No. _____

SUPREME COURT OF THE UNITED STATES

ELOY HERACLIO ALCALA,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent,

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX

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Neutral
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Alcala v. State

Court of Appeals of Texas, Thirteenth District, Corpus Christi - Edinburg

August 28, 2023, Delivered; August 28, 2023, Filed

NUMBER 13-18-00614-CR

Reporter
2023 Tex. App. LEXIS 6647 *; 2023 WL 5541572

ELOY HERACLIO ALCALA, Appellant, v. THE STATE OF TEXAS, Appellee.

Notice: PLEASE CONSULT THE TEXAS RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

Subsequent History: Petition for discretionary review refused by *In re Alcala, 2024 Tex. Crim. App. LEXIS 439 (Tex. Crim. App., June 5, 2024)*

Prior History: **[*1]** On appeal from the 332nd District Court of Hidalgo County, Texas.

Core Terms

truck, Investigator, trial court, blood, recovered, gunshot residue, crime scene, cross-examination, gunshots, witnesses, shooting, inside, fired, consent to search, credibility, clothing, murder, parked, door, exigent circumstances, residents, bullet, block, circumstances, casings, rounds, scene, designated, weapon, gun

Case Summary

Overview
HOLDINGS: [1]-The trial court's finding that defendant consented to a search was not clearly erroneous because the validity of the consent to search was a factual determination that ultimately turned on witness credibility which the court afforded total deference to trial court's factual determination which was supported by officer's testimony that defendant gave verbal consent to enter the premise and the officer affirmed that no physical or psychological tactics had been employed in the process.

Outcome
Judgment affirmed.

Counsel: For Eloy Heraclio Alcala, Criminal - Appellant: Hon. Victoria Guerra.

For The State of Texas, Criminal - State of Texas: Hon. Toribio "Terry" Palacios, Hon. Roxanna Salinas.

Judges: Before Justices Longoria, Hinojosa,[1] and Silva. Memorandum Opinion by Justice Silva.

Opinion by: CLARISSA SILVA

Opinion

MEMORANDUM OPINION

Appellant Eloy Heraclio Alcala appeals his conviction of capital murder involving a double homicide, a first-degree felony. *See* *Tex. Penal Code Ann. § 19.03(a)(7)*. The trial court assessed a life sentence. By eleven issues, which we have reorganized, renumbered, and consolidated into four issues, appellant argues: (1) the evidence is insufficient to support his conviction; (2) the trial court abused its discretion in denying appellant's motion to suppress; (3) the trial court impeded his ability to cross-examine witnesses; and (4) the trial court erred in denying his request for an exclusionary rule instruction under *Article 38.23(a) of the Texas Code of Criminal Procedure.*[2] We affirm.

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[1] The Honorable Leticia Hinojosa, former Justice of this Court, did not participate in this decision because her term of office expired on December 31, 2022.

[2] After the case was submitted on oral argument, appellant filed a third amended brief containing three additional issues absent the Court's permission. We do not address these issues. *See Tex. R. App. P. 38.7* (providing that a brief may be amended or supplemented with the court's permission); *Garrett v. State, 220 S.W.3d 926, 929 (Tex. Crim. App. 2007)*

I. Background[3]

At approximately 1:30 a.m. on October 8, 2010, Pharr Police Department (PPD) Investigator Enrique Ontiveros contacted dispatch to report hearing "three loud noises that appeared to be gunshots." Within minutes, Investigator Ontiveros **[*2]** was directed to respond to reports of "shots fired with two men down" in the 900 block of East Santa Monica. Investigator Ontiveros arrived on scene near the intersection of East Santa Monica and South Sabino Avenue and observed a brown van with its lights on and engine running. Two men, later identified as cousins David Garcia and Victor De La Cruz, were lying motionless on the ground by the van, blood pooling around their heads. Investigator Ontiveros was soon joined by PPD Investigator Juan Manuel Quilantan Jr., Interim Police Chief Jose Alejandro Luengo, Investigator Michael Perez, Officer Eric Galaviz, Sergeant David Castillo, and Sergeant Daniel Leal.

Less than two hours later, appellant and his son, Eloy Jiovanni Perez Alcala (Jiovanni), had been identified as suspects in the double homicide and arrested. Appellant was later indicted on capital murder charges and pleaded not guilty. In a trial spanning over four weeks, twenty-three witnesses testified and well over three hundred exhibits were admitted. We summarize the relevant evidence below.

A. Lay Witnesses

1. The Garcias

David's mother and sister, both named Maricela Garcia,[4] testified that David arrived home after midnight on **[*3]** October 8, 2010, severely beaten up and covered in blood. David told his mother and sister that he had gotten into a fight. Shortly thereafter, a white car, described by Maricela as a "beige or white" Cadillac, pulled up in front of their home. David went outside, and a physical altercation ensued inside the white car between David and the driver of the white car, an individual Mrs. Garcia recognized as a former classmate of David's and Maricela recognized by name—Jiovanni. A neighbor intervened and separated David and Jiovanni. Mrs. Garcia testified that Jiovanni drove away only to return and attempt to "veer[] the car into" David, who sought shelter behind a mailbox. Maricela corroborated Mrs. Garcia's testimony, stating that Jiovanni "steered the car towards" David, but David "jumped to the side of the mailbox." Jiovanni then left, and David began walking on foot towards Victor's house, located several blocks away.

At some unspecified point, Jiovanni returned but this time as a passenger in a white truck driven by another man. They were looking for David. After a brief exchange with Mrs. Garcia, the two men left the home. Maricela described the two men as "angry," and in an affidavit **[*4]** admitted at trial, Maricela stated that Jiovanni apologized before leaving. After the white truck departed, Maricela saw Victor's van pass by their house. "[M]aybe four minutes" later, Maricela heard gunshots. Mrs. Garcia later identified the driver of the white car as Jiovanni and the man who had accompanied Jiovanni to her home that same night in a white truck as appellant.

2. De La Cruzes

Luis Alberto De La Cruz and Robert Mena De La Cruz, Victor's brothers, testified that earlier that evening, they had been drinking with David, Victor, and some friends. According to Luis, David arrived around 7:00 p.m., but after four or five hours, David wanted a ride to buy drugs. Luis and Robert testified that David ultimately left the home by himself. When David returned, he "was bloodied up" with a gash on his face. David claimed to have been attacked by Jiovanni. Victor insisted that he and David confront Jiovanni. Victor and David departed in Victor's van. Luis estimated that five or six minutes elapsed, and he went inside the house. Then, Luis and Robert heard gunshots and eventually made their way to the crime scene, where Luis and Robert saw Victor's van.

(holding that a reviewing court may decline to address an issue raised for the first time in post-submission brief).

[3] This is appellant's second appeal before this Court. Appellant was previously tried and convicted of capital murder and sought review, in relevant part, of the trial court's denial of his motion to suppress evidence of his statements to police. *Alcala v. State, No. 13-12-00259-CR, 2014 Tex. App. LEXIS 7949, 2014 WL 3731733, at *19 (Tex. App.—Corpus Christi—Edinburg July 24, 2014, pet. ref'd)* (mem. op., not designated for publication). Finding error and harm in the inclusion of this evidence at trial, we reversed the judgment of the trial court and remanded the case for a new trial. *Id.*

[4] We refer to David's mother as Mrs. Garcia and his sister as Maricela.

3. David Garza

David Garza testified **[*5]** that on October 8, 2010, he resided in the 700 block of East Santa Monica. In the early morning hours, Garza was awoken by a phone call. Already awake, Garza heard commotion coming from outside his home. Garza looked out his window and saw Jiovanni pacing back and forth, yelling, and threatening to "kill the damn dog." Believing Jiovanni was expressing an intention to kill Garza's dog, Garza prepared to go outside to speak with Jiovanni. By the time he got outside, however, Jiovanni was getting into appellant's white Dodge truck. Appellant and Jiovanni drove off, and Garza retreated inside his home.

