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5/15/2024 **COA Case No. 05-22-00294-CR**
JOHNSON, PATRICK DOUGLAS **Tr. Ct. No. F18-76856-J** **PD-0268-24**

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

Deana Williamson, Clerk

CHRISTINA DEAN
ASSISTANT PUBLIC DEFENDER
CAPITAL MURDER DIVISION
133 N RIVERFRONT BLVD LB-2
DALLAS, TX 75207-4361
* DELIVERED VIA E-MAIL *

APPENDIX A.

AFFIRMED and Opinion Filed March 11, 2024

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-22-00294-CR

PATRICK DOUGLAS JOHNSON, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 3
Dallas County, Texas
Trial Court Cause No. F18-76856-J

MEMORANDUM OPINION

Before Justices Pedersen, III, Garcia, and Kennedy
Opinion by Justice Pedersen, III

A jury found appellant guilty of capital murder, and the trial court assessed punishment at life imprisonment without possibility of parole. Appellant brings nine issues on appeal, complaining the evidence is legally insufficient to support the jury's verdict, the trial court erroneously admitted evidence, and the statute providing for appellant's automatic sentence of life imprisonment without possibility of parole is unconstitutional. We affirm the trial court's judgment.

BACKGROUND

Robbi Hodge and her adult son Michale Hodge were shot and killed in Robbi's Dallas home. A grand jury indicted appellant for capital murder, involving multiple persons. *See* TEX. PENAL CODE ANN. § 19.03(a)(7)(A). It recited appellant unlawfully, intentionally, and knowingly caused the death of Robbi Hodge by shooting her with a firearm, a deadly weapon, and during the same criminal transaction intentionally and knowingly caused the death of Michale Hodge by shooting him with a firearm, a deadly weapon.

At appellant's trial, Robbi's daughter, Mikesha Hodge, testified appellant resided in Robbi's home with Michale and Robbi. Michale had dropped out of high school, was unemployed, was on probation, and occasionally lived with Robbi. Robbi gave Michale money, bought him a vehicle, and let him live in her home without paying rent. Mikesha testified appellant and Michale had been in fights. She testified, "My brother was trying to protect [Robbi], and [appellant] wanted my brother not there." She thought Robbi was "in between" appellant and Michale. In October 2018, Mikesha learned appellant had tried to evict Michale from Robbi's home. She testified that due to the unsuccessful eviction, Robbi told appellant to move out of her home. Appellant was to move out in November 2018, but failed to do so.

Dallas Police Detective Frank Serra testified about text messages between appellant and Robbi. The messages were extracted from Robbi's telephone. In the

messages, appellant complained of Michale's living in Robbi's home without paying rent and that Robbi favored Michale over him. On December 18, 2018—the day before Robbi and Michale were shot—Robbi texted to appellant, "You got three days to leave." On the day of the shootings, appellant texted, "Your son in your relationship with me, and I don't like it." Additionally, Detective Serra was aware appellant sent Robbi a message stating she "[got] high" with Michale.

Janean Ellis, Robbi's friend, testified appellant was at her home on December 19 to make repairs to her house. Robbi also was present. Eventually, appellant yelled and screamed at Robbi "from the street all the way to the porch" and "the F-word was used every moment." Ellis asked Robbi what was wrong, and she replied, "Michale." Ellis "definitely" knew Michale was a source of contention between appellant and Robbi. Appellant and Robbi left Ellis's home at 7:30 p.m. in Robbi's vehicle.

Robbi's next-door neighbor, David James, testified that later that evening he was outside his home and heard gunshots between 7:45 and 9 p.m. He walked toward Robbi's driveway and saw her garage door open about thirty-five to forty seconds after hearing the gunfire. The garage light was on. He saw appellant standing or coming out of the garage. He did not see anyone other than appellant. He saw appellant get into Robbi's Dodge Nitro and drive away, flying through a stop sign. He did not see appellant return later that night. He did not hear gunshots from

Robbi's home or in the neighborhood later that evening or in the early morning hours of December 20.

Moreover, James testified about his familiarity with appellant. Additionally, James heard "through the neighborhood" that appellant's biggest complaint was Michale. And Michale had told him about appellant's problems with Michale.

Charlie Ribron, another of Robbi's neighbors, testified he heard gunshots at about 7:15 p.m. to 8:15 p.m. on December 19 and at 3:30 a.m. on December 20. He had no idea where the shots came from. He did not call 911 because he commonly hears gunshots throughout the neighborhood.

Millie Madison, another neighbor, testified she heard gunshots between 7 p.m. to 8 p.m. on December 19 and more at about 3 a.m. on December 20. At 3 a.m., she saw a "flash of light" from a window in Robbi's house, "I guess—I found out later that's [Robbi's] bathroom." She did not call 911 because she was drowsy and went back to sleep. Moreover, she testified she saw appellant speaking with a City of Dallas worker on the morning of December 20. She identified him, "Because of the body size and shape."

