App. 1

[SEAL]

In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00058-CR

THOMAS DIXON, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 140th District Court
Lubbock County, Texas
Trial Court No. 2012-435,942,
Honorable Jim Bob Darnell, Presiding

January 13, 2022

MEMORANDUM OPINION

Before QUINN, C.J., and PARKER and DOSS, JJ.

Appellant, Thomas Dixon, a former Amarillo plastic surgeon, was indicted on two counts of capital murder for the July 10, 2012 death of Lubbock physician, Joseph Sonnier, M.D.[1] The State did not seek the death

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[1] *See* TEX. PENAL CODE ANN. §§ 19.03(a)(3) (murder for remuneration), 19.03(a)(2) (murder in the course of burglary) and 7.01 (parties to offense), 7.02 (criminal responsibility for conduct of another); 12.31(a)(2) (punishment for capital felony-life without parole).

penalty. Following a mistrial, the case was retried; a second jury found Appellant guilty on both counts of capital murder. The trial court imposed the obligatory sentence of life in prison without parole on each count. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 1; TEX. PENAL CODE ANN. § 12.31(a)(2).

Appellant challenged his convictions via fifty issues. In *Dixon v. State*, 566 S.W.3d 348 (Tex. App.—Amarillo 2018), *rev'd*, 595 S.W.3d 216 (Tex. Crim. App. 2020), we overruled Appellant's sufficiency-of-the-evidence challenges (Issues 1-2), but sustained his issues challenging the trial court's denial of his motion to suppress historical cell site location information obtained without a warrant (Issues 43-47) and exclusion of the public from the courtroom (Issues 11-16). On the State's petition for discretionary review, the Court of Criminal Appeals reversed our judgment as to the cell site location data and closed courtroom grounds and remanded for our consideration of Appellant's remaining issues. *Dixon v. State*, 595 S.W.3d 216 (Tex. Crim. App. 2020).[2]

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[2] After remand to this Court from the Court of Criminal Appeals, Dixon filed motions titled "Appellant's Motion to Stay Proceedings and Further Review of his Case on Appeal Pending the Filing and Disposition of a Petition for Writ of Certiorari or in the Alternative to Expedite Oral Arguments" and "Appellant's Motion to Withdraw his Motion to Stay Proceedings and Further Review of his Case on Appeal Pending the Filing and Disposition of a Petition for Writ of Certiorari [and to Expedite Hearing on the Remaining Issues Presented on this Appeal]." We deny those motions as moot.

On remand, we now address the remaining issues (Issues 3-10, 17-42, 48-50). We sustain Dixon's 17th issue complaining that two convictions for a single offense violate his Fifth Amendment right to be free from double jeopardy; we therefore reverse and render a judgment of acquittal for the offense charged under the second count of the indictment, *viz.*, murder "in the course of committing or attempting to commit the offense of burglary of a habitation of Joseph Sonnier, III."

We overrule Appellant's remaining issues and affirm Appellant's conviction for capital murder under the first count of the indictment, specifically that Dixon intentionally or knowingly caused the death of Sonnier by employing David Shepard to murder Sonnier "for remuneration or the promise of remuneration, from the defendant . . . " *See* TEX. PENAL CODE ANN. § 19.03(a)(3). Because Dixon's conviction of murder for remuneration stands, we affirm Dixon's sentence of imprisonment for life without the possibility of parole.

Background

This Court's 2018 opinion, which held that legally sufficient evidence supports the jury's guilty verdict, provides additional detail of the evidence presented at trial. Though the Court of Criminal Appeals reversed this Court's judgment on other grounds, it upheld the legal sufficiency holding. We therefore discuss only the facts that are relevant to the remaining issues on remand.

Dixon, an Amarillo resident, divorced his wife after he began a relationship with Richelle Shetina. In time, the relationship waned and Shetina began seeing Joseph Sonnier, who lived in Lubbock.

Dixon and his friend and business associate, David Shepard, conversed for at least three months in 2012 regarding plans for dealing with Sonnier. On July 10, 2012, Shepard entered Sonnier's Lubbock home through a rear window. Shepard killed Sonnier by shooting him five times and stabbing him eleven times.

Dixon was aware Shepard was at Sonnier's home on July 10; the two regularly messaged each other while awaiting Sonnier's arrival home that evening. Dixon contends he thought Shepard was at the home to install a camera that would reveal Sonnier's alleged unfaithfulness to Shetina. The State contends this evidences Dixon's knowledge and intention for Shepard to kill Sonnier on July 10.

Before Shepard killed Sonnier, Dixon had paid Shepard with three bars of silver. The State contends the silver had been paid to Shepard as consideration for agreeing to kill Sonnier. Dixon contends payment was for his investment in Physician Ancillary Services, Inc. (PASI), an allergy testing business partnered by the men. On July 11, 2012, with Dixon's consent, Shepard sold at least one bar of silver at a pawn shop in Amarillo. After Shepard killed Sonnier, Shepard returned to Amarillo where Dixon gave him three cigars.

On July 11, Sonnier's body was discovered, and Shetina named Dixon as one who should be further

questioned. Lubbock police detectives Zach Johnson and Ylanda Pena drove to Amarillo on the evening of July 11 to interview Dixon and his girlfriend, Ashley Woolbert. Dixon initially denied knowing Sonnier, a statement Dixon admitted at trial to be a lie. When Detective Pena asked Dixon about the identity of "Dave," a name revealed in a conversation with Woolbert, Dixon identified Shepard and provided Shepard's telephone number. Dixon related that Shepard had been at Appellant's home the prior day to get cigars but did not disclose he knew Shepard had been at Sonnier's home.

Immediately after his interview with detectives, Dixon communicated with Shepard more than a dozen times through the evening of July 11 and morning of July 12, including the period immediately before and after detectives reached out to speak with Shepard about Sonnier's death.

Shepard attempted suicide at least twice during the initial days following Sonnier's murder. On the evening of July 14, following one failed suicide attempt, Dixon met Shepard at Appellant's medical office in Amarillo and stitched Shepard's left wrist. Around the same time, Dixon "took measures to try to get rid of my messages" with Shepard. Dixon first deleted the messages from the phone. He also got into a swimming pool with his phone; when the water failed to destroy the phone, he removed its SIM card. What Dixon did not realize at the time was that his phone had already synced some of the messages with his computer.

On July 15, 2012, Paul Reynolds, Shepard's roommate, contacted the Lubbock Crime Line and related that Shepard and Dixon were involved in Sonnier's murder. Dixon and Shepard were arrested the following day. Later, Shepard led police to an Amarillo lake, where they recovered the pistol he said he used to shoot Sonnier. The pistol was owned by Dixon.

Shepard pled nolo contendere to the capital murder of Sonnier. Under the terms of a plea-bargain agreement, he was sentenced to confinement in prison for life without parole. At Appellant's first trial, during the State's case-in-chief, Shepard testified Appellant did not hire him to murder Sonnier. As noted, that trial ended in a hung jury.

In Dixon's second trial, Shepard was present and available to be called as a witness. However, Shepard was never called to the stand.

Analysis

Part I: Double Jeopardy

By his seventeenth issue, Dixon complains he was twice convicted for the murder of Sonnier in violation of the Fifth Amendment's Double Jeopardy Clause.[3] The State concedes the issue must be sustained. As noted, Dixon was charged and prosecuted for Sonnier's death under two capital murder theories: Count 1, murder for remuneration; and Count 2, as a party to murder committed in the course of a burglary. *See* TEX.

[3] U.S. Const. amend. V.

PENAL CODE ANN. §§ 19.03(a)(3), 19.03(a)(2) and 7.01. The jury found Appellant guilty on both counts.

The Double Jeopardy Clause protects criminal defendants from, among other things, multiple punishments for the same offense. *Ex parte Milner*, 394 S.W.3d 502, 506 (Tex. Crim. App. 2013) (citing *Brown v. Ohio*, 432 U.S. 161, 164-65, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977)). Dixon's two convictions for murdering Sonnier is violative of his double-jeopardy protections from being twice convicted for the same offense. *See Reyna v. State*, No. 13-12-00484-CR, 2014 Tex. App. LEXIS 475, at *7-8 (Tex. App.—Corpus Christi Jan. 16, 2014, pet. ref'd) (mem. op., not designated for publication). When, as here, a defendant is twice convicted of the same offense and both offenses carry the same punishment, a reviewing appellate court may strike either conviction. *See Martinez v. State*, 225 S.W.3d 550, 555 (Tex. Crim. App. 2007). In this case, we render a judgment of acquittal for the offense charged under Count 2 of the indictment, murder in the course of committing burglary. We sustain Appellant's seventeenth issue and examine Dixon's remaining issues as they relate to Count 1 of the indictment (murder for remuneration).

Part II: Admission / Exclusion of Evidence

Via ten issues (Issues 3-10, 21-22), Dixon complains he was harmed by the trial court's erroneous admission or exclusion of certain evidence detailed further below. A trial judge has wide discretion in the

admission of evidence at trial. *Druery v. State*, 225 S.W.3d 491, 502 (Tex. Crim. App. 2007). We review the trial court's decision to admit or exclude evidence under an abuse of discretion standard. *Davis v. State*, 329 S.W.3d 798, 803 (Tex. Crim. App. 2010). In applying the standard, we do not disturb the trial court's decision if the ruling was within the zone of reasonable disagreement. *Id.* If the trial court's ruling admitting evidence is correct under any applicable theory of law, we will not disturb it, even if the trial court gave a wrong or insufficient reason for the ruling. *Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016).

Admission of Evidence Regarding Statements by Shepard, and Communications between Dixon and Shepard (Issues 3, 4, 5, and 6)

Through issues three, four, and five, Dixon complains the State never called Shepard to testify, but the court permitted the jury to hear out-of-court statements by Shepard and others to prove Dixon's guilt. Appellant contends Shepard's statements constituted inadmissible hearsay and that other witnesses' references to Shepard's remarks violated Dixon's right to confrontation under the Sixth Amendment. In his sixth issue, Dixon complains the trial court erred in allowing "incomplete misleading hearsay text messages" between Appellant and Shepard to be admitted, in violation of the hearsay rule and Rule of Evidence 403.

A. Admissibility of Hearsay Statements by Shepard Regarding Dixon's Role in Murder for Remuneration Plan

Dixon was the first to elicit hearsay testimony about what Shepard said to Detective Johnson during the murder investigation. Pursuing a trial theme that Reynolds, not Appellant, assisted and encouraged Shepard to murder Sonnier, Dixon's counsel asked Detective Johnson whether Shepard had implicated Reynolds when discussing the murder. Johnson said Shepard had implicated Reynolds. During redirect examination, Johnson was then asked whether Shepard had implicated anyone else. Dixon lodged no objection during the following exchange:

> Q. You were asked whether David Shepard had implicated Paul Reynolds in this murder?
>
> A. Yes, sir.
>
> Q. Did David Reynolds—I mean, did David Shepard implicate Mike Dixon in this murder?
>
> A. Yes, sir, he did.

Only when the State asked Johnson for details of Dixon's alleged involvement in the murder did Appellant object.[4]

[4] No objection under the Confrontation Clause was made.

Reynolds also took the stand and testified[5] about Dixon's role in assisting Shepard in murdering Sonnier. The following exchange with the State's attorney occurred:

> Q. Did you give [Shepard] any advice about how to kill someone?
>
> A. No.
>
> Q. Did [Shepard] tell you anything about— . . . let me ask you this first. Did he tell you anything about the Defendant paying him to do this?
>
> A. Yes, he did.
>
> Q. And what did he tell you about that?
>
> A. He said Dixon paid him in silver bars, three silver bars for it . . .
>
> Q. And, again, you relayed this to law enforcement when you gave your statement; is that correct?
>
> A. I believe so.
>
> Q. And Shepard told you that he had—that the Defendant had given him—or was giving him three silver bars to do this?
>
> A. That's correct.

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[5] Prior to Reynolds taking the stand, counsel for Dixon lodged a hearsay objection. The district court ruled, "I'm going to allow him to testify about what was said, not any statements that he made." Counsel later urged an objection under the Confrontation Clause. No ruling was obtained.

Q. Did he even tell you what a value that was?

A. He said he thought the bars were worth about $3,000.00 a piece, $9,000.00.

Counsel for the State later clarified with Reynolds about what he understood Shepard had agreed to perform in exchange for the silver bars. Counsel asked, "Let's go back to these silver bars that Shepard had told you about. He said the Defendant gave him three silver bars for this murder. Is that what your understanding is?" Reynolds replied, "That's what he said." In addition, when the prosecutor asked Reynolds how Shepard obtained the gun used to shoot Sonnier, he responded Shepard had said, "Mike Dixon gave it to him."

During further cross-examination, *Dixon* introduced into evidence a transcript of the detectives' recorded interview of Reynolds to identify inconsistencies with his testimony. This exhibit also documents Reynolds saying that Shepard admitted Dixon was involved in Sonnier's murder; that Dixon paid three bars of silver to Shepard; and that Dixon provided the gun used to shoot Sonnier. Dixon's attorney also elicited the following testimony from Reynolds:

Q. And you knew that [Mike Dixon's] investment in the allergy business was the silver bars, didn't you?

A. Oh, no, not at all.

Q. So you told Mike that Dave paid to kill—that Mike paid Dave to kill Dr. Sonnier. That's what you told the police?

A. That's what Shepard told me.

We hold the trial court did not commit reversible error in admitting evidence regarding what Shepard said about Dixon's role in murdering Sonnier, that the gun used to shoot Sonnier was owned by Dixon, and that Dixon paid Shepard with three silver bars as remuneration for Sonnier's murder. First, despite efforts by Dixon to assert hearsay and Confrontation Clause objections to some testimony regarding what Shepard told others, the same evidence of Dixon's remuneration and agreement with Shepard was presented to the jury at other times without a timely objection. Dixon even introduced some of this evidence by his questions and an admitted exhibit. Thus, no reversible error is presented. *Taylor v. State*, 109 S.W.3d 443, 449 n.25 (Tex. Crim. App. 2003) ("Where the same evidence or argument is presented elsewhere during trial without objection, no reversible error exists."); *Moore v. State*, No. 07-13-00270-CR, 2014 Tex. App. LEXIS 4517, at *3 (Tex. App.—Amarillo Apr. 24, 2014, no pet.) (per curiam) (mem. op., not designated for publication) (alleged error regarding the admission of evidence "is cured when the same evidence comes in elsewhere without objection"). *See also* TEX. R. APP. P. 33.1(a)(1)(A).[6]

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[6] This same rule also demonstrates the absence of error in the trial court's admission of testimony from Haley Shepard

Second, even if Dixon had preserved his hearsay objections to statements by Shepard regarding Dixon's alleged agreement to murder Sonnier, Reynolds's testimony about what Shepard said would be proper under the statement-against-interest exception to the hearsay rule. *See* TEX. R. EVID. 803(24); *Dewberry v. State*, 4 S.W.3d 735, 751 (Tex. Crim. App. 1999) (noting that "[a] statement which is self-inculpatory can be admissible against a defendant who was not the declarant of the statement.").[7] Under that statement-against-interest exception, Shepard's statements as related by Reynolds from the stand are admissible under the Rules of Evidence if:

> (A) a reasonable person in [Shepard's] position would have made [the statement] only if [Shepard] believed it to be true because, when made, it was so contrary to [Shepard's]

(David Shepard's daughter), who testified Shepard said he "did some work for [Appellant] and he paid me early." Shepard also allegedly instructed his daughter not to ask about the type of work he had performed. However, Appellant elicited the same testimony from Haley Shepard, curing any error posed by the jury's hearing this testimony.

[7] Johnson's testimony about what Reynolds told him Shepard had said constitutes hearsay within hearsay. TEX. R. EVID. 805 (permitting admissibility of hearsay within hearsay if "each part of the combined statements conforms with an exception to the rule."). Excepting what Shepard told Reynolds from the hearsay rule per TEX. R. EVID. 803(24) does not address that Reynolds's out-of-court statements to Johnson also constitute hearsay. Any error in admitting Johnson's statements, however, are harmless given that the same information came in through a variety of other sources, including through Reynolds and Dixon's admission of the interview transcript.

> proprietary or pecuniary interest or had so great a tendency to . . . expose [Shepard] to civil or criminal liability or to make [Shepard] an object of hatred, ridicule, or disgrace; and
>
> (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose [Shepard] to criminal liability.

See TEX. R. EVID. 803(24). When assessing whether there are sufficient corroborating circumstances that clearly indicate the statement's trustworthiness, the Texas Court of Criminal Appeals provides that the trial court should consider: (1) whether the declarant's guilt is inconsistent with the defendant's guilt, (2) whether the declarant was so situated that he might have committed the crime, (3) the declaration's timing, (4) the declaration's spontaneity, (5) the relationship between the declarant and the party to whom the statement is made, and (6) the existence of independent corroborative facts. *Love v. State*, No. AP-77,085, 2021 Tex. Crim. App. Unpub. LEXIS 187, at *78 (Tex. Crim. App. Apr. 14, 2021); *Dewberry*, 4 S.W.3d at 751. When, as here, Shepard's statements are being offered by the State to inculpate Dixon, the first two factors are "not relevant." *Id.* (citing *Woods v. State*, 152 S.W.3d 105, 113 (Tex. Crim. App. 2004)).

We hold Reynolds's testimony about statements attributed to Shepard constitute admissible statements against interest, as they subjected Shepard to criminal liability for murder for remuneration.

Moreover, we hold the statements bear sufficient indicia of trustworthiness. Shepard spontaneously made the statements to Reynolds, whom Dixon describes in his brief as Shepard's "roommate, life-long friend, and best man at his wedding," mere days after the murder and during a time Shepard was experiencing signs of personal distress. *See Woods*, 152 S.W.3d at 113 (holding that the timing and spontaneity of statements against interest tend to establish their reliability). When a declarant makes incriminating statements to individuals with whom he shares a close relationship, there exist fewer trustworthiness concerns than if the statement had been made to someone outside his circle, such as members of law enforcement. *See Love*, 2021 Tex. Crim. App. Unpub. LEXIS 187, at *78 (incriminating statements made by declarant to friends and cousin whom declarant sought to recruit into murder-for-hire scheme bore sufficient indicia of trustworthiness in murder trial against co-conspirator); *Hernandez v. State*, No. 13-17-00271-CR, 2018 Tex. App. LEXIS 5766, at *19-20 (Tex. App.—Corpus Christi July 26, 2018, pet. ref'd) (mem. op., not designated for publication) (admission by declarant to fellow gang member that he, in conjunction with co-conspirator, had robbed game room was sufficiently trustworthy as an admissible statement against interest in criminal trial against co-conspirator for engaging in organized criminal activity and aggravated assault).

Third, abundant evidence also independently corroborates Shepard's statements regarding a murder

for remuneration agreement with Dixon, including (1) Dixon's testimonial admission that he paid Shepard in silver bars; (2) with Dixon's permission, Shepard sold one of the bars the day after Sonnier's murder; (3) Dixon communicating with Shepard throughout the time he knew Shepard was at Sonnier's home leading up to the murder; and (4) the pistol Shepard said he used to shoot Sonnier belonged to Dixon. Shepard's hearsay statements that Dixon paid Shepard three bars of silver to murder Sonnier was therefore admissible as a statement against interest. *See* TEX. R. EVID. 803(24).

B. Dixon's Right to Confront Shepard Regarding his Statements of the Murder for Remuneration Plan

The Sixth Amendment's Confrontation Clause bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). "Testimonial" statements include those "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 52. At minimum, testimonial statements pertain "to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 68. On the other hand, remarks made under more informal circumstances, such as those to family members or friends,

are generally not testimonial under the Confrontation Clause. *Id.* at 52; *Woods*, 152 S.W.3d at 113 (declarant's statements about murder to acquaintances at coffee shop were non-testimonial); *Mata v. State*, No. 04-07-00146-CR, 2008 Tex. App. LEXIS 5084, at *18 (Tex. App.—San Antonio July 9, 2008, pet. ref'd) (mem. op., not designated for publication) (declarant's statements to vehicle passengers that he had shot a girl in the head held to be non-testimonial); *Gongora v. State*, 214 S.W.3d 58, 61 (Tex. App.—Fort Worth 2006, pet. ref'd) (declarant's admission to fellow gang member that he and appellant took part in murder held to be non-testimonial).

Shepard's admissions to Reynolds about murdering Sonnier pursuant to his agreement with Dixon did not violate Appellant's rights under the Confrontation Clause because they were non-testimonial, and because Dixon failed to preserve error to each statements' admission with a specific, timely objection. TEX. R. APP. P. 33.1(a). Further, Shepard's other statements, including those he made to law enforcement,[8] are cumulative of those that were otherwise admitted at trial or are merely tangential to the evidence of the murder-for-hire agreement. *McNac v. State*, 215 S.W.3d 420, 424-25 (Tex. Crim. App. 2007) (finding no harm beyond

[8] These include Shepard's statements concerning the following: (1) the route Shepard took from Amarillo to Sonnier's home in Lubbock; (2) Shepard's concern that his cell phone would disclose his location; (3) the route Shepard took to avoid highway cameras; (4) Shepard's awareness of "burner phones"; and (5) Appellant's destruction of his old computer and obtaining a new computer " 'to cover his tracks.' "

a reasonable doubt when unchallenged evidence was cumulative of evidence admitted in violation of the Confrontation Clause); TEX. R. APP. P. 44.2(a). The trial court did not commit reversible error in allowing the jury to receive Shepard's out-of-court statements detailing Dixon's role in the plot to murder Sonnier.