Shortly thereafter, Garza heard three gunshots. Garza ran to the window and saw appellant's white Dodge truck traveling down Santa Monica with his headlights off. According to Garza, the truck parked along the side of the street and Jiovanni got out of the passenger side of the truck. Before going inside the home, Jiovanni went to his own vehicle—a Cadillac parked in the driveway of the home—and opened and shut the hood. Meanwhile, appellant did not immediately exit the truck. It was only after an officer drove by that appellant moved his white Dodge truck into the driveway within the fenced-off **[*6]** perimeter of his home.

As appellant was closing the fence gate, Garza used the opportunity to approach appellant. Garza told appellant he had heard gunshots and asked appellant if he knew what had happened. Appellant claimed he had not heard anything and excused himself. Garza testified that appellant's statement and general disinterest struck him as unusual because appellant was the head of the neighborhood watch group, and he ordinarily expressed interest in neighborhood incidents.

Garza remained outside his home and after seeing officers talking to a neighbor, he approached officers and notified them that the only vehicle he had seen traveling after the shooting had been driven by his neighbor—appellant, and appellant had just pulled the white Dodge truck into his yard.

B. Law Enforcement Testimony

1. Investigator Enrique Ontiveros

Investigator Ontiveros testified that he was the first to arrive on scene and upon seeing the two men down, he immediately called for backup and notified dispatch that he had received information that a gray truck was witnessed leaving the scene.[5] Two minutes later, Investigator Ontiveros informed officers he had received subsequent information from an eyewitness **[*7]** describing the involved vehicle as a white Dodge truck.

An SUV pulled up behind Investigator Ontiveros while he was attempting to secure the crime scene. Mrs. Garcia and Maricela exited the vehicle, distraught. Mrs. Garcia told officers her son David "had just gotten into a fight" with an unknown male. Although Mrs. Garcia could not identify the male subject by name, she informed officers he drove a white truck and indicated he lived near Santa Monica and Laurel Avenue—three blocks west of the shooting.

2. Interim Chief Jose Alejandro Luengo

Chief Luengo was a patrol officer on duty on October 8, 2010, when he responded to a dispatch call regarding two men down. On his way to the crime scene, Chief Luengo initiated a traffic stop of a vehicle traveling from the direction of the alleged shooting. Upon receiving a description of the suspect vehicle, he ended the stop and began canvasing the 900 block of East Santa Monica for the vehicle matching the description provided by witnesses: a white Dodge truck. While walking westbound, Chief Luengo spotted a white Dodge truck parked at 7002 South Laurel, at the intersection of Laurel and Santa Monica. Officers spoke with the residents of 7002 **[*8]** South Laurel and ruled the truck out as the suspect vehicle.

Chief Luengo then spoke with witnesses who directed him to 708 Santa Monica, a residence located in the intersection of La Mora and Santa Monica, one block over. Chief Luengo set a perimeter up around 708 Santa Monica. A white Dodge truck and white Cadillac were both located within the fenced area of the home. Chief Luengo recounted having received information concerning a physical altercation involving one of the deceased and the driver of a white Cadillac just prior to the shooting.

Chief Luengo testified that he accompanied Sergeant Castillo to search the white Dodge truck on the property, where Sergeant Castillo found bullets. Chief Luengo

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[5] 9-1-1 calls were admitted as exhibits. While one of the callers advised that the vehicle leaving the scene was a grey truck, another caller advised that it was a white truck.

also reported seeing blood in plain view inside the Cadillac after passing through the fence line.

3. Investigator Juan Manuel Quilantan Jr.

Investigator Quilantan testified that he helped secure and block off the crime scene to preserve any potential evidence. Investigator Quilantan then joined other officers in looking for the suspect vehicle and ruled out the involvement of two other white Dodge trucks within the neighborhood before locating a third white Dodge truck at 708 Santa Monica. **[*9]**

While surveying the property at 708 Santa Monica, a neighbor told Investigator Quilantan that the driver of the white Dodge truck returned to the home without its headlights on shortly after the shooting.[6] Investigator Quilantan then noticed somebody peeking through the windows from the home and the sound of a door locking followed. Investigator Quilantan determined that exigent circumstances dictated that he enter the property to feel the hood of the truck to determine if it was warm from recently being driven. Investigator Quilantan confirmed the hood felt hot and noticed two live rounds of ammunition in the cab of the white Dodge truck.

Also parked at the home was a white Cadillac. Investigator Quilantan and Sergeant Castillo were standing a few feet behind the white Cadillac when Sergeant Castillo shined his light into the back window of the white Cadillac and both officers noted blood inside the vehicle.[7] Investigator Quilantan, accompanied by additional officers, initiated contact with the residents of 708 Santa Monica. Appellant answered the door, after which the officers explained that they were with PPD and investigating a double homicide. According to Investigator Quilantan, **[*10]** appellant signed a consent to search form, which was admitted as an exhibit. Investigator Quilantan denied making any threats to appellant or telling him that they had obtained a search warrant.

4. Officer Eric Galaviz

Edinburg Independent School District Officer Eric Galaviz testified that he was a patrol officer with PPD on October 8, 2010. Officer Galaviz assisted in canvassing the area for the white Dodge truck, moving west down Santa Monica with Investigator Quilantan and Chief Luengo. Officer Galaviz advised that the officers originally identified a white Dodge truck in a cul-de-sac at the intersection of Laurel and Santa Monica, where they spoke to the residents. While the officers were speaking with the residents, a vehicle approached Officer Galaviz and provided further information on the suspect vehicle, leading them to 708 Santa Monica. Officer Galaviz recalled that the white Dodge truck was "parked underneath a tree," with "no lighting."

Officer Galaviz testified that after Sergeant Castillo saw blood in the white Cadillac in the driveway, the officers decided to approach the residents of the home and ask the homeowner, later identified as appellant, for consent to enter the **[*11]** home. Appellant provided oral and written consent to search the home, the white Dodge truck, and the white Cadillac. Officer Galaviz described the residents as cooperative and denied using any force or threats while inside the home.

5. Lieutenant Daniel Leal

Lieutenant Leal testified that on October 8, 2010, he was a patrol sergeant and joined the investigation at 708 Santa Monica. Lieutenant Leal testified that he asked for and received verbal and written consent to search the property from appellant. A copy of the written consent to search was admitted into evidence, which provided PPD with permission to search 708 Santa Monica, the white Dodge truck, and the white Cadillac.

Lieutenant Leal denied being involved in the actual search of the home but accompanied Sergeant Castillo during the search of both vehicles. According to Lieutenant Leal, appellant accompanied the officers to the white Dodge truck while conducting the search and pointed out a backpack underneath the rear seat. The backpack contained boxes of .40 caliber ammunition and some magazines. Appellant then led Lieutenant Leal and Lieutenant William Ryan to a walk-in closet in one of the bedrooms of his home where he turned **[*12]**

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[6] Investigator Ontiveros's dash camera was admitted into evidence at trial. While en route to the 900 block of East Santa Monica, Investigator Ontiveros's vehicle can be seen passing a white Dodge truck parked along the street outside a home on 708 Santa Monica. Investigator Ontiveros noted that when he returned to 708 Santa Monica, the same white Dodge truck was now parked inside a chain-link fence on the property. The white Dodge truck parked on the street at 708 Santa Monica was also captured on Chief Luengo's dash camera.

[7] The trial court admitted two photographs of the backseat of the white Cadillac, which depicted a significant amount of blood on the head rests of both front seats and throughout the back seat.

over a .40 caliber rifle to officers.