Adam Richard testified he was employed by the City of Dallas. He testified that on December 20, he discovered Robbi's Dodge Nitro hidden in a secluded area. It was locked and appeared to be undamaged. It was found within walking distance of where police arrested appellant. Richard informed Robbi's next-door neighbor about finding the vehicle.

James testified he spoke with a City of Dallas worker who found Robbi's vehicle. James called Robbi's telephone number, but no one answered.

Soon after noon on December 20, police arrived at Robbi's home in response to a 911 report by Robbi's employer to check her welfare. James told police Robbi "had been having some I guess disturbances with the guy that she was staying with." Police entered Robbi's home. They found two dead bodies in a hallway. Nothing in the home otherwise seemed out of the ordinary.

Dallas Police Officer Steven Papas testified it appeared Robbi and Michale died of gunshot wounds. He did not see signs of forced entry or other criminal activity. Detective Serra testified police found Robbi's telephone and one of Michale's two telephones at Robbi's home.

Dallas Police Officer Jordan Bratcher testified she collected and recorded evidence at Robbi's home. The deadbolt on the front door was locked from inside. A bloody shoe print was directed at the kitchen and garage. She identified fifteen 9mm fired cartridge casings at the scene. An empty ammunition magazine found at the scene could hold fifteen 9mm rounds. Police found a 9mm handgun in a bathroom near the bodies. Police found Robbi lying face down in a hallway. She was wearing a T-shirt, pants, socks, a watch, rings, earrings, a necklace, and eyeglasses; and was holding a remote control. Robbi's right arm was on top of Michale's feet.

April Kendrick, firearm section supervisor at Southwest Institute of Forensic Sciences (SWIFS), testified the cartridge shells were fired by the 9mm handgun. She

could not determine with certainty whether bullets recovered from the bodies were fired from that handgun. There could have been another firearm in addition to the 9mm handgun, but she did not know whether that was the case.

Jagbir Khangura, who completed his medical fellowship at SWIFS, testified Robbi was shot seven times and died due to gunshot wounds. Medical Examiner Stephen Lenfest testified Michale was shot five times, causing his death. Michale's toxicology examination indicated he had used marijuana a day or two before he died.

Audrey Basse, a forensic biologist at SWIFS, testified the bottom of appellant's right shoe and his left shoe tested presumptively positive for blood. So did the accelerator pedal and a floor mat of Robbi's vehicle.

Courtney Ferreira, a forensic biologist at SWIFS, testified that Robbi Hodge was a potential contributor of DNA found on a presumptive bloodstain taken from the bottom of appellant's right shoe. DNA from a presumptive bloodstain on the heel and back of appellant's right shoe also included Robbi as a potential DNA contributor. Robbi and Michale were potential contributors of DNA detected in blood on a floor mat taken from Robbi's car. Appellant and Michale were potential contributors for DNA on the grip and slide of the 9mm handgun.

Waleska Castro, trace-evidence supervisor at SWIFS, testified gunshot residue was found on a swab taken from the steering wheel of Robbi's vehicle. If a person fired a firearm and then touched an item, then that person could transfer particles from their hands to that item.

Mike Fegely, a cell phone analyst, testified that appellant's telephone was last used at 6:22 p.m. on December 19 and that one of Michale's telephones was last used at 7:57 p.m. on December 19.

Edward Hueske, forensic psychologist, testified, "Gunshot residue does not require someone to be present when a shot is fired, simply to go through the area in a reasonable time and touch things, and then the transfer occurs that way." He testified the evidence presented at appellant's trial would be consistent with appellant's walking through the crime scene at Robbi's home and touching Robbi's body.

Lenfest, the medical examiner, testified he performed the autopsy of Michale's body. His performed the autopsy at 8 a.m. on December 21. He testified Michale's body was in "full rigor" when he received it. However, determining an exact time of death is not possible. He testified full rigor mortis is expected to occur within eight to twelve hours of death and to remain for another eight to twelve hours. However, it can occur much faster or it can take longer, depending on many factors, including circumstances surrounding a death, ambient temperature, the temperature of the body, toxicology, and other factors. Former SWIFS fellow Khangura testified bodies are taken to the medical examiner's office and put into a refrigeration system until an autopsy is performed, which potentially slows rigor mortis.

Detective Serra testified he believed Robbi and Michale were killed during the same criminal transaction on the evening of December 19. He did not believe

Robbi and Michale were shot at 3:00 a.m. on December 20 because Robbi was wearing daytime attire and jewelry when her body was found, as Officer Bratcher had testified. Moreover, Robbi's telephone indicated its last activity was on December 19 at 5:49 p.m., a conversation with Ellis. There was no other activity on Robbi's telephone that evening. The next activity on Robbi's telephone was a payment from Ellis at 6:07 a.m. on December 20. He acknowledged appellant was Robbi's usual "number one contact" but that Robbi's phone did not receive a call from appellant's telephone after Robbi spoke with Ellis at 5:49 p.m. on December 19. The last communication on Robbi's telephone between Robbi and appellant was at 4:30 p.m. on December 19. Detective Serra testified it did not make sense that the shootings occurred at 3:00 a.m. on December 20, "Because we know that there's no communication with the phones."