C. Hearsay / Unfair Prejudice Objections Regarding Dixon's Text Messages with Shepard

In his sixth issue, Dixon complains the trial court erred in allowing "incomplete misleading hearsay text messages" with Shepard to be admitted, in violation of the hearsay rule and Rule of Evidence 403. Documentary evidence and Dixon's own testimony show that before and on the day Shepard murdered Sonnier, Appellant and Shepard were communicating over their mobile phones via text message. Appellant testified that a few days after the murder, in an effort to conceal his messages from law enforcement, he attempted to delete all messages from his mobile phone. When that effort was not fruitful, Dixon entered his swimming pool with the phone to attempt to destroy the messages.[9] Appellant later removed the phone's SIM card and placed it in another mobile phone. Unbeknownst to Dixon, his phone had already synced with his laptop computer, where at least some of his messages were saved and later recovered.

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[9] On cross-examination by Dixon, Lubbock police detective Trent McNeme similarly testified that Shepard told him Dixon obtained a new computer for the purpose of "cover[ing] tracks."

At a hearing outside the presence of the jury, Dixon argued the messages constituted hearsay, violated his right to confrontation, and were misleading due to the absence of some deleted messages. An expert called by the State was unable to recover additional data from Dixon's phone because it had been reset to its factory settings. At trial, Dixon took the stand in his own defense and sought to explain the meaning of his communications with Shepard and why he attempted to delete the text messages.

Even assuming their contents were offered for the truth of the matter asserted, *see* TEX. R. EVID. 801(d)(2), we hold the text message statements between Dixon and Shepard were non-hearsay. TEX. R. EVID. 801(e)(2)(A), (D), (E) (including as non-hearsay opposing party's statements, statements by agent during scope of relationship, and statements by co-conspirator during furtherance of conspiracy). And for the reasons similar to those explained above, we find no violation of Dixon's rights under the Confrontation Clause because the text messages exchanged between Dixon and Shepard are non-testimonial.

We are also unmoved by Dixon's argument that because some text messages could not be recovered, considerations of "context" required the trial court to exclude the remaining messages. Dixon attempted to obstruct the police investigation by destroying all text messages with Shepard; his efforts failed for some of the messages. Dixon's problem is of his own making. We decline Dixon's invitation to exclude from

consideration the messages he unsuccessfully attempted to conceal through his own acts.

Moreover, the probative value of the text message exchange was not substantially outweighed by danger of any of the unfairness factors identified in TEX. R. EVID. 403. The evidence permitted the jury to test the veracity of Dixon's defense that he had merely agreed for Shepard to install a camera at Sonnier's home that would surreptitiously video Sonnier's alleged unfaithfulness. In other words, it permitted the jury to question that if merely installing a camera was the agreed-upon plan, why would Dixon and Shepard await Sonnier's arrival or Dixon encourage Shepard to be patient in lying in wait for Sonnier?

We hold the district court did not err in admitting the challenged statements. We also conclude beyond a reasonable doubt that in light of all the evidence, any error in admitting the challenged statements did not contribute to Appellant's conviction. *See* TEX. R. APP. P. 44.2(a). We overrule Appellant's issues three through six.

Admission of Evidence Regarding Statements by Shepard to Haley Shepard (Issues 7-8)

Through his seventh and eighth issues, Appellant argues the trial court abused its discretion in allowing Haley Shepard to opine she did not believe her father was truthful when he testified in the prior trial that Appellant did not pay him to kill Sonnier. Under the

circumstances presented here, we find no reversible error in the trial court's admission of this testimony.

Prior to Haley's testimony, Appellant asked Monty Dixon, Dixon's brother, about the truthfulness of what Shepard said in the prior trial:

> Q. And then in this very courtroom [Shepard] told the truth that [Appellant] didn't have anything to do with planning, or paying, or participating in that murder, didn't he?
>
> A. Yes, sir.

During examination by the State, Monty admitted he had no idea whether Shepard had told the truth during his prior testimony.

When Haley took the stand, Appellant pressed onward with his theme that Shepard was truthful when he said he acted alone (or with Reynolds) in killing Sonnier. The following exchange occurred between Appellant's counsel and Haley:

> Q. Do you recall your father telling [Shepard's youngest daughter], "I'm going to tell the truth when I testify"?
>
> A. Yes.
>
> Q. And, "That [Appellant] did not pay me to kill Joseph Sonnier"? Do you remember him saying that?
>
> A. I do remember him saying that.

> Q. And he said, "I'm going to tell the truth when I testify." You recall him saying that?
>
> A. Yes.

On redirect examination, the State probed Haley about the alleged truthfulness of Shepard's statements:

> Q. [Appellant's counsel] asked you about [Shepard] telling the truth, and you sat through his testimony and watched that; is that correct?
>
> A. Yes.
>
> Q. Do you have an opinion whether or not he was being truthful?
>
> [Appellant's counsel]: Your Honor, this is absolutely, positively not permitted under the Rules of Evidence. She is not a truth polygraph detector, and I object to it.
>
> [The Court]: The Court will overrule your objection.
>
> [Appellant's counsel]: So the Court is going to allow her to express an opinion about whether he was telling the truth?
>
> [The Court]: I will.
>
> [Counsel for Appellant]: Okay. Your Honor, we object that that violates our rights under 5th and 14th Amendments to the United States Constitution and 105 of the Code of Criminal Procedure.
>
> [The Court]: That will be noted.

> Q. [Prosecutor to Haley]: Do you think he told the truth, Haley?
>
> A. I do not.

In 2015, Rule of Evidence 801's definition of "hearsay" was amended. Hearsay now means a statement that "(1) the declarant does not make while testifying at the *current* trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." TEX. R. EVID. 801(d)(1) (emphasis added to identify 2015 addition to hearsay definition). Shepard's statements to his daughter and testimony at the prior trial both constitute hearsay as defined by Rule of Evidence 801(d), as amended. Once Shepard's hearsay statements were admitted, Rule 806 permitted Shepard's credibility to be attacked by any evidence that would be admissible as if he had personally testified in the current trial. This permitted the State to elicit opinion evidence attacking Shepard's character for untruthfulness, per Rule of Evidence 608(a). *See Urrutia v. State*, 2019 Tex. App. LEXIS 10177, at *9-13 (Tex. App.—El Paso 2019, pet ref'd) (not designated for publication) (applying Rule 806 and finding no error in trial court's admission of testimony that non-testifying defendant had a bad reputation for truthfulness given prior admission of "buyer's guide" containing a hearsay declaration attributable to defendant).

Moreover, even if Haley's opinion about Shepard's truthfulness did not fall within Rule of Evidence 608, the trial court did not err in admitting the testimony because Dixon "opened the door" by eliciting earlier

testimony Shepard was telling the truth in the prior trial. Dixon sought to show the jury that Shepard was telling the truth when he said he acted alone in killing Sonnier. That opened the door to the State presenting evidence that Shepard was *not* telling the truth when he made those statements. *See Schutz v. State*, 957 S.W.2d 52, 71 (Tex. Crim. App. 1997) (holding that otherwise inadmissible evidence may be admitted if the party against whom the evidence is admitted opens the door, provided that the party offering the evidence does not "stray beyond the scope of the invitation.").

Because, under these circumstances, the district court did not err in admitting Haley Shepard's opinion testimony about the truthfulness of her father's prior claims that he acted alone in murdering Sonnier, Appellant's seventh and eighth issues are overruled.

Refusal to Admit Shepard's Recorded Interviews (Issues 9-10)

Through issues nine and ten, Dixon argues the trial court denied him the opportunity to present a defense when it sustained objections to Dixon's efforts to introduce into evidence two recorded interviews of Shepard. The Court of Criminal Appeals has identified two occasions in which a trial court's error in excluding evidence may violate the constitutional rights of a criminal defendant: (1) when an evidentiary rule categorically and arbitrarily prohibits the defendant from offering relevant evidence that is vital to his defense; or (2) when a trial court erroneously excludes relevant

evidence that is a vital portion of the case and the exclusion effectively precludes the defendant from presenting a defense. *Ray v. State*, 178 S.W.3d 833, 835 (Tex. Crim. App. 2005). Dixon argues for application of the second category, i.e., that the district court's exclusion of Shepard's recorded interviews unconstitutionally restrained Appellant from presenting the defense that Shepard acted alone. For reasons explained below, we disagree with Appellant's contention that the trial court committed reversible error.

"That [the defendant] was unable to . . . present his case to the extent and in the form he desired is not prejudicial where, as here, he was not prevented from presenting the substance of his defense to the jury." *Potier v. State*, 68 S.W.3d 657, 666 (Tex. Crim. App. 2002) (en banc) (quoting *United States v. Willie*, 941 F.2d 1384, 1398-99 (10th Cir. 1991)). We hold Appellant was not prevented from presenting the substance of his defense to the jury. Dixon testified that Shepard acted alone in killing Sonnier. Shepard, the alleged corroborating witness, was available in the Lubbock County Jail during the entirety of Dixon's trial, but neither side elected to call him to testify. In light of the other available evidence, the district court's exclusion of the recordings did not unconstitutionally preclude Dixon from presenting his defense. *See Ray*, 178 S.W.3d at 836 (holding exclusion of corroborating witness did not unconstitutionally preclude defendant from showing she did not possess drugs when she testified to the same); *Vanwinkle v. State*, No. 02-09-00200-CR, 2010 Tex. App. LEXIS 8686, at *8 (Tex.

App.—Fort Worth Oct. 28, 2010, pet ref'd) (mem. op., not designated for publication) (exclusion of evidence that affects the "method" for presenting a defense is not of constitutional dimension when other means of presenting the defense remain available).

We next look to whether any error in excluding Shepard's interview recordings constitute harm, per Appellate Rule 44.2(b). *See* TEX. R. APP. P. 44.2(b). In *Ray*, the Court of Criminal Appeals held that although the trial court's erroneous exclusion of third-party witness testimony was not of a constitutional dimension, the error was reversible under the Rules of Appellate Procedure due to the prejudice the ruling caused in preventing the defendant from presenting evidence "which would have corroborated and given independent credibility to the defense she sought to establish." *Ray*, 178 S.W.3d at 836. Unlike in *Ray*, however, Appellant's complaint is not that Shepard was excluded from testifying. We do not know if Shepard would have testified whether Dixon had any role in Sonnier's murder because he was never called to the stand. Appellant's decision to not elicit testimony from an unpredictable witness may reflect his difficult, albeit not uncommon, trial dilemma, but militates against an argument he was barred from presenting such evidence due to the trial judge's ruling. We, therefore, conclude that, in the context of the entire case against Appellant, any error in excluding Shepard's interview recordings did not have a substantial or injurious effect on the jury's verdict and did not affect Appellant's substantial rights. *McKinney v. State*, 59 S.W.3d 304, 313 (Tex. App.—Fort

Worth 2001, pet. ref'd). Appellant's issues nine and ten are overruled.

Admission of Victim Character Evidence (Issues 21-22)

By issues twenty-one and twenty-two, Appellant argues the trial court abused its discretion by admitting alleged victim character evidence during the guilt/innocence phase of trial.[10] The State offered twelve Sonnier family photographs for admission into evidence. Appellant objected. This colloquy followed:

> [Appellant's counsel]: There's 12 pictures that appear to be just simple victim impact evidence, and so we object on that basis. I think we had this same problem last time and you allowed, I believe, one of them in but not all 12, so we object for that reason. It's more prejudicial than it is probative.
>
> [Prosecutor]: The Court also knows where this is going. The Court ultimately allowed all of them in, because what Defense will do is paint Dr. Sonnier as some type of crazed

[10] We hold that Appellant's generic "due process" objection was not specific enough to sufficiently apprise the trial court of a constitutional complaint. *See Hooks v. State*, 144 S.W.3d 652, 654 (Tex. App.—Beaumont 2004, no pet.) (stating "[a]lthough [appellant] tendered a general state and federal due process challenge to the entire sex offender registration statute, the particular provisions of the act that are challenged on appeal were not mentioned in the trial court. Likewise, no specific due process arguments or authorities were presented to the trial court.").

> womanizer, some morally bankrupt man, and so we have the right to rebut that charge.
>
> [The Court]: The Court will overrule your objection and admit [the photographs].
>
> [Appellant's counsel]: Make sure we're clear we're objecting this is victim impact testimony and due process clause.

Victim character evidence is generally recognized as "evidence concerning good qualities possessed by the victim." *Mathis v. State*, 67 S.W.3d 918, 928 (Tex. Crim. App. 2002) (citing *Mosley v. State*, 983 S.W.2d 249, 261 (Tex. Crim. App. 1998) (internal quotation marks omitted)). Such evidence is not probative of guilt or innocence and therefore inadmissible "at the guilt-innocence phase of a trial because it does not tend to make more or less probable the existence of any fact of consequence with respect to guilt or innocence." *Love v. State*, 199 S.W.3d 447, 456-57 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (citing *Miller-El v. State*, 782 S.W.2d 892, 895 (Tex. Crim. App. 1990)).

Error in the admission or exclusion of evidence under the rules of evidence is generally reviewed for non-constitutional error. *See Walters v. State*, 247 S.W.3d 204, 219 (Tex. Crim. App. 2007) ("The erroneous exclusion of evidence offered under the rules of evidence generally constitutes non-constitutional error."). Under this standard, an appellate court must disregard a non-constitutional error that does not affect a criminal defendant's "substantial rights." TEX. R. APP. P. 44.2(b). An error affects a substantial right of the defendant

when the error has a substantial and injurious effect or influence in determining the jury's verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997); *Lynch v. State*, No. 01-15-00421-CR, 2016 Tex. App. LEXIS 4755, at *17-19 (Tex. App.—Houston [1st Dist.] May 5, 2016, pet. ref'd) (mem. op., not designated for publication). To determine if non-constitutional error had a substantial or injurious influence on the jury's verdict, we consider the following:

> [E]verything in the record, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, and the character of the alleged error and how it might be considered in connection with other evidence in the case.

Barshaw v. State, 342 S.W.3d 91, 94 (Tex. Crim. App. 2011); *Lynch*, 2016 Tex. App. LEXIS 4755 at *15.

After considering the record as a whole consistent with the instruction from the Court of Criminal Appeals, we hold that any error by the district court in admitting Sonnier's photographs into evidence was harmless. The State marshalled a substantial body of evidence over a lengthy trial to prove Appellant's guilt. We affirmed the sufficiency of that evidence to prove Appellant's guilt in our earlier opinion, and that determination was not overturned on further appeal. The State's introduction of the twelve photographs were admitted, in part, to rebut Dixon's introduction of evidence to attack Sonnier's character. While none of this evidence was relevant to determination of Appellant's

guilt or innocence, we do not find that introduction of the photographs had a substantial or injurious effect or influence in determining the jury's verdict in light of all the other evidence. *See* TEX. R. APP. P. 44.2(b); *Lynch*, 2016 Tex. App. LEXIS 4755 at *18-19 (holding that trial court's improper admission of victim-character evidence harmless given the other evidence of defendant's guilt). Appellant's twenty-first and twenty-second issues are overruled.

Part III: Comments During Jury Selection

Trial Court Comments During Voir Dire (Issue 18)

In his eighteenth issue, Dixon argues the district court erred by improperly commenting on the weight of the evidence. At a bench conference[11] during jury selection, the attorneys were involved in a discussion regarding venirepersons' answers to questions about whether they would consider probation as punishment if Dixon were convicted of manslaughter. The following exchange occurred:

> [Prosecutor, discussing venireperson]: I mean, he's not challengeable for cause under this fact pattern. This is, again, just another way of trying to get good jurors excused for cause,

[11] A bench conference has been found to be a hearing outside the presence of the jury, satisfying the requirement of Rule of Evidence 103. *Haley v. State*, 173 S.W.3d 510, 517 (Tex. Crim. App. 2005) (discussing former Rule 103(a)).

> when the fact pattern is no way in the world supporting manslaughter in this case.
>
> [The Court]: I would agree.
>
> [Appellant's Counsel]: Well, Judge, it was in the jury charge last time.
>
> [The Court]: I know it was in the jury charge. *That doesn't necessarily mean the Court thinks that the jury is going to return a verdict finding the person guilty of that charge based on the Court's recollection of the evidence.*
>
> [Appellant's Counsel]: I understand. That's why we have juries though.
>
> [The Court]: I understand that.
>
> [Appellant's Counsel]: But to be qualified for this jury to be qualified—they have to be qualified to give punishment and consider every –
>
> [The Court]: If they were to find a person guilty of that particular charge.
>
> [Appellant's Counsel]: Exactly.
>
> [The Court]: And that's where the Court's decision as to whether or not to excuse people for something on a lesser offense that might not necessarily be convicted of but be raised.
>
> [Appellant's Counsel]: I'm just saying, Judge, I'm afraid you're injecting reversible error from the beginning –

(emphasis added).

According to Dixon, the trial court's statement, "That doesn't necessarily mean the Court thinks that the jury is going to return a verdict finding the person guilty of that charge based on the Court's recollection of the evidence," constitutes an improper comment on the weight of the evidence because it predisposed the venire "to reject consideration of lesser punishment and lesser included offenses." We disagree. The record reflects the trial court's comments were made outside the jury's presence. Fundamental to the premise that the trial court erred in making a comment predisposing the jury against the Appellant is the requirement that jurors (or potential jurors) must hear it. Much like the proverbial tree that falls in the woods, a judge's statement cannot be said to unfairly benefit the State or prejudice the jury against the defendant when no juror is around to hear it. Appellant's eighteenth issue is overruled.

Prosecutor's Statements During Voir Dire (Issues 19-20)

Through issues nineteen and twenty, Appellant argues the State's attorney unfairly prejudiced the jury when he told the venire during jury selection that he does not try people who are not guilty. The prosecutor stated:

> If I'm going to sit somebody down and accuse them of the most serious crime that the State of Texas has, I dang sure better be able to prove it. If I don't, find him not guilty. I'm not scared of those words, okay? My job—If you go

> to our office and you look above our reception, in our grand jury room and in my office above my desk is a sign that simply says, "It's the duty of the prosecutor to seek justice." Not to gain convictions, but to seek justice. When it describes my job, it says in this book and all these different colored books that we have, it says my job is to seek justice. Sometimes that's not done. Y'all have heard of Timothy Cole here, right? Okay. Timothy Cole was a guy that was tried and prosecuted when I was in school, and he was convicted of a rape he didn't commit, okay? He's got a statue now that's over—kind of in his honor over there by Texas Tech. Anybody know how Timothy Cole got exonerated?

Appellant's counsel then asked to approach the bench. Before the bench, counsel stated:

> I've heard [the prosecutor] say that he is the one who exonerated Tim Cole on more than one occasion. And because of that I've done a little research and talked to some witnesses, and if he's going to say that again to this jury right now we want to present evidence on that later on because he is making this issue relevant in front of this jury.

An exchange between the attorneys ensued. The trial court then intervened, stating:

> Time out. I'm well aware of who Mr. Cole is and all that. I don't have a problem y'all talking about it, but leave it at DNA testing being done and that will be the end of it.

The prosecutor responded, "All right," and the State resumed its voir dire, picking up with the following: "We were talking about the exoneration of Timothy Cole, and it was done because DNA was requested by our office to show that he didn't commit that crime, okay? That's justice in that case." Appellant's counsel made no objection to the prosecutor's remarks, but further discussed Cole's conviction and exoneration to illustrate to the venire why innocent people sometimes go to prison.

When a prosecutor injects personal opinion in statements to a jury, such a statement "encourages jurors to conclude that a defendant is 'necessarily guilty because he was being tried.'" *Escobar v. State*, No. 01-13-00496-CR, 2015 Tex. App. LEXIS 3624, at *3 (Tex. App.—Houston [1st Dist.] Apr. 14, 2015 pet. ref'd) (mem. op., not designated for publication) (quoting *Mendoza v. State*, 552 S.W.2d 444, 447 (Tex. Crim. App. 1977)). It is unnecessary to take a position on whether the prosecutor's remarks were improper because the error was not preserved for appellate review. As noted earlier in this opinion, Appellate Rule 33.1 ordinarily requires a party to make a specific, timely objection before it can preserve an alleged error for appellate review. TEX. R. APP. P. 33.1(a). Dixon's attorney lodged no objection, but indicated a desire to present additional evidence to challenge the prosecutor's statement that Cole's exoneration was the result of the State's efforts.

In apparent recognition of his failure to preserve error, Appellant now attempts to invoke the "plain error" doctrine that is referenced in Federal Rule of

Criminal Procedure 52(b). Texas does not have a procedural rule that is a direct counterpart to Rule 52(b),[12] although Rule of Evidence 103(e) permits a court to "take notice of a fundamental error affecting a substantial right, even if the claim of error was not properly preserved." TEX. R. EVID. 103(e). In *Marin v. State*,[13] the Court of Criminal Appeals categorized a litigant's rights in three groups: (1) systemic rights: "absolute requirements and prohibitions;"[14] (2) waivable rights: "rights of litigants which must be implemented by the system unless expressly waived;"[15] and (3) forfeitable rights: "rights of litigants which are to be implemented upon request."[16] *Id.* at 279. For purposes of

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[12] *See Thomas v. State*, No. 08-14-00095-CR, 2015 WL 6699226, 2015 Tex. App. LEXIS 11311 (Tex. App.—El Paso Nov. 3, 2015, pet ref'd) (not designated for publication).

[13] 851 S.W.2d 275, 279 (Tex. Crim. App. 1993), *overruled on other grounds by Cain v. State*, 947 S.W.2d 262 (Tex. Crim. App. 1997).

