No. _____

IN THE

Supreme Court of the United States

MARK ANTHONY GONZALEZ,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the
Court of Criminal Appeals of Texas

PETITION APPENDIX

Mridula S. Raman
Counsel of Record
Ty Alper
Elisabeth A. Semel
DEATH PENALTY CLINIC
UNIVERSITY OF CALIFORNIA, BERKELEY
SCHOOL OF LAW
Berkeley, CA 94720
(510) 642-5748
mraman@berkeley.edu

Counsel for Petitioner

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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. AP-77,066

MARK ANTHONY GONZALEZ, Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL
FROM CAUSE NO. 2011-CR-5289 IN THE 175TH DISTRICT COURT
BEXAR COUNTY

KEEL, J., delivered the opinion of the Court, in which KELLER, P.J., and KEASLER, HERVEY, NEWELL, WALKER, and SLAUGHTER, JJ., joined. RICHARDSON and YEARY, JJ., did not participate.

In October 2015, appellant entered a not guilty plea, but a jury convicted him of capital murder for the 2011 murder of a police officer. *See* TEX. PENAL CODE § 19.03(a)(1). Based on the jury's answers to the special issues set forth in Texas Code of Criminal Procedure Article 37.071, §§ 2(b) and 2(e), the trial judge sentenced appellant

to death. TEX. CODE CRIM. PROC. art. 37.071, § 2(g). Direct appeal to this Court is automatic. *Id.*, § 2(h).

Appellant raises twenty-eight points of error. Point of error four, complaining about the trial court's juror-substitution procedure, is an issue of first impression before this Court, and we address it first. The remaining points of error are addressed generally in trial order in the portion of the opinion not designated for publication. Finding none of his points to have merit, we affirm the trial court's judgment and sentence of death.

Throughout this opinion, unless otherwise specified, all references to "Article" mean the Code of Criminal Procedure, all references to "Section" mean the Penal Code, and all dates refer to 2011. For the sake of clarity we refer to some witnesses by their first names because they share a last name with someone else in the record.

I. OVERVIEW

Shortly after 2:00 a.m. on Saturday, May 28, Memorial Day weekend, Sergeant Kenneth Vann of the Bexar County Sheriff's Office (BCSO) was found shot to death in his patrol car at the intersection of Southeast Loop 410 and State Highway 87 in San Antonio. At the time of his death, Vann was a licensed peace officer working the overnight shift as a first-line supervisor for patrol officers.

Appellant's identity as Vann's killer was not an issue at trial. Rather, the defensive theory was that appellant did not act intentionally, knowingly, or voluntarily because he was in an automatistic state brought on by a "perfect storm" of alcohol and prescription-drug abuse, head injuries, brain dysfunction, and hypoglycemia.

II. JUROR SUBSTITUTION PROCEDURE

In point of error four, appellant asserts that the trial court reversibly erred under the Sixth Amendment by substituting an alternate juror during punishment phase deliberations without instructing the jury to begin its deliberations anew and by telling the attorneys that what the original jury had already decided should "remain." Appellant also cites the Eighth Amendment and various Texas constitutional provisions, but those arguments are inadequately briefed. *See* Tex. R. App. P. 38.1(i); *Wolfe v. State*, 509 S.W.3d 325, 342–43 (Tex. Crim. App. 2017) (noting that we have no obligation to make an appellant's argument for him); *Lucio v. State*, 353 S.W.3d 873, 877–78 (Tex. Crim. App. 2011) (finding a point of error inadequately briefed where the brief contains a single-sentence assertion and is unaccompanied by any other argument or authorities); *Murphy v. State*, 112 S.W.3d 592, 596 (Tex. Crim. App. 2003) ("[B]ecause appellant does not argue that the Texas Constitution provides, or should provide, greater or different protection than its federal counterpart, appellant's point of error is inadequately briefed."). As for his Sixth Amendment argument, it was not preserved, and even if it had been, it is without merit because any error would have been harmless.

II.A. Relevant Facts

Twelve jurors and two alternates were individually interviewed and selected according to the same process. These fourteen all took the same oath to render a true verdict according to the law and evidence and received the same instructions from the trial court, including: injunctions against reading about or researching the case or

discussing it with anyone not on the jury; an injunction against discussing it with one another before deliberations; instructions about their exclusive role as judges of the facts proved, the credibility of the witnesses, and the weight to be given the testimony; and an instruction that they would receive the law from the trial court and would be governed by that law.

Immediately before the indictment was read, the trial court addressed the alternate jurors:

> [B]oth of you are alternates and what that means is that you will be with us until the jury begins deliberating. So if someone should become disabled or something happens that the person can't finish the trial, then one of you will be selected to step into their place. Okay?

This instruction comported with the pre-2007 version of Article 33.011(b).

Before reading the guilt-phase charge to the jury on Monday, October 12, 2015, the trial court instructed the jury in accord with the applicable version of Article 33.011(b):

> Ladies and gentlemen of the jury: Your jury includes two alternates. In order of selection, they are jurors [S.F.] and [M.R.]. The law now requires that the alternate jurors remain through the entirety of the trial process.
>
> The alternate jurors will accompany the jurors into the jury room. The alternate jurors will not participate in any deliberations or in any voting unless they are instructed to do so by this Court. The alternate jurors must attentively listen to all deliberations as it is always uncertain if and when we might need to utilize one or both of them.

The trial court then read the charge. The twelve jurors, shadowed by the two alternate jurors, retired to select a presiding juror and to deliberate. Roughly one hour

later, the jury returned a verdict finding appellant guilty of capital murder as charged in the indictment. When polled individually, each regular juror affirmed the verdict.

Punishment phase testimony began on Thursday, October 15, 2015. The alternate jurors listened to and observed the evidence along with the regular jurors, the parties rested and closed late that same day, and proceedings resumed the following Monday after lunch. Before reading the punishment charge, the trial court again gave a preliminary instruction about the alternates' roles:

> Pertaining to the alternate jurors, [S.F.] and [M.R.], you will accompany the jurors into the jury room. The alternate jurors will not participate in any deliberations or in any voting unless they are instructed to do so by this Court.
>
> The alternate jurors must attentively listen to all deliberations as it is always uncertain if and when we might need to utilize one or both of them.

After argument, the trial court sent the regular jurors to the jury room to begin deliberating. The alternate jurors accompanied them.

At about 7:00 p.m., the jury sent its first note, asking, "Can you clarify Issue #2? In particular, 'character & background'[?] Can you please rephrase in other terms? Also, please clarify 'sufficient.'" The trial court issued its first supplemental charge in response to this note, stating in relevant part, "Be advised that you have all the law and evidence before you, please continue to deliberate."

At 11:24 p.m., the trial court asked the jury whether it wished to continue deliberating that night; it did. Sometime later, the trial court informed the parties that "EMS" was going to take regular juror R.P. to the hospital and that the trial court was

therefore going to send the remainder of the jury to a hotel to rest for the night. "The jury" in this context appears to have referred to both the regular jurors and the alternates. The trial court stated, "I'm going to have them come back at 10:00 o'clock in the morning. [R.P.] may be better by then and if so he will be asked to come back to deliberate beginning at 10:00 o'clock."

Sometime after the jurors asked to continue deliberating and before the trial court reported R.P.'s condition, the jury sent a second note asking: "Are we deciding life imprisonment or the death penalty? Or only deciding if any mitigating circumstances [sic]? Also, if anything that reduces blameworthiness [sic]? Both relate to Issue # 2."

The next morning, October 20, 2015, the trial court, prosecutors, and defense counsel interviewed juror R.P. in chambers. He said that he had suffered a debilitating anxiety or panic attack during deliberations the night before and still had uncontrollable physical symptoms. R.P. did not reveal anything about the state of the jury's deliberations except that "things" had become "very tense." The trial court excused R.P. from jury service over defense counsel's generic, non-specific objection.

The trial court then summoned alternate juror S.F. to chambers and spoke with her as follows:

> THE COURT: [S.F.], how are you?
>
> JUROR [S.F.]: Good.
>
> THE COURT: I wanted to let you know that you are going to replace [R.P.]. He is ill.
>
> JUROR [S.F.]: Yes, ma'am.

THE COURT: And so you have taken an oath. You have sat through all of the deliberations.

JUROR [S.F.]: Yes.

THE COURT: And so now you will be able to not only join the deliberations but also vote.

JUROR [S.F.]: Okay.

THE COURT: And so you will replace him and it's official as of right now.

JUROR [S.F.]: Okay.

THE COURT: All right? Thank you.

The trial court did not summon the other jurors to the courtroom to inform them that R.P. had been excused and that alternate juror S.F. had replaced him. Nor did the trial court provide the jury with any instructions about how, if at all, S.F.'s substitution should affect its punishment deliberations to that point.

The parties then started to argue about the proper response to the jury's second note, but during this argument, defense counsel objected to R.P.'s replacement by alternate juror S.F.:

[LEAD DEFENSE COUNSEL]: I need to object to the seating of the alternate juror. She is not one of the 12 that originally found the defendant guilty and she supposedly [has] not taken part in any deliberations. And I think it's appropriate to ask that they go back to guilt/innocence with this new 12, re-deliberate that, and certainly for them to re-deliberate the entirety of punishment, presuming that my objection to seating this alternate juror is denied.

THE COURT: That is denied.

The argument about the proper response to the second jury note continued but was again sidelined by defense counsel:

> [LEAD DEFENSE COUNSEL]: The thing about it is, now we have a 12th different juror.
>
> [STAFF ATTORNEY]: Well, but she's been in there the whole time.
>
> [LEAD DEFENSE COUNSEL]: No, I get that.
>
> [STAFF ATTORNEY]: I don't think that's a concern.
>
> [LEAD DEFENSE COUNSEL]: But the point is, it's only a theoretical concern in that –
>
> [SECOND CHAIR DEFENSE COUNSEL]: She could change the answer to Number 1.
>
> [LEAD DEFENSE COUNSEL]: Yeah.

After conferring with lead defense counsel, second chair defense counsel asserted, "[W]e have a new juror which [sic] could change the answer to [Special Issue] Number 1." Lead defense counsel added, "We -- we do have 12 new jurors -- I mean one new juror, which does -- she has theoretically not voted on [Special] Issue Number 1." This exchange followed:

> THE COURT: So what are you saying?
>
> [LEAD DEFENSE COUNSEL]: That there's now a replacement --
>
> [APPELLATE PROSECUTOR]: The jury may have voted on Question Number 1 before she was on the jury and now that she's on and I believe -- and, correct me if I'm wrong, and so she may not have voted on the first special issue.
>
> [STAFF ATTORNEY]: So they're going to re-vote essentially. If

they have already voted on one because they have a new body, they're going to say let's vote again because she didn't get a say-so.

THE COURT: Well, the problem --

[LEAD PROSECUTOR]: I guess it only matters if she has a different vote than the previous 12 -- the other jurors.

THE COURT: Well, here -- here's my thought on that. What has been decided should remain, period. I don't see how you can go back and change something. She wasn't on the jury at that time. So -- and we don't have any case law on that either, do we?

[APPELLATE PROSECUTOR]: No. This is the only kind of case where there are two questions for the jury or questions at all, so this doesn't come up in any other case. And I can't think of a death penalty case where a juror has been replaced during punishment deliberations. So I don't think there is any case law on that. I am sure that they will address all the issues among themselves.

THE COURT: I'm sure they will as well. But it's only commonsense that you -- you know, what are we supposed to do, go back and re-litigate the first phase of the trial?

[SECOND CHAIR DEFENSE COUNSEL]: No, no. Not the first phase, Special Issue Number 1.

THE COURT: And the same issue with what has happened already. I mean, how can you go back and change the vote or change anything?

[APPELLATE PROSECUTOR]: I think that's correct. It's been decided by the jury as it was comprised at that time. I mean, just extrapolating from case law, since we don't have any real guidance, there was nothing wrong with the jury that decided guilt and there is nothing wrong with the jury that if they [sic] reached a decision on the first special issue.

THE COURT: If they did.

[APPELLATE PROSECUTOR]: They were the proper jury at the time.

THE COURT: And we don't know. We don't know.

[SECOND CHAIR DEFENSE COUNSEL]: Well, the charge is taken as a whole, you know.

THE COURT: Pardon?

[SECOND CHAIR DEFENSE COUNSEL]: The charge is taken as a whole, so they're back there debating now the punishment charge as a whole with 12 people.

THE COURT: Well, we --

[APPELLATE PROSECUTOR]: One of which is new.

THE COURT: Well, the problem is we don't know what their decision was, or if they decided Issue Number 1. We're assuming that they answered Issue Number 1 because otherwise they wouldn't go on to Issue Number 2.

[LEAD PROSECUTOR]: Whether or not the new juror -- what effect the new juror has, we're left with the note that the previous jury sent. They have sent a new note. I think we need to address the note that's before us --

THE COURT: Exactly.

[LEAD PROSECUTOR]: -- and not speculate as to what the effect of the new juror is.

THE COURT: I agree.

After a third note from the jury and an interview of a juror on an unrelated matter, the reconstituted jury sent a note at about 4:50 p.m. indicating that it had reached a punishment verdict. After the verdict was read in court, the trial court individually polled the jurors at defense counsel's request, stating: "Ladies and Gentlemen, I'm going to ask you now if this is your individual verdict to Issue No. 1 and Issue No. 2." Each member

of the reconstituted jury, including juror S.F., affirmed that it was.

II.B. Preservation

To preserve error for appellate review, a defendant must make a timely objection or request and state the grounds on which he thinks he is entitled to a favorable ruling. An objection or request is sufficiently specific if the trial court is aware of the complaint or if the grounds are apparent from the context. TEX. R. APP. P. 33.1(a). Magic words are not required, but the litigant must "let the trial court know what he wants and why he feels himself entitled to it clearly enough for the judge to understand him." *Vasquez v. State*, 483 S.W.3d 550, 554 (Tex. Crim. App. 2016). A general objection will not preserve error unless the legal basis is obvious to the trial court and opposing counsel. *Id.* A complaint is obvious if there are "statements or actions on the record that clearly indicate what the judge and opposing counsel understood the argument to be." *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012). In this case, no error was preserved because the nature of appellant's request and its Sixth Amendment basis were not obvious to the trial court.

Appellant did not ask the trial court to instruct the jury to begin deliberations anew. The closest he came was when he said, "I think it's appropriate to ask that they go back to guilt/innocence with this new 12, re-deliberate that, and certainly for them to re-deliberate the entirety of punishment, presuming that my objection to seating this alternate juror is denied." The prosecution, court staff attorney, and the trial court assumed that the jury would "address all the issues among themselves[,]" leading the trial

court to ask, "[W]hat are we supposed to do, go back and re-litigate the first phase of the trial?" This question shows that the trial court did not understand that appellant wanted an instruction to begin punishment deliberations anew. The defense attorney's answer did not clarify the matter, either. His answer, "No, no. Not the first phase, Special Issue Number 1[,]" perpetuated the idea about a need to "relitigate" the punishment phase. Even if it had been obvious that appellant wanted an instruction to the jury to begin deliberations anew, the basis for his request was not obvious; he never mentioned the Sixth Amendment or any other authority to support his position.

Under these circumstances, any error was not preserved. Even if it were preserved, it was harmless, as discussed below.

II.C. Appellant's Argument

Appellant argues that the trial court violated the Sixth Amendment when it denied trial counsel's request to instruct the jury to deliberate anew and that it further erred when it told the parties that what the original jury had already decided should "remain." He relies on *Williams v. Florida*, in which the Supreme Court stated that

> the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence.

399 U.S. 78, 100 (1970). Appellant contends that the Supreme Court has thus identified group deliberation as an essential feature of the Sixth Amendment's guarantee of the right to trial by jury. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]"). He also asserts

that many federal circuit courts of appeals have concluded that the failure to instruct a jury to deliberate anew after a post-deliberations juror substitution violates the Sixth Amendment.

II.D. Relevant Law

Our statutes envision a juror substitution during deliberations but specify no procedures for such a substitution. *See* TEX. CODE CRIM. PROC. arts. 33.011(a), 36.29(b)-(c). The United States Supreme Court has not considered whether the Sixth Amendment permits the substitution of an alternate juror after deliberations have begun, and if so, whether the Sixth Amendment mandates any specific procedures such as an instruction to deliberate anew.

The federal circuit courts that have considered the issue have held or implied that the Sixth Amendment does not categorically prohibit the mid-deliberations substitution of an alternate juror. *See United States v. Cencer*, 90 F.3d 1103, 1109–10 (6th Cir. 1996); *Claudio v. Snyder*, 68 F.3d 1573, 1577 (3rd Cir. 1995); *Peek v. Kemp*, 784 F.2d 1479, 1484–85 (11th Cir. 1986) (en banc); *Miller v. Stagner*, 757 F.2d 988, 995 (9th Cir. 1985); *United States v. Hillard*, 701 F.2d 1052, 1055 (2d Cir. 1983); *United States v. Phillips*, 664 F.2d 971, 990 (5th Cir. 1981); *United States v. Evans*, 635 F.2d 1124, 1126–27 (4th Cir. 1980); *Henderson v. Lane*, 613 F.2d 175, 178–79 (7th Cir. 1980). But these courts are split on the importance of an instruction to deliberate anew in assessing the constitutional validity of a mid-deliberations juror substitution.

The Second, Third, Fifth, and Ninth Circuit Courts of Appeals have generally

concluded that an instruction to deliberate anew is a vital procedural safeguard to preserve the "essential feature" of the Sixth Amendment right to trial by jury. *See Claudio*, 68 F.3d at 1577; *Miller*, 757 F.2d at 995; *Hillard*, 701 F.2d at 1055; *Phillips*, 664 F.2d at 990. These courts have generally found no Sixth Amendment violation and no prejudice where the trial court expressly or constructively instructed the jury to begin deliberations anew. *See Claudio*, 68 F.3d at 1577; *Miller*, 757 F.2d at 995; *Hillard*, 701 F.2d at 1055; *Phillips*, 664 F.2d at 990. Whether determining the existence of a Sixth Amendment violation or assessing prejudice, these courts have made highly fact-specific inquiries and (1) considered any other procedural safeguards that preserved the jury's "essential feature"; and (2) compared the length of pre-substitution deliberations with the length of post-substitution deliberations. *See Claudio*, 68 F.3d at 1574–77; *Hillard*, 701 F.2d at 1055–57; *Phillips*, 664 F.2d at 990–93.

The Fourth, Sixth, Seventh, and Eleventh Circuit Courts of Appeals have placed less emphasis on supplemental instructions to begin deliberations anew. *See Cencer*, 90 F.3d at 1109–10; *Peek*, 784 F.2d at 1484–85; *Evans*, 635 F.2d at 1126–27; *Henderson*, 613 F.2d at 178–79. Instead, these courts have generally found it more relevant whether the reconstituted jury was actively prevented from deliberating anew. *See Cencer*, 90 F.3d at 1109–10; *Peek*, 784 F.2d at 1484–85; *Evans*, 635 F.2d at 1126–27; *Henderson*, 613 F.2d at 178–79. But like the other circuit courts of appeals, the Fourth, Sixth, Seventh, and Eleventh Circuit Courts of Appeals have also made fact-specific inquiries focused on the overall procedural safeguards that were in place to preserve the jury's

"essential feature." *See Cencer*, 90 F.3d at 1109–10; *Peek*, 784 F.2d at 1484–85; *Henderson*, 613 F.2d at 178–79. And these courts, too, have sometimes noted the length of time that the reconstituted jury deliberated. *See Cencer*, 90 F.3d at 1106, 1109–10; *Henderson*, 613 F.2d at 178–79.

II.E. Analysis

We agree with the federal circuit court opinions discussed above that any error in failing to instruct a jury to deliberate anew is not structural. Assuming that an error occurred, we will reverse only upon a finding of harm under the applicable analysis. We conclude that, even if the Sixth Amendment required the trial court to instruct the reconstituted jury to deliberate anew, the error in failing to do so was harmless beyond a reasonable doubt under the circumstances of this case in which the alternates attended deliberations before the substitution, the trial court did not prohibit the jury from beginning its deliberations anew, and the verdict was adopted by each juror individually in the post-verdict poll. *See* TEX. R. APP. P. 44.2(a) (requiring reversal of a judgment or conviction "unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment"); *cf. Jasper v. State*, 61 S.W.3d 413, 423 (Tex. Crim. App. 2001) (applying the standard of harm for constitutional error when faced with both non-constitutional and constitutional error).

An instruction to deliberate anew can operate as a valuable procedural safeguard to ensure that a re-formed jury deliberates with the new member. *See Claudio*, 68 F.3d at 1577; *Miller*, 757 F.2d at 995; *Hillard*, 701 F.2d at 1055; *Phillips*, 664 F.2d at 990; *see*

also Peek, 784 F.2d at 1484–85. The trial court gave no such instruction in appellant's case, but nor did it give an instruction that prevented the jury from beginning its deliberations anew. *See Peek*, 784 F.2d at 1485; *Evans*, 635 F.2d at 1128. Appellant emphasizes the trial court's statement that "[w]hat has been decided should remain, period[,]" but this statement was made outside the presence of any jurors.

The two pre-substitution notes relevant to the mitigation special issue suggest that the original jury may have reached at least a tentative consensus on future dangerousness. But when addressing the alternate, the court did not limit the special issues on which she could deliberate and vote. The court merely confirmed the fact that the alternate had taken the juror's oath and sat through deliberations to that point. The court then instructed the alternate that she could actively join in the deliberations and vote.

