer Arnold. The officer

testified that the video showed appellant with a gun and that appellant was the one directing the other codefendants to bring the van into the body shop. The video was used extensively during the testimony of the two complainants, both to corroborate what they were saying but also to show what was missing from the video.

Defense counsel emphasized that things took place off the video screen too. But at the same time he relied upon the video to argue that it only shows appellant's mere presence at the scene of the crime.

The video was a central piece of evidence in the case. It was discussed by many witnesses and was certainly used to corroborate the complainants' testimony. While there was independent evidence about the complainants' rolling out of the van and the van being on fire, the video was crucial evidence to support appellant's involvement in the crimes.

On this record, I would hold that the error contributed to the conviction. Because harm is established, I would reverse the trial court's judgment and remand for a new trial. I respectfully dissent.

/s/ Tracy Christopher

Justice

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App. 115

OFFICIAL NOTICE FROM COURT OF  
CRIMINAL APPEALS OF TEXAS  
P.O. BOX 12308, CAPITOL STATION,  
AUSTIN, TEXAS 78711

[SEAL]

**1/13/2021**

**FOREMAN, NATHAN RAY Tr. Ct. No. 1374837  
PD-1090-18**

On this day, the Appellant's motion for rehearing has  
been denied.

Deana Williamson, Clerk

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App. 116

OFFICIAL NOTICE FROM COURT OF  
CRIMINAL APPEALS OF TEXAS  
P.O. BOX 12308, CAPITOL STATION,  
AUSTIN, TEXAS 78711

[SEAL]

**1/13/2021**

**FOREMAN, NATHAN RAY Tr. Ct. No. 1374838**  
**PD-1091-18**

On this day, the Appellant's motion for rehearing has  
been denied.

Deana Williamson, Clerk

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## EXHIBIT A

I, D. Arnold, a peace officer employed by Houston Police Department do solemnly swear that I have reason to believe and do believe that on the property of 2501t #2 Central Parkway Houston, Harris County, Texas (Target Location), with the authority to search for and to seize any and all ITEMS CONSITUTING EVIDENCE CONSTITUTING AGGRAVATED ASSAULT AND ROBBERY that may be found therein including, but not limited to all DNA and items that may contain biological material; fingerprints; hair fiber(s); audio/video surveillance video and/or video equipment; instrumentalities of the crime including firearm(s) and ballistics evidence; gasoline container(s), lighter(s), tape, zip tie(s), van; fruits of the crime including wallet(s), suitcase, briefcase, money, documents establishing identity of Complainants) and/or Suspect(s) such as paper(s), license(s), cell phone(s).

Said location of **2501-C #2 Central Parkway Houston, Harris County, Texas** is more particularly described as a single story building complex with a large sign facing Central Parkway that shows address 2501-C for all the businesses within the complex strip, this particular business is made of metal and brick with dark tinted glass windows and black

painted aluminum; a sign attached to the front of the building over the door reads "Dreams Auto Customs"; the front door is dark tinted glass and faces parking lot; on the door is the suite number C#2; the back of the business has an aluminum looking, gray in color bay door that opens into the business.

MY BELIEF IS BASED UPON THE FOLLOWING FACTS:

D. Arnold (Affiant) was assigned to investigate Aggravated Assault and reviewed offense report #161435712D written by Officer A. Deleon. Affiant was dispatched to 10500 Northwest Freeway, Houston, Harris County, Texas. Affiant learned from Officer A. Deleon that Cindy Davis (Witness) reported that on December 24, 2012 she observed two men (Complainants) lying injured on the side of the roadway with their hands tied and mouths duct taped. Affiant learned from HPD Officer A. Deleon that Complainants had apparent gunshot wounds to their bodies and had been transported to Ben Taub Hospital for treatment. Affiant spoke to Diane Deyoung who witnessed Complainants coming out of a white van license plate AV5-0784 before the continued down the road without stopping. Affiant learned from hospital personnel that Moses Glekiah (Complainant Glekiah) was recovering from gunshot wounds and Richard Merchant (Complainant Merchant) was in critical condition for his gunshot injuries.

Affiant spoke with Moses Glekiah (Complainant Glekiah) and learned he and his friend Richard

Merchant (Complainant Merchant) had agreed to engage in business transaction at 2501-C #2 Central Parkway Houston, Harris County, Texas with a male known as “Jerry.” When Complainants arrived on December 24, 2012 at the business that they describe as an autoshop, they are grabbed by several males and held against their will. Complainant Glekiah reported that Suspects grabbed Complainants, beat them with hands and feet, and tied their hands with zip ties. The Suspects also stole their cash money \$400 that Complainants had in their possession, wallets, cell phone and a suitcase/briefcase container belonging to Complainant Merchant. Suspect 1 poured gasoline on Complainants and held lighter near Complainants threatening to set them on fire. Suspect 1 then called two other Suspects to who put Complainants in truck at gunpoint. Complainant Glekiah says that he felt in fear for their lives. Complainants jumped out of the van because they believed they were going to be killed. As Complainant leaped out of the vehicle they were shot by Suspects.