6. Lieutenant William Ryan

Lieutenant Ryan testified that he went to 708 Santa Monica to assist officers in collecting evidence and arrived after the consent to search had already been obtained. Lieutenant Ryan received Jiovanni's clothing from Investigator Quilantan and placed the clothes into a brown paper bag, all of which were admitted as exhibits. Lieutenant Ryan also assisted Lieutenant Leal in recovering a rifle that appellant turned over. According to Lieutenant Ryan, the rifle was loaded with a round in the chamber. The rifle, chambered round, and loaded magazine were admitted as exhibits. Lieutenant Ryan testified that the ammunition loaded in the magazine was .40 caliber hollow point rounds.

At some point after appellant and Jiovanni's arrest, Lieutenant Ryan learned that the walk-in closet where the firearm had been retrieved contained a gun safe. Lieutenant Ryan opined that a thorough search had not been done in the home that night.

7. Investigator Michael Perez

Hidalgo County District Attorney's Office Investigator Michael Perez testified that that he was an investigator with PPD on October 8, 2010. Investigator Perez spoke with a witness **[*13]** who confirmed he saw a white Dodge truck drive southbound, away from the crime scene immediately after the shooting. Additionally, Investigator Perez spoke with Mrs. Garcia and Maricela, who recounted David's fight with Jiovanni and appellant and Jiovanni driving to their home in a white Dodge truck. Maricela also advised Investigator Perez that appellant and Jiovanni lived westward from the crime scene, in the same neighborhood. Accordingly, Investigator Perez instructed officers Quilantan, Luengo, and Galaviz to look for a white Dodge truck in that direction while he remained on scene.

Investigator Perez testified that once he was at 708 Santa Monica, he received consent to collect DNA cheek swab samples from Jiovanni and appellant and gunshot residue samples from their hands. Appellant told Investigator Perez that he had shot a firearm around 5:00 pm that day but threw any empty casings in a ditch full of water.

Investigator Perez further obtained search warrants for the white Dodge truck and white Cadillac and performed a search of each vehicle. Investigator Perez opined that the search of 708 Santa Monica could have been more thorough, and the officers should not have allowed appellant **[*14]** to collect the suspect firearm and hand it to them.

8. Janie Arellano

Janie Arellano, evidence technician supervisor for the PPD Crime Scene Unit, testified that she photographed and marked evidence at the crime scene, noting two bullet casings and a pink receipt issued by Matt's Building Supply found around a van near the decedents. The casings were .40 caliber Winchester, and the receipt was dated October 2, 2010.

After processing the crime scene, Arellano proceeded to 708 Santa Monica to process any evidence found there. Evidence collected included a bullet in the cupholder in the front seat of the white Dodge truck and seven pink receipts from Matt's Building Supply found in the back seat of the white Dodge truck. Ammunition and magazines found in the backseat of the white Dodge truck were identified as "Glock 40 caliber magazine[s]" loaded with full metal jacket and hollow point rounds. Boxes of ammunition included Federal and Winchester hollow point .40 caliber rounds. Meanwhile, the recovered receipts contained date stamps ranging from September 22, 2010, to October 2, 2010.

In addition, Arellano inspected the clothing recovered from 708 Santa Monica. One of the shoes belonging **[*15]** to Jiovanni had blood on it as well as on the sole. Arellano noted the similarities between the sole of Jiovanni's shoe and a bloody footprint located on the passenger side doorstep of the white Dodge truck. Arellano submitted several of the blood swabs taken from both the white Dodge truck and the white Cadillac, clothing recovered from 708 Santa Monica, and clothing worn by appellant for DNA and gunshot residue testing.

C. Forensic Testimony

1. Doctor Norma Jean Farley

Doctor Norma Jean Farley, a forensic pathologist for Hidalgo County, performed the autopsies for David and Victor and generated reports for each autopsy; both reports were admitted as exhibits.

David's cause of a death was a single gunshot wound to

the face. Dr. Farley testified that the gunshot wound had "powder tattooing," meaning the muzzle of the gun was "fairly close to the face," causing powder and hot gas from the firearm to leave slight abrasions to the skin around the wound. Dr. Farley recovered bullet fragments from David's injury, which she believed to be hollow point bullets.

Victor's cause of death, meanwhile, was the result of two gunshot wounds: one to the left side of the chest and another to the head. Dr. **[*16]** Farley indicated that both wounds contained powder tattooing. Bullet fragments were removed from Victor's head wound, while larger in-tact pieces were recovered from his chest wound. Dr. Farley opined that both bullets were hollow point rounds.

2. Carlos Vela

Carlos Vela, a Texas Department of Public Safety (DPS) latent print expert, testified that he inspected the .40 caliber rifle that was recovered from appellant's home and .40 caliber casing recovered from the crime scene. Vela was unable to retrieve a suitable fingerprint from either item recovered. Vela explained that the absence of latent prints was not unusual.

3. Bradford Means

Bradford Means, a DPS crime lab forensic scientist in the firearms and toolmarks division, tested the.40 caliber rifle that was recovered from appellant's home, the casing recovered from the initial crime scene, and the bullet fragments recovered from the autopsies. According to Means, the casings recovered from the initial crime scene could not be confirmed or eliminated as having been fired from the .40 caliber rifle recovered. Moreover, the DPS crime lab determined that three of the four bullet jacket fragments were not fired from the rifle recovered **[*17]** but could neither confirm nor rule out that the fourth jacket fragment was fired from the .40 caliber rifle.

3. Vanessa Nelson

Vanessa Nelson, Ph.D. testified that she is the Biology Program Coordinator for the DPS crime lab in McAllen. Dr. Nelson was provided control DNA samples from David, Victor, Jiovanni, and appellant for comparison with other samples collected. According to Dr. Nelson, the samples taken from the driver side seatbelt, side mirror, passenger side doorstep of the white Dodge truck did contain "apparent blood." Dr. Nelson, however, did not compare the blood sample from the driver's side with any of the control samples for DNA analysis.

Dr. Nelson additionally tested various other items collected for the presence of blood, including appellant's jeans worn the night of October 8, 2010, and a jacket recovered from appellant's truck. Appellant's jeans and jacket both had "apparent blood" on them. The DNA profile for the blood on appellant's jeans and jacket matched appellant's DNA profile. Dr. Nelson testified that the blood recovered from the doorstep on the white Dodge truck and Jiovanni's shoe was consistent with the DNA profile for David. Blood from Jiovanni's jeans **[*18]** was consistent with the DNA profile for Victor.

4. Krystina Vachon

Krystina Vachon, a Bexar County Criminal Investigation Laboratory forensic scientist, examined the swabs collected from Joivanni's and appellant's hands, as well as the clothing items taken from Joivanni's room and clothing items worn by appellant for the presence of gunshot residue. Vachon concluded that appellant's left hand contained trace particles consistent with gunshot residue, but his right hand did not. The shirt and jeans recovered from Jiovanni contained trace particles consistent with gunshot residue. The clothing worn by appellant also contained trace particles consistent with gunshot residue, as well as the jacket recovered from appellant's truck. Finally, no trace particles for gunshot residue were detected on Jiovanni's hands.

Vachon explained that the absence of gunshot residue on Jiovanni's hands did not rule out that he fired a gun because gunshot residue will come off with time or "can be easily washed away with soap and water." Whereas gunshot residue does not come off clothing as readily because it can get caught between fibers.

Vachon testified that the acceptable window for gunshot residue collection **[*19]** is within four to six hours after contact because beyond that the residue is typically not found. Accordingly, if appellant fired a gun around 5:00 pm the preceding day, Vachon would not expect any gunshot residue to be present. However, Vachon could not be certain that appellant fired a gun, as handling a gun that had been fired may transfer gunshot residue to his hands or he may have been near a fired gun.