[14] These are rights "which are essentially independent of the litigants' wishes. Implementation of these requirements is not optional and cannot, therefore, be waived or forfeited by the parties." *Sanchez v. State*, 120 S.W.3d 359, 366 (Tex. Crim. App. 2003) (citing *Marin*, 851 S.W.2d at 279.)

[15] These are rights that cannot be forfeited. "That is to say, they are not extinguished by inaction alone. Instead, if a defendant wants to relinquish one or more of them, he must do so expressly." *Sanchez*, 120 S.W.3d at 366 (citing *Marin*, 851 S.W.2d at 278-79).

[16] A party must "insist upon [the implementation of these rights] by objection, request, motion, or some other behavior calculated to exercise the right in a manner comprehensible to the system's impartial representative, usually the trial judge. . . . The trial judge as an institutional representative has no duty to enforce forfeitable rights unless requested to do so." *Sanchez*, 120

Dixon's argument on appeal, we will assume Appellant's "plain error" argument intends to claim the prosecutor's statements about Timothy Cole violate the first or second *Marin* categories and may be raised for the first time on appeal. *See Proenza v. State*, 541 S.W.3d 786, 795 (Tex. Crim. App. 2017) (identifying "fundamental error" described in Rule 103(e) as the first two categories of rights in *Marin*).

After a careful review of the prosecutor's statements in the context of the entire record, we hold that assuming such statements were improper, they did not prejudice Dixon via "fundamental error." The record indicates the statements occurred alongside significant discussion by the prosecutor regarding the presumption of innocence and the State's burden of proof, undermining a finding of fundamental error. *Escobar*, 2015 Tex. App. LEXIS 3624, at *10. Any harm in the prosecutor's references to Timothy Cole was further mitigated once Appellant's counsel also referred to Cole as a warning of how innocent people can be convicted. "Fundamental error must be so egregious it prevents a fair and impartial trial." *Escobar*, 2015 Tex. App. LEXIS 3624, at *4 (quoting *Beltran v. State*, 99 S.W.3d 807, 811 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd)). Mr. Cole was used as an example by both sides and in support of their perspectives about the

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S.W.3d at 366 (citing *Marin*, 851 S.W.2d at 279-80). "[W]hen a defendant fails to assert his forfeitable rights at trial, no error attends failure to enforce them and none is presented for review on appeal." *Id.* (citing *Marin*, 851 S.W.2d at 280) (internal quotation marks omitted).

burden of proof. In light of the entire record, the prosecutor's statements did not constitute fundamental error because they neither bore on the presumption of innocence nor vitiated the impartiality of the jury.

Because we find no fundamental error arising from the prosecutor's statements, Dixon was required to interject a timely, specific objection to such statements in order to preserve his complaint for appellate review. Dixon failed to do so, so his nineteenth and twentieth issues are overruled.

Part IV: Challenges for Cause

Through his twenty-fourth and twenty-fifth issues, Appellant argues the trial court erred by refusing to strike for cause venirepersons who indicated they could not consider probation as punishment for conviction of the lesser-included offense of manslaughter and he was therefore harmed because the jury selected included those who would not follow the law. Appellant also injects into his consolidated argument of these two issues complaints that the trial court reversibly erred by denying other defense challenges for cause and for refusing to grant additional peremptory challenges.

"Both the State and defense are entitled to jurors who can consider the entire range of punishment for the particular statutory offense—*i.e.*, from the maximum to the minimum and all points in between." *Cardenas v. State*, 325 S.W.3d 179, 184 (Tex. Crim. App. 2010). "Jurors must be able to consider both 'a situation in which the minimum penalty would be

appropriate and . . . a situation in which the maximum penalty would be appropriate.'" *Id.* (quoting *Fuller v. State*, 829 S.W.2d 191, 200 (Tex. Crim. App. 1992)). "Therefore, both sides may question the panel on the range of punishment and may commit jurors to consider the entire range of punishment for the statutory offense." *Id.* (internal footnotes omitted). *Id.*

In the present case, the jury convicted Appellant of capital murder. Because his life sentence without the possibility of parole was mandated by statute, *see* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 1, the jury was not asked to consider Appellant's punishment. The Court of Criminal Appeals has previously held any error by a trial court's refusal to grant a defendant's for-cause challenges would be harmless when the punishment range of a lesser-included offense was never considered due to the defendant's conviction for capital murder. *King v. State*, 953 S.W.2d 266, 268 (Tex. Crim. App. 1997). We similarly conclude that despite Appellant's complaint about the trial court's refusal to strike potential jurors who refused to consider probation as punishment for the offense of manslaughter, any error was harmless when Appellant was convicted of capital murder.

Appellant appends to the argument a complaint that he was forced to peremptorily challenge seven venirepersons (numbers 1, 6, 7, 24, 39, 50, and 54) who should otherwise have been stricken for cause. Appellant's request of the trial court for additional peremptory challenges "to try to cure this error" was denied. Preservation of error when a challenge for cause is

denied requires an appellant demonstrate on the record that: "1) he asserted a clear and specific challenge for cause; 2) he used a peremptory challenge on the complained-of venireperson; 3) all his peremptory challenges were exhausted; 4) his request for additional strikes was denied; and 5) an objectionable juror sat on the jury." *Feldman v. State*, 71 S.W.3d 738, 744 (Tex. Crim. App. 2002). The requirement of a "clear and specific challenge for cause" ensures the defendant alerts the trial court of his complaint at a time when the court has an opportunity to respond and cure the complaint. *Comeaux v. State*, 445 S.W.3d 745, 749 (Tex. Crim. App. 2014) (citing *Loredo v. State*, 159 S.W.3d 920, 923 (Tex. Crim. App. 2004)).

Appellant argues Venireperson number 1 should have been stricken for cause because she could not judge people, and that Venireperson number 39 should have been stricken because she was a victim and could not be fair. We are not directed to, nor do we find, a location in the record where Appellant asserted a clear and specific challenge for cause of Venirepersons number 1 or 39. We hold error was not preserved for review. *See* TEX. R. APP. P. 33.1(a).

Appellant next asserts Venireperson number 6 should have been stricken for cause because she would credit law enforcement over other testimony, and that Venireperson number 50 should have been stricken due to friendship with two testifying police officers. For preservation of these claimed errors, Appellant cites only to juror questionnaires contained in a sealed supplemental clerk's record. There is no indication

the trial court was made aware of the complaints Appellant now makes. Appellant's complaints on appeal regarding Venirepersons number 6 and 50 were not preserved for review. *See* TEX. R. APP. P. 33.1(a).

Appellant argues Venireperson number 24 should have been stricken for cause because she could not give her attention to the evidence if selected. Yet, in the portion of the record to which Appellant cites, Venireperson number 24 agrees with defense counsel that if selected she will give the evidence her "full, undivided attention." We have no indication Venireperson 24 was challenged for cause on the basis of an asserted inability to give attention to the evidence. Accordingly, this complaint is not preserved for appellate review. *See* TEX. R. APP. P. 33.1(a). If this is the intended basis for a challenge for cause which was denied, we hold that no abuse of discretion has been shown.

Appellant complains that Venireperson number 54 should have been stricken for cause because, on a second juror questionnaire, she checked a response agreeing that Appellant "might possibly be guilty." When questioned by the trial court, Venireperson number 54 acknowledged there was no reason she could not be a fair and impartial juror. Appellant's for-cause challenge to Venireperson number 54 was not based on the ground of her answer to the second juror questionnaire, but because she allegedly indicated a bias in favor of law enforcement witnesses. We hold the complaint raised in this issue was not preserved. *See* TEX. R. APP. P. 33.1(a); *Clark v. State*, 365 S.W.3d 333, 339

(Tex. Crim. App. 2012) (issues raised on appeal must comport with objections made at trial).

Finally, regarding Venireperson number 7, Dixon argues she should have discharged without further inquiry from either party or the court because she allegedly expressed in her questionnaire an opinion about Appellant's guilt or innocence based on what she had heard or read about the case. During jury selection, Venireperson number 7 denied she was still of this opinion; she promised that, if selected, she would set aside anything she had heard or read about the case and decide the case based only on the evidence. Venireperson number 7 indicated her earlier opinion had been based on hearsay from the media, but she had since learned of the importance of evidence.

Texas Code of Criminal Procedure Article 35.16(a) provides in part that a "challenge for cause may be made by either the state or the defense for any one of the following reasons":

> That from hearsay or otherwise, there is established in the mind of the juror such a conclusion as to the guilt or innocence of the defendant as would influence the juror in finding a verdict. To ascertain whether this cause of challenge exists, the juror shall first be asked whether, in the juror's opinion, the conclusion so established will influence the juror's verdict. If the juror answers in the affirmative, the juror shall be discharged without further interrogation by either party or the court. If the juror answers in the

> negative, the juror shall be further examined as to how the juror's conclusion was formed, and the extent to which it will affect the juror's action; and, *if it appears to have been formed from reading newspaper accounts, communications, statements or reports or mere rumor or hearsay, and if the juror states that the juror feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that the juror is impartial and will render such verdict, may, in its discretion, admit the juror as competent to serve in such case.* If the court, in its discretion, is not satisfied that the juror is impartial, the juror shall be discharged[.]

TEX. CODE CRIM. PROC. ANN. art. 35.16(a)(10) (emphasis supplied).

Venireperson number 7 made clear her questionnaire opinion would not influence her verdict because it was formed from media reports, and that she had since learned of the centrality of evidence in a trial and would make her decision only on the evidence received. We conclude the trial court did not abuse its discretion by denying Appellant's challenge for cause of Venireperson number 7.

Having found no error by the trial court in failing to strike for cause the seven venirepersons made the subject of Appellant's complaint in issues twenty-four and twenty-five, we also conclude the trial court did not err in refusing to grant Appellant six additional peremptory challenges corresponding to venirepersons

numbers 1, 6, 7, 39, 50, and 54 "to try to cure [the] error" of not striking these venirepersons for cause. Appellant's twenty-fourth and twenty-fifth issues are overruled.

Part V: Search Warrants

For Appellant's issues twenty-six through thirty-four, we examine the propriety of the district court's denial of Dixon's attempt to suppress evidence seized by law enforcement at his residence, medical office, and PASI. We review a trial court's ruling on a motion to suppress for abuse of discretion, using a bifurcated standard. *Guzman v. State*, 955 S.W.2d 85, 88-89 (Tex. Crim. App. 1997). Generally, with respect to a suppression ruling, the trial court's findings of historical fact supported by the record, as well as mixed questions of law and fact that turn on an evaluation of credibility and demeanor, are given "almost total deference[.]" *Id.* at 89. *See also Dunn v. State*, 478 S.W.3d 736, 742 (Tex. App.—Fort Worth 2015, pet. ref'd). A de novo standard is applied to a trial court's determination of the law and its application of law to the facts when such application does not turn on an evaluation of credibility and demeanor. *Id.* We will uphold a trial court's ruling on a motion to suppress if the ruling is reasonably supported by the record and correct under any theory of law applicable to the case. *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006).

Texas law requires that no search warrant issue without an affidavit stating facts establishing probable

cause. *See* TEX. CODE CRIM. PROC. ANN. art. 18.01(b), (c). In other words, a magistrate "may not issue a search warrant without first finding 'probable cause' that a particular item will be found in a particular location." *State v. Duarte*, 389 S.W.3d 349, 354 (Tex. Crim. App. 2012) (citation omitted). In our evaluation of a probable cause affidavit, we consider "whether a reasonable reading by the magistrate would lead to the conclusion that the four corners of the affidavit provide a 'substantial basis' for issuing the warrant." *Id.* at 354. Probable cause exists when, "under the totality of the circumstances, there is a 'fair probability' that contraband or evidence of a crime will be found at the specified location. This is a flexible, nondemanding standard." *Id.* (citations omitted).

We review the supporting affidavit "realistically, and with common sense," focusing on the combined logical force of the facts stated in the affidavit rather than on facts that are not stated. *Duarte*, 389 S.W.3d at 354 (citing *Rodriguez v. State*, 232 S.W.3d 55, 61 (Tex. Crim. App. 2007)). "When in doubt, we defer to all reasonable inferences that the magistrate could have made." *Rodriguez*, 232 S.W.3d at 61.

Affidavit Supporting Search Warrant for Appellant's Medical Office (Issues 26-28)

Through issues twenty-six, twenty-seven, and twenty-eight, Appellant argues the affidavit submitted by Detective Johnson was insufficient to establish probable cause for the search of Appellant's medical

office. Johnson stated in his affidavit that as a part of his employment by the Lubbock Police Department in the person crimes section, he was investigating the murder of Sonnier. Johnson stated his basis for connections between Sonnier and Dixon, included that both men had dated Shetina. During Johnson's interview with Paul Reynolds, Johnson learned Shepard told Reynolds he had, among other things, (1) admitted to killing Sonnier; (2) was in business with Dixon; (3) communicated with Dixon via electronic text message while surveilling Sonnier; (4) been paid by Dixon with three bars of silver in exchange for killing Sonnier; and (5) used Dixon's handgun to shoot Sonnier. Johnson also provided information gleaned from his interview with Reynolds and a meeting with Vicky Wheeler that Dixon, a medical doctor, stitched Shepard's wrists at his medical office after Shepard unsuccessfully attempted suicide in the days following Sonnier's murder.

Johnson expressed the opinion that Appellant's medical office contained electronic devices (including cell phones, computers and various storage devices) and other documentation relevant to the charged offense. Johnson noted he found it unusual that when a search was conducted at Dixon's residence, no computers were found. He reasoned that "it is a known possibility" that Dixon would have the computers and electronic devices at his medical office.

Appellant complains Johnson's affidavit is insufficient because it only points to where the items sought are not (i.e., because evidence of the crime was not at

Dixon's residence, it must be at his office). But we note that the magistrate was not required to hypertechnically analyze Johnson's affidavit. Rather, applying a reasonable, commonsense interpretation and drawing from its facts all reasonable inferences, the magistrate could determine from the affidavit that Appellant and Shepard were in business together; that Appellant agreed to pay Shepard three bars of silver for the murder of Sonnier; that Appellant provided a gun for Shepard; and that Shepard and Appellant communicated via electronic messaging while Shepard watched for Sonnier to arrive at home. The affidavit also permitted the magistrate to determine that four days after Shepard killed Sonnier, after normal business hours, Appellant and Shepard were seen together at Appellant's medical office for Appellant to stitch Shepard's cuts.

The affidavit permits the reasonable inference that Dixon must possess and use some device capable of transmitting electronic messages with Shepard. In 2012, medical offices contained computers and data storage devices; a surgeon in Dixon's position possesses some degree of computer literacy. Therefore, the magistrate was permitted to properly find there existed a fair probability or substantial chance that Appellant's medical office contained computers, mobile phones, and/or data storage devices possessing data and information about Sonnier's murder. If not in electronic form, tangible records relevant to the gun Appellant provided Shepard and payment for murder with silver bars also were contained inside Appellant's

medical office. Applying a high degree of deference to the magistrate's determination, as we must, we find that Johnson's affidavit concerning the requested search of Appellant's medical office presented a substantial basis for the magistrate's probable cause determination. Appellant's issues twenty-six, twenty-seven, and twenty-eight are overruled.

Affidavit Supporting Search Warrant for Appellant's Residence (Issues 29-31)

By issues twenty-nine, thirty, and thirty-one, Appellant argues the affidavit submitted by Detective Pena was insufficient to establish probable cause for the search of Appellant's residence. According to Pena's affidavit, she was employed by the Lubbock Police Department in the person crimes section, and investigating Sonnier's murder. She stated the opinion that Appellant possessed and was concealing at his residence a gun, ammunition, at least one knife possibly containing DNA evidence, computers and storage devices, clothing possibly containing blood and DNA evidence, cellular telephones, cameras, and paper documentation relevant to the murder of Sonnier.

Pena's affidavit contains statements of fact and opinion substantially similar to the previously-noted averments of Johnson. Pena added to the information Shepard had disclosed to Reynolds that Shepard sent Appellant several text messages while watching Sonnier "right before" Shepard killed Sonnier. We find that Pena's affidavit concerning the requested search of

Appellant's residence presented a substantial basis for the magistrate's probable cause determination. Appellant's issues twenty-nine, thirty, and thirty-one are overruled.

Affidavit Supporting Search Warrant for PASI (Issues 32-34)

Through issues thirty-two, thirty-three, and thirty-four, Appellant complains the affidavit supporting the warrant for searching the office of PASI, "does not contain facts sufficient to justify a conclusion that the objects of the search are probably on the premises to be searched at the time the warrant issued." The State responds that the claimed error was not preserved by pretrial motion to suppress or trial objection and was therefore forfeited.

In the trial court, Appellant requested a *Franks*[17] hearing to argue the affidavits supporting the search warrants issued contained materially-false information and omitted material information in reckless disregard of the truth. Assuming for this discussion that Appellant's motion for a *Franks* hearing sufficiently included a challenge of Johnson's affidavit pertaining to the search warrant for PASI, Appellant nevertheless failed to challenge the affidavit via the factual-insufficiency ground urged on appeal. A complaint on appeal must align with the complaint made in the trial court. *See Thomas v. State*, 723 S.W.2d 696,

[17] *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

700 (Tex. Crim. App. 1986) ("[I]f an objection made in the trial court differs from the complaint made on appeal, a defendant has not preserved any error for review"). Appellant's issues thirty-two, thirty-three, and thirty-four are overruled.

Sufficiency of Search Warrant for Appellant's Medical Office (Issues 35-37)

Through issues thirty-five, thirty-six, and thirty-seven, Appellant argues the trial court erred by failing to suppress the items seized during the search of his medical office because the search was accomplished under an unlawful general warrant. The State responds that of all the items seized from Appellant's medical office only an Apple laptop computer and router were received into evidence. The State also argues that Appellant's complaint was not preserved for appeal. We agree with the State.

"Because indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment, that Amendment requires that the scope of every authorized search be particularly described." *Walter v. United States*, 447 U.S. 649, 657, 100 S. Ct. 2395, 65 L. Ed. 2d 410 (1980) (internal quotation marks and citation omitted). "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another."

Marron v. United States, 275 U.S. 192, 196, 48 S. Ct. 74, 72 L. Ed. 231 (1927).

While the Fourth Amendment prohibits warrants allowing "general, exploratory rummaging in a person's belongings"[18] the accused is not relieved of the obligation to challenge an alleged general warrant via timely, specific objection. TEX. R. APP. P. 33.1(a). Issues on appeal must correspond or comport with objections and arguments made at trial. *Wright v. State*, 154 S.W.3d 235, 241 (Tex. App.—Texarkana 2005, pet. ref'd) (citing *Dixon v. State*, 2 S.W.3d 263, 273 (Tex. Crim. App. 1998)). When "a trial objection does not comport with the issue raised on appeal, the Appellant has preserved nothing for review." *Id.*; *see* TEX. R. APP. P. 33.1(a).

Appellant directs us to five locations in the record which he contends demonstrate the matter was sufficiently brought to the trial court's attention: three suppression motions, a brief, and the tenor of cross-examination questions posed of Johnson at the suppression hearing.[19] However, after a careful review of

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[18] *Walthall v. State*, 594 S.W.2d 74, 78 (Tex. Crim. App. 1980) (cleaned up).

[19] Appellant's motions and brief discussed the following:

- Via his first and second motions to suppress, Appellant argued the relief he sought was warranted because "evidence seized and obtained was the result of a search of the [Appellant's] property or places where he had an expectation of privacy without a valid search warrant and without probable cause. . . ."

Appellant's arguments alongside the record, we find no instance in which Dixon urged the general-warrants argument he now makes on appeal. Appellant's issues thirty-five, thirty-six, and thirty-seven are overruled.

Alleged Materially False Statements and Omissions in the Probable Cause Affidavits (Issues 38-39)

Through issues thirty-eight and thirty-nine, Appellant argues the affidavits offered in support of a warrant to search his residence, white mobile phone, and offices contain materially-false statements and material omissions, and that probable cause was accordingly dissipated.[20] An affidavit supporting a search warrant is presumed to be truthful. *Franks*, 438 U.S. at 171. But this presumption may be rebutted, and a *Franks* hearing is ordered, when "a defendant [ ] makes a substantial preliminary showing that a false statement was made in a warrant affidavit knowingly and

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- In a supplemental motion to suppress, Appellant "object[ed] to the illegal search of his office."
- In a reply brief concerning his requested suppression of items seized from Appellant's medical office, he complained, "The affiants gave the magistrate zero information to conclude [Appellant] owned a computer or that any evidence at all would be found on it."

[20] Johnson signed the affidavit requesting a warrant to search Appellant's mobile phone and flash drive, the PASI office, and Appellant's medical office. Pena signed the affidavit supporting the request for a warrant to search Appellant's residence. The affidavits contain essentially identical allegations of fact relevant to issues thirty-eight and thirty-nine.

intentionally, or with reckless disregard for the truth. . . ." *Harris v. State*, 227 S.W.3d 83, 85 (Tex. Crim. App. 2007).

When at a *Franks* hearing the defendant proves by a preponderance of the evidence perjury or reckless disregard for the truth, the affidavit's false material is set aside, and the remaining content of the affidavit is tested for the existence of sufficient probable cause. *Harris*, 227 S.W.3d at 85. In the context of a *Franks* analysis, truthful "does not mean letter-perfect, but rather that the information put forth in the affidavit is believed or appropriately accepted by the affiant as true." *Clement v. State*, 64 S.W.3d 588, 592 (Tex. App.—Texarkana 2001, pet ref'd) (citing *Franks*, 438 U.S. at 164-65).