Forensic psychologist and neuropsychologist John Fabian testified appellant suffers from major depressive disorder with psychotic features, a potential to schizophrenia and borderline intellectual functioning, a previous head injury, language deficits, and PTSD. Appellant had difficulty with decision making and problem solving in stressful situations. A person with appellant's conditions would not react "the same as normal people do when something bad happens[.]"

The jury found appellant guilty of capital murder. The trial court sentenced him to life imprisonment without possibility of parole. Appellant filed a notice of appeal. This appeal followed.

SUFFICIENCY OF THE EVIDENCE

Appellant states his first two issues as follows:

> *First issue:* The evidence was legally insufficient to support the verdict; the State failed to prove that Appellant intentionally or knowingly caused the deaths of more than one person.
>
> *Second issue:* The evidence was legally insufficient to support the verdict; the State failed to prove that Appellant caused the deaths of more than one person in the same criminal transaction.

We address appellant's first two issues together.

Standard of Review

When conducting a legal sufficiency analysis, the court of appeals views all of the evidence in the light most favorable to the verdict and determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Rollerson v. State*, 227 S.W.3d 718, 724 (Tex. Crim. App. 2007). It measures the sufficiency of the evidence by the elements of the offense as defined in a hypothetically correct jury charge. *See Cada v. State*, 334 S.W.3d 766, 773 (Tex. Crim. App. 2011). Such a charge is one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. *See Byrd v. State*, 336 S.W.3d 242, 246 (Tex. Crim. App. 2011).

Direct and circumstantial evidence are treated equally in a sufficiency review. *See Sorrells v. State*, 343 S.W.3d 152, 155 (Tex. Crim. App. 2011). "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." *Hammack v. State*, 622 S.W.3d 910, 914-15 (Tex. Crim. App. 2021). The reviewing court must defer to the jury's credibility and weight determinations because the jury is the "sole judge of the witnesses' credibility and the weight to be given their testimony." *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010) (emphasis added). The standard of review tasks the factfinder with resolving conflicts in the testimony, weighing the evidence, and drawing reasonable inferences from basic facts. *See Jackson*, 443 U.S. 319; *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015). On appeal, reviewing courts determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict. *See Murray*, 457 S.W.3d at 448. Thus, appellate courts are not permitted to use a "divide and conquer" strategy for evaluating sufficiency of the evidence because that approach does not consider the cumulative force of all the evidence. *See id.* When the record supports conflicting inferences, we presume that the factfinder resolved the conflicts in favor of the verdict, and we defer to that determination. *See id.* at 448-49.

Applicable Law

Section 19.02(b)(1) of the Texas Penal Code provides that a person commits murder if the person intentionally or knowingly causes the death of an individual. *See* PENAL § 19.02(b)(1). Section 19.03(a)(7)(A) of the code provides that a person commits capital murder if the person commits murder as defined under section 19.02(b)(1) and the person murders more than one person during the same criminal transaction. *See id.* § 19.03(a)(7)(A). The Texas Court of Criminal Appeals defines "same criminal transaction" as "a continuous and uninterrupted chain of conduct occurring over a very short period of time . . . in a rapid sequence of unbroken events." *Williams v. State*, 301 S.W.3d 675, 684 (Tex. Crim. App. 2009) (quoting *Jackson v. State*, 17 S.W.3d 664, 669 (Tex. Crim. App. 2000)). When reviewing the sufficiency of the evidence to show the "same criminal transaction," a reviewing court looks to see whether "the jury could rationally conclude appellant engaged in a continuous and uninterrupted process, over a short period of time, of carrying on or carrying out murder of more than one person." *Jackson*, 17 S.W.3d at 669.

Analysis

Appellant argues the State failed to meet its burden to prove he intentionally or knowingly killed Robbi and Michale or that they were murdered during the same criminal transaction. He argues the evidence reasonably supports a factual theory that someone else shot Robbi and Michale. Appellant asserts that (1) no witness "definitively" testified the shots heard at 8 p.m. on December 19 emanated from

Robbi's home; (2) James did not clearly see the person leaving Robbi's garage seconds after James heard gunfire; (3) neighbors heard shots at 3 a.m. on December 20; (4) a neighbor saw a flash of light from Robbi's home at 3 a.m. on December 20; (5) he could not have fired shots at 3 a.m. on the twentieth, according to the State's timeline of the shootings; (6) a neighbor saw appellant speaking to a City of Dallas worker on December 20; (7) Michale had a criminal history and used controlled substances; (8) police recovered one of Michale's two telephones; (9) a firearm other than the 9mm handgun, although not found, might have been present at Robbi's home at the time of the shootings; (10) Michale's rigor mortis was more consistent with his having died at 3 a.m. on December 20 than at 8 p.m. on December 19; and (11) he suffered mental illness and low intellectual functioning.

