NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA
October 2, 2023 Term

TERRY WAYNE KING, II,	**§**
Petitioner	**§**
	§
vs.	**§**
	§
	§
STATE OF TEXAS,	**§**
Respondent	**§**

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

Submitted by:

WILLIAM S. HARRIS
Attorney and Counselor at Law
307 West 7th Street, Suite 1905
Fort Worth, Texas 76102
(817) 332-5575; Fax (817) 335-6060
E-mail: wmsharris.law@gmail.com

COUNSEL OF RECORD FOR TERRY WAYNE KING, II

QUESTION PRESENTED FOR REVIEW

Does a person have a legitimate expectation of privacy in a tractor trailer truck cab that serves as his home while he is on the road working for an employer who owns the truck?

Does that legitimate expectation of privacy survive his incarceration in the absence of evidence of his termination or the truck's reassignment to another driver?

STATEMENT REGARDING PARTIES TO THE CASE

The names of all parties to the case are contained in the caption of the case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTES

STATE STATUTES

FEDERAL RULES

Terry Wayne King, II, respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals in this case.

STATEMENT OF JURISDICTION

The Texas Court of Criminal Appeals affirmed Petitioner's conviction and reversed the intermediate Court of Appeals on June 28, 2023. (Appendix 1). This petition is being filed within 90 days after entry of that order, pursuant to Supreme Court Rules 13.1 and 13.3. The decision of the Texas Court of Criminal Appeals presents questions arising under the 4th and 14th Amendments to the United States Constitution. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation,and particularly describing the place to be searched, and the persons or things to be seized.
>
> U.S. Const. amend. IV
>
> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> U.S. Const. amend. XIV(*in pertinent part*.)

STATEMENT OF THE CASE

The factual summary of the Texas Court of Criminal Appeals is accurate and is adopted for the purposes of this Petition.

> On April 19, 2018, in Fort Worth, Appellant Terry King assaulted a twelve-year old girl who was on her way to the school bus. At all times relevant to this case, Appellant was working as a truck driver, operating a semi-tractor trailor (hereinafter, "truck") owned by his employer, John Feltman. Due to the nature of his work as a long-haul truck driver, Appellant lived out of the truck while working on the road. On July 17, 2018, Appellant was arrested in Oklahoma City, Oklahoma near the tractor trailer truck he drove. On the same day, the Oklahoma police searched the truck pursuant to a warrant. During the search, detectives found Appellant's cell phone and intended to seize it, but inadvertently left the cell phone in the truck. The gathered evidence, minus the cell phone, was transported to the Fort Worth Police Department. Upon realizing the cell phone was missing, Fort Worth Police Detective Pat Henz contacted the truck owner, Feltman, and asked him to retrieve the phone and send it to the police department. Upon receipt on August 9, 2018, a search warrant for the contents of the cell phone was issued and executed. Child pornography was found on the cell phone.
>
> During punishment, the State sought the admission of the child pornography into evidence. Appellant moved to suppress this evidence, arguing that the cell phone was seized from the truck after the search warrant expired and was no longer valid. The State acknowledged that the warrant had expired, but argued that Appellant had no standing to challenge the seizure because he retained no expectation of privacy in the truck when the phone was seized, given that the truck belonged to Feltman. The trial court denied the motion to suppress, explaining on the record that Appellant's expectation of privacy in the truck had expired by the time the phone was seized.

(Appendix 1, pp. 2-3.) Petitioner was convicted of Injury to a Child, causing serious bodily injury and attempted aggravated kidnaping in the 371st District Court of Tarrant County, Texas. He received a life sentence for each charge. He appealed and the appeal was transferred to the Texas Court of Appeals for the First

Appellate District. Appendix 3.

The Court of Appeals affirmed the Petitioner's convictions, but held that the trial court erred by denying his motion to suppress photographs found on Petitioner's cell phone. The Court reversed the punishment assessed in each case and remanded to the trial court for a new punishment hearing. *King v. State*, No. 01-19-00793-CR (Tex. Ct. of App. District 1, October 28, 2021.) Appendix 2.

The State first filed a Motion for Rehearing and a Motion for Hearing En Banc. Both motions were denied on June 9, 2022. *King v. State*, No. 01-19-00793-CR (Tex. Ct. of App. District 1, June 9, 2022.) The State then filed a Petition for Discretionary Review by the Texas Court of Criminal Appeals. The Petition was granted and the Court issued its opinion on June 28, 2023, reversing the Court of Appeals and affirming the trial court. *King v. State*, No PD-0330-22, (Texas Court of Criminal Appeals, June 28, 2023). Appendix 1.

During the hearing on the Motion to Suppress, most of the facts were stipulated. Appendix 4, pp. 7-30. The Petitioner's truck was searched pursuant to a search warrant obtained from an Oklahoma magistrate. The Petitioner's cell phone was found, but was inadvertently left behind. At some point, the Fort Worth Detective realized he did not have the phone so he called the truck's owner, Petitioner's employer, and asked him to look in the truck for the phone. The owner, John Feltman, did so and sent the phone to the detective via Federal Express. A warrant was then obtained for a forensic examination of the phone and some child pornography was found on the phone. The trial court denied to Motion to Suppress

and the pornography was admitted against Petitioner at the punishment stage of the trial.

ARGUMENT

REASON FOR GRANTING CERTIORARI

The Texas Court of Criminal Appeals has decided an important issue of law under the United States Constitution that this court has not addressed.

Question One

Does a person have a legitimate expectation of privacy in a tractor trailer truck cab that serves as his home while he is on the road working for an employer who owns the truck?

Whether a person is protected from search or seizure of their effects has long been a question of whether they have a reasonable expectation of privacy in area or item searched. *Katz v. United States*, 389 U.S. 347 (1967). The expectation must not only be reasonable, it must be an expectation that society is willing to accept as legitimate. *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (quoting *Jones v. United States* 362 U.S., at 261.) (1978).

On July 12, 2018, an arrest warrant for petitioner was issued in Fort Worth, 3 RR 106.[1] On July 18, 2018, Detective Henz of the Fort Worth Police Department was informed that Petitioner had been detained on the warrant by the United States Marshal's Office in Oklahoma City, 3 RR 106-107. Detective Henz then

[1] References to the Reporter's Record will be made citing first the volume, then RR followed by the page number.

traveled to Oklahoma City, *Id.*

While Petitioner was in custody, a search warrant was obtained to the cab of his tractor trailer truck (hereinafter truck) 7 RR DX7. The search warrant was executed on July 17, 2018. The inventory and return was filed on July 24, 2018. His truck was searched and several personal items seized. A cell phone was located and photographed, but left behind in the truck.

At some point after the initial search and return, Detective Henz was reviewing the return and noticed that the cell phone had not been seized. He then called John Feltman, the owner of the truck, and asked him to look for the phone in the truck. 6 RR 11. Feltman found the phone and shipped it to Detective Henz via Federal Express at Fort Worth Police Departments expense. *Id.* Pursuant to a separate search warrant (which is not at issue here) the phone was searched and child pornography found on it. These images were submitted to the jury at the punishment phase.

Petitioner used the truck as his work vehicle, but also as his home when working on the road. He was authorized to do so by his employer. Surely his expectation of privacy was as great or greater than the unauthorized driver of a rental car in *Byrd v. United States*, 138 S. Ct. 1518 (2018). Petitioner's expectation of privacy is greater than Byrd's as he was authorized by the owner, Feltman, to use the truck. Further, he used the truck as his abode and was thus in a position similar to the defendant in *Minnesota v. Olson*, 495 U.S. 91 (1990). Olson was allowed to stay overnight in a friends home. The police entered without a warrant

to arrest him for a robbery. The Court held that as an overnight guest he had a reasonable and legitimate expectation of privacy. Here Petitioner was permitted by the owner to dwell in the truck.

Here, the police tacitly recognized an expectation of privacy because the obtained a search warrant. Under the authority of this Court's precedent, Petitioner was protected by the 4th Amendment.

In Oklahoma, a search warrant must be served with in 10 days or it is void, Okla. Stat. tit. 22, § 1231. In this instance the warrant was served in this time period, but the record is silent about when Henz requested Feltman to search the truck for the phone. It was after the return was filed. The state conceded on appeal that the search warrant was no longer valid, so the seizure of the phone was without a warrant. Appendix 2, p. 56.

Was Feltman acting as an agent of the state? Of course the 4th Amendment only protects against unlawful intrusions by the government. Whether a private actor is an agent of the government requires a broad overview of the facts.

> To determine whether a private citizen should be deemed an "agent of the state," both the United States Supreme Court and the Texas Court of Criminal Appeals have adopted the following test: "[I]n light of all the circumstances, the private citizen must be regarded as acting as an instrument or agent of the state." *Coolidge [v. New Hampshire]* 403 U.S. [443] at 488, 91 S.Ct. 2022; *State v. Comeaux*, 818 S.W.2d 46, 49 (Tex.Crim.App. 1991) (plurality opinion).

Bessey v. State, 199 S.W.3d 546, 550 (Tex. App. 2006). In this instance, Henz initiated the call to Feltman to recover the phone without a warrant. Feltman complied and did precisely what Henz instructed him to do. Clearly he was acting

as an agent of law enforcement under all the circumstances.

Question Two

Does that legitimate expectation of privacy survive his incarceration in the absence of evidence of his termination or the truck's reassignment to another driver?

The Texas Court of Criminal Appeals held that it was the Petitioner's burden to prove that at the time the cell phone was seized, he still had a reasonable expectation of privacy. Appendix 1, p. 9. *Simmons v. United States*, 390 U.S. 377 (1968), *Kothe v. State*, 152 S.W.3d 54 (Tex. Crim. App. 2004). The dissenting judge was of the opinion that he had done so. The majority were not. No evidence was presented regarding the Petitioner's employment at the time that the motion to suppress was heard. He had been arrested and was in custody. No evidence was presented that the Petitioner had been fired, or that the truck had been reassigned to another driver. The phone was found in the truck just as Detective Henz expected. While it was true that John Feltman was not asked any questions, his unavailability was caused by his lack of anyone to care for his child. Mr. Feltman, was at that point living in Chicago and could not fly to Fort Worth until the day after the Motion to Suppress hearing, 6 RR 12.

Petitioner showed that he was employed by Feltman when he was arrested and when the truck was originally searched. The failure to show the date of the seizure was largely due to the state failing to record the date. From the 17th of July, until the 9th of August, Petitioner was in jail. 6 RR 10, 12. This was a total of 23

days during which, unable to post bail, Petitioner could not return to work nor recover his truck.

CONCLUSION

Petitioner asks the Court to grant a Writ of Certiorari to the Texas Court of Criminal Appeals to determine if the Petitioner showed a sufficient reasonable and legitimate expectation of privacy to protect his effect, including his cell phone, from seizure by a private citizen acting as an agent for the police. And, whether that showing of a reasonable expectation of privacy survived the elapsed time from the service of the original warrant and the subsequent seizure of the cell phone.

Respectfully submitted,

WILLIAM S. HARRIS
Attorney and Counselor at Law
307 West 7th Street, Suite 1905
Fort Worth, Texas 76102
(817) 332-5575
(817) 335-6060 FAX
wmsharris.law@gmail.com

_____

William S. Harris
SBOT No. 09096700

Attorney for Terry Wayne King, II

PROOF OF SERVICE

I, WILLIAM S. HARRIS, do swear that on this date, the 26th day of September, 2023, as required by Supreme Court Rule 29 I have served the enclosed Motion for Leave to Proceed in Forma Pauperis and Petition for a Writ of Certiorari on each party to the above proceeding by depositing an envelope containing the

above documents in the United States mail properly addressed to each of them and with first class postage prepaid:

VICTORIA A. FORD OBLON
Assistant Criminal District
Attorney
State Bar No. 24101763
Tim Curry Criminal Justice
Center
401 West Belknap, 4th Floor
Fort Worth, Texas 76196-0201

I declare under penalty of perjury that the foregoing is true and correct.

SIGNED THIS THE 26th DAY OF SEPTEMBER, 2023.

_____
WILLIAM S. HARRIS

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.2, I certify that the Petition for a Writ of Certiorari contains 11 pages.

I declare under penalty of perjury that the foregoing is true and correct.

SIGNED THIS THE 26th DAY OF SEPTEMBER, 2023.

_____
WILLIAM S. HARRIS

APPENDICES

APPENDIX 1

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0330-22

TERRY WAYNE KING II, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE 1st COURT OF APPEALS TARRANT COUNTY

MCCLURE, J., delivered the opinion of the Court in which KELLER, P.J., HERVEY, RICHARDSON, YEARY, NEWELL, KEEL, and SLAUGHTER, JJ., joined. WALKER, J., filed a dissenting opinion.

OPINION

Does an employee retain standing to contest a search or seizure in his work vehicle several days after he was arrested and after the vehicle was returned to his employer? Possibly. In this case, however, we hold that Appellant has not met his burden to establish a reasonable expectation of privacy as would confer standing.

BACKGROUND

On April 19, 2018, in Fort Worth, Appellant Terry King assaulted a twelve-year-old girl who was on her way to the school bus. At all times relevant to this case, Appellant was working as a truck driver, operating a semi-tractor trailor (hereinafter, "truck") owned by his employer, John Feltman. Due to the nature of his work as a long-haul truck driver, Appellant lived out of the truck while working on the road. On July 17, 2018, Appellant was arrested in Oklahoma City, Oklahoma near the tractor trailer truck he drove. On the same day, the Oklahoma police searched the truck pursuant to a warrant. During the search, detectives found Appellant's cell phone and intended to seize it, but inadvertently left the cell phone in the truck. The gathered evidence, minus the cell phone, was transported to the Fort Worth Police Department. Upon realizing the cell phone was missing, Fort Worth Police Detective Pat Henz contacted the truck owner, Feltman, and asked him to retrieve the phone and send it to the police department. Upon receipt on August 9, 2018, a search warrant for the contents of the cell phone was issued and executed. Child pornography was found on the cell phone.

During punishment, the State sought the admission of the child pornography into evidence. Appellant moved to suppress this evidence, arguing that the cell phone was seized from the truck after the search warrant expired and was no longer valid. The State acknowledged that the warrant had expired, but argued that Appellant had no standing to challenge the seizure because he retained no expectation of privacy in the truck when the phone was seized, given that the truck belonged to Feltman. The trial court denied the

motion to suppress, explaining on the record that Appellant's expectation of privacy in the truck had expired by the time the phone was seized.

COURT OF APPEALS

On appeal, Appellant argued, among other things, that the trial court erred in denying the motion to suppress the photographs containing child pornography. The First Court of Appeals found in Appellant's favor and reversed. The court held that Appellant had standing to challenge the seizure of the phone because his expectation of privacy in the truck had not ended or diminished when Feltman seized the cell phone for the police. The court reached its conclusion by analyzing the factors enumerated in *Granados v. State* to determine whether Appellant had an expectation of privacy. *King v. State*, 650 S.W.3d 241, 275 (Tex. App.—Houston [1st Dist.] 2021) (citing *Granados v. State*, 85 S.W.3d 217, 223 (Tex. Crim. App. 2002)). The following is a reproduction of the factors analyzed by the lower court followed by a summary of its analysis.

(1) Whether the accused had a property or possessory interest in the place invaded:

Not only did Appellant have his employer's permission to possess and operate the truck, but because of the nature of his work as a trucker, Appellant lived out of the truck while working. The other items seized included clothing, toiletries, a backpack, medication, a journal, a social security card, electronics, and personal pictures reflect that the truck was a living space.

(2) Whether he was legitimately in the place invaded:

Ownership is only one factor to consider in a search and is not a prerequisite for standing. The Supreme Court of the United States held in *Byrd* that a person has a reasonable expectation of privacy in a motor vehicle owned by another. This case was based on the reasonable expectation of privacy an individual has in a rental car. The Supreme Court of the United States has likewise held that employees often have a reasonable expectation of privacy in the workplace, even where that workplace is shared with other employees.

(3) Whether he had complete dominion or control and the right to exclude others:

Appellant's use of the truck demonstrates lawful control and a right to exclude others.

(4) Whether, before the intrusion, he took normal precautions customarily taken by those seeking privacy:

The cell phone was located in the semi-truck alongside Appellant's personal belongings and valuables.

(5) Whether he put the place to some private use:

Appellant lived out of the semi-truck.

(6) Whether his claim of privacy is consistent with historical notions of privacy:

Historically, homes are protected with the utmost respect for privacy. Meanwhile, workplaces have been given a moderate amount of reverence.

Following the lower court's reversal, the State petitioned this Court on the following ground: Did the court of appeals err in concluding that an employee retained an expectation

of privacy in his work vehicle several days after he was arrested and after the vehicle was returned to his employer? The State argues that the lower court's decision "unreasonably extends an employee's expectation of privacy in a work vehicle."

ANALYSIS

To reach the State's question of whether Appellant had an expectation of privacy in the truck at the time the cell phone was seized, we address the following preliminary questions: (i) What is standing? (ii) Who bears the burden of establishing standing? (iii) Did Appellant meet this burden?

i. What Is Standing?

To challenge the constitutionality of a search, a defendant must have "a legitimate expectation of privacy in the place invaded." *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996)(plurality opinion). In a motion to suppress, the issue of whether a legitimate expectation of privacy exists—whether a defendant has "standing" to contest a search—is determined by a trial court after consideration of the "totality of the circumstances surrounding the search." *Ex parte Moore*, 395 S.W.3d 152, 159 (Tex. Crim. App. 2013). When reviewing a trial court's ruling on a motion to suppress, we defer to the trial court's factual findings and view them in a light most favorable to the prevailing party, but review the legal issue of standing *de novo*. *Kothe v. State*, 152 S.W.3d 54, 59 (Tex. Crim. App. 2004). Absent a legitimate expectation of privacy, a defendant lacks standing to raise this issue and we may not consider the substance of his complaint. *Id.*

As the First Court of Appeals noted, courts look to several factors when deciding whether a person has a reasonable expectation of privacy in a place or object searched. They are:

> (1) whether the person had a proprietary or possessory interest in the place searched;
>
> (2) whether the person's presence in or on the place searched was legitimate;
>
> (3) whether the person had a right to exclude others from the place;
>
> (4) whether the person took normal precautions, prior to the search, which are customarily taken to protect privacy in the place;
>
> (5) whether the place searched was put to a private use; and
>
> (6) whether the person's claim of privacy is consistent with historical notion of privacy.

Granados, 85 S.W.3d at 223. Because this list is not exhaustive and no one factor is dispositive of a particular assertion of privacy, we examine the circumstances in their totality. *Id*.

ii. Who Bears the Burden?

Appellant has the burden of establishing all the elements of his Fourth Amendment claim. *Klima*, 934 S.W.2d at 111 (citing *Rawlings v. Kentucky*, 448 U.S. 98, 105, 100 S. Ct. 2556 (1980)). As noted in *Wilson v. State*, 692 S.W.2d 661, 669 (Tex. Crim. App. 1985), defendants are on notice that a privacy interest in the searched premises is an element of a Fourth Amendment claim which they have the burden of establishing.

Allegations in a motion to suppress are not "self-proving" and are insufficient to establish standing without proof. *Calloway v. State*, 743 S.W.2d 645, 650 (Tex. Crim. App. 1988); *accord Handy v. State*, 189 S.W.3d 296, 299 (Tex. Crim. App. 2006) (holding that Handy's assertion made in the motion to suppress that the residence searched belonged to the defendant was insufficient where "he presented no proof of such claim"). Evidence must prove both that the defendant "exhibited an actual subjective expectation of privacy" and that society recognizes this expectation as an objectively reasonable one under the circumstances. *Villarreal*, 935 S.W.2d at 138.

Part of that proof includes establishing his own privacy interest in the premises searched. *Id*. (citing *Rakas v. Illinois*, 439 U.S. 128, 149–50 (1978); *Wilson v. State*, 692 S.W.2d 661, 666–67 (Tex. Crim. App. 1994)). A defendant, because he has greater access to the relevant evidence, has the burden of proving facts establishing a legitimate expectation of privacy. *Villarreal*, 935 S.W.2d at 138.

This reasonable expectation of privacy must exist *at the time of the seizure or search*. *See McDuff v. State*, 939 S.W.2d 607, 616 (Tex. Crim. App. 1997) (analyzing McDuff's expectation of privacy "at the time of the search"). A person can have a reasonable expectation of privacy in a location at one point in time and lose that expectation when his status with respect to the location changes. *See*, *e.g.*, *Tilghman v. State*, 624 S.W.3d 801 (Tex. Crim. App. 2021); *Granados*, 85 S.W.3d at 225. Relevant to this proceeding, Appellant must establish that he had a reasonable expectation of privacy at the time his phone was seized.

iii. Did Appellant Meet His Burden?

At the hearing on the motion to suppress, the defense offered a copy of the affidavit, the search warrant, and return and inventory for purposes of the hearing. The only witness called to testify was Detective Jeremy Perkins with the Oklahoma City Police Department. Perkins testified that he wrote the warrant for the search, helped conduct the search, and located a cell phone with a shattered screen that was mounted to the front windshield. Detective Perkins testified he did not collect the cell phone, did not recall seeing somebody else collect it, and did not have possession of the phone.

Appellant stipulated to the following facts:

(1) Appellant was arrested in Oklahoma County on July 17, 2018;

(2) Appellant was arrested near and after driving the tractor trailer in question;

(3) The tractor trailer is owned by John Feltman;

(4) There was a search of that tractor trailer pursuant to a warrant;

(5) As a result of that search, what was thought to be the Defendant's cell phone was found and was photographed;

(6) The phone was inadvertently left in the truck and not seized by the joint search of the Oklahoma City Police Department and the Fort Worth special crime — or major case unit;

(7) Detective Henz, upon receiving the inventory from that search, realized that that phone was not in property;

(8) Detective Henz contacted the owner of the tractor trailer, John Feltman;

(9) Mr. Feltman looked in the truck and found the phone;

(10) John Feltman shipped the phone via FedEx to Detective Henz and was reimbursed for the shipping costs;

(11) On August 9, 2018, Detective Henz gained possession of the actual cell phone, which matched the photograph taken during the search on July 17, 2018;

(12) The contents of the phone were searched by a separate warrant (which is not contested by Appellant).

While the lower court analyzed whether Appellant retained an expectation of privacy of the trailer *at the time of his arrest*, that court did not analyze whether Appellant had an expectation of privacy of the trailer *at the time of the seizure of the cell phone*. *See McDuff*, 939 S.W.2d at 618. Instead, it appeared to hold that because Appellant had an expectation of privacy when he was arrested and because his arrest alone could not be used as supporting an expired expectation of privacy, that he retained such expectation. *King*, 650 S.W.3d at 280. It ignored one glaring issue: the burden lies with Appellant to establish a reasonable expectation of privacy at the time the search occurred. *See Kothe*, 152 S.W.3d at 59; *see also McDuff*, 939 S.W.2d at 618.

With the proper time frame and burden in mind, we hold that Appellant failed to establish his own privacy interest in the truck at the time of the seizure of the cell phone. Specifically, no questions were asked regarding Applicant's right to privacy in the tractor trailer at the time of the seizure of the cell phone such as Appellant's employment status, whether Appellant's keys or other personal property remained in the trailer, whether he

had the right to exclude others from the trailer, or whether the truck was still being put to private use by Appellant. Likewise, no questions were asked of John Feltman, such as the date when the seizure occurred. In fact, John Feltman was not called to testify at all.