Appellant alleged to the district court that the detectives' affidavits contained materially-false statements and material omissions in a number of ways, as summarized below:

- They falsely alleged Appellant's mobile phone and a flash drive were reported as seized from him during his arrest;
- They materially omitted the fact that when Shepard told Reynolds he killed Sonnier, (a) Shepard was "delusional and 'all spaced out;'" (b) Shepard admitted killing his own mother and being insane; (c) Shepard had offered to kill Reynolds's brother; and (d) Reynolds did not believe portions of Shepard's story;

- They materially omitted the fact that an employee of Sonnier told police the "last known incident" between Shetina and Appellant was five months prior to Sonnier's murder;
- They materially omitted the fact that Shepard killed a homeless man in New York, saw himself as Appellant's "avenger," and had a "hit list" numbering 40-50 people;
- They materially omitted the fact that Shetina was "untruthful and deceptive" with police.

Appellant's reply brief also refers to a ninety-seven-page block of testimony from the June 16, 2014, suppression hearing as a location where "falsehoods and omissions" were presented to the trial court. Without specific references to the record, we decline Appellant's invitation to parse the pages in search of other omissions or falsehoods. For purposes of assessing Appellant's *Franks* arguments on appeal, we restrict our review to the bulleted list, above. TEX. R. APP. P. 33.1(a).

(1) Mobile Phone and Flash Drive

Appellant argues his mobile phone and flash drive were not on his person when he was arrested and were seized and searched before a warrant issued. His *Franks* contention appears to be that these devices were seized from his home without a warrant, but that

Johnson falsely stated in his affidavit that the items were taken from Appellant's person at the time of arrest by Randall County sheriff's deputies. Considering the deferential standard afforded to the court in assessing the evidence, we hold the testimony and other evidence does not affirmatively show that Johnson intentionally and falsely swore that Appellant's mobile phone and flash drive were seized from Appellant's person at the time of his arrest by Randall County deputies.

Former Randall County deputy sheriff Bret Harbert testified at trial that during the early morning hours of July 16, 2012, he executed a warrant for Dixon's arrest at his residence. Harbert testified he could not remember if Appellant had a mobile phone or flash drive on his person at the time of the arrest. Johnson's testimony at the suppression hearing was also unclear: when shown a video of Dixon in the interview room, Johnson said dark images on a table might be a mobile phone and flash drive, but could not be sure unless the picture was enlarged or clarified. Johnson also acknowledged the possibility that the items were removed prior to the interview. Johnson testified he believed the arresting officer had told him Appellant possessed an iPhone at the time of arrest. In addition, Lubbock Police Department officer Christopher Powe testified he understood Appellant's iPhone and flash drive were seized from Dixon by arresting officers at the time of arrest.

The conflicting state of the evidence permits the district court's reasonable determination that Johnson

did not materially or falsely aver in his affidavit that Dixon's iPhone or flash drive were seized from his person at the time of his arrest.

(2) Statements Regarding Shepard's Other Conduct

Appellant urges Detectives Johnson and Pena omitted numerous material facts about Shepard from the probable cause affidavits and with reckless disregard for the truth. When asked about why he omitted reference to certain facts from his affidavit—such as Shepard's alleged murder of his mother and a homeless man, an offer to kill Reynold's brother, and a hit list—Johnson replied that such information was not probative and evidentiary to the purpose of the affidavit. He explained he includes in his affidavits "information that corroborates a crime scene, and an offense that has occurred." The omitted allegations pertain to Shepard's character.

It remains to be seen how such omissions are material given the other conduct contained in the affidavit that impugns Shepard's character. Those stated actions—that Dixon does not contest—show that Shepard: (1) killed Sonnier in exchange for three bars of silver; (2) surveilled Sonnier for several weeks before the murder; (3) entered Sonnier's home by coming through a window; (4) both shot and stabbed Sonnier numerous times; (5) made efforts to muzzle the gunshots; and (6) twice attempted suicide following his murder of Sonnier. The omitted facts were not inconsistent with the bizarre, heinous nature of the murder

the affiants did describe. To the extent Reynolds had doubts about the accuracy of Shepard's statements, many were countered by evidence found at the murder scene but not revealed to the public.

(3) Statements Regarding End of Shetina's Relationship with Dixon

Dixon also complains the detectives materially omitted a portion of a statement attributed to Marylu Mendez, a co-worker of Sonnier's. Johnson's affidavit reports Sonnier allegedly told Mendez that "[Shetina's] ex-boyfriend would not leave her alone." Appellant argued in his *Franks* motion the affidavit omits that Mendez also said, "the last known incident" between Shetina and Appellant occurred five months before the murder.

However, nothing in Mendez's statement actually indicates what Dixon alleges. The exact words in Mendez's written statement read, "Doctor Sonnier told me [Shetina's] ex-boyfriend, the doctor, would not leave her alone. Doctor Sonnier told me [Shetina] received a phone call from her ex-boyfriend approximately 5 months ago." Mendez does not aver that the phone call was the last contact or "incident" between Appellant and Shetina. The record before us fails to demonstrate the omission of material statements by Mendez or was done for the purpose of knowingly and intentionally, or with reckless disregard for the truth, misleading the magistrate.

(4) Statements Regarding Shetina

Concerning Shetina, the affiants stated Shetina told them Appellant "insisted on still seeing her, even though she was dating" Sonnier. Appellant argues the affiants materially omitted information that Shetina was "deceptive and untruthful with investigators in regards to her phone contact with the victim and her whereabouts on the day of the [h]omicide." This language originates in an assistant district attorney's application requesting the trial court order that a mobile telephone service provider produce records specific to a stated telephone number. The application does not mention Shetina by name. Even if we assume the requested telephone records concerned Shetina and that she was "deceptive and untruthful with investigators" about her telephone contacts with Sonnier and location on the day of his murder, and that this impeached the credibility of her statement that Appellant insisted on seeing her, we remain faced with two other statements: (1) Appellant would not leave Shetina alone and (2) Shepard killed Sonnier because of a triangle between a "girlfriend that [Sonnier] and [Appellant] had in common." We conclude the force of the affidavits would not have been diminished had the omitted language from the assistant district attorney's application been included.

Assuming but without deciding that Appellant made the required substantial preliminary showing for any of these alleged misstatements or omissions, we conclude Appellant failed to prove by a preponderance of the evidence the affiants made false statements

deliberately or with a reckless disregard for the truth, or that they omitted material facts with the same degree of culpability. Moreover, we do not find that the affidavits would be devoid of sufficient probable cause even if the cited portions of the affidavits were set aside. Appellant's issues thirty-eight and thirty-nine are overruled.

Execution of Search Warrant for Appellant's Residence (Issues 40-42)

Through his fortieth through forty-second issues, Appellant argues the officers who searched his residence exceeded the scope of the "mere evidence" warrant by seizing items not specified by the magistrate. Chapter 18 of the Texas Code of Criminal Procedure governs search warrants. *See Jennings v. State*, 531 S.W.3d 889, 893 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd). Property capable of seizure under article 18.02(a)(10) is often referred to as "mere evidence." *Id.* (citation omitted); TEX. CODE CRIM. PROC. ANN. art 18.02(10) (a warrant may issue to search and seize "property or items, except the personal writings by the accused, constituting evidence of an offense or constituting evidence tending to show that a particular person committed an offense[.]"). Mere evidence is evidence linked to a crime, but does not consist of fruits, instrumentalities, or contraband. *Jennings*, 531 S.W.3d at 893 n.1.

A mere evidence warrant was issued in the present case. It directed officers to search Appellant's residence for, and if found, seize the following items:

> A .25 caliber handgun and associated ammunition, a knife or knives possibly containing blood and DNA evidence, computers, removable disc drives, hard drives, and other computer data devices containing information of the murder for hire plot involving the victim, Joseph Sonnier III, MD, clothing possibly containing blood and DNA evidence, cellular telephone(s) containing evidence of the surveillance and murder for hire plot . . . and camera(s) containing evidence of the surveillance and murder for hire plot . . . camera(s) containing evidence of surveillance and . . . receipts, documentation, pawn tickets and any other paper documentation that evidences the murder for hire plot. . . .

(ellipses added). Following the warrant's execution, Johnson signed a return listing the following ten items as having been seized:

- Two birthday cards;
- SD Card;
- United States Currency totaling $1800;
- Sony iPhone with charger
- Five smoked cigars from the patio of the residence;
- Land title;
- Video tape;

- Certificate for Ancillary Services business;
- Black bag containing adult sexual activity items; and
- Garage door opener.

The currency, iPhone and charger, and PASI certificate were sufficiently specified by the warrant. The smoked cigars were not. They were tested for DNA and the results, showing Shepard and Appellant had each smoked a cigar at Appellant's residence, were presented to the jury. Assuming it was error for the trial court not to suppress evidence of the five smoked cigars, the likelihood that the error was a contributing factor in the jury's deliberations in arriving at its verdict is *de minimis*. *Scott v. State*, 227 S.W.3d 670, 690 (Tex. Crim. App. 2007). The fact that Shepard and Appellant had been together at Appellant's residence was not disputed at trial. Appellant told officers he had given Shepard some cigars. We find beyond a reasonable doubt that any error in presenting this evidence to the jury did not contribute to Dixon's conviction or punishment." TEX. R. APP. P. 44.2(a).[21]

We next address the remaining items that were seized: two birthday cards; a document of title to land, a video tape, a black bag containing adult sexual

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[21] The erroneous admission of evidence obtained in violation of the Fourth Amendment is constitutional error analyzed under Texas Rule of Appellate Procedure 44.2(a). *Ayala v. State*, No. 03-14-00320-CR, 2016 Tex. App. LEXIS 3545, at *31 (Tex. App.—Austin Apr. 7, 2016, pet. ref'd) (mem. op., not designated for publication) (citing *Long v. State*, 203 S.W.3d 352, 353 (Tex. Crim. App. 2006)).

activity items, and a garage door opener. None of these items were admitted into evidence. Beyond a reasonable doubt any error by the trial court in failing to suppress these items was, therefore, harmless. Appellant's issues forty, forty-one, and forty-two are overruled.

Part VI: Remaining Issues

Charge Error (Issue 23)

Via his twenty-third issue, Appellant complains the application paragraph concerning Count 2 of the indictment did not authorize a conviction for capital murder because it failed to charge Appellant with intending the death of Sonnier. We have sustained Appellant's double-jeopardy complaint under issue seventeen and render a judgment of acquittal for the offense charged under Count 2 of the indictment. As any alleged error in submission of the trial court's charge pertaining to Count 2 is not relevant to Appellant's conviction under Count 1, Appellant's twenty-third issue is overruled.

Findings of Fact and Conclusions of Law (failure to suppress historical cell site data) (Issue 48)

By his forty-eighth issue, Appellant asserts the trial court erred by failing to file requested findings of fact and conclusions of law pertaining to its denial of his motion to suppress historical cell site data. The trial court prepared and filed the requested findings and conclusions in 2017 in response to our order of

abatement and remand. *See Dixon v. State*, No. 07-16-00058-CR, 2017 Tex. App. LEXIS 2096 (Tex. App.—Amarillo Mar. 10, 2017, per curiam order) (not designated for publication). Appellant's forty-eighth issue is dismissed as moot.

Cumulative Error (Issues 49-50)

By his forty-ninth and fiftieth issues, Appellant argues the cumulative effect of the trial court's errors denied him due process of law. Error may accumulate to such a level that the accused is denied a fair trial. *Tello v. State*, No. 07-08-00314-CR, 2009 Tex. App. LEXIS 8401, at *18-19 (Tex. App.—Amarillo Oct. 30, 2009, no pet.) (mem. op., not designated for publication). However, reversal of the conviction is not warranted unless the combined force of the errors undermined the fundamental fairness of the trial. *Estrada v. State*, 313 S.W.3d 274, 311 (Tex. Crim. App. 2010) (citing *United States v. Bell*, 367 F.3d 452, 471 (5th Cir. 2004)); *cf. United States v. Wood*, 207 F.3d 1222, 1237 (10th Cir. 2000) ("A cumulative error analysis aggregates all the errors that individually might be harmless, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless.") (internal quotation marks and citation omitted).

When we conduct a cumulative error analysis, we consider only errors that were preserved for appeal. *See Taylor v. State*, No. 05-14-00821-CR, 2016 Tex. App. LEXIS 13705, at *25 (Tex. App.—Dallas Dec. 27, 2016,

pet. ref'd) (mem. op., not designated for publication). We do not consider complained-of errors that were not actually errors. *Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex. Crim. App. 1999) ("[W]e are aware of no authority holding that non-errors may in their cumulative effect cause error."); *Schmidt v. State*, 612 S.W.3d 359, 372-73 (Tex. App.—Houston [1st Dist.] 2019, pet. ref'd) (finding no cumulative error because the complaints were either not error or not preserved).

In the present matter, the jury heard more than sixteen days of testimony from sixty witnesses; some 1,800 exhibits were admitted. Dixon testified at trial where he admitted to his knowledge and agreement with Shepard's whereabouts on the evening of Sonnier's murder, but offered an alternative theory about what his arrangement with Shepard was intended to cover. The collective force of any error this record demonstrates[22] is not "logarithmic," that is, "producing a total impact greater than the arithmetic sum of its constituent parts." *United States v. Sepulveda*, 15 F.3d 1161, 1196 (1st Cir. 1993). The Constitution requires a criminal defendant receive a fair trial but not a mistake-free trial. *Id.* (citing *Van Arsdall*, 475 U.S. at 681); *Brown v. State*, 978 S.W.2d 708, 716 (Tex. App.—Amarillo 1998, pet. ref'd) ("Appellant is not entitled to a perfect trial, but he is entitled to at least one

[22] Our analysis of Dixon's cumulative error argument took account of the harmless errors we assumed in this opinion as well as the double jeopardy violation and the harmless error the Court of Criminal Appeals assumed. *See Dixon*, 595 S.W.3d at 219-20 (assuming the admission of cell-site location information was error but finding it harmless beyond a reasonable doubt).

tolerably fair.") (internal quotation marks, bracketing, and citations omitted). Based on the record before us, we conclude beyond a reasonable doubt that the trial Appellant received was constitutionally appropriate. Appellant's forty-ninth and fiftieth issues are overruled.

Conclusion

Having sustained Appellant's double-jeopardy complaint, we reverse and render a judgment of acquittal for the offense charged under Count 2 of the indictment, murder in the course of committing burglary. TEX. R. APP. P. 43.2(c). Otherwise, having overruled each of Appellant's remaining issues, we affirm his murder-for-remuneration conviction under Count 1 of the indictment and corresponding sentence of imprisonment for life without parole. TEX. R. APP. P. 43.2(a).

Lawrence M. Doss
Justice

Do not publish.

[SEAL]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0048-19

THOMAS DIXON, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE SEVENTH COURT OF APPEALS LUBBOCK COUNTY

KELLER, P.J., delivered the opinion for a unanimous Court. HERVEY, J., filed a concurring opinion in which KEASLER and NEWELL, JJ., joined.

The Court of Appeals reversed Appellant's conviction for two reasons: (I) because cell phone location information was improperly admitted, and (2) because the trial court deprived him of a public trial. Neither of these reasons appears to stand up to close scrutiny. In this murder-for-hire prosecution, Appellant's whereabouts on a date other than the date of the murder were not particularly important to the case, so any error in admitting the evidence was harmless. As for the public

trial complaints, two were not preserved and the other has no merit. Consequently, we reverse the judgment of the court of appeals.

I. Cell-Site Location Information (CSLI)

A. The Investigation

Appellant, Thomas Dixon, was a plastic surgeon in Amarillo. Joseph Sonnier was a physician in Lubbock. David Shepherd was a friend of Dixon's. On July 10, 2012, David Shepard killed Joseph Sonnier. The State's theory was that Dixon hired Shepard to kill Sonnier.

The State introduced evidence that Sonnier was dating Dixon's former girlfriend and that Dixon wanted her back. Shepard's roommate testified that Shepard told him that Dixon paid him to kill Sonnier. The State also introduced fifty-five pages of cell phone records that showed numerous phone calls and text messages between Dixon and Shepard in the months leading up to the murder and on the day of the murder. These records also included cell-site location information.

Fifty-one of those pages were from Shepard's cell phone provider. The admissibility of Shepard's phone records is not in dispute. From these records, the State showed that Dixon and Shepard exchanged hundreds of text messages in the months leading up to the murder and that at least some of the messages were about the victim. The day before the murder, Shepard texted, "Perfect day to travel to hub city" and Dixon responded,

"Need it done ASAP." They exchanged forty-one text messages on the day of the murder. CSLI from Shepard's cell phone showed Shepard in Lubbock during times when he was communicating with Dixon. It also showed that Shepherd was in Lubbock on March 12, 2012.

CSLI from Dixon's phone showed that he was in Lubbock on March 12, 2012. But the State did not obtain a warrant for the CSLI for Dixon's phone.[1] Dixon had claimed to the police that he was not in Lubbock on March 12, but at trial, he conceded that he must have traveled to Lubbock because the cell phone records showed him there. Also, a gas-station receipt showed that Dixon had bought gasoline in Plainview on March 12.

Although Dixon had originally told the police that he knew nothing about Sunnier, he admitted at trial that this was untrue. Dixon testified that he had hired Shepard to track and photograph Sonnier (hoping to obtain photos that would cause Dixon's former girlfriend to break up with Sonnier) and that he understood that Shepard would be planting a camera at Sonnier's house for this purpose. Also, Shepard's phone records revealed that Dixon called Shepard within minutes after the police finished speaking to Dixon.

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[1] The State did obtain a court order for the records, as required by statute. *See* TEX. CODE CRIM. PROC. art. 18.21.

B. Appeal

Dixon claimed on appeal that the trial court erred in failing to suppress CSLI from his cell phone records. Relying on the Supreme Court's recent decision in *Carpenter v. United States*,[2] the court of appeals agreed.[3] The court of appeals further held that it could not conclude that the error was harmless beyond a reasonable doubt.[4]

In support of its conclusion on harm, the court of appeals observed that the CSLI served two purposes: (1) as circumstantial evidence of Dixon's complicity in the murder (by showing that he and Shepard worked closely together) and (2) to impeach Dixon's testimony.[5] The court of appeals concluded that, "absent the CSLI, there was no evidence appellant ever was in Lubbock with Shepard for *any* purpose."[6] Although Dixon had purchased gas in Plainview on March 12, the court of appeals concluded that that evidence said nothing about Dixon's contact with Shepard.[7] The court of appeals further concluded that the CSLI evidence was in a form likely to have a strong impact on jurors.[8] And the court of appeals concluded that the CSLI formed a

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[2] 135 S. Ct. 2206 (2018).

[3] *Dixon v. State*, 566 S.W.3d 348, 363-64 (Tex. App.–Amarillo 2018).

[4] *Id.* at 370-71. *See also* TEX. R. APP. P. 44.2(a).

[5] *Dixon*, 566 S.W.3d at 365-66.

[6] *Id.* at 367 (emphasis in original).

[7] *Id.* at 366.

[8] *Id.* at 367.

main pillar of support for the State's trial argument that Dixon could not be believed.[9] The court of appeals concluded that Dixon's credibility was important because the jury had to decide what his purpose was in working with Shepard—whether it was to kill the victim or for the alternative purpose offered in Dixon's testimony (to track the victim to dig up damaging information to share with the girlfriend).[10]

C. Analysis: Any Error Was Harmless

We conclude that the court of appeals erred in its harm analysis; even assuming the admission of the evidence was error, it was clearly harmless. The CSLI evidence showed that Dixon was in Lubbock on March 12, 2012, but that was not the day that the victim was killed. The victim was killed months later, on July 10. Because this was a murder-for-hire case, the evidence did not have to show that Dixon was in Lubbock at all, much less on a particular day. And in fact, the evidence showed that Dixon was not in Lubbock on the day of the murder. His presence in Lubbock on some other day months before, even coupled with Shepard's presence and their conversation, was not particularly important to this prosecution.

Moreover, Dixon's own theory of the case was that he hired Shepard to track and photograph the victim.

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[9] *Id.* at 368.

[10] *Id.* at 367-68.

Dixon's presence in Lubbock to confer with Shepard would be entirely consistent with that purpose.

Further, of the fifty-five pages of cell phone records introduced by the State, only four pages were from Dixon's cell-phone provider. The other fifty-one pages were records from Shepard's cell-phone provider, the admission of which is not challenged here. Shepard's phone records provided plenty of evidence that Dixon and Shepard were working together. The March 12 CSLI information was not particularly significant in light of the evidence from Shepard's phone.

As for the State's use of the CSLI to impeach Dixon's credibility, Dixon's credibility was also impeached by the evidence that he bought gas in Plainview on March 12. The shortest route from Amarillo to Lubbock goes straight through Plainview, so this evidence suggested that Dixon was traveling between Amarillo and Lubbock on March 12.[11] The State showed that Shepard was in Lubbock on that date by means of the location information from his phone

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[11] Dixon's concession at trial that he must have traveled to Lubbock because the cell phone records showed him there also impeached his credibility. Although this concession was in response to illegally obtained evidence, the Fourth Amendment does not require the exclusion of evidence used to impeach false testimony by the defendant. *See Duckworth v. Egan*, 492 U.S. 195, 208 (1989) (citing *Walder v. United States*, 347 U.S. 62, 65 (1954) ("exclusionary rule does not create 'a shield against contradiction of [the defendant's] untruths' and evidence seized in violation of the Fourth Amendment may be used for impeachment purposes") (bracketed material in *Egan*)). There is a good argument, therefore, that the concession was not illegally obtained.

records. This properly admitted evidence, which suggested that both men were in Lubbock on the same day, was a significant basis for the jury to disbelieve Dixon's testimony that he was not with Shepard in Lubbock. The CSLI from Dixon's phone provided a more specific link between Dixon and Shepard's locations, giving the jury an incrementally greater reason to doubt Dixon's testimony about whether he was with Shepard that day, but it was not conclusive—the location data could not rule out the possibility that the two just happened to be in the same general area.