D. Jury Charge and Verdict

At the close of evidence, the jury was provided its charge of the court. The charge instructed the jury on the elements of murder and capital murder, including the law of parties. The jury ultimately found appellant guilty of capital murder, and appellant was sentenced to life in prison. This appeal followed.

II. Sufficiency of the Evidence

Appellant challenges the sufficiency of the evidence supporting his conviction.[8]

A. Standard of Review

We review the sufficiency of the evidence by considering "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." *Hammack v. State, 622 S.W.3d 910, 914 (Tex. Crim. App. 2021)*; *see Jackson v. Virginia, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*. The jury **[*20]** is the sole judge of witnesses' credibility and weight to be given the evidence presented, and we defer to those conclusions. *Hammack, 622 S.W.3d at 914* (citing *Garcia v. State, 367 S.W.3d 683, 687 (Tex. Crim. App. 2012)*). We look to the "events occurring before, during and after the commission of the offense and may rely on actions of the defendant which show an understanding and common design to do the prohibited act." *Id.* (quoting *Hooper v. State, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007)*). "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." *Id. at 914-15*. Not every fact or piece of evidence needs to point directly to appellant's guilt, so long as the cumulative force of all the evidence supports the convictions. *Id. at 914*. "Juries are permitted to draw reasonable inferences from the evidence presented at trial 'as long as each inference is supported by the evidence presented at trial.'" *Carter v. State, 620 S.W.3d 147, 150 (Tex. Crim. App. 2021)* (quoting *Hooper, 214 S.W.3d at 15*).

We measure the sufficiency by the elements of an offense as defined by a hypothetically correct jury charge. *Hammack, 622 S.W.3d at 914*. "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 **[*21]** describes the particular offense for which the defendant was tried." *Id.* (quoting *Malik v. State, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)*).

B. Applicable Law

A person commits murder if he intentionally or knowingly causes the death of an individual. *Tex. Penal Code Ann. § 19.02(a)-(b)*. As relevant here, a person commits capital murder if he murders more than one person during the same criminal transaction. *Id. § 19.03(a)(7)(A)*. "A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both." *Id. § 7.01(a)*. "A person is criminally responsible for an offense committed by the conduct of another if acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense." *Id. § 7.02(a)(2)*. "However, mere presence of a person at the scene of a crime, or even flight from the scene, without more, is insufficient to support a conviction as a party to the offense." *Gross v. State, 380 S.W.3d 181, 188 (Tex. Crim. App. 2012)*.

C. Analysis

Appellant contends the evidence is insufficient to support his conviction for capital murder because there is no direct evidence that he committed the murder, and the circumstantial evidence has "no bearing on whether [he] is guilty" **[*22]** and is a product of "mere coincidence." We review the relevant evidence supporting the conviction to determine whether a rational juror could have found each of the elements beyond a reasonable doubt. *See Hammack, 622 S.W.3d at 914*.

Mrs. Garcia, Maricela, Luis, and Robert testified that Jiovanni and David fought shortly before David's death. Mrs. Garcia and Maricela witnessed Jiovanni attempt to

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[8] Appellant puts forth two sufficiency challenges: legal sufficiency and factual sufficiency. However, the court of criminal appeals held that there is no distinction between legal and factual sufficiency. *Brooks v. State, 323 S.W.3d 893, 902 (Tex. Crim. App. 2010)*. Accordingly, we conduct a singular sufficiency review. *See id.*

run David over in his white Cadillac. *See* Temple v. State, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013) ("Although motive and opportunity are not elements of murder and are not sufficient to prove identity, they are circumstances indicative of guilt."). Following the physical altercation between David and Jiovanni in front of Mrs. Garcia's residence, Jiovanni returned with appellant in appellant's white Dodge truck, looking for David. Minutes later, Mrs. Garcia and Maricela both reportedly heard gunshots. *See* Wolfe v. State, 917 S.W.2d 270, 275 (Tex. Crim. App. 1996) (finding sufficient evidence to support conviction where the evidence showed, in part, that "appellant lived in the same neighborhood[] and . . . was seen within a few blocks of the crime scene shortly before and shortly after the murder"). Residents nearby the shooting told officers they witnessed a white Dodge truck driving away immediately after hearing gunshots. *See* ***[*23]*** *id.; see also* Hammack, 622 S.W.3d at 914. Garza, appellant's neighbor, testified that appellant and Jiovanni returned home shortly after gunshots had rung out, and appellant drove with the Dodge truck's headlights "blacked out" so as not to be seen. *See* Guevara v. State, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004) (attempts to conceal evidence are probative of wrongful conduct and are circumstances of guilt). Moreover, Garza witnessed appellant wait until after an officer had driven past appellant's home to move his truck from along the street to an area behind a tree within his property's fence line, as if to hide it. *See id.* Garza's testimony is further corroborated by officer dash camera footage, which depicted appellant's white Dodge truck parked on the street minutes before the same officers returned to appellant's residence and observed the same truck now parked within the gated property. Coupled with the bloody footprint officers observed on the passenger-side doorstep of appellant's vehicle, there was sufficient evidence to support the inference that it was appellant and his white Dodge truck at the scene of the murder.

Further, Garza's testimony that Jiovanni was yelling that he was going to "kill the dog" shortly before he and appellant went to search for David **[*24]** could support a conclusion that Jiovanni set out with the intent to commit an offense. *See* Ross v. State, 133 S.W.3d 618, 621 (Tex. Crim. App. 2004) (finding sufficient evidence to support a conviction where defendant threatened the decedent with violence not long before the murder). Moreover, Garza testified that he asked appellant about the gunshots, but appellant denied hearing any whereas Luis and Robert testified they heard the gunshots from several blocks away. Garza explained that appellant disregarding the gunshots was inconsistent with his prior behavior as the head of the neighborhood watch group and would normally have investigated the cause.

Officers recovered Winchester .40 caliber hollow point ammunition from appellant's white Dodge truck—the same brand of casings found at the crime scene and type of bullets used to shoot David and Victor. *See* Hammack, 622 S.W.3d at 914-15; *see also* Marquez v. State, No. 04-09-00018-CR, 2009 Tex. App. LEXIS 8439, 2009 WL 3645670 (Tex. App.—San Antonio Nov. 4, 2009, pet. ref'd) (mem. op., not designated for publication) (considering empty shell casings found at the crime scene matched the ammunition with the weapon connected to the appellant when reviewing the sufficiency of the evidence).

Further, the forensic evidence tying Jiovanni and appellant to the murder supports the conviction. Appellant's hand and both Jiovanni's and appellant's clothing **[*25]** had gunshot residue present. *See* Ledford v. State, 649 S.W.3d 731 (Tex. App.—Houston [1st Dist.] 2022, no pet.) (considering the presence of gunshot residue on gloves worn by appellant when affirming conviction for murder); *see also* Firo v. State, No. 13-03-122-CR, 2004 Tex. App. LEXIS 1588, 2004 WL 305977 (Tex. App.—Corpus Christi—Edinburg Feb. 19, 2004, no pet.) (mem. op., not designated for publication) (considering the presence of gunshot residue on appellant's clothing when affirming conviction for murder). The jury was free to disbelieve evidence that appellant fired a weapon earlier in the day and accept Vachon's explanation that she would not expect to find gunshot residue on appellant's hand if he had fired a weapon only when he claimed to have—approximately eleven hours before officers collected the sample from appellant's hand. *See* Hammack, 622 S.W.3d at 914.