Ultimately, Appellant produced insufficient evidence of his reasonable expectation of privacy in the search of the tractor trailer. Nor did the parties' stipulation establish any reasonable expectation of privacy on Appellant's behalf. *See Moore*, 395 S.W.3d at 161; *see also Villarreal*, 935 S.W.2d at 139. Viewed in the light most favorable to the trial court's ruling, the record shows Appellant failed to meet his burden of establishing his subjective expectation of privacy that society is prepared to recognize as objectively reasonable under the circumstances. *See Granados*, 85 S.W.3d at 225–26; *Villarreal*, 935 S.W.2d at 138–39.

CONCLUSION

From this record, we find that Appellant did not put on any evidence indicating that—at the time of the seizure of the phone—he had any proprietary or possessory interest in the tractor trailer, or, for that matter, any evidence demonstrating a reasonable expectation of privacy in the tractor trailer when John Feltman took the phone from the truck and mailed it to the detective. *See generally Esco v. State*, 668 S.W.2d 358, 361 (Tex. Crim. App. 1982). Therefore, we hold as a matter of law that Appellant failed to establish standing to assert a Fourth Amendment claim. Accordingly, we reverse the judgment of the court of appeals and affirm the trial court's judgment.

DELIVERED: June 28, 2023

PUBLISH

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0330-22

TERRY WAYNE KING II, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE FIRST COURT OF APPEALS TARRANT COUNTY

WALKER, J., filed a dissenting opinion.

DISSENTING OPINION

Today, the Court concludes that Appellant did not meet his burden to establish a reasonable expectation of privacy as would confer standing because he did not testify or present enough evidence demonstrating a reasonable expectation of privacy at the suppression hearing. I cannot agree. I believe Appellant met his burden because there was no evidence that his reasonable expectation of privacy in the truck, his secondary home, was diminished to the level of losing

standing by the time the second search was executed. Because I would affirm the judgment of the court of appeals, I respectfully dissent.

I. There Is Little or No Evidence that Appellant's Expectation of Privacy May Have Been Diminished.

Under the Fourth Amendment, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated [.]" U.S. CONST. amend. IV. The chief concern underlying the Fourth Amendment is the protection from police officers' "unbridled discretion to rummage at will among a person's private effects." *State v. Martinez*, 570 S.W.3d 278, 283 (Tex. Crim. App. 2019) (citing *Arizona v. Gant*, 556 U.S. 332, 345 (2009) and *State v. Rodriguez*, 521 S.W.3d 1, 8–9 (Tex. Crim. App. 2017)). It is well-established that there is a strong privacy interest in one's home. *See United States v. York*, 895 F.2d 1026, 1029 (5th Cir. 1990) ("[T]he right to be free from unreasonable government intrusion into one's own home is a cornerstone of the liberties protected by the fourth amendment.") (citing *Payton v. New York*, 445 U.S. 573, 583–89 (1980)).

A defendant "has standing to challenge the admission of evidence obtained by an unlawful search or seizure only if he had a legitimate expectation of privacy in the place invaded." *State v. Betts*, 397 S.W.3d 198, 203 (Tex. Crim. App. 2013) (internal quotation marks omitted). A defendant seeking to suppress evidence from a search or seizure bears the burden of showing that he had a reasonable expectation of privacy. *State v. Klima*, 934 S.W.2d 109, 111 (Tex. Crim. App. 1996) (citing *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980)); *Kothe v. State*, 152 S.W.3d 54, 59 (Tex. Crim. App. 2004) ("He must prove that he was a 'victim' of the unlawful search or seizure."). To meet this burden, a defendant must prove: (1) he has a subjective expectation of privacy in the

place searched; and (2) society is prepared to recognize that expectation as "reasonable." *State v. Granville*, 423 S.W.3d 399, 405 (Tex. Crim. App. 2014).

In determining whether a defendant's subjective expectation of privacy is one that society is prepared to recognize as objectively reasonable, this Court looks to the totality of the circumstances as well as the following non-exhaustive list of factors:

> (1) whether the accused had a property or possessory interest in the place invaded;
>
> (2) whether he was legitimately in the place invaded;
>
> (3) whether he had complete dominion or control and the right to exclude others;
>
> (4) whether, before the intrusion, he took normal precautions customarily taken by those seeking privacy;
>
> (5) whether he put the place to some private use; and
>
> (6) whether his claim of privacy is consistent with historical notions of privacy.

Granados v. State, 85 S.W.3d 217, 223 (Tex. Crim. App. 2002) (citing *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996)). The question here concerns whether Appellant established that his expectation of privacy in the truck remained intact at the time of the subsequent search several days later. *See McDuff v. State*, 939 S.W.2d 607, 616 (Tex. Crim. App. 1997) (analyzing a defendant's expectation of privacy in the context of abandonment "at the time of the search").

When Appellant presented his motion to suppress to the trial court, he offered Defendant's Exhibit 7.[1] The exhibit included an affidavit for the search warrant of the truck, the search warrant itself, and the return and inventory list from the warrant's execution. The warrant affidavit states:

---

[1] Appellant offered Defense Exhibit No. 7. *See* Reporter's Record Volume 6, at 9. ("[Defense counsel]: Well, Judge, for that purpose, I would like to introduce for purposes of this [suppression] hearing only what I marked as Defense Exhibit No. 7, which is just a copy of the affidavit and – the affidavit, warrant, and return of the truck that was written in . . . Oklahoma County, Judge.").

> During this investigation it was discovered Terry is employed as a truck driver that drives cross country to complete deliveries. Terry regularly drives a green tractor trailer . . . during these deliveries and that it is believed he lives out of this vehicle while he is away from home. It is therefore reasonable to assume that the suspect would keep items such as cellphones, clothing, and backpacks within this vehicle as he travels . . . .

The return and inventory list of items seized included items such as: prescription medications, personal documents, photos, clothing, toiletries, a journal, a cell phone, and other personal items.

In contrast, the State presented no evidence at the suppression hearing to affirmatively refute that Appellant lost his expectation of privacy other than the fact that Appellant's employer was in possession of the truck due to his arrest. The State did not call any witnesses, and it did not cross-examine the witness called by Appellant. There is no evidence that the employer fired Appellant, that another driver was using the truck in his absence, or that there was an employment policy in place regarding possession of the truck if a driver is absent. Had he been able to post bail, Appellant may well have returned to living in the truck to continue making deliveries. Moreover, the subsequent search occurred only several days after Appellant's arrest. I hesitate to find that one loses standing to challenge a search of his secondary home simply because he was arrested several days earlier and needs the owner of the property to take possession of the property in his absence.

Appellant's use of the truck demonstrates that he had permission to operate and possess the truck, put the truck to private use, and it is likely that based upon his private use, he had the right to exclude others from the truck. *See Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978) ("[O]ne who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude."). Appellant's use of the truck as a secondary home is also common among cross-country truckers, indicating that Appellant's

subjective expectation of privacy is consistent with historical notions of privacy found in the home and the workplace.

The Majority faults Appellant for not producing any exhibits at the hearing on the motion to suppress. Majority Opinion at 8. However, as I discussed above, Defendant's Exhibit 7 was produced and was sufficient evidence to show Appellant's reasonable expectation of privacy in the truck as to confer standing. The Majority also faults Appellant for not calling his employer to testify and for not testifying himself about his employment status and the status of the truck at the time of the search. Majority Opinion at 10. While such evidence would have bolstered Appellant's motion to suppress, it is unnecessary. Appellant offered solid evidence of his private use of the truck—he possessed the truck, he lived in it, he worked out of it, he likely had to right to exclude others from it, and there is no evidence that he was evicted from the truck. This is sufficient to demonstrate standing to challenge the State's search.

II. It Is Immaterial that Appellant Did Not Own the Truck.

It should also be noted that the fact that Appellant was not the owner of the truck or only had access to it through his employment does not destroy his expectation of privacy. The Fourth Amendment right against police intrusion has been extended to protect the homes of tenants, hotel guests, and overnight guests in certain circumstances. *See Stoner v. California*, 376 U.S. 483, 490 (1964) ("No less than a tenant of a house, or the occupant of a room in a boarding house . . . a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures."); *Tilgham v. State*, 624 S.W.3d 801, 811 (Tex. Crim. App. 2021) (a hotel guest has a reasonable expectation privacy unless hotel staff take affirmative steps to evict the guest); *Granados*, 85 S.W.3d at 226 (an overnight guest loses his expectation of privacy once he has been asked to leave by one with authority to exclude).

In the employment context, the Supreme Court has found that employees may have a reasonable expectation of privacy against police intrusion in their workplace. *O'Connor v. Ortega*, 480 U.S. 709, 716 (1987). The Supreme Court reasoned in *O'Connor* that "[a]s with the expectation of privacy in one's home, such an expectation in one's place of work is 'based upon societal expectations that have deep roots in the history of the [Fourth] Amendment.'" *Id.* (quoting *Oliver v. United States*, 466 U.S. 170, 178, n.8 (1984)).

In Appellant's case, the property searched served both as his workplace and his living space, weighing in favor of finding an expectation of privacy. The State's only argument at the suppression hearing was that the employer had possession of the truck after he was arrested. There is no evidence to conclude that Appellant was fired or otherwise evicted from the truck. The employer's possession of the truck is not fatal to Appellant's standing argument because the nature of the property involved would require the employer to take possession of the truck. This fact does not mean that the truck was removed from Appellant's use altogether. Therefore, based on the totality of the circumstances, I am unable to conclude that Appellant had no standing to challenge the State's search in the place where he worked and lived.

III. Conclusion

I believe Appellant met his burden to show standing. Appellant had standing to begin with, and there was no evidence that he lost that standing. Had the State attempted to rebut Appellant's argument and show that he had lost his expectation of privacy, my opinion may be different, but the State failed to do this. Therefore, I would affirm the judgment of the court of appeals. I respectfully dissent to the Court's decision to reverse.

FILED: June 28, 2023

PUBLISH

FILE COPY

FILED
TARRANT COUNTY
6/29/2023 9:04 am
THOMAS A. WILDER
DISTRICT CLERK

COURT OF CRIMINAL APPEALS

P.O. BOX 12308, CAPITOL STATION
AUSTIN, TEXAS 78711

June 28, 2023

District Clerk Tarrant County
401 W. Belknap
Fort Worth, TX 76196
* Delivered Via E-Mail *

1st Court Of Appeals Clerk
301 Fannin Street
Houston, TX 77002-7006
* Delivered Via E-Mail *

Re: King, Terry Wayne, Ii
CCA No. PD-0330-22 **COA No.** 01-19-00793-CR
Trial Court Case No. 1588183R

The court has issued an opinion on the above referenced cause number.

Sincerely,

Deana Williamson

Deana Williamson, Clerk

cc: Victoria Ford Oblon (Delivered Via E-Mail)
Presiding Judge 371st District Court (Delivered Via E-Mail)
District Attorney Tarrant County (Delivered Via E-Mail)
Mary B. Thornton (Delivered Via E-Mail)
State Prosecuting Attorney (Delivered Via E-Mail)

APPENDIX 2

Opinion issued October 28, 2021

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00793-CR

TERRY WAYNE KING II, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 371st District Court
Tarrant County, Texas
Trial Court Case No. 1588183R[1]

O P I N I O N

[1] The Supreme Court of Texas transferred this appeal from the Court of Appeals for the Second District of Texas. *See* TEX. GOV'T CODE § 73.001 (authorizing transfer of cases between courts of appeals).

Appellant Terry Wayne King II was charged in a two-count indictment with the offenses of injury to a child causing serious bodily injury[2] and attempted aggravated kidnapping.[3] A jury found King guilty of both offenses. The jury also made an affirmative deadly-weapon finding for each offense. King pleaded true to a felony-enhancement allegation contained in the indictment. The jury assessed King's punishment at life in prison for each offense. On appeal, King raises seven issues.

Relating to the guilt-innocence phase of trial, King's first six issues contain two issues challenging the sufficiency of the evidence, three issues contending that the jury should have been charged on lesser-included offenses, and one issue challenging the trial court's denial of King's motion to suppress DNA evidence. In his seventh issue, King contends that the trial court erred during the punishment phase by denying his motion to suppress and admitting into evidence, for the jury's consideration in assessing his punishment, photographs discovered on his cell phone containing child pornography.

Because we conclude that the trial court erred in denying the motion to suppress the photographs containing child pornography, and such error was harmful, we reverse the portions of the judgment sentencing King to life in prison for each

---

2 *See* TEX. PENAL CODE § 22.04(a)(1).

3 *See id.* §§ 15.01, 20.04

offense, and we remand the case to the trial court for a new sentencing hearing. But, because King's first six issues pertaining to the guilt-innocence phase of trial are without merit, we affirm the remaining portions of the judgment.

Background

On the morning of April 19, 2018, 12-year-old Jane (a pseudonym) was walking to her school bus stop at the corner of Calumet Avenue and Laredo Street in Fort Worth, Texas. As she was walking, she was approached on foot by King. He told Jane that he needed help and asked her to come with him. Jane agreed and walked with King, turning from Calumet onto Laredo Street.

Initially, King was nice to Jane, but after they had walked a distance, King hit Jane on her cheek with his hand. He then put his hands around Jane's neck, forced her to the ground, and kicked her. King squeezed Jane's neck, and Jane fought back using her hands. Jane could not breathe and eventually lost consciousness for a while. When a school bus stopped nearby, King ceased strangling Jane and ran away. A short time later, Jane got up, stumbled a bit, and walked to her bus.

T. Dover, Jane's school bus driver, noticed that Jane was approaching the bus from Laredo Street, rather than walking down Calumet as she normally did. When Jane arrived at the bus's door, Dover saw that Jane was covered in grass and had blood coming from her nose and mouth. Dover called 9-1-1.

When paramedics arrived, Jane was scared and shaking. They determined that her oxygen levels were slightly below normal. She had dried blood in and around her nostrils, a swollen lower lip, bruises on her back, and a bruise on her neck consistent with being choked. To the paramedics, Jane's condition initially did not appear life threatening. The paramedics transported Jane to the emergency room by ambulance. During the trip to the hospital, Jane's condition deteriorated.

When she arrived at the emergency room, Jane was considered a "trauma stat," meaning that she was having difficulty maintaining life-sustaining functions. Jane's oxygen levels were low, and she was struggling to breathe. The emergency room physician determined that Jane had a negative pressure pulmonary injury, an injury which may result from strangulation. The negative pressure caused Jane's lungs to fill with fluid, a condition known as pulmonary edema. The medical staff intubated Jane to help her breathe by putting a tube down her throat and then forcing air in and out of her lungs. Jane needed more help than the emergency room could provide, and she was transferred to the hospital's intensive care unit. There, Jane was placed on an ECMO, a machine that took over Jane's heart and lung functions by pumping her blood for her heart and oxygenating her blood for her lungs. Jane ultimately survived her injuries.

Detective P. Henz of the Fort Worth Police Department's Major Case Unit was assigned to the case. Detective Henz went to the hospital to meet with Jane, but

because of her condition, he was unable to speak with her. At that point, he had no suspects. Detective Henz, along with other detectives and officers, began their investigation by obtaining surveillance video from ten businesses in the general area of Calumet Avenue and Laredo Street.

Detective Henz contacted the school district to determine whether there were surveillance videos from any school buses that had been in the area. He was provided a video from Bus 200.

Bus 200 was not Jane's school bus. It was another school bus that had been parked on Laredo Street, waiting to start its route that morning. While parked on Laredo Street next to the back parking lot of the Knights Inn Motel, Bus 200 had faced the intersection with Calumet. In front of the bus, on the right, the bus's video showed a wood fence bordering a commercial lot. Detective Henz determined that the business that had been on the lot was no longer operating. His testimony at trial indicated that business was vacant, stating there was "no sign of business there," and it was "closed up." On the other side of the lot was an iron fence. A building stood at the back of the lot. He stated that the only way in an out of lot was on Laredo Street.

As Bus 200 waited to start its route, the bus's video showed a white, bearded man—wearing a hat and a backpack, and carrying an item of dark clothing—come from behind the wood fence bordering the vacant business lot and run toward Bus

200. The man ran into the parking lot of the Knights Inn Motel. About six minutes later, the bus's video showed Jane come into view in the vacant business lot from which the man had run earlier. She stumbled a bit and stood still for about 20 seconds. She then walked toward her school bus on the other side of Calumet Avenue. Detective Henz testified that, based on Bus 200's video, the police believed that the vacant business lot was where Jane had been attacked.

Surveillance video from the Knights Inn Motel also showed the man run around the wood fence of the vacant business lot and through the motel's parking lot. The man then walked through the motel's courtyard, swimming pool area, and another parking lot. He put on a sweatshirt as he walked. Surveillance video from Moritz Kia, a car dealership next to the motel, showed the man cross the motel's property and walk along the service road of the freeway.

A Days Inn was located on the other side of the freeway in the direction the man had walked. The Days Inn surveillance video showed the man enter its lobby and talk to the clerk. Detective Henz testified that the man asked the clerk for a public restroom, and after the clerk told him that there were no public restrooms, the man left.

Surveillance video showed the man enter a nearby Waffle House. The time stamp on the video indicated that the man was in the Waffle House for 15 minutes. Although not shown in the portion of the surveillance video admitted into evidence,

Detective Henz testified that video from inside the Waffle House showed the man enter the restroom. When he came out of the restroom, the man's appearance had changed.

Video from outside the Waffle House also showed that, when he left the restaurant, the man's appearance was different than it had been when he had entered the restaurant. He had shaved his beard, put his hair up in a bun, taken off his hat and sweatshirt, and changed his shirt. But the man appeared to be wearing the same jeans, backpack, and tennis shoes—which had distinctive white trim—as the person had been wearing in the earlier surveillance videos.

From the Waffle House, the man walked to a nearby Jack in the Box restaurant. Video from the restaurant showed him entering the restroom and then sitting at a table for about five minutes where he appeared to make a phone call. He then went to the parking lot where he was picked up by a white SUV. Detective Henz used registration records to trace the vehicle to King's wife, Whitney. Detective Henz obtained photographs of King and noticed "a lot" of resemblance between King and the man seen in the surveillance videos. Detective Henz also noted that King had distinctive tattoos on his neck and his arm, which are seen on the man in the videos. Detective Henz also obtained cell tower records, indicating that King and his wife were near the Jack in the Box on that day.

King and his wife moved to Oklahoma in May 2018. Detective Henz obtained a warrant for King's arrest on July 12, 2018. King worked as a semi-truck driver, and he was arrested near his truck in Oklahoma City by the U.S. Marshal's Service on July 17, 2018, at a truck stop. King was initially held by authorities in Oklahoma City, and the Oklahoma City Police Department assisted with the investigation.

Detective Henz traveled to Oklahoma City where he interviewed King. During the interview, Detective Henz showed King still images taken from the surveillance videos. King acknowledged that he was the person in the images from the Days Inn, Waffle House, and Jack in the Box videos, but he denied that he was the person in a still image taken from Bus 200's video, showing the man running from behind the wood fence of the vacant business lot.

Detective M. Klika with the Oklahoma City Police Department assisted the Fort Worth police with the case. Detective Klika signed a probable-cause affidavit to support the issuance of a search warrant to obtain DNA evidence from King. Based on Detective Klika's affidavit, an Oklahoma judge signed a search warrant for King's saliva. Detective Klika executed the warrant by taking a buccal swab from King.

At the hospital, a forensic nurse examiner had swabbed Jane's hands, under her fingernails, and other areas of Jane's body to obtain possible DNA evidence from

her assailant.[4] T. Crutcher, a senior forensic scientist with the Fort Worth Police Department's Crime Lab, did a DNA analysis on the swabs obtained from Jane and the buccal swab obtained from King. She established King's DNA profile from the buccal swab, and she established Jane's DNA profile from a sample known to be only from her. Crutcher then determined that there was DNA from another person on Jane's hands. Crutcher compared the DNA profile for that person with King's DNA profile. She concluded that the profile of the DNA obtained from Jane's hands was consistent with King's DNA profile.

Detective J. Perkins of the Oklahoma City Police Department also assisted with the case. He signed a probable cause affidavit to obtain a search warrant for the semi-truck, owned by King's employer, that King had been driving before his arrest and was located at the truck stop where King was arrested. Based on Perkins's affidavit, an Oklahoma judge issued a search warrant for the truck. The search warrant permitted the police to seize specified personal property, such as cell phones, from the truck. The warrant was issued and executed on July 17, 2018, the same day that King was arrested. The execution of the warrant was performed jointly by the Fort Worth Major Case Unit and the Oklahoma City Police Department, including

---

[4] The evidence showed that the nurse examiner had taken swab samples from under Jane's fingernails and from her hands, but the swabs were labeled "hands/fingernails," so it was not clear which swabs came from under Jane's fingernails and which came from her hands. For simplicity's sake, we will refer to the samples as being taken from Jane's hands.

Detective Perkins. The warrant and inventory of the search were returned to the Oklahoma judge on July 24, 2018.

A photograph of the interior of the truck, taken during the search, showed that the detectives had found an LG Cricket cell phone in the truck. The detectives intended to seize the cell phone but left it in the truck. The phone was not listed on the inventory.

Once back in Fort Worth, Detective Henz received the inventory and realized that the cell phone had not been seized from the semi-truck. He contacted King's employer, J. Feltman, who owned the truck. Detective Henz asked Feltman to look in the semi-truck for the cell phone, retrieve it, and send it to him. Feltman obtained the phone as requested by Detective Henz and sent it to him by Federal Express. Detective Henz reimbursed Feltman for the shipping cost. Detective Henz received the cell phone from Feltman on August 9, 2018. He then obtained a search warrant for the data contents of the cell phone. The phone had information on it indicating that it belonged to King, such as a photograph of his driver's license. The phone also had other photographs, including 17 photographs containing child pornography.

King was returned to Fort Worth and charged in a two-count indictment. In count one, the State alleged that King had committed the offense of injury to a child causing serious bodily injury by "intentionally or knowingly" causing "serious bodily injury to [Jane], a child younger than 15 years of age, . . . by squeezing the

throat of [Jane] with his hand. . . ."[5] In count two, the State alleged that King committed the offense of attempted aggravated kidnapping when he, "with the specific intent to commit the offense of aggravated kidnapping," did the following act or acts: "requesting [Jane] go with him and/or striking [Jane] with his hand and/or by grabbing [Jane] with his hand and/or by squeezing the throat of [Jane] and/or by pushing [Jane], amounting to more than mere preparation, but [which] fail[ed] to effect the commission of the offense intended."

The case was tried to a jury in September 2019. During the guilt-innocence phase, Jane testified regarding the events surrounding the attack, and she described the attack itself. Among the State's other witnesses, Detective Henz testified regarding how the Fort Worth Police Department had developed King as the suspect. Along with his testimony, the State introduced a video compilation of the surveillance videos from Bus 200 and the surrounding businesses, linking King back to the vacant business lot where the police believed Jane was attacked. The full version of the video from Bus 200 was also introduced by the defense for optional completeness. The full-length bus video showed a man running from the vacant

[5] The indictment originally alleged that King had caused Jane serious bodily injury, not only by squeezing her throat with his hand, but also by striking her, grabbing her, and pushing her. However, at the charge conference, the State expressly abandoned those additional manner and means of committing the offense, leaving only the allegation that King caused Jane serious bodily injury by squeezing her throat.

business lot and, after about six minutes, showed Jane come into view, stumble a bit, stand still for about 20 seconds, and then walk from the lot toward her school bus.