Significantly, the alternate jurors in this case had the benefit of having attended the pre-substitution deliberations. *Compare, Claudio*, 68 F.3d at 1574 (alternates sequestered from regular jurors at beginning of deliberations); *Hillard*, 701 F.2d at 1055 (same); *United States v. Lamb*, 529 F.2d 1153, 1155-56 (9th Cir. 1975) (alternate discharged at beginning of deliberations); *Henderson*, 613 F.2d at 176 (same); *Evans*, 635 F.2d at 1126 (same); *United States v. Josefik*, 753 F.2d 585, 587 (7th Cir. 1985) (same); *United States v. Quiroz-Cortez*, 960 F.2d 418, 420 (5th Cir. 1992) (same). That circumstance obviated any need here to instruct the jury to deliberate anew after the substitution. *See Cencer*, 90 F.3d at 1110 (concluding that detailed procedures such as questioning all the jurors about their ability to start over, confiscating all previously-prepared written materials, and

instructing the jury to deliberate anew were unnecessary where the alternate had been present for all the prior deliberations).

Post-substitution deliberations here lasted until almost 5:00 p.m., undermining any claim that the alternate may have been pressured into passively ratifying positions that the original jury may have already reached. *Cf. Quiroz-Cortez*, 960 F.2d at 420; *Josefik*, 753 F.2d at 587; *Lamb*, 529 F.2d at 1156. Such a claim is further undermined by the post-verdict polling. In response to the poll, each juror confirmed that the answers were his own, alleviating "any concerns that the alternate juror might have simply acquiesced in a predetermined verdict as a result of coercion, unease, or incomplete deliberation." *See State v. Dalton*, 385 P.3d 412, 418 (Ariz. 2016) (stating that the jury poll used by the trial court was a "procedural safeguard [that] lessened possible prejudice from the lack of a deliberate-anew instruction"). Consequently, any error from the juror substitution procedure was harmless.

Point of error four is overruled, and the judgment of the trial court is affirmed. The remainder of the opinion is not designated for publication. TEX. R. APP. P. 77.2.

III. STATE'S CASE-IN-CHIEF

In its case-in-chief, the State proved that appellant opportunistically shot and killed Vann at random on the street in the middle of the night. During the week between the shooting and his arrest, appellant made efforts to conceal his guilt but otherwise behaved no differently than he had before the shooting—he continued to work, drink, party, and look at porn.

III.A. Discovery of the Offense

Shortly before 2:00 a.m. on May 28, Vann was dispatched to a shooting call. At 2:08:25 a.m., Vann's patrol car was on westbound Highway 87 approaching the intersection with Southeast Loop 410, and by 2:08:55 a.m., it was stopped at the northeast corner of this intersection in San Antonio's city limits.

Within moments of Vann's arrival at the intersection, the San Antonio Police Department's (SAPD's) Communications Unit received a call reporting "shots fired" in Vann's immediate vicinity. Responding SAPD and BCSO officers found piles of broken glass behind the traffic light's stop line. Blood, flesh, and brain matter were mixed in with the glass, suggesting that the patrol car had been at the stop line when the windows were broken. The patrol car's engine was still running and in gear, and the car was covered with bullet holes. Vann's hand was on his on-board computer keyboard, his gun was holstered and fully loaded, and his holster was snapped closed.

Vann was obviously dead. He had been "shot multiple, multiple times, [an] unknown amount of times." His "face was pretty much gone and there was blood matter, brain matter, matter everywhere in the car, splatter in the car, even on the side of the driver door where it was like kind of sliding down."

Once medical examiner personnel removed Vann's body from the vehicle, the full extent of his injuries became apparent to the deputies: "[P]retty much everything from [Vann's] chin to the . . . top of his abdomen was shredded or gone." A deputy who had witnessed many fatalities over the course of his career testified that Vann's injuries were

by far the worst he had ever seen.

Deputies collected 11 projectiles from inside Vann's patrol car and two more projectiles from the roadway, but no cartridge cases were found in his car or at the scene.

III.B. Autopsy Results

Dr. Kimberly Molina, Deputy Chief Medical Examiner for the Bexar County Medical Examiner's Office, collected from Vann's body a total of twenty-five intact bullets and too many bullet fragments to count. Vann had suffered extensive, devastating injuries from being shot multiple times with a rifle. Because rifles are high-velocity weapons, their bullets cause a "ballooning" or "pulpification" effect and are more damaging than pistol bullets. Some of Vann's large wounds could have been caused by multiple bullets hitting the same areas, so Molina reported the minimum number of his gunshot wounds, thirty-nine, all entering on the right side of his body.

Molina identified eight entrance wounds in Vann's head, face, and neck. The base of his skull and his facial bones were fractured, his jugular vein and the back of his mouth were torn, and his spinal cord was torn in half at the base of his neck. The remaining entrance wounds were clustered in the front and back of Vann's right neck, right shoulder, and right chest area. His sternum was destroyed, his clavicles were shattered, his ribs were fractured, and his front chest wall was pulpified. His heart, lungs, and diaphragm were all injured and torn, some of his intestines were in his chest, his colon was cut in half, and his liver was destroyed. His left upper arm bone was badly broken by a bullet exiting that side of his body.

Molina concluded that Vann's death was a homicide caused by multiple gunshot wounds.

The scene and Vann's injuries were consistent with Vann having been in his patrol car driver's seat and someone having fired multiple rifle rounds into the vehicle at him from the passenger side. The presence of Vann's teeth and other bodily tissue found in the patrol car was explained by the rifle rounds' high velocity. It was as if a "mini explosion" had occurred inside Vann's patrol car. Vann's death was probably almost instantaneous.

III.C. A Manhunt Begins

An extensive manhunt involving county, state, and federal agencies began immediately after Vann's body was discovered. Surveillance videos from nearby businesses gave investigators their first clues. Through these time- and date-stamped videos, investigators identified rough details of two vehicles that had been in Vann's vicinity immediately before or at the time of the shooting. The first one was a white, work-type truck with several distinctive characteristics that appeared right before the shooting. The second one was a blue pickup truck with an extended cab that was at the intersection at the time of the shooting and turned right onto the northbound Loop 410 access road afterwards.

One surveillance video recorded the sound of the shooting: forty-six shots, with a short pause after the twenty-third or twenty-fourth round. The pause in the middle of the shooting indicated either that Vann's assailant had performed a very fast reload or had

been using a large-capacity magazine.

Federal Bureau of Investigation (FBI) agents performed a trajectory analysis, and Special Agent Rex Miller testified that shots fired from the windshield-level of an F-150 in the next lane of traffic would have been consistent with the trajectory analysis that he and BCSO investigators made.

III.D. Witnesses Come Forward

At a little past 2:00 a.m. on May 28, Kelli Swan and her husband were at the light at the northwest corner of the Loop 410 access road and Highway 87 when she heard gunshots to her left, i.e., toward Vann's location at the intersection. Looking that way, she saw a dark-colored Ford F-150 truck in a non-turn lane, pointed in her direction. Even though the truck was not in a turn lane, it "took off" and made a "crazy" turn to its right onto the northbound Loop 410 access road, almost hitting a pole. Aerial photographs accounted for the "crazy" turn because they showed that a traffic-directing triangle curb separated a dedicated turn lane from the other lanes. To turn right onto the feeder road from a lane that was not a turn-only lane, Vann's assailant would have had to go forward into the intersection and around the triangle curb.

Motorist Debra Burton saw Vann's patrol car drift across the Loop 410/Highway 87 intersection and come to a stop against crash barrels under the Loop 410 overpass. The driver and front passenger windows were shattered, and Vann, who "didn't seem okay," was leaning over in the driver's seat.

John Vrzalik III was in the drive-through lane of a Jack-in-the-Box just after 2:00

a.m. when he saw a patrol car at the northeast corner of the Loop 410/Highway 87 intersection. A blue, brand-new body style Ford F-150 truck came speeding up next to the patrol car and stopped at the light in the lane immediately next to the officer. About ten seconds later, Vrzalik heard a lot of gunshots. Five to ten seconds after the gunshots stopped, Vrzalik saw the truck turn right although it was not in a turn lane. A few seconds later, the patrol car rolled through the intersection and hit a barricade.

Stephen Starling contacted investigators on Saturday, June 4, and identified appellant as Vann's killer.

Starling testified that he and appellant had been friends off and on since attending high school in the 1980s. Starling had not seen appellant for about two years and had not talked to him for about six months, but shortly after 4:00 p.m. on Friday, May 27, appellant called him from a Chick-fil-A restaurant, where appellant seemed to be having a meal. Appellant said that he had gotten off work early and wanted to get together. Starling had to change some tires on a semi-truck belonging to a client, Steve "Skip" Dorrell, and he invited appellant to come along.

Starling and appellant thereafter met at a convenience store. Appellant was driving a blue, Ford F-150, crew-cab pickup. Appellant mentioned that he had his .223-caliber Smith & Wesson M&P AR-15 rifle with him. Appellant bought some beer and then followed Starling to Dorrell's house. Two of Dorrell's neighbors, James Moeller and Randy Cox, arrived soon after Starling and appellant, and the group talked and drank beer while Starling began changing Dorrell's semi-truck tires. When the conversation turned

to guns, appellant showed his rifle to Dorrell, and they went some distance away to shoot at a fence post until Dorrell's wife told them to stop.

While they were at Dorrell's house, appellant was taking Xanax and exchanging angry texts with his wife. He also smoked some marijuana he got from Dorrell. He mentioned that he had tried to join the SAPD, but his test scores had not been high enough. He showed Starling his new, large, drum-style magazine.

After they left Dorrell's house, appellant followed Starling to Sir Vesa's Cantina, located on Highway 87 a few miles east of the offense's location. Starling was driving his white truck, and he was hauling tires. On the way to Sir Vesa's, appellant called Starling to say that two tires had fallen from the back of Starling's truck. Starling pulled to the side of the road to look for the tires, and appellant pulled in behind him. Appellant accidentally ran into Starling's truck, causing minor damage to both vehicles before they resumed their trip to Sir Vesa's.

While they were at Sir Vesa's, appellant kept his bottle of Xanax on the table and again brought up his failed effort to join the SAPD and mentioned that he had lost his commercial driver's license (CDL) due to tickets, a fact corroborated by other evidence offered at trial. Starling testified that appellant seemed more upset about losing his CDL and not getting hired by the SAPD than he did about the damage to his truck.

Meanwhile, appellant was still arguing with his wife via text and pressured Starling to let him to stay at Starling's house to make it look like appellant was staying with another woman, but Starling declined. They left Sir Vesa's at about 2:00 a.m. to go

to the Denny's near the Loop 410/Highway 87 intersection, each driving his own truck and appellant following Starling.

As they were nearing the Loop 410/Highway 87 intersection, a patrol car passed them and stopped at the red light. Starling reached the same light and started to turn right onto the northbound Loop 410 access road, and appellant pulled up next to the patrol car. Starling wondered what appellant was doing, because he thought that appellant had been planning to follow him to Denny's. When Starling completed his turn, he heard a loud noise. He attributed it to a backfire and continued to Denny's.

After Starling got to Denny's, appellant called him, but Starling told him that he would call him back. Heading home about half an hour later, Starling saw in his rearview mirror that more patrol cars were arriving at the Loop 410/Highway 87 intersection. Starling then called appellant back. The first words out of appellant's mouth were, "I killed a cop. Don't tell no one, not even your wife." Starling looked at the lights in his rearview mirror and told appellant, "Just looks like a bunch of fireworks back there." Appellant responded by chuckling, which Starling thought was "pretty sick." By this time, Starling realized that what he had heard on his way to Denny's had been gunshots and not backfire.

On Sunday morning, Appellant texted him to ask whether Starling had ever found the second tire that had fallen from his truck. Starling felt that appellant was checking up on him. Appellant next contacted him on Wednesday, saying that he had called the insurance company and told the representative that someone had hit his truck while it was

parked in his driveway. Appellant promised Starling that he would pay whatever it cost to repair Starling's truck. Starling told appellant to get his head examined. He felt like appellant was checking up on him again and that appellant was hoping that by "fixing the trucks, he would make everything else go away."

On the Saturday after the offense, Starling got a call from Dorrell who seemed to suspect that appellant might have been involved in the offense. Starling did not tell Dorrell what he knew. But the call prompted him to tell his wife what had happened, and she insisted that they contact the authorities.

Investigators succeeded in verifying Starling's account and eliminating his rifle as the murder weapon. Denny's surveillance videos showed him eating and using his phone at the times he had reported to the investigators. His cellphone records confirmed appellant and Starling's call and text exchanges immediately before and after the shooting. His pickup looked like the white truck that was on surveillance video just before the shooting, and the damage to his truck was consistent with his account of the minor collision between it and appellant's truck.

An insurance-claim database showed that appellant made a claim on his mother's blue 2010 Ford F-150 truck to Progressive Insurance at 10:47 a.m. on May 28, just hours after the offense. Investigators obtained the insurance company's records of the claim, including a recording of appellant's call in which he nonchalantly explained that: he was the truck's primary driver although it was registered to his mother; he had just woken up to discover that the truck had been "sideswiped" during the night while it was parked in

front of his mother's house; the truck had sustained damage to the right-front passenger side; and there was white paint on the damaged area. Investigators also learned that appellant had already taken his truck to a local autobody shop for repairs which was consistent with Starling's statement.

Investigators contacted Dorrell who corroborated the details of Starling's account about Starling and appellant being at his house on May 27. Dorrell gave them the shell casings he had picked up after he and appellant had shot the rifle.

III.E. Execution of Warrants

Based on the foregoing information, investigators obtained an arrest warrant for appellant and a search warrant for his residence and vehicle and executed them on Sunday, June 5.

BCSO's SWAT team, supported by FBI SWAT, executed the arrest warrant at appellant's residence. Video and documentary exhibits showed that the uniformed SWAT officers arrived at appellant's residence in an armored vehicle marked "Bexar County Sheriff SWAT."

As the SWAT entry team approached the front door, a man appeared at the window of the master bedroom at the front of the residence. When the entry team reached the front door, they yelled "Sheriff's Office!" and "Police!" Inside they encountered a woman, later identified as appellant's wife, standing at the master bedroom doorway. Appellant was right behind her. As an entry team member pushed appellant's wife out of the way, appellant moved quickly toward the bathroom and tried to close the

door behind him. But the entry team member pushed through and took appellant to the ground. Another officer handcuffed appellant. Appellant, who was face down on the ground, continued to resist by moving around on the floor after being handcuffed.

During the search of appellant's residence, investigators found a Smith & Wesson M&P AR-15 rifle with an "Ultra-dot" scope in the master bathroom tub. A .22-caliber revolver lay on the edge of the tub. The rifle and the revolver were unloaded. The rifle appeared to have been recently cleaned; there was fresh oil around its trigger guard and the main housing area. A firearms buyer's guide was nearby.

Among other things, investigators seized from elsewhere in the house a receipt for the rifle in appellant's wife's name, a ninety-round drum magazine for .223 caliber ammunition loaded with eighty bullets, a 100-round snail drum magazine for 7.62 mm cartridges, a rifle scope, several cell phones, a flash drive, and a hard drive. The electronic devices were searched later pursuant to an additional warrant.

Appellant was warned pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), and Article 38.22 while at his house and then taken to the Bexar County Criminal Investigations Division (CID). Appellant's wife was also taken into custody, given *Miranda* warnings, and separately transported to the CID.

III.F. Appellant's Statement

At the CID, appellant was given written warnings which he signed and understood. He gave his personal information during the interview, and recited from memory his: age, birth date, home address, social security number, cellular telephone

number, and driver's license number and expiration date; his wife's name; his children's names, ages, and birth dates; and his mother's name and address.

Appellant said he worked as a contract aircraft mechanic for Boeing at Kelly Air Force Base. He admitted that his wife had been buying guns for him. When asked whether his wife had been in the truck with him when he shot Vann on May 27, appellant replied, "What are you talking about?" and "I didn't kill nobody." He stated that if they were questioning him about a capital murder charge, that was "crazy."

Appellant said he could not remember what he had done on May 27. He could not even remember what he had done the day before his arrest. He could not explain his lack of memory. When asked if he was mentally ill or on medication, he said he suffered from anxiety and was taking medication for high blood pressure and cholesterol and that he was also taking Xanax and Zoloft. Appellant stated that he experienced no side effects from his medication unless he failed to take it.

Appellant recalled his arrest: he had been in his bathroom when he heard a loud bang. He thought someone was breaking in, so he grabbed his AR-15 rifle. But then he saw a uniformed officer enter, so he threw the rifle down and got on the ground as instructed. Appellant had thought the officers were there as part of a warrant round-up, explaining that he had recently paid $3,000 worth of tickets.

Appellant was able to remember that he had bought and sold various guns over the years and to describe the firearms and firearms accessories he presently had. Appellant said that he normally stored his firearms in a safe, except for the AR-15 rifle which he

kept in the open in case of intruders but unloaded because of his children. He kept the rifle's magazine nearby but high in the closet and more ammunition for it in his kitchen. He denied that anyone else had possessed his AR-15 rifle and asserted that it had been months since he had fired it.

Appellant's regular work schedule was Monday through Friday, from 3:00 p.m. to 11:30 p.m. Regarding the prior weekend, appellant said that he had taken Friday and Monday off from work. He could not really remember what he had done on that Monday, Memorial Day, but later recalled that he had patched a leak in his mother-in-law's roof that day. He claimed that he did not remember what he had done on that Sunday.

He denied having driven the truck on May 27 even when confronted with contrary information that his wife had provided to the investigators. He also denied that he normally traveled with his weapons.

Appellant stated that he did not remember where he went or what he did after he left work at about 3:30 p.m. on Friday, May 27, or what he did on Saturday, May 28. He implied that he could not remember because he was on medication, and he drank a lot every day. But he continued to deny any role in Vann's death.

III.G. Post-Arrest Investigation

Investigators seized appellant's truck pursuant to a search warrant and took it to an FBI evidence bay for processing. Its interior was extremely clean. Appellant's bank records and a local car wash employee's testimony confirmed that appellant had had his

truck washed and detailed on Wednesday morning, June 1, the day after local news reported that a blue truck might have been involved in the shooting. Other evidence showed that, later the same day, appellant took his truck to a local body shop for repairs related to the claim he had earlier reported to his insurance carrier.

The State's trace evidence expert found gunshot residue on the headliner and the driver's seat. She also collected and compared paint fragments from the damaged areas of both appellant's and Starling's trucks and found they were consistent with paint from each truck having been transferred to the other during a collision between the two.

Cell site location data showed that, immediately after the offense, appellant sped from the shooting scene to arrive at his mother's house sometime between 2:30 and 3:00 a.m. Shortly after the offense, appellant began using another phone. In addition, he attempted to erase text messages and photographs of his AR-15 rifle from his old phone.

The State's toolmark expert, Edward Wallace of the Bexar County Crime Lab, test fired appellant's AR-15 and compared the test-fired bullets with those recovered from Vann's body and patrol car. He also compared the nine cartridge casings collected from Dorrell with the casings from the test firing. He concluded that all nine casings collected from Dorrell had been fired from appellant's AR-15 rifle and that appellant's rifle fired twenty-two of the thirty bullets and bullet fragments collected from Sergeant Vann's body and patrol car. The remainder were too damaged for a successful comparison, but Wallace could not rule out the possibility that they had been fired from appellant's rifle.

In addition, Wallace testified that after the rifle was fired at Dorrell's ranch but

before it was seized, someone had tampered with its firing pin by means of a Dremel-like tool or a grinder. There is no innocuous reason to alter a firing pin in this manner. It would make it more likely to misfire. Thus, the only purpose Wallace could see for making such an alteration would be to make it harder for a toolmark expert to perform a comparison analysis. Other evidence showed that appellant had ordered a new firing pin for the rifle after the offense and before his arrest.

Wallace also testified that Vann's shooter had to have pulled the trigger 46 times. Having listened to the audio of Vann's shooting, Wallace noted a short pause in the shooting at around shot number twenty-three or twenty-four. This pause was too short to accommodate reloading the rifle but was more consistent with someone using a large-capacity magazine and pausing either to change fingers on the trigger or to rest his trigger finger.

III.H. Appellant's Arrest History

During its cross-examination of lead detective John Mahon, the defense elicited evidence of appellant's local arrest history. Appellant had been charged with: driving while intoxicated (DWI), carrying a weapon, and attempting to elude an officer on September 25, 1988; three burglaries of a vehicle on June 7, 1989; and driving with an invalid license on September 18, 2000. The record suggests that appellant was convicted of the DWI but is unclear about whether he was convicted of anything else.

IV. DEFENSE GUILT-PHASE CASE-IN-CHIEF

The defensive theory focused on a "perfect storm" of a recent head injury, alcohol

and Xanax ingestion, and hypoglycemia, causing appellant to suffer an "automatistic state" during the shooting. He had no independent memory of the night of the offense past the point of stopping to look for Starling's tires. He first learned of his involvement in Vann's death on Wednesday morning in a phone call with Starling. It was only then that he told Starling not to tell anyone about it and that he tried to hide his involvement in it. Starling had been motivated by the possibility of reward money to lie about appellant's contemporaneous confession. The offense was out of character for appellant, and he had no discernable motive to target Vann.

IV.A. Appellant's Personal Background

At the time of the offense, appellant was a forty-one-year-old contract aircraft mechanic working on a project for Boeing in San Antonio. Some of his in-laws were law enforcement officers, and he generally expressed admiration for law enforcement. Appellant also encouraged his younger son to become a police officer.

Appellant began drinking as a teen, and his drinking increased over time. By the offense date, his alcohol consumption had increased significantly, and he was "not handling it well." Some witnesses testified that appellant was nonviolent and calm when he was sober. But members of his nuclear family acknowledged that appellant was prone to becoming aggressive, angry, argumentative, obnoxious, and profane when he drank. Appellant's wife, Patricia Alcala, acknowledged that she sometimes felt threatened by him when he was drinking, and she would insist that he leave the house until he calmed down. However, Alcala denied that appellant was ever physically violent with her or

their two sons.