Moreover, there was other evidence that seriously undermined Dixon's credibility. Dixon admitted at trial that he had lied in an interview with the Lubbock Police. And one of his lies was central to the prosecution: Dixon said that he knew nothing about Sonnier. In fact, though, he testified at trial that he had hired Shepard to track Sonnier. And Shepard's phone records showed that Dixon called Shepard within minutes of the end of the police interview.

In summary, Dixon's whereabouts on March 12, and any deception about those whereabouts, were not a significant pillar of the State's case. Far more important were Dixon's admitted hiring of Shepard to track the victim, the numerous phone contacts between the two, Dixon's hiding of this arrangement from the police, his later phone call to Shepard within minutes after contact with law enforcement, and Shepard's admission to his roommate that Dixon had hired him to kill the victim. The admission of the March 12

location evidence was harmless beyond a reasonable doubt.

II. Public Trial

A. Trial Proceedings: Exclusion of Some Persons from Courtroom

I. Sketch Artist

First, during jury selection, the bailiffs excluded a sketch artist from the courtroom. The bailiffs told the sketch artist that there was no room for him. When the trial court became aware of this, it allowed the sketch artist to sit in the jury box. The next day, Dixon complained about the exclusion. One of his attorneys claimed that the sketch artist "was sitting out in the hallway the entire time yesterday." The record does not reveal when counsel became aware of the situation.

2. Hearing Outside Jury's Presence

Second, the trial judge asked for the courtroom to be cleared of spectators after an argument erupted between the attorneys after the jury was released for the day. Before the jury was released, defense attorney Sellers asked a witness on cross-examination, "Here in this courtroom you know that David Shepard has repeatedly said, 'Mike Dixon did not pay me for this murder.'" Prosecutor Jackson, who had questioned the witness on direct examination, interjected, "Your Honor, may I take this witness on voir dire?" The trial court responded, "The Court is going to instruct the

two of you not to talk about the question that was just asked." Defense attorney Hurley then stated, "I'm going to object that that violates our rights under the 5th Amendment to the United States Constitution and 105 of the Code of Criminal Procedure." Defense attorney Sellers then asked, "You're aware that as recently as two weeks ago David Shepard told Matt Powell [one of the prosecutors] – " but was interrupted by prosecutor Stanek, who objected to hearsay. The trial court sustained the objection, and Sellers passed the witness. Prosecutor Powell then said, "Judge, now it's out there we need to go into it now. I mean, Counsel – may we approach?" At this point the trial judge released the jury for the day.

After the jury was released, the parties' attorneys began to argue with each other, as follows:

> PROSECUTOR POWELL: I guess I need to do a Motion in Limine on everything when I rely on Counsel to follow Rules of Evidence. I obviously know I can't do that, because he purposefully put that – he knows that's an improper question. He knows he cannot get into that information, that it's hearsay without an exception, and he knows that. If he doesn't then he needs to go back and get a refresher course.
>
> THE TRIAL COURT: Well, both of you –
>
> DEFENSE ATTORNEY HURLEY: That's Brady –
>
> DEFENSE ATTORNEY SELLERS: And you weren't going to turn it over.

The trial court then responded, "Hey, y'all chill out. Everybody—if everybody would please excuse yourself from the courtroom except for the attorneys." Defense counsel then objected that "that's a violation of *Presley v. Georgia*.[12] The trial court responded, "From now on one person asking questions will be the one that makes objections. None of this all four people making any objections. Is that understood?" Mr. Hurley, responded that he understood the court's ruling but wanted to advise the court of a constitutional violation. The trial court responded, "Well you can advise Mr. Sellers, and he can make that objection." Mr. Hurley then stated that "sometimes it's not timely" and that he was going to continue to object to constitutional violations. The parties' attorneys then began discussing other matters, but at some point, Mr. Hurley returned to his objection: "I want to say for the record that the Court has excused about 50 people from the gallery, and they are not present for this conference, this discussion we're having. We object under the 6th Amendment, the 14th Amendment and right now it's basically all lawyers and staff from the D.A.'s office in the courtroom and all of the public has been excused." Two of the prosecutors then began discussing which people present were or were not from the prosecutor's office. The trial court then interrupted, "Well, there's going to be a $500.00 fine for everybody that makes some comment other than asking questions. These side-bar comments are going to stop, or you are going to start writing checks, every one of you. Anybody have any questions about

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[12] *See Presley v. Georgia*, 558 U.S. 209 (2010).

this?" Mr. Hurley, Mr. Sellers, and one of the prosecutors replied, "No, sir." When asked if there was anything else to take up outside the presence of the jury, the parties initially responded that there was not, but the defense then engaged in a discussion with the trial court about a video statement. The defense did not further address the *Presley* objection, and the trial court did not rule on it.

3. Closing Arguments

Third, in a motion for new trial, Dixon complained for the first time that some members of the public were excluded from the courtroom during closing arguments. In affidavits, the defense attorneys claimed that they learned about the exclusion after trial.

At the motion-for-new-trial hearing, the wife of one of the defense attorneys testified that, when she arrived fifteen minutes after the proceedings had started that day, two sheriff's deputies "were preventing anyone to come in." She stated that four or five people, including herself, were excluded. She further testified that, when asked, "Why can't we come in?" one of the deputies responded, "He doesn't want anyone standing." She then stated that she "looked in and there were empty spots." When asked, on cross-examination, whether she told her husband or the other defense attorney during one of the breaks in argument about what was going on, she responded that she did not. When asked if she was ultimately able to enter the courtroom, she responded that she was able to enter

when someone she knew was coming out. The defense called another attorney, who was not affiliated with the case. This attorney testified that she wanted to watch closing arguments but was told that she could not go into the courtroom because the judge did not want anyone standing. She responded affirmatively when asked if the judge said "it would be one in, one out." The sergeant who supervised security at the courthouse testified that the judge allowed only for those who could sit and that the policy would be that one could come in when another person went out. The sergeant testified that the courtroom appeared to be full but that he could not say whether there were any empty seats. The sergeant also testified that the courtroom used for trial was the largest courtroom in the courthouse.

In its findings of fact, the trial court found that the trial was held in the largest courtroom in the courthouse and that "the courtroom was filled to capacity with spectators" during closing arguments. The trial court further found that "[a]ny regulation of entrants into the courtroom was done for safety reasons, to maintain courtroom decorum, and to minimize juror distraction."

B. Appeal

Dixon complained that these three instances—when the bailiffs excluded a sketch artist during jury selection, when the trial court ordered spectators out of the courtroom after releasing the jury for the day,

and when some persons were excluded during closing arguments—constituted the improper closing of the courtroom. The court of appeals agreed.[13] In response to the State's arguments that Dixon failed to preserve error with respect to the first and third instances of courtroom closure, the court of appeals pointed to Dixon's objection to the exclusion of the sketch artist, to Dixon's claim in his motion for new trial regarding the exclusion of spectators during closing argument, and to Dixon's claim that he learned of the closing-argument exclusion after trial.[14] The court of appeals further stated: "The State does not point us to, and we do not find, facts in the record tending to indicate that appellant's complaints of the first and third closures were not made at the earliest possible opportunity."[15]

C. Analysis

The right to a public trial is forfeitable and must be preserved by a proper objection at trial.[16] Preservation requires a timely, specific objection.[17] The complaining party must also obtain a ruling on the objection, or absent a ruling, the complaining party must object to the trial court's refusal to rule.[18] As the appealing party, Dixon had the burden to bring forth a

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[13] *Dixon*, 566 S.W.3d at 371, 373-74.

[14] *Id.* at 371 n.27.

[15] *Id.*

[16] *Peyronel v. State*, 465 S.W.3d 650 (Tex. Crim. App. 2015).

[17] TEX. R. APP. P. 33.1(a)(l)(A).

[18] *Id.* 33.1(a)(2).

record showing that error was preserved.[19] The State has argued preservation on only the first and third instances for which Dixon alleges an improper closure, but preservation of error is a systemic requirement that a first-tier appellate court is obligated to address before reversing a conviction.[20] When the court of appeals has failed to address an outstanding issue of error preservation, this Court can do so when confronted with one.[21] We conclude that Dixon has failed to meet his burden to show preservation as to the second instance as well as the first instance.

1. The Sketch Artist

With respect to the first instance, the exclusion of the sketch artist, Dixon's objection was late. Dixon did not object to the exclusion of the sketch artist until the next day. When he objected, he said that the sketch artist was in the hallway the day before, but he did not explain when the defense became aware of that fact. The court of appeals concluded that the State did not point to facts in the record showing that the objection was not made at the earliest opportunity, but that

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[19] *See Word v. State*, 206 S.W.3d 646, 651-52 (Tex. Crim. App. 2006) ("It is usually the appealing party's burden to present a record showing properly preserved, reversible error.").

[20] *Darcy v. State*, 488 S.W.3d 325, 327-28 (Tex. Crim. App. 2016).

[21] *Id.* We note that Dixon's brief before us contends that error was preserved with respect to the second instance: "Both defense counsel immediately objected and made a record that no member of the public remained in the courtroom. Accordingly, this error was preserved." (Citation omitted).

places the burden of proof on the wrong party. It was Dixon's burden to prove that his objection was made at the earliest opportunity. The record shows that the objection was made late, so Dixon was required to proffer information justifying a late objection. He has not done so because his attorneys did not explain when the sketch artist's exclusion first came to their attention.

2. Hearing Outside the Jury's Presence

In the second instance, when the trial court ordered the courtroom cleared, the defense objected at the time of the event but never obtained a ruling. The trial court told the attorneys that the "person asking the questions will be the one that makes any objections." Instead of following that procedure, a defense attorney who was not asking questions continued with the objection, the discussion shifted to other matters, and the trial court did not rule on the objection. We need not decide whether the defense team procedurally defaulted error by failing to follow the trial court's procedure regarding which attorney must make the objection because none of the defense team requested a ruling from the trial court or objected to the trial court's refusal to rue.[22] Although the trial court

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[22] *Cf. Cameron v. State*, 490 S.W.3d 57, 61 (Tex. Crim. App. 2014) ("As we view it, the record shows very clearly that the appellant's trial counsel brought the issue of the closed courtroom to the attention of the trial court. The court acknowledged the appellant's Sixth Amendment rights and then stated that the courtroom was not closed. Counsel then requested (at least six separate times) that the court rule on his objection, but the court declined to rule. Texas Rule of Appellate Procedure 33.1 clearly states that,

threatened to fine the attorneys, it was specifically for making sidebar comments. The court did not threaten to fine the attorneys for making objections or for asking for a ruling on an objection. At any rate, when asked if they had anything further to take up outside the presence of the jury, the defense attorneys could have, but did not, ask for a ruling on the public-trial objection.

3. Closing Arguments

Regarding the third instance, under *Presley,* "Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials."[23] The trial court found that the courtroom was filled to capacity. Although there was testimony from a defense attorney's wife that there were empty seats in the courtroom, the trial court was not required to believe this testimony and could rely upon its own recollection that the courtroom was full.[24] The exclusion of

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in order to preserve error, the record must show that the trial court either 'ruled on the request, objection, or motion either expressly or implicitly or refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.' This happened below."); *see also Smith v. State*, 499 S.W.3d 1, 6 (Tex. Crim. App. 2016) (plurality op.) ("Appellant never asked for a ruling on the issue, nor did he object to the trial judge's failure to rule. Because he failed to obtain a ruling on the Fourth Amendment complaint, he failed to preserve error with respect to that complaint.").

[23] *Presley*, 558 U.S. at 215.

[24] *See Okonkwo v. State*, 398 S.W.3d 689, 695 (Tex. Crim. App. 2013) ("The trial court, as factfinder, is the sole judge of witness credibility at a hearing on a motion for new trial with respect

spectators from the courtroom because the courtroom is full is not by itself a violation of the right to a public trial.[25]

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to both live testimony and affidavits. Accordingly, the appellate court must afford almost total deference to a trial court's findings of historical facts as well as mixed questions of law and fact that turn on an evaluation of credibility and demeanor. This same deferential review must be given to a trial court's determination of historical facts based solely on affidavits, regardless of whether the affidavits are controverted. Here, in viewing the evidence in a light most favorable to the trial court's ruling, the court of appeals should have deferred to the trial court's implied finding that counsel's affidavit lacked credibility. In the absence of that affidavit, the court of appeals should have examined the totality of the record in a light most favorable to the trial court's ruling.") (citations omitted).

[25] *See United States v. Downs-Moses*, 329 F.3d 253 (1st Cir. 2003) (quoting *United States v. Kobli*, 172 F.2d 919, 923 (3d Cir. 1949) ("The courts . . . have denied that the constitutional right to a public trial involves the necessity of holding the trial in a place large enough to accommodate all those who desire to attend.") (ellipsis in *Dawns-Moses*)); *St. Clair v. Commonwealth*, 140 S.W.3d 510, 555 (Ky. 2004) ("[T]he exclusion of a single member (or even a handful of members) of the public from trial proceedings will not convert an otherwise public trial into a 'star chamber.' ") (also quoting *Wendling v. Commonwealth*, 143 Ky. 587, 137 S.W. 205, 211 (1911) ("The provision in section 11 of the Constitution recognizing the right of an accused to have a public trial does not mean that all of the public who desire to be present shall have opportunity to do so . . . The requirement is fairly observed if . . . a reasonable proportion of the public is suffered to attend.") (internal quotation marks omitted, ellipses in *St. Clair*)); *Williams v. Nelson*, 172 Colo. 176, 178, 471 P.2d 600, 601-02 (1970) ("Being filled to capacity, it was undoubtedly true that some persons were thus prevented from attending the heating. But this did not transform it into a secret hearing. It remained in every sense a public hearing. The requirement of a public trial is fairly observed if without partiality or favoritism a reasonable portion of the public is

In a notorious case from Texas involving cameras in the courtroom, the Supreme Court explained that the purpose of the Sixth Amendment right to a public trial is to guarantee that the accused will be fairly dealt with and not unjustly condemned.[26] History, the Court said, "had proven that secret tribunals were effective instruments of oppression.[27] It is the danger of secret trials, then, that the right to a public trial was meant to address.[28]

Chief Justice Warren explained that a trial is public, in the constitutional sense, "when a courtroom has facilities for a reasonable number of the public to observe the proceedings."[29] And in a concurring opinion in that same case, Justice Harlan explained:

> Obviously, the public trial guarantee is not violated if an individual member of the public cannot gain admittance to a courtroom because there are no available seats. The guarantee will already have been met, for the "public" will be present in the form of those persons who did gain admission. Even the

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suffered to attend."); *State v. Saale*, 308 Mo. 573, 580-81, 274 S.W. 393, (1925) ("[T]he right of a defendant in a criminal case to a public trial is not violated, where, after admitting the public until the seats of the court room were filled, others seeking admission are excluded.") (citing *State v. Brooks*, 92 Mo. 542, 5 S.W. 257 (1887), *overruled on other grounds by State v. Hathorn*, 166 Mo. 229, 65 S.W. 756 (1901)).

[26] *Estes v. Texas*, 381 U.S. 532, 538-39 (1965).

[27] *Id.* at 539.

[28] *Id.*

[29] *Id.* at 584 (Warren, C.J. concurring).

> actual presence of the public is not guaranteed. A public trial implies only that the court must be open to those who wish to come, sit in the available seats, conduct themselves with decorum, and observe the trial process.[30]

Just so. Here, the trial court reasonably accommodated public attendance by using the largest courtroom in the courthouse. There was no error.

III. Disposition

As the court of appeals observed, Dixon raised fifty issues before it, and the court of appeals addressed only some of those issues.[31] We reverse the judgment of the court of appeals and remand the case to that court to address Dixon's remaining claims that have not yet been addressed.

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[30] *Id.* at 588-89 (Harlan, J., concurring).

[31] *Dixon*, 566 S.W.3d at 354. In addition to the CSLI and public-trial claims, the court of appeals also addressed—and rejected—sufficiency-of-the-evidence claims. *See id.* at 354-63.

[SEAL]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0048-19

THOMAS DIXON, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE SEVENTH COURT OF APPEALS LUBBOCK COUNTY

HERVEY, J., filed a concurring opinion in which KEASLER and NEWELL JJ., joined.

CONCURRING OPINION

I join the Court's opinion because I agree that the admission of the historical CSLI records in this case was harmless under the Fourth Amendment exclusionary rule. But I write separately to address the court of appeals's analysis and our decision in *Love v. State*, 543 S.W.3d 835, 845 (Tex. Crim. App. 2016), which the lower court relies on.

Love dealt with Article I, Section 9 of the Texas Constitution[1] and whether text messages should have been suppressed under Article 38.23(a) of the Texas Code of Criminal Procedure—not the Fourth Amendment—as is the issue here.[2] And while it is true that we analyzed the statutory error in *Love* for constitutional harm, we were wrong to do so and should disavow that part of the Court's opinion.[3]

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[1] Article I, Section 9 states that,

> The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

TEX. CONST. art. I, § 9.

[2] In relevant part, Article 38.23(a) states that,

> No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.
>
> * * *

TEX. CODE CRIM. PROC. art. 38.23(a).

[3] Harm analysis is governed by Rule 44.2 of the Texas Rules of Appellate Procedure. In relevant part that rule states that,

> (a) Constitutional Error. If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.

We use a constitutional-harm standard to determine whether a Fourth Amendment violation is harmful because the federal exclusionary is constitutional in nature, inherent in the Fourth Amendment. *Hernandez v. State*, 60 S.W.3d 106 (Tex. Crim. App. 2001); *see* TEX. R. APP. 44.2(a). Unlike the Fourth Amendment, however, we have held that there is no suppression remedy inherent in Article I, Section 9. *Hulit v. State*, 982 S.W.2d 431, 437 (Tex. Crim. App. 1998) (citing *Welchek v. State*, 247 S.W. 524 (1922)). Instead, the remedy for an Article I, Section 9 violation is to invoke one of Texas's statutory exclusionary rules.[4]

That brings me to the problem with *Love.* Violations of statutes are reviewed for non-constitutional harm, not constitutional harm.[5] Thus, we erred when

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> (b) Other Errors. Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
>
> * * *

TEX. R. APP. P. 44.2(a)–(b).

[4] The majority of suppression claims rely on the general suppression remedy in Article 38.23(a), but there are other more specific statutory suppression rules that can be relied on. *See* TEX. CODE CRIM. PROC. art. 18A.205 ("The state may not use as evidence in a criminal proceeding information gained through the use of an interception device installed under this subchapter if authorization for the device is not sought or is sought but not obtained.").

[5] Presiding Judge Keller has reached the same conclusion. In *Hernandez*, she wrote in dissent that "Article 38.23 is a statutory mechanism, not a constitutional one, and any error predicated thereon must be analyzed under the standard of harm for non-constitutional errors." *Hernandez*, 60 S.W.3d at 116 (Keller, P.J., dissenting).

we analyzed the statutory error in that case for constitutional harm. Consequently, we should overrule that part of our opinion at our earliest opportunity. Erroneously assessing harm under the much higher constitutional-harm standard unfairly punishes the State.[6]

With these comments, I join the opinion of the majority.

Filed: January 15, 2020

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[6] *Clark v. State*, 365 S.W.3d 333, 338 (Tex. Crim. App. 2012) ("[C]onstitutional and non-constitutional errors are subject to vastly different analyses on appeal.").

[SEAL]

In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00058-CR

THOMAS DIXON, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 140th District Court
Lubbock County, Texas
Trial Court No. 2012-435,942,
Honorable Jim Bob Darnell, Presiding

December 13, 2018

OPINION

Before QUINN, C.J., and CAMPBELL and PARKER, JJ.

Appellant Thomas Dixon, an Amarillo plastic surgeon, was indicted on two counts of capital murder for the July 10, 2012 death of Lubbock physician, Joseph Sonnier, M.D. The State did not seek the death penalty. After the first trial ended in a mistrial, the case was retried, and a second jury found appellant guilty of both counts of capital murder. The trial court signed a separate judgment for each count, imposing in each

judgment the mandatory sentence of life in prison without the possibility of parole.[1] On appeal, appellant raises fifty issues challenging his convictions. For the reasons we will describe, we will reverse the trial court's judgments and remand the case for a new trial.

Analysis

To resolve the appeal, we find it necessary to address three groups of the issues appellant raises. We will begin with his first and second issues, by which appellant challenges the sufficiency of the evidence supporting his convictions. We then will discuss his issues numbered 43 through 47, concerning the trial court's ruling on his motion to suppress historical cell site data obtained from his cell phone service provider without a warrant. Finally, we will address appellant's issues numbered 11 through 16, regarding occasions on which members of the public were excluded from the courtroom during appellant's trial. We will give relevant background facts in our discussion of each of the issue groups.