The compilation video introduced by the State showed the man run from the vacant business lot, walk through the property of the Knights Inn Motel while putting on a sweatshirt, continue walking through the area toward the other side of the freeway, enter and leave the Days Inn, enter the Waffle House, and then leave the restaurant with a changed appearance. While in the Waffle House, the man had shaved his beard, put his hair up in a bun, and changed some of his clothing, including removing his hat and sweatshirt. But other items of clothing, such as the backpack and distinctive tennis shoes, were seen in other portions of the compilation. The man entered a Jack in the Box where he was soon picked up by a white SUV.

Detective Henz testified that he determined that the SUV belonged to King's wife. He stated that he had obtained photographs of King, which he compared to the videos. He testified that King's face and distinctive tattoos on his arm and neck looked a lot like those of the man in the surveillance videos. Detective Henz also stated that he obtained cell tower records indicating that King and his wife had been near the Jack in the Box that day. The State's exhibits also included an aerial satellite map of the area showing the location of Jane's bus stop, the vacant business lot, and the businesses in the surrounding area from which the police had obtained surveillance videos.

In addition, Detective Henz described his interview with King in Oklahoma City. During the interview, King had looked at still images taken from the surveillance videos and had acknowledged that he was the man in the videos from the Days Inn, the Waffle House, and the Jack in the Box. He denied that he was the man seen running from the lot of the vacant business. The State offered the video of Detective Henz's interview with King into evidence.

The State's proof also included evidence showing that King's DNA was found on Jane's hands. Before trial, King moved to suppress the DNA evidence. The trial court heard the motion outside the jury's presence. King asserted that Detective Klika's affidavit, which supported the search warrant to obtain a saliva sample from King, was misleading because it omitted a full description of how Detective Henz had developed King as a suspect. The parties stipulated to the facts for the trial court to consider, and, after hearing the parties' arguments, the trial court denied King's motion to suppress the DNA evidence.

The forensic nurse examiner testified that, after Jane was brought to the hospital, she swabbed Jane's hands and under her fingernails to collect evidence. Detective Klika testified that he obtained a search warrant to collect King's saliva and that he had collected the buccal swab from King's mouth. He stated that King refused to allow a buccal swab even after being told that the police had a warrant to take the sample. Detective Klika described how he took the sample from King

involuntarily by pinching King's nose, which forced King to open his mouth. A video of the interaction with the police, including Detective Klika taking the sample from an uncooperative King, was admitted into evidence.

The forensic scientist, Crutcher, testified that she analyzed the swabs taken form Jane's hands and the buccal swab taken from King. She then compared the DNA profiles developed from the swabs and found that the DNA on Jane's hands was consistent with King's DNA.

The jury found King guilty of the charged offenses of (1) injury to a child causing serious bodily injury and (2) attempted aggravated kidnapping. The jury also found King had used a deadly weapon—his hands—during the commission of the offenses. King elected to have the jury assess his punishment. He pleaded true to an enhancement allegation for the prior federal felony offense of bank larceny. Due to the enhancement, the punishment range for the injury-to-a-child offense was life or 15 to 99 years in prison, and the punishment range for the attempted-aggravated-kidnapping offense was life or 5 to 99 years in prison. *See* TEX. PENAL CODE § 12.42(b), (c)(1).

During the punishment phase, the trial court heard King's motion to suppress the 17 photographs containing child pornography found on his cell phone. King acknowledged that the State had obtained a search warrant for the contents of the cell phone but argued that the photographs should be suppressed because the cell

phone itself was seized from his work truck after the search warrant had expired and was no longer valid. The State countered that King had no expectation of privacy in the truck at the time the phone was seized because the truck belonged to his employer, and it was his ex-employer who had obtained the phone for the police after the search warrant expired. The State also asserted that King had abandoned the phone because he should have requested to take the phone with him when he was arrested. The trial court agreed with the State and denied King's motion to suppress. The 17 photographs containing child pornography were admitted into evidence for the jury to consider in assessing King's punishment.

At the punishment phase, Jane's father testified that Jane nearly died from her injuries. He stated that Jane had to stay in the hospital for four months after the attack, during which time she underwent a heart transplant. Jane's father testified that Jane continues to take medication to prevent her body from rejecting the new heart and that she will be required to take the medication for the rest of her life. He testified that Jane has a long scar on her chest from the heart transplant.

Jane's father said that Jane had been readmitted to the hospital in May 2019—five months before trial—because her body was rejecting the new heart. During her hospitalization, Jane had a tube inserted into her body "to check [to see] if the heart [was] still working properly" and had adjustments made to her medication. Jane's father said that she also was admitted to the hospital in August 2019, the month

before trial. Jane had become ill at school and was taken by ambulance to the hospital. Jane told the doctors that she was not feeling well because she was afraid of the upcoming trial.

In addition to the federal conviction for bank larceny, which served as the enhancement allegation, King also stipulated that he had previously been convicted in Texas state courts of theft, burglary of a vehicle, prostitution, burglary of a building, and bodily-injury assault. A written stipulation of evidence signed by King along with the judgments of conviction and other filings related to the stipulated offenses were admitted into evidence.

The State also offered evidence demonstrating that King had a history of violence. King committed bodily-injury assault against his wife, Whitney, in 2014. Officer L. Myers of the Fort Worth Police Department had responded to the scene of that assault. She recalled that Whitney's face "was completely covered in blood" and that Whitney had blood "matted in her hair." Officer Myers had photographed Whitney, and two of those photographs were admitted into evidence. The first photo, a close-up of Whitney's face, showed her face covered in blood. The photo also showed that she had blood matted in her hair. The second photo showed Whitney from the knees up. In the photo, Whitney had blood in her hair, on her face, chest, and arms, as well as on her shirt and jeans.

King's ex-girlfriend, F.A., also testified. She stated that she dated King from 2003 to 2004. F.A. described King as being angry, aggressive, and violent. She said that he lacked remorse for things that he had done. She recalled him telling her that he had stabbed someone. She said King told her in a very casual manner as if stabbing someone "wasn't a big deal."

F.A. testified that King had been violent with her, too. She described one incident during which King became angry when she had changed her mind about moving in with him. She said that he "went into kind of an angry rage, started yelling, started punching through my apartment cabinets." He then picked up F.A., held her against the wall, and choked her. She said that she could not talk and could barely breathe. King eventually stopped and put her down.

F.A. recalled another incident when she saw King be violent. She said they were hanging out with King's sister and her husband. King became upset with his brother-in-law, and King pinned him down and "just basically attacked him."

The State also offered evidence that King had been involved in a road-rage incident in March 2018, less than one month before he attacked Jane. C. Lipe testified that he was driving through a mall parking lot in Fort Worth when a white SUV made an illegal U-turn near him. Lipe honked his horn to a avoid a collision with the SUV. Lipe testified that the man driving the SUV became angry and started waving his arms, but Lipe continued to drive and exited the mall's parking lot. When

Lipe reached the access road, the white SUV forced him off the road. Lipe's window would not roll down, so he opened his door. Lipe said the man driving the SUV seemed "very angry." Before Lipe could unbuckle his seat belt, the man came over to his car and was "landing blows" on him, punching and kicking him. When the man left, Lipe's passenger photographed the SUV's license plate. Police traced the vehicle to King's wife, Whitney.

Detective K. Bickley of the Fort Worth Police Department contacted King by phone about the road rage incident. Detective Bickley testified that, at first, King denied the incident but then admitted assaulting Lipe. Detective Bickley testified that he had obtained an arrest warrant for King for the assault.

King's 88-year-old grandmother, Wanda, testified for the defense. She stated that King had suffered from spinal meningitis as an infant, which had left him with "a mental condition." Wanda stated that she had primarily raised King because his mother and father were alcoholics and his mother had abandoned King as a toddler. Wanda also indicated that King's father was periodically in his life and had physically abused King. Wanda testified that, when King was a child under her care, she had placed King on medication for his mental condition, which helped him. But King's father later refused to allow King to take the medication.

Wanda confirmed that King was married and had a four-year-old daughter. A photograph of King with his daughter was admitted into evidence. Wanda said that

King had a "very close" relationship with his daughter and that "she loved him terribly." Wanda testified that she thought King was a good father.

During its closing argument, the defense asked the jury for leniency so that King could someday be reunited with his daughter. The State responded by countering that King did not deserve mercy because he had shown Jane no mercy. The State asked that King be sentenced to life in prison for each count. It pointed to the evidence regarding King's attack on Jane, the trauma and life-altering injuries he had inflicted on her, his criminal record, and his past and recent history of violent acts. The State argued that King could not be rehabilitated and that the jury should focus on deterrence and punishment when assessing his punishment. The State emphasized the photographs from King's cell phone containing child pornography, arguing that they showed "[w]ho he is and what he likes and what he wants." The State also pointed to the child pornography to refute the defense's request for leniency, stating, "'Is this the person you want around [King's] daughter? Is this the person you want around another child?' Because the answer is no."

After hearing the parties' closing arguments, the jury assessed King's punishment at life in prison for each offense. As statutorily required, the trial court ordered the sentences to run concurrently. *See* TEX. PENAL CODE § 3.03(a). King now appeals, raising seven issues.

Sufficiency of the Evidence

In his first two issues, King challenges the sufficiency of the evidence to support his convictions for the offenses of injury to a child causing serious bodily injury and attempted aggravated kidnapping.

A. Standard of Review

We review a challenge to the sufficiency of the evidence under the standard enunciated in *Jackson v. Virginia*, 443 U.S. 307 (1979). *See Winfrey v. State*, 393 S.W.3d 763, 768 (Tex. Crim. App. 2013). Pursuant to the *Jackson* standard, we "consider all the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational juror could have found the essential elements of the crime beyond a reasonable doubt." *Alfaro-Jimenez v. State*, 577 S.W.3d 240, 243–44 (Tex. Crim. App. 2019) (quoting *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007)); *see Jackson*, 443 U.S. at 319. We can hold evidence to be insufficient under the *Jackson* standard when (1) the record contains no evidence, or merely a "modicum" of evidence, probative of an element of the offense, or (2) the evidence conclusively establishes a reasonable doubt. *Britain v. State*, 412 S.W.3d 518, 520 (Tex. Crim. App. 2013) (citing *Jackson*, 443 U.S. at 320).

The sufficiency-of-the-evidence standard gives full play to the responsibility of the fact finder to resolve conflicts in the testimony, to weigh the evidence, and to

draw reasonable inferences from basic facts to ultimate facts. *See Jackson*, 443 U.S. at 319; *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). An appellate court presumes that the fact finder resolved any conflicts in the evidence in favor of the verdict and defers to that resolution, provided that the resolution is rational. *See Jackson*, 443 U.S. at 326.

In our review of the record, direct and circumstantial evidence are treated equally; circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *Hooper*, 214 S.W.3d at 13. Finally, "[e]ach fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction." *Id.*

B. King's Identity

The State must prove, beyond a reasonable doubt, the accused's identity as the person who committed the charged offense. *Miller v. State*, 667 S.W.2d 773, 775 (Tex. Crim. App. 1984); *Smith v. State*, 56 S.W.3d 739, 744 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). In his first issue, and as part of his second issue, King challenges the sufficiency of the evidence to establish that he was the person who committed the charged offenses.

The Court of Criminal Appeals has made clear that identity may be proven by direct evidence, circumstantial evidence, or by reasonable inferences from the

evidence. *Ingerson v. State*, 559 S.W.3d 501, 509 (Tex. Crim. App. 2018) (citing *Gardner v. State*, 306 S.W.3d 274, 285 (Tex. Crim. App. 2009)). Here, we conclude that the evidence was legally sufficient to prove that King was Jane's assailant.

Jane testified that she fought against her assailant using her hands. Soon after the attack, swabs were taken from Jane's hands and fingernails at the hospital by a forensic nurse examiner. Other swab samples were taken from areas of Jane's body containing DNA known to be hers. A buccal swab was obtained from King pursuant to a search warrant. Forensic scientist Crutcher developed DNA profiles for Jane and for King. She testified that her analysis established that the swabs from Jane's hands contained two DNA profiles. One of the profiles matched Jane's DNA profile, and the other was consistent with King's DNA. King is Caucasian, and Crutcher testified that the probability that a random, unrelated Caucasian person could have contributed to the DNA profile was 1 in 329.3 trillion.

In his brief, King asserts that finding his DNA on Jane's hands "can be explained in a plethora of ways." He states that "[t]he most logical is that he came upon her while she was unconscious on the ground and either touched her hand or brushed her fingernail in a superficial, inexperienced attempt to render aid." Alternatively, he posits that his DNA may have transferred to Jane's hands as they passed one another on the sidewalk. However, even assuming these theories are reasonable, "the State need not disprove all reasonable alternative hypotheses that

are inconsistent with the defendant's guilt." *Wise v. State*, 364 S.W.3d 900, 903 (Tex. Crim. App. 2012); *see Wilson v. State*, 7 S.W.3d 136, 141 (Tex. Crim. App. 1999) ("We have rejected the reasonable hypothesis construct as a measure of legal sufficiency."). The jury was free to reject King's theories regarding how his DNA was transferred to Jane's hands, and it was permitted to draw the reasonable inference that King was her assailant, who she testified she had fought back against using her hands. *See Zuniga v. State*, 551 S.W.3d 729, 739 (Tex. Crim. App. 2018).

King also contends that "[t]he mere fact that his DNA was found on [Jane's] hand or under one of her fingernails is not enough to prove beyond a reasonable doubt that he was the perpetrator that committed these crimes." We need not determine the correctness of this contention because the DNA evidence was not the only evidence connecting King to the offenses.

As discussed, King acknowledged during his interview with Detective Henz that he was the person seen in the surveillance videos from the Jack in the Box, the Waffle House, and the Days Inn. Tracing back from these surveillance videos through the surveillance videos that precede them—that is, the videos from the Knights Inn Motel, the car dealership, and Bus 200—the videos placed King at the vacant business lot. In Bus 200's video, a man is seen running from the vacant business lot, which Jane leaves six minutes later. The man has a beard, and he is

wearing a hat and dark jeans. His shoes are dark with bright white trim at the bottom, and he is carrying a backpack and a dark item of clothing.

The video from the Knights Inn Motel also showed the man run around the fence of the lot into its parking lot and then walk through its property. While walking though the property, the man puts on the dark item of clothing that he is carrying, revealing that it is a sweatshirt. Video from the nearby car dealership shows the man walk toward the other side of the freeway.

King acknowledged that he entered the Days Inn, which is on the other side of the freeway. He appears to be wearing the same sweatshirt, jeans, hat, and backpack as the man who left the vacant business lot and then walked through the property of the Knights Inn Motel and put on the sweatshirt. He also appears to be wearing the same tennis shoes with the bright white trim. From this evidence, the jury reasonably could have inferred that King was the man seen leaving the lot of the vacant business from which Jane then left and walked to her bus. When she walked to her bus, Jane had been attacked and was bleeding from her nose and mouth.

The man who left the lot of the vacant business also had a beard. When he entered the Days Inns, King had a beard. After he left the Days Inn, King acknowledged that he went to the Waffle House. The video showed that while in the Waffle House, he shaved his beard. He further changed his appearance by removing

his hat, taking off his sweatshirt, changing his shirt, and putting his hair in a bun. The jury could have reasonably interpreted King's altering of his appearance as a consciousness of guilt and an effort to evade detection. *See Hedrick v. State*, 473 S.W.3d 824, 830 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (explaining that evidence of defendant's suspicious conduct after commission of crime can indicate consciousness of guilt); *see also Clayton*, 235 S.W.3d at 780–81 (recognizing that jury could rationally draw inference of consciousness of guilt from defendant's efforts to avoid apprehension).

Viewing the evidence in the light most favorable to the verdict, we conclude that a rational fact finder could have found, beyond a reasonable doubt, that King was the person who committed the charged offenses. We overrule King's first issue and the portion of his second issue challenging the sufficiency of the evidence to establish his identity as the person who committed the charged offenses.

C. Attempted Aggravated Kidnapping

In the remaining portion of his second issue, King contends that the evidence was legally insufficient to support his conviction for the offense of attempted aggravated kidnapping.

1. Elements of attempted aggravated kidnapping

An attempted offense occurs when a person, with specific intent to commit an offense, does an act amounting to more than mere preparation that tends but fails to

affect the commission of the offense. *See* TEX. PENAL CODE § 15.01(a). To prove that King committed the offense of attempted aggravated kidnapping, the State was required to present sufficient evidence that King did an act amounting to more than mere preparation with the specific intent to commit aggravated kidnapping. *See id.*; *Laster v. State*, 275 S.W.3d 512, 521 (Tex. Crim. App. 2009).

A person commits the offense of aggravated kidnapping when two elements are proven: (1) the person intentionally or knowingly abducted another person, and (2) he committed an aggravating element. *Laster*, 275 S.W.3d at 521; *see* Michael B. Charlton, *Texas Practice: Texas Criminal Law* § 11.4 (2d ed. 2001) ("[Aggravated kidnapping] is essentially abduction plus the requisite specific intent to commit one of the aggravating factors, including. . . inflicting bodily injury.").

"'Abduct' means to restrain a person with intent to prevent his liberation by: (A) secreting or holding him in a place where he is not likely to be found; or (B) using or threatening to use deadly force." TEX. PENAL CODE § 20.01(2). Thus, "abduct" includes two elements. *Laster*, 275 S.W.3d at 522.

The first element of "abduct" requires that the defendant restrained another, which is the *actus reus* requirement. *Id.* "Restrain" means to restrict a person's movements without consent, so as to interfere substantially with her liberty, by moving her from one place to another or by confining her. TEX. PENAL CODE § 20.01(1). Restraint is without consent if it is accomplished by: (A) force,

intimidation, or deception; or (B) any means, including acquiescence of the victim, if she is a child less than 14 years of age and the parent, guardian, or person or institution acting *in loco parentis* has not acquiesced in the movement or confinement. *Id.*

The second element of "abduct" requires that the defendant had the specific intent to prevent liberation, which is the *mens rea* requirement. *Laster*, 275 S.W.3d at 521. "Secreting or holding another where he or she is unlikely to be found is part of the *mens rea* requirement of the offense—not the *actus reus*. This is an important distinction because the State is not required to prove that the defendant actually secreted or held another." *Id.* Instead, the State must prove that the defendant restrained another with the specific intent to prevent liberation by secreting or holding the person. *Id.* Thus, the offense of kidnapping is legally completed when the defendant, at any time during the restraint, forms the intent to prevent liberation by secreting or holding another in a place unlikely to be found. *Id.*

A kidnapping is aggravated when the abduction is committed intentionally or knowingly with the specific intent to accomplish one of six purposes. TEX. PENAL CODE § 20.04(a)(1–6); *Laster*, 275 S.W.3d at 521. One such purpose is to inflict bodily injury on the abductee. TEX. PENAL CODE § 20.04(a)(4). A kidnapping is also aggravated if the accused used or exhibited a deadly weapon during the offense. *See* TEX. PENAL CODE § 20.04(b); *Laster*, 275 S.W.3d at 521.

2. Analysis

Here, the State was required to prove, beyond a reasonable doubt, that King committed an act, beyond mere preparation, to restrain Jane with the intent to secrete or hold her in a place where she was unlikely to be found and that he committed an aggravating element. *See Laster*, 275 S.W.3d at 522. The State was not required to prove that King could, or did, secrete or hold Jane in a place where she was unlikely to be found. *See id.*

King contends that the evidence was insufficient to prove that he had the intent to abduct Jane because the evidence did not show that he had the intent to prevent her liberation, that is, to secrete or hold her in a place where she was unlikely to be found. King asserts that the evidence showing that he pushed Jane to the ground and held her down while strangling her indicated only an intent to restrain Jane so that he could assault her. He asserts that evidence of those acts showed no intent to abduct her by holding her in a place where she was unlikely to be found. King argues, "[T]he facts logically suggest that his acts were straightforward: that he saw [Jane] and decided either to assault or sexually assault her. Nothing persuades that [King's] intent was to snatch [Jane] away and stash her some place."

In making this argument, King incorrectly assumes that the only act of attempted restraint shown by the evidence was his holding Jane down and strangling her. However, the evidence also demonstrated that King engaged in another act of

attempted restraint. The evidence showed that he asked 12-year-old Jane to come with him to help him, and Jane agreed, walking with him to the vacant business lot where he attacked her. Because she was under the age of 14, King's conduct of asking her to come with him and then leading her to the empty lot was more than mere preparation to restrict Jane's movement "so as to interfere substantially" with her liberty by moving her from one place to another by "any means," including her acquiescence. *See* TEX. PENAL CODE § 20.01(1)(B)(i); *see also Walker v. State*, No. 13–01–00568–CR, 2002 WL 34230963, at *3 (Tex. App.—Corpus Christi Aug. 8, 2002, no pet.) (not designated for publication) (holding, in aggravated kidnapping case, that evidence was sufficient to prove defendant had "restrained" 11-year-old boy by taking boy without parents' permission to shed two houses away from boys' trailer because, even if boy had agreed to go with defendant, to prove restraint, defendant accused of kidnapping "need only have restricted the child's movement by 'any means, including acquiescence of the victim'").

Regardless of whether the act of restraint was pushing and holding Jane down while strangling her at the lot of the vacant business or it was asking Jane to come with him and leading her to the lot, the evidence showed that King had the intent to secrete or hold Jane where she was unlikely to be found. *See Kenny v. State*, 292 S.W.3d 89, 95 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd) ("Intent can be inferred from an accused's conduct, remarks, and the surrounding circumstances.").

Detective Henz described the lot where King led Jane as "a secluded business parking lot." He testified that "there's a business building there, a wooden stockade fence on the north side of that parking lot, and a wrought iron fence on the south side of that parking lot, and the only way in and out is from Laredo Street." He stated, "And the business is closed. There's no signs of business being there. It's closed up. And there's a fence on both sides of the business that you—that would prevent anybody from being able to come from the back side of the business."

In addition, the video from Bus 200 and an aerial satellite map of the area showed that, on one side of the vacant business lot was the large, back parking lot of the Knights Inn Motel, and on the other side was a grassy lot with a transmission tower. The evidence also showed that the attack occurred early in the morning before 7:00 a.m. From the evidence, the jury could have reasonably inferred that King had intent to secrete or hold Jane where she was unlikely to be found, i.e., on the lot of a vacant business with limited entry in the early morning. *See* TEX. PENAL CODE § 20.01(2)(A); *see also Dixon v. State*, No. 01-04-01100-CR, 2005 WL 2620541, at *7 (Tex. App.—Houston [1st Dist.] Oct. 13, 2005, no pet.) (mem. op., not designated for publication) (holding, in kidnapping case, that evidence was sufficient to show that defendant had intent to secrete complainant in place where she was unlikely to be found when, in middle of night, he forced her behind her neighbor's house that appeared to be vacant for purpose of sexually assaulting her).