Appellant's eighteen-year-old son, Mark Gonzalez, Jr., also testified that appellant was never physically violent with him or his younger brother but that he would sometimes get "physical" with Alcala. When his parents' verbal fighting began to escalate, Alcala would throw appellant out of the house.

Alcala testified that appellant loved firearms, owned several of them, and often talked of killing himself with one. He took Zoloft and Xanax for depression. Mario Sepulveda, Alcala's cousin and appellant's best friend, testified that appellant's depression appeared to stem in part from his only sibling's 2000 suicide. In that incident, appellant's brother killed at least one other person before killing himself with a handgun.

Alcala and Sepulveda acknowledged that appellant was also experiencing financial difficulties. Alcala's job had provided the family's medical insurance and a significant portion of its income. But at some point before the offense, Alcala had been laid off, and she had not yet found a new job. Appellant was worried about paying bills and paying for his prescriptions. Another financial burden stemmed from about $3,000 in outstanding tickets from appellant's earlier venture in trucking.

In the weeks leading up to the offense, appellant and Alcala were struggling to pay those tickets. Appellant was especially eager to pay them because he hoped to work on a contract job in Chihuahua, Mexico, but that required a passport, and the outstanding tickets complicated his efforts to get one. Although he borrowed money from family members and pawned one of his handguns, he was not able to pay the tickets in time, and

he lost the Chihuahua opportunity. In addition, he learned that a warrant would issue for his arrest if he did not pay the tickets in full by the Friday after Memorial Day.

IV.B. Appellant's Mood and Head Injuries

Alcala testified that appellant acted significantly more depressed after losing the opportunity to work on the Chihuahua contract. Worried that appellant was suicidal, Alcala called Sepulveda sometime shortly before the weekend preceding the offense. Sepulveda invited appellant and his family to join him in Corpus Christi for the weekend and volunteered to cover their costs.

Late that Saturday evening in Corpus Christi, Sepulveda and appellant walked to the beach, but appellant slipped on some steps near the waterline, fell into the water, and hit his head. Sepulveda testified on direct examination that appellant hit his head very hard and that immediately afterward, appellant's body was "weird" and "contorted." He described appellant's arm as being bent to the side and "freaky looking." He was not moving, his eyes were rolled back in his head, he would not respond to his name, and a large lump formed on the back of his head. Sepulveda went for ice, and when he returned, appellant had not moved. Although appellant's eyes were open, Sepulveda had the impression that appellant was unconscious. Sepulveda insisted that it took anywhere from five to fifteen minutes for appellant's eyes to return to their normal position.

At some point, appellant said he was "good," and he and Sepulveda sat there talking for another thirty to forty-five minutes while appellant held the ice pack to his head. That night appellant told Sepulveda, "Maybe this is karma for me thinking of

killing myself. This is why I slipped and rammed my head." Appellant seemed "out of it" through the next day.

On cross-examination Sepulveda acknowledged his 2011 statement in which he had said that appellant was "alert the whole time" after hitting his head or only "out for a few seconds." Appellant was well enough to spend the next day at the beach. Sepulveda admitted that he was biased in appellant's favor and that, although he had met many times before trial with defense counsel, he had refused to speak with the prosecution.

Alcala testified that appellant was acting "dazed" and "weird" when he and Sepulveda returned to the hotel room, but he refused to go to the emergency room. He seemed okay on Sunday, the family spent the day at the beach, and appellant drove everyone back to San Antonio.

Appellant's mother, Ninfa Gonzalez, testified that when appellant was a toddler, he fell and hit his head on a cement patio. She took him to the hospital, where he was X-rayed and released. As a teen he had an accident while riding a motorcycle. When he got home, his head was "swelling[,]" and Ninfa could "hardly see his eyes."

IV.C. The Week Between Appellant's Fall and the Offense

Sepulveda testified that appellant seemed somewhat less depressed and in a better mood after they returned from Corpus Christi.

Alcala testified that everything was normal, and Appellant went to work as usual on Monday and Tuesday, but on Tuesday he went to an emergency room and was diagnosed with a concussion, and he returned to work on Wednesday and Thursday.

Michael Diaz, appellant's crew leader at work, testified that in the week leading up to Memorial Day weekend, he "wrote [appellant] up" for the first time for leaving his work area full of debris and not properly accounting for his tools. Appellant did not mention feeling unwell.

Appellant's co-worker, Theodore Cravens, was surprised when he learned of appellant's arrest. Appellant was always a mild, good-tempered person whom he had never seen get annoyed. Cravens noticed nothing out of the ordinary about him either the week before or the week after the offense. Cravens remembered appellant saying that he had lost his sunglasses in Corpus Christi, but he did not say anything about a head injury.

IV.D. The Hours Immediately After the Offense

Appellant's mother, Ninfa, testified that she was at home asleep during the early morning hours of May 28 when she heard appellant's truck. She met him at the door as he let himself in. He said he had a headache, and she explained that he had a long history of migraine headaches. After taking something for his headache, appellant went to bed in the room that she kept for him. Ninfa said appellant went to bed with his clothes on, which was unusual for him.

Ninfa testified that appellant did not tell her about the damage to his truck until later that day. However, Ninfa conceded that she had previously given an audiotaped statement in which she had said that, on his arrival at her house, appellant said someone had hit his truck when it was parked in a Walmart parking lot.

Ninfa got up before appellant that morning intending to buy breakfast for herself

and appellant, but she had to move appellant's truck because it was blocking her own truck. She noticed damage to the front passenger side, but she did not see any shell casings inside of appellant's truck. That was the only time she drove appellant's truck that weekend. Appellant's truck stayed at her house until he took it in for repairs.

Ninfa conceded that, although appellant had told her that his truck had been damaged in a Walmart parking lot, she told the insurance company the same story that appellant did—that his truck had been hit in front her house.

IV.E. The Week Between the Offense and Appellant's Arrest

Alcala testified that after their last exchange of angry texts on Friday evening, May 27, she did not hear from appellant again until the next day when Appellant asked Alcala to pick him up at Ninfa's house. Appellant told Alcala that he needed to leave his blue truck there for Ninfa to use because her truck was not running.

Sepulveda testified that, either the morning after the offense or the next day, appellant called or texted him and said that he had been at Starling's property on the night of the offense. Sepulveda's phone records showed that at 1:21 a.m. on June 1, he sent two text messages to appellant. One read, "The Notorious B–I–G. Remember Biggie Smalls? Haha." Sepulveda agreed that Biggie Smalls was a rapper who had been shot to death at a stoplight. Sepulveda could not remember having sent these texts and did not know why he would have sent them to appellant.

On the night before his arrest, appellant texted Sepulveda that he was at a party at Ninfa's neighbor's house, getting "fucked up" or drunk. When Sepulveda joined

appellant at this party, appellant tried to convince him to drive with him back to Corpus Christi in search of his sunglasses.

Sepulveda agreed that appellant was doing essentially the same thing the weekend after the offense as he had done the weekend of the offense: "getting fucked up." His behavior had not changed between the two events.

Diaz, appellant's crew leader, testified that when the crew met during the week after Memorial Day, one of its members commented that they would not be a real team until they all "duke[d] it out" with one another. Appellant responded, "Would I like to take [Diaz] outside the gate." Later Diaz said, "Mark, just to clarify, you'd like to take me out -- you would like to take me outside the gate to take me to lunch or something like that?" Appellant chuckled and said, "Yeah, I guess," and mentioned McDonald's. Diaz let the issue drop, and the work week proceeded normally, but in hindsight he found appellant's comments unsettling.

IV.F. Defense Expert Testimony

Dr. James Merikangas, a clinical psychiatrist and neurologist, examined and interviewed appellant and reviewed the emergency room records related to appellant's Corpus Christi fall. Those records included a computerized axial tomography (CAT) scan that had ruled out bleeding in appellant's brain. Merikangas also ordered and reviewed: a magnetic resonance image (MRI) of appellant's brain, and a positron emission tomography (PET) scan; a glucose tolerance test; and a lab test that ruled out autoimmune disease. Merikangas also reviewed the results of neuropsychological testing

performed on appellant in 2012 and 2014 and listened to Sepulveda's and Ninfa's testimony.

Merikangas concluded that appellant had suffered a concussion because of his Corpus Christi fall. Appellant's MRI revealed "white matter hyperintensities," abnormalities that were consistent with appellant having sustained a traumatic brain injury (TBI) at some point. If the damage that caused the white matter hyperintensities preceded the Corpus Christi fall, it would have worsened the effects of appellant's subsequent concussion.

Merikangas interpreted appellant's PET scan as showing an abnormal distribution of metabolic activity and areas with lower metabolic activity than one would see in a normal person, indicating some kind of brain dysfunction.

Appellant's pre-trial neuropsychological testing showed that he had a low-average IQ of 89 and non-severe difficulties in thinking, reasoning, attention, and abstraction. These results were consistent with the dysfunction that Merikangas believed the PET scan showed in certain areas of appellant's brain. The deficiencies detected by the neuropsychological testing could have been caused by a TBI. The PET scan and neuropsychological test results showed that appellant was "not very intelligent, but he also ha[d] deficiencies in using the intelligence that he ha[d]."

Merikangas testified that appellant's PET scan results showed that his brain was using less glucose than normal. If a person's brain is using less glucose to begin with, and then the person develops low blood sugar, the low blood sugar will worsen the

situation. Appellant's glucose tolerance test results showed that, after fasting for five hours, appellant had an abnormally low blood sugar level in the hypoglycemic range. Merikangas asserted that this test result showed that appellant had a tendency toward hypoglycemia. Having a blood sugar level in the hypoglycemic range, albeit one lower than appellant exhibited after five hours of fasting, could be enough by itself to cause a person to enter an automatistic state.

In an automatistic state, a person's "rational mind" is disconnected from his "lower mind," and the person acts involuntarily and forms no memories. A person in such a state could engage in complex behaviors while appearing normal to an outside observer. For example, a person who was familiar with guns and had a weapon handy could fire it and kill someone while in such a state.

Merikangas noted that appellant had been drinking at the time of the offense and that drinking alcohol can directly lower a person's blood sugar. He further noted that appellant had been taking Xanax which is in a class of drugs known to be capable of producing automatistic behavior. Even if appellant normally ingested alcohol and Xanax at the same time without any notable effects, a recent head injury could have disrupted that equilibrium.

Based on his assessment and appellant's self-report, Merikangas concluded that appellant had experienced a sudden, acute, organically based dissociative episode with amnesia. During this automatistic state, appellant was not acting voluntarily and had no conscious desire to cause the results of his actions. Merikangas called it "a perfect storm

of bad circumstances that produced a terrible result."

On cross-examination, Merikangas acknowledged that he: spent about an hour interviewing and examining appellant; believed the death penalty should be abolished; lectured extensively at defense attorney seminars; and testified almost exclusively for the defense. Merikangas denied that he had a pattern of testifying that criminal defendants' violent actions occurred when these defendants were in dissociative states caused by some combination of brain damage, hypoglycemia, alcohol, and drugs.

Merikangas acknowledged that he expressly directed that no radiologist from the testing center review and report on the results of appellant's MRI and PET scans and that in prior cases in which radiologists had issued reports, they reported normal results where Merikangas found abnormalities. Merikangas also acknowledged that he had seen no evidence that appellant had been showing symptoms of hypoglycemia in the hours before the offense.

Merikangas admitted that if appellant told Starling, "I just shot a cop," it would show that appellant was aware of what he had done. But Merikangas asserted that such a statement would not necessarily show that appellant was conscious at the time of the offense; it would only show that appellant had discovered the offense earlier than he claimed. Merikangas also admitted that if appellant had eaten at about 4:00 p.m., as Starling testified, it would be a significant difference from what appellant had told Merikangas. But Starling was not credible in Merikangas' view, and Merikangas discounted the Chick-fil-A receipt because it did not show exactly what appellant had

eaten, and it would not matter anyway because the testing showed that appellant was hypoglycemic after five hours. Merikangas relied on what appellant told him about the day of the offense and the week following it even though appellant had lied to his wife, his mother, Sepulveda, the police, and the insurance company.

V. THE STATE'S REBUTTAL

The State offered the testimony of two experts who disputed Merikangas's methods and conclusions. They were Dr. Peter Fox and Dr. Brian Skop.

V.A. Fox

Fox testified that he holds a medical degree and specializes in neurology and neuroimaging. At the time of appellant's trial, he had served for 24 years as director of the Texas Health Science Center–San Antonio's (THSC-SA's) Research Imaging Institute, a "research grade" facility specializing in medical imaging. He was Vice-Chair for THSC-SA's Department of Radiology and appointed to its Department of Neurology, Psychiatry, and Physiology. He was recognized as one of the most highly cited neuroscientists in the world and was in the top ten for neuroimaging. About 99% of his work consisted of reading medical images, including brain scans, and teaching others how to do so. Fox testified that he was not being paid for his testimony.

Fox rejected Merikangas's conclusion that appellant had experienced a hypoglycemic attack, stating that it was "extremely implausible and the evidence for it [was] weak and contradictory." Fox stressed that it is very uncommon to experience hypoglycemia at all unless one is diabetic, and there was no evidence that appellant was

diabetic. Therefore, the issue was whether appellant had experienced the even less-common phenomenon of non-diabetic hypoglycemia, of which there are two types: reactive hypoglycemia and fasting hypoglycemia.

Reactive hypoglycemia is an unusual syndrome in which blood sugar drops very low a few hours after eating. It is generally associated with patients who have had certain types of gastric surgery. There was no evidence that appellant had undergone such a surgery. As to fasting hypoglycemia, Fox explained that anyone could experience this if he went without food for long enough but that it takes several days and is normally only seen in people with underlying liver disease, a tumor, or an endocrine disorder. No evidence suggested that appellant had any such conditions.

According to Fox, the oral glucose test that Merikangas ordered was not the appropriate method for diagnosing either reactive or fasting hypoglycemia, and appellant's fasting glucose level on that test had been in the normal range.

Based on Starling's testimony and appellant's bank records, Fox concluded that appellant had not been fasting on the day of the offense but had eaten something at Chick-fil-A around 4:00 or 5:00 p.m. Noting that the offense occurred at about 2:00 the following morning, Fox stated that this period would not have been long enough to produce fasting hypoglycemia.

Fox also emphasized that appellant had no history of fasting hypoglycemia. Although it is remotely possible for alcohol consumption to cause a reduction in blood sugar, this was unlikely in appellant's case because there was no evidence that appellant

had an underlying disorder that would cause him to experience chronic recurrent hypoglycemia exacerbated by alcohol. If appellant had fasting hypoglycemia aggravated by alcohol, appellant and those around him would have already known it because he routinely drank a lot. Fox ruled out fasting hypoglycemia as a possible diagnosis.

Fox was skeptical of Sepulveda's trial testimony about appellant's fall in Corpus Christi because Sepulveda had originally given a different account of the incident, and Sepulveda's testimony was inconsistent with appellant's account of it to Fox. Fox believed that appellant had at most experienced a mild concussion that had no material effect on his behavior.

Fox also rejected Merikangas's assertions about appellant's neuropsychological tests and brain scans. Although the neuropsychological tests indicated that appellant had a history of depressive symptoms, they did not show any deficits in appellant's neuropsychological functioning. Appellant's brain scans did not show any abnormality or trauma. For example, the white matter hyperintensities identified by Merikangas were in fact normal blood vessels.

Fox rejected the theory that appellant was in an automatistic state at the time of the offense. To the extent appellant claimed to have no memory of the offense, Fox distinguished amnesia from automatism because one can act intentionally even if he is not forming memories.

Fox pointed out that appellant's friends and family said his consciousness remained intact during the alcoholic blackouts he had experienced in the past. These

blackout episodes thus did not represent instances of automatistic behavior. Fox acknowledged that a combination of alcohol and Xanax could induce automatistic behavior, but the theory was far-fetched in this case in part because appellant had no history of such episodes. Furthermore, automatism describes involuntary movements that are typically very simple. The simpler the behavior, the more likely that the behavior was a true automatism. To the extent Merikangas asserted that the opposite was true, Fox testified that Merikangas was wrong.

In addition, appellant's behavior immediately before, during, and after the offense was inconsistent with his having been in an automatistic state. He had been driving normally, but an automatistic person would have been driving erratically. Appellant then stopped at the traffic light, and there was a period of delay during which he presumably prepared the weapon. Further, the audiotape of the shooting was inconsistent with automatistic behavior because the shots were "paced," and their pace was "remarkable." Then there was a pause, and the shots resumed.

Appellant drove away in control of his vehicle. To the extent that he swerved to avoid hitting a traffic pole, Fox noted that someone fleeing the scene of a crime might do that. Fox testified that it is much more common to lie than it is to engage in complex automatistic behavior. Therefore, it was much more likely that appellant's story was fabricated. Because the only thing out of the ordinary in appellant's behavior that night had been his shooting at Vann, Fox was skeptical that firing the weapon at the deputy had been a complex automatistic behavior.

V.B. Skop

Skop, a general and forensic psychiatrist, examined and interviewed appellant to determine whether his medical or psychological history might support his claim of amnesia during the offense. Skop concluded that appellant was fabricating his claim and had not been suffering hypoglycemia or automatism when he shot Vann.

Although appellant probably suffered a mild concussion about a week before the offense, Skop testified that it would not have affected his ability to understand the nature of his actions or have caused amnesia a week later. If Xanax had caused him to black out, it would have done so at least two hours before the shooting based on appellant's account of when he took it. Similarly, any alcohol-induced blackout would have happened many hours before the shooting.

Appellant told Skop that he did not know he had been involved in the shooting until he talked to Starling on Wednesday morning, but appellant's efforts to hide the evidence started before then, and his lies about the damage to his truck indicated his desire to leave Starling out of the picture.

Skop rejected the idea that appellant experienced hypoglycemia during the shooting. It takes at least 24 hours without food to produce hypoglycemia, but Starling's testimony and appellant's bank records showed he had eaten in the afternoon before the shooting. Hypoglycemia produces progressive symptoms that start with hunger and end in a coma. Between these two extremes are irritability, light-headedness, loss of coordination, confusion, and delirium. If appellant had been experiencing hypoglycemia,

his symptoms would have been noticeable to those around him before he blacked out. Indeed, his symptoms would have been even worse by the time he got to his mother's house, but she reported at the beginning of the investigation that he had seemed normal. The fact that he lied to her indicated that his upper-level cognitive functioning was "pretty good" about an hour after the shooting. Furthermore, when Skop asked appellant how he had been feeling before the shooting, he reported nothing consistent with hypoglycemia.

As for the glucose test ordered by Merikangas, it has a false positive rate of about 25%, and appellant's medical records showed that, when tested at various times before the shooting, his fasting blood sugar levels had been normal or slightly high.

Skop also rejected the theory that appellant had been in an automatistic state during the shooting. Appellant's actions before and during the shooting were too complex—driving, stopping, aiming, firing—and the sound of the gunfire would have awakened him from such a state. Similarly, his actions afterwards—fleeing, making phone calls, lying to his mother—were inconsistent with automatism.

Skop noted that the most common explanation for an alleged blackout in the criminal context is that a defendant is lying. Skop also saw nothing about appellant's alcohol or drug use that would lead him to think that appellant was in an automatistic state when he killed Vann. Even if he assumed that appellant was in an automatistic state during the offense, Skop testified, appellant's use of alcohol and Xanax had been voluntary.

Skop noted that appellant was depressed and under stress at the time of the offense. He had a lot of repressed anger and was argumentative and malcontented. Skop opined that on the night of the offense, appellant got drunk and decided to lash out. His fabricated memory loss reflected a denial of responsibility.

VI. STATE'S PUNISHMENT PHASE CASE

The State presented evidence that appellant had an outburst at the end of a pre-trial hearing when he stood up and threw some papers toward the gallery, exclaiming, "This is for the fucking media" and then resisted deputies as they tried to remove him from the courtroom. A deputy testified that, when they got him to the holding area, appellant said: "I'm sorry. It's nothing personal. I'm fighting for my life and I'll do what I got to do." She took that as a threat.

A forensic examination of appellant's phone showed that appellant had used an image of a Desert Eagle pistol as his phone's wallpaper, and on the afternoon preceding his arrest, his phone had taken a photograph of a handgun that was for sale. Immediately after the offense and immediately before appellant's arrest, the phone had been repeatedly used to browse internet pornography. Appellant's texting history showed that he had tried to sell his phone to a third party during the week between the offense and his arrest. At a little after 1:00 a.m. on the day before his arrest, appellant texted that he was "getting fucked up." A few minutes later he began searching for information about the Corpus Christi restaurant near which he had lost his sunglasses. Shortly after midnight on the day of his arrest, appellant told Sepulveda that he was at a party "getting fucked up" and

invited Sepulveda to join him.

The State concluded its punishment case by presenting testimony from Vann's family members.

VII. DEFENSE PUNISHMENT CASE

Appellant's family members collectively testified that, although appellant drank too much and got "worked up" about things that did not bother others, he was a loving and attentive son and father who encouraged his children to pursue their goals in life. They related the emotional and financial strain appellant experienced when his younger son was born with hydrocephalus. The jury also heard of appellant's kindness to homeless people. A prison classification expert testified about TDCJ's inmate classification system, living conditions, and restrictions within each classification.

VIII. LEGAL SUFFICIENCY CLAIMS

In points of error nine and ten, appellant claims that no rational juror could have found that he acted with the requisite culpable mental state or that he acted voluntarily when he shot Vann. In point eleven, he says no rational juror could have found a probability that he would commit criminal acts of violence that would constitute a future danger to society.