Importantly, the DNA taken from the blood samples connect Jiovanni to the murders. Although the presence of David's blood could be explained by the fight between David and Jiovanni, no other evidence was presented to explain the presence of Victor's blood on Jiovanni's clothing. Furthermore, the bloody footprint on the doorstep—and absence of bloody footprint in the white Cadillac—combined with what appeared to be a bloody footprint at the crime scene permits the jury to make the inference that Jiovanni or appellant shot David, Jiovanni stepped in David's **[*26]** blood, then got into the truck and went home. *See* Carter, 620 S.W.3d at 150. Although not all the forensic evidence supports a conviction, the jury has the sole authority to determine

the weight to be given to the evidence. *See* Hammack, 622 S.W.3d at 914.

Finally, appellant's actions before and after the shooting support the conclusion that, even if he were not the shooter, he was more than merely present at the crime scene. *See id.*; Gross, 380 S.W.3d at 188. Considering the entire record, we conclude there was sufficient evidence that a rational jury found each element of the offense beyond a reasonable doubt either as a principal actor or under the law of parties. *See* Tex. Penal Code Ann. §§ 7.01(a), 7.02(a)(2), 19.02(a)-(b); Hammack, 622 S.W.3d at 914. Appellant's first issue is overruled.

III. Motion to Suppress

By what we construe as appellant's second issue, appellant argues the officers committed criminal trespass in entering his property, and any consent obtained was involuntary and in violation of his constitutional rights under the Fourth, Fifth, and Fourteenth Amendments to the U.S. Constitution and under Article 1, §§ 9 and 19 of the Texas Constitution.

A. Standard of Review

We review a trial court's ruling on a motion to suppress evidence using a bifurcated standard of review. Wexler v. State, 625 S.W.3d 162, 167 (Tex. Crim. App. 2021), *cert. denied*, *142 S. Ct. 821, 211 L. Ed. 2d 508 (2022)*; Pecina v. State, 361 S.W.3d 68, 78-79 (Tex. Crim. App. 2012). "We afford almost total deference to the trial court's rulings on questions of historical fact and on application of law to fact **[*27]** questions that turn upon credibility and demeanor . . . ." Pecina, 361 S.W.3d at 79. When, as here, the trial court does not make explicit findings of fact, we view the evidence in the light most favorable to the trial court's ruling and presume that the court made implicit findings of fact supported by the record. Lerma v. State, 543 S.W.3d 184, 189-90 (Tex. Crim. App. 2018). A trial court's ruling should not be reversed unless it is arbitrary, unreasonable, or outside the zone of reasonable disagreement. State v. Cortez, 543 S.W.3d 198, 203 (Tex. Crim. App. 2018).

"[W]e review de novo the trial court's rulings on application of law to fact questions that do not turn upon credibility and demeanor." Pecina, 361 S.W.3d at 79. We will affirm the trial court's ruling on a motion to suppress if it is supported by the record and "correct under any applicable theory of law." Wells v. State, 611 S.W.3d 396, 406 (Tex. Crim. App. 2020) (quoting Furr v. State, 499 S.W.3d 872, 877 (Tex. Crim. App. 2016)).

B. Applicable Law

The text of the Fourth Amendment "expressly imposes two requirements[:] [f]irst, all searches and seizures must be reasonable[;] [s]econd, a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity." Kentucky v. King, 563 U.S. 452, 459, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011) (citing U.S. Const. amend. IV); Martin v. State, 620 S.W.3d 749, 759 (Tex. Crim. App. 2021). Such special protections attach to the home. Martin, 620 S.W.3d at 759. "At the [Fourth] Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" **[*28]** Florida v. Jardines, 569 U.S. 1, 6, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013) (quoting Silverman v. United States, 365 U.S. 505, 511, 81 S. Ct. 679, 5 L. Ed. 2d 734 (1961)). "To give full practical effect to that right, the Court considers curtilage—the area immediately surrounding and associated with the home—to be part of the home itself for Fourth Amendment purposes." Collins v. Virginia, 138 S. Ct. 1663, 1670, 201 L. Ed. 2d 9 (2018) (quoting Jardines, 569 U.S. at 6) (cleaned up). "[T]he extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself." United States v. Dunn, 480 U.S. 294, 300, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987).

"When a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred." Collins, 138 S. Ct. at 1670. A warrantless search of a curtilage is presumptively unreasonable. Igboji v. State, 666 S.W.3d 607, 613 (Tex. Crim. App. 2023). Where a defendant establishes that a warrantless search occurred, "the State has the burden of showing that probable cause existed at the time the search was made and that exigent circumstances requiring immediate entry made obtaining a warrant impracticable." Turrubiate v. State, 399 S.W.3d 147, 151 (Tex. Crim. App. 2013). "If either probable cause or exigent circumstances are not established, a warrantless entry will not pass muster under the Fourth Amendment." Parker v. State, 206 S.W.3d 593, 597 (Tex. Crim. App. 2006).

"Probable cause exists when reasonably trustworthy

circumstances within the knowledge of the police officer on the scene would lead him to reasonably believe that evidence of a crime will be found." **[*29]** *Turrubiate, 399 S.W.3d at 151*. Exigent circumstances justifying a warrantless entry include "(1) providing aid to persons whom law enforcement reasonably believes are in need of it; (2) protecting police officers from persons whom they reasonably believe to be present, armed, and dangerous; or (3) preventing the destruction of evidence or contraband." *Ratliff v. State, 663 S.W.3d 106, 116 (Tex. Crim. App. 2022)* (quoting *Turrubiate, 399 S.W.3d at 151*); *see Lange v. California, 141 S. Ct. 2011, 2017-18, 210 L. Ed. 2d 486 (2021)* (reviewing well-recognized exceptions for warrantless entry onto private property).

Pertinent to this appeal, voluntary consent to search is a recognized exception to the warrant requirement that exists separate from any exigency exception. *McGee v. State, 105 S.W.3d 609, 615 (Tex. Crim. App. 2003)*. However, officers which seek consent-based encounters must first be "lawfully present in the place where the consensual encounter occurs." *King, 563 U.S. at 463*. "[T]o constitute a valid waiver of *Fourth Amendment* rights through consent, a suspect's consent to search must be freely and voluntarily given." *State v. Villarreal, 475 S.W.3d 784, 799 (Tex. Crim. App. 2014)*. "An additional necessary element of valid consent is the ability to limit or revoke it." *Id.* Consent may be given orally or by action, or shown by circumstantial evidence. *Valtierra v. State, 310 S.W.3d 442, 448 (Tex. Crim. App. 2010)*. The validity of an alleged consent to search is a question of fact to be determined from the totality of the circumstances. *State v. Weaver, 349 S.W.3d 521, 526 (Tex. Crim. App. 2011)*. The "standard for measuring the scope of a **[*30]** suspect's consent under the *Fourth Amendment* is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Id.* Because issues of consent are necessarily fact-intensive, a trial court's finding of voluntariness must be accepted on appeal unless it is clearly erroneous. *See Meekins v. State, 340 S.W.3d 454, 460 (Tex. Crim. App. 2011)*.

C. Analysis

1. Relevant Background

Several officers testified at a hearing on appellant's motion to suppress. We summarize the relevant testimony below as it closely resembles testimony provided at trial.

At approximately 1:35 a.m. on October 8, 2010, Investigator Quilantan received notice from dispatch that two shots had been fired and two men were down in the 900 block of Santa Monica. Investigator Quilantan was the first to arrive on scene, and initial eyewitnesses reported seeing a gray pickup. By 1:38 a.m., Investigator Quilantan had received additional information from residents—the vehicle involved was a white Dodge truck. Investigator Perez testified that a neighbor claimed to have seen a white Dodge truck traveling southbound, fleeing the shooting. According to offense reports admitted as exhibits at the hearing, officers were also informed **[*31]** by the deceased's family member that one of the deceased had been in an argument earlier that same day with a male subject who resides at the corner of Laurel and Santa Monica.