Viewing it in a light most favorable to the verdict, we hold that the evidence was legally sufficient to support King's conviction for attempted aggravated kidnapping. We overrule the remaining portion of King's second issue.

DNA Evidence

In his third issue, King contends that the trial court erred by denying his motion to suppress the State's evidence of his DNA, obtained by the police pursuant to a search warrant. King asserts that the trial court should have granted his motion because the affidavit supporting the search warrant contained "false and misleading" information.

A. Trial Court Proceedings

The week before trial, King filed a motion to suppress evidence seized from his home, vehicles, and person, including "items of serology," specifically, King's saliva and hair. On the first day of trial, the trial court conducted a hearing on King's motion to suppress the State's DNA evidence. The evidence was derived from the buccal swabs of King's mouth taken by Oklahoma City Police Detective Klika pursuant to a search warrant issued by an Oklahoma judge.

The search warrant had been issued based on Detective Klika's affidavit. In support of his motion to suppress, King complained about Detective Klika's statement in the affidavit that "Detective Henz, through his investigation, identified Terry Wayne King II by reviewing video from the school bus and surrounding

businesses." King asserted, "[I]t's my contention that that statement, while not per se false, is misleading." King argued that the statement was misleading because Detective Henz's identification of King had taken several months and had required more investigation than just reviewing video surveillance from the school bus and surrounding businesses. King explained that, to identify him as the suspect, the police had also, for example, used cell tower records. King asserted that Detective Klika's statement gave the impression that identifying him as a suspect was simpler than it had been because the statement omitted information about the full extent of the investigation.

The State agreed that Detective Henz's investigation had involved more steps to identify King as a suspect than just reviewing the surveillance videos. Regarding those additional steps, the parties stipulated to the following facts:

- On one of the surveillance videos, the police saw a person, later identified as King, get into a car.
- The police determined that the car in the surveillance video was registered to King's wife.
- In some of the surveillance videos, a tattoo is clearly seen on the person's arm.
- After obtaining photographs of King, the police compared King's facial features and tattoo with the person in the surveillance videos and determined King was that person.
- Police also used cell phone and cell tower records in their investigation to identify King.

Earlier in the hearing, King had indicated that he planned to call Detective Henz to testify. But, after the parties stipulated to the facts about the investigation, King decided not to call Detective Henz to testify, stating that "all I was going to get—elicit from [Detective Henz], was that there was more to this investigation than this one sentence."

As Defense Exhibit 1, King offered Detective Klika's affidavit for the search warrant authorizing the police to obtain his saliva. King also offered, as Defense Exhibit 2, the affidavit of Fort Worth Police Officer A. Fincher. Officer Fincher's affidavit had been used to obtain a search warrant of King's home. Officer Fincher's affidavit more thoroughly described the steps of the investigation than had Detective Klika's affidavit, and King offered Officer Fincher's affidavit to show the full extent of the investigation.

The trial court denied King's motion to suppress the DNA evidence obtained through the search warrant. The trial court explained the basis for its ruling:

> The Court has reviewed Defense [Exhibits] 1 and 2. The Court finds that although Defense 1 does not contain every step of the investigation, as [defense counsel] has raised, Defense 2 states that surveillance videos from a nearby Fort Worth Independent School District school bus and the surrounding businesses were collected and viewed as part of this investigation and these videos led to the identification of Terry Wayne King, II, as a suspect by [sic]. And then it goes through a more—certainly a more detailed investigation than is mentioned in Defense 1. However, the Court finds that that is not the way that it's stated in Defense 1 is not a falsehood or a reckless disregard for the truth. It's just—doesn't have the entire investigation.

B. Governing Legal Principles

King asserts that the trial court erred in denying his motion to suppress the DNA evidence based on *Franks v. Delaware*, 438 U.S. 154 (1978). In *Franks*, the Supreme Court of the United States held that a search warrant must be voided as violating the Fourth Amendment—and any evidence obtained pursuant to the warrant suppressed—if (1) the defendant can establish by a preponderance of the evidence that the affidavit supporting the warrant contains a material misstatement that the affiant made knowingly, intentionally, or with reckless disregard for the truth, and (2) excising the false statement, the affidavit's remaining content is insufficient to establish probable cause. *Id.* at 155–56; *see Janecka v. State*, 937 S.W.2d 456, 462 (Tex. Crim. App. 1996). Unlike an issue of probable-cause deficiency, when deciding a *Franks* motion, "the trial court may consider not only the probable-cause affidavit but also the evidence offered by the party moving to suppress because this attack on the sufficiency of the affidavit arises from claims that it contains false statements." *Jones v. State*, 338 S.W.3d 725, 739 (Tex. App.—Houston [1st Dist.] 2011), *aff'd*, 364 S.W.3d 854 (Tex. Crim. App. 2012). The Court of Criminal Appeals has not extended *Franks* to allegations of material omissions, but several Texas intermediate appellate courts—including both Houston Courts of Appeals and Fort Worth's Second Court of Appeals—have extended the *Franks* analysis to allegations of material omissions. *See Darby v. State*, 145 S.W.3d 714,

722 (Tex. App.—Fort Worth 2004, pet. ref'd) (expressly agreeing with Fifth Circuit and intermediate Texas appellate courts' application of *Franks* analysis to material omissions); *Blake v. State*, 125 S.W.3d 717, 724 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (applying *Franks* analysis to claim of material omission); *Melton v. State*, 750 S.W.2d 281, 284 (Tex. App.—Houston [14th Dist.] 1988, no pet.) ("Such omissions are treated essentially the same as claims of material misstatements.").

We review a trial court's decision on a *Franks* suppression issue under the same standard that we review a probable-cause deficiency, a mixed standard of review. *Jones*, 338 S.W.3d at 739; *Fenoglio v. State*, 252 S.W.3d 468, 473 (Tex. App.—Fort Worth 2008, pet. ref'd). Under this mixed standard, we give almost total deference to a trial court's rulings on questions of historical fact and application-of-law-to-fact questions that turn on an evaluation of credibility and demeanor, while we review de novo application-of-law-to-fact questions that do not turn upon credibility and demeanor. *Jones*, 338 S.W.3d at 739 (citing *Johnson v. State*, 68 S.W.3d 644, 652–53 (Tex. Crim. App. 2002)). Here, however, we are presented with a question of law based on undisputed, stipulated facts; thus, we perform a de novo review. *See Dyar v. State*, 125 S.W.3d 460, 462 (Tex. Crim. App. 2003); *Morales v. State*, No. 02-17-00130-CR, 2018 WL 2346708, at *2 (Tex. App.—Fort Worth May 24, 2018, no pet.) (mem. op., not designated for publication).

C. Analysis

In the trial court, King challenged the validity of the warrant by arguing that Klika's statement that "Detective Henz, through his investigation, identified Terry Wayne King II by reviewing video from the school bus and surrounding businesses" was misleading because it omitted information about the full scope of the investigation to identify King as the suspect. The State agreed that the investigation had entailed more than just reviewing the videos. King compared Klika's affidavit with Officer Fincher's affidavit, which had been used to obtain a search warrant for King's home and had provided a more detailed description of the investigation.

To support his argument that the Detective Klika's statement regarding the investigation was misleading, King relies on *Hass v. State*, 790 S.W.2d 609 (Tex. Crim. App. 1990) and *Juarez v State*, 586 S.W. 2d 513 (Tex. Crim. App. 1979). But King misplaces his reliance on *Hass* and *Juarez*. Both cases involved affiants who falsely stated in their search-warrant affidavits that they had personally observed persons or transactions when they had not. *Hass*, 790 S.W.2d at 612 ("The dishonesty in the affidavits consists of the affiants' claims to have personally witnessed events which were beyond their purview."); *Juarez*, 586 S.W.2d at 515 (involving record showing affiant described transaction as his own firsthand observation, but he later admitted that he was not at scene when transaction occurred). Further, the affiants in those cases were asked specifically about the truth

of these statements at the suppression hearing and admitted that the statements were untrue. *See Hass*, 790 S.W.2d at 611; *Juarez*, 586 S.W.2d at 517–18.

Unlike the challenged statements in *Hass* and *Juarez*, Detective Klika's statement that "Detective Henz, through his investigation, identified Terry Wayne King II by reviewing video from the school bus and surrounding businesses" was not objectively false. In *Hass*, the Court of Criminal Appeals observed that one of the false statements there could have been remedied had the affiant officer stated that another officer had seen the event to which he testified instead of attributing the observation to himself. *Hass*, 790 S.W.2d at 612 n.2. Consistent with this observation, Detective Klika's affidavit reflected that the information he conveyed about Detective Henz's investigation and identification of King was information that he learned after King had already been identified. Detective Klika's affidavit indicated that he learned about Detective Henz's investigation after King's arrest on a Texas warrant by the U.S. Marshal's Service in Oklahoma City.

Detective Klika did not claim to have personally observed or have first-person knowledge about the events conveyed in his affidavit regarding Detective Henz's investigation and identification of King. Nor did Detective Klika's affidavit or the stipulated facts reflect that Detective Klika was aware of all the steps taken by Detective Henz in identifying King as the suspect. As a result, King failed to meet his burden to prove by a preponderance of the evidence that Detective Klika's

affirmative statement about Detective Henz's investigation and identification of King, or any material omissions related to it, were made intentionally, knowingly, or with reckless disregard for the truth. *See Franks*, 438 U.S. at 155–56; *Darby*, 145 S.W.3d at 722; *Blake*, 125 S.W.3d at 724–25 (holding that appellant did not meet *Franks* burden because he did not offer any evidence to show that omission from officer's affidavit was intentional, knowing, or with reckless disregard for truth); *see also Mireles v. State*, No. 13-02-706-CR, 2005 WL 1492078, at *4 (Tex. App.—Corpus Christi June 23, 2005, pet. ref'd) (mem. op., not designated for publication) (upholding trial court's *Franks* ruling when officer listed information in affidavit received from others without claiming personal knowledge of information). Furthermore, King has not shown that Detective Klika's affidavit, if supplemented with the omitted information about the investigation, would be insufficient to support a finding of probable cause. *See Darby*, 145 S.W.3d at 722.

We overrule King's third issue.

Lesser-Included Offense Instructions

In his fourth and fifth issues, King contends that, with respect to the charged offense of attempted aggravated kidnapping, the trial court erred by denying his request to submit lesser-included offense instructions for the offenses of (1) unlawful restraint of a child under 17 years of age and (2) unlawful restraint exposing the victim to serious bodily injury. In his sixth issue, King contends that, with respect to

the charged offense of injury to a child causing serious bodily injury, the trial court erred by denying his request to submit a lesser-included offense instruction for the offense of injury to a child causing bodily injury.

A. Governing Legal Principles

Article 37.09 of the Code of Criminal Procedure pertains to lesser-included offenses and provides that an offense is a lesser-included offense if:

> (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged;
>
> (2) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission;
>
> (3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or
>
> (4) it consists of an attempt to commit the offense charged or an otherwise included offense.

TEX. CODE CRIM. PROC. art. 37.09.

Courts apply a two-step analysis to determine whether an instruction on a lesser-included offense should be given to the jury. *State v. Meru*, 414 S.W.3d 159, 162 (Tex. Crim. App. 2013); *Cavazos v. State*, 382 S.W.3d 377, 382 (Tex. Crim. App. 2012). The first step of the analysis is a question of law that does not depend on the evidence at trial and compares the elements of the offense as alleged in the indictment with the elements of the requested lesser-included offense. *Meru*, 414 S.W.3d at 162; *see Hall v. State*, 225 S.W.3d 524, 535–36 (Tex. Crim. App. 2007)

(holding that first step in lesser-included offense analysis must be "capable of being performed before trial by comparing the elements of the offense as they are alleged in the indictment or information with the elements of the potential lesser-included offense"). The question at this step is, "[A]re the elements of the lesser offense 'established by proof of the same or less than all the facts required to establish[] the commission of the offense charged'?" *Ex parte Watson*, 306 S.W.3d 259, 264 (Tex. Crim. App. 2009) (brackets in original) (quoting TEX. CODE CRIM. PROC. art. 37.09(1)). Courts compare the statutory elements and any "descriptive averments," such as "non-statutory manner and means[] that are alleged for purposes of providing notice," alleged in the indictment for the greater offense to the statutory elements of the lesser offense. *Id.* at 273 (op. on reh'g).

An offense is a lesser-included offense of the charged offense if the indictment for the greater-inclusive offense either: (1) alleges all of the elements of the lesser-included offense, or (2) alleges elements plus facts (including descriptive averments, such as non-statutory manner and means, that are alleged for purposes of providing notice) from which all of the elements of the lesser-included offense may be deduced. *Id.* "[T]he elements of the lesser-included offense do not have to be pleaded in the indictment if they can be deduced from facts alleged in the indictment." *Meru*, 414 S.W.3d at 162. "When there are allegations in the indictment that are not identical to the elements of the lesser offense, a court should apply the functional-

equivalence test to determine whether elements of the lesser offense are functionally the same or less than those required to prove the charged offense." *Safian v. State*, 543 S.W.3d 216, 220 (Tex. Crim. App. 2018). "An element of the lesser-included offense is functionally equivalent to an allegation in the charged greater offense if the statutory elements of the lesser offense can be deduced from the elements and descriptive averments in the indictment for the charged greater offense." *Id.* (citing *McKithan v. State*, 324 S.W.3d 582, 588–89 (Tex. Crim. App. 2010)).

If the analysis under the first step supports a conclusion that the defendant's requested lesser offense is a lesser-included offense, the court moves to the second step of the analysis and considers whether a rational jury could find that, if the defendant is guilty, he is guilty only of the lesser offense. *Meru*, 414 S.W.3d at 162–63. This step is a factual determination that is based on the evidence presented at trial. *Id.* at 163. If there is evidence that raises a fact issue on whether the defendant is guilty only of the lesser offense, a lesser-included offense instruction is warranted, "regardless of whether the evidence is weak, impeached, or contradicted." *Id.*; *Hall*, 225 S.W.3d at 536 ("In this step of the analysis, anything more than a scintilla of evidence may be sufficient to entitle a defendant to a lesser charge."). The evidence must establish the lesser offense as a "valid, rational alternative to the charged offense." *Hall*, 225 S.W.3d at 536 (quoting *Forest v. State*, 989 S.W.2d 365, 367 (Tex. Crim. App. 1999)). The evidence may be "weak or contradicted," but it "must

still be directly germane to the lesser-included offense and must rise to a level that a rational jury could find that if [the defendant] is guilty, he is guilty only of the lesser-included offense." *Cavazos*, 382 S.W.3d at 385. To meet this threshold, the evidence must be more than mere speculation; this threshold "requires affirmative evidence that both raises the lesser-included offense and rebuts or negates an element of the greater offense." *Id.*

B. Entitlement to Instruction on Unlawful Restraint Offenses

Related to the charged offense of attempted aggravated kidnapping, King asserts that the trial court erred by denying his request to give the jury lesser-included-offense instructions for the offenses of (1) unlawful restraint of a child under 17 years of age and (2) unlawful restraint exposing the victim to serious bodily injury. Applying the two-step analysis set out above, we first compare the elements of attempted aggravated kidnapping, as alleged in the indictment, with the elements of the lesser offenses of unlawful restraint requested by King. *See Meru*, 414 S.W.3d at 162.

The indictment in this case alleged, in relevant part, that King:

> did, with the specific intent to commit the offense of aggravated kidnapping, do an act, to-wit: requesting [Jane] go with him and/or striking [Jane] with his hand and/or by grabbing [Jane] with his hand and/or by squeezing the throat of [Jane] and/or by pushing [Jane], amounting to more than mere preparation, but fail[ed] to effect the commission of the offense intended.

As modified by the indictment, the elements of attempted aggravated kidnapping are:

> (1) King
>
> (2) with the intent to abduct Jane,
>
> (3) with an intent to commit an aggravating factor,
>
> (4) did an act or acts that amounted to more than mere preparation and tended, but failed, to effect the commission of aggravated kidnapping, by (a) requesting Jane to go with him, and/or (b) striking Jane with his hand, and/or (c) grabbing Jane with his hand, and/or (d) squeezing the throat of Jane, and/or (e) pushing Jane.

See TEX. PENAL CODE §§ 15.01(a), 20.04; *see Laster*, 275 S.W.3d at 521.

For purposes of our analysis, the elements of the lessor offense of simple unlawful restraint are:

> (1) King
>
> (2) intentionally or knowingly
>
> (3) restrained Jane.

See TEX. PENAL CODE § 20.02(a). The offense of simple unlawful restraint is a Class A misdemeanor. *See id.* § 20.02(c). The offense of unlawful restraint becomes "a state jail felony if the person restrained was a child younger than 17 years of age." *See id.* § 20.02(c)(1). If "the actor recklessly exposes the victim to a substantial risk of serious bodily injury," then the offense of unlawful restraint becomes a third-degree felony. *See id.* § 20.02(c)(2)(A).

King did not request lesser-included offense instructions for simple misdemeanor assault, but he did request lesser-included offense instructions for (1) the state jail felony offense of unlawful restraint of a child younger than 17 years of age and (2) the third-degree felony offense of unlawful restraint exposing the victim to serious bodily injury. The only difference between unlawful restraint of a child younger than 17 years of age and unlawful restraint exposing the victim to serious bodily injury and misdemeanor unlawful restraint—and between one another—are the additional elements affecting the level of offense. The prohibited conduct—intentionally or knowingly restraining another—is the same for all three levels of the offense of unlawful restraint. For this reason, we need not separately analyze whether King was entitled to lesser-included offense instructions for the two lesser offenses requested by King—that is, we may conduct a combined analysis for the lesser offenses of (1) unlawful restraint of a child under 17 years of age and (2) unlawful restraint exposing the victim to serious bodily injury, to determine whether King was entitled to lesser-included offense instructions for those lesser offenses.

To determine whether King was entitled to the requested lesser-included offense instructions, we ask whether the elements of the lesser offenses of unlawful restraint are established by proof of the same or less than all the facts required to

establish the commission of attempted aggravated kidnapping as alleged. *See Watson*, 306 S.W.3d at 264. We agree with the State that that they are not.

We are mindful that unlawful restraint is a lesser-included offense of the completed offenses of kidnapping and aggravated kidnapping. *Schweinle v. State*, 915 S.W.2d 17, 19 (Tex. Crim. App. 1996) (holding that "false imprisonment [predecessor offense to unlawful restraint] is a lesser included offense of kidnapping and aggravated kidnapping"). Kidnapping and aggravated kidnapping require an abduction, which includes the completed *actus reus* of restraint. *See id.* §§ 20.01, 20.03, 20.04; *Schweinle*, 915 S.W.2d at 19; *see also Megas v. State*, 68 S.W.3d 234, 240 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd) ("Once restraint has been proven, the offense of kidnapping is complete when the actor evidences a specific intent to prevent liberation"). Similarly, the lessor offense of unlawful restraint requires the State to prove a completed *actus reus* of restraint. *See id.* § 20.02(a); *Schweinle*, 915 S.W.2d at 19 (recognizing that, while "kidnapping is accomplished by abduction, which includes restraint . . . false imprisonment is committed by restraint only."); *see also* Michael B. Charlton, *Texas Practice: Texas Criminal* Law § 11.2 (2d ed. 2001) (stating that "gravamen of [unlawful restraint] is restraint of the complainant without his or her consent").

In contrast, the offenses of attempted kidnapping and attempted aggravated kidnapping do not require a completed act of restraint. Instead, to prove those

offenses, the State must prove "an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended." TEX. PENAL CODE § 15.01(a); *see Laster*, 275 S.W.3d at 522 (explaining that to prove attempted aggravated kidnapping, "the State was required to prove that Laster committed an act beyond mere preparation with the intent to secrete or hold [the victim] and commit an aggravating element—not that Laster could, or did, actually accomplish this purpose").

On appeal, King contends that, as modified by the indictment here, proof of the greater offense of attempted aggravated kidnapping would establish the conduct prohibited by the lesser offenses, i.e., King's restraint of Jane. In making this argument, King points to the acts alleged in the indictment for the purpose of establishing the manner and means of how he committed the offense of attempted aggravated kidnapping. Specifically, King relies on the descriptive averments in the indictment alleging that he did the following act or acts that amounted to more than mere preparation to abduct Jane: requesting Jane to go with him, and/or striking Jane with his hand, and/or grabbing Jane with his hand, and/or squeezing the throat of Jane, and/or pushing Jane.

King asserts that "[t]hese alleged acts meet the statutory elements of unlawful restraint." We disagree. The acts alleged in the descriptive averments are neither

identical to the element of restraint nor are they the functional equivalent of the element. *See McKithan*, 324 S.W.3d at 593 (citing *Watson*, 306 S.W.3d at 273).

"Restrain" means to restrict a person's movements without consent, so as to interfere substantially with her liberty, by moving her from one place to another or by confining her. TEX. PENAL CODE § 20.01(1). The acts alleged in the descriptive averments do not entail King moving Jane from one place to another nor are they equivalent to King confining her. The Penal Code does not define "confine," but the Fort Worth Court of Appeals has recognized that "confine" means "to hold within bounds," "to restrain from exceeding boundaries," or "to keep in narrow quarters: imprison." *Cox v. State*, 497 S.W.3d 42, 48 (Tex. App.—Fort Worth 2016, pet. ref'd) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 476 (2002)); *see Holmes v. State*, 873 S.W.2d 123, 126 (Tex. App.—Fort Worth 1994, no pet.) (defining "confine" as "to shut up, imprison, immure, put or keep in detention, to relegate to certain limits") (citing OXFORD ENGLISH DICTIONARY 805–06 (24th ed. 1983)). None of the acts alleged in the indictment, including the act of grabbing Jane, equate to King moving Jane from one place to another or to him confining her. Thus, the descriptive averments are not the same as the element of restraint.

Further, the acts alleged in the descriptive averments are not functionally equivalent to the element of restraint. *McKithan*, 324 S.W.3d at 593. In making the functionally-equivalent determination, "[t]he relevant inquiry is not what the

evidence may show but what the State is required to prove to establish the charged offense." *Id.* To prove any of the manner or means alleged for the greater offense of attempted aggravated kidnapping, the State was not required to prove restraint. The State was required only to show that any of the alleged manner-and-means acts in the descriptive averments were more than mere preparation and tended, but failed, to affect the commission of aggravated kidnapping. Therefore, the manner and means allegations are not the functional equivalent of the element of restraint, even if the State's evidence showed restraint. *See id.*; *see also Farrakhan v. State*, 247 S.W.3d 720, 722–23 (Tex. Crim. App. 2008) (approving appellate court's decision that "fleeing" offense was not lesser-included offense of charged "evading" offense even though proof of charged "evading" offense may also have shown "fleeing" offense).

We conclude that the elements of the lesser offenses of unlawful restraint are not established by proof of the same or less than all the facts required to establish the commission of the charged offense of attempted aggravated kidnapping. *See* TEX. CODE CRIM. PROC. art. 37.09(1). We hold that the trial court did not err by denying King's request to instruct the jury on the unlawful restraint offenses.

We overrule King's fourth and fifth issues.