VIII.A. Culpable Mental State

As charged here, a person commits capital murder if he (1) intentionally or knowingly causes the death of (2) a peace officer who is in the official discharge of an official duty, and (3) the perpetrator knows the victim is a peace officer. *See* TEX. PENAL

CODE §§ 19.02(b)(1), 19.03(a)(1). In point of error nine, appellant argues that no rational juror could have found that he was aware that his conduct was reasonably certain to cause Vann's death because he was in an automatistic state when he shot Vann.

When reviewing the legal sufficiency of the evidence to support a conviction, we consider the evidence in the light most favorable to the verdict and determine whether any rational juror could have found the essential elements of the offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979); *Adames v. State*, 353 S.W.3d 854, 860 (Tex. Crim. App. 2011). The trier of fact is the sole judge of the weight and credibility of the evidence after drawing reasonable inferences from the evidence. *See Adames*, 353 S.W.3d at 860. On appellate review, we therefore determine whether the necessary inferences made by the trier of fact are reasonable based on the cumulative force of all the evidence. *See id.*

"Motive is a significant circumstance indicating guilt." *Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004). So are efforts to conceal evidence, contradictory statements, and dubious explanations to investigators. *Id.* Intent to murder can be inferred from circumstantial evidence such as a defendant's acts and words and the extent of the victim's injuries. *See Ex parte Weinstein*, 421 S.W.3d 656, 668–69 (Tex. Crim. App. 2014); *Patrick v. State*, 906 S.W.2d 481, 487 (Tex. Crim. App. 1995).

Appellant's motive, words, and actions proved his culpable mental state. He had reason to resent law enforcement because his Chihuahua job opportunity had been thwarted in part by tickets, and he had been rejected as a recruit by a local law

enforcement agency, a circumstance on his mind right before the shooting. When Vann passed him, he hurried to catch up with him and fired forty-six shots at him, causing devastating and instantly fatal injuries. Shortly after the shooting, he admitted it to Starling and chuckled about it. He later tried in various ways to conceal his guilt. The jury was free to disregard Marikangas's testimony and instead credit that of Fox and Skop that appellant's ability to form intent was intact at the time of the shooting. Viewing the evidence in the light most favorable to the verdict, a rational jury could have found that appellant acted intentionally or knowingly when he killed Vann.

Point of error nine is overruled.

VIII.B. Voluntariness

In point of error ten, appellant claims that the evidence was legally insufficient to establish that he acted voluntarily when he killed Vann. *See* TEX. PENAL CODE § 6.01(a). Appellant argues that "[h]is history of head injuries and hypoglycemia, combined with his chronic use of alcohol and Xanax, created an automatistic state that resulted in an involuntary [act]."

Section 6.01(a) states in relevant part that "'a person commits an offense only if he voluntarily engages in conduct, including an act" or "an omission." "Voluntariness" means a person's "physical body movements. If those physical movements are the nonvolitional result of someone else's act, are set in motion by some independent non-human force, are caused by a physical reflex or convulsion, or are the product of unconsciousness, hypnosis, or other nonvolitional impetus, that movement is not

voluntary." *Rogers v. State*, 105 S.W.3d 630, 638 (Tex. Crim. App. 2003). Voluntariness is a separate issue from mental state. *Whatley v. State*, 445 S.W.3d 159, 166 (Tex. Crim. App. 2014).

The State need only prove voluntariness when the evidence raises an issue about it. *Alford v. State*, 866 S.W.2d 619, 624 n.8 (Tex. Crim. App. 1993). In determining whether the evidence was sufficient to prove beyond a reasonable doubt that the accused's actions were voluntary within Section 6.01(a)'s meaning, we apply the *Jackson* standard and look at the evidence and inferences from it in the light most favorable to the verdict. *See Whatley*, 445 S.W.3d at 166.

Appellant raised a Section 6.01(a) voluntariness issue through Merikangas's testimony that appellant was in an automatistic state and engaging in involuntary physical bodily movements when he killed Vann. Accordingly, the State was required to satisfy Section 6.01(a). *See Alford*, 866 S.W.2d at 624 n.8. It did. Fox and Skop testified that appellant was not in an automatistic state when he shot Vann, and his physical bodily movements that resulted in Vann's death were voluntary. The jury was entitled to reject Merikangas's contrary opinion. *See Adames*, 353 S.W.3d at 860.

Point of error ten is overruled.

VIII.C. Future Dangerousness

In his eleventh point of error, appellant claims that the evidence was legally insufficient to support the jury's affirmative answer to the "future dangerousness" special issue because he was a family man with no violent criminal history whose "conscious

mind was in total shutdown at the time of the shooting."

The future dangerousness special issue requires the jury to determine "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." TEX. CODE CRIM. PROC. art. 37.071, § 2(b)(1). In deciding this issue, the jury is entitled to consider the evidence admitted at both the guilt and punishment phases of trial. *Devoe v. State*, 354 S.W.3d 457, 462 (Tex. Crim. App. 2011). We review the evidence in the light most favorable to the verdict. *Jackson*, 443 U.S. at 319; *Williams v. State*, 273 S.W.3d 200, 213 (Tex. Crim. App. 2008).

Assessing the evidence and all reasonable inferences from it in this light, we determine whether any rational trier of fact could have believed beyond a reasonable doubt that there is a probability the defendant would commit criminal acts of violence that would constitute a continuing threat to society. *Williams*, 273 S.W.3d. at 213. The offense's circumstances alone may be sufficient to support an affirmative answer to the future dangerousness special issue. *Buntion v. State*, 482 S.W.3d 58, 66 (Tex. Crim. App. 2016); *Trevino v. State*, 991 S.W.2d 849, 854 (Tex. Crim. App. 1999) ("[A] jury can rationally infer future dangerousness from the brutality of the offense."). An affirmative answer to the future dangerousness issue can also be supported by evidence of a defendant's lack of remorse and willingness to engage in future violence. *See Daniel v. State*, 485 S.W.3d 24, 32 (Tex. Crim. App. 2016) (noting that a lack of remorse may be probative of future dangerousness); *Trevino*, 991 S.W.2d at 854 ("[F]uture dangerousness

can be inferred from evidence showing a lack of remorse and/or indicating an expressed willingness to engage in future violent acts.").

Appellant's reliance on his lack of a violent criminal history is misplaced. *See Barley v. State*, 906 S.W.2d 27, 30–31 (Tex. Crim. App. 1995) (explaining that even a non-violent criminal history can lead a reasonable juror to find a probability of future dangerousness when the offenses reflect an escalating and on-going pattern of disrespect and continued violations of the law). Appellant's jury could have reasonably inferred from the evidence that, in 1988 and 1989, appellant engaged in conduct that led to his arrest for vehicle burglaries, unlawfully carrying a weapon, DWI, and attempting to elude an officer. In 2000, he drove with an invalid license, and the jury could have reasonably inferred that he continued to do so after that date and often drove while intoxicated. When he lost his right to buy guns, he circumvented the restriction by persuading his wife to buy them for him, and he then used one of those guns to murder Vann. The jury could have reasonably concluded that appellant demonstrated an on-going and escalating pattern of disrespect for and continued violations of the law. *See id.*

Further, the facts of the offense are especially heinous. Appellant murdered Vann, a total stranger to him, without provocation, by firing forty-six shots at him with a rifle. Appellant paused in the middle of firing to rest or switch his trigger finger before resuming firing. The resulting "mini explosion" inside Vann's vehicle destroyed the deputy's body. The sheer brutality of the instant killing could indicate to a jury that appellant posed a future danger to society. Even if the jury had been inclined to find that

appellant's conduct stemmed from an isolated incident of rage, it could have rationally concluded that appellant's "rage is of such an uncontrollable and extreme nature that he is a continuing danger to society." *Sonnier v. State*, 913 S.W.2d 511, 517 (Tex. Crim. App. 1995).

In addition, the jury could have reasonably found that appellant displayed a lack of remorse and expressed a willingness to engage in future violent acts. Immediately after murdering Vann, appellant admitted to committing the crime and chuckled about it. Hours later, he browsed pornography sites. During the following week, he engaged in a cover-up, re-loaded the murder weapon's high-capacity magazine, made a threatening comment to his supervisor, continued to browse pornography sites, focused on finding his lost sunglasses, shopped for more firearms, continued to get "fucked up" on alcohol, and partied.

When uniformed SWAT officers arrived in a clearly marked armored vehicle and approached his home, appellant tried to retreat to a bathroom where the murder weapon and another firearm were located. Although those guns were not loaded, the jury could have inferred, as argued by the prosecutor, that appellant forgot that fact in the stress of the moment. Appellant then struggled against the officers who prevented him from barricading himself inside the bathroom, took him to the ground, and handcuffed him. And at the end of a pretrial proceeding, appellant disrupted the courtroom and struggled against and threatened the deputies who were charged with escorting him to the holding area, stating, "I'll do what I got to do." *See Trevino*, 991 S.W.2d at 854.

Point of error eleven is overruled.

IX. SUPPRESSION RULINGS

In points of error twelve through fifteen appellant challenges the trial court's pretrial rulings denying three of his motions to suppress: a "Motion to Suppress Statements" and a "Motion to Dismiss Due to Sixth Amendment Violation," both file-stamped February 18, 2014, and a "Motion to Suppress," file-stamped June 26, 2015. He also challenges an evidentiary ruling the trial court made during the suppression hearing.

IX.A. Police Interrogation Techniques

In point of error twelve, appellant claims that the trial court erred when it sustained the State's objections to his questions of Detective Mahon about police interrogation techniques. Appellant says these questions were relevant to his theory that the police used a "discomfort and enticement" technique to coerce his statement. Relying primarily on *Crane v. Kentucky*, 476 U.S. 683 (1986), appellant asserts that the trial court should have allowed him to ask these questions. Assuming that this issue was preserved, it is without merit.

When defense counsel cross-examined Mahon at the suppression hearing, Mahon acknowledged that he had received training in interviewing and interrogation. Trial counsel then asserted that, "tactically, as a police officer, it is important to as early as possible to get someone's story, isn't it?" When Mahon asked for clarification, trial counsel asked, "Well, don't you commit them to a certain scenario?" Mahon answered, "Not necessarily. There's a whole bunch of different techniques." Trial counsel

continued, "Well, let's talk about that. In interrogating an arrested person –– [.]"

The prosecutor interrupted the question, objecting on relevance grounds and arguing that trial counsel had "gone beyond the scope of the motion as filed by defense counsel at this point. He is now talking about theories of interrogation." After the trial court sustained the objection, defense counsel asserted that he was talking about theories of interrogation "with regard to the specific motion that I filed." The trial court again sustained the State's objection.

The cross-examination continued:

> Q. (BY [DEFENSE COUNSEL]) Okay. So, in any event, when you go in to question an arrested person, are you trained to make them comfortable and put them at ease?
>
> A. No, I mean, obviously, I don't think that is a big part of my training. It may have been a part, but I don't recall that off the top of my head, to make them feel comfortable.
>
> Q. Well, but aren't you supposed to try to establish rapport with the individual that you're questioning?
>
> A. Again, all those --
>
> [PROSECUTOR]: Judge, I'm going to object to the relevance. I understand that the previous question might go to some coercive or threatening behavior, but this seems to be beyond the motion.

The trial court sustained the objection. Trial counsel continued his cross examination by asking about Mahon's approach to interrogating appellant:

> Q. Okay. And is it fair to say that in interrogating [appellant], part of your approach in the beginning was to make him comfortable, to put him at ease, and to establish a rapport with him?

A. That's a technique. In this case, obviously, I did not do that right away.

Q. Okay. So, to the best of your ability, tell the Court what approach you used in the very beginning of this interview?

A. Okay, there's not a name behind it, but basically I just brought the fact that I believed that it was a foregone conclusion that we had evidence in support of capital murder and I wanted to let him know that. From there, giving him an opportunity to tell me his side of the story, the truth, you know, information, and then go from there, basically.

We review a trial court's ruling on the admission of evidence for an abuse of discretion. *Colone v. State*, 573 S.W.3d 249, 263-64 (Tex. Crim. App. 2019). A trial court "abuses its discretion when it acts without reference to any guiding rules and principles or acts arbitrarily or unreasonably." *Rhomer v. State*, 569 S.W.3d 664, 669 (Tex. Crim. App. 2019); *see Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010) (stating that a trial court does not abuse its discretion unless its determination "lies outside the zone of reasonable disagreement").

"Relevant evidence is evidence which has any tendency to make the existence of any fact of consequence more or less probable than it would be without the evidence." *Gonzalez v. State*, 544 S.W.3d 363, 370 (Tex. Crim. App. 2018) (citing Texas Rule of Evidence 401). While "relevant evidence is generally admissible, irrelevant evidence is not." *Gonzalez*, 544 S.W.3d at 370 (citing Texas Rule of Evidence 402).

The issue in the suppression hearing was whether appellant gave his custodial statement voluntarily. Evidence about the circumstances of appellant's interrogation would have been relevant to that issue. The trial court's rulings did not prevent appellant

from asking questions about the circumstances of his interrogation, and in fact appellant developed the evidence about those circumstances. In contrast, the questions that the trial court disallowed were not designed to address the circumstances of appellant's interrogation because they were about interrogation techniques generally, not interrogation techniques used on appellant.

Appellant's reliance on *Crane* is misplaced. *Crane* stands for the proposition that a defendant is entitled to introduce before his jury "evidence about the manner in which a confession was obtained." *See* 476 U.S. at 691. But here, defense counsel's questions in a pretrial hearing were about potential interrogation or interview techniques that Mahon or police in general could have used while interviewing appellant, rather than techniques, if any, that Mahon did use. Techniques that Mahon could have used—but did not—would not be relevant under *Crane*, even in front of a jury.

Point of error twelve is overruled.

IX.B. Voluntariness of Custodial Statements

In point of error thirteen, appellant argues that "his statements to the police were involuntary and were coerced and enticed from him." In support of his argument he cites evidence that he was physically uncomfortable, out of breath, and in pain during the four hours that elapsed between his arrest and his statement. He specifies that the handcuffs were painful and that he was denied water.

We review a trial court's ruling on a motion to suppress under a bifurcated standard of review. *State v. Ruiz*, 577 S.W.3d 543, 545 (Tex. Crim. App. 2019). "We

give almost total deference to the trial court's findings of fact and review *de novo* the application of the law to the facts." *Id*. We view the record in the light most favorable to the trial court's ruling and uphold the ruling if the record supports it and if it is correct under any theory of the law applicable to the case. *Id*. The voluntariness of a custodial statement depends on the circumstances under which it was taken. *Creager v. State*, 952 S.W.2d 852, 856 (Tex. Crim. App. 1997).

The record shows that appellant was arrested at 3:39 p.m. and advised of his rights while still at his house. He was then taken to CID and placed into an interview room for a couple of hours. During that time, he was handcuffed from behind by two sets of handcuffs, giving his arms and shoulders greater latitude, and his handcuffs were loosened during his wait, and in one instance the handcuffs were removed in turn. The deputy tending to him during this interval was responsive to his complaints about his discomfort and made note of the adequate space between the cuffs and appellant's wrists. When appellant was taken to a second interview room, the handcuffs were removed, Mahon again advised him of his Article 38.22 rights, and appellant acknowledged them in writing, and he was given water when he asked for it.

The trial court concluded that: appellant was in lawful custody when he made his videotaped statement; he was advised of his rights in compliance with Article 38.22 before he made his statement; he knowingly, intelligently, and voluntarily waived these rights and made his statement under voluntary conditions; and appellant's statements before his invocation of the right to counsel were voluntarily made and were therefore

admissible. Our *de novo* review confirms these conclusions.

The videotapes, Mahon's testimony, and the documentary evidence offered at the suppression hearing proved that appellant was warned in accordance with Article 38.22, he understood those warnings, and no one threatened, coerced, or induced him to make a statement. His handcuffs were loosened for him, he was double cuffed for greater ease of movement, the deputy tending to him was responsive to his complaints about the handcuffs, and there was room between the cuffs and appellant's wrists. Although the deputy did not bring appellant water in the first interview room, water was provided to him in the second interview room.

Point of error thirteen is overruled.

IX.C. Sixth Amendment Violation and Delay in Magistration

In point of error fourteen, appellant claims that his Sixth Amendment right to counsel was violated because police interrogated him after the arrest warrant affidavit was filed, and its filing marked the beginning of formal adversarial proceedings against him. He also argues that there was no reason for failing to take him before a magistrate sooner than was done and that the only appropriate remedy was dismissal of his case.

The Sixth Amendment right to counsel attaches when the prosecution has commenced. *Rubalcado v. State*, 424 S.W.3d 560, 570 (Tex. Crim. App. 2014). Prosecution commences with the "first appearance before a judicial officer at which the defendant is told of the formal accusation against him and restrictions are imposed on his liberty." *Id.* (quoting *Rothgery v. Gillespie County*, 554 U.S. 191, 198 (2008)) (internal

quotation marks omitted). Since appellant was not taken before a judicial officer when the warrant affidavit was filed, his Sixth Amendment right to counsel did not attach at that point.

To the extent that appellant complains that he was not taken to a magistrate without unnecessary delay, we find no error because the investigation was ongoing after appellant's arrest. Specifically, in the interim between appellant's arrest and his appearance before a magistrate, police were searching his house and truck, and Mahon was interviewing appellant's wife and talking to other investigators. Investigation is not an unnecessary delay. *See Moya v. State*, 426 S.W.3d 259, 263 (Tex. App.—Texarkana 2013, no pet.) (holding that continuing the investigation does not constitute "unnecessary delay" under Article 15.17).

Point of error fourteen is overruled.

IX.D. Search Warrant's Lack of Particularity

In point of error fifteen, appellant alleges that the trial court erred when it denied his motion to suppress the evidence seized from his truck because the search warrant did not specify what was to be seized from the truck. He contends that law enforcement officers violated his Fourth Amendment rights when they searched and photographed his truck and removed parts of the interior for gunshot residue testing.

The search warrant specified two locations to be searched: appellant's residence and "also in Bexar County, Texas a blue Ford F150 pick-up truck, Lic. AK7 0144 which is located at Jordan Ford, 13850 Judson Road." The warrant commanded officers to

search those places for firearms, ammunition, and "other evidence that would associate Suspect with" the shooting death of Vann. It continued, "In addition, you are to search for and seize the blue Ford pick-up truck . . . from Jordan Ford." Thus, with respect to the truck it commanded officers to look for it, seize it, and search it for evidence related to Vann's murder. Appellant claims that this was insufficient to authorize officers to take pictures of the truck's interior and to seize its headliner and driver's seat to test for gunshot residue.

The Fourth Amendment requires warrants to "particularly" describe "the place to be searched, and the persons or things to be seized." U.S. CONST. AMEND. IV. The requirements for particularity "can vary according to the thing being described. Those things subject to First Amendment concerns . . . must be described with greater particularity than other things." *Walthall v. State*, 594 S.W.2d 74, 78 (Tex. Crim. App. 1980); *see also Stanford v. Texas*, 379 U.S. 476, 485 (1965) ("[T]he constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain.").

A warrant's description of items to be seized is sufficiently particular if the officer executing the warrant will reasonably know what items are to be seized. *Harmel v. State*, 597 S.W.3d 943, 962-63 (Tex. App.—Austin 2020, no pet.). A warrant that failed to describe "the items to be seized *at all*" was "plainly invalid." *Groh v. Ramirez*, 540 U.S. 551, 557-58 (2004). But a warrant that authorized the search for and seizure of evidence

relating to "the crime of false pretenses with respect to Lot 13T" was sufficient, notwithstanding an additional, general clause referencing "other evidence of . . . crime[.]" *Andresen v. Maryland*, 427 U.S. 463, 480-81 (1976).

The warrant here did not implicate First Amendment concerns, and it did not fail to describe the items to be seized. It specified that the truck itself was to be seized, and it specified that it was to be searched for firearms, ammunition, and other evidence that would connect appellant to Vann's murder. These commands were sufficiently particular to authorize a search of the truck's interior.

Even if the warrant had failed in its particularity, any error in admitting the evidence found within the truck would have been harmless. The evidence of appellant's identity as the shooter was overwhelming, and the evidence found within the truck—gunshot residue and an unfired cartridge—was not specific to Vann's shooting and were unremarkable discoveries given appellant's enthusiasm for guns. Appellant, his truck, and his rifle were linked to the shooting in multiple other ways. We are confident that no substantial and injurious effect or influence resulted from the admission of this evidence. *See* TEX. R. APP. P. 44.2(b).

Point of error fifteen is overruled.

X. VOIR DIRE

In point of error eight, appellant alleges that the trial court erred under *Morgan v. Illinois*, 504 U.S. 719 (1992), when it restricted defense counsel's questions to prospective jurors about their views on punishment. Appellant states that he attempted to

ask his "*Morgan*" question of twenty different prospective jurors and that three of those twenty served on the jury, forcing him to speculate about their views on capital punishment. Even assuming that appellant was prevented by the trial court's rulings from asking a proper question on voir dire, this point is without merit because appellant did not exhaust his peremptory strikes.