Officers began canvasing the neighborhood for vehicles matching the new description, and at 2:03 a.m., officers arrived at a residence located between the intersection of Laurel and Santa Monica with a white Dodge truck in the driveway. After speaking with the owners of the vehicle, officers ruled out their involvement in the shooting and continued their search for the suspect vehicle.

Investigator Quilantan testified that at some unspecified point, another officer was informed that a white truck had driven up to the front of a home at 708 Santa Monica with the truck's headlights off. Investigator Quilantan testified that although other officers had passed 708 Santa Monica and noted the white Dodge truck, the vehicle was not observed to be on the street as described by the witness. Rather, the vehicle was situated "five, six feet" behind a chain linked fence. Upon returning to 708 Santa Monica at 2:16 a.m., Investigator Quilantan used his flashlight to shine a light on the property. Shortly thereafter, Investigator **[*32]** Quilantan saw an individual peek through window blinds and heard a door lock. Sergeant Castillo, meanwhile, spotted a large amount of blood inside a white Cadillac parked in the driveway of the same home.

At approximately 2:24 a.m., less than one hour after receiving calls of shots fired, officers entered the property of 708 Santa Monica. PPD Officer Jesus Garza testified that they entered the property to confirm there was no on-going danger. "We didn't know if anyone was in [the vehicle]," said Officer Garza. "[I]t could have been either a suspect, or another victim, or we didn't know. So we have to pretty much make sure that it's

clear from . . . from any other, I guess, threats to the public or ourselves." Investigator Quilantan testified he walked to the white Dodge truck and touched the hood, which he described as "pretty hot." Using his flashlight, Investigator Quilantan also observed a round inside the truck resembling a round found next to the deceased. The officers then exited the property.

At 2:56 a.m., four officers proceeded to the front door to initiate contact with the home's occupants and were greeted by appellant. Investigator Quilantan testified that no weapons were **[*33]** displayed or drawn. According to Investigator Quilantan, although they were invited in, out of an abundance of caution, Sergeant Leal sought written consent to search from appellant. The consent to search form was signed by appellant and contained a written-in time of 3:00 a.m. Sergeant Leal testified that he never got the impression that appellant did not understand what he was signing. Sergeant Leal further stated no weapons were drawn and he denied using any intimidation tactics, describing appellant as "welcoming and helpful." Officer Galaviz testified in concurrence.

Although appellant did not testify, he asked that the trial court take judicial notice of his sworn affidavit, wherein appellant stated at approximately 2:45 a.m., he heard a knock on his front door and opened it to see "about [five] officers" at the door and "many other officers around [his] property." Appellant stated, "Almost all of the officers had their weapons drawn. I was intimidated and fearful for my family because there were so many officers around my home with weapons." Appellant maintained that it was only after officers had begun searching the interior of his home and vehicles—that officers asked appellant **[*34]** for consent to search. Appellant avers that he was not given an opportunity to read the consent form before signing it; he was not informed that he had a right to refuse the search; and he felt "had no choice." Appellant further stated, "I did not want the officers on my property, but I was intimidated and fearful for my family. They had invaded my home and I was powerless to stop them."

2. Probable Cause

Assuming, without deciding, that the officers' entry onto the property past the gated fence line and touch of the truck was an unlawful entry and search, for reasons expounded below, we conclude probable cause and exigent circumstances existed, rendering entry and search permissible. *See* Martin, 620 S.W.3d at 759; Parker, 206 S.W.3d at 597; *see also* King, 563 U.S. at 463.

The following information available to officers at the time of their entry onto appellant's curtilage established probable cause: a double homicide had transpired less than one hour before, and multiple witnesses reported the involvement of a white Dodge truck; a white Dodge truck was parked at appellant's home at 708 Santa Monica; the decedents' family told officers that David had been in a physical altercation with an individual who resided at the home where the white Dodge truck was **[*35]** parked; appellant's neighbor reported seeing the white Dodge truck returning to the home with its headlights off shortly after the shooting, an unusual activity considering the time of evening; in response to the officers presence on the street, a resident of 708 Santa Monica was seen peeking through blinds before locking the door; and while still outside the fence line, an officer observed what he believed to be blood inside another vehicle parked in the driveway. These facts and circumstances were sufficient to warrant a reasonable man in believing that (1) a crime had been committed; (2) the white Dodge truck was utilized in the commission of the crime; and (3) an individual or individuals residing at 708 Santa Monica had committed the crime. *See* Turrubiate, 399 S.W.3d at 151.

3. Exigent Circumstances

We now turn to the question of whether the evidence of exigent circumstances in this case was sufficient to support a warrantless search of the curtilage. Investigator Quilantan testified he believed exigent circumstances warranted entry: "[A] double homicide had just occurred. People were telling us that that's the suspect vehicle. And I didn't know if anybody was in there. I didn't know if we were going to have **[*36]** an active shooter. I didn't know if the suspect was still inside the vehicle at that time." Additionally, Investigator Quilantan testified regarding his concern about the potential loss of evidence, namely, the dissipation of heat leaving the vehicle believed to be involved in the shooting. This—coupled with the officers' observance that there was blood splattered inside another vehicle in the driveway and that a resident inside the home locked the door in response to police presence—satisfied the exigent circumstance exception. *See* Missouri v. McNeely, 569 U.S. 141, 145, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013) (observing that consistent with general Fourth Amendment principles, exigency is a matter which "must be determined case by case based

on the totality of the circumstances"); Barocio v. State, 158 S.W.3d 498, 500 (Tex. Crim. App. 2005) ("[P]olice may properly enter to look for other perpetrators or victims.") (internal citations omitted). Further, we defer to the trial court's evaluation of the officers' credibility and demeanor during their testimony as to the circumstances on the night in question. See Estrada v. State, 154 S.W.3d 604, 610 (Tex. Crim. App. 2005); see, e.g., Pache v. State, 413 S.W.3d 509, 513 (Tex. App.—Beaumont 2013, no pet.) (concluding there was probable cause to enter a home without a warrant where officers reported that appellant opened the door, saw officers, and fled). Thus, we conclude that the trial court did not abuse its discretion **[*37]** in finding that exigent circumstances were present. We overrule this issue in part.

4. Involuntary Consent to Search

We next turn to the issue of appellant's consent.[9] We observe that the motion to suppress record contains conflicting evidence, with appellant asserting via affidavit that he was uninformed of his rights to decline the officers' search and that he had only consented under coercion. See *Villarreal, 475 S.W.3d at 799*; see also Tippin v. State, No. 13-17-00201-CR, 2018 Tex. App. LEXIS 6045, 2018 WL 3675646, at *6 (Tex. App.—Corpus Christi—Edinburg Aug. 2, 2018, pet. ref'd) (mem. op., not designated for publication) ("Warning an individual of their right to refuse consent is not necessary for a voluntary grant of consent."). Meanwhile, officers denied behaving in a threatening or coercive manner, described appellant's demeanor as calm and cooperative, and stated appellant provided verbal consent prior to signing the consent to search form. See *Villarreal, 475 S.W.3d at 799*. Additionally, according to officers' testimony, appellant gave no indication that he objected to the search, nor did he withdraw consent as he watched officers execute the search. See Miller v. State, 393 S.W.3d 255, 266 (Tex. Crim. App. 2012) (providing that a person who consents to law enforcement entry "may specifically limit or revoke his consent"); Villarreal v. State, 565 S.W.3d 919, 931 (Tex. App.—Corpus Christi—Edinburg 2018, pet. ref'd) (providing that where appellant "placed no limitations on the scope of his consent and never objected to the search, **[*38]** even as he watched [the officer] explore various parts of the vehicle for over an hour," the trial court appropriately concluded the officer had received consent to search).