C. Entitlement to Instruction on Injury to a Child Causing Bodily Injury

Count one of the indictment alleged that King had committed the offense of injury to a child causing serious bodily injury by "intentionally or knowingly" causing "serious bodily injury to [Jane], a child younger than 15 years of age, . . . by squeezing the throat of [Jane] with his hand. . . ." In his sixth issue, King contends that the trial court erred when it refused to instruct the jury on the offense of injury to a child causing bodily injury as a lesser-included offense of the charged offense of injury to a child causing serious bodily injury.

Regarding the first step of the lesser-included offense analysis, the State correctly concedes that the offense of injury to a child causing bodily injury is a lesser-included offense of injury to a child causing serious bodily injury because the only difference between the two offenses is that a less serious injury suffices to constitute the offense of injury to a child causing bodily injury. *See id.* art. 37.09(2). Thus, we turn to the second step of the analysis in which we must consider the evidence presented at trial and determine whether a rational jury could find that, if the defendant is guilty, he is guilty only of the lesser offense. *See Meru*, 414 S.W.3d at 162–63. "Meeting this threshold requires more than mere speculation—it requires affirmative evidence that both raises the lesser-included offense and rebuts or negates an element of the greater offense." *Cavazos*, 382 S.W.3d at 385. Although anything more than a scintilla of evidence may suffice to raise a lesser-included

offense, the evidence must establish that the lesser-included offense is "a valid, rational alternative to the charged offense." *Roy v. State*, 509 S.W.3d 315, 317 (Tex. Crim. App. 2017) (citing *Goad v. State*, 354 S.W.3d 443, 446 (Tex. Crim. App. 2011)).

For the evidence to show that King, if guilty, is guilty only of injury to a child causing bodily injury, the evidence must demonstrate that King caused Jane bodily injury rather than serious bodily injury. *See* TEX. PENAL CODE § 22.04(a)(1), (3). A person is criminally responsible for a result "if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient." *Id.* § 6.04(a). "Serious bodily injury" is "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." *Id.* § 1.07(46). "Bodily injury" is defined as "physical pain, illness, or any impairment of physical condition." *Id.* § 1.07(8).

King contends that there is a scintilla of evidence showing that his actions caused only bodily injury to Jane, not serious bodily injury. He points to the testimony of the paramedic who treated Jane immediately after the attack. King relies on the paramedic's testimony that Jane's injuries were not life threatening

when the paramedics initially treated Jane before taking her to the hospital. But, in making this argument, King takes the testimony of out of context.

Dr. Shaw, the emergency room doctor who treated Jane, testified that when she arrived at the hospital, Jane was "trauma stat," meaning that the paramedics were having difficulty maintaining her life-sustaining functions. Jane's oxygen levels were dangerously low and she "couldn't breathe." It was determined that Jane had developed bilateral pulmonary edema, meaning that she had fluid in her lungs, which prevented her from breathing properly and getting oxygen.

Dr. Shaw provided testimony showing that Jane's life-threatening injuries were caused by the strangulation injuries she reported had been inflicted by her attacker. Dr. Shaw testified that as a result of "those kinds of injuries, you can have severe damage to the lungs. And it turns out, that is what she had." Dr. Shaw then explained how strangulation injuries cause lung damage:

> So it's pretty well described—it's very well described in the medical literature. If you look in the medical journals, it's called a negative pressure pulmonary injury in people who are either strangled or people who unfortunately try to hang themselves sometimes. When the windpipe or the neck is compressed or closed, the human body tries really hard to draw a breath of air because we all have a survival instinct. And even though the windpipe is closed, the respiratory muscles, the breathing muscles, fire and do their best to take a deep breath just as if somebody is in a pool and can't breathe. But what happens is, when the air can't come in because someone is being chok[ed] or strangled, it generates really strong suction or negative pressure. . . . And so then that results in an injury to the lungs and eventually the heart, as well.

Related to why Jane had fluid in her lungs, Dr. Shaw explained that the negative lung pressure can cause the person's capillaries to leak fluid into the lungs. He testified that he feared for Jane's life at the time and stated that she would not have survived without medical care. Thus, the State offered evidence demonstrating that King's act of strangling Jane caused her to experience a physical condition that created a substantial risk of death, which is a serious bodily injury. *See id.* § 1.07(46).

King points to testimony by Dr. Shaw that he asserts is affirmative evidence that he caused only bodily injury to Jane. On cross-examination, King asked Dr. Shaw whether "there are some heart conditions that could basically force the lungs to work overdrive" and cause pulmonary edema. Dr. Shaw answered that it could happen "in theory." He clarified that he said "in theory" because he had never seen that happen in a pediatric patient. King points to no evidence in the record showing that Jane had any preexisting conditions.

The evidence relied on by King does not affirmatively show that he caused only bodily injury to Jane because it does not rise above the level of requiring the jury to speculate about whether Jane's medical condition was caused by a preexisting condition rather than strangulation. *See Cavazos*, 382 S.W.3d at 385. The evidence cited by King would not permit a rational jury to find that if he is guilty, King is guilty of only the lesser-included offense of injury to a child causing bodily injury.

We therefore conclude that the trial court did not err by refusing King's requested instruction.

We overrule King's sixth issue.

Suppression of Photographs Containing Child Pornography

In his seventh issue, King contends that the trial court erred when it denied his motion to suppress 17 photographs containing child pornography found on his cell phone.

A. Background Relevant to Motion to Suppress

On June 17, 2019—the same day that King was arrested at an Oklahoma City truck stop—Detective Perkins signed a probable-cause affidavit to obtain a search warrant for the semi-truck King drove for his job as a truck driver. The semi-truck was located at the truck stop where King was arrested. An Oklahoma district court judge issued a search warrant for the semi-truck, which permitted King's personal items, including cell phones, to be seized. His cell phone was in the truck, but during the police's execution of the warrant, also on July 17, they failed to seize the phone. The warrant and inventory were returned to the district court judge on July 24, 2019.

The inventory of the items seized from the semi-truck was also sent to Detective Henz in Fort Worth. Because it had not been seized by the police during the search, the cell phone was not on the inventory. After he realized that the cell phone had not been seized, Detective Henz contacted Feltman, the owner of the

semi-truck who had employed King. Detective Henz requested Feltman to retrieve the cell phone from the semi-truck. As requested, Feltman retrieved the cell phone from the truck and sent it Detective Henz, who received the cell phone on August 9, 2019. The police then obtained a search warrant for the phone's contents and discovered 17 photographs containing child pornography.

The State did not seek to admit the photographs during the guilt-innocence phase but sought to admit them during the punishment phase. King moved to suppress the contents of his cell phone, including the photographs. He argued that, because the search warrant for the semi-truck was invalid at the time Feltman seized the cell phone on behalf of the police, the warrantless seizure of the phone violated the Fourth Amendment's prohibition against unreasonable searches and seizures.

A hearing on the suppression motion was conducted at the start of the punishment phase. As the hearing began, the trial court confirmed that King was challenging the seizure of the cell phone itself at the Oklahoma truck stop and was not challenging the search of the contents of the phone, which were obtained pursuant to a warrant issued after the phone was seized and sent to Fort Worth.

The defense offered into evidence, without objection from the State, (1) the probable-cause affidavit signed by Detective Perkins supporting issuance of the Oklahoma search warrant for the semi-truck, (2) the Oklahoma search warrant, and (3) the return and inventory of the items seized by police from the semi-truck

pursuant to the warrant. The parties then stipulated on the record to the following facts in lieu of further proof or testimony:

- On July 17, 2018, King was a truck driver who drove a tractor trailer truck owned by John Feltman.

- King was arrested in Oklahoma County, Oklahoma, on July 17, 2018, "near and after driving" his work truck.

- On July 17, 2018, a search warrant was issued in Oklahoma authorizing a search of King's work truck and the seizure of personal property found in the truck, including, among other things, cell phones.

- The Oklahoma City Police Department and the Fort Worth Police Department's Major Case Unit conducted a joint search of King's work truck.

- During the search of the King's work truck, a cell phone believed to be King's was found and photographed.

- The cell phone that was found in King's work truck was inadvertently left in the truck and not seized by the joint search team.

- Detective Henz received the inventory of the search and determined that the cell phone that was found and photographed in King's work truck was not logged into property.

- Detective Henz contacted the owner of King's work truck, Feltman, and said, "Would you look in the truck to see if the phone is present?"

- The date Detective Henz contacted Feltman is unknown.

- Feltman confirmed that a cell phone was in the truck King used for work.

- The date Feltman found the phone in the truck King used for work is unknown.

- Detective Henz requested that Feltman send the cell phone to him in Fort Worth, Texas, and Detective Henz reimbursed Feltman for the shipping costs.

- Feltman shipped the cell phone via Fed Ex to Detective Henz.

- Detective Henz received the cell phone from Feltman on August 9, 2018.

- The cell phone Detective Henz received from Feltman matched the cell phone found and photographed during the search of King's work truck on July 17, 2019.

- Detective Henz obtained a search warrant to search the contents of the cell phone, and the photographs containing child pornography were discovered.

King argued that the seizure of his cell phone was unlawful because the phone's seizure was not done pursuant to a valid warrant in violation of his Fourth Amendment rights. The State did not dispute King's claim that the search warrant was no longer valid when the cell phone was seized. Instead, the State argued that King did not have standing to challenge the seizure of the phone from the semi-truck because, by the time Feltman seized the phone at the request of the police, King did not have a reasonable expectation of privacy in the semi-truck.

The State acknowledged that, when he was driving the semi-truck, King had a privacy interest in the vehicle. But the State argued that, when he was not driving the semi-truck, King did not have an expectation of privacy in the vehicle because it was owned by his employer, Feltman. In tandem with this argument, the State asserted that, to the extent King had an expectation of privacy in the semi-truck at

the time of his arrest, that expectation had dissipated by the time Feltman seized the phone on behalf of the police.

King disagreed with the State's position. He claimed that whether he had standing should be determined by analyzing his reasonable expectation of privacy at the time of his arrest and not at the time that his cell phone was seized by Feltman on behalf of the police many days later. King asserted that, when he left his cell phone in the semi-truck at the time of his arrest, he had a reasonable expectation of privacy in the vehicle because he had been driving it for work. He argued that his phone had remained in the vehicle for Feltman to retrieve only because he had been arrested at the truck stop where the semi-truck was located, not because he had voluntarily abandoned the phone in the truck.

At the suppression hearing, the trial court was skeptical of King's argument. The trial court acknowledged that when a person is arrested "in their own car and then they're taken away, they still have a right to—to a reasonable expectation of privacy within the contents of the car." But the court then asked King's counsel:

> [I]f someone is arrested in their work car, then the work car doesn't sit there waiting for him to come back or a family member waiting to claim it. It goes to someone else, a third party, who actually has a greater right to that car, the employer who is the owner of the car. And then, at that point, how protected are their effects that are left in the car from the owner?

King's counsel responded:

> I think that would then go to the concept of abandonment of property, which if somebody is voluntarily abandoning something. But I would argue that if he's arrested at the time, he can't voluntarily abandon anything. And at the time, the police obviously felt it necessary to issue a warrant to search that truck, and which they did, and then seized whatever they seized . . . .

The trial court also asked defense counsel when King's expectation of privacy in the semi-truck ended. Counsel responded that he did not know but did not change his position that it had not ended at the time Feltman seized the phone on behalf of the police without a valid warrant. The trial court disagreed, stating, "I think that it—it had ended by the time that this seizure happened." The trial court then denied King's motion to suppress the photographs containing child pornography. The photographs were admitted for the jury to consider in assessing King's punishment.

B. Standard of Review

When reviewing a ruling on a motion to suppress, we "apply a bifurcated standard of review, giving almost total deference to a trial court's determination of historic facts and mixed questions of law and fact" that rely on the trial court's determination of witness credibility. *Martinez v. State*, 348 S.W.3d 919, 922–23 (Tex. Crim. App. 2011). But we apply a de novo standard of review "to pure questions of law and [to] mixed questions that do not depend on credibility determinations." *Id.* Because, here, the facts relevant to the motion to suppress were stipulated and undisputed, the only questions presented to us involve the trial court's application of the law to the facts, which we review de novo. *See Garcia v. State*,

296 S.W.3d 180, 183 (Tex. App.—Houston [14th Dist.] 2009, no pet.); *see also State v. Villarreal*, 475 S.W.3d 784, 798 (Tex. Crim. App. 2014) ("[B]ecause the facts are undisputed and the questions before us are matters of law, we apply a de novo standard of review."); *Parker v. State*, 182 S.W.3d 923, 925 (Tex. Crim. App. 2006) (recognizing that whether defendant has standing to contest search and seizure is question of law, which appellate courts review de novo).

C. Standing

We first address whether King met his burden to establish that he had standing to challenge the lawfulness of the seizure of his cell phone. Standing was the principal issue in dispute at the suppression hearing. The trial court indicated that it denied King's motion to suppress because it concluded that King did not have standing. On appeal, the primary dispute between the parties continues to be whether King had standing to challenge the seizure.

The Fourth Amendment guarantees people the right "to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures[.]" U.S. CONST. amend. IV. The rights secured by the Fourth Amendment are personal, and accordingly, an accused has standing to challenge the admission of evidence obtained by an unlawful search or seizure only if he had a legitimate expectation of privacy in the place invaded. *State v. Betts*, 397 S.W.3d 198, 203 (Tex. Crim. App. 2013) (citing *Rakas v. Illinois*, 439 U.S. 128, 139 (1978)); *see Katz v. United States*,

389 U.S. 347, 351 (1967) (observing that "the Fourth Amendment protects people, not places").

The defendant who challenges a search has the burden of proving facts demonstrating a legitimate expectation of privacy. *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996). "To carry this burden, the accused must normally prove: (a) that by his conduct, he exhibited an actual subjective expectation of privacy, i.e., a genuine intention to preserve something as private; and (b) that circumstances existed under which society was prepared to recognize his subjective expectation as objectively reasonable." *Id.*; *see State v. Granville*, 423 S.W.3d 399, 405 (Tex. Crim. App. 2014) (stating defendant must prove that he had subjective expectation of privacy and that society is prepared to recognize that expectation as "reasonable" or "legitimate").

In determining whether a defendant's subjective expectation of privacy was one that society was prepared to recognize as objectively reasonable, we examine the totality of the circumstances surrounding the search, including these factors:

(1) whether the accused had a property or possessory interest in the place invaded;

(2) whether he was legitimately in the place invaded;

(3) whether he had complete dominion or control and the right to exclude others;

(4) whether, before the intrusion, he took normal precautions customarily taken by those seeking privacy;

(5) whether he put the place to some private use; and

(6) whether his claim of privacy is consistent with historical notions of privacy.

Granados v. State, 85 S.W.3d 217, 223 (Tex. Crim. App. 2002) (citing *Villarreal*, 935 S.W.2d at 138). This is a non-exhaustive list of factors, and no one factor is dispositive. *Id.*

The record, here, does not support the trial court's conclusion that King did not have standing to challenge the seizure of his cell phone. Instead, the record shows that King had an objectively reasonable expectation of privacy in the semi-truck when his phone was seized.

The undisputed evidence and stipulated facts show that Feltman owned the semi-truck and that King worked for him as a long-haul truck driver, driving the semi-truck. King was arrested "near" the semi-truck at a truck stop after he had been driving it, and his cell phone was inside the truck at the time.

In the July 17 probable cause affidavit for the search warrant—which was admitted into evidence at the suppression hearing without objection—Detective Perkins testified that he was informed that King had been arrested by the U.S. Marshal's task force at the Petro Truck Stop earlier that day. He stated that he had also been informed that King had been "in possession of" the semi-truck.

Detective Perkins further testified:

> During this investigation it was discovered [that King] is employed as a truck driver that drives cross country to complete deliveries. [King] regularly drives a green tractor trailer bearing (state) license P876801 and vehicle registration number 3HSCUAPR6BN224015 during these deliveries and that it is believed he lives out of this vehicle while he is away from home. It is therefore reasonable to assume that the suspect would keep items such as cellphones, clothing, and backpacks within this vehicle as he travels which could include items used during the commission of this offense.

The evidence showed that not only did King have Feltman's permission to possess and operate the semi-truck, but, because of the nature of his work as a trucker, King lived out of the vehicle while working on the road. King's personal use of the semi-truck was also reflected by the items seized from the semi-truck during the July 17 search that were listed in the inventory. These items included clothing (such as pants, shirts, shorts, undershorts, and a belt), a pocketknife, toiletries, a backpack, prescription and over-the-counter medication, a journal, a social security card, an electronic tablet, and personal pictures. The evidence indicated King's private use of the semi-truck, not uncommon for truckers, which is consistent with historical notions of privacy. It also logically follows that King's lawful control over the vehicle provided him the right to exclude others from it. *See Rakas*, 439 U.S. at 143 n.12 ("[O]ne who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude [others].").

We acknowledge that King did not have an ownership interest in the semi-truck, "but that is just one factor to consider and not a requirement for a person to have standing to challenge improper police actions." *Betts*, 397 S.W.3d at 204 (holding that appellant had reasonable expectation of privacy in backyard of his aunt's home where he kept his dogs); *see Minn. v. Olson*, 495 U.S. 91, 96–97 (1990) (holding that overnight guest has legitimate expectation of privacy in his host's home). Although the factors for analyzing privacy expectations are more easily applied to an expectation of privacy in real property, the United States Supreme Court has held that a defendant has a reasonable expectation of privacy in a motor vehicle owned by another. *See Byrd v. United States*, __ U.S. __, 138 S. Ct. 1518, 1531 (2018) (holding that defendant had reasonable expectation of privacy in rental car even when he was not listed as authorized driver because he had lawful possession and control of rental car).

In addition, the fact that King was in control of the semi-truck as an employee did not negate his reasonable expectation of privacy. The Supreme Court has recognized that employees may have a reasonable expectation of privacy in the workplace:

> Within the workplace context, this Court has recognized that employees may have a reasonable expectation of privacy against intrusions by police. . . . As with the expectation of privacy in one's home, such an expectation in one's place of work is "based upon societal expectations that have deep roots in the history of the Amendment."

O'Connor v. Ortega, 480 U.S. 709, 716–18 (1987) (quoting *Oliver v. United States*, 466 U.S. 170, 178 n.8 (1984)). For example, in *Mancussi v. DeForte*, the Court determined that a union official, who shared an office with other union employees, had a privacy interest in the office sufficient to challenge the warrantless search of that office. 392 U.S. 364, 369 (1968). Similarly, Texas courts have held that an employee may have a reasonable expectation of privacy sufficient to provide him standing to challenge a search or seizure in the workplace. *See Dawson v. State*, 868 S.W.2d 363, 371 (Tex. App.—Dallas 1993, pet. ref'd) (holding that employee had reasonable expectation of privacy in locker provided by employer to store her personal belongings); *Johnson v. State*, No. 03-04-00732-CR, 2006 WL 1865059, at *3 (Tex. App.—Austin July 7, 2006, pet. ref'd) (mem. op., not designated for publication) (holding that employee had standing to challenge seizure of files from his employer's offices).

The State acknowledges that King had a reasonable expectation of privacy in the semi-truck at the time of his arrest. But it asserts that King did not have a reasonable expectation of privacy in the semi-truck when the phone was seized by Feltman for the police. The State asserts that King had no reasonable expectation of privacy at the time of the seizure because, "[i]mportantly to this case, King did not take any precautions to secure his personal belongings from intrusion prior to the retrieval of his cell phone." The State points out that the trial court remarked at the

suppression hearing that King could have asked the arresting officers to retrieve his cell phone from the semi-truck when he was arrested. The State asserts that King should have known at the time that, once the vehicle was returned to Feltman, he could remove King's belongings, including the cell phone. The State contends that "King knew the truck did not belong to him and that it would likely be returned to his employer, yet he did not take the precaution of requesting his cell phone be removed from the truck at the time of the arrest."[6]

In making this argument, the State implicitly asserts that King abandoned his cell phone in the semi-truck. *See State v. Martinez*, 570 S.W.3d 278, 285–86 (Tex. Crim. App. 2019) (rejecting State's implicit argument that defendant abandoned his blood sample at hospital because he did not take it with him when he left hospital). When property is abandoned before police take possession of it, there is no seizure

[6] The State intimates that, in addition to requesting to take his cell phone at the time of his arrest, King could have taken other post-arrest action to secure the phone. We note, however, that Detective Perkins's probable-cause affidavit reflects that when King was arrested, "[c]rime scene tape was placed along the perimeter of the Semi and Trailer along with a uniformed [Oklahoma City Police Department] patrol officer as scene security," which would have restricted access to the semi-truck. The search warrant was issued and executed that same day. The warrant permitted cell phones to be seized, but the police failed to take King's cell phone from the semi-truck when they executed the warrant. Even though they thought they had seized the phone, the police had not taken it from the truck. Detective Henz did not realize that the phone had not been seized until he received the inventory, at which point, he contacted Feltman, who then seized the phone. Thus, to the extent the State contends that King should have taken action to secure the phone during or after his arrest, it is unclear how he would have been able to do that with on-scene security or how he would have known that the phone was not seized pursuant to the warrant when even the police did not know it had not been seized.

under the Fourth Amendment. *Swearingen v. State*, 101 S.W.3d 89, 101 (Tex. 2003). Abandonment is primarily a question of intent to be inferred from words spoken, acts done, and other objective facts and relevant circumstances. *Martinez*, 570 S.W.3d at 286 (citing *McDuff v. State*, 939 S.W.2d 607, 616 (Tex. Crim. App. 1997)).

Abandonment consists of two components: (1) a defendant must intend to abandon the property, and (2) a defendant must freely decide to abandon the property. *Id.* "[T]he test for abandonment in the Fourth Amendment context requires affirmative proof of abandonment." *Id.* "To make the determination of voluntary abandonment we must determine if appellant intended to abandon." *Comer v. State*, 754 S.W.2d 656, 659 (Tex. Crim. App. 1986). "The test does not begin with a presumption of abandonment which must be rebutted by proof of an intent not to abandon." *Martinez*, 570 S.W.3d at 286.

The State asserts that King failed to protect his privacy interest by not requesting to take his cell phone with him when he was arrested. However, the record is silent on this point. The record shows that King was arrested by U.S. Marshals near the semi-truck at a truck stop and that the phone remained in the semi-truck after his arrest, but the record does not contain any information about whether King did or did not request to take his cell phone with him. Here, the State's argument that King abandoned his cell phone, based solely on evidence that the phone

remained in the semi-truck, improperly begins with a presumption of abandonment. *See id.* Absent here is the type of affirmative evidence demonstrating an intent to abandon present in other cases. For example, in *Edwards v. State*, we held that the evidence demonstrated that the appellant had abandoned his cell phone because he had placed the phone on top of a stolen car, committed a crime, and then, believing the police were on the way, fled the scene without retrieving his phone from the top of the car. 497 S.W.3d 147, 161 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd). In contrast, King did not voluntarily flee from the scene; rather, he was taken from the scene in custody by law enforcement. And, unlike in *Edwards*, King had his cell phone inside the semi-truck while he was in possession of the vehicle for work purposes, thus demonstrating a subjective expectation of privacy that society would recognize as objectively reasonable. *See Martinez*, 570 S.W.3d at 287 (explaining that "[n]ot only will privacy expectations vary with the type of property involved . . . but they will vary with the location of the property" (alteration in original)) (quoting *United States v. Oswald*, 783 F.2d 663, 666–67 (6th Cir. 1986)).