Sufficiency of the Evidence – Issues One and Two

By the indictment and its evidence, the State alleged appellant was guilty of capital murder under two provisions of the Texas Penal Code. The indictment's

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[1] *See* TEX. PENAL CODE ANN. § 12.31(a) (West Supp. 2018) (punishments for capital felony).

first count alleged appellant intentionally or knowingly caused Sonnier's death by employing David Shepard to murder Sonnier for remuneration or the promise of remuneration, and Shepard caused Sonnier's death by shooting and stabbing him.[2] Appellant's guilt under the second count required proof he was criminally responsible for Shepard's conduct.[3] In that way, the second count alleged, appellant was guilty of intentionally causing Sonnier's death by shooting and stabbing him, in the course of committing or attempting to commit burglary of Sonnier's residence.[4] As noted, the jury found appellant guilty on both counts.[5]

On appeal, he contends the evidence presented to the jury was not sufficient to support a conviction under either count. We begin with these issues because sustaining them would entitle appellant to the greatest relief, a judgment of acquittal. *Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004).

Sonnier was found dead in the garage of his Lubbock home on the morning of July 11, 2012. He had been stabbed and shot. That appellant's friend David

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[2] *See* TEX. PENAL CODE ANN. § 19.03(a)(3) (West Supp. 2018) (murder for remuneration).

[3] *See* TEX. PENAL CODE ANN. § 7.01 (parties to offenses); § 7.02 (West 2011) (criminal responsibility for conduct of another).

[4] *See* TEX. PENAL CODE ANN. § 19.03(a)(2) (West Supp. 2018) (murder in the course of burglary).

[5] By other issues raised in his brief, appellant contends his two convictions for the murder of one victim violate the prohibition on double jeopardy. Given our disposition of the issues we discuss, we need not address the double-jeopardy claim.

Shepard entered Sonnier's home through a window and killed Sonnier was not disputed at appellant's trial and is not questioned on appeal. Shepard pled nolo contendere to the capital murder of Sonnier. Under the terms of a plea-bargain agreement, he was sentenced to confinement in prison for life without the possibility of parole.

There was no evidence appellant was present at the time of Sonnier's murder. In fact, undisputed alibi evidence established appellant was in Amarillo at the time.

Early in his investigation of the murder, Lubbock police detective Zach Johnson interviewed Sonnier's girlfriend, Richelle Shetina. She and Sonnier recently had returned from celebrating her birthday in France. Shetina previously had been involved in a relationship with appellant. She gave Johnson a list of those she felt law enforcement should contact. The list included appellant.

During the late evening of July 11, Johnson and Lubbock police detective Ylanda Pena interviewed appellant and his new girlfriend, Ashley Woolbert, at appellant's Amarillo home. Appellant told Johnson he knew nothing about Sonnier. But regarding Shetina, he told Johnson he "would love to have her back," and it "broke his heart" she was in another relationship.

While Johnson spoke with appellant, Pena interviewed Woolbert. She told Pena of another person, "Dave." According to Woolbert's testimony she, appellant, and Shepard had dinner together on July 11. As

the detectives were leaving appellant's residence Pena asked appellant about "Dave." He explained Dave was his friend, Dave Shepard. He gave the detectives Shepard's telephone number.

Appellant also told the detectives Shepard came by his house between 10:00 and 10:30 the evening before "to get two cigars."[6] Telephone records in evidence indicate that, within minutes of the detectives' departure, appellant called Shepard and they regularly communicated during the following hours. Immediately after appellant's call, Shepard telephoned his roommate, Paul Reynolds.

Twice during the three or four days following Sonnier's murder, Shepard attempted suicide. On the evening of July 14, appellant met Shepard at appellant's medical office where he stitched Shepard's left wrist, following the second failed suicide attempt.

On Sunday, July 15, Reynolds contacted the Lubbock crime line and related that Shepard confessed to him that appellant paid Shepard to kill Sonnier. Police obtained warrants and Shepard and appellant were arrested on July 16. Indictments followed.

Shepard led police to an Amarillo lake where he said he threw the pistol he used to shoot Sonnier. Police divers recovered the pistol from the lake. A Department of Public Safety firearms examiner testified that

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[6] Testimony showed appellant and Shepard enjoyed good cigars, and that appellant recently had returned from a trip to Bermuda with friends and had brought some Cuban cigars home. It was two of the Cuban cigars that appellant gave Shepard.

the cartridge casings recovered from Sonnier's residence had been "cycled through" the recovered pistol. The pistol was one that appellant's brother had given appellant.

For appellant's second trial, Shepard was brought from prison on a bench warrant and held in the county jail throughout trial. But neither the State nor the defense presented him as a witness. This meant the State's direct proof of an agreement between appellant and Shepard for the murder of Sonnier depended on hearsay statements attributed to Shepard.

Reynolds testified for the State. He related a conversation he and Shepard had on July 12. According to Reynolds, Shepard told him that he had killed a man by shooting him. He said he and appellant planned the murder, and appellant gave him the gun he used. Reynolds said Shepard told him Sonnier "had been causing problems" for appellant and "there was a girlfriend that they had in common." Reynolds further testified that Shepard told him Dixon paid Shepard three bars of silver to kill Sonnier. Evidence showed Shepard sold a silver bar at an Amarillo pawn shop on June 15, 2012, and sold two silver bars to the same business on July 11, the day following Sonnier's murder.

Johnson testified that Reynolds told him that appellant's involvement "in the murder for hire plot was that he had paid David Shepard in three silver bars to commit the murder of Dr. Sonnier." Johnson further testified that Shepard told him "all about how he and Dixon had for months surveilled and planned and

funded and had carried out this execution of Dr. Sonnier."

Appellant testified in his defense and denied any involvement in Sonnier's murder. Appellant related to the jury that he and his wife divorced after he began an affair with Shetina. While the divorce was pending appellant purchased shares in an allergy testing business Shepard was starting, Physicians' Ancillary Services, Inc. (PASI). Because of his ongoing divorce proceeding, appellant said, he purchased his interest in PASI with three silver bars that were his separate property.

After he divorced his wife for Shetina,[7] appellant's relationship with her became difficult. According to appellant's testimony, she was demanding and volatile, and pushed him to give her an engagement ring. Nonetheless, his ego was deeply wounded, he said, when Shetina told him in January 2012 she could not meet him to discuss their relationship because she had begun a "committed" relationship with Sonnier. She lauded Sonnier in social media posts.

Appellant's testimony indicated that meanwhile he and Shepard were "meeting regularly" to discuss Shepard's efforts to initiate PASI's allergy-testing business. The business required referrals from physicians and Shepard represented to appellant that he was regularly traveling to Lubbock to solicit

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[7] He once told Shetina in a text message that she was the "sole reason" for his divorce. In another message, he said he "sold [his] family down the river for her."

physicians. At a point, appellant testified, Shepard said some people he met in Lubbock told him Sonnier was seeing other women. Appellant further testified Shepard led him to believe he had been a private investigator, and that he could obtain proof that Sonnier was dating women other than Shetina. Over a period of some four months leading up to the day of Sonnier's murder, appellant said, he encouraged Shepard in plans to discredit Sonnier in Shetina's eyes. By one plan, sometimes referred to in the record as "Plan A," Shepard would obtain photographs of Sonnier with other women, for appellant to show Shetina.[8] By another, "Plan B," Shepard would hire a female to tell Shetina that Sonnier was unfaithful.

Evidence showed during this time appellant and Shepard communicated regularly, by cellphone and text message. The following exchange of text messages between Shepard and appellant occurred on July 9, 2012, the day before Sonnier's murder.

Shepard to Appellant:	**Appellant to Shepard:**
"Perfect day for travel to hub city." 4:23 p.m.	"Need it done ASAP" 4:24 p.m.
"Me too." 4:25 p.m.	
"I've got gas and ready to head south tomorrow." 8:26 p.m.	"Yay" 8:27 p.m.

[8] Appellant testified his "understanding of Plan A initially was that [Shepard] was going to take some pictures, and then it sort of morphed into he was going to place a camera that could do that remotely for him."

"Got a good feeling about tomorrow." 8:28 p.m.	"Hope so :-)" 8:32 p.m.
"Hope he shows." 8:51 p.m.	

On July 10, the day of Sonnier's murder, Shepard and appellant exchanged some forty-one telephone and text messages. The text messages of that day in evidence were as follows:

Shepard to Appellant:	**Appellant to Shepard:**
	"Absolut." 12:48 p.m.
"On target" 4:53 p.m.	"Put it on em." 12:48 p.m.
"Still no show, only been an hr, but Damn." 5:56 p.m.	"Patience" 5:56 p.m.
"Easier said then (sic) done with your c - - - hanging out. Persevere we shall" 6:02 p.m.	
"At least I'm not sweating my a - - off" 6:03 p.m.	
"Vitamins supplements I bought must be helping as well." 6:06 p.m.	"Good" 6:07 p.m.
"Any Intel from anywhere?" 6:46 p.m.	"No" 6:46 p.m.
"Almost 2 hrs." 6:46 p.m.	"Hold fast" 6:47 p.m.
"How long do you think it is safe to park my car on the street, unattended?" 7:38 p.m.	"Patience" 6:47 p.m.
"Been parked since 4:45" 7:39 p.m.	"Been" 7:39 p.m.

"Almost have to stay another 30-45 min. to allow dusk to cover exit now. Hearing activity in alley. 7:42 p.m.
"I think it's ok" 7:40 p.m.
"K" 7:43 p.m.
"Will keep you posted." 7:44 p.m.

Appellant testified he thought on the day of the murder Shepard was at Sonnier's house to place a camera to take the pictures they sought. After the police visited appellant on July 11, he deleted a number of text messages from his cellphone and jumped into his swimming pool with his cellphone in an attempt to destroy stored text messages. Because appellant had backed up the messages on his cellphone to his laptop computer, however, many were recovered. A substantial volume of communication evidence recovered from the cellphones of Dixon, Shepard, and Reynolds was presented at trial.

Consideration of Objected-to Hearsay Statements in Sufficiency Review

Case law establishes that an appellate court reviewing the sufficiency of the evidence to support a conviction considers all the evidence in the record, whether direct or circumstantial, and whether properly or improperly admitted. *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

At the outset of our discussion of the sufficiency of the evidence supporting his convictions, we must

address appellant's contention regarding the proper treatment of hearsay statements offered by the State and admitted over his objection. On appeal, appellant raises issues challenging the trial court's admission of the hearsay statements. And, he argues, as we review the sufficiency of the evidence supporting the essential elements of the charged offenses, we consider inadmissible hearsay statements that were admitted over objection but we must regard such statements as lacking any probative value and thus as incapable of supporting a judgment.[9]

We disagree with appellant's position. Regarding the interplay between objected-to hearsay statements and sufficiency review, we consider the following discussion from *Moff v. State*, 131 S.W.3d 485 (Tex. Crim. App. 2004), to be dispositive of the matter:

> Sometimes a claim of trial court evidentiary error and a claim of insufficient evidence overlap so much that it is hard to separate them. For example, suppose that the identity of a bank robber is proven through the testimony of one and only one witness at trial. Suppose further that this witness' testimony is rank hearsay: "Little Nell told me that Simon was the bank robber." On appeal a defendant might raise a hearsay claim and a claim of sufficiency of the evidence to prove identity.

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[9] Appellant builds his argument chiefly on *Gardner v. State*, 699 S.W.2d 831, 835 (Tex. Crim. App. 1985) (op. on reh'g) (stating "inadmissible hearsay is the only form of evidence that lacks probative value. Since such evidence lacks probative value, it is discounted when determining sufficiency questions").

He will have the right to have the hearsay question considered on its merits only if he objected properly at trial; he will have the right to have the question of the sufficiency of evidence to prove identity considered on its merits whether or not he objected.

But an appellate court must consider *all* evidence actually admitted at trial in its sufficiency review and give it whatever weight and probative value it could rationally convey to a jury. Thus, even if the trial court erred in admitting the witness' testimony of Little Nell's out-of-court statement, the reviewing court must consider that improperly-admitted hearsay in assessing the sufficiency of the evidence to prove the bank robber's identity. As Professors Dix and Dawson explain: "an appellant . . . is not entitled to have an appellate court first consider the appellant's complaints concerning improper admitted evidence and, if it resolves any of those in favor of the appellant, to then, second, consider the sufficiency of the properly-admitted evidence to support the conviction."[10]

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[10] *Moff* continues:

There is much logic in that rule:

> This rule rests in large part upon what is perceived as the unfairness of barring further prosecution where the State has not had a fair opportunity to prove guilt. A trial judge's commission of trial error may lull the State into a false sense of security that may cause it to limit its presentation of evidence. Erroneous admission of hearsay evidence, for example, may cause the State to

Id. at 489-90 (footnotes omitted, emphasis in original) (citing George E. Dix and Robert O. Dawson, 43A TEXAS PRACTICE, CRIMINAL PRACTICE AND PROCEDURE § 43.531, at 742 (2d ed. 2001)). Other more recent opinions of the Court of Criminal Appeals are in accord with *Moff*. *See*, *e.g.*, *Winfrey v. State*, 393 S.W.3d 763, 767 (Tex. Crim. App. 2013); *Powell v. State*, 194 S.W.3d 503, 507 (Tex. Crim. App. 2006); *see also Griffin v. State*, 491 S.W.3d 771, 781 n.3 (Tex. Crim. App. 2016) (Yeary, J., dissenting) (noting "[u]nobjected-to hearsay has probative value" and "even had the [witness's] testimony been erroneously admitted over an objection, the Court would still take it into account in [its] sufficiency analysis") (citing *Winfrey*, 393 S.W.3d at 767); *Thomas v. State*, 753 S.W.2d 688, 695 (Tex. Crim. App. 1988) (stating jurors do not act irrationally taking into account evidence that was erroneously admitted). For that reason, regardless whether the court properly admitted Reynolds' and Johnson's testimony to Shepard's hearsay statements, we consider the testimony

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> forego offering other evidence that would ultimately prove admissible.
>
> In our example, had the judge excluded the hearsay identification evidence, the State might have put on other evidence to prove identity. The remedy lies in a new trial, not an acquittal for insufficient evidence, because "the risk of frustrating the State's legitimate interest in a full opportunity to prove guilt, in any case, outweighs the defendant's interest in being subjected to trial only once."

Moff, 131 S.W.3d at 490 (footnotes omitted) (quoting in part 43A Dix and Dawson § 43.531, at 742).

for the purpose of evaluating the sufficiency of the evidence to support the jury's verdicts.

Sufficiency of the Evidence

To assess the sufficiency of the evidence supporting a conviction, we review all the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). "[O]nly that evidence which is sufficient in character, weight, and amount to justify a fact finder in concluding that every element of the offense has been proven beyond a reasonable doubt is adequate to support a conviction." *Brooks*, 323 S.W.3d at 917. When reviewing all of the evidence under the *Jackson* standard of review, we consider whether the jury's finding of guilt was a rational finding. *Id.* at 907. We must "defer to the jury's credibility and weight determinations because the jury is the sole judge of the witnesses' credibility and the weight to be given their testimony." *Id.* at 899-900. As the Supreme Court put it in *Jackson*, the standard of review "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319.

With respect to count one of the indictment,[11] the jury heard appellant acknowledge he gave three bars of silver to Shepard. The jury heard two versions of the purpose for their transfer. Appellant testified the bars constituted his investment in PASI. Reynolds testified that Shepard told him appellant paid him the silver to murder Sonnier. Johnson testified Shepard told him essentially the same thing. Under the standard of review we apply, it was the role of the jury to resolve the conflict in the testimony and determine whether appellant's statement, or Shepard's incriminating statements related by Reynolds and Johnson, truthfully reflected the purpose for appellant's transfer of the silver to Shepard.[12] Appellant's text messages urging Shepard to persevere in carrying out their plan also are pertinent here. In sum, the evidence permitted the

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[11] As to count one, the jury was instructed as follows by the jury charge's application paragraph:

> Now bearing in mind the foregoing instructions, if you find from the evidence beyond a reasonable doubt that on or about July 10, 2012, in Lubbock County, Texas, THOMAS DIXON, did then and there, intentionally or knowingly cause the death of an individual, namely Joseph Sonnier, III, by employing David Shepard to murder the said Joseph Sonnier, III for remuneration or the promise of remuneration, from the Defendant, and pursuant to said agreement, the said David Shepard did then and there intentionally or knowingly cause the death of the said Joseph Sonnier, III by shooting the said Joseph Sonnier, III and by stabbing the said Joseph Sonnier, III, then you will find the defendant guilty of capital murder as charged in the indictment.

[12] The State contends appellant's promise to give Shepard the Cuban cigars also could have been the remuneration for the murder. We need not address that contention here.

jury rationally to conclude, beyond a reasonable doubt, that appellant was guilty of capital murder for remuneration as alleged by count one of the indictment.

Under count two of the indictment, appellant's guilt required proof Shepard intentionally caused Sonnier's death in the course of committing or attempting to commit burglary of his habitation, and that appellant, acting with intent to promote or assist the commission of the offense, encouraged, directed, aided, or attempted to aid Shepard to commit the offense.[13]

A large body of evidence showed Shepard entered Sonnier's home by pushing in a rear window. It is undisputed that inside the home Shepard murdered Sonnier. In addition to the evidence we have noted indicating that appellant paid Shepard the silver for the murder, the State placed in evidence many text messages, some quoted above, and evidence of telephone calls showing a stream of communication between Shepard and appellant over the months preceding the murder. As we will discuss in detail later in the opinion, expert testimony based on cell tower location information placed both Shepard and appellant in Lubbock on March 12, 2012, near locations associated with Sonnier and Shetina, further suggesting

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[13] The jury was instructed: "Our law provides that a person commits the offense of burglary of a habitation, if, without the effective consent of the owner, he enters a habitation with intent to commit a felony, theft or assault." *See* Tex. Penal Code Ann. § 30.02(a)(1) (West Supp. 2018) (burglary).

appellant's encouragement and direction of Shepard's activities leading up to the murder.

From the texts we have quoted that the two exchanged on July 9 and 10, the jury reasonably could have determined that the two anticipated Shepard would accomplish some task at a Lubbock location, and that Shepard was on location from near 5:00 p.m. on July 10, awaiting an individual to "show." The jury reasonably could have read appellant's texts to encourage Shepard's completion of the anticipated task, and to encourage him to be patient and "hold fast." It appears also from Shepard's texts that he feared being discovered at his location. Because there is no dispute that Shepard, during that evening, entered Sonnier's home and killed him, we agree with the State the jury rationally could infer that it was Shepard's murderous activity that the two anticipated, and that appellant was encouraging and directing through his text messages. Further, it is undisputed that the pistol found in the lake, through which the cartridge casings found at the murder scene had been "cycled," belonged to appellant.

From our review of the entirety of the evidence before the jury, viewed in the light most favorable to its verdict, we find the jury acted rationally by concluding beyond a reasonable doubt that appellant was guilty of capital murder as described in count two.

Accomplice Witness Testimony

We will address also appellant's argument that the testimony of accomplice witnesses was not corroborated as required by law.

An accomplice is someone who participates with the defendant before, during, or after the commission of a crime and acts with the required culpable mental state. *Nelson v. State*, 297 S.W.3d 424, 429 (Tex. App.—Amarillo 2009, pet. ref'd) (citing *Druery v. State*, 225 S.W.3d 491, 498 (Tex. Crim. App. 2007)). The testimony of an accomplice is considered untrustworthy and should be "received and viewed and acted on with caution." *Walker v. State*, 615 S.W.2d 728, 731 (Tex. Crim. App. 1981). Accordingly, before a conviction can be based on an accomplice's testimony, the testimony must be corroborated by other evidence tending to connect the accused with the crime. Tex. Code Crim. Proc. Ann. art. 38.14 (West 2005); *Nelson*, 297 S.W.3d at 429.

The testimony of one accomplice may not be relied on to corroborate the testimony of another accomplice. *See Smith v. State*, 332 S.W.3d 425, 439 (Tex. Crim. App. 2011) (accomplice testimony must be corroborated by "other, non-accomplice evidence that tends to connect the accused to the offense").

A challenge of the sufficiency of evidence corroborating accomplice testimony is not the same as a challenge to the sufficiency of the evidence supporting the verdict. *Cantelon v. State*, 85 S.W.3d 457, 460 (Tex. App.—Austin 2002, no pet.) (citing *Cathey v. State*, 992 S.W.2d 460, 462-63 (Tex. Crim. App. 1999)). When

reviewing the sufficiency of non-accomplice evidence under Texas Code of Criminal Procedure article 38.14, an appellate court decides whether the inculpatory evidence tends to connect the accused to the commission of the offense. *Smith*, 332 S.W.3d at 439. The non-accomplice evidence need not directly link the defendant to the crime, "nor does it alone have to establish his guilt beyond a reasonable doubt." *Castillo v. State*, 221 S.W.3d 689, 691 (Tex. Crim. App. 2007). A reviewing court eliminates all the accomplice testimony from its consideration and examines the remaining portions of the record to determine whether any evidence tends to connect the accused with the commission of the offense. *Castillo v. State*, 221 S.W.3d 689, 691 (Tex. Crim. App. 2007). It views the corroborating evidence in the light most favorable to the jury's verdict. *Gill v. State*, 873 S.W.2d 45, 48 (Tex. Crim. App. 1994).