To establish harm from a trial court's ruling disallowing a proper question of a potential juror, a defendant must show: (1) he exhausted all of his peremptory challenges; (2) he requested more challenges; (3) his request was denied; and (4) he identified an objectionable juror on whom he would have exercised a peremptory challenge. *Anson v. State*, 959 S.W.2d 203, 204 (Tex. Crim. App. 1997) (plurality op.). A defendant's failure to exhaust his peremptory strikes mitigates any harm from disallowing a proper question on voir dire because the leftover strikes demonstrate that the defendant was not forced to waste needed strikes before the jury was seated. *Janecka v. State*, 937 S.W.2d 456, 471 (Tex. Crim. App. 1996); *see also Sanchez v. State*, 165 S.W.3d 707, 713, 713 n.16 (Tex. Crim. App. 2005) (stating that Texas Rule of Appellate Procedure 44.2(b) is the appropriate harm standard to apply when voir dire is conducted in a group setting but implying that the *Anson* test applies to capital cases, in which prospective jurors are questioned individually); *Rich v. State*, 160 S.W.3d 575, 577 (Tex. Crim. App. 2005) (same).

Appellant did not exhaust his fifteen peremptory challenges. *See* TEX. CODE CRIM. PROC. art. 35.15(a). Thus, he fails to satisfy even the first of the four

requirements for showing harm from the trial court's alleged error.

Point of error eight is overruled.

XI. PHOTOGRAPHS

In point of error sixteen, appellant asserts that the trial court erred when it overruled his objections to State's Exhibits 39 through 60, certain crime scene photographs of Vann's body in the patrol car, the interior of the patrol car, and Vann's body on the ground after it was removed from the patrol car. In point of error seventeen, he argues that the trial court erred when it overruled his objections to State's Exhibits 285, 310 through 316, and 318 through 321, autopsy photographs. In both points of error, appellant argues that the photographs' admission violated his due process and Eighth Amendment rights, and their prejudicial effect substantially outweighed their probative value.

Appellant failed to preserve his due process and Eighth Amendment claims because he did not object on those grounds when the photographs were offered at trial. *See* TEX. R. APP. P. 33.1. To the extent that he relies on his pretrial "Motion to Preclude Admission of Prejudicial Photographs" for preservation of his Eight Amendment and due process claims, it was premature. Furthermore, it was too vague with respect to these claims because it made a fleeting, generic reference to the Eighth and Fourteenth Amendments in its introductory paragraph and later made a passing assertion that the Eighth Amendment "requires a greater degree of accuracy and fact finding" in a capital case than in a non-capital case. Appellant did, however, urge the trial court to exclude

the photographs under Texas Rule of Evidence 403. Therefore, we will consider whether the photographs were admitted in violation of Rule 403.

Rule 403 requires that a photograph possess some probative value and that its inflammatory nature not substantially outweigh that value. *Williams v. State*, 301 S.W.3d 675, 690 (Tex. Crim. App. 2009). We review a trial court's admission of photographs over a Rule 403 objection for an abuse of discretion. *Id*.

We examine several factors, including the photographs' probative value, their potential to impress the jury in some irrational and indelible way, the time needed to develop the evidence, and the proponent's need for the photographs. *Prible v. State*, 175 S.W.3d 724, 733 (Tex. Crim. App. 2005). We also consider their number, gruesomeness, detail, and size; whether they are in color, are close-ups, and depict a clothed versus a naked body; the availability of other means of proof; and other circumstances unique to the individual case. *Williams*, 301 S.W.3d at 690.

Where elements of a photograph are genuinely helpful to the jury in making its decision, and the photograph's power "emanates from nothing more than what the defendant has himself done[,] we cannot hold that the trial court has abused its discretion merely because it admitted the evidence." *Sonnier*, 913 S.W.2d at 519; *see Prible*, 175 S.W.3d at 734 n.20.

XI.A. Scene Photographs

We turn first to State's Exhibits 39 through 60. These color photographs as they appear in the record measure roughly 5 x 7 inches each. Exhibits 39 through 49 depict

Vann's body as it was positioned in the car and the car's interior as it looked when the offense was discovered. The photos are taken from various angles and offer different details. Shattered glass and heavy blood and tissue spatter are evident, but Vann's injuries are not clearly shown. Exhibits 50 through 53 are similar photographs of the vehicle's interior, taken after Vann's body was removed.

The crime scene investigator who took these photographs testified that part of her purpose was to document the distinctive pattern of blood and tissue spatter she encountered inside Vann's patrol car. She particularly noted the multi-directional angle of the spatter as well as the distance that it traveled across the vehicle's interior, suggesting that it was consistent with multiple shots from a high-powered weapon.

State's Exhibits 54 and 55 show that Vann's service weapon was holstered at his side, and the holster was snapped closed. State's Exhibits 56 and 57 show that the magazine for Vann's weapon was full.

State's Exhibits 58 through 60 depict Vann's body after it had been removed from the patrol car and more clearly depict the damage done to his body. Collectively, these photographs show that Vann's head has essentially collapsed into his chest. The front of his uniform, which looks soaked, presumably with blood, has been torn open by the bullets that hit him. His face and torso are covered in blood, and massive damage to the right side of his face, neck area, chest, and upper abdomen is apparent.

XI.B. Autopsy Photographs

State's Exhibits 285, 310 through 316, and 318 through 321 are also in color and

measure about 5 x 7 inches. Referring to these exhibits, Dr. Molina testified that autopsies involve a process of documenting the subject's injuries and disease processes, if any, and that photographs are a vital part of this process. She explained that these photographs showed Vann's body after it had been cleaned, they were a small portion of the total number of autopsy photographs taken, and they were important for the jury to see because Vann's injuries could not "really be adequately described in a picture or with words" as might be possible in other cases. They helped Molina to explain the unique kind of damage caused by a high velocity weapon such as a rifle and the difficulties in identifying the total number of entrance wounds Vann sustained.

Molina described State's Exhibit 285, a close-up of Vann's face, as an identification photograph used to link him to a unique case number. The photograph depicts damage to Vann's face, including a large laceration. State's Exhibits 310 and 312 show the facial laceration and extensive damage to Vann's neck and upper chest area from different angles. Molina testified that she could not adequately describe or diagram the injuries to this area of Vann's body or the number of entrance wounds. She used the photographs to point out eight entrance wounds for the jury and to emphasize why she could only confirm the minimum number of rifle wounds Vann received.

State's Exhibit 311 focuses on the area between Vann's right ear and the top of his head. It depicts various injuries to his scalp, ear, and cheek, as well as a bullet entrance wound on the right temple. State's Exhibits 313 through 321 focus on Vann's torso from different angles and distances. These photographs collectively show large lacerations,

skin tears, additional bullet entrance wounds, exit wounds, and bruising. Some of these photos also depict abrasions and scratches that Molina opined were caused by flying debris or items in Vann's pockets as his chest ballooned out from the impact of the rifle rounds.

XI.C. Analysis

The complained-of photographs were relevant to and probative of the capital murder charge, particularly intent. Besides showing Vann's wounds and assisting the medical examiner in explaining them, the photographs corroborated witness testimony about the crime scene and the nature of the weapon used in the offense. *See Prible*, 175 S.W.3d at 733, 735. The danger of unfair prejudice did not substantially outweigh the photographs' probative value. The photographs' power emanated primarily from appellant's actions. *See Sonnier*, 913 S.W.2d at 519. Under these circumstances, the trial court did not abuse its discretion by admitting these photographs.

Points of error sixteen and seventeen are overruled.

XII. JUSTIN VANN'S TESTIMONY

In point of error eighteen, appellant argues that the trial court erred at the guilt phase when it overruled his relevance objections to the testimony of Vann's twenty-three-year-old son, Justin. Appellant argues that Justin's testimony was calculated to improperly appeal to the jury's emotions by painting a sympathetic portrait of Vann. Appellant contends that he was harmed by this testimony because it came at the end of trial and thus it had a "recency effect" on the jury.

XII.A. The Objections and Testimony

Immediately before Justin testified, defense counsel objected that the testimony would be "simply an appeal to prejudice and passion." Defense counsel asserted that there could be no probative value to Justin's testimony since appellant had already stipulated to Vann's identity. The trial court overruled the objection.

When Justin took the stand, the prosecutor elicited his name and age without objection. But when the prosecutor asked Justin how many children Vann had, defense counsel lodged a relevance objection, asserting that the answer would have no probative value. The trial court overruled the objection. Justin explained that his father had three children: two sons and a daughter.

The prosecutor then asked, "And what are you currently doing right now? Are you working and going to school?" Justin began to answer, "I'm currently a student -- ," but was cut off by defense counsel's request for "a continuing running objection to this." The trial court granted the request but overruled the objection. Justin then testified that he was pursuing a master's degree in biomedical science with the goal of becoming a medical doctor and that his brother Kenny was pursuing a bachelor's degree in international studies and international commerce.

Over defense counsel's renewed relevance objections, Justin testified that Vann had been a United States Marine before becoming a police officer. Vann and his first wife, Justin and Kenny's mother, divorced when Justin was in first grade. Justin and Kenny lived with their father after the divorce until Vann's death. Justin also testified

that Vann worked several side jobs to provide for them. When Justin was in seventh grade, Vann married his second wife, Yvonne. Yvonne helped Vann raise Justin and Kenny. Justin thought of Yvonne as his mother.

Justin testified that he was at home sleeping when he learned of his father's death about two hours after the offense. Defense counsel objected that the prosecutor was about to introduce inappropriate victim-impact testimony, and the trial court overruled the objection. The prosecutor then asked: "And from your understanding, where was your dad when he was killed?" Justin responded, "He was on patrol, just doing his nightly routine. He worked nights. And that's where I thought he was at."

The prosecutor passed the witness after this response. Defense counsel declined to cross-examine Justin, and the prosecutor rested the State's case-in-chief.

XII.B. Analysis

Some victim-background evidence is admissible at the guilt phase to provide framework and context. *See Renteria v. State*, 206 S.W.3d 689, 705–06 (Tex. Crim. App. 2006) (finding mother's sometimes-tearful testimony about where the victim attended school, the type of student she was, and what she liked to do was not victim-impact testimony because it did not concern how the murder affected the mother or her family's life); *Matchett v. State*, 941 S.W.2d 922, 931 (Tex. Crim. App. 1996) (holding no error in overruling objection to widow's testimony that she and the victim had been married for twenty-five years, they had five children, and he was home alone on the night of his murder). But victim "character" evidence, which "concerns good qualities possessed by

the victim," is usually inadmissible at the guilt phase because it is irrelevant or unfairly prejudicial. *See Mosley v. State*, 983 S.W.2d 249, 261 (Tex. Crim. App. 1998).

Justin's testimony consisted of biographical information. It did not touch on how the murder affected him or others, nor did it touch on Vann's good qualities, so it was not victim-impact testimony or character evidence. *See Renteria*, 206 S.W.3d at 706. The trial court did not err in overruling the objections to it. Even if it had been victim-impact evidence, its admission would not have warranted reversal because it did not affect appellant's substantial rights. *See* TEX. R. APP. P. 44.2(b); *see also Gonzalez*, 544 S.W.3d at 373 (stating that the erroneous admission of evidence is non-constitutional error). The evidence of appellant's guilt was overwhelming, and Justin's testimony was not inflammatory, so its admission could have had no substantial and injurious effect on the jury's verdict. *See* TEX. R. APP. P. 44.2(b).

And contrary to appellant's representation, Justin's testimony was not the last testimony the jury heard before deliberating on the issue of guilt. Rather, Justin's testimony represented the end of the State's guilt-phase case-in-chief. The defense then presented a lengthy case, and the State thereafter presented a rebuttal case.

Point of error eighteen is overruled.

XIII. LESSER-INCLUDED OFFENSE

In point of error three, appellant alleges that the trial court erred at the guilt phase when it denied an instruction on the lesser-included offense of criminally negligent homicide. Appellant contends that the ruling violated the Eighth and Fourteenth

Amendments to the United States Constitution and Article I, Sections 13, 15, and 19 of the Texas Constitution.

We do not consider appellant's state constitutional claims because he has inadequately briefed them. *See* TEX. R. APP. P. 38.1(i); *Wolfe*, 509 S.W.3d at 342–43; *Lucio*, 353 S.W.3d at 877–78; *Murphy*, 112 S.W.3d at 596.

As for his federal due process claims, we use a two-step test to decide whether a trial court should have charged the jury on a lesser-included offense. *See Bullock v. State*, 509 S.W.3d 921, 924 (Tex. Crim. App. 2016). First we determine whether the offense at issue is a lesser included of the charged offense. *See id.*; *see also* TEX. CODE CRIM. PROC. art. 37.09 (providing that an offense is a lesser-included offense if it is established by proof of the same or less than all the facts required to establish the commission of the charged offense). We have previously recognized that criminally negligent homicide is a lesser-included offense of murder, and therefore, of capital murder. *Cardenas v. State*, 30 S.W.3d 384, 392–93 (Tex. Crim. App. 2000). Appellant accordingly satisfies the first step.

In the second step we ask whether the record contains some evidence that would permit a rational jury to find that the defendant is guilty only of the lesser offense. *Bullock*, 509 S.W.3d at 924–25; *Hall v. State*, 225 S.W.3d 524, 536 (Tex. Crim. App. 2007). Although anything more than a scintilla of evidence may suffice to raise a lesser offense, the evidence must establish that the lesser-included offense is a valid, rational alternative to the charged offense. *Bullock*, 509 S.W.3d at 925. "In applying this prong

of the test, [we] must examine the entire record instead of plucking certain evidence from the record and examining it in a vacuum." *Enriquez v. State*, 21 S.W.3d 277, 278 (Tex. Crim. App. 2000); *see also Ritcherson v. State*, 568 S.W.3d 667, 676–78 (Tex. Crim. App. 2018).

In addition, we must view the evidence in light of the defendant's factual theory of the case. *Ramos v. State*, 865 S.W.2d 463, 465 (Tex. Crim. App. 1993); *see Godsey v. State*, 719 S.W.2d 578, 584 (Tex. Crim. App. 1986) (criticizing the intermediate appellate court for "[giving] a meaning to [the] appellant's statement that [the] appellant did not."). However, we do not consider the credibility of the evidence or whether it conflicts with other evidence or is controverted. *Bullock*, 509 S.W.3d at 925.

The elements of criminally negligent homicide are: (1) the defendant's conduct caused an individual's death; (2) the defendant ought to have been aware that there was a substantial and unjustifiable risk of death from his conduct; and (3) the defendant's failure to perceive the risk constituted a gross deviation from the standard of care that an ordinary person would have exercised under like circumstances. *See Montgomery v. State*, 369 S.W.3d 188, 192–93 (Tex. Crim. App. 2012); TEX. PENAL CODE §§ 6.03(d), 19.05. The key to criminal negligence is the failure to perceive the risk. *Montgomery*, 369 S.W.3d at 193.

Appellant contends that the following evidence showed that he negligently caused Vann's death:

- Instead of following Starling to Denny's, appellant pulled his truck up beside Vann's patrol car and opened fire;

- Appellant hit his head in Corpus Christi the weekend before the shooting;
- Days later he went to an ER for that injury;
- He had a history of head injuries;
- His intellectual functioning falls in the low-average range;
- He is a chronic alcoholic and kept drinking heavily after he hit his head in Corpus Christi;
- He had prescriptions for and took Zoloft and Xanax;
- Leading up to the offense, he drank alcohol for many hours at Dorrell's home and smoked marijuana there, and then drank at Sir Vesa's;
- He had not eaten for hours before the shooting, leading to hypoglycemia, fatigue, and impaired judgment;
- He was routinely overusing his prescription Xanax and drinking heavily; and
- He had his assault weapon with him in the cab of his truck.

Appellant argues that, from this evidence, a rational jury could have found that he "failed to perceive a substantial and unjustifiable risk that the result of this shooting would occur."

The foregoing litany does not demonstrate that appellant failed to perceive the risk of Vann's death when he aimed his loaded rifle at him and pulled the trigger dozens of times. Furthermore, a theory that appellant failed to perceive the risk of Vann's death would not be a rational alternative to capital murder in view of a defensive theory that posited an inability on appellant's part to rationally perceive anything.

Point of error three is overruled.

XIV. GUILT PHASE ARGUMENT

In point of error twenty, appellant argues that the trial court erred at the guilt phase by overruling his objections that the prosecutor was striking at him over defense counsel's shoulders. He asserts that the trial court's rulings violated his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution as well as Article I, Sections 10, 13, 15, and 19, of the Texas Constitution. We do not consider appellant's state constitutional claims because he has inadequately briefed them. *See* TEX. R. APP. P. 38.1(i); *Wolfe*, 509 S.W.3d at 342–43; *Lucio*, 353 S.W.3d at 877–78; *Murphy*, 112 S.W.3d at 596.

XIV.A. Background

Defense counsel spent a significant part of his guilt-phase closing argument asserting that the defense, in contrast to the State, had tried to present the jury with the most information. He emphasized his efforts to admit into evidence the complete statements that testifying witnesses made to the police and argued that the State and the trial judge had improperly thwarted his efforts at every turn. For example:

> Who in this trial has tried to bring you the most information? And who in this trial has tried to prevent you from getting information? Because, if you recall . . . I kept trying to get people to go back to their original statements to the police, their original recordings. I sought to bring in the entirety of everything. The State repeatedly objected and the judge repeatedly sustained.

Defense counsel also reasserted that appellant had been in an automatistic state when he shot Vann and that his cover-up did not begin until several days later when he realized what he had done. Counsel ended his argument by suggesting that appellant's

cover-up was understandable because few people would have had the courage to come forward upon making such a realization.

The complained-of arguments occurred during the first part of the State's argument in rebuttal. Referring to defense counsel's closing argument, the prosecutor stated:

> Ladies and gentlemen, what you have heard just now is revisionist history and fiction developed over the last four years by a guilty man who is trying to get away with murder. What you have just heard is a cover-up that began the night Sergeant Vann was murdered and ended with those final words from [defense counsel].

Defense counsel objected that the prosecutor was improperly striking at appellant over defense counsel's shoulders. The trial court overruled the objection, and the prosecutor continued:

> And I feel like I need to make a comment based on what [defense counsel] has said about the lawyering in this case and the rules. There are rules in court. There are rules of law. And just because [defense counsel] acted like the rules do not apply to him does not mean that --

Defense counsel again objected that the prosecutor was improperly striking at appellant over counsel's shoulders. The trial court overruled the objection and granted defense counsel's request for a running objection. The prosecutor's argument resumed:

> Let me give you an example. There are absolutely things that are not admissible in the evidence. Witness prior statements, the whole thing, when they are up there testifying, police reports, other things that are never admissible in court.

Defense counsel objected that the prosecutor was misstating the law and asserted that "[t]hey are prior inconsistent statements and when they are they become admissible in

court." The prosecutor responded, "Not the whole document," and the trial court overruled the objection.

The prosecutor concluded the relevant portion of her argument:

> And what a fine example that is. Right? So here's how the defense is crafted. I'm going to ask for things that nobody will ever get because it's against the law and then when the State objects, I'm going to say they look like they're hiding it. And when the judge properly says that can't come into evidence, he says the judge is trying to keep things from you. What a brilliant form of improper arguing to you to make you think that evidence is being kept from you when nothing more than the rules are being followed by everyone else in this room.

XIV.B. Relevant Law

There are four proper areas of jury argument: (1) a summation of the evidence; (2) a reasonable deduction drawn from that evidence; (3) an answer to opposing counsel's argument; and (4) a plea for law enforcement. *Milton v. State*, 572 S.W.3d 234, 239 (Tex. Crim. App. 2019). But "argument that strikes at a defendant over the shoulders of defense counsel is improper." *Davis v. State*, 329 S.W.3d 798, 821 (Tex. Crim. App. 2010) (citing *Wilson v. State*, 7 S.W.3d 136, 147 (Tex. Crim. App. 1999), and *Dinkins v. State*, 894 S.W.2d 330, 357 (Tex. Crim. App. 1995)).

> This Court maintains a special concern for final arguments that result in uninvited and unsubstantiated accusation of improper conduct directed at a defendant's attorney. Trial judges should assume responsibility for preventing this type of argument. In its most egregious form, this kind of argument may involve accusations of manufactured evidence, or an attempt to contrast the ethical obligations of prosecutors and defense attorneys.

Mosley, 983 S.W.2d at 258 (internal citations and quotation marks omitted).

We review a trial court's ruling on an objection to jury argument for an abuse of

discretion. *Milton*, 572 S.W.3d at 241. A trial court abuses its discretion when its ruling falls outside the zone of reasonable disagreement. *Gonzalez*, 544 S.W.3d at 370.

Regarding milder comments—such as those that assert that defense counsel's arguments are an attempt to divert the jury's attention or obscure the issues—we have stated that "it is impossible to articulate a precise rule." *See Mosley*, 983 S.W.2d at 258–59 (referring to our diverse holdings in *Gorman v. State*, 480 S.W.2d 188, 190 (Tex. Crim. App. 1972), and *Dinkins*, 894 S.W.2d at 357).

In *Gorman*, for example, the prosecutor stated, "Don't let [defense counsel] smoke-screen you[;] he has smoke-screened you enough." *See* 480 S.W. 2d at 190. We concluded that this argument was not improper because it could be interpreted as attacking defense counsel's arguments rather than counsel himself. *See id.* at 190–91 (stating that the "remark was not a personal attack" on defense counsel, but an "answer to counsel's argument which attempted to minimize the scope and extent of appellant's prior criminal record"). But in *Dinkins*, we appeared to retreat from this position. *See Mosley*, 983 S.W.2d at 259 (stating that *Dinkins* brought *Gorman*'s holding "into question").

In *Dinkins*, defense counsel made certain arguments about the voluntariness of the defendant's confession. *Dinkins*, 894 S.W.2d at 357. At rebuttal, the prosecutor argued that the evidence showed that the confession had been voluntary and that defense counsel "want[ed] to mislead you a little bit." *Id*. We concluded that the prosecutor's comment was not permissible as rebuttal to defense counsel's prior argument about the confession's voluntariness. *See id.* We explained, "Although the prosecutor's statements may have

been intended as rebuttal, they also cast aspersion on defense counsel's veracity with the jury." *Id*.