A case useful to our analysis is *United States v. Robinson*, 430 F.2d 1141 (6th Cir. 1970). There, police arrested the appellant, Robinson, for armed bank robbery. *Id.* at 1143. Thirty-four days after Robinson was arrested, FBI agents searched his apartment, seizing an item of clothing linking him to the robbery. *Id.* at 1142–43. Although Robinson had been "continuously incarcerated during this intervening

period, giving the agents an adequate opportunity to secure a search warrant, no warrant for the search was obtained. Instead, the agents merely sought and received the permission of the building manager to conduct the search of the apartment." *Id.* at 1143.

On appeal, the principal issue was whether Robinson had abandoned the apartment at the time of the search. *Id.* The court explained that "abandonment will not be presumed" and "must be clearly shown by the party asserting it." *Id.* The court further explained that "where, as here, the party's absence from the premises is involuntary because of his arrest and incarceration, the government should bear an especially heavy burden of showing that he intended to abandon them." *Id.*

To show Robinson had abandoned his apartment, the government offered the testimony of the building manager who based his opinion that Robinson had abandoned the apartment on Robinson's absence from the apartment, which was due to his post-arrest incarceration. *Id.* The court concluded that "the government failed to show that the premises had been abandoned by [Robinson] at the time of the search, that the warrantless search of the premises was therefore unlawful, and that receipt of the [clothing item] into evidence constituted error." *Id.* at 1144.

Robinson provides a good example of why circumstances created by a defendant's arrest and incarceration, coupled with a lapse in competency by law enforcement, should be closely scrutinized when determining whether those

circumstances give rise to a conclusion that the defendant did not have a reasonable expectation of privacy in the place or item that was subject to search or seizure. Although factually distinguishable, *Robinson* serves not only to highlight that King did not abandon his cell phone but also illustrates why King's expectation of privacy at the time Feltman seized his cell phone was no different than his expectation of privacy at the time of his arrest. Even though the evidence showed that King exhibited a reasonable expectation of privacy in the semi-truck at the time of his arrest, the State contends (and the trial court appeared to agree) that King's reasonable expectation of privacy had ended by the time of Feltman's delayed, post-warrant seizure of the cell phone. We disagree with that contention.

The stipulated facts showed that the delay occurred because of the police's failure to seize the cell phone during the search authorized by the warrant. If King's arrest and incarceration—along with the police's lapse in seizing the cell phone—were permitted to create the basis for concluding that King's reasonable expectation of privacy ended by the time of the seizure, then the police's conduct and delay would improperly be the force behind divesting King of his reasonable expectation of privacy rather than his own conduct influencing that determination. *See Villarreal*, 935 S.W.2d at 138 (considering *defendant's conduct* in determining whether he met burden of establishing privacy requirement by proving that he

exhibited actual subjective expectation of privacy that society was prepared to recognize as objectively reasonable).

We recognize that a defendant who has a reasonable expectation of privacy in property belonging to another may lose that expectation when his status with respect to the property changes. For instance, in *Tilghman v. State*, the Court of Criminal Appeals recently held that a hotel guest has a reasonable expectation of privacy in a hotel room, but "upon hotel staff taking affirmative steps to evict a guest, control of the hotel room reverts to the hotel, and the guest loses his reasonable expectation of privacy therein." 624 S.W.3d 801, 810 (Tex. Crim. App. 2021).

Another example is seen in *Granados*, 85 S.W.3d at 226. There, the Court of Criminal Appeals held that an apartment tenant's "indefinite" overnight guest had a reasonable expectation of privacy in the apartment. *Id.* at 223. However, the tenant lost his right of privacy when the tenant asked the guest "on several occasions" to leave the apartment, and the guest was given an opportunity to gather his belongings and vacate apartment. *Id.* at 226. For this reason, the court held that the guest did not have a reasonable expectation of privacy in the apartment when the police entered the apartment 12 hours after the tenant had asked the guest to leave. *See id.*

Here, unlike the defendants in *Tilghman* and *Granados*, King lost possession of the semi-truck, not because Feltman as the owner took steps to end King's right to use the truck, but because he was arrested and incarcerated by police. And

significantly, the stipulated facts show that, when he seized the cell phone, Feltman was not acting on his own behalf or of his own accord. Feltman did so because Detective Henz contacted him and asked that he retrieve the phone from the semi-truck and send it to him. Feltman complied, retrieving the phone and shipping it to Detective Henz, who then reimbursed Feltman for the shipping costs. Accordingly, Feltman was acting, not as a private party or owner of the semi-truck, but as an agent of the police when he seized the phone. *See Burwell v. State*, 576 S.W.3d 826, 831 (Tex. App.—Houston [1st Dist.] 2019, pet. ref'd) (identifying factors to consider when determining whether private individual was acting as agent of government are (1) whether government knew of, and acquiesced in, intrusive conduct, and (2) whether party performing search intended to assist law enforcement efforts or, instead, to further his own ends); *see also Dawson*, 868 S.W.2d at 369 (holding that employer who searched employee's locker was acting as agent of police).

We conclude that King established that he had a reasonable expectation of privacy in the semi-truck at the time of his arrest and that, under the circumstances presented here, his expectation of privacy had not ended or diminished when Feltman seized the cell phone for the police. Therefore, King had standing to challenge the seizure of his cell phone.

D. Fourth-Amendment Violation

1. Seizure Without a Warrant

The purpose of the Fourth Amendment is to safeguard a person's legitimate expectation of privacy from unreasonable government intrusions. *Villarreal*, 935 S.W.2d at 138; *see* U.S. CONST. amend. IV (prohibiting unreasonable searches and seizures by government). To suppress evidence based on an alleged Fourth Amendment violation, a defendant bears the initial burden of producing evidence that rebuts the presumption of proper police conduct. *Amador v. State*, 221 S.W.3d 666, 672 (Tex. Crim. App. 2007). A defendant meets his initial burden of proof by establishing that a search or seizure occurred without a warrant. *Id.*; *see Kothe v. State*, 152 S.W.3d 54, 59 n.10 (Tex. Crim. App. 2004) ("[W]arrantless searches and seizures are presumed to be unreasonable."). Here, the State recognizes in its brief that the seizure did not occur with a warrant, stating "King's cell phone was not seized pursuant to the warrant executed on July 17, 2018, as the cell phone was left in King's work truck at that time." The record also supports this assessment.

According to the stipulated facts, Feltman seized the phone from the semi-truck after the execution of the Oklahoma search warrant, that is, after police had already used the warrant to authorize their search of the semi-truck on July 17, during which they seized numerous items but not the cell phone. The stipulated facts also show that the phone was seized after the search's inventory was prepared, indicating

that the police considered the execution of the search warrant completed. Detective Henz received the inventory, revealing that the cell phone had not been seized during the warrant's execution. And the undisputed evidence showed that the inventory and the warrant were returned to the Oklahoma court that had issued the warrant on July 24. The stipulated facts also reflect that Detective Henz did not receive the cell phone from Feltman via Federal Express until August 9, twenty-three days after the search warrant was executed. In sum, the record establishes that the seizure of the cell phone occurred without a search warrant because the cell phone was not seized during the execution of the Oklahoma search warrant but was instead seized after the warrant's execution by Feltman. *See Coburn v. State*, 148 P.2d 483, 485 (Okla. Crim. App. 1944) (citing earlier Oklahoma authority recognizing "the rule often announced that officers may not twice search the same premises where only one search warrant is issued"); *see also United States v. Keszthelyi*, 308 F.3d 557, 568–69 (6th Cir. 2002) ("[T]he general rule [is] that a warrant authorizes only one search.") (citing *United States v. Gagnon*, 635 F.2d 766, 769 (10th Cir. 1980) ("We agree that once a search warrant has been fully executed and the fruits of the search secured, the authority under the warrant expires and further governmental intrusion must cease.")); Wayne R. LaFave, 2 SEARCH & SEIZURE § 4.10(d) (6th ed. 2020) (explaining that search warrant "may be executed only once").

Because he established that he had standing and that the seizure was not conducted pursuant to a warrant, King satisfied his burden of establishing his Fourth Amendment claim. *See Betts*, 397 S.W.3d at 207. The burden then shifted to the State to establish an exception to the warrant requirement. *See id.*

2. Attenuation of the Taint

The State does not contend that an exception to the warrant requirement applied to the seizure of King's phone. Instead, for the first time on appeal, the State asserts that the photographs containing child pornography discovered on King's cell phone were admissible pursuant to the doctrine of attenuation of the taint.[7] Specifically, the State asserts that the search warrant—issued after Detective Henz received the cell phone from Feltman—authorizing the police to access the cell phone's data contents, was an intervening circumstance that attenuated "any taint associated with the unlawful seizure [of the phone]."

In his brief, King contends that the photographs on his phone were "fruit of the poisonous tree" and, thus, should not have been admitted into evidence. The "fruit of the poisonous tree" doctrine serves to exclude from evidence both direct

---

[7] The State may permissibly make new arguments in support of a trial court's ruling for first time on appeal because "an appellate court will uphold the trial court's ruling if that ruling is 'reasonably supported by the record and is correct on any theory of law applicable to the case.'" *Mahaffey v. State*, 316 S.W.3d 633, 637 (Tex. Crim. App. 2010) (quoting *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006)).

and indirect products of Fourth Amendment violations. *Wong Sun v. United States*, 371 U.S. 471, 484 (1963); *State v. Iduarte*, 268 S.W.3d 544, 550 (Tex. Crim. App. 2008). We agree with King that the photographs containing child pornography seized from his phone were logically the product of the unlawful seizure of his phone.

King also points out that the exclusionary rule codified in Code of Criminal Procedure article 38.23(a) prohibited the admission of the photographs into evidence. Under that provision, "[n]o evidence obtained by an officer or other person in violation of any provisions 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). However, neither the Fourth Amendment's nor article 38.23(a)'s exclusionary rule requires the suppression of evidence not "obtained" as a result of some illegality. *State v. Jackson*, 464 S.W.3d 724, 731 (Tex. Crim. App. 2015).

The Court of Criminal Appeals has explained that "not every but/for product of police illegality will constitute evidence 'obtained' from that illegality for either federal or state exclusionary rule purposes; evidence is not subject to suppression, in other words, 'simply because it would not have come to light but for the illegal actions of the police.'" *Id.* (quoting *State v. Mazuca*, 375 S.W.3d 294 (Tex. Crim. App. 2012)) (in turn quoting *Wong Sun*, 371 U.S. at 488). Instead, the court

recognized—in discussing the "attenuation of the taint doctrine"—that "the more apt question is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Mazuca*, 375 S.W.3d at 300 (quoting *Wong Sun*, 371 U.S. at 488).

To determine whether the attenuation of the taint doctrine applies here, and whether the photographs from King's cell phone containing child pornography were admissible, we consider three factors: (1) the temporal proximity of the violation of law and the seizure of physical evidence; (2) the presence of intervening circumstances; and (3) the purposefulness or flagrancy of the police misconduct. *See id.* at 301–07.

We begin by determining whether the search warrant for the contents of the cell phone was an "intervening circumstance." In other words, we answer whether the search warrant was a "means" of obtaining the photographs on the phone that was "sufficiently distinguishable" from the unlawful seizure of the phone "to be purged of the primary taint." *See id.* The State asserts that it was. Based on the record, we disagree.

To understand why the search warrant for the contents of the cell phone did not provide an "intervening circumstance," it is helpful to discuss examples of warrants that were found to be an "intervening circumstance" that broke the chain

of causation between the illegal police conduct and the acquisition of the evidence. Such an example is found in *Mazuca*. There, police pulled over a car in which Mazuca was a passenger on the belief that the taillights were emitting white light instead of red light as required by a Texas statute. *Id.* at 296–97. During the stop, the police officers discovered that Mazuca had outstanding warrants for his arrest. *Id.* at 297. After taking him into custody, one of the officers asked Mazuca if he had anything illegal on him, and Mazuca responded that he did in his pants pocket. *Id.* The officer placed Mazuca into custody and patted him down. *Id.* During the search, the officer found ecstasy in Mazuca's pants pocket. *Id.*

It turned out that the taillights of the car that Mazuca had been riding in were, in fact, statutorily compliant; thus, there had been no reasonable suspicion for the police to stop the car and detain him. *See id.* at 299. Mazuca filed a motion to suppress, arguing that the discovery of the ecstasy should be excluded because the traffic stop was illegal. *Id.* at 296. The trial court granted Mazuca's motion to suppress. *Id.* at 298. The State appealed, and the court of appeals affirmed the trial court's ruling. *Id.* at 300.

The Court of Criminal Appeals reversed the court of appeals and remanded to the trial court. *Id.* at 310. The court held that the exclusionary rule did not apply because the discovery of the arrest warrants after the illegal stop was an intervening circumstance that broke the causal connection between the illegal stop and the

seizure of the ecstasy, thus purging the primary taint of the illegality. *See id.* at 308, 310. The court also determined that the police did not purposely or flagrantly violate Mazuca's rights. *Id.* at 310.

In its brief, the State cites *Arochi v. State*, another case in which a court held a warrant to be an intervening circumstance that attenuated the taint between the unlawful police conduct and the acquisition of the evidence sought to be suppressed. No. 05-16-01208-CR, 2018 WL 3372919, at *22 (Tex. App.—Dallas July 11, 2018, pet. ref'd) (mem. op., not designated for publication). There, the appellant, Arochi, was convicted of the aggravated kidnapping of Christina Morris. *Id.* at *1. During the investigation of the case, the police came to suspect that Arochi had abducted Morris and, at some point, placed her in the trunk of his car. *See id.* at *8. The police obtained a court order to attach a GPS tracking device to his vehicle. *Id.* at *7.

Three weeks later, the police obtained a warrant to seize Arochi's car. *Id.* at *8. When the police went to Arochi's home to execute the warrant, the car was not there. *Id.* The police used the previously attached GPS tracking device to locate the car in a restaurant parking lot. *Id.* The police then took samples from the car's trunk pursuant to the warrant. *Id.* at *9. Forensic analysis of the samples revealed Morris's DNA in the trunk. *Id.*

Arochi filed a motion to suppress. *Id.* at *20. He asserted that the installation of the GPS tracking device had been unlawful because the police had obtained the

order to attach the tracking device without demonstrating probable cause. *Id.* Arochi claimed that the improper tracking order had "tainted the execution of the search warrant" of the car and, thus, the DNA evidence obtained from the trunk should be suppressed. *Id.* at *21–22. The trial court denied the motion. *Id.* at *21. Arochi appealed.

The court of appeals upheld the trial court's denial of the suppression motion. *Id.* at *22. The court observed that Arochi's car was "seized pursuant to the search warrant, not the tracking order," and "[t]he only apparent connection between the two is that the police used the tracking device to locate [Arochi's] car at the restaurant, where they seized the vehicle." *Id.* Following these observations, the court concluded that the search warrant was an "'intervening circumstance' in the attenuation-of-taint analysis." *Id.* The court explained that the search warrant had "intervene[d] between the inception of the primary illegality, i.e., the 'unlawfully installed tracker,' and the later discovery of evidence that [was] alleged to be the 'fruit of the poisonous tree,' e.g., the trunk mat and the swabs showing the presence of Morris's DNA." *Id.* The court also determined that the police had not acted with "purposefulness or flagrancy" in obtaining the complained-of order for the tracking device. *Id.*

Mazuca and *Arochi* highlight why, here, the search warrant for the cell phone's data contents was not an intervening circumstance like the warrants in those

cases. The *Mazuca* and *Arochi* intervening warrants, which lawfully permitted the conduct resulting in the seizure of the complained-of evidence, were issued independently of the unlawful conduct in those cases. The arrest warrants in *Mazuca* had already been issued and were outstanding at the time the car that Mazuca was riding in was unlawfully stopped. *See Mazuca*, 375 S.W.3d 297. Similarly, the lawful search warrant authorizing the seizure of Arochi's car was obtained independently of the unlawful installation of the tracking device. *See Arochi*, 2018 WL 3372919, at *22 (stating that "[t]he only apparent connection" between search warrant and unlawful order to issue tracking device was "that the police used the tracking device to locate appellant's car at the restaurant, where they seized the vehicle" pursuant to lawful search warrant). In short, the evidence sought to be suppressed in those two cases had been obtained "by means sufficiently distinguishable to be purged of the primary taint" of the complained-of illegal conduct. *See Mazuca*, 375 S.W.3d at 300.

Here, in contrast, the photographs sought to be suppressed were obtained because the search warrant for the phone's contents was "come at by exploitation of" the illegal seizure of the cell phone. *See id.* According to the stipulated facts, the search warrant for the phone's contents was obtained by Detective Henz after the phone had been unlawfully seized and sent to him. Although the record contains neither the search warrant nor the probable-cause affidavit for the warrant's

issuance, the only logical deduction is that the search warrant for the phone's contents would not have issued if the police did not already have the cell phone in their possession. The unlawful seizure of the phone was a critical step in obtaining the search warrant for the phone's contents. Thus, we conclude that the search warrant was not an "intervening circumstance" that was "sufficiently distinguishable" from the illegal seizure of the phone to purge the photographs of the "primary taint" of the unlawful seizure. *See id.*

We turn to the two remaining factors of the attenuation-of-the taint analysis: temporal proximity and the purposefulness or flagrancy of the police misconduct. *See id*. at 301–07. The stipulated facts show that the police's conduct was purposeful. After receiving the search inventory, Detective Henz realized that the cell had not been seized pursuant to the search warrant when the warrant was executed. No longer having an executable warrant, Detective Henz contacted Feltman and enlisted him to seize the phone rather than contacting the Oklahoma City police—with whom Detective Henz had been working and who had successfully obtained the initial search warrant—to request them to obtain a second search warrant for the phone's seizure. Thus, this factor weighs against a conclusion that the taint of the illegal seizure was purged.

Finally, relevant to the factor of temporal proximity, not only does the record not contain the search warrant for the phone's contents, but the record also does not

reflect the length of time between the illegal seizure of the phone and the seizure of the photographs. The stipulated facts showed that when he realized that the phone had not been seized pursuant to the July 17 search warrant, Detective Henz contacted Feltman and enlisted him to seize the phone. Feltman sent the phone from Oklahoma City to Detective Henz in Fort Worth by Federal Express. Detective Henz then obtained the search warrant for the phone's contents. Thus, it would be reasonable to deduce that it was at least a day from the time of the illegal search to the seizure of the photographs. However, given the direct causal link between the illegal seizure of the phone and the seizure of the photographs, the logistical challenges involved here—lengthening the time between the illegal conduct and the seizure of the photographs—should not alone serve to attenuate the taint of the illegality. We conclude that the attenuation of the taint doctrine does not apply to support the trial court's denial of the motion to suppress.

In summary, we conclude that (1) King established that he had standing to challenge the search of the semi-truck and the seizure of his cell phone, (2) he met his initial burden of showing that the seizure of his phone was without a warrant in violation of the Fourth Amendment, (3) the State did not meet its burden of proving an exception to the warrant requirement, and (4) the record does not support a conclusion that the taint of the illegal seizure was purged from the seizure of the photographs. We hold that the trial court erred in denying King's motion to suppress,

and the 17 photographs from his cell phone containing child pornography should not have been admitted during the punishment phase of trial. *See* TEX. CODE CRIM. PROC. art. 38.23(a).

E. Harm

Finally, we must determine under the applicable standard whether the error of denying the motion to suppress and admitting the photographs containing child pornography contributed to King's sentence of life in prison for each offense.

1. Standard of Review

When, as here, a trial court erroneously denies a motion to suppress and admits evidence obtained in violation of the Fourth Amendment, the error is constitutional and subject to the harmless-error analysis under Rule of Appellate Procedure 44.2(a). *See* TEX. R. APP. P. 44.2(a); *Hernandez v. State*, 60 S.W.3d 106, 108 (Tex. Crim. App. 2001). Under that rule, constitutional error is harmful unless the reviewing court determines, beyond a reasonable doubt, that the error did not contribute to the conviction or punishment. TEX. R. APP. P. 44.2(a).

When applying the harmless error test, reviewing courts are to "ask whether there is a 'reasonable possibility' that the error might have contributed to the conviction or punishment." *Love v. State*, 543 S.W.3d 835, 846 (Tex. Crim. App. 2016). The analysis should not focus on the propriety of the outcome at trial. *Id.*

"[T]he question for the reviewing court is not whether the jury verdict was supported by the evidence." *Scott v. State*, 227 S.W.3d 670, 690 (Tex. Crim. App. 2007). "Instead, the question is the likelihood that the constitutional error was actually a contributing factor in the jury's deliberations in arriving at that verdict." *Id.* In other words, the reviewing court asks whether "the error adversely affected the integrity of the process leading to the conviction." *Id.* (internal quotation marks omitted). To that end, the reviewing court "should calculate as much as possible the probable impact of the error on the jury in light of the existence of other evidence." *Love*, 543 S.W.3d at 846. That is, "the reviewing court must ask itself whether there is a reasonable possibility that the . . . error moved the jury from a state of non-persuasion to one of persuasion on a particular issue." *Scott*, 227 S.W.3d at 690. A ruling that an error is harmless is, in essence, an assertion that the error could not have affected the jury. *Wells v. State*, 611 S.W.3d 396, 410 (Tex. Crim. App. 2020) (citing *Wesbrook v. State*, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000)).

In deciding whether an error of constitutional dimension contributed to the conviction or punishment, factors to consider include, but are not limited to, the nature of the error—"e.g., erroneous admission or exclusion of evidence, objectionable jury argument, etc."—whether the error was emphasized by the State, the probable implications of the error, and the weight the jury would likely have assigned to the error during its deliberations. *Snowden v. State*, 353 S.W.3d 815, 822

(Tex. Crim. App. 2011). Further, the presence of overwhelming evidence supporting the jury's verdict can also be a factor in the harmless error calculation. *Wells*, 611 S.W.3d at 410 (citing *Motilla v. State*, 78 S.W.3d 352, 357 (Tex. Crim. App. 2002)). Reviewing courts should consider any and every circumstance apparent in the record that logically informs the harmless error determination, and the entire record is to be evaluated in a neutral manner and not in the light most favorable to the prosecution. *Love*, 543 S.W.3d at 846.

2. Analysis

The State has the burden, as beneficiary of the error, to prove the error is harmless beyond a reasonable doubt. *Haggard v. State*, 612 S.W.3d 318, 328 (Tex. Crim. App. 2020); *Wells*, 611 S.W.3d at 411 (citing *Williams v. State*, 958 S.W.2d 186, 194 n.9 (Tex. Crim. App. 1997)); *Deck v. Missouri*, 544 U.S. 622, 635 (2005)). Here, the State has offered no argument, nor otherwise addressed the harmfulness of the error. Thus, the State has not satisfied its burden to show the error was harmless. *See Haggard*, 612 S.W.3d at 328; *Wells*, 611 S.W.3d at 411. The State's failure to meet its burden aside, an examination of the record shows that under the applicable standard of review the error was harmful error.

The type of error here was the erroneous admission of evidence, specifically, the admission of 17 photographs containing child pornography discovered on King's cell phone. We begin our harm analysis by reviewing other evidence of significance

to punishment. Evidence important to assessing King's punishment included evidence admitted during the guilt-innocence phase of trial showing the details of King's attempted kidnapping of Jane and his assault against her. The jury also heard evidence about the severity of the life-threatening injuries King inflicted on Jane.