Under the circumstances of this case, the validity of appellant's consent to search was a factual determination that ultimately turned on witness credibility. See Meekins, 340 S.W.3d at 460; Hutchins v. State, 475 S.W.3d 496, 500 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd) (finding that, where a defendant denies consent was provided in contravention to officer testimony, the trial court's determination turns on witness credibility). In accordance with the established standard of review on a motion to suppress, we afford "almost total deference" to the trial court's factual determination that appellant validly consented to the search, and that determination was supported in the record by Sergeant Leal's unequivocal testimony that appellant gave verbal consent to enter the premises and Sergeant Leal's affirmance that no physical or psychological tactics had been employed in the process. See Hutchins, 475 S.W.3d at 500; Uriel-Ramirez v. State, 385 S.W.3d 687, 693 (Tex. App.—El Paso 2012, no pet.) (finding that appellant consented to a search where detectives testified appellant said "Go ahead," and "the trial court was free to disbelieve" appellant's testimony that he did not provide consent); see also Tippin, 2018 Tex. App. LEXIS 6045, 2018 WL 3675646, at *6 (concluding "[w]arning **[*39]** an individual of their right to refuse consent is not necessary for a voluntary grant of consent" and an appellant's previous law enforcement encounters were indicative of an appellant's awareness she could deny consent to search). The trial court's finding is not "clearly erroneous" when viewed in the light most favorable to the prosecution, and we defer to it on appeal. See State v. Ruiz, 581 S.W.3d 782, 785 (Tex. Crim. App. 2019); Meekins, 340 S.W.3d at 459 n. 24, 460. We overrule appellant's second issue.

IV. Evidentiary Issues

We construe issues one through six, renumbered as issue three, to be a challenge to appellant's ability to cross-examine Officer Galaviz and Luis.

A. Standard of Review and Applicable Law

The Confrontation Clause of the Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the

[9] Appellant argues the consent to search was involuntary because the officers' entry into his home was illegal, and that the taint in the illegality had not dissipated by the time consent was given. We have rejected his argument that the entry was illegal.

accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The Sixth Amendment right to confront witnesses includes the right to cross-examine to attack their general credibility or to show their possible bias, self-interest, or motives in testifying. Johnson v. State, 490 S.W.3d 895, 909 (Tex. Crim. App. 2016); Hammer v. State, 296 S.W.3d 555, 561 (Tex. Crim. App. 2009) (citing Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)). Although broad, the scope of appropriate cross-examination is not unlimited, and the trial court generally has wide discretion in limiting the scope and extent of cross-examination. Johnson, 490 S.W.3d at 909-910; Hammer, 296 S.W.3d at 561. For example, a trial court may properly limit the **[*40]** scope of cross-examination to prevent "harassment, prejudice, confusion of the issues," harm to the witness' safety, and "repetitive or only marginally relevant" interrogation. Johnson, 490 S.W.3d at 910-11. We review a trial court's decision to limit cross-examination for an abuse of discretion. *See* Nguyen v. State, 506 S.W.3d 69, 85 (Tex. App.—Texarkana 2016, pet. ref'd); *see also* Garcia v. State, No. 13-17-00218-CR, 2019 Tex. App. LEXIS 2397, 2019 WL 1388532, at *6 (Tex. App.—Corpus Christi—Edinburg Mar. 28, 2019, pet. ref'd) (mem. op., not designated for publication). In order to preserve error regarding improperly excluded evidence, a party must timely object, obtain a ruling from the trial court (or object to the trial court's refusal to rule), and prove the substance of the excluded evidence through an offer of proof. *See* Tex. R. App. P. 33.1(a); Tex. R. Evid. 103(a).

B. Eric Galaviz

Appellant first points to a single exchange wherein appellant alleges his trial counsel was prohibited from properly cross-examining Officer Galaviz to show "the existence of possible criminal conduct on the part of the [officers], as well as their bias, motive[,] and prejudice."

> [DEFENSE:] Okay. Now, with reference to the house, you said you were—you-all had focused your attention towards the truck. Did you even make an effort to go towards knocking and talking while—
>
> [STATE:] Your Honor, objection. This is again talking—he's—it's argumentative. He is trying to imply that there is some **[*41]** kind of trespass that occurred[,] and this Court has already ruled that it was not a trespass.
> [DEFENSE:] Your Honor, we're going to—
> [STATE:] And he has ruled on this issue.
> [DEFENSE:] Your Honor, we would object. If she has a specific objection, she needs to state that—
> [STATE:] Argumentative.
> [DEFENSE:] —and not make an argumentative objection, Your Honor.
> THE COURT: I am going to sustain the objection.

Here, after the State objected to appellant's cross-examination of Officer Galaviz, appellant replied that the State's objection lacked specificity. Appellant did not argue nor did he cite to any rules of evidence, cases, or constitutional provisions regarding his perceived limitation on his right to confrontation. Moreover, appellant did not provide an offer of proof to show the substance of the excluded evidence.[10] *See* Tex. R. Evid. 103(a)(2). Accordingly, appellant's sub-issue has been waived. *See* Golliday v. State, 560 S.W.3d 664, 670-71 (Tex. Crim. App. 2018) ("[A] defendant must state the grounds for the ruling that he seeks with sufficient specificity."); Reyna v. State, 168 S.W.3d 173, 179 (Tex. Crim. App. 2005) (providing that objection that evidence should have been admitted for "credibility" did not preserve complaint based on the Confrontation Clause); *see also* Hameed v. State, No. 13-19-00145-CR, 2020 Tex. App. LEXIS 2959, 2020 WL 1857842, at *3-4 (Tex. App.—Corpus Christi—Edinburg Apr. 9, 2020, no pet.) (mem. op., not designated for publication) (concluding that appellant did not **[*42]** preserve his complaint where he did not object to the trial court's ruling on the appealed of basis and did not provide an offer of proof to show the substance of the excluded evidence). We overrule this sub-issue.

C. Luis De La Cruz

Appellant next argues the trial court abused its discretion in excluding impeachment evidence concerning Luis's criminal history,[11] namely, a pending

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[10] By one sentence, appellant cites to another colloquy in the record, arguing: "This Court need not pass on the strength or merits of [appellant's] defense in order to find that the trial court's 'argumentative' ruling, 34R42-44, is arbitrary and served no legitimate purpose." The colloquy, however, accumulated with an off the record discussion followed by a decision by the trial court that was favorable to appellant. In this instance, the trial court overruled the State's objection and gave appellant "a little bit of leeway to continue his examination." It is unclear what appellant is challenging here.

[11] Appellant was permitted to cross-examine Luis on his prior felony conviction of aggravated assault with a deadly weapon

misdemeanor assault charge.