The defendant's liability as a principal or under a party theory is not relevant under an article 38.14 analysis. *Joubert v. State*, 235 S.W.3d 729, 731 (Tex. Crim. App. 2007). The question is whether some evidence "tends to connect" him to the crime; the connection need not establish the exact nature of his involvement as a principal or party. *Id.*

Appellant contends Reynolds should be considered an accomplice witness; the State disagrees. We need not resolve their disagreement on that point. Although Shepard did not testify, to evaluate the non-accomplice witness evidence, we will exclude hearsay statements attributed to him. Our analysis thus considers the evidence presented to the jury through sources other

than Shepard and Reynolds. *See Castillo*, 221 S.W.3d at 691.

The non-accomplice witness evidence begins with the undisputed evidence appellant's friend Shepard killed Sonnier. It continues with appellant's own testimony, from which the jury learned that Sonnier was dating Shetina, for whom appellant still had strong feelings; that appellant and Shepard were engaged in an effort to photograph Sonnier with other women; that appellant understood Shepard's efforts toward that end would include planting a camera at Sonnier's house; that appellant knew Shepard was at Sonnier's house when they exchanged text messages during the late afternoon and early evening of July 10; that, when Shepard returned to Amarillo the evening of July 10, he went to appellant's house and received cigars appellant had promised him; that appellant did not mention his connection with Shepard during his initial conversation with Johnson because he feared he would be connected with the camera he believed Shepard left at Sonnier's house; and that, after learning of Sonnier's death, appellant took steps to clear text messages from his phone. Appellant also acknowledged in his testimony he had "some responsibility" for Shepard's presence at Sonnier's residence.

Other non-accomplice testimony came from Woolbert, and from two other Amarillo women who testified Shepard sought their help to discredit Sonnier in Shetina's eyes. Those three witnesses' testimony demonstrated appellant's strong interest in Shetina and in Sonnier's relationship with her. Text messages and

phone records showed frequent communication between Shepard and appellant, at times leading up to and including the time Shepard was outside Sonnier's house before the murder. The non-accomplice testimony based on cell tower location information placing Shepard and appellant in Lubbock on March 12, 2012, in the vicinity of Shetina's house, Sonnier's house, and the D'Venue dance studio[14] further connects appellant with Shepard's tracking of Sonnier's activities. And non-accomplice testimony showed that after police departed appellant's home on the night of July 11, appellant immediately began a text message and cell phone dialogue with Shepard. An expert testified shell casings recovered from Sonnier's home had been "cycled through" the pistol appellant agreed was his.[15]

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[14] Sonnier and Shetina frequented the dance studio and Sonnier also danced with other women who were there. Witnesses indicated a person fitting Shepard's description sat in a parked car outside the studio and once came inside.

[15] We do not depend on it for our conclusion there is ample evidence tending to connect appellant with Sonnier's murder, but we note that during cross examination of Reynolds, appellant placed in evidence a transcription of the recorded statement Reynolds gave Johnson and Pena. The transcription contains other statements the jury could have seen as tending to connect appellant with the murder. Because the transcription of Reynolds' statement was appellant's evidence, introduced without limitation, the law might permit its use as corroborating evidence. *Brown v. State*, 476 S.W.2d 699, 702 (Tex. Crim. App. 1972); *but cf. Smith v. State*, 332 S.W.3d 425, 439 (Tex. Crim. App. 2011) ("an accomplice's testimony cannot be corroborated by prior statements made by the accomplice witness to a third person"). *See* 43A George E. Dix & John M. Schmolesky, Texas Practice:

Viewed in the light most favorable to the verdict, the evidence before the jury from sources other than Reynolds and Shepard tends to connect appellant with Shepard's murder of Sonnier, satisfying the corroboration requirement. *See Joubert*, 235 S.W.3d at 731.

We overrule appellant's first and second issues.

Failure to Suppress Historical Cell Site Location Information Obtained Without a Warrant – Issues 43 through 47

Through his issues 43-47, appellant contends the trial court reversibly erred by failing to suppress historical cell site location information ("CSLI") derived from his cell phone, which the State obtained without a warrant from his cell service provider, AT&T.

On August 11, 2015, the State obtained a court order under the Stored Communications Act, 18 U.S.C. § 2703 and its Texas counterpart, Code of Criminal Procedure article 18.21, which directed appellant's cellular telephone service provider to produce "the cell tower sites and locations and call detail records belonging to [appellant's cell phone number], for the period of February 1, 2012- July 15, 2012." The order was based on "reasonable and articulable facts" which the issuing magistrate found produced a "reasonable belief" that the information sought was "relevant to a legitimate law enforcement inquiry." TEX. CODE CRIM. PROC. ANN.

Criminal Practice and Procedure, § 51:68 n.2 (3d ed. 2011) (distinguishing *Brown* from *Smith*).

art. 18.21, § 5(a) (West Supp. 2018). AT&T complied with the order. Appellant filed a pretrial motion to suppress the CSLI, arguing the failure to obtain a search warrant violated the Fourth Amendment to the United States Constitution, Article I, section 9 of the Texas Constitution, 18 U.S.C. 2703, and Texas Code of Criminal Procedure article 38.23. The trial court overruled the motion.

The facts of the search and seizure of appellant's CSLI are not disputed because the information was obtained by court order. The question presented is therefore purely one of law which, in the context of reviewing a trial court's ruling on a motion to suppress, we review de novo. *Love v. State*, 543 S.W.3d 835, 840 (Tex. Crim. App. 2016) (citing *Wilson v. State*, 311 S.W.3d 452, 458 (Tex. Crim. App. 2010)).

After briefing in this appeal was completed, the United States Supreme Court decided *Carpenter v. United States*, 585 U.S. ___, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018), in which it held that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI" and, under the Fourth Amendment, law enforcement officers therefore must generally obtain a warrant before obtaining CSLI records. 138 S. Ct. at 2217, 2221. We requested the parties to supplement their appellate briefs to discuss the impact of *Carpenter* on the appeal. Both have done so.

As for whether the trial court erred by failing to suppress appellant's CSLI obtained by a court order

but without a warrant, we believe the holding of the Court's *Carpenter* opinion is controlling and applies retroactively, a conclusion the parties do not dispute in their supplemental briefing. *See Davis v. United States*, 564 U.S. 229, 243, 244, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011) (citing *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987)) (newly announced rules of constitutional criminal procedure must apply retroactively without exception to all cases, state or federal, pending on direct review or not yet final); *McClintock v. State*, 541 S.W.3d 63, 67 n.4 (Tex. Crim. App. 2017) ("we ordinarily follow federal rules of retroactivity"); *cf. Olivas v. State*, No. PD-0561-17, 2018 Tex. Crim. App. Unpub. LEXIS 619 (Tex. Crim. App. Sep. 12, 2018) (per curiam) (not designated for publication) (granting petition as to defendant's challenge of CSLI obtained without a warrant and remanding case to court of appeals for further action in light of *Carpenter*, decided during pendency of petition for discretionary review). We agree with the parties that, under the holding of *Carpenter*, the trial court erred by denying appellant's motion to suppress his CSLI.[16]

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[16] For the same reason the court discussed in *Love*, 543 S.W.3d at 845, we need not consider whether the State may have obtained appellant's CSLI in objective good faith reliance on the lawfulness of the court order obtained under the Stored Communications Act. Appellant's motion to suppress the CSLI cited our state's statutory exclusionary rule, article 38.23(a) of the Code of Criminal Procedure, which, unlike the federal exclusionary rule, contains no good faith exclusion for evidence obtained without a warrant. *See also McClintock*, 541 S.W.3d at 67 n.4 ("Moreover, it seems plain enough that Article 38.23(b) does not provide a good faith exception for an illegal warrantless search. . . .").

That evidence should not have been presented to the jury. We next must consider the harmfulness of the error.

When, as here, the trial court's error is constitutional, we must reverse a judgment of conviction or punishment unless we determine beyond a reasonable doubt that the error did not contribute to the conviction or punishment. Tex. R. App. P. 44.2(a); *Snowden v. State*, 353 S.W.3d 815, 817-18, 822 (Tex. Crim. App. 2011).

The constitutional harmless error analysis asks whether there is a reasonable possibility the error might have contributed to the conviction. *Love*, 543 S.W.3d at 846 (citing *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998) (op. on reh'g)). Its focus is not on the propriety of the trial's outcome; rather, it aims to calculate as much as possible the error's probable impact on the jury in light of the existence of other evidence. *Id.* (citing *Wesbrook v. State*, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000)). To that end, considerations include the nature of the error, the degree of its emphasis by the State, the probable collateral implications of the error, and the weight a juror probably placed on the error. *Love*, 543 S.W.3d at 846; *Snowden*, 353 S.W.3d at 822. But these considerations are not exclusive. *Snowden*, 353 S.W.3d at 822. "At bottom, an analysis for whether a particular constitutional error is harmless should take into account any and every circumstance apparent in the record that logically informs an appellate determination whether 'beyond a reasonable doubt [that particular] error did not

contribute to the conviction or punishment.'" *Id.* at 822 (bracketed text in original) (quoting TEX. R. APP. P. 44.2(a)). For this purpose, we must evaluate the entire record in a neutral manner rather than in the light most favorable to the prosecution. *Love*, 543 S.W.3d at 846.

The record of the trial is complex. The jury heard over 16 days of testimony. Combined, the prosecution and defense presented testimony from 60 witnesses, and some 1,800 exhibits were admitted.

We begin with a description of the nature of the error we evaluate. *Love*, 543 S.W.3d at 846. As noted, because appellant's CSLI was not suppressed, the jury saw evidence it should not have seen.

Appellant's historical cell site location information, derived from AT&T's records, was a part of the extensive cell phone record evidence the State used to show the contacts, by phone call and text message, between Shepard and appellant before and after Sonnier's murder. In particular, appellant's AT&T CSLI depicted appellant's location, based on his cell phone's contacts with cell towers, at what the State contended were critical times.

Using Shepard's Sprint cell phone records and appellant's AT&T records, Lubbock police Corporal Darren Lindly gave expert testimony at trial. Lindly was on the stand for much of a day's testimony. His testimony demonstrated the extent of the contacts that occurred between Shepard and appellant on days Shepard was in Lubbock. As examples, summarizing

the information he had compiled, Lindly told the jury he counted 19 text messages and nine calls between the two on May 15; 31 texts and nine calls on May 16; 38 texts and four calls on May 17; 27 texts and one call on June 6; 41 texts and three calls on June 12; and 65 texts and 11 calls on June 14. On the day of the murder, July 10, there were, Lindly said, 37 texts and four calls between the two, and on July 11, 21 texts and no calls.[17]

Lindly's testimony was supported with a slide presentation containing Google Earth satellite views of Lubbock, Amarillo, and points along the connecting Interstate Highway 27. Lindly explained how he plotted the cell tower location information for phone calls[18] made between Shepard and appellant. Relying on appellant's AT&T CSLI, and CSLI from Shepard's Sprint account,[19] he placed pins on the slides designating Shepard's and appellant's locations on various dates and times when their cellphones contacted cell towers.

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[17] Lindly's testimony showed appellant to be a prolific user of text messages. He said, for instance, that on July 10 appellant sent a total of 242 text messages, of which the 37 texts exchanged with Shepard amounted to roughly 15 percent.

[18] Describing his review of the cell phone records, Lindly said, "The records show the tower that is being used by the phone." He explained that the records identify the cell tower a phone contacts when it is used in a phone call, but not when it is used in a text message. The records, however, identify the date and time text messages were exchanged, so the parties' locations can be inferred if phone calls and text messages are exchanged near the same time.

[19] Appellant's challenge to admission of CSLI is limited to his information obtained from AT&T. The admissibility of Shepard's Sprint records is not contested.

The information was depicted in State's exhibit 1757. The exhibit contains satellite maps on which Lindly placed pins indicating the locations of cell towers in Lubbock and in Amarillo. The Amarillo map also contains icons designating appellant's house, appellant's medical office, Shepard's apartment, and the pawn shop where Shepard sold the silver bars. The Lubbock map marks the locations of Sonnier's house, Shetina's house and the D'Venue dance studio. After those two maps, the exhibit contains maps and records pertaining to calls made by appellant or Shepard on seventeen days between March 12 and July 11, 2012. For each of the seventeen dates, the exhibit contains one or more pages of phone records and one or more maps depicting Lindly's estimate of a phone's location at the time of the call, relative to the cell tower shown on the record for each call. In total, the exhibit contains 67 satellite maps of areas in or between Lubbock and Amarillo, and 55 pages of cell phone records from which Lindly derived the information to support the locations he plotted on the maps.

Of the 55 pages of cell phone records in State's exhibit 1757, only four were of appellant's AT&T records; the remaining 51 pages were of Shepard's Sprint records. The AT&T records were for calls occurring on March 12 and June 15. Of the 16 maps reflecting calls on March 12, eight contained plots of information from appellant's AT&T records. Two of the five maps depicting June 15 calls contained plots of AT&T information.

The State's use of appellant's CSLI focused primarily on his location on March 12. Addressing the

emphasis placed on that evidence and its probable implications, the State's brief says appellant's CSLI "showed that Appellant and Shepard were together in Lubbock on March 12, 2012, which the State used to prove two points: that Shepard and Appellant were working closely together, and that Appellant was lying." We agree that the State used appellant's CSLI both as circumstantial evidence of his complicity in Sonnier's murder, and to impeach appellant's testimony.

The State's brief continues: "The focus of the CSLI presentation was unquestionably Shepard's location during the months preceding the murder. The State presented evidence of Shepard making frequent trips to Lubbock over the course of several months prior to July 2012. In Lubbock, Shepard would ping off cell towers close in location to [Shetina's] home, Dr. Sonnier's home, and the dance venue where Dr. Sonnier and [Shetina] met and continued to attend—D'Venue. The CSLI showed that on March 12, 2012, both Appellant and Shepard traveled to Lubbock, and were pinging off the same or similar towers around the same general times. The cell tower that Appellant and Shepard hit most frequently was the one near the D'Venue dance studio. Later in the evening, Appellant and Shepard hit the same towers traveling back to Amarillo."[20]

The State contends admission of appellant's CSLI was harmless, even under the constitutional standard.

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[20] We have omitted the record references in our quotation from the State's brief.

The State first argues that appellant's own evidence established the same facts regarding his presence in Lubbock on March 12 as were shown by his CSLI. To support the statement, the State relies on Defendant's exhibit 116, a list of gasoline purchases appellant prepared from his credit card statement. The list contains a March 12 gas purchase at a station in Plainview, Texas. That appellant bought gas in Plainview might suggest he traveled to Lubbock, but it does not alone prove it. And, as the State's brief acknowledges, appellant denied he was with Shepard. Appellant's purchase of gas in Plainview, even accompanied by his later admission he was in Lubbock on that day,[21] says nothing about contact with Shepard. As showing the two were together in Lubbock that day, appellant's evidence does not carry nearly the probative value of the satellite map depicting his whereabouts, and Shepard's, near a location associated with Sonnier and Shetina. We can see no merit in the State's contention appellant's gas purchase record is the evidentiary equivalent of his CSLI.

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[21] On cross examination, asked where he went on March 12, appellant said, "It appears now that I came to Lubbock." He elaborated, "[I] didn't remember that before until I saw the cell phone records. I still don't remember that trip to Lubbock, but my cell phone says I was in Lubbock, so I believe I was." Under continued cross examination, he acknowledged the CSLI showed his cell phone and Shepard's "hit two or so of the same towers in Lubbock," and agreed "then coming home you're hitting the same towers around Abernathy and New Deal. . . ." He asserted, though, the men "weren't together," and said their apparent presence near the same towers "would have to be a coincidence."

The State next contends the fact appellant and Shepard were working closely together prior to the murder was well shown by other evidence, making it unlikely the jury assigned significant weight to the erroneously-admitted CSLI. We find the contention improperly minimizes the significance of the CSLI evidence, for two general reasons.

First, while witness testimony, and evidence of text messages and phone calls exchanged between Shepard and appellant established without question that the two communicated often regarding Shepard's activities, the March 12 CSLI evidence is unique. By means of that evidence, the State's brief acknowledges, the jury was presented the implication that "[a]ppellant was physically with Shepard."

Nonetheless, the State argues, the evidence appellant "may have been in Lubbock with Shepard four months prior to the offense," told the jury only what they already knew, "that Appellant and Shepard were working closely together to track Dr. Sonnier's movements." The question, the State argues, "was always for *what purpose* they were tracking Dr. Sonnier's movements."[22] But our review of the evidence indicates that, absent the CSLI, there was no evidence appellant ever was in Lubbock with Shepard for *any* purpose. That Lindly's satellite maps prepared with the AT&T CSLI placed the two near identified locations associated with Sonnier and Shetina adds to its importance.

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[22] Italics in original.

The State makes the point that appellant's presence in Lubbock was in March, four months before the murder. But given the undisputed evidence that appellant and Shepard discussed and carried out surveillance of Sonnier over a several-month period, we do not consider it significant that their joint presence in Lubbock occurred then rather than closer to Sonnier's murder. The State's evidence that Shepard and appellant attempted to initiate their Plan B during March shows they were actively pursuing the plans to influence Sonnier's relationship with Shetina at that time.

Secondly, not only was the appellant's cell tower location information the only evidence that appellant was ever in Lubbock with Shepard, contrary to his denial before the jury, it appeared in a form likely to have a strong impact on jurors. *See Coble v. State*, 330 S.W.3d 253, 281 n.77 (Tex. Crim. App. 2010) (quoting John W. Strong, *Language and Logic in Expert Testimony: Limiting Expert Testimony by Restrictions of Function, Reliability, and Form*, 71 OR. L. REV. 349, 361 n.81 (1992)) ("There is virtual unanimity among courts and commentators that evidence perceived by jurors to be "scientific" in nature will have particularly persuasive effect"); *Bagheri v. State*, 119 S.W.3d 755, 764 (Tex. Crim. App. 2003) (noting "the powerful persuasive effect that 'scientific' evidence has on the average juror").

Lindly acknowledged on cross examination that his plottings of Shepard's and appellant's locations involved some "guesstimating." But the satellite maps before the jury depicted no guesswork; appellant's

location on each map was pinpointed and labeled with the date and time from the cell phone records, down to the second. And, even if the pinpoint depicted was inaccurate, the point still was made that appellant was present in Lubbock on that day and was at least in the vicinity of Shepard and the dance studio. Even appellant, on cross examination, was forced to acknowledge that the cell phone records disproved his statement he had not been in Lubbock.

We think the State correctly identifies an issue that was critical for the jury's resolution in the question "for *what purpose*" appellant and Shepard "were tracking Dr. Sonnier's movements." We think the State also accurately summarizes the evidence when its brief further states, "Appellant admitted to working so closely with Shepard from the beginning, but offered an alternative story as to the motivation behind the ongoing surveillance of Dr. Sonnier." The State further, and accurately, notes that at trial and on appeal, appellant "proffered his own version of events to explain away the damning text messages and exchange of silver and cigars." The jury, the State argues, was "free to disbelieve any or all of Appellant's testimony and version of events." The argument highlights the second purpose for which the State used the evidence derived from appellant's CSLI, to show that "Appellant was lying."

At trial, appellant consistently denied he ever had been together with Shepard in Lubbock. After seeing the State's CSLI evidence, he acknowledged he had been in Lubbock on March 12, but he continued to deny

he had been there with Shepard. The State made strong use of the AT&T CSLI evidence to argue that, in the denial, he was lying to the jury.

Again minimizing the importance of the CSLI, the State argues appellant's credibility before the jury "was damaged from the outset by other means." The State points to appellant's deceptive failure to mention his friendship with Shepard during his initial interview by Johnson, his statement on that occasion that he did not know anything about Sonnier, and his feigned surprise that he was being contacted about the murder.

In his testimony, appellant acknowledged his untruthful statements to Johnson but attributed them to his fear that the camera he believed Shepard had installed would be "traced back" to him and he would be "drawn into" the investigation of a murder he had no part in.

Contrary to the State's position on appeal, we find Lindly's satellite map evidence, created partly by use of appellant's AT&T CSLI, formed a main pillar supporting the State's argument to the jury that appellant could not be believed.

As noted, on the witness stand, appellant acknowledged he lied in his first conversation with Johnson, but explained his reasons for doing so. Appellant's denial he was present in Lubbock with Shepard, by contrast, was made directly to the jury, and gave the State the opportunity to emphasize its impact on his credibility.

In arguments to the jury, in its opening, the State emphasized the satellite maps depicting appellant's location on March 12. In the slide presentation that accompanied its argument, the State displayed six of the March 12 Google maps, five of them containing appellant's AT&T cell tower data. The State pointed the jury to appellant's denial that he "came to Lubbock with Shepard," and reviewed with the jury the cell tower evidence showing appellant's locations at various times on March 12, pointing specifically to his locations in the vicinity of the D'Venue dance studio. Concluding the argument focusing on that evidence, which occupied about a page of the reporter's record, the State asked, "Do you believe Dixon when he tells you that he was not in the Lubbock area with Shepard?"

The State returned to the theme briefly in its closing argument, asking the jury:

> Is there any doubt in your mind now that Mike Dixon was with Dave Shepard on the D'Venue on the March the 12th? He looked you in the eye and said, "Nope, never been to Lubbock with Dave Shepard before." And we – all these things hinge on the credibility of this Defendant.

In this court, the State argues it did not emphasize the evidence derived from appellant's CSLI.[23] The

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[23] The State argues also that the jury likely assigned little weight to the evidence appellant was in Lubbock on March 12 while Shepard also was there because it was not probative of any element of the offense. We disagree with that assertion; the jury well could have seen it as evidence appellant encouraged,

prominent place the State gave the evidence in its argument to the jury demonstrates otherwise.