In *Mosley*, we acknowledged the impossibility of formulating a precise rule. *See* 983 S.W.2d at 259. However, we emphasized that "a prosecutor runs a risk of improperly striking at the defendant over the shoulder of counsel when the argument is made in terms of defense counsel personally and when the argument explicitly impugns defense counsel's character." *See id.* (assuming impropriety when the prosecutor referred to defense counsel personally and argued that they had attempted to divert the jury from the truth).

XIV.C. Analysis

The prosecutor's initial remarks—describing appellant as a guilty man who had spent four years fabricating a mental-state defense—was within the scope of proper jury argument. It was a reasonable deduction from the evidence, and it was not directed at defense counsel, but at appellant himself. *See Davis*, 329 S.W.3d at 822–23 (concluding that the prosecutor did not attack counsel over the defendant's shoulders when the prosecutor argued that the defendant was a "con man").

The next set of remarks, however—stating that defense counsel behaved "as if legal rules did not apply to him" and that counsel was engaging in "a brilliant form of improper arguing"—are troubling.

On one hand, defense counsel attacked the trial judge's and prosecutors' motives in excluding or seeking to exclude evidence, implying that they had behaved unlawfully and

unethically. Arguably, defense counsel invited the complained-of remarks. *See Mosley*, 985 S.W.2d at 258 (stating that our "special concern" applies to final argument that results in "uninvited" remarks directed at defense counsel). In that regard, this case is distinguishable from *Dinkins* and *Mosley* in which such inflammatory defense arguments did not precede the prosecutor's challenged remarks. *See Mosley*, 983 S.W.2d at 259; *Dinkins*, 894 S.W.2d at 357. The prosecutor was not required to allow this attack to go unanswered. To find otherwise would allow defense counsel to use our jurisprudence in this area as both "a shield and a sword." *Cf. Bailey v. State*, 507 S.W.3d 740, 746 (Tex. Crim. App. 2016) (noting that a legal privilege may not be used simultaneously as a sword to gain a litigation advantage and then as a shield to protect the defendant from any adverse consequences).

On the other hand, prosecutors must exercise great care in responding to such arguments. As in *Dinkins* and *Mosley*, the prosecutor here seems to have intended her statements to rebut defense counsel's assertions. But she also expressly and personally criticized defense counsel. *See Mosley*, 983 S.W.2d at 259; *Dinkins*, 894 S.W.2d at 357. We have cautioned prosecutors against such arguments, noting the risk that such remarks will be found to have improperly struck at the defendant over defense counsel's shoulders. *See Mosley*, 983 S.W.2d at 259; *Dinkins*, 894 S.W.2d at 357.

On balance we hold that the trial court did not err in overruling the objection. Defense counsel invited the arguments about his behavior by suggesting that he had been thwarted in his efforts to bring forth all the evidence, and the prosecutor's response was

explicitly tied to that suggestion. Under these circumstances, the trial court did not abuse its discretion in overruling the objection to the prosecutor's arguments. Even if the ruling had been an abuse of discretion, however, the arguments were harmless.

In assessing harm in this context, we have considered three factors: (1) "severity of the misconduct (the magnitude of the prejudicial effect of the prosecutor's remarks)"; (2) "measures adopted to cure the misconduct (the efficacy of any cautionary instruction by the judge)"; and (3) "the certainty of conviction absent the misconduct (the strength of the evidence supporting the conviction)." *See Mosley*, 983 S.W.2d at 259.

The first factor does not favor appellant. While we do not condone the prosecutor's remarks, they were only "mildly inappropriate." *See Mosley*, 983 S.W.2d at 260. As discussed above, defense counsel invited the remarks through his own argument. Further, the prosecutor did not accuse defense counsel of manufacturing evidence or directly accuse counsel of lying. *See id.* at 258. Instead, her comments suggested that defense counsel was trying to distort the jury's view of the evidence before it. *See id.* at 260. The second factor weighs in appellant's favor. No curative action was taken because the trial court overruled defense counsel's objection to the remarks. The third factor weighs in the State's favor. The evidence of appellant's guilt was overwhelming. It came from a variety of sources, was both direct and circumstantial, and included appellant's admission to Starling that he had killed a cop and a defensive theory that admitted the deed but denied a culpable mental state and voluntariness. Given the relatively mild nature of the prosecutor's remarks and the strength of the State's guilt-

phase case, any error was harmless. *See* TEX. R. APP. P. 44.2(b).

Point of error twenty is overruled.

XV. PUNISHMENT PHASE JURY CHARGE

In point of error one, appellant claims that the trial court should have instructed the jury that appellant was ineligible for parole if sentenced to life on a capital murder conviction. In point of error twenty-four, he argues that the trial court should have instructed the jury that it could consider voluntary intoxication as a mitigating circumstance in answering the special issues.

XV.A. Parole Ineligibility

In point of error one, appellant claims that the trial court erred in refusing to instruct the jury that appellant would be ineligible for release if he was convicted of capital murder and if the jury answered the future dangerousness issue in the negative. He bases his claim on the structure of the jury charge and on excerpts from the prosecutor's closing argument in the punishment phase, and he relies on *Simmons v. South Carolina*, 512 U.S. 154 (1994) (plurality op.), *Shafer v. South Carolina*, 532 U.S. 36 (2001), *Kelly v. South Carolina*, 534 U.S. 246 (2002), and *Lynch v. Arizona*, 136 S.Ct. 1818 (2016). He claims that the prosecution and the trial court created the false impression that his conviction for capital murder would not foreclose the possibility of his release on parole and that this false impression violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution as well as Article I, Sections 13 and 19, of the Texas Constitution.

We do not consider appellant's state constitutional claims because he has inadequately briefed them. *See* TEX. R. APP. P. 38.1(i); *Wolfe*, 509 S.W.3d at 342–43; *Lucio*, 353 S.W.3d at 877–78; *Murphy*, 112 S.W.3d at 596. As for his federal constitutional claims, they are without merit because Appellant's jury was repeatedly and correctly instructed that the only two sentencing options for a capital murder conviction were life without parole and death. Unlike the juries in *Simmons*, *Shafer*, *Kelly*, and *Lynch*, appellant's jury was not misled about the possibility of parole.

XV.A.1. *Simmons*, *Shafer*, *Kelly,* and *Lynch* vs. This Case

In *Simmons*, the trial court refused to instruct the jury that "life" meant life without parole, though it did mean that. *Simmons*, 512 U.S. at 160. The prosecution argued that future dangerousness was a consideration for the jury in choosing between life and death; Simmons countered that he was unlikely to be dangerous in prison because he tended to victimize elderly women. *Simmons*, 512 U.S. at 157. During its deliberations, the jury asked whether a life sentenced carried the possibility of parole, and the trial court said not to consider parole or parole eligibility. *Id.* at 160. It further instructed that "life sentence" and "death penalty" were to be understood according to their plain and ordinary meanings. *Id.*

A plurality of the Supreme Court decided that the State violated due process by getting a death sentence based in part on the defendant's future dangerousness "while at the same time concealing from the sentencing jury the true meaning of its noncapital sentencing alternative, namely, that life imprisonment meant life without parole." *Id.* at

162. The plurality deemed "the actual duration of the defendant's prison sentence [to be] indisputably relevant" to the assessment of his future dangerousness. *Id.* at 163. "Because truthful information of parole ineligibility allows the defendant to 'deny or explain' the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court." *Id.* at 169.

The trial court's instructions did not meet that requirement because invoking the "plain and ordinary meaning" of "life" would not have dispelled "the misunderstanding reasonable jurors may have about the way in which any particular State defines 'life imprisonment.'" *Id.* at 170. The instruction not to consider parole "actually suggested that parole *was* available but that the jury, for some unstated reason, should be blind to this fact." *Id.* And even if the latter instruction had been effective, Simmons' "due process rights still were not honored. Because [his] future dangerousness was at issue, he was entitled to inform the jury of his parole ineligibility." *Id.* at 171.

In *Shafer*, the defendant unsuccessfully sought an instruction or the opportunity to argue that a life sentence meant life without parole. *Shafer*, 532 U.S. at 41-42. The trial judge told the jury that if it found an aggravating circumstance, then it had to choose a sentence of life or death and that "life imprisonment means until the death of the defendant." *Id.* at 43. In closing, the defense attorney argued that a life sentence meant that the defendant would "die in prison" after "spending his natural life there." *Id.* at 52. But the jury was confused. *Id.* at 53. During its deliberations it asked if life meant "any

remote chance" of parole, *id.* at 44, and the trial court replied that "life imprisonment means until the death of the offender" and that parole was "not for your consideration." *Id.* at 45.

A life sentence could not be reduced in any way under South Carolina law, but "this reality was not conveyed to Shafer's jury by the court's instructions or by the arguments defense counsel was allowed to make." *Id.* at 54. The trial court's final instruction that parole was not for the jury's consideration might have further misled the jury that parole was a possibility. *Id.* at 45. If future dangerousness was submitted for the jury's consideration, then Shafer had the right to inform the jury that he was ineligible for parole if sentenced to life. *Id.* at 39, 54.

In *Kelly*, the trial court told the jury to consider aggravating circumstances in choosing between "life imprisonment" and a "death sentence" and that these two terms were to be given their plain and ordinary meanings. *Kelly*, 534 U.S. at 250. But the trial court did not specify that future dangerousness was not at issue or that a life sentence meant no parole. *Id.* The prosecutor's argument—that he hoped the jurors would never again have to be near a person like the defendant—implied that the defendant might get out some day. *Id.* at 255. The defense attorney's opening statement telling the jury that the defendant would be in prison for the rest of his life and would "never see the light of day again" plus the trial court's instruction that life and death should be given their ordinary meanings were inadequate to overcome the possibility that the jury was misled. *Id.* at 257.

In *Lynch*, the trial court refused to let the defendant tell the jury that he would be ineligible for parole on a life sentence though the prosecution argued that the jury should consider future dangerousness in assessing punishment. *Lynch*, 136 S.Ct. at 1819. The Supreme Court held that Lynch had the right to inform the jury that he was ineligible for parole, and the possibility of executive clemency or future legislation did not extinguish that right. *Id.* at 1819–20.

The present case is distinct from the foregoing cases because appellant's jury was told in a variety of ways throughout the trial that there were only two possible punishments in the event of a capital murder conviction: life without parole or death. Rather than prevent appellant from telling the jury about life without parole, the trial court encouraged him to do so, and the jury displayed no confusion about the lack of a parole possibility.

At the beginning of voir dire the trial court told the potential jurors twice that there were only two possible punishments for capital murder: life without parole or the death penalty. First: "As to punishment, a person who is found guilty of capital murder in which the State seeks the death penalty shall be punished by imprisonment in the Texas Department of Criminal Justice for life without parole or death. The State is seeking the death penalty in this case." Second: "At the conclusion of the punishment phase, the jury will be asked to answer specific questions. And based on the jury's answers to these questions, the Court will sentence the defendant to life without parole or death."

The questionnaire submitted to the potential jurors instructed them that a capital

murder conviction was punishable by "life imprisonment in the Texas Department of Criminal Justice for life without parole or by death." It emphasized those exclusive options by asking questions such as "Are you in favor of life without parole?" and "Do you think that spending a lifetime in prison without the possibility of parole is equivalent to the death penalty?"

In approving the questionnaire, the trial judge explicitly told the attorneys that it was only a tool and that she expected them to "go over reasonable doubt, life without parole, voluntary intoxication, all of those issues if you see fit to do so" during the individual interviews. The attorneys did tell eleven of the fourteen jurors and alternates that a conviction for capital murder was punishable only in two possible ways, life without parole or death. One juror was told that if the answer to the future danger issue was unanimously yes, then appellant was "death eligible," and if the mitigation issue was answered "yes" by at least ten jurors, then a sentence of life without parole would result.

In the punishment phase, the defense offered the testimony of Frank Aubuchon, a TDCJ classification expert, who testified on direct that life without parole "is essentially another form of a death sentence because they are not getting out of prison" and that life without parole means "exactly that. . . It means the offender will die in custody." He said that life without parole means the prisoner "will serve that sentence until whenever it is they pass away and they leave the penitentiary in their coffin." He explained that Texas adopted life without parole in 2005 and that before then, a capital life sentence carried various parole possibilities. He also detailed the administrative guidelines and

security levels for prisoners serving life without parole.

Aubuchon's testimony on cross examination reemphasized the meaning of life without parole: it means the prisoner would never "be able to get out," and the State tried to make the point that such offenders are disincentivized from behaving well in prison, making them dangerous.

In his closing argument, defense counsel emphasized that the only options facing appellant were life without parole and death:

> "Mark should not be executed and . . . instead he should get life without parole in prison."
>
> "And the fact of the matter is, if you lock him up in prison for life without parole, the only way he comes out of prison is in a pine box."
>
> "And I believe that he should be punished but that he should live. And if he lives, the only way that he comes out of prison is in a pine box."

The jury's questions during deliberations did not indicate any misunderstanding about the meaning of life without parole. It asked with respect to the mitigation issue whether it was deciding between "life imprisonment or the death penalty? Or only deciding if any mitigating circumstances?" and whether "background" meant "personal and/or criminal background?" The trial court's supplemental charge responding to these questions reiterated the original instructions: a unanimous "yes" to future dangerousness and a "yes" vote to mitigation by ten or more jurors would yield a sentence of life without parole. The trial court never instructed appellant's jury to disregard parole.

This record defeats appellant's claim that his jury might have been confused about the exclusive punishment options for capital murder.

XV.A.2. Appellant's Argument

Appellant contends, however, that the structure of the jury charge could have misled the jury about the possibility of parole because it did not tell the jury that a negative answer to future dangerousness would yield a life-without-parole sentence. It only told the jury that an affirmative answer to mitigation could do so. Thus, according to appellant, the jury might have believed that a negative answer to future dangerousness could result in something less than life without parole. He contends that the State enhanced the likelihood of such a misunderstanding by two arguments that he says were misleading. We reject appellant's contention because there is no possibility that the jury was misled by the jury charge or by the State's closing argument or by a combination of them.

Appellant did not object to the positioning of the life-without-parole information within the charge, but we must consider all alleged error in the court's written jury charge even if the issue was not preserved in the trial court. *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012).

The punishment phase charge told the jury that it had to answer two issues and that its answers would determine the punishment to be assessed. The court then set forth the first issue, future dangerousness, followed by the two possible answers ("Yes" or "No"). The charge continued:

> You are instructed that if you return a verdict of "No" to Issue Number 1, then you shall cease your deliberations.
>
> You are further instructed that if you return a verdict of "Yes" to

> Issue Number 1, only then are you to answer Issue Number 2.
>
> The jury may not answer Issue Number 2 "No" unless there is unanimous agreement of the individual jurors upon that answer.
>
> The jury may not answer Issue Number 2 "Yes" unless ten (10) or more jurors agree on that answer.
>
> In determining the answer to Issue Number 2, you are instructed that you need not agree on what particular evidence supports an affirmative finding on the issue and shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blame-worthiness.

The charge next presented the mitigation special issue which was answerable either "Yes" or "No" and then instructed as follows:

> [I]f you answer that a circumstance or circumstances warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed, the Court will sentence the defendant to imprisonment in the Institutional Division of [TDCJ] for life without parole.
>
> If the defendant is sentenced to confinement for life without parole, he is ineligible for release from the department on parole.

The positioning and content of the trial court's life-imprisonment-without-parole instruction were consistent with Article 37.071. Article 37.071, Section 2(e)(1), requires the trial court to "instruct the jury that if the jury returns an affirmative finding to" the future dangerousness special issue, the jury "shall answer the [mitigation special issue]." TEX. CODE CRIM. PROC. art. 37.071, § 2(e)(1). The statute then states that the court shall:

> (A) instruct the jury that if the jury answers that a circumstance or circumstances warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed, the court will sentence the defendant to imprisonment in [TDCJ] for life without parole; and

> (B) charge the jury that a defendant sentenced to confinement for life without parole under this article is ineligible for release from the department on parole.

TEX. CODE CRIM. PROC. art. 37.071 § 2(e)(2). By conforming the charge to Article 37.071, the trial court fulfilled its duty to explain the law in its written charge. *See Kelly*, 534 U.S. at 256. Appellant's argument that the charge misled the jury about the possibility of parole is merely speculative because the jury was repeatedly told in various ways throughout the trial that capital murder carries only two possible punishments, life without parole and death.

As for the State's closing argument, appellant points to one instance where the prosecutor told the jury that its answers to the two special issues would dictate the sentence, "a life sentence or a death sentence." Appellant's objection "that it's misstated if it's not life without parole" was overruled. Appellant maintains that the ruling created the impression that the defense was wrong that "life" meant "life without parole." This, too, is merely speculative in light of the extensive information given to the jury throughout the trial about the exclusivity of the capital murder punishment options.

In the second instance of argument that appellant points to, the prosecutor stated without objection that "society" includes prison society "if the defendant finds himself in prison" and "[w]hatever society the defendant finds himself in, for whatever reason he may find himself there[.]" According to appellant, those comments could have misled the jury about the possibility of parole, but in fact the comments highlighted the fact that parole was not possible.

The upshot of the prosecutor's argument was that the jury should consider prison society in deciding whether he posed a future danger, and appellant could only pose such a danger to non-prison society if he escaped:

> And society, we talked about the fact that when we think about well, if you lock somebody away then society is safe, but what we did was we actually moved our problem from one location to another.
>
> And obviously if the defendant finds himself in prison, that society needs to be considered. There are other inmates in that society. There are guards, there are medical personnel, there are teachers, there are ministers, there's visitors who come to see their families. All of those people need to be considered. And then there is always the potential for escape, for movement from one society to another. And what would the defendant do if he found himself in that society. What is his behavior going to be. Whatever society the defendant finds himself in, for whatever reason he may find himself there is viewed as a society in that question.

Instead of tending to mislead about the meaning of life without parole, this argument highlighted its true significance.

On this record there is no possibility that appellant's jury was misled about a possibility of parole.

We overrule point of error one.

XV.B. Voluntary Intoxication

The trial court refused to include the following instruction in the punishment phase jury charge:

> In arriving at your answer to special issues numbers 1 and 2, you may consider [appellant's] voluntary intoxication as a mitigating circumstance to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

Appellant contends that the trial court's ruling violated his rights under the Eighth and

Fourteenth Amendments to the United States Constitution and Sections 13 and 19 of the Texas Constitution because it precluded the jury from considering evidence of his voluntary intoxication as a mitigating circumstance. We do not reach the state constitutional aspects of point of error twenty-four because appellant has inadequately briefed them. *See* TEX. R. APP. P. 38.1(I); *Wolfe*, 509 S.W.3d at 342–43; *Lucio*, 353 S.W.3d at 877–78; *Murphy*, 112 S.W.3d at 596. And his federal constitutional arguments have no merit.

The trial court must "give the jury a written charge 'setting forth the law applicable to the case; not expressing any opinion as to the weight of the evidence, not summing up the testimony, discussing the facts or using any argument in [its] charge calculated to arouse the sympathy or excite the passions of the jury.'" *Kirsch*, 357 S.W.3d at 651 (quoting Article 36.14). Generally, neither party is entitled to a special jury instruction that: (1) is not statutorily-grounded; (2) is covered by the general charge to the jury; or (3) focuses the jury's attention on a specific type of evidence that may support an affirmative or negative answer to one or more of the punishment phase special issues. *Cf. Walters v. State*, 247 S.W.3d 204, 212 (Tex. Crim. App. 2007). "In such a case, the non-statutory instruction would constitute a prohibited comment on the weight of the evidence." *Id*.

The punishment charge followed the statute and instructed the jury to consider all the evidence from both stages of trial in answering the special issues. *See id.*; *see also Riddle v. State*, 888 S.W.2d 1, 8 (Tex. Crim. App. 1994). And appellant's proposed

instruction was an improper comment on the weight of the evidence because it focused the jury's attention on a specific type of evidence—appellant's voluntary intoxication on the night of the offense—that might have supported an affirmative or negative issue to one or more of the punishment phase special issues. *See Walters*, 247 S.W.3d at 212. The trial court did not err in refusing it.

Point of error twenty-four is overruled.

XVI. PUNISHMENT PHASE ARGUMENT

In points of error twenty-one and twenty-three, appellant claims that the trial court erred in overruling his objections to some of the State's arguments in the punishment phase of trial.

XVI.A. Comment on Failure to Testify

In point of error twenty-one, appellant claims that the trial court erred when it overruled his objection that the State commented on his failure to testify by arguing that appellant had failed to accept responsibility for killing Vann. He contends that the trial court's ruling violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 13, 15, and 19 of the Texas Constitution.

We will not review appellant's State constitutional claims because he fails to distinguish them from his federal claims, and he did not preserve the Article 1, Sections 15 and 19 claims in the trial court. *See* TEX. R. APP. P. 33.1; *Lagrone v. State*, 942 S.W.2d 602, 612 (Tex. Crim. App. 1997) (declining to address state constitutional claims where the appellant did not distinguish them from or argue that the Texas Constitution

provides greater protections than the federal constitution). His Sixth Amendment claim is inadequately briefed because he relies exclusively on Fifth Amendment cases. *See* TEX. R. APP. P. 38.1(i). Accordingly, we consider only whether the State's argument violated appellant's Fifth Amendment privilege against self-incrimination.