However, appellant's argument relies on testimony and evidence that conflict with evidence that sufficiently supports the jury's verdict and on witness testimony the jury assessed for credibility. *See Brooks*, 323 S.W.3d at 899 (the jury is the sole judge of the witnesses' credibility and the weight to be given their testimony); *see also Murray*, 457 S.W.3d at 448 (the factfinder resolves conflicts in the testimony, weighs the evidence, and draws reasonable inferences from basic facts). Moreover, appellant's argument from selected evidence is an impermissible "divide and conquer" argument. *See Murray*, 457 S.W.3d at 448 (reviewing courts are not permitted to use a "divide and conquer" strategy for evaluating sufficiency of the evidence, which fails to consider the cumulative force of all the evidence).

Rather, the jury below heard evidence that appellant murdered Robbi and Michale. It heard of appellant's increasing frustration with Robbi and Michale and of the escalating conflict among them. *See Frazier v. State*, No. 07-20-00006-CR, 2020 WL 7549946, at *1 (Tex. App.—Amarillo Dec. 21, 2020, pet. ref'd) (per curiam) (mem. op., not designated for publication) (evidence of an "acrimonious relationship" between defendant and murder victim depicted hostility or ill will and was relevant circumstantial evidence of defendant's motive to later kill her father). The jury heard that the conflict loudly intensified at Ellis's home early in the evening of December 19, soon before the murders. Moreover, it heard testimony concerning the fact and time of the murders from a witness who heard gunshots from Robbi's home at about 7:45 p.m. and 9 p.m. on December 19—but not later on December 20—and of two other witness who heard gunfire at that time. Additionally, eyewitness testimony placed appellant at Robbi's home at the time gunshots emanated from Robbi's home on December 19. Appellant was seen exiting Robbi's garage seconds after the shots and immediately fleeing in Robbi's vehicle. *See Flanigan v. State*, No. 05-03-00120-CR, 2004 WL 729147, at *2 (Tex. App.—Dallas Apr. 6, 2004, no pet) (mem. op., not designated for publication) (stating in case in which single witness positively identified appellant as the person she saw carrying gray sheets that appeared to be full of items on the day of the burglary: "A single witness can be sufficient to support a conviction."). Moreover, forensic evidence tied appellant to the shootings through blood, DNA, and gunshot-residue evidence

involving appellant's shoes, Robbi's vehicle—last seen driven by appellant—and the 9mm handgun found in Robbi's home. Additionally, the jury heard testimony that Robbi and Michale were killed in the same criminal transaction on December 19.

Conclusion

Based on our review of the record, we conclude the jury could rationally have decided beyond a reasonable doubt that appellant engaged in a continuous and uninterrupted process, over a short period of time, of carrying on or carrying out the murder of more than one person. *See* PENAL §§ 19.02(b)(1), 19.03(a)(7)(A); *Jackson*, 17 S.W.3d at 669.

We overrule appellant's first and second appellate issues.

HEARSAY

Appellant states his third issue as follows:

> *Third Issue:* Appellant suffered harmful error when the trial court admitted Mikesha Hodge's hearsay testimony that Appellant had previously pulled a gun on complainant Michale Hodge.

"Hearsay" means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement. *See* TEX. R. EVID. 801(d). Hearsay is not admissible unless any of the following provides otherwise: a statute; these rules; or other rules prescribed under statutory authority. *See* TEX. R. EVID. 802.

Mikesha testified Robbi received a telephone call from Michale when Robbi had visited with her in Ohio. Mikesha testified Robbi seemed stressful, quiet, and distant after the call. Mikesha testified, "I asked her what happened." Appellant lodged a hearsay objection, and the trial court overruled it. Mikesha testified, "She [Robbi] said that Patrick just pulled a gun out on Michale." Appellant again objected on grounds of hearsay. On voir dire, the trial court ruled Robbi's statement was an excited utterance and overruled the hearsay objection. *See* TEX. R. EVID. 803(2). The trial court also overruled appellant's brief objection, "[I]t's more prejudicial than probative." *See* TEX. R. EVID. 403. Subsequently, Mikesha testified again—over appellant's same objections—"That Patrick had pulled a gun out on Michale."

We will assume here, without deciding, that the trial court erred in overruling the objection. Improper admission of evidence is non-constitutional error that an appellate court disregards unless the error affects appellant's substantial rights. TEX. R. APP. P. 44.2(b); *see Garcia v. State*, 126 S.W.3d 921, 925, 927 (Tex. Crim. App. 2004) (complaint of admission of "hearsay within hearsay" as appellant claims of here). Under Rule 44.2, an appellate court may not reverse for non-constitutional error if, after examining the record as a whole, it has fair assurance that the error did not have a substantial and injurious effect or influence in determining the jury's verdict. *See* TEX. R. APP. P. 44.2(b); *Garcia*, 126 S.W.3d at 927. Moreover, "Erroneously admitted evidence will not result in reversal when other such evidence was received without objection, either before or after the complained-of ruling."