We agree with the State's jury argument that much hinged on appellant's credibility. The jury's acceptance of appellant's assertion that his encouragement and direction of Shepard did not go beyond Plans A and B was essential to appellant's defense.

Appellant testified his intent was that Shepard obtain photographs of Sonnier in a compromising position, so appellant could demonstrate to Shetina that Sonnier was not the faithful friend she believed him to be. Appellant testified, "We were trying to get proof . . . about the fact that there was not a committed relationship that I had been told all about." Asked what he did when Shepard "told you that he could prove that Joseph Sonnier was not what people thought he was, what did you do?" appellant responded, "I told him, 'Yeah, get – I'd like to see that proof.' "

The text messages in evidence, on which the State relied heavily, reflect that appellant advised, encouraged, and directed Shepard to carry out a plan, but do not expressly make clear what plan is referred to. No text message in evidence refers directly to any intention to harm or kill Sonnier or even to confront him physically. At the same time, no text in evidence refers expressly to photographs or cameras. From our review of the text messages, we find a rational juror could read

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directed, aided, or attempted to aid Shepard to commit the offense, proof of which was essential to appellant's conviction under count two.

them as reflecting appellant's encouragement of Shepard to complete Sonnier's murder, or could read them as reflecting his encouragement of the plan appellant described.[24]

In like fashion, appellant's testimony, if believed, provided a counter to other significant pieces of the State's case. Appellant said the three bars of silver were his contribution to the formation of Shepard's corporation, PASI. The corporation's records in evidence show it was organized during May and June of 2011, with three shareholders, Shepard, appellant, and Kevin Flemming. Appellant's share certificate is dated June 9, 2011. Flemming testified to the corporation's formation, and said he funded the corporation's expenses for ten to twelve months, including, on occasion, Shepard's gasoline expenses for his travel to Lubbock to solicit physicians, until Shepard was arrested.

With regard to the pistol, appellant did not deny that the pistol retrieved from the lake belonged to him, but he testified Shepard knew where he kept it and, appellant believed, "at some time he took it from my house." He flatly denied he ever gave Shepard a gun.

The State adduced evidence of the effort, sometimes referred to as "Plan B," by which Shepard, with

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[24] The State urged the jury to view appellant's use in the text messages of phrases such as "put it on 'em," "get 'er done," and "whip and spur," as encouragement of violence. Appellant attributed his use of such phrases to his rural upbringing, and introduced evidence that he commonly used those phrases in communications with his family members and friends.

appellant's urging, asked two Amarillo women to contact Shetina in an effort to disrupt her relationship with Sonnier. One testified Shepard "wanted me to contact [Sonnier's] girlfriend at the time and basically try to get them to break up." She identified a text message she received from Shepard telling her he needed "help with a revenge issue." The text was dated March 12, 2012, the same day the cell tower evidence showed Shepard and appellant together in Lubbock. Texts between appellant and Shepard on March 13 and days following demonstrated appellant's interest in Shepard's effort. The other woman testified Shepard "wanted to give me an anonymous prepaid phone to call an ex-girlfriend of Dr. Dixon's and tell her that I was having sex with her boyfriend . . . for money." Shepard told her he was doing "a favor" for Dr. Dixon, and offered her "[a] few hundred dollars" to make the call.[25] Neither woman agreed to Shepard's request.

Such elaborate efforts to diminish Sonnier's standing with Shetina would have been unnecessary, of course, if the plan were simply to kill him. During his testimony, appellant acknowledged he met with and encouraged Shepard in his efforts to obtain photographs of Sonnier with other women. But he steadfastly denied asking Shepard to engage in any confrontation with Sonnier. He later told the jury that

[25] In his testimony, appellant described Plan B somewhat differently. He said he understood Shepard was going to have the women "[e]ither take pictures with Dr. Sonnier, to act like they were his girlfriend, or to actually show up at his house to knock on the door to say, you know, while he was there with someone to say, 'Oh, I'm here. I didn't realize you were with someone.' "

he never "in his wildest dreams" thought any harm could come to Sonnier from his activities.

At trial, appellant tried in other ways to blunt the effect of Reynolds' testimony that Shepard directly implicated appellant in the murder. Appellant strongly attacked Reynolds' credibility. He adduced and emphasized evidence that Shepard implicated Reynolds in the murder. Reynolds acknowledged under cross examination that Shepard "said I helped him."

Reynolds' testimony also was a mixed bag for the parties. Reynolds testified he considered Shepard a "psych case," mentally unstable, "out in left field." Though he testified Shepard told him appellant paid him to kill Sonnier, he also said Shepard lived in a "fantasy world." Reynolds told the jury Shepard had said he had a "hit list" of 40 to 50 names; had said he had helped kill his own mother by overdosing her with insulin; and had said he had killed others, including a homeless man. Reynolds testified he initially did not believe Shepard when he said he had killed a man in Lubbock, and that he did not believe Shepard's statement that he had tried to commit suicide until Shepard showed him the sliced wrist that appellant had sutured. Reynolds also acknowledged before the jury that he was aware Shepard since had repeatedly said appellant did not pay him for a murder.

The State presented Shepard's statements implicating appellant, through the testimony of Reynolds

and Johnson,[26] and implicitly through Shepard's nolo plea and conviction, and presented a slew of incriminating circumstances. Appellant's case depended on the jury's rejection of Shepard's statements and its acceptance of appellant's explanation of the incriminating circumstantial evidence. The State argued before the jury that appellant's explanations were not credible. Its contention that appellant lied during his testimony formed a significant part of that argument, and the AT&T CSLI was the vehicle to demonstrate appellant's lie. We have reviewed the entirety of the evidence in a neutral light. Having done so, we cannot say that beyond a reasonable doubt the erroneous admission of appellant's cell tower location information did not contribute to his conviction. *See* TEX. R. APP. P. 44.2(a); *Snowden*, 353 S.W.3d at 817-18, 822. Appellant's issues 43-47 are sustained.

Exclusion of Public from Courtroom – Issues 11 through 16

Through issues 11-16 appellant complains the trial court unlawfully excluded the public from his trial on three occasions.

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[26] Shepard's daughter Haley Shepard also testified. She told the jury her father paid cash for presents and dinner for her and her sisters on June 16, 2012. When she asked him "how he was able to spend so much money for the weekend," she said he responded, "I did some work for [appellant] and he paid me early." He also told them, she said, that they should not ask what kind of work he had done.

On the first occasion, bailiffs excluded a sketch artist during voir dire, telling him there was no room for him in the courtroom. Before jury section resumed the next morning counsel for appellant objected to the artist's exclusion claiming denial of the right to a fair and public trial and citing *Presley v. Georgia*, 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010) (per curiam). The trial court explained it permitted the artist to sit in the jury box when the court became aware there was not space for him elsewhere in the courtroom. The court denied appellant's motion for a mistrial.

The second exclusion alleged took place during the testimony of a detective when tensions arose between appellant's counsel and the State's attorneys. The trial court released the jury for the day and stated to the gallery, "Everybody—if everybody would please excuse yourself from the courtroom except for the attorneys." Counsel for appellant again objected under *Presley*. During the following conference between the court and counsel, one of appellant's attorneys stated "about 50 people" were excused from the gallery and were not present for the conference. He added, "[A]ll of the public has been excused." The State countered in its brief, "several spectators remained in the courtroom." In its later findings, the trial court found, "spectators remained in the courtroom."

The third claim of unlawful closure occurred the morning of closing arguments. The wife of one of appellant's attorneys testified at the motion for new trial hearing that she, along with "four or five" others, was

barred from the courtroom by deputies and "several other people." According to her testimony a deputy said, "'He doesn't want anyone standing.'" She added, "And there—I looked in and there were empty spots." "There were places that people could sit down." The witness added she was kept from the courtroom for fifteen to twenty minutes. An attorney testified she tried to enter the courtroom about 9:30 or 9:45 a.m. but was told by a deputy sheriff she could not enter "because it was sitting room only." She later entered the courtroom during a break after a spectator departed. The deputy in charge of courthouse security testified he contacted the trial court judge in the interest of public safety and it was decided "sitting room only" would be permitted for closing arguments. Once the courtroom was full, according to the deputy, admission was allowed only when a seat became available. The deputy acknowledged the county's central jury room is larger than the trial courtroom and was vacant three days a week. He further acknowledged it was not equipped for jury trials.[27]

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[27] The State argues appellant failed to raise timely objections to the exclusion of the sketch artist during voir dire and the exclusion of spectators during closing argument, and thus forfeited his closed-courtroom complaints on those occasions. "[A] complaint that a defendant's right to a public trial was violated is subject to forfeiture." *Peyronel v. State*, 465 S.W.3d 650, 653 (Tex. Crim. App. 2015). In support of its argument, the State cites *Suarez v. State*, No. 10-14-00218-CR, 2015 Tex. App. LEXIS 10874, at *1-3 (Tex. App.—Waco Oct. 22, 2015, no pet.) (mem. op.) (not designated for publication), in which the court found a public trial complaint was forfeited. That case is distinguished from the present case by the court's observation that the defendant there

The Sixth Amendment to the United States Constitution guarantees an accused the right to a public trial in all criminal prosecutions. U.S. CONST. AMEND. VI; *Lilly v. State*, 365 S.W.3d 321, 328 (Tex. Crim. App. 2012). The Fourteenth Amendment extends this fundamental right to defendants in state criminal prosecutions. U.S. CONST. AMEND. XIV; *Herring v. New York*, 422 U.S. 853, 857, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975) (citing *In re Oliver*, 333 U.S. 257, 266-67, 68 S. Ct. 499, 92 L. Ed. 682 (1948)). "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Waller v. Georgia*, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (citations and internal quotation marks omitted). "'[A] presumption of

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"did not press the issue and request a mistrial or any other relief for an alleged violation of his Sixth Amendment right to a public trial." 2015 Tex. App. LEXIS 10874, at *3. Here appellant objected to the exclusion of the sketch artist and then moved for a mistrial which was denied. His objection to exclusion of spectators from closing argument was raised in a motion for new trial. In a supporting affidavit, one of his attorneys stated he learned of the exclusion, "after the trial." The State does not point us to, and we do not find, facts in the record tending to indicate that appellant's complaints of the first and third closures were not made at the earliest possible opportunity. *See Woods v. State*, 383 S.W.3d 775, 780 (Tex. App.—Houston [14th Dist.] 2012, pet. refused) (complaint at earliest possible opportunity "arises as soon as the error becomes apparent such that the party knows or should know that an error has occurred"). We find appellant preserved his closed-courtroom complaints by timely objection.

openness inheres in the very nature of a criminal trial under our system of justice.'" *Lilly*, 365 S.W.3d at 328 n.6 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980)). "This presumption that criminal trials should be public, absent an overriding interest, reflects our country's basic distrust of secret trials and the belief that "justice must satisfy the appearance of justice." *Id.* (quoting *In re Oliver*, 333 U.S. at 268 and citing *Offutt v. United States*, 348 U.S. 11, 14, 75 S. Ct. 11, 99 L. Ed. 11 (1954)). The Sixth Amendment right to a public trial extends to voir dire, *Presley*, 558 U.S. at 213, and closing argument. *People v. Woodward* (1992) 4 Cal.4th 376, 382-83 [14 Cal.Rptr.2d 434, 841 P.2d 954].

"[T]he right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Waller*, 467 U.S. at 45. "Such circumstances will be rare, however, and the balance of interests must be struck with special care." *Id.*

The "standards for courts to apply before excluding the public from any stage of a criminal trial," the Court later held in *Presley*, require:

> [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it

> must make findings adequate to support the closure.

Presley, 558 U.S. at 213-14 (quoting *Waller*, 467 U.S. at 48); *see Steadman v. State*, 360 S.W.3d 499, 504 (Tex. Crim. App. 2012) (applying standard).

The "presumption of openness," the Court said in *Waller*, "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." The required findings must be "specific enough that a reviewing court can determine whether the closure order was properly entered." *Waller*, 467 U.S. at 46 (quoting *Press-Enter. Co. v. Super. Ct. of Cal., Riverside Cnty.*, 464 U.S. 501, 510, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)).

In this court, the State does not take the position that the trial court never actually closed the courtroom. *See Lilly*, 365 S.W.3d at 331-32 (burden on defendant to show trial was closed to the public). The State instead argues the record reflects only partial closures. *See Steadman*, 360 S.W.3d at 505 n.19 (pointing out some state and federal courts have distinguished between partial and total closures of the courtroom); *Woods*, 383 S.W.3d at 781 (excluding a specific person or group, even if only temporarily, constitutes a partial closure) (citing *Douglas v. Wainwright*, 739 F.2d 531, 532 (11th Cir. 1984)). Accordingly, the State argues, the three partial exclusions of the public from the courtroom may be justified on a showing they were supported by a "substantial reason," a less

stringent requirement than the "overriding interest" required by *Waller*. *Steadman*, 360 S.W.3d at 505 n.19.

We need not consider whether a substantial reason supported the exclusions of the public reflected by the record, because as the court pointed out in *Steadman*, even when the "substantial reason" standard applies, the trial court must satisfy the fourth requirement set out in *Waller* by making findings adequate to support the closure. *See Waller*, 467 U.S. at 46; *Steadman*, 360 S.W.3d at 505 n.19 (citing *Commonwealth v. Cohen*, 456 Mass. 94, 113, 921 N.E.2d 906, 922 (2010) for proposition that even in partial closure context remaining *Waller* factors must be satisfied); *Lilly*, 365 S.W.3d at 329 ("findings by the trial court are the linchpin of the *Waller* test").

The appellate record contained no findings supporting exclusion of members of the public from the courtroom. We abated the appeal and remanded the cause for preparation of those findings. The trial court prepared and filed findings and we quote them here in full:

> 1. At both trials, the Court quickly became aware that due to trial publicity, a larger courtroom would be needed. The Court moved the trial to the largest courtroom in the Lubbock County Courthouse-the 72nd District Court (capacity of ninety eight [98] without added seating as compared to sixty [60] in the 140th District Court).
>
> 2. At both trials, special accommodations were made to seat the Defendant's parents,

> Mary and Perry Dixon, in the courtroom despite limited seating. Even though the courtroom was full for the voir dire examination with potential jurors, the Court made seating available for Defendant's parents on the side of the audience.
>
> 3. On the first day of jury selection on October 21, 2015, the Court was unaware that sketch artist Roberto Garza was excluded from the courtroom. Immediately upon learning this information, the Court invited Mr. Garza to sit in the jury box to observe voir dire.
>
> 4. Near the halfway point of the trial, the Court found it necessary to admonish counsel for both sides on appropriate courtroom decorum, and excluded all spectators from the courtroom to do so. Nonetheless, spectators remained in the courtroom.
>
> 5. During closing arguments, the courtroom was filled to capacity with spectators. Any regulation of entrants into the courtroom was done for safety reasons, to maintain courtroom decorum, and to minimize juror distraction.

The trial court's findings, issued after our abatement of the appeal and remand for that purpose, are entirely inadequate to support even partial closure of the courtroom on any of the three occasions. The findings are particularly inadequate with regard to the occasion on which, as the findings describe it, "the Court found it necessary to admonish counsel for both sides

on appropriate courtroom decorum, and excluded all spectators from the courtroom to do so." The findings identify neither an overriding interest nor a substantial reason for excluding the public from the courtroom on that occasion. Much less do they contain factual statements describing how allowing the public to remain in the courtroom would prejudice such an interest or reason, why the court's action caused a closure that was no broader than necessary, and why no reasonable alternatives existed. *See Lilly*, 365 S.W.3d at 329 (describing attributes of proper findings, citing *Presley*, 130 S. Ct. at 725). As the court further held in *Lilly*, the law's "exacting record requirements stem from the fact, at least in part, that the trial court itself may sua sponte close the proceedings, rather than relying on the State or the defendant to move to close the trial." *Lilly*, 365 S.W.3d at 329. The trial court's action here illustrates the point made in *Lilly*.

The trial court's findings with regard to the third partial closure, that occurring during closing arguments, identify the court's reasons for regulating entrance into the courtroom as for "safety reasons, to maintain courtroom decorum, and to minimize juror distraction." But the court found no specific facts justifying closure because any of these interests would likely be prejudiced. Courtroom safety or security is a legitimate interest that may authorize closure under some circumstances. *Steadman*, 360 S.W.3d at 508. On a proper factual showing, maintaining courtroom decorum and minimizing juror distraction might support closure. But case law is clear that findings must

express more than generic concerns. *See Lilly*, 365 S.W.3d at 329; *Steadman*, 360 S.W.3d at 506. Here there are no specific findings of fact describing how the court's stated reasons would be affected absent closure, why the court's closure was no broader than necessary to protect safety, maintain decorum, and minimize juror distraction, why no reasonable alternatives existed. *Lilly*, 365 S.W.3d at 329. The same can be said for the exclusion of the sketch artist in the first occasion described in the court's findings. The court makes the point it was unaware of his exclusion from the courtroom. That factor is not relevant to the determination whether the courtroom was in fact closed. *Woods*, 383 S.W.3d at 781.

"Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials." *Presley*, 558 U.S. at 215; *Steadman*, 360 S.W.3d at 505 (quoting *Presley*). Excluding members of the public from the courtroom requires a balancing of interests "struck with special care" and the trial court bears the burden of considering reasonable alternatives to closure of the courtroom. *See Steadman*, 360 S.W.3d at 505 (citations omitted). The court must make findings adequate to support closure of the courtroom. *Id.* The trial court did not do so in this case.[28]

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[28] In his reply brief appellant argues we should not consider the trial court's findings, contending the procedure of issuing "post hoc" findings is inconsistent with *Waller* and not authorized by *Steadman*. In *Steadman*, the court was confronted with a similar argument regarding findings made after the court of appeals

Given the record before us, we must find appellant's Sixth Amendment right to a public trial was violated. The violation of a defendant's public-trial right is structural error that does not require a showing of harm. *Waller*, 467 U.S. at 49-50; *Lilly*, 365 S.W.3d at 328 (citing *Johnson v. United States*, 520 U.S. 461, 468-69, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997)), and *Steadman*, 360 S.W.3d at 510. We sustain appellant's issues 11-16. For that reason also, appellant is entitled to a new trial.

Conclusion

We have addressed the issues raised that are necessary to our disposition of the appeal. Tex. R. App. P. 47.1. Having overruled appellant's first and second issues on appeal, but sustained his issues numbered 43 through 47 and 11 through 16, we reverse the trial

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remanded the cause so the trial court could prepare *Waller* findings. *Steadman*, 360 S.W.3d at 503-04. The Court of Criminal Appeals held it need not consider the argument in view of its conclusion that a Sixth Amendment violation was shown, even considering the trial court's findings. *Id.* at 504. We likewise need not address appellant's reply-brief argument because the trial court's findings, made after we remanded the cause for their preparation, are not adequate to meet the law's requirements.

court's judgments of conviction and remand the cause for a new trial.

James T. Campbell
Justice

Quinn, C.J., concurring in the result.[29]

Publish.

[29] Chief Justice Quinn joins the opinion of the majority as it addresses the disposition of the issues concerning the legal sufficiency of the evidence and the denial of the motion to suppress evidence only. He concludes those issues are dispositive of the appeal and none other need be addressed.

NO. 2012-435,942

THE STATE OF TEXAS	§	IN THE 140TH
	§	DISTRICT COURT
VS.	§	OF
	§	LUBBOCK COUNTY,
THOMAS MICHAEL DIXON	§	TEXAS

RIGHT TO PUBLIC TRIAL FINDINGS OF FACT

(Filed Apr. 3, 2017)

The Court has considered Defendant's *Motion for New Trial*. The Defendant, Thomas Michael Dixon, did not appear with his attorneys of record, Daniel Hurley and Frank Sellers, at the hearing on January 29, 2016. Wade Jackson, Sunshine Stanek, and Lauren Murphree with the Lubbock County Criminal District Attorney's Office represented the State. The Court hereby makes the following findings of fact regarding Defendant's right to a public trial argument raised in the *Motion for New Trial*.

FINDINGS OF FACT:

The Court finds the following facts to be true:

1. At both trials, the Court quickly became aware that due to trial publicity, a larger courtroom would be needed. The Court moved the trial to the largest courtroom in the Lubbock County Courthouse—the 72nd District Court(capacity of ninety eight [98] without added seating as compared to sixty[60] in the 140th District Court).

2. At both trials, special accommodations were made to seat the Defendant's parents, Mary and Perry Dixon, in the courtroom despite limited seating. Even though the courtroom was full for the voir dire examination with potential jurors, the Court made seating available for Defendant's parents on the side of the audience.

3. On the first day of jury selection on October 21, 2015, the Court was unaware that sketch artist Roberto Garza was excluded from the courtroom. Immediately upon learning this information, the Court invited Mr. Garza to sit in the jury box to observe voir dire.

4. Near the halfway point of the trial, the Court found it necessary to admonish counsel for both sides on appropriate courtroom decorum, and excluded all spectators from the courtroom to do so. Nonetheless, spectators remained in the courtroom.

5. During closing arguments, the courtroom was filled to capacity with spectators. Any regulation of entrants into the courtroom was done for safety reasons, to maintain courtroom decorum, and to minimize juror distraction.

SIGNED AND ENTERED this 3rd day of April, 2017.

/s/ Jim Bob Darnell
Jim Bob Darnell
Judge Presiding

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8/24/2022 **COA No. 07-16-00058-CR**
DIXON, THOMAS **Tr. Ct. No. 2012-435,942**
PD-0242-22

On this day, the Appellant's petition for discretionary review has been refused.

Deana Williamson, Clerk

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