Evidence admitted during the punishment-phase (as detailed above in the background section) revealed that King had a criminal record and a history of violence, including assaults against his wife and girlfriend and a recent road rage incident. The jury also heard additional information about the gravity of Jane's injuries and trauma inflicted by King, including evidence that the injuries required her to undergo a heart transplant, which will cause her life-long medical issues.

While the record contained ample evidence relevant to King's punishment, our inquiry is not one simply of weight or sufficiency of the evidence; rather, we determine the likelihood that the admission into evidence of the photos of child pornography corrupted or affected the integrity of the process of assessing punishment or prejudiced the jurors' decision-making. *See Friend v. State*, 473 S.W.3d 470, 484 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd) (citing, inter alia, *Snowden*, 353 S.W.3d at 819). The highly disturbing subject matter of the erroneously admitted photographs place them in a different category of evidence than the other evidence relevant to punishment, which, although also disturbing, almost certainly would not have had the same emotional impact or prompted the

same visceral reaction as viewing images of the sexual exploitation of children. And, given that the offenses here involved the attempted kidnapping and serious bodily injury of a 12-year-old girl, the impact of the photographs depicting harm to children would have been intensified.

The State also emphasized the error. In its closing argument, the State responded to a request for leniency made by the defense in its closing argument. The defense had requested the jury to consider King's love for his four-year-old daughter and "give him an opportunity to be a part of his daughter's life at some time in the future." The State argued that King should be held accountable for "the man [he] has become." To show who that was, the State pointed to King's history of violence and, in an apparent reference to the child pornography, the State told the jury that it had gotten "a look inside [King's] mind." The State argued:

> I'm not going to make you look at these pictures again, but I think you saw exactly who this Defendant is. Who he is and what he likes and what he wants.
>
> So ask yourself: Is this going to be about rehabilitation? No, it's not. It's about two things. It's about deterrence, and it's about punishment.

The State reiterated to the jury what evidence it could consider in assessing punishment and again focused on the child pornography:

> It is all the stuff that I've already talked about: the assaults, the criminal history, what [King] did to his wife, those pictures on his cell phone.
>
> If somebody wants to go back there and they're talking about feeling sorry for his daughter, show them the pictures on that cell phone and

> say, "Is this the person you want around that daughter? Is this the person you want around another child?" Because the answer is no.

In short, the State emphasized the child pornography, arguing that it exposed King as a truly dangerous offender who cannot be rehabilitated and should be kept in prison. And the State used the child pornography to counter the only argument made by the defense to support why the jury should show leniency. The State requested the jury to assess punishment at life in prison for each count, and the jury complied.

Given the highly disturbing nature of the erroneously admitted photographs, the likely effect on the jury, the State's emphasis of the photographs, and the jury's assessment of punishment for each offense at life in prison—the maximum sentence King could receive—we are unable to conclude, beyond a reasonable doubt, that the error did not contribute to King's punishment. We hold that the error was harmful. *See* TEX. R. APP. P. 44.2(a).

We sustain King's seventh issue.

Conclusion

We reverse the portions of the judgment sentencing King to life in prison for the offense of injury to a child causing serious bodily injury and to life in prison for the offense of attempted aggravated kidnapping. We affirm the remaining portions of the judgment. We remand the case to the trial court for a new sentencing hearing.

Richard Hightower
Justice

Panel consists of Justices Kelly, Landau, and Hightower.

Publish. *See* TEX. R. APP. P. 47.2(b).

APPENDIX 3

CASE NO. 1588183R COUNT NO. ONE
INCIDENT NO./TRN: 9048020131

THE STATE OF TEXAS	§	IN THE 371ST DISTRICT COURT
V.	§	
TERRY WAYNE KING II	§	TARRANT COUNTY, TEXAS
STATE ID NO.: TX05980106	§	

JUDGMENT OF CONVICTION BY JURY

Judge Presiding:	HON. MOLLEE WESTFALL	Date Sentence Imposed:	9/11/2019
Attorney for State:	SHAREN WILSON R DALE SMITH DARREN DELACRUZ	Attorney for Defendant:	TAYLOR FERGUSON STEVE GEBHARDT

Offense for which Defendant Convicted:
INJURY TO A CHILD - INTENTIONALLY AND KNOWINGLY CAUSE SERIOUS BODILY INJURY OR SERIOUS MENTAL DEFICIENCY, IMPAIRMENT OR INJURY

Charging Instrument:	Statute for Offense:
Indictment	22.04(e) PC
Date of Offense:	Plea to Offense:
4/19/2018	NOT GUILTY
Degree of Offense:	
1ST DEGREE FELONY	
Verdict of Jury:	Findings on Deadly Weapon:
Guilty	Yes, not a firearm
1st Enhancement Paragraph:	Finding on 1st Enhancement Paragraph:
True	True
2nd Enhancement Paragraph:	Finding on 2nd Enhancement Paragraph:
N/A	N/A
Punishment Assessed by:	Date Sentence Commences: (Date does not apply to confinement served as a condition of community supervision.)
Jury	9/11/2019

Punishment and Place of Confinement: LIFE Institutional Division, TDCJ

THIS SENTENCE SHALL RUN CONCURRENTLY.

☐ SENTENCE OF CONFINEMENT SUSPENDED, DEFENDANT PLACED ON COMMUNITY SUPERVISION FOR N/A.
(The document setting forth the conditions of community supervision is incorporated herein by this reference.)

☐ Defendant is required to register as sex offender in accordance with Chapter 62, CCP.

(For sex offender registration purposes only) The age of the victim at the time of the offense was N/A

Fine:	Court Costs:	Restitution:	Restitution Payable to:
N/A	$319.00	N/A	(See special finding or order of restitution which is incorporated herein by this reference.)

Was the victim impact statement returned to the attorney representing the State? N/A

(FOR STATE JAIL FELONY OFFENSES ONLY) Is Defendant presumptively entitled to diligent participation credit in accordance with Article 42A.559, Tex. Code Crim. Proc.? N/A

Total Jail Time Credit: 422 Days

If Defendant is to serve sentence in county jail or is given credit toward fine and costs, enter days credited below.

N/A Days Notes: N/A

This cause was called for trial by jury and the parties appeared. The State appeared by her District Attorney as named above.

Counsel / Waiver of Counsel (select one)

☒ Defendant appeared with counsel.

☐ Defendant appeared without counsel and knowingly, intelligently, and voluntarily waived the right to representation by counsel in writing in open court.
☐ Defendant was tried in absentia.

Both parties announced ready for trial. It appeared to the Court that Defendant was mentally competent to stand trial. A jury was selected, impaneled, and sworn, and Defendant entered a plea to the charged offense. The Court received the plea and entered it of record.

The jury heard the evidence submitted and argument of counsel. The Court charged the jury as to its duty to determine the guilt or innocence of Defendant, and the jury retired to consider the evidence. Upon returning to open court, the jury delivered its verdict in the presence of Defendant and defense counsel, if any.

The Court received the verdict and ORDERED it entered upon the minutes of the Court.

Punishment Assessed by Jury / Court / No election (select one)

☒ **Jury.** Defendant entered a plea and filed a written election to have the jury assess punishment. The jury heard evidence relative to the question of punishment. The Court charged the jury and it retired to consider the question of punishment. After due deliberation, the jury was brought into Court, and, in open court, it returned its verdict as indicated above.
☐ **Court.** Defendant elected to have the Court assess punishment. After hearing evidence relative to the question of punishment, the Court assessed Defendant's punishment as indicated above.
☐ **No Election.** Defendant did not file a written election as to whether the judge or jury should assess punishment. After hearing evidence relative to the question of punishment, the Court assessed Defendant's punishment as indicated above.

In accordance with the jury's verdict, the Court ADJUDGES Defendant GUILTY of the above offense. The Court FINDS that the Presentence Investigation, if so ordered, was done according to the applicable provisions of Subchapter F, Chapter 42A, Tex. Code Crim. Proc..

The Court ORDERS Defendant punished in accordance with the jury's verdict or Court's findings as to the proper punishment as indicated above. After having conducted an inquiry into Defendant's ability to pay, the Court ORDERS Defendant to pay the fine, court costs, and restitution, if any, as indicated above.

Punishment Options (select one)

☒ **Confinement in State Jail or Institutional Division.** The Court ORDERS the authorized agent of the State of Texas or the County Sheriff to take and deliver Defendant to the Director of the Correctional Institutions Division, TDCJ, for placement in confinement in accordance with this judgment. The Court ORDERS Defendant remanded to the custody of the County Sheriff until the Sheriff can obey the directions of this paragraph. Upon release from confinement, the Court ORDERS Defendant to proceed without unnecessary delay to the District Clerk's office, or any other office designated by the Court or the Court's designee, to pay or to make arrangements to pay any fine, court costs, and restitution due.
☐ **County Jail Confinement / Confinement in Lieu of Payment.** The Court ORDERS Defendant committed to the custody of the County Sheriff immediately or on the date the sentence commences. Defendant shall be confined in the county jail for the period indicated above. Upon release from confinement, the Court ORDERS Defendant to proceed without unnecessary delay to the District Clerk's office, or any other office designated by the Court or the Court's designee, to pay or to make arrangements to pay any fine, court costs, and restitution due.
☐ **Fine Only Payment.** The punishment assessed against Defendant is for a FINE ONLY. The Court ORDERS Defendant to proceed immediately to the District Clerk's office, or any other office designated by the Court or the Court's designee, to pay or to make arrangements to pay the fine, court costs, and restitution ordered by the Court in this cause.
☐ **Confinement as a Condition of Community Supervision.** The Court ORDERS Defendant confined **N/A Days** in **N/A** as a condition of community supervision. The period of confinement as a condition of community supervision starts when Defendant arrives at the designated facility, absent a special order to the contrary.

Execution / Suspension of Sentence

☒ The Court ORDERS Defendant's sentence EXECUTED. The Court FINDS that Defendant is entitled to the jail time credit indicated above. The attorney for the state, attorney for the defendant, the County Sheriff, and any other person having or who had custody of Defendant shall assist the clerk, or person responsible for completing this judgment, in calculating Defendant's credit for time served. All supporting documentation, if any, concerning Defendant's credit for time served is incorporated herein by this reference.

Furthermore, the following special findings or orders apply:

COUNT ONE AND TWO TO RUN CONCURRENTLY.

NOTICE OF APPEAL FILED: 9/11/2019

REPEAT OFFENDER NOTICE - TRUE

DEADLY WEAPON FINDING NOTICE - TRUE

ATTACHMENT A, ORDER TO WITHDRAW FUNDS

Date Judgment Entered: 9/11/2019

X _____
JUDGE PRESIDING

CASE NO. 1588183R COUNT NO. TWO
INCIDENT NO./TRN: 9048020131

THE STATE OF TEXAS	§	IN THE 371ST DISTRICT COURT
V.	§	
TERRY WAYNE KING II	§	TARRANT COUNTY, TEXAS
STATE ID NO.: TX05980106	§	

JUDGMENT OF CONVICTION BY JURY

Judge Presiding:	HON. MOLLEE WESTFALL	Date Sentence Imposed:	9/11/2019
Attorney for State:	SHAREN WILSON R DALE SMITH DARREN DELACRUZ	Attorney for Defendant:	TAYLOR FERGUSON STEVE GEBHARDT

Offense for which Defendant Convicted:
ATTEMPTED AGGRAVATED KIDNAPPING

Charging Instrument: Indictment	Statute for Offense: 20.04(a)(1-6) PC
Date of Offense: 4/19/2018	Plea to Offense: NOT GUILTY
Degree of Offense: 2ND DEGREE FELONY	
Verdict of Jury: Guilty	Findings on Deadly Weapon: Yes, not a firearm
1st Enhancement Paragraph: True	Finding on 1st Enhancement Paragraph: True
2nd Enhancement Paragraph: N/A	Finding on 2nd Enhancement Paragraph: N/A
Punishment Assessed by: Jury	Date Sentence Commences: (Date does not apply to confinement served as a condition of community supervision.) 9/11/2019

Punishment and Place of Confinement: LIFE Institutional Division, TDCJ

THIS SENTENCE SHALL RUN CONCURRENTLY.

☐ SENTENCE OF CONFINEMENT SUSPENDED, DEFENDANT PLACED ON COMMUNITY SUPERVISION FOR N/A.
(The document setting forth the conditions of community supervision is incorporated herein by this reference.)

☐ Defendant is required to register as sex offender in accordance with Chapter 62, CCP.

(For sex offender registration purposes only) The age of the victim at the time of the offense was N/A

Fine:	Court Costs:	Restitution:	Restitution Payable to:
N/A	$0.00	N/A	(See special finding or order of restitution which is incorporated herein by this reference.)

Was the victim impact statement returned to the attorney representing the State? N/A

(FOR STATE JAIL FELONY OFFENSES ONLY) Is Defendant presumptively entitled to diligent participation credit in accordance with Article 42A.559, Tex. Code Crim. Proc.? N/A

Total Jail Time Credit: 422 Days

If Defendant is to serve sentence in county jail or is given credit toward fine and costs, enter days credited below.
N/A Days Notes: N/A

This cause was called for trial by jury and the parties appeared. The State appeared by her District Attorney as named above.

Counsel / Waiver of Counsel (select one)
☒ Defendant appeared with counsel.

☐ Defendant appeared without counsel and knowingly, intelligently, and voluntarily waived the right to representation by counsel in writing in open court.
☐ Defendant was tried in absentia.

Both parties announced ready for trial. It appeared to the Court that Defendant was mentally competent to stand trial. A jury was selected, impaneled, and sworn, and Defendant entered a plea to the charged offense. The Court received the plea and entered it of record.

The jury heard the evidence submitted and argument of counsel. The Court charged the jury as to its duty to determine the guilt or innocence of Defendant, and the jury retired to consider the evidence. Upon returning to open court, the jury delivered its verdict in the presence of Defendant and defense counsel, if any.

The Court received the verdict and ORDERED it entered upon the minutes of the Court.

Punishment Assessed by Jury / Court / No election (select one)

☒ **Jury.** Defendant entered a plea and filed a written election to have the jury assess punishment. The jury heard evidence relative to the question of punishment. The Court charged the jury and it retired to consider the question of punishment. After due deliberation, the jury was brought into Court, and, in open court, it returned its verdict as indicated above.
☐ **Court.** Defendant elected to have the Court assess punishment. After hearing evidence relative to the question of punishment, the Court assessed Defendant's punishment as indicated above.
☐ **No Election.** Defendant did not file a written election as to whether the judge or jury should assess punishment. After hearing evidence relative to the question of punishment, the Court assessed Defendant's punishment as indicated above.

In accordance with the jury's verdict, the Court ADJUDGES Defendant GUILTY of the above offense. The Court FINDS that the Presentence Investigation, if so ordered, was done according to the applicable provisions of Subchapter F, Chapter 42A, Tex. Code Crim. Proc..

The Court ORDERS Defendant punished in accordance with the jury's verdict or Court's findings as to the proper punishment as indicated above. After having conducted an inquiry into Defendant's ability to pay, the Court ORDERS Defendant to pay the fine, court costs, and restitution, if any, as indicated above.

Punishment Options (select one)

☒ **Confinement in State Jail or Institutional Division.** The Court ORDERS the authorized agent of the State of Texas or the County Sheriff to take and deliver Defendant to the Director of the Correctional Institutions Division, TDCJ, for placement in confinement in accordance with this judgment. The Court ORDERS Defendant remanded to the custody of the County Sheriff until the Sheriff can obey the directions of this paragraph. Upon release from confinement, the Court ORDERS Defendant to proceed without unnecessary delay to the District Clerk's office, or any other office designated by the Court or the Court's designee, to pay or to make arrangements to pay any fine, court costs, and restitution due.
☐ **County Jail Confinement / Confinement in Lieu of Payment.** The Court ORDERS Defendant committed to the custody of the County Sheriff immediately or on the date the sentence commences. Defendant shall be confined in the county jail for the period indicated above. Upon release from confinement, the Court ORDERS Defendant to proceed without unnecessary delay to the District Clerk's office, or any other office designated by the Court or the Court's designee, to pay or to make arrangements to pay any fine, court costs, and restitution due.
☐ **Fine Only Payment.** The punishment assessed against Defendant is for a FINE ONLY. The Court ORDERS Defendant to proceed immediately to the District Clerk's office, or any other office designated by the Court or the Court's designee, to pay or to make arrangements to pay the fine, court costs, and restitution ordered by the Court in this cause.
☐ **Confinement as a Condition of Community Supervision.** The Court ORDERS Defendant confined N/A Days in N/A as a condition of community supervision. The period of confinement as a condition of community supervision starts when Defendant arrives at the designated facility, absent a special order to the contrary.

Execution / Suspension of Sentence

☒ The Court ORDERS Defendant's sentence EXECUTED. The Court FINDS that Defendant is entitled to the jail time credit indicated above. The attorney for the state, attorney for the defendant, the County Sheriff, and any other person having or who had custody of Defendant shall assist the clerk, or person responsible for completing this judgment, in calculating Defendant's credit for time served. All supporting documentation, if any, concerning Defendant's credit for time served is incorporated herein by this reference.

Furthermore, the following special findings or orders apply:

COUNT TWO AND ONE TO RUN CONCURRENTLY

NOTICE OF APPEAL FILED: 9/11/2019

REPEAT OFFENDER NOTICE - TRUE

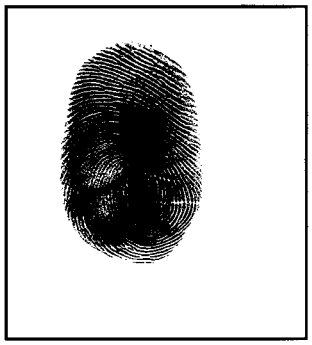
DEADLY WEAPON FINDING NOTICE - TRUE

Date Judgment Entered: 9/11/2019

X _____
JUDGE PRESIDING

CASE NO. 1588183R COUNT ONE AND TWO
INCIDENT NO./TRN: 9048020131

THE STATE OF TEXAS	§	IN THE 371ST DISTRICT COURT
	§	
V.	§	
AKA TERRY WAYNE KING II	§	
TERRY WAYNE KING JR	§	TARRANT COUNTY, TEXAS
	§	
STATE ID NO.: TX05980106	§	Date: SEP 11 2019



Right Thumbprint

X _____

PERSON TAKING PRINT

JUDGMENT AND SENTENCE FINGERPRINT PAGE

Clerk

AF	EV

Cause No. 1588183R

THE STATE OF TEXAS	§	IN THE 371ST DISTRICT COURT
	§	
V.	§	
	§	
TERRY WAYNE KING II	§	TARRANT COUNTY, TEXAS
	§	

ATTACHMENT A
ORDER TO WITHDRAW FUNDS

TO: INMATE TRUST ACCOUNT, TEXAS DEPARTMENT OF CRIMINAL JUSTICE
COPY TO: TERRY WAYNE KING II SID #: TX05980106

GREETINGS:

THE ABOVE named Texas Department of Criminal Justice offender has of this date been assessed court costs, fees and/or fines and/or restitution in the IN THE 371ST DISTRICT COURT **TARRANT** County, Texas, in the above entitled cause in accordance with the sentence imposed as reflected in the judgment to which this Order is attached. The Court finds that the offender is unable to pay the court costs, fees and/or fines and/or restitution on this date and that the funds should be withdrawn from the offender's Inmate Trust Account. Court costs, fees and/or fines and/or restitution have been incurred in the amount of **$319.00.**

THE COURT ORDERS that payment be made out of the offender's Inmate Trust Account as follows:
Pay an initial amount equal to the lesser of:

(1) 15% of the account balance up to and including $100, plus 25% of any portion of the account balance that is between $100.01 and $500 inclusive, plus 50% of any portion of the account balance that is more than $500; or
(2) The total amount of court costs, fees and/or fines and/or restitution that remains unpaid.

After the payment of the initial amount, the offender shall pay an amount equal to the lesser of:

(1) 10% of each deposit in the offender's Inmate Trust Account; or
(2) The total amount of court costs, fees and/or fines and/or restitution that remains unpaid.

Payments are to continue until the total amount of the court costs, fees and/or fines and/or restitution are paid, or the offender is released from confinement.

On receipt of a copy of this Judgment, the department (Inmate Trust Account) shall withdraw money from the trust account of the offender, hold same in a separate account, and shall forward said money to the TARRANT County District Clerk, 401 W BELKNAP, FT.WORTH, TX. 76196 on the earlier of the following dates:

(1) Monthly

(2) The date the total amount to be forwarded equals the total amount which remains unpaid; or

(3) The date the offender is released.

THIS ORDER is entered and incorporated into the Judgment and Sentence of this Court and pursuant to Government Code, Section 501.014, on this **12** day of SEPTEMBER, **2019**.

BILL OF COST

CAUSE NO. 1588183R

THE STATE OF TEXAS	§	IN THE 371ST DISTRICT COURT
	§	
V.	§	
	§	
TERRY WAYNE KING II	§	TARRANT COUNTY, TEXAS
	§	

The total cost assessed in this case for court costs:

COURT COST BREAKDOWN	
Clerk Fees-R	$40.00
DC Recs Tech	$4.00
DC Rec Pre&A-R	$2.50
Security Fees-R	$5.00
Crim. Records	$22.50
Jury Service FD	$4.00
Jury Fees-R	$40.00
PO Arrest Fee	$50.00
PO Commit/Rel	$5.00
Ind DefenseFund	$2.00
Jud Support-CRM	$6.00
E-File Crim	$5.00
CCC-Felony	$133.00
Total Court Cost Breakdown:	$319.00

DISTRICT COURT OF TARRANT COUNTY, TEXAS

I hereby certify that the foregoing is a correct account of the Court Costs adjudged against the Defendant in the above entitled and numbered cause, up to 9/11/2019.

Deputy, Amy Fabila
Thomas A. Wilder, District Clerk
Tarrant County, Texas

APPENDIX 4

REPORTER'S RECORD

VOLUME 6 OF 7 VOLUMES

TRIAL COURT CAUSE NO. 1588183R

COURT OF APPEALS NO. 01-19-00793-CR

THE STATE OF TEXAS	IN THE DISTRICT COURT OF
VS.	TARRANT COUNTY, TEXAS
TERRY WAYNE KING, II	371ST JUDICIAL DISTRICT

==========

TRIAL ON PUNISHMENT CONTINUED

==========

On September 11, 2019, the following proceedings came on to be heard in the above-entitled and numbered cause before the said Honorable Mollee Westfall, Judge of the 371st District Court, held in Fort Worth, Tarrant County, Texas:

Proceedings reported by computerized stenotype machine.