Mays v. State, No. 05-13–00086-CR, 2014 WL 3058462, at *2 (Tex. App.—Dallas July 8, 2014, no pet.) (mem. op., not designated for publication); *see Cook v. State*, 665 S.W.3d 595, 600 (Tex. Crim. App. 2023); *Lane v. State*, 151 S.W.3d 188, 192–93 (Tex. Crim. App. 2004). In other words, error in the admission of evidence may be rendered harmless when "substantially the same evidence" is admitted elsewhere without objection. *Mays*, 2014 WL 3058462, at *2.

In addition to the objected to testimony, Detective Serra testified, without objection, about an October 23, 2018 text message from Mikesha to Robbi. In the message, Mikesha said to Robbi that appellant should not have pulled a gun out on Michale. Detective Serra's unobjected to testimony about the October 23 text message provided substantially the same evidence as Mikesha's testimony of which appellant complains on appeal, "That Patrick had pulled a gun out on Michale." *See Mays*, 2014 WL 3058462, at *2.

After examining the record as a whole, we are assured any error in admission of the complained-of testimony did not have a substantial and injurious effect or influence in determining the jury's verdict. *See* TEX. R. APP. P. 44.2(b); *Garcia*, 126 S.W.3d at 927. Accordingly, we conclude even if the trial court erred when it admitted the complained of testimony, the error was not harmful error. *See Bellard v. State*, No. 05-21-00633-CR, 2023 WL 1097769, at *9 (Tex. App.—Dallas Jan. 30, 2023 pet. ref'd) (mem. op., not designated for publication) (concluding error, if

any, in admitting evidence was harmless because substantially the same evidence was admitted elsewhere without objection).

We overrule appellant's third issue.

TELEPHONE RECORDS

Appellant states his fourth and fifth issues as follows,

> *Fourth Issue:* Appellant suffered harmful error when the trial court admitted phone records with a business records declaration that failed to include the language that the declarant made the declaration under penalty of perjury in violation of Texas Rule of Evidence 902(10) and therefore Rule 803(6).
>
> *Fifth Issue:* Appellant suffered harmful error when the trial court admitted phone records with a business records declaration that did not contain an adequate description of the quantity of records in violation of Texas Rule of Evidence 902(10) and therefore 803(6).

Appellant complains the trial court abused its discretion in admitting telephone records accompanied by a declaration that stated, "I hereby certify that the foregoing statement made by me is true. I understand that if any of the statements made by me herein are willfully false, I am subject to punishment." Appellant asserts the declaration was inadmissible because it "did not contain any language to indicate the custodian was signing under penalty of perjury . . . ." (underscore in original); *see* TEX. R. EVID. 902(10)(B) ("The proponent may use an unsworn declaration made under penalty of perjury in place of an affidavit.").

Appellant also complains the affidavit was inadmissible because it improperly failed to state how many pages of telephone records accompanied the affidavit.

Texas Rule of Evidence 902(10)(B) provides, "An affidavit is sufficient if it includes the following language, but this form is not exclusive." *Id.* 902(10)(B). Rule 902(10)(B) includes a "form of affidavit" which, in part provides, "Attached are ___ pages of records." *Id.*

We will assume, without deciding, that the trial court erred by overruling appellant's objection to the admission of the telephone records into evidence. However, as stated above, improper admission of evidence is non-constitutional error that an appellate court disregards unless the error affects an appellant's substantial rights. TEX. R. APP. P. 44.2(b); *see Garcia*, 126 S.W.3d at 925, 927; *Harding v. State*, No. 13-14-00090-CR, 2015 WL 6687287, at *5 (Tex. App.—Corpus Christi-Edinburg Oct. 29, 2015, pet. ref'd) (mem. op., not designated for publication) (erroneous admission of telephone records under rule 9.02(10) was non-constitutional and harmless error). In making this decision, we consider the entire record, including any testimony and physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error, how it might be considered in connection with other evidence in the case, and whether the State emphasized the alleged error. *See Gonzalez v. State*, 544 S.W.3d 363, 373 (Tex. Crim. App. 2018); *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002). We may consider closing statements and voir dire, jury instructions, the State's theory, and defensive theories. *See Motilla*, 78 S.W.3d at 355–56.

Appellant asserts admission of telephone records was harmful because, "The cell phone records were the only evidence, outside of the neighbors' imprecise witness testimony to the events of December 19, 2018, to corroborate the State's narrative that Appellant shot the complainants in the evening of December 19, 2018." He argues the records formed the basis of Fegely's testimony that appellant's telephone last communicated at 6:22 p.m. on December 19 and that one of Michale's telephones last communicated at 7:57 on December 19.