In determining whether a prosecutor's comment violated the Fifth Amendment, a court should view the prosecutor's argument from the jury's standpoint and resolve any ambiguities in favor of the argument being permissible. *Randolph v. State*, 353 S.W.3d 887, 891 (Tex. Crim. App. 2011). Accordingly, "the implication that the State referred to the defendant's failure to testify must be a clear and necessary one. If the language might reasonably be construed as merely an implied or indirect allusion, there is no violation." *Id*. The test "is whether the language used was manifestly intended or was of such a character that the jury would necessarily and naturally take it as a comment on the defendant's failure to testify." *Id*. "In applying this standard, the context in which the comment was made must be analyzed to determine whether the language used was of such character." *Id*.

During the State's rebuttal closing argument, the prosecutor suggested that the jury consider three areas in answering the future dangerousness special issue. "The first is how you respond to problems in your life. The second is what actions you actually take. And the third is do you take responsibility for those actions." The prosecutor presented argument about the first two areas, but when she attempted to segue to the third area, the complained-of exchange followed:

[PROSECUTOR:] . . . And, third, does he accept responsibility for his actions.

[DEFENSE COUNSEL]: Excuse me. I object to argument contrary to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, Section 10 and Section 13 and the Eighth Amendment of the United States Constitution.

THE COURT: You're overruled.

[PROSECUTOR]: You saw his interview with the police. You heard about his interview with the doctors. You heard that family members talked to him at the jail and over the phone. Right? Has there been any acceptance of responsibility in this case?

[DEFENSE COUNSEL]: Can I, of course, have a running objection to all of that as I articulated previously, Judge?

THE COURT: You may.

[DEFENSE COUNSEL]: And it's overruled?

[PROSECUTOR]: You saw his interview with the police. You heard about his interview with the doctors. You heard that family members talked to him at the jail and over the phone. And here's the bottom line: If a person cannot accept responsibility --

[DEFENSE COUNSEL]: And I should have added to all of that, Your Honor, it is a comment on his right to remain silent in a trial. That's a little more specific, but it's ever since you're charged with a crime. I presume that's overruled as well?

THE COURT: I'm sorry, I can't hear you.

[DEFENSE COUNSEL]: Yes, ma'am. It's a comment on his right to remain silent in violation of the Fifth Amendment and Sixth and Fourteenth Amendments, and Article 1, Section 10.

THE COURT: It's overruled.

[DEFENSE COUNSEL]: Thank you.

> [PROSECUTOR]: And I am not commenting on that. I am talking about the breadth of comments that you have heard that have come in from other sources during this trial. Here's the thing again, and I'm going to keep on saying it no matter how many times I get interrupted because it's important, that if someone cannot accept responsibility for the things that they have done, then they cannot change. And if they cannot change, then they will always be dangerous.
>
> This defendant is dangerous. You have heard nothing about him changing or anything. He is dangerous and he always will be.

The trial court's rulings were not an abuse of discretion for two reasons.

First, the prosecutor's language was not manifestly intended or of such a character that the jury would naturally understand the argument to be a comment on appellant's right not to testify. The prosecutor explicitly referred to appellant's statements to the police, his doctors, and his family members. *See Randolph*, 353 S.W.3d at 893–94 ("[T]he prosecutor may comment upon the testimony actually given during the guilt stage and that is not construed as a comment on the defendant's choice to remain silent during the punishment stage.").

Second, appellant defended himself on the grounds that, although he caused Vann's death, he was not criminally liable because he was in an automatistic state at the time of the shooting. Thus, the State could have fairly argued that appellant denied responsibility for the offense. *Cf. id.* at 892 ("[T]he prosecution may fairly argue, during the guilt or punishment stage, that the defendant denied responsibility because he testified to an alibi or he claimed that the deceased died as the result of an accident.").

Point of error twenty-one is overruled.

XVI.B. Improper Plea for Law Enforcement

In point of error twenty-three, appellant alleges that the trial court erred when it overruled his objections to two of the State's pleas for law enforcement. Specifically, appellant contends that the trial court denied him due process and a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 15 and 19, of the Texas Constitution. Appellant fails to provide any distinction between his state and federal constitutional arguments or to argue that the Texas Constitution provides greater protections than the Fifth Amendment. Accordingly, we analyze only the federal aspect of this point of error. *See*, *e.g.*, *Lagrone*, 942 S.W.2d at 612.

In the first complained-of argument, the prosecutor stated: "Ladies and gentlemen, police officers in our community are our most visible sign of safety and security. And when you attack a police officer, it is an attack on all of us because the fact of the matter is ––[.]" Defense counsel interrupted, objecting that the prosecutor's argument was "contrary to the special issue construct and [was] also not a legitimate plea for law enforcement." The trial court overruled the objection.

The prosecutor continued, "The fact of the matter is, if you can a [sic] take that bold of a step to kill a police officer, then no one is safe." The prosecutor then noted the danger inherent in being a police officer and the bravery that police officers routinely display. But the prosecutor observed that sitting at a stoplight was not supposed to be dangerous, and she argued that Vann's death was senseless and unfair because he had not even had a chance to defend himself. She argued that appellant killed Vann simply

because Vann was a police officer and because appellant decided to unleash his anger at that moment. She argued that nothing appellant had presented was sufficiently mitigating to warrant a life-without-parole sentence.

The prosecutor thereafter made the second complained-of argument:

> Ladies and gentlemen, it is the time to tell this defendant that he cannot commit this kind of offense, deny responsibility for it, and then expect you as a jury to give him the minimum sentence for a capital murder. It is time to show by your verdict to the people in this community--

Defense counsel objected that the preceding "type of plea for law enforcement" was "outside of the prosecutorial legitimacy." The trial court overruled the objection.

The State "is generally not permitted to argue that the community or any segment of the community demands or is expecting a certain verdict or punishment." *Freeman v. State*, 340 S.W.3d 717, 729 (Tex. Crim. App. 2011). But "the State is not prohibited from addressing the concerns of the community." *Id.*; *see also Borjan v. State*, 787 S.W.2d 53, 55–56 (Tex. Crim. App. 1990) (collecting cases with similar holdings).

The trial court did not abuse its discretion in overruling appellant's objections. The first challenged argument could reasonably be understood as an appeal to find appellant was a future danger: since he was willing to murder a police officer, he would likely not hesitate to injure or kill others. In the second challenged argument, the prosecutor asked the jury to send a deterrent message that killing police officers is unacceptable. Such an argument is permissible. *See*, *e.g.*, *Freeman*, 340 S.W.3d at 729–30 (permitting prosecutor's argument asking, "[W]hen you don't have [the]

consequence [of killing a police officer], then what's going to happen to our society?", and urging the jury to send a deterrent message to criminals that killing a peace officer is unacceptable).

Point of error twenty-three is overruled.

XVII. MOTION FOR MISTRIAL

In point of error twenty-two, appellant alleges that the trial court erred at the punishment phase by denying his motion for mistrial. As we discussed regarding point of error twenty-one, *supra* Part XV.A., during punishment-phase closing argument, the prosecutor expressly referred to appellant's statements to the police, his doctors, and his family members and asserted that these showed that he had failed to accept responsibility for his conduct: "You saw his interview with the police. You heard about his interview with the doctors. You heard that family members talked to him at the jail and over the phone. Right? Has there been any acceptance of responsibility in this case?"

Not long after making the preceding assertions, the prosecutor argued:

> You know, ladies and gentlemen, when Mark Gonzalez, Jr. testified, his son, I felt sorry for him because he too is just a different kind of victim for the actions of his father. But the problem here is that the son is the only Mark Gonzalez who is crying about this. You have heard zero evidence that this defendant has any remorse for what he has done.

Defense counsel objected that this argument was "a comment on [appellant] not testifying in trial and his right to remain silent since he was arrested and it's contrary to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution." The trial court sustained the objection. Defense counsel asked the trial court to instruct the jury to

disregard the prosecutor's remark, and the trial court did. Defense counsel moved for a mistrial, the trial court denied it, and that is the ruling at issue here.

The prosecutor continued:

> And, of course, one more time I am not talking about the defendant's right to remain silent or whether or not he testified. I'm talking about the evidence that you have heard that has come out of his mouth, meaning his interview with the police and his interviews with the doctors and any conversations he's had with family and friends. That of course is what I'm talking about.

We use a three-factor approach in determining whether a trial court abused its discretion in denying a mistrial. *Lee v. State*, 549 S.W.3d 138, 145 n.8 (Tex. Crim. App. 2018). Under that approach, we balance: (1) the severity of the harm; (2) curative measures; and (3) the certainty of the punishment absent the misconduct. *Id*.

The first factor weighs against appellant. Given the prosecutor's earlier reference to appellant's statements to the police, his doctors, and his family members, the jury could have reasonably interpreted the prosecutor's subsequent remark as an allusion to that same evidence. *See Ladd v. State*, 3 S.W.3d 547, 569 (Tex. Crim. App. 1999) (finding the prosecutor's comments on the defendant's lack of remorse were not objectionable when the jury could have reasonably interpreted them as alluding to testimony given in the case by an expert witness).

But acceptance of responsibility and remorse are distinct concepts. *See Randolph*, 353 S.W.3d at 891–92. Where a defendant does not testify, a statement that he does not deserve leniency because he has not shown remorse may constitute an impermissible comment on the failure to testify. *See id*. at 892 ("[A] comment on the defendant's failure

to show remorse is generally not proper if the defendant testifies at the guilt phase and presents some defense, but does not testify at the punishment phase."). But the prosecutor here immediately clarified that she meant the reasonable inferences the jury could draw from appellant's statements to the police, the expert witnesses who interviewed him, family members, and friends. Thus, the harm, if any, from the prosecutor's comment was minimal.

The second factor also weighs against appellant. The trial court's instruction to disregard the prosecutor's remark was sufficient to cure the minimal nature of any harm that resulted. *Cf. Simpson v. State*, 119 S.W.3d 262, 272 (Tex. Crim. App. 2003) (noting that mistrial is only appropriate for highly prejudicial and incurable errors, and ordinarily a prompt instruction to disregard will cure error associated with an improper question and answer).

The third factor similarly weighs against appellant. Appellant, unprovoked, fired a rifle forty-six times at Vann at close range, inflicting catastrophic injuries. He chuckled about it immediately afterward and tried to cover his tracks. The jury could have reasonably inferred from the evidence that appellant refused to accept responsibility for the offense and that he lacked remorse. Appellant's mitigation case was weak, consisting mainly of evidence that he was a good father and son, he was kind to homeless people, and he had faced financial and emotional strain during his adult life.

Given the senseless brutality of the offense and inferable lack of remorse, we conclude that a death sentence was reasonably certain even absent the prosecutor's

remark. *See id.* at 272–74.

Point of error twenty-two is overruled.

XVIII. CONSTITUTIONAL CHALLENGES TO ARTICLE 37.071, § 2(a)(1)

In points of error five, six, and twenty-six, appellant challenges the constitutionality of Article 37.071, Section 2(a)(1). *See* TEX. CODE CRIM. PROC. art. 37.071 § 2(a)(1). In point of error twenty-six, he argues that the statute is facially unconstitutional because it prohibits a juror from being informed of the effect of a jury's failure to agree on the special issues submitted to it. In point of error five, he alleges that this provision was unconstitutional as applied to him at trial because it prohibited juror E.M. from giving effect to her belief that a death sentence was not appropriate in this case. In point of error six, he contends that E.M. considered improper information, i.e., the possible consequences of a failure to agree, when answering the punishment phase special issues.

XVIII.A. Relevant Facts

At about 3:00 p.m. on the second day of punishment-phase deliberations, the jury sent a note asking three questions: (1) "What are the consequences of a juror unwilling to uphold their oath due to inability to answer yes/no due to their emotions?"; (2) "What support system is in place for jurors who are struggling with their emotions (professional support after the case)?" and (3) "Is it possible for a juror to withdraw their self?"

The State argued that the court should identify and interview that juror to determine whether the juror was: refusing to deliberate; so overwhelmed with emotion

that the juror could not vote one way or another; or simply in the minority and the subject of pressure from the majority of the jurors. If the court found that the juror was so overwhelmed by emotion that the juror could not vote either way, the State asserted, Article 33.011 would permit the court to replace that juror with the second alternate. Defense counsel argued that the trial court should simply instruct the jurors that they were not required to agree and that if a jury disagreed, it was to be discharged. The trial judge followed the procedure suggested by the State. The juror was identified as E.M., and the judge interviewed her in chambers in the presence of defense counsel and the State's attorneys.

E.M. said she was "stressed," she was not sleeping well, and she "was letting [her] emotions get too much into the process, into the decision-making of it." E.M. acknowledged that at the beginning of trial, she had agreed that she would not let her "emotions get into it" but said that she could not "make a clear decision with -- with [her] mind right now" because she did not "want to do the wrong thing" or to feel guilty about the outcome. She wanted to formulate her answers "by taking everything into consideration," but her fellow jurors were telling her that the things she was focusing on were not in evidence.

E.M. reiterated that she could not make a decision "without [her] emotions getting in the way of it though." She elaborated, "I feel that [appellant] should get life . . . instead of death . . . because what he did was horrible, but I think that he has to be a horrible person to get the death penalty but for this [sic]." E.M. also acknowledged that there

were "no excuses" for the "horrible" thing that appellant had done.

The judge stressed multiple times to E.M. that she had a right to her beliefs and a right to stick to them. E.M. indicated that she understood. The judge then attempted to paraphrase what E.M. had told the court, leading to this exchange:

> THE COURT: So I hear that -- that you have one opinion; the other jurors may have other opinions; and you feel as though you can't discuss those opinions.
>
> JUROR [E.M.]: I don't want it to be a mistrial just because I what happens though if I don't agree with it?
>
> THE COURT: And here's the problem with that: I am not here to talk to you about the consequences of a decision you make. I can't do that. All I can tell you is that you have to hold on to your beliefs, whatever they are.
>
> JUROR [E.M.]: And if there is enough evidence that -- if we do find him guilty, how do I -- how am I supposed to live with that, though, having him -- having him be dead? There's no coming out of that.

The judge assured E.M. that counseling would be available after trial. E.M. continued to assert that she could not decide due to her emotions. She agreed that her difficulty stemmed in large part from "just the fact that this issue of sending someone to perhaps the death penalty . . . really bother[ed] her." The court told her "that ultimately the bottom line is that you have a right to make up your mind and to hold your beliefs, and it doesn't matter whether it's for the death penalty or for life without parole. Can you do that?" E.M. answered, "Yes."

> THE COURT: Then that's what you have to do. And that's all we want you to do. Hold on to those beliefs, whatever they are. Will you do that?

JUROR [E.M.]: (Nods head.)

THE COURT: And we do have counseling that you can go to after this is all over.

JUROR [E.M.]: (Nods head.) Okay.

THE COURT: You have any other questions?

JUROR [E.M.]: No.

THE COURT: Okay. Well, I'm so sorry that you feel like your emotions won't let you do your job, but I am satisfied that you are strong enough to hang on to your beliefs. Okay?

All right. You may go back to the jury room.

JUROR [E.M.]: Thank you.

Immediately after E.M. left the room to rejoin the jury and continue deliberating, defense counsel referenced her allusion to a mistrial. Counsel asked the judge whether she was "going to tell them that the jurors are not required to agree." The judge stated that she was "not going to say anything to them. They're going to continue to deliberate."

A little before 5:00 p.m., defense counsel moved the court to discharge the jury and impose a life sentence without parole:

[LEAD DEFENSE COUNSEL]: [E.M.] was unequivocal. She stated it clearly. And she said all of this time has been because of her, is what I heard her say. And, therefore, at this time I move that the jury be discharged and you impose a life sentence without parole on [appellant].

[LEAD PROSECUTOR]: Judge, we were there. We heard what was said. At one point she said, "It's not my verdict." She specifically stopped herself and said "It's not my verdict." She gave her personal opinions, and she said she is in conflict with her personal opinions. And the defense attorney is asking you to instruct the jury contrary to Texas law.

[LEAD DEFENSE COUNSEL]: What is that? What is contrary to Texas law?

[LEAD PROSECUTOR]: Regarding the effect of what the nonagreement on the special issues would be.

[LEAD DEFENSE COUNSEL]: No.

THE COURT: That request is denied.

While this exchange was occurring, the jury announced that it had reached a verdict. The answer to the first special issue was: "We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to Issue No. 1 is yes." The answer to the second special issue was: "We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to Issue No. 2 is no." In response to individual polling, each juror affirmed that the answers were his own.

Immediately afterward, defense counsel tried to make a record of the length of time between the end of the judge's interview with E.M. and the jury's note announcing that it had a verdict. The State asserted that the interval was about thirty to forty minutes. Defense counsel asserted that the jury announced that it had a verdict after only about fifteen minutes. The judge acknowledged both parties' assessment of the time elapsed but did not make a definitive finding on this issue.

XVIII.B. Facial Challenge

Appellant acknowledges our numerous decisions rejecting facial challenges to the constitutionality of Article 37.071, Section 2(a)(1). *See*, *e.g.*, *Jenkins v. State*, 493 S.W.3d 583, 613–14 (Tex. Crim. App. 2016); *Coble v. State*, 330 S.W.3d 253, 296 (Tex.

Crim. App. 2010). We are not persuaded that they were wrongly decided.

Point of error twenty-six is overruled.

XVIII.C. As-Applied Challenge

Appellant bears the burden of showing that the statute operated unconstitutionally against him. *See Raby v. State*, 970 S.W.2d 1, 7 (Tex. Crim. App. 1998). He asserts that the trial court reversibly erred by not disregarding Article 37.071, Section 2(a)(1), and informing E.M. that a non-unanimous verdict on one or more of the special issues would result in appellant being sentenced to life without parole. Appellant argues that the lack of this information undermined E.M.'s opinion that appellant deserved a life sentence and prevented E.M. from giving a meaningful effect or a reasoned moral response to appellant's mitigating evidence.

The consequences of a capital jury's failure to agree on the special issues are not evidence. Thus, the trial court's ruling did not deprive E.M. of evidence or prevent her from giving meaningful effect to appellant's mitigating evidence. Further, the trial judge encouraged E.M. to "hold on to [her] beliefs, whatever they are." Appellant fails to show that the statute operated unconstitutionally against him.

Point of error five is overruled.

XVIII.D. Lack of Curative Instruction

Appellant alleges that, once the trial court became aware that E.M. was considering the consequences of the jury's potential failure to agree on the special issues, the court should have instructed her not to consider those consequences in reaching her

answers. However, appellant did not ask for such an instruction or object to the failure to give it. Accordingly, he failed to preserve this allegation for appellate review. *See* TEX. R. APP. P. 33.1(a).

Point of error six is overruled.

XIX. MOTION FOR NEW TRIAL

In points of error nineteen and twenty-five, appellant contends that the trial court erred by denying certain grounds included in his motion for new trial. All dates in this section of the opinion refer to 2015.

XIX.A. Standard of Review

We review a trial court's denial of a motion for new trial under an abuse of discretion standard, "reversing only if no reasonable view of the record could support the trial court's ruling." *Burch v. State*, 541 S.W.3d 816, 820 (Tex. Crim. App. 2017). We must "view the evidence in the light most favorable to the trial court's ruling" and without substituting our own judgment for that of the trial court, and we must uphold the ruling "if it is within the zone of reasonable disagreement. The trial court's ruling is within the 'zone of reasonable disagreement' when there are two reasonable views of the evidence." *Id.* (internal citations omitted).

XIX.B. Funding for a Consulting Expert's Report

In point of error nineteen, appellant contends that the trial court should have granted him a new trial for its failure to grant funds at the beginning of the punishment phase to obtain the report of Dr. Robert Soto, an expert whom Dr. Merikangas had

consulted about appellant's PET scan.

XIX.B.1. Underlying Proceedings

The State rested its guilt-phase rebuttal case, consisting of Dr. Fox's and Dr. Skop's testimony, on October 9. That same day, the defense recalled Merikangas to present his testimony in surrebuttal. Merikangas testified that he had consulted Soto, a nuclear medicine specialist, regarding appellant's PET scans. Merikangas stated that Soto had agreed with him that appellant's PET scans showed abnormal glucose metabolism and that Soto had mentioned that appellant's scans had many digital artifacts in them. Merikangas stated that digital artifacts can result in erroneous readings. Merikangas asserted that the human eye and brain were better than computers at interpreting complicated images. Therefore, Merikangas testified, his way of interpreting appellant's PET scans—by looking at them with the naked eye and applying his clinical experience—was superior to Fox's method.

After Merikangas testified in surrebuttal, the State recalled Fox. Fox addressed Merikangas's criticisms of Fox's methodology in interpreting appellant's PET scans. The State rested again after Fox testified.

Thereafter defense counsel orally requested funding to retain Soto. Defense counsel acknowledged that he had known about Fox since September 25, but he asserted that he had not anticipated needing his own clinical radiologist to testify. Counsel stated that he now wanted to rebut Fox's testimony by calling Soto.

The trial court initially granted the request under the mistaken belief that Soto was

present and available to testify. But then defense counsel clarified that Soto would have to be flown in from out of state. The prosecution argued that the defense request was belated given how long the defense had known about Fox's credentials as both a neurologist and neuroradiologist. After hearing further argument, the trial court denied the defense request for funding because Soto was not then available. Defense counsel renewed the request when the parties reconvened on October 12. The trial court heard additional argument from both sides but again denied the request.

On October 13, after the jury had returned its guilty verdict, the defense filed a "Motion for Appointment of Expert" asking the trial court to appoint Soto to prepare a written report describing his findings when he reviewed appellant's various scans at Merikangas's request. Counsel asserted only that Soto's "services [were] necessary to the defense of this case." The motion was denied after a hearing before a magistrate judge.

After the trial court sentenced appellant to death, appellant moved for appointment of Soto to prepare a written report describing his findings to support a motion for new trial. The trial court granted the request.