Complainant Glekiah directed Affiant to the autoshop where this Aggravated Assault and Robbery occurred at 2501-C #2 Central Parkway Houston, Harris County, Texas. Affiant researched the location and found the owner to be Charese Foreman. Affiant reviewed computer databases and discovered that Charese Foreman is married to Nathan Ray Foreman. Affiant reviewed criminal history of Nathan Ray Foreman and found that he had been charged with auto-theft, possession of prohibited weapon and delivery of

cocaine. Affiant showed Complainant Glekiah a known photograph of Nathan Ray Foreman along with five other photos of similar looking males. Complainant Glekiah positively identified Nathan Ray Foreman as Suspect 1 who participated in punching Complainants, told other suspects what to do, poured the gasoline on Complainants and contacted 2 suspects to drive Complainant away from business. Affiant knows that gasoline and lighter are deadly weapons that can kill a person.

Affiant believes that Complainants and Suspects DNA will be inside the Target Location along with property belonging to Complainant such as money, suitcase/briefcase, wallets, cell phone, identification cards. Also instrumentalities of the crime such as white van that transported Complainants, guns used to shoot Complainants, zip ties used to tie complainants may also be inside Target Location.

WHEREFORE, PREMISES CONSIDERED, Your affiant respectfully request that a warrant issue authorizing your affiant, or any other peace officer of Harris County, Texas to enter the Target Location which is **2501-C #2 Central Parkway Houston, Harris County, Texas** with authority to search for and to seize the property and items set out earlier in this affidavit.

/s/ D. Arnold  
AFFIANT

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Sworn to and Subscribed before me on this  
the 7th of January, 2013.

/s/ Blanca Villagomez  
MAGISTRATE  
JUDGE, \_\_\_\_\_  
District Court  
Harris County, Texas

BLANCA VILLAGOMEZ  
Harris County Criminal Law  
Hearing Officer  
Harris County, Texas

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THE STATE OF TEXAS      §  
                                    § SEARCH WARRANT  
COUNTY OF HARRIS      §

TO THE SHERIFF OR ANY PEACE OFFICER OF  
HARRIS COUNTY TEXAS

GREETINGS:

WHEREAS, Complaint in writing, under oath, has been made before me by D. Arnold, a peace officer employed by Houston Police Department, which complaint is attached hereto and expressly made a part hereof for all purposes and said complaint having stated facts and information in my opinion sufficient to establish probable cause for the issuance of this warrant;

YOU ARE THEREFORE COMMANDED to forthwith search the place therein named, to wit 2501-C #2 Central Parkway Houston, Harris County, Texas, with the authority to search for and to seize any and all ITEMS CONSITUTING EVIDENCE CONSTITUTING AGGRAVATED ASSAULT AND ROBBERY that may be found therein including, but not limited to all DNA and items that may contain biological material; fingerprints; hair fiber(s); audio/video surveillance video and/or video equipment.; instrumentalities of the crime including firearm(s) and ballistics evidence; gasoline container(s), lighter(s), tape, zip tie(s), van; fruits of the crime including wallet(s), suitcase, briefcase, money, documents establishing identity of

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Complainant(s) and/or Suspect(s) such as paper(s), license(s), cell phone(s).

HEREIN FAIL NOT and due return make hereof.

WITNESS MY SIGNATURE on this the 7th day of January A.D. 2013 at 11:27 O'clock, A.M.

/s/ Blanca Villagomez

MAGISTRATE  
JUDGE, \_\_\_\_\_  
District Court  
Harris County, Texas

BLANCA VILLAGOMEZ  
Harris County Criminal Law  
Hearing Officer  
Harris County, Texas

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THE STATE OF TEXAS      §  
                                  §      RETURN AND  
COUNTY OF HARRIS      §      INVENTORY

The undersigned, being a peace officer under the laws of the State of Texas, certifies that the foregoing warrant came to hand on the day it was issued and that it was executed on the 8 day of JAN A.D. 2013 by making the search directed therein and seizing during the search the following described property:

3 – HARD DRIVES FOR COMPUTER

(– DELL OPTIPLEX 320 – JJ.J301)

(– DELL “ ” – 2XW3D1)

(– “ ” GX520, C4HZ091)

BLACK ZIP TIES

GRAY ZIP TIES

RED GAS CAN

1 – CANON DIGITAL CAMERA # 8924113873

1 – WHITE PLUG IN SKIMMER

– SWAB EVIDENCE – DNA

1 – Iron

1 – 5gal. Gas can

/s/ D. Arnold  
OFFICER EXECUTING PROCESS

[SEAL]

I, Chris Daniel, District Clerk of Harris County, Texas certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date.

Witness my official hand and seal of office this January 31, 2013

Certified Document Number: 54531318

/s/ Chris Daniel  
Chris Daniel, DISTRICT CLERK  
HARRIS COUNTY, TEXAS

In accordance with Texas Government Code 406.013 electronically transmitted authenticated documents are valid. If there is a question regarding the validity of this document and or seal please e-mail support@hcdistrictclerk.com

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