Initially, appellant's argument improperly discounts James's testimony. *See Flanigan*, 2004 WL 729147, at *2 ("A single witness can be sufficient to support a conviction."). Additionally, appellant's argument ignores extensive evidence, described above, that supports the jury's verdict.

Moreover, the weight of evidence of the defendant's guilt is relevant in conducting the harm analysis under rule 44.2(b). *See Gonzalez*, 544 S.W.3d at 373; *Zacny v. State*, No. 05-15–01125-CR, 2016 WL 4311729, at *3 (Tex. App.—Dallas Aug. 15, 2016, no pet.) (mem. op., not designated for publication). In this case, the appellate record contains extensive evidence, described above, that appellant murdered Robbi and Michale in the same criminal transaction on December 19. *See Motilla*, 78 S.W.3d at 358 ("We hold once again that the evidence of the defendant's guilt is a factor to be considered in any thorough harm analysis."); *Gonzalez*, 510 S.W.3d at 29 ("We agree that the [erroneously admitted] evidence played a large part in the State's case. . . . Nevertheless, we conclude that the admission of this

evidence was harmless error given . . . the extent of the other evidence of appellant's guilt . . . .").

Additionally, the State did not emphasize the objected to evidence. The State did not refer to the records in voir dire or in its opening statement. The record reflects that the allegedly improper testimony concerning the timing of the two telephone calls appears in about five pages of the reporter's record. However, much of that testimony addresses technological telecommunications issues. The five pages of testimony is a small in relation to the three volumes of testimony recorded below. *See Gonzalez*, 544 S.W.3d at 373 (erroneous admission of evidence was harmless, in part, because evidence relating to drug use and possession was elicted in five pages of the State's thirty-two page cross-examination, much of it unrelated to drug use and possession). Although the State referred to the telephone records in closing argument, there was extensive evidence, described above, apart from those records, that appellant murdered Robbi and Michale in the same criminal transaction on December 19. *See Harding*, 2015 WL 6687287, at *5 (erroneous admission of records under rule 9.02(10) was harmless error—although the State emphasized the records in closing argument—due to extensive evidence, apart from objected to records, of appellant's guilt.).

Moreover, the record does not suggest the objected to records or Fegely's testimony about the timing of the telephones' last activity was considered by the jury or swayed its verdict in any way. In assessing harm, we may review the jury's

questions asked during deliberations. *See Garcia v. State*, No. 13, 22-00001-CR, 2022 WL 3257538, at *5 (Tex. App.—Corpus Christi-Edinburg Aug. 11, 2022, no pet.) (mem. op., not designated for publication); *Washington v. State*, 449 S.W.3d 555, 567 (Tex. App.—Houston [14th Dist.] 2014, no pet.). The jury below, while deliberating, sent a note to the trial judge as follows,

> We would like the following evidence
>
> - Photos of shoe print in blood
> - Photos of bloody shoes
> - Photo of gas pedal
> - Both shoes
> - Court eviction notice
> - Hand written eviction notice
> - Text messages between Robbi & Patrick—all of them

The jury's note indicates the jury rationally focused on evidence other than the timing of the last use of appellant's and Michale's telephones. Although the jury asked for the content of the text messages, it did not ask for telephone records or Fegely's testimony concerning the timing of the telephones' last use. Indeed, the text messages were extracted from Robbi's telephone. Instead, the jury demonstrated attention to physical evidence related to the scene of the killings, physical evidence concerning the vehicle in which appellant was seen driving from the murder scene minutes after shots were heard, physical evidence connecting appellant with the

scene of the murders, and evidence of the increasingly strained relationship among Robbi, Michale, and appellant. *See Garcia*, 2022 WL 3257538, at *5 (jury's notes to the trial court demonstrated the jury focused on criminal acts germane to the indictment rather than on objected to evidence of previous conviction); *Washington*, 449 S.W.3d at 568 (holding that jury charge that improperly included modes of party liability was harmless because notes from the jury indicated the jury was focused on relevant proper theories of liability).

Consequently, we conclude the appellate record as a whole reflects there was ample evidence for the jury to consider when reaching its verdict without considering the objected to telephone records and related testimony. Given the foregoing, we have "fair assurance" that the telephone records and related testimony had either no effect or slight effect in this case. Therefore, we do not find appellant's substantial rights were affected. *See Gonzalez*, 544 S.W.3d at 375.

We overrule appellant's fourth and fifth issues.

EQUAL PROTECTION

Appellant states his sixth and seventh issues as follows,

> *Sixth Issue*: Texas's mandatory, automatic life without parole sentence upon conviction for a capital murder for which the State chooses not to pursue the death penalty violates the Eighth Amendment's prohibition against cruel and unusual punishment.
>
> *Seventh Issue*: Texas's mandatory, automatic life without parole sentence upon conviction for a capital murder for which the State chooses not to pursue the death penalty violates the Texas Constitution's prohibition against cruel and unusual punishment.