Appellant attached Soto's report to his motion for new trial. In the "technical considerations" portion of the report, Soto stated that the "FDG PET" study of appellant's brain suffered from "prominent streak artifacts" in certain areas. In the "findings" portion of the report, Soto stated in pertinent part that the exam was "abnormal" and demonstrated "reduced glucose metabolism" in certain parts of the brain and that the "significant streak artifacts" made the PET scan "unsuited to Statistical Parametric

Mapping[.]"The trial court denied the motion for new trial.

XIX.B.2. Analysis

The trial court did not abuse its discretion in rejecting ground two of appellant's motion for a new trial. "[D]ue process may require that an indigent defendant be granted access to expert assistance if 'the expert can provide assistance which is "likely to be a significant factor" at trial.'" *Ex parte Jimenez*, 364 S.W.3d 866, 876 (Tex. Crim. App. 2012) (quoting *Ake v. Oklahoma*, 470 U.S. 68, 74 (1985)). But "[i]f the trial judge appoints an expert, and the defendant requests another or a different expert, the trial judge may deny further expert assistance unless the defendant proves that the original appointed expert could not adequately assist the defendant." *Jimenez*, 364 S.W. 3d at 877. An indigent defendant is not entitled to the appointment of experts "when he offers 'little more than undeveloped assertions that the requested assistance would be beneficial.'" *Id*. at 877–78 (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985)).

The trial court had already granted appellant expert assistance by appointing Merikangas who was able to consult with defense counsel, interpret records, prepare counsel to cross-examine the State's experts, and generally help present appellant's defense. *See Jimenez*, 364 S.W.3d at 877. Merikangas testified at length during the guilt phase about appellant's brain functioning, including the narrow issue of whether appellant's brain abnormally metabolized glucose.

The belated and informal October 9 request to appoint Soto was an attempt to bolster Merikangas's credibility on this issue. It was further geared toward rebutting the

State's suggestion that Merikangas had actively sought to keep a radiologist from interpreting the results of appellant's brain scans. But these purposes are distinct from whether appellant had an expert witness who was able to help him prepare and present his defense. *See id.* at 876–77 ("[T]he State need not purchase for an indigent defendant all the assistance that his wealthier counterparts might buy.") (internal quotation marks omitted). Further, the trial court could have reasonably concluded that Soto's testimony would have been cumulative of Merikangas's testimony and that the request was little more than an undeveloped assertion that the assistance would have been beneficial. *See id.* at 877–78.

The trial court could have reasonably determined that appellant's October 13 written "Motion for Appointment of Expert" was inadequate for similar reasons. Counsel simply made a conclusory assertion that Soto's report "[was] necessary to the defense of this case." *See id.* Because the court did not abuse its discretion in denying the underlying funding requests for Soto's report or testimony, the court also did not abuse its discretion in denying ground two of appellant's motion for new trial.

Point of error nineteen is overruled.

XIX.C. "Junk Science"

In point of error twenty-five, we understand appellant to argue that the trial court erred in denying the first ground of his motion for new trial in which appellant claimed that "the trial court erred in denying the defense motion for mistrial based upon the [State's] experts' reliance upon the 'junk science' basis for the neuropsychological report

of Dr. Kate Glywasky." Appellant failed to preserve this point because his mistrial motion was untimely.

XIX.C.1. Background Facts

Appellant's first team of trial attorneys hired a neuropsychologist, Dr. Gilbert Martinez, to evaluate appellant and prepare a written report summarizing his findings. The trial attorneys who later replaced them hired their own neuropsychologist, Dr. James Sullivan, for the same purpose. Both reports were provided to the State's experts.

During its October 8 cross-examination of Skop, the defense elicited evidence that Skop had consulted a different neuropsychologist, Glywasky, who also had assessed appellant and prepared a report. Skop testified that he relied on Glywasky's report, as he had on the defense neuropsychologists' reports, in the sense that they provided information. But Skop further testified that he did not rely on Glywasky's report for his "ultimate conclusion as to whether [appellant's mental state defense] was fabrication or not."

Skop acknowledged that Glywasky had disagreed with Martinez's and Sullivan's conclusions. One reason for Glywasky's disagreement, Skop testified, was her conclusion that the defense neuropsychologists had not sufficiently factored appellant's educational and cultural background into their interpretations of the data. When asked whether appellant's ethnicity was a factor in Glywasky's findings, Skop answered, "It was one of the things she mentioned in her interpretation, yes." Neither Glywasky nor the defense neuropsychologists testified at appellant's trial, and their reports were not entered

into evidence.

Appellant concedes that the defense did not raise any concerns with Glywasky's methodology until October 15, after the guilty verdict. On that day, the defense filed motions for: Martinez's appointment, a continuance of the punishment hearing, and a mistrial based on alleged prosecutorial misconduct in using "junk science" to secure appellant's capital murder conviction.

Collectively, these motions said that Glywasky's report found that appellant did not have a measurable brain injury. Counsel stated that they had discussed Glywasky's report with the prior defense team's expert, Martinez, and Martinez had informed them that the part of Glywasky's report criticizing his assessment results was based on "junk science" and "false." The defense later stated that its expert, Sullivan, had told them the same thing. The defense asked for a continuance of the punishment phase to investigate further, requested funds to hire Martinez to testify at the punishment phase, and asked for a mistrial based on the prosecution's use of Glywasky's allegedly faulty or false report to obtain appellant's capital murder conviction.

After a hearing, the trial court denied the motions for mistrial and for a continuance of the punishment phase but granted the motion to have Martinez testify for the defense at the punishment phase of trial. For reasons that are not apparent in the record, however, Martinez did not testify. After the trial court sentenced appellant to death, appellant filed a motion for new trial in which he argued that the trial court should have granted his mistrial motion concerning Glywasky's report. The trial court denied

the motion for new trial.

XIX.C.2. Analysis

Appellant failed to preserve this point of error for appellate review because his underlying motion for mistrial was untimely. *See* TEX. R. APP. P. 33.1(a). Counsel's remarks at the mistrial motion hearing show that the defense had access to Glywasky's report ten days before counsel filed his motion for mistrial and access to at least one expert neuropsychologist who could have critiqued that report. The defense's cross-examination of Skop on October 8 indicates that the defense had by then flagged Glywasky's criticism of the defense neuropsychologists' failure to account for appellant's education and culture in interpreting the data. Yet the defense waited until October 15, after the jury had rendered its guilt-phase verdict, to request a mistrial, and that was too late. *See Griggs v. State*, 213 S.W.3d 923, 927 (Tex. Crim. App. 2007) (stating that a motion for mistrial is timely only if it is made as soon as the grounds for it become apparent); *Young v. State*, 137 S.W.3d 65, 70 (Tex. Crim. App. 2004) (stating that a party may no more rely on an untimely motion for mistrial than it may rely on an untimely objection).

Point of error twenty-five is overruled.

XX. MOTION TO WITHDRAW

In point of error seven, appellant seeks a new competency hearing on grounds that the trial court erred when it denied defense counsel's motion to withdraw from representing him at the competency trial held after the punishment verdict. He contends

that counsel had a conflict of interest in simultaneously acting as appellant's counsel and as a witness on his behalf. Specifically, appellant argues that the denial of the withdrawal motion violated Texas Disciplinary Rule of Professional Conduct 3.08 (Rule 3.08). He also argues that the court's ruling violated his state and federal rights to conflict-free counsel and to call witnesses in his favor. But he did not argue these grounds in his written motion to withdraw or in his arguments at the hearing, so he failed to preserve them. *See* TEX. R. APP. P. 33.1(a). Consequently, we only address his Rule 3.08 argument. The argument fails because Rule 3.08 does not apply to competency hearings, and even if it did, appellant makes no showing of actual prejudice from the denial of the motion to withdraw.

XX.A. Background

Between the guilty verdict and the beginning of the punishment phase, defense counsel voiced concerns about appellant's competency to stand trial because appellant had discussed trial proceedings on the phone, disregarding his attorney's advice against doing so. Counsel asserted that appellant was not following their advice due to the TBI that Merikangas had testified to at the guilt phase.

The trial court postponed the punishment proceedings and referred the competency matter to a magistrate to decide whether appellant needed a psychiatric evaluation. At an informal inquiry held later the same day, the competency judge granted the defense request for an evaluation. *See* TEX. CODE CRIM. PROC. art. 46B.005(a). A court-appointed expert evaluated appellant that afternoon and reported him to be competent to

stand trial. *See id.*

Defense counsel then requested a contested competency trial. *See* TEX. CODE CRIM. PROC. art. 46B.005(b). With the agreement of both parties, the magistrate postponed the competency trial until after the jury had rendered its verdict on punishment but before the trial judge pronounced the sentence. *See* TEX. CODE CRIM. PROC. art. 46B.005(d).

After the jury returned its punishment verdict but before pronouncement of sentence, a separate trial in front of a new jury was held on appellant's competency to stand trial, and one of appellant's attorneys testified in that trial. That jury found appellant to have been competent to stand trial during both phases of his capital murder trial and to be presently competent. Following the competency trial verdict, appellant was sentenced to death.

XX.B. Analysis

With certain exceptions, Rule 3.08 generally prohibits a lawyer from accepting or continuing employment as an advocate if he "may be a witness necessary to establish an essential fact on behalf of" his client. But Rule 3.08 is only a disciplinary rule, and according to its commentary, it "is not well suited to use as a standard for procedural disqualification" and, at most, the rule may furnish some guidance in procedural disqualification disputes. *See id.* at R. 3.08 cmts. 9 & 10.

Furthermore, Rule 3.08 is not applicable to competency trials. "[T]he nature of [a] competency hearing is very different from that of [an] adversarial trial on the merits."

Manning v. State, 766 S.W.2d 551, 554 (Tex. App.—Dallas 1989, pet. granted on other grounds) (affirmed and adopted in *Manning v. State*, 773 S.W.2d 568, 568–69 (Tex. Crim. App. 1989)). "[T]he only purpose for the determination of competency to stand trial is to see whether the adversarial process can be commenced or continued. Thus, raising the issue of competency suspends the adversarial process." *Manning*, 766 S.W.2d at 554 (internal citations omitted).

In addition, "[b]ecause the issue of competency goes to the fundamental issue of whether a defendant can exercise his constitutional rights, and because resolution of the issue is essentially nonadversarial . . . defense counsel's role in a competency proceeding is markedly different." *Id*. at 555. Defense counsel will often be the most knowledgeable and only witness on the issue of a defendant's competency to stand trial. *See id.* Thus, a "court should be able to utilize counsel's knowledge whenever the question of competency to stand trial is raised" so long as, in keeping with attorney-client privilege, counsel does not reveal the substance of any confidential communications. *See id.* at 555–57. But in the competency context, the attorney-client privilege does not preclude counsel from testifying to his client's demeanor and mental capacity during confidential communications. *See id.* at 557–58.

Appellant cites two Texas cases to support his claim that Texas courts have "repeatedly" frowned on forcing defense counsel to act as both advocate and witness, but neither case addressed the denial of a motion to withdraw or arose in the context of a competency hearing.

The first case, *In re Sanders*, 153 S.W.3d 54, 56 (Tex. 2004), was a mandamus action arising in a divorce suit in which the wife sought to disqualify the husband's lawyer because the fee arrangement made the attorney the husband's employer and thus a witness. *Id.* The trial court did not abuse its discretion in denying the disqualification motion, and mandamus relief was conditionally granted on the husband's behalf. *Id.* at 58.

In the second Texas case cited by appellant, the defendant sought to exclude the punishment-phase testimony of two assistant district attorneys who were not his trial prosecutors. *House v. State*, 947 S.W.2d 251, 252 (Tex. Crim. App. 1997). This Court did not decide whether Rule 3.08 had been violated because "[t]hat is the domain of the State Bar" but held that, absent a showing of actual prejudice from an alleged disciplinary rule violation, a defendant is entitled to no relief on appeal. *Id.* at 253; *see also Brown v. State*, 921 S.W.2d 227, 230 (Tex. Crim. App. 1996) (requiring actual prejudice).

Appellant claims he suffered an "adverse effect" from the denial of the motion to withdraw because only one of his attorneys testified at the competency hearing, thus depriving the jury of the testimony the other attorney would have given. But the denial of the motion to withdraw did not prevent either attorney from testifying at the competency trial; apparently that was a strategic choice of the defense. Thus, even if Rule 3.08 applied to a competency trial, and even if an adverse effect is the same thing as actual prejudice, appellant has not demonstrated that the ruling caused the adverse effect.

Point of error seven is overruled.

XXI. JUDICIAL BIAS

In point of error two, appellant contends that he is entitled to a new trial because the trial judge demonstrated judicial bias throughout the proceedings. In this multi-faceted allegation, he contends that the judge: made comments suggesting that lead defense counsel was manipulative, dishonest, and incompetent; implemented arbitrary procedural rules that interfered with defense counsel's ability to represent appellant; and commented on the evidence and the parties' arguments.

Appellant argues that the judge's behavior undermined the presumption of appellant's innocence under the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 10, of the Texas Constitution. To the extent that the judge commented on the evidence and the parties' arguments, appellant alleges, the judge also violated the prohibition against a judge making "any remark calculated to convey to the jury his opinion of the case." *See* TEX. CODE CRIM. PROC. art. 38.05. Appellant further alleges that the judge's conduct was fundamental error that did not require a contemporaneous objection to obtain appellate review. Appellant's arguments fail on the merits.

XXI.A. Constitutional Claims

We first address appellant's constitutional arguments. As the Supreme Court has explained, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555 (1994). Critical, disapproving, or even hostile remarks made during trial "ordinarily do not support a bias

or partiality challenge." *Id.* They may if they are derived from an extrajudicial source or if they are so biased or antagonistic "as to make fair judgment impossible." *Id.* But "expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds" of human imperfection will not support a claim of judicial bias. *Id.* at 555–56. "A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune." *Id.* at 556.

Appellant complains of "judicial rulings, routine trial administration efforts, and ordinary admonishments" to counsel and to witnesses. *See id.* at 556. On a few occasions in the jury's presence, the judge responded to defense counsel in an irritated manner, but this does not establish bias or partiality of the kind that would amount to a due process violation that denied appellant a fair trial. *See id.*; *see also Jasper*, 61 S.W.3d at 421 ("[A] trial judge's irritation at the defense attorney does not translate to an indication as to the judge's views about the defendant's guilt or innocence."). Nor did the judge's comments "[rise] to such a level as to bear on the presumption of innocence or vitiate the impartiality of the jury." *Jasper*, 61 S.W.3d at 421.

To the extent that appellant complains of certain procedures the trial judge required counsel to follow in this case, "a trial court's inherent power includes broad discretion over the conduct of its proceedings." *State ex rel. Rosenthal v. Poe*, 98 S.W.3d 194, 199 (Tex. Crim. App. 2003); *see also Jasper*, 61 S.W.3d at 421 ("A trial judge has broad discretion in maintaining control and expediting the trial."). The judge's "Order on

Counsel Conduct" included such unremarkable requirements as: "Counsel will timely appear before the Court at each setting and following each recess"; "Counsel will state all objections to the Court and not engage in jury arguments or sidebar remarks during the presentation of objections"; and "Counsel will not interrupt and talk over each other, except to state a specific valid objection." Appellant has not shown that the trial court abused its discretion in implementing such requirements.

XXI.B. Article 38.05 Claims

We likewise reject appellant's contention that the trial judge reversibly erred under Article 38.05 by commenting on the weight of the evidence.

A comment violates Article 38.05 if it is "reasonably calculated to benefit the State or prejudice the defendant's rights." *Proenza v. State*, 541 S.W.3d 786, 791 (Tex. Crim. App. 2017) (internal quotation marks omitted). If such an error occurs and is raised as a freestanding statutory complaint, it is subject to a non-constitutional harm analysis. *Id*.; *see also* TEX. R. APP. P. 44.2(b).

Appellant complains of four instances in which he claims that the trial judge commented on the weight of the evidence. Three of those were outside the jury's hearing or presence. Accordingly, they could not have conveyed the judge's opinion to the jury. *See* TEX. CODE CRIM. PROC. art. 38.05 (prohibiting the court from conveying its opinion to the jury).

The fourth complained-of instance occurred when the trial judge was excusing State's witness Deputy Carl Davis from the stand after his guilt phase testimony. Defense

counsel had cross-examined him about differences between his trial testimony and his written report. Davis acknowledged that his report did not include certain details about which he had testified.

After defense counsel passed the witness, and the State indicated it had no further questions of Davis, defense counsel offered Davis's written report into evidence. The judge sustained the State's objection and excused the jury from the courtroom. During the ensuing bench conference, the judge admonished lead defense counsel for "sneering" at her. After the jury returned to the courtroom, the State asked if Davis might be excused from the witness stand. The judge told Davis, "You may be excused. Next time read your report." Appellant contends that by this remark the judge advised Davis how to avoid future impeachment and therefore how to provide better testimony for the State. Thus, appellant avers, the remark demonstrated the judge's bias against defense counsel. We disagree.

This statement is more reasonably read as a criticism of Davis's preparedness as a witness due to his apparent unfamiliarity with the contents of his written report. The statement did not violate Article 38.05 because it was not reasonably calculated to benefit the State or prejudice the defendant's rights. *See Proenza*, 541 S.W.3d at 791. Alternatively, appellant suffered no harm because the remark did not affect his substantial rights. *See id.*; TEX. R. APP. P. 44.2(b).

Point of error two is overruled.

XXII. AUDIOTAPES

In point of error twenty-seven, appellant alleges that the trial court erred by denying him access to the audiotapes of his trial. In point of error twenty-eight, appellant contends the trial court erred by making fact findings on this request without first holding a hearing.

XXII.A. Procedural Background

Appellant sought access to the court reporter's audiotapes of the trial in order to substantiate his claims that the trial court once called him "Mr. Dopey" in open court and that his attorney's suggestion of appellant's incompetency was made the day before it appears in the record. He pursued the tapes via various motions filed in the trial court and this court. Ultimately, the trial court found that the record was complete and denied the motion for access to the audiotapes.

XXII.B. Analysis

Appellant contends that the audiotapes are necessary to assess the viability of two possible appellate or state habeas claims: whether the trial judge was biased against lead defense counsel at trial and whether lead defense counsel was ineffective in the timing of his suggestion of appellant's incompetence to stand trial. Appellant seems to argue that the timing of this suggestion is dispositive of the deficient performance issue, if any. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984) (setting forth the two-pronged test for ineffective assistance claims—deficient performance and prejudice). In other words, appellant appears to argue that counsel performed deficiently if he made this suggestion on the morning of October 13, 2015, the day after the jury's guilty verdict, instead of on

the afternoon of October 12, 2015, the day of the jury's guilty verdict.

Appellant further asserts that Rule of Appellate Procedure 34.6(e)(2) entitled him to a hearing on whether he should have been given access to the audiotapes before the trial judge ruled against his request for such access. By a "hearing," we understand appellant to mean something more than a "paper hearing" or hearing by affidavit.

Rule 34.6(e)(2) provides:

> If the parties cannot agree on whether or how to correct the reporter's record so that the text accurately discloses what occurred in the trial court and the exhibits are accurate, the trial court must—after notice and hearing—settle the dispute. If the court finds any inaccuracy, it must order the court reporter to conform the reporter's record (including text and any exhibits) to what occurred in the trial court, and to file certified corrections in the appellate court.

TEX. R. APP. P. 34.6(e)(2).

Rule 34.6(e)(2) is a judicial rule. We have not considered whether "hearing" as used in Rule 34.6(e)(2) contemplates a proceeding in which the parties may present live testimony and cross-examine witnesses or whether a "paper hearing" may also suffice. But this case does not require us to decide the issue because appellant's underlying argument about the necessity of the audiotapes is unpersuasive.

First, the lack of these tapes did not prevent appellant from raising a judicial bias claim; he in fact raised such an allegation as point of error two in this appeal. We have examined that allegation at length earlier in this opinion, *see supra* Part XXI, and it lacks merit. Even if the tapes showed that the trial court made the alleged "Mr. Dopey" remark, it would not cause us to grant relief on point of error two.

The remark, if made, would suggest name-calling and ridicule. If the trial judge engaged in name-calling, it would indicate that she momentarily abandoned her role as a neutral arbiter. *See Proenza*, 541 S.W.3d at 802. We do not condone such conduct. However, it would reflect but one instance of such behavior rather than a pattern of conduct. Further, Goeke did not contend that the judge made the remark within the jury's earshot. This isolated, improper comment, if it occurred, could not have affected the jury's impartiality. *See Liteky*, 510 U.S. at 555–56; *Jasper*, 61 S.W.3d at 421.

Second, we reject appellant's assertion that the tapes were necessary to help him determine whether he has a viable ineffective assistance claim against lead defense counsel due to the timing of the incompetence suggestion. Appellant has not shown why suggesting incompetence on the afternoon of the guilty verdict versus the next morning would be relevant to establishing that counsel performed deficiently. Nor does he show any prejudice; he received a contested competency trial, and a separate jury found him to have been competent through both phases of his capital murder trial. *See* TEX. R. APP. P. 44.2(b).

Points of error twenty-seven and twenty-eight are overruled.

XXIII. CONCLUSION

We affirm the judgment of the trial court.

Delivered: November 4, 2020
Publish in part

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3/3/2021
GONZALEZ, MARK ANTHONY Tr. Ct. No. 2011-CR-5289 AP-77,066
On this day, the Appellant's motion for rehearing has been denied.
JUDGE YEARY AND JUDGE RICHARDSON DID NOT PARTICIPATE

Deana Williamson, Clerk

DISTRICT CLERK BEXAR COUNTY
101 W. NUEVA, SUITE 217
SAN ANTONIO, TX 78205
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