==========

Brenda Clark, Texas CSR #2077
Official Court Reporter
371st District Court
401 West Belknap
Fort Worth, Texas 76196-7118
(817) 884-2895

APPEARANCES:

ATTORNEY(S) FOR THE STATE OF TEXAS:
HON. DALE SMITH
SBOT No. 24037518
AND
HON. DARREN DE LA CRUZ
SBOT No. 24097586
Assistant District Attorneys
401 West Belknap
Fort Worth, Texas 76196-0201
Telephone: (817) 884-1400

ATTORNEY(S) FOR THE DEFENDANT:
HON. TAYLOR FERGUSON
SBOT No. 24053199
Attorney at Law
300 Burnett Street, Suite 130
Fort Worth, Texas 76102
Telephone: (682) 710-3625
AND
HON. STEVE GEBHARDT
SBOT No. 24050649
Attorney at Law
500 Main Street, Suite 640
Fort Worth, Texas 76102
Telephone: (817) 502-3600

ALSO PRESENT:
Mr. Jerome Nkinda, Interpreter

CHRONOLOGICAL INDEX

TRIAL ON PUNISHMENT CONTINUED
VOLUME 6 OF 7 VOLUMES

ALPHABETICAL WITNESS LIST CONTINUED

WITNESSES	DREX	CREX	VDEX	VOL
HENZ, PAT	48			6
HUMPHRIES, WANDA	66	74		6
KING, TERRY WAYNE, II			64	6
NGUYEN, H.	56			6
PERKINS, J.			22	6
			23	6

EXHIBITS LIST

STATE'S EXHIBITS NO.	DESCRIPTION	OFD	ADD	VOL
31	Computer diskette containing recording of interview of Defendant	49	49	6
32	Photograph	61	61	6
33	Photograph	61	61	6
34	Photograph	61	61	6
35	Photograph	61	61	6
36	Photograph	61	61	6
37	Photograph	61	61	6
38	Photograph	61	61	6
39	Photograph	61	61	6
40	Photograph	61	61	6
41	Photograph	61	61	6

* For purposes of the record only.
** Excluded.
\+ For demonstrative purposes only.

STATE'S EXHIBITS CONTINUED

NO.	DESCRIPTION	OFD	ADD	VOL
42	Photograph	61	62	6
43	Photograph	61	62	6
44	Photograph	61	62	6
45	Photograph	61	62	6
46	Photograph	61	62	6
47	Photograph	61	62	6
48	Photograph	61	62	6

DEFENDANT'S EXHIBITS

NO.	DESCRIPTION	OFD	ADD	VOL
7	Affidavit for Search Warrant, Search Warrant, and Return and Inventory	9	9	6
8	Photograph	73	74	6

* For purposes of the record only.
** Excluded.
\+ For demonstrative purposes only.

PROCEEDINGS

(The following proceedings commenced at 1:02 p.m., Wednesday, September 11, 2019:)

(OPEN COURT, DEFENDANT PRESENT, JURY NOT PRESENT:)

THE COURT: Let's go on the record.

I understand there's a suppression issue.

MR. FERGUSON: Yes, Your Honor. In reference to a cell phone that was seized out of the truck that was driven by Mr. King up in Oklahoma.

Judge, for purposes of that, I guess there's a couple of ways -- I can call a witness. You know, I know that the State, I guess, is saying that we don't have standing to challenge it. I believe the evidence from the trial shows that we do. It shows that Terry was a truck driver, that he was arrested in that truck, and that the phone they're talking about was found in that truck.

I don't -- I believe that someone has the right -- an expectation of privacy in their own phone, which is also heightened due to, you know, the most recent case. I think it's *Carpenter versus United States*. So I believe standing has already been established in this case, Your Honor.

THE COURT: Well, there's two different

searches. There's a -- there's a seizure of the phone, and there's a search of the phone, right?

MR. FERGUSON: Correct. And I'm challenging the seizure of the phone, Judge.

THE COURT: Okay. Because the search of the phone, as I understand it, was pursuant to a warrant.

MR. FERGUSON: Correct, Judge.

THE COURT: So you're not challenging -- somebody has an expectation of privacy of the phone, but that's not the part you're challenging.

MR. FERGUSON: Correct, Judge. I am challenging the seizure of the phone in Oklahoma.

THE COURT: Okay.

MR. FERGUSON: The search was done subsequent to a warrant in -- out of Tarrant County, and I'm not challenging that point. Just the seizure of the phone itself.

THE COURT: Are there any disputed facts about the seizure?

MR. FERGUSON: There are some facts that need to be presented in evidence which we can do via testimony or stipulate to, which I --

THE COURT: Stipulation is always more efficient, but it's up to you how you want to present

it.

MR. FERGUSON: Well, Judge, for that purpose, I would like to introduce for purposes of this hearing only what I marked as Defense Exhibit No. 7, which is just a copy of the affidavit and -- the affidavit, warrant, and return of the truck that was written in -- what county was he found in -- Oklahoma County, Judge.

MR. SMITH: No objection.

THE COURT: Defense 7 is admitted.

MR. FERGUSON: And just out of this -- what I --

THE COURT: For the hearing.

MR. FERGUSON: Yes, just for the hearing, Judge.

And what I'm wanting to point out is just the date that it was actually written was July 17th, 2018, and that the return date was July 24th of 2018, and that I believe the cell phone in question was not listed on the return because it was --

THE COURT: So your objection is that the cell phone was not seized?

MR. FERGUSON: It was not seized at that time.

THE COURT: Okay.

MR. FERGUSON: And then I -- there -- the evidence that's established -- I mean, I can just call Detective Henz to the stand, and we can cover it all or --

MR. SMITH: If I may, Your Honor, and see if the defense is willing to stipulate this as fact for purposes of this hearing.

The Defendant, Terry King, II -- Terry Wayne King, II, was arrested in Oklahoma County on July 17th of 2018. He was arrested after -- arrested near and after driving the tractor trailer in question, the one that is referenced into the search warrant that's the defense's exhibit.

There was a search of that tractor trailer. As a result of that search, what was thought to be the Defendant's cell phone was found and was photographed. However, inadvertently, it was left in the truck and not seized by the joint search of the Oklahoma City Police Department and the Fort Worth special crime -- or major case unit.

Detective Henz, upon getting the inventory from that search back here in Fort Worth, at some point realized that that phone was not in property and, in talking to other officers, figured out it was inadvertently left in the truck.

The Defendant is an employee who drives this tractor trailer which is owned by one John Feltman. John Feltman was contacted by Detective Henz. Yes, Your Honor, Detective Henz called John Feltman, the owner of the truck, and said, "Would you look in the truck to see if the phone is present."

And that's what Detective Henz would testify to if he was here. I asked him about it last night and turned that information over to Mr. Ferguson this morning.

Mr. Feltman looked in the truck and found the phone. At that time, Detective Henz offered that if Mr. Feltman would FedEx the phone to him in Fort Worth, Texas, Mr. Henz -- Detective Henz would repay John Feltman for the price of shipping. And then Mr. Feltman did ship the phone via FedEx where Detective Henz then gained possession of the actual cell phone, which matched the photograph taken during the search on July 17th, 2018, where he subsequently then got a warrant to search the phone, which defense has said they're not contesting.

And, Defense Counsel, would you agree to stipulate that?

MR. FERGUSON: Yes, Judge.

And I might not have heard. Did you

state the date that the phone was received by Detective Henz?

MR. SMITH: Yes.

MR. FERGUSON: August the 9th?

MR. SMITH: August 9th, 2018. And --

MR. FERGUSON: Yes, Judge, that's -- I'm agree -- I'm willing to stipulate to those facts, that that's what happened.

THE COURT: Is there anything further as far as facts that need to be established?

MR. FERGUSON: The only fact -- and I don't -- and I'm not sure anybody knows the answer to this -- is when Mr. Feltman found the actual phone.

MR. SMITH: And I do not, Your Honor. Mr. Feltman lives in Chicago now, and he was scheduled to fly in last night, but, however, due to child care issues, he was unable to fly in last night and would not be able to fly in until tonight, making him not available until tomorrow. We informed the Court of that, but right now he is not available to testify. So I can't make any of those -- I can't make any assertions to the Court on that.

THE COURT: What was the date that he -- that Detective Henz contacted him?

MR. SMITH: I don't have the exact date,

and Detective Henz didn't make a special note of it in his case file. But Detective Henz did tell me last night on the phone and reaffirmed this morning that he is the one that reached out to Mr. Feltman.

MR. FERGUSON: So no additional facts, Judge, just some statutes and case law I'd like to present to the Court.

THE COURT: Okay. Go ahead.

MR. SMITH: And, Your Honor, at this time, we do not believe that the defense has established standing as of yet.

The defense is -- I don't believe there's been any evidence of -- that was presented in trial yet of that truck or -- we have stipulated to some today, but we're still at the point where the Defendant is driving a truck owned by another person. Don't believe that standing has been established.

MR. FERGUSON: And I would just disagree, Judge. It's not that -- he has established he's a truck driver. And then whether he's employed by someone else to drive a particular truck, if he's the one driving that truck, he's got a right to the -- to the items contained with that truck at that moment.

And we're not talking about the truck as a whole; we're talking specifically about his phone

which was located in there. And obviously, you know, his personal property was in the truck. He would have standing on all of it, but it's especially heightened when it comes to a phone.

THE COURT: It's not heightened when it comes to a phone unless you're cracking the phone. The phone is just an item until you search it. So that is a separate issue.

MR. FERGUSON: But I would -- I would argue that standing has been established, that if he's arrested in that truck and his phone is located with him at the time he's arrested, that that's standing to me.

THE COURT: Well, here's my question for you, because I think that, in general, yes, that would be standing, because if he was arrested -- a person is arrested in their own car and then they're taken away, they still have a right to -- to a reasonable expectation of privacy within the contents of the car. It's lessened because the car is mobile and so forth.

However, if someone is arrested in their work car, then the work car doesn't sit there waiting for him to come back or a family member waiting to claim it. It goes to someone else, a third party, who actually has a greater right to that car, the employer who is the owner of the car. And then, at that point,

how protected are their effects that are left in the car from the owner?

MR. FERGUSON: Well, Judge, and I -- I think that would then go to the concept of abandonment of property, which if somebody is voluntarily abandoning something. But I would argue that if he's arrested at the time, he can't voluntarily abandon anything. And at the time, the police obviously felt it necessary to issue a warrant to search that truck, and which they did, and then seized whatever they seized, and then relinquished it.

THE COURT: But not to him. They didn't go to his house and grab a phone out of it.

MR. FERGUSON: Right. I think, Judge, it would be no different than a rental car. If you borrowed someone's car, you have a right -- an expectation of privacy at that point. Whether you're getting it back or not, I think at that point you have that right.

THE COURT: But when the rental car company gets it back, you -- where does your expectation of privacy end? I mean, you know it's going back to a third party who can do whatever they want. They can take your phone and throw it away or give it to the police or -- I don't think they could necessarily sell

it. They can't convert it, but they can do everything short of that.

MR. FERGUSON: Yes. Yes, Judge. And I think once you relinquish -- once you voluntarily relinquish that car back to the rental company, if you've left something in there, you've relinquished that, as well.

But if you were arrested while driving that rental car, you're not voluntarily relinquishing it back to the person it belongs to because you're getting arrested. And if any property is in that car that's your property, you don't have an opportunity to take it with you or release it to somebody else, especially in this scenario where the police are searching and seizing whatever they find.

THE COURT: Well, did you not, though? I mean --

MR. FERGUSON: In some --

THE COURT: Okay. Hold on. If -- if this were a female who got arrested and her purse was in the car, but not on her person, she got pulled out, she doesn't have to the ability to say, "I need my purse. Grab it out of there. I need my effects."

MR. FERGUSON: And in some circumstances, yes, Judge, if the police didn't want to seize it as

evidence. That happens all the time.

But in this particular instance, it's very clear the police wanted to seize this phone. Had Terry asked for his phone, I feel -- be very confident they would not have given it to him, and they just inadvertently left it behind.

THE COURT: And so does he -- my --

MR. FERGUSON: Well, he doesn't know at that point. He's been arrested.

THE COURT: He doesn't know that he doesn't have his phone?

MR. FERGUSON: Well, I mean, he doesn't know what's being left in that truck or not. He's being put in handcuffs and taken away.

MR. GEBHARDT: Judge, the --

THE COURT: Yes. Go ahead.

MR. GEBHARDT: The hypothetical you gave, the female with the purse who's not the driver --

THE COURT: No. It doesn't have anything to do with whether she's the driver or not.

MR. GEBHARDT: Okay.

THE COURT: I'm talking about someone's personal effects. When you're arrested and you don't want to leave them to chance, you ask the police -- I mean, no one would ever say, "Let's just leave something

of value in the car and hope for the best."

So you leave something in a car and you've been arrested and the car belongs to someone else, you know it's going to go out of your possession to another person, like a rent car. What is your expectation at that point?

MR. GEBHARDT: I think standing is evaluated right there at the time of the stop. Right there at the time --

THE COURT: That's not when the seizure happened, though.

MR. GEBHARDT: It kind of did because he wasn't there. There's been --

THE COURT: They didn't seize it.

MR. GEBHARDT: He was taken away.

THE COURT: There was no -- there was no State action at that point to seize the property.

MR. FERGUSON: Judge, I'd argue that they did seize it and they just accidentally left it behind.

THE COURT: If it ends up with the employer, how did they seize it?

MR. FERGUSON: I think by -- there was a mistake on their part. I think that was the whole --

THE COURT: You can't mistakenly seize something and then mistakenly un-seize it without any

consciousness. I mean, there has to be a decision-making. "We're going to grab this."

Leaving it mistakenly behind and letting it go to a third party is the opposite of seizure because they don't have anything. How can you seize something that you don't have?

MR. FERGUSON: And I -- Judge, I do think that there will be a potential witness that can shed some light on that.

THE COURT: On how to seize something that you don't have?

MR. FERGUSON: No, that they discovered it and seized it.

THE COURT: Well, and I -- that's been stipulated, that they looked at it and they took a picture of it. They actually didn't take it with them to the PD and log it into evidence and have it.

MR. FERGUSON: Well, I --

THE COURT: "Oh, look, here's a phone."

MR. FERGUSON: Judge, and I believe that witness is here that I can call that says -- listed in his report, "The following items discovered and seized: cell phone mounted to front windshield. I gave it -- it was collected by Detective Klika, given to an investigator at the scene, and subsequently misplaced."

THE COURT: Well, you just stipulated to something different.

MR. FERGUSON: Well, I think that what they had said before was that the phone was inadvertently left.

THE COURT: Right. But what you just said is factually not true. Somebody thought that that's what happened, and they assumed that's what happened, but if that, in fact, did happen, then the employer would not have a phone to FedEx to the PD because the police department would have had the phone.

MR. FERGUSON: Right. And I guess --

THE COURT: So it doesn't matter what somebody says that's mistaken. What I'm trying to get at are the actual facts. So the fact that someone put it in their police report and they even thought that that's what happened -- "Oh, look, a phone." Take a picture of the phone. "You got the phone, right?" And then whoever said they had the phone or thought they had the phone didn't actually get it, then that's not a seizure because it didn't happen.

Just because it's written in a police report doesn't make it true, believe it or not.

MR. FERGUSON: Well, I understand, Judge, and I -- yes. It was my understanding that they thought

they had seized it and it got misplaced.

THE COURT: They actually -- how could it be misplaced if they never took it out of the car? I mean, how could it be in the car if they ever took -- are you saying that they -- somebody's going to testify, "We took it out of the car at the scene, but then we put it back in the car"?

MR. FERGUSON: Well, I'm not exactly sure from his report. I mean, we can call him as a witness real quick to ask the question.

THE COURT: Who is "he"?

MR. FERGUSON: Detective Perkins.

THE COURT: Okay. Let's have Detective Perkins.

Did everyone get a copy of the charge, the revised charge with the new parole instruction?

MR. FERGUSON: Defense did, Your Honor.

MR. SMITH: State did, Your Honor.

THE COURT: It's just good conduct time is not defined any longer under the law that's applicable as of September 1st.

(Witness sworn.)

THE COURT: Have a seat, sir.

MR. FERGUSON: May I proceed, Your Honor?

THE COURT: Yes, you may.

J. PERKINS,

having been first duly sworn, testified as follows:

VOIR DIRE EXAMINATION

BY MR. FERGUSON:

Q. Detective Perkins, my name is Taylor Ferguson. We've never met before, right?

A. Correct.

Q. Okay. What we're -- what I want to ask you about is the search of Mr. King's truck from July 17th of 2018. Did you assist in that search?

A. Yes.

Q. Okay. And you were the one that actually wrote the warrant for that search?

A. That is correct.

Q. In that, did you help -- you helped conduct the search, as well?

A. Correct.

Q. Did you locate a cell phone with a shattered screen that was mounted to the front windshield?

A. Yes.

Q. Did you actually collect it?

A. That, I don't recall.

Q. So -- because, in your report, it says that it was collected by Klika and then given to investigator and then subsequently misplaced. But you don't know

whether it was ever removed from the truck or not?

A. From the best of my knowledge, I believe it was removed from the truck.

Q. Okay. And then we don't know where it went from there -- or you don't know where it went from there?

A. Correct.

VOIR DIRE EXAMINATION

BY THE COURT:

Q. Did you collect it?

A. No, Your Honor.

Q. Did you see somebody else collect it?

A. I don't recall.

Q. Do you know for a fact whether it was collected or not, first from personal knowledge and from your recollection?

A. No, Your Honor.

Q. If it had been collected, how would it have gotten back into the truck? If you guys collected it, would you still have it?

A. Yes.

Q. Do you have it?

A. No, I don't have the phone.

Q. Did you ever have it in your evidence room?

A. No. Everything was collected and turned over

to the Fort Worth detective.

Q. And so this particular piece of evidence, the cell phone, was it taken to your police department evidence room?

A. No.

Q. And so the fact that you said that you think that it was collected and turned in, there's no record of that actually happening, the physical cell phone being accounted for, bagged, and logged?

A. Correct.

MR. FERGUSON: No additional questions from me, Your Honor.

MR. SMITH: I have no questions, Your Honor.

THE COURT: You may step down, sir.

(Witness excused from the courtroom.)

MR. FERGUSON: And then, Judge, I would just argue that even if it never made it to their department, that at least for some moment out there, the Oklahoma City PD seized that phone.

THE COURT: Well, it got un-seized, clearly, and then got seized by an employer. And everybody agrees that it came through this employer and not through the PD.

MR. FERGUSON: Yes, Judge.

THE COURT: And so what -- from either -- let's just say, even though there's no evidence other than a police report that nobody has any personal knowledge of, there's no evidence to support the idea that the police department ever actually exercised any control over this phone other than taking a picture of it. Let's say that they did and they took it back to their police department and then, somehow, by means unknown, the cell phone got from their evidence room, without any -- touching any logs or anything, no record was made, back to the truck. So what is the harm that flows from your client from that seizure? From it being put back exactly where it was before when your client had custody of it?

MR. FERGUSON: Well, I think it -- the harm goes into then whether a private citizen can then collect at the request of the -- of law enforcement, collect and return it. You know, I did find some cases to support the concept of -- that a private citizen can't do something that a police officer couldn't otherwise do.

THE COURT: Well, the police officer could do it under the search warrant; they just failed to do it.

MR. FERGUSON: And my argument would be,

Judge, then -- because pursuant to Oklahoma law, search -- and I have the statute. Search warrants become void ten days after they've been issued, executed, and returned. They become void ten days after that.

And so, by whichever date you look at it, the return date of the 24th of July or the 17th day, either way, if the phone isn't returned to Mr. Henz by August the 9th, I believe that ten days has expired. It says -- it isn't --

THE COURT: What does the statute say?

MR. FERGUSON: Yes. "A search warrant must be executed and returned" --

THE COURT: Executed.

MR. FERGUSON: -- "executed and returned to the magistrate by whom it is issued within ten days. After the expiration of these times respectively, the warrant, unless executed, is void."

And then the -- "Provided, if the search warrant authorizes a forensic" -- oh, okay -- "the search shall be commenced within a reasonable time, return shall be made within ten days following the completion of said search."

But that's to go inside the item. It's my -- I would think they would have to write another

warrant to go search again.

THE COURT: Okay. So what was the date that Detective Henz -- we don't have a date.

MR. SMITH: He didn't -- he did not make a note of when he reached out to Dr. Feltman -- I mean Mr. Feltman. Although, the only date -- hard date we have is when he received the phone on August 9th.

THE COURT: And what says the State regarding having a -- directing a private citizen to seize a piece of evidence and send it outside that time frame?

Let's just -- because we have -- okay. We have ten days. 31st. Ten days to execute this warrant, probably excluding the day of filing. I don't know how they calculate time in Oklahoma. Oh, wait. It was issued on the 17th.

MR. SMITH: Yes.

THE COURT: So that gives till July 29th, potentially, under Oklahoma law, for the search warrant to still be executable.

MR. SMITH: Yes, Your Honor.

THE COURT: I'm not worried about the return date because the statute doesn't say "return." It says "executed."

MR. SMITH: Right, Your Honor.

THE COURT: Which I understand there's a certain staleness factor at that point.

MR. SMITH: And we don't have a hard date to answer that question, Your Honor.

At this point, it's still a question, I believe, of a reasonable expectation of privacy. I don't believe the Defendant has any in that work truck if --

THE COURT: Do you have any case law on that?

MR. SMITH: Not specifically on point, Your Honor, but just what the idea of reasonable expectation of privacy is for a citizen.

In a work truck like this, arrested or not, the owner of that truck could have taken all his belongings and thrown them away and wouldn't be charged with a criminal offense because they're in his automobile or his tractor trailer. Anything that's left in there is his at the end of a shift or anything like that.

There's no reasonable -- I understand a reasonable expectation of privacy when he's driving the truck on the highway, but once he's done with the truck, days later, which it's either after the -- if we want to make the argument that the warrant is stale, I mean,

that's a long time later. He still has a reasonable expectation of privacy at that time?

THE COURT: That's a good question. Is a cloak -- is the truck cloaked forevermore with Mr. King's expectation of privacy? Does it end at some point? If he's in custody far, far away, he continues to have a reasonable expectation that somebody else's truck is private as to him?

MR. FERGUSON: And, Judge, I would just argue that if he's arrested in that truck and there's items of his that were left behind --

THE COURT: Answer my question. He is, in fact, arrested in the truck. There's no question. So does his privacy end at some point? Does his employer just have to leave that cell phone in there rattling around until Mr. King comes for it, or do you think that what -- you know, what expectation of privacy does he have? And when does that end?

MR. FERGUSON: May I just have a second?

MR. GEBHARDT: I mean, common sense would dictate, of course, the expectation of privacy would end at some point in time. But, again, I believe standing is evaluated right then and there at the time of the stop.

THE COURT: But the seizure didn't happen

at that time. So we have to evaluate standing at the time of the seizure, not -- we can't just do it piecemeal.

MR. FERGUSON: And, Judge, I think -- I think it goes hand-in-hand in the instant -- in the concept of had he voluntarily left that phone in that truck and been arrested somewhere else.

THE COURT: All right. But, still, at some point, whether he left the truck accidentally, voluntarily, he left his phone in there, he did it on purpose, he did it without knowledge, somebody forced it from his hands and made him leave it there, or however it happened, at a certain point, there's a truck and a car that doesn't belong to him in somebody else's possession, and how does he have some kind of expectation that things -- his -- his items that don't belong in there shouldn't be seized and can't be seized by someone?

MR. FERGUSON: And I guess that at some point, yes, that expectation of privacy would dissuade. I don't -- I don't have an answer as to when that actually would be.

THE COURT: Well, and I think that it -- it had ended by the time that this seizure happened. So I'm going to deny your motion to suppress.