The United States and Texas Constitutions prohibit cruel and unusual punishment. *See* U.S. Const. amend. VIII; Tex. Const. art. I, § 13; *see Roper v. Simmons*, 543 U.S. 551, 560 (2005) (the Eighth Amendment applies to the states). There is no distinction between the protections offered by these two constitutional provisions. *See Cantu v. State*, 939 S.W.2d 627, 645 (Tex. Crim. App. 1997) (stating there is "no significance in the difference between the Eighth Amendment's 'cruel and unusual' phrasing and the 'cruel *or* unusual' phrasing of Art. I, Sec. 13 of the Texas Constitution" and refusing to interpret the Texas Constitution in a more expansive manner than the federal constitution) (emphasis in original). Section 19.03(b) of the penal code, under which appellant was convicted, provides, "An offense under this section is a capital felony." PENAL § 19.03(b). Section 12.31(a)(2) of the penal code provides, "An individual adjudged guilty of a capital felony in a case in which the state does not seek the death penalty shall be punished by imprisonment in the Texas Department of Criminal Justice for life without parole, if the individual committed the offense when 18 years of age or older." *Id.* § 12.31(a)(2).

Appellant argues, "The imposition of a mandatory, automatic sentence of life without parole without applying an individualized sentencing hearing is cruel and unusual punishment." However, appellant recognizes the U.S. Supreme Court has rejected the argument that a sentence of life imprisonment without the possibility of

parole violated the Eighth Amendment's prohibition against cruel and unusual punishment when the trial court was not permitted to hear and consider mitigating evidence before imposing that sentence. *See Harmelin v. Michigan*, 501 U.S. 957, 995–96 (1991). Following *Harmelin*, Texas courts—including this Court—have held a mandatory sentence of life without parole is not cruel and unusual under either the federal or state constitutions. *See, e.g., Hardge v. State*, No. 05-22-00317-CR, 2023 WL 4571918, at *7-8 (Tex. App.—Dallas July 18, 2023, pet. ref'd) (mem. op, not designated for publication); *Phifer v. State*, No. 05-18-01232-CR, 2020 WL 1149916, at *13 (Tex. App.—Dallas Mar. 10, 2020, pet. ref'd) (mem. op., not designated for publication); *Arevalo v. State*, No. 05-18-00126-CR, 2019 WL 3886650, at *8 (Tex. App.—Dallas Aug. 19, 2019, pet. ref'd) (mem. op., not designated for publication); *Hunter v. State*, No. 05-18-00458-CR, 2019 WL 2521721, at *10 (Tex. App.—Dallas June 19, 2019, pet. ref'd) (mem. op., not designated for publication); *Lopez v. State*, 493 S.W.3d 126, 138-39 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd); *Murkledove v. State*, 437 S.W.3d 17, 30 (Tex. App.— Fort Worth 2014, pet. ref'd); *Straughter v. State*, No. 05-10-00163-CR, 2011 WL 2028234, at *3 (Tex. App.—Dallas May 25, 2011, no pet.) (mem. op., not designated for publication) (rejecting argument, also made here, that Eighth Amendment jurisprudence is evolving away from the rule adopted in *Harmelin*).

Appellant also acknowledges additional judicial opinions of Texas intermediate appellate courts that have rejected arguments that imposing a life-

without-parole sentence without considering mitigating factors is unconstitutional. *See Abram v. State*, No. 10-16-00348-CR, 2019 WL 6606959, at *13 (Tex. App.—Waco Dec. 4, 2019, pet. ref'd) (mem. op., not designated for publication); *Lopez v. State*, 493 S.W.3d 126, 138-39 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd).

Appellant argues, "[B]ecause the imposition of an automatic life-without-parole sentence is the harshest and only sentence available in a capital murder case in which the State chooses not to pursue the death penalty, Appellant submits that trial courts should be permitted to consider mitigating circumstances before imposing this sentence to die in prison."

Appellant presents no new argument to distinguish the opinions cited above.

We are bound by precedent of this Court and precedent of the United States Supreme Court. *See Roberson v. State*, No. 05-22-00190-CR, 2023 WL 8108659, at *9 (Tex. App.—Dallas Nov. 22, 2021, no pet.) (mem. op., not designated for publication) (citing *Tiller v. State*, No. 05-21-00653-CR, 2022 WL 2093008, at *2 (Tex. App.—Dallas June 10, 2022, no pet.) (mem. op., not designated for publication) ("We are bound to follow our own precedent unless it conflicts with an opinion of the Court of Criminal Appeals.")); *Narasimha v. State*, No. 05-15-01410-CR, 2016 WL 6462400, at *3 (Tex. App.—Dallas Oct. 31, 2016, pet. ref'd) (mem. op., not designated for publication) (precedent of United States Supreme Court). Accordingly we follow *Harmelin*, *Hardge*, *Phifer, Arevalo*, *Hunter*, and *Straughter* and reject appellant's arguments that his punishment violated the federal and state

constitutions as cruel and unusual punishment. *See Harmelin*, 501 U.S. at 995–96; *Hardge*, 2023 WL 4571918, at *7-8; *Phifer*, 2020 WL 1149916, at *13; *Arevalo*, 2019 WL 3886650, at *8; *Hunter*, 2019 WL 2521721, at *10; *Straughter*, 2011 WL 2028234, at *3.

We overrule appellant's sixth and seventh issues.

DUE PROCESS

Appellant states his eighth and ninth issues as follows,

> *Eighth Issue*: Texas's mandatory, automatic life without parole sentence upon conviction for a capital murder for which the State chooses not to pursue the death penalty violates federal due process.
>
> *Ninth Issue*: Texas's mandatory, automatic life without parole sentence upon conviction for a capital murder for which the State chooses not to pursue the death penalty violates state due course of law.

The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Due Course of Law provision of the Texas Constitution similarly provides that "[n]o citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disenfranchised, except by the due course of law of the land." Tex. Const. art. I, § 19. Texas courts generally interpret these clauses the same way. *See Lewis v. State*, 448 S.W.3d 138, 147 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd). The majority of Texas courts of appeals have repeatedly held the due course of law provision provides the same protections as the federal Due Process Clause.

See McCardle v. State, 550 S.W.3d 265, 275 n.7 (Tex. App.—Houston [14th Dist.] pet. ref'd) (citing *Fleming v. State*, 376 S.W.3d 854, 857 (Tex. App.—Fort Worth 2012), and *State v. Vasquez*, 230 S.W.3d 744, 751 (Tex. App.—Houston [14th Dist.] 2007, no pet.), *aff'd*, 455 S.W.3d 577 (Tex. Crim. App. 2014)).

Appellant argues, "Texas's automatic life-without-parole sentencing statute violated Appellant's right to due process and due course of law by denying him an opportunity of presenting mitigating evidence at a sentencing hearing."

This issue is well-settled. This Court has rejected the claim that an automatic life sentence for capital murder violates both the Due Process Clause of the Fourteenth Amendment and the due course of law guarantee found in article I, section 19 of the Texas Constitution. *See Hardge*, 2023 WL 4571918, at *7-8; *Phifer*, 2020 WL 1149916, at *13; *Speers v. State*, No. 05-14-00179-CR, 2016 WL 929223, at *5 (Tex. App.—Dallas Mar. 10, 2016, no pet.) (mem. op., not designated for publication). Moreover, other Texas intermediate appellate courts have held likewise. *See, e.g., Lopez*, 493 S.W.3d at 139-40; *Lewis*, 448 S.W.3d at 147-48; *Moore v. State*, 54 S.W.3d 529, 544-52 (Tex. App.—Fort Worth 2001, pet. ref'd).

Appellant fails to present new argument that distinguishes the judicial opinions cited above. Moreover, appellant cites inapposite judicial authority. *See Stanley v. Illinois*, 405 U.S. 645, 649 (1972) (holding unwed father entitled to a hearing on his fitness as a parent before children could be taken from him after their mother's death); *Bell v. Burson*, 402 U.S. 535, 542-43 (1972) (holding that before

Georgia may deprive an uninsured motorist "of his driver's license and vehicle registration it must provide a forum for the determination of the question whether there is a reasonable possibility of a judgment being rendered against him as a result of the accident."). After citing *Stanley* and *Bell*, appellant asserts, "[S]urely a capital case in which a person may be sentenced to life in prison without the possibility of parole upon conviction merits a fair sentencing hearing in which the convicted person has the opportunity to present mitigating evidence." *But see Lewis*, 448 S.W.3d at 147 (capital murder opinion rejecting argument that life without parole violates due process and stating of *Stanley* and *Bell*, cited by appellant here, "Apart from these easily distinguishable cases, appellant offers little support for his contention.").

We must adhere to our precedent. *See Roberson*, 2023 WL 8108659, at *9; *Tiller*, 2022 WL 2093008, at *2. Accordingly, we follow *Hardge*, *Phifer*, and *Speers* and reject appellant's due-process and due-course-of-law arguments. *See Hardge*, 2023 WL 4571918, at *7; *Phifer*, 2020 WL 1149916, at *13; *Speers*, 2016 WL 929223, at *5.

We overrule appellant's eighth and ninth issues.

CONCLUSION

We affirm the trial court's judgment.

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TEX. R. APP. P. 47.2(b).

/Bill Pedersen, III/
BILL PEDERSEN, III
JUSTICE

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

PATRICK DOUGLAS JOHNSON, Appellant	On Appeal from the Criminal District Court No. 3, Dallas County, Texas Trial Court Cause No. F18-76856-J. Opinion delivered by Justice Pedersen, III. Justices Garcia and Kennedy participating.
No. 05-22-00294-CR V.	
THE STATE OF TEXAS, Appellee	

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 11th day of March, 2024.