We review the trial court's admission or exclusion of impeachment evidence under the same abuse-of-discretion standard set forth above. *Beham v. State, 559 S.W.3d 474, 478 (Tex. Crim. App. 2018)*. Generally, however, a witness's credibility may not be impeached with specific instances of conduct except through certain criminal convictions. *See Tex. R. Evid. 608(b)*, *609*; *see also Crambell v. State, No. 01-17-00331-CR, 2018 Tex. App. LEXIS 4823, 2018 WL 3150693, at *11 (Tex. App.—Houston [1st Dist.] June 28, 2018, pet. ref'd)* (mem. op., not designated for publication) ("Moreover, because [the witness] did not have a criminal conviction for filing a false report, use of the prior charge would violate *Rule 608(b)*'s prohibition against using specific instances of a witness's conduct to attack the witness's character for truthfulness."). Certain credibility evidence may be also admissible where a witness "opens the door" by placing his or her credibility at issue. *Allen v. State, 473 S.W.3d 426, 454 (Tex. App.—Houston [14th Dist.] 2015, pet. dism'd)*; *see Daggett v. State, 187 S.W.3d 444, 453 n.24 (Tex. Crim. App. 2005)* ("When a witness makes a broad statement of good conduct **[*43]** or character on a collateral issue, the opposing party may cross-examine the witness with specific instances rebutting that false impression, but generally may not offer extrinsic evidence to prove the impeachment acts."). Even if a party "opens the door," the trial court still retains its discretion to exclude the evidence under *Rule 403*. *Hayden v. State, 296 S.W.3d 549, 554 (Tex. Crim. App. 2009)*; *see Tex. R. Evid. 403*. That is, the trial court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." *Tex. R. Evid. 403*; *see also Tex. R. Evid. 401* (providing that evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence). The burden is on the proponent of evidence to tell the trial court why the evidence is admissible following an objection by the opponent of the evidence. *White v. State, 549 S.W.3d 146, 152 (Tex. Crim. App. 2018)* (citing *Reyna, 168 S.W.3d at 177*). "[I]t is not enough to tell the judge that evidence is admissible." *Reyna, 168 S.W.3d at 177*.

Following appellant's question of whether Luis had "currently pending charges," the State objected, arguing that information concerning the witness's pending criminal case is irrelevant **[*44]** and improper impeachment under *Rule 609*. Appellant countered that Luis's pending charge could "lead to a potential bias or—or influence of testimony," and appellant was "allowed to impeach [Luis's] character under *Rule 608* for truthfulness or untruthfulness." We agree with the State.

The transcript of appellant's cross-examination of Luis consists of over forty-five pages in the reporter's record. Appellant had a full and fair opportunity to probe and expose Luis's alleged testimonial infirmities through cross-examination. *See id.* at 847. Immediately preceding appellant's question concerning Luis's pending criminal charge question, appellant was permitted to cross-examine Luis on his prior felony conviction of aggravated assault with a deadly weapon and alleged gang involvement. While the Confrontation Clause of the Sixth Amendment affords appellant the right to be confronted with the witnesses against him, the Confrontation Clause does not permit appellant the right to impeach Luis's general credibility through otherwise prohibited modes of cross-examination. *See id.* at 893.

Moreover, *Rule 608(b)* provides in relevant part: "Except for a criminal conviction under *Rule 609*, a party may not inquire into or offer extrinsic evidence to prove specific instances of the witness's conduct in order to attack **[*45]** or support the witness's character for truthfulness." *Tex. R. Evid. 608(b)*. Accordingly, whether Luis's pending criminal charge was admissible is at least subject to reasonable disagreement. *See Beham, 559 S.W.3d at 478*. Therefore, the trial court did not abuse its discretion by excluding the testimony. We overrule this issue in its entirety.

V. Charge Error

In his fourth point of error, appellant challenges the legality of his proffered consent leading to the search of his home and property and alleges the trial court erred in denying his request for an exclusionary rule instruction under *Article 38.23(a) of the Texas Code of Criminal Procedure*. *See Tex. Code Crim. Proc. Ann. art. 38.23(a)* ("No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.").

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and alleged gang involvement.

A. Standard of Review and Applicable Law

Trial courts are obligated to instruct the jury on the law applicable to the case. *Williams v. State, 662 S.W.3d 452, 460 (Tex. Crim. App. 2021)*; *see* *Tex. Code Crim. Proc. Ann. art. 36.14*. In evaluating alleged jury charge error, we first determine whether the trial court erred in refusing the requested instruction. *Gonzalez v. State, 610 S.W.3d 22, 27 (Tex. Crim. App. 2020)*. If we find error, we then engage in a harm analysis. *Id.* The degree of harm necessary for reversal **[*46]** depends on whether the error was preserved. *Jordan v. State, 593 S.W.3d 340, 346 (Tex. Crim. App. 2020)* (citing *Almanza v. State, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985)*). Where, as here, the defendant preserved the alleged error, should we find error then we must reverse if we find "some harm." *Jordan, 593 S.W.3d at 347* ("'Some harm' means actual harm and not merely a theoretical complaint."); *Almanza, 686 S.W.2d at 171*.

Article 38.23(a) is a statutory exclusionary rule which exists to prevent illegally obtained evidence from being used at trial. *See* *Holder v. State, 639 S.W.3d 704, 707 (Tex. Crim. App. 2022)*; *Day v. State, 614 S.W.3d 121, 128 (Tex. Crim. App. 2020)* ("The text of *Article 38.23* addresses the admissibility of evidence at trial when the law has been violated."). When evidence presented at trial directly pertains to a contested fact issue and raises a concern of whether it was legally obtained, the jury shall be instructed that "if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of [*Article 38.23*], then and in such event, the jury shall disregard any such evidence so obtained." *Tex. Code Crim. Proc. Ann. art. 38.23(a)*. In other words, *Article 38.23(a)* "is fact-based: For example, 'Do you believe that Officer Obie held a gun to the defendant's head to extract his statement? If so, do not consider the defendant's confession.'" *Oursbourn v. State, 259 S.W.3d 159, 173-74 (Tex. Crim. App. 2008)*. The "contested fact issue must be material to the lawfulness of the challenged conduct in obtaining the evidence," and the burden is on the defendant to make the showing **[*47]** of materiality. *Chambers v. State, 663 S.W.3d 1, 4 (Tex. Crim. App. 2022)* (first citing *Tex. Code Crim. Proc. Ann. art. 38.23*; and then citing *Madden v. State, 242 S.W.3d 504, 510-11 (Tex. Crim. App. 2007)*). Further, disputed evidence must be brought forth by an appropriate witness. *Oursbourn, 259 S.W.3d at 177*. "The cross-examiner cannot create a factual dispute for purposes of an *Article 38.23(a)* instruction merely by his questions. It is only the answers that are evidence and may create a dispute." *Madden, 242 S.W.3d at 514*.

B. Analysis

During a charge conference, appellant requested the submission of an *Article 38.23(a)* jury instruction:

> We are asking for the instruction that as a matter of fact the Court—I mean, this Jury can consider whether the search of the premises was voluntary and given certain facts and circumstances that they were able to hear. And during the course of this case they could make certain determinations with reference to certain evidence that was brought forward and make the determination as a matter of fact that consent was not proper or elicited in a way that would justify its inclusion and to their consideration. So they should be instructed under that basis of law as well, Your Honor.

The State countered that appellant had not shown there was a material fact issue on the voluntariness of appellant's consent because the State's witnesses uniformly testified that consent had been provided voluntarily, **[*48]** knowingly, and intelligentially. The trial court denied appellant's requested *Article 38.23(a)* jury instruction, and the jury returned a guilty verdict.

As the State correctly notes, appellant elicited no testimony at trial to raise a fact issue suggesting that appellant's consent was *not* freely or voluntarily given. While appellant's trial counsel insinuated through his questioning on cross-examination of various officers that appellant was not given adequate time to review the consent to search form, no evidence was adduced at trial to contradict Sergeant Leal's testimony that appellant's consent was obtained voluntarily, knowingly, and intelligentially. *See* *Madden, 242 S.W.3d at 514*; *see also* *Rodriguez v. State, No. 13-19-00326-CR, 2022 Tex. App. LEXIS 3546, 2022 WL 1669069, at *17 (Tex. App.—Corpus Christi—Edinburg May 26, 2022, no pet.)* (mem. op., not designated for publication) (concluding appellant's pretrial hearing testimony concerning voluntariness could not be considered in the instruction analysis because some evidence must have been presented to the jury at trial on voluntariness). To the extent that appellant also challenges the officers' conduct preceding the obtained valid written consent, we are once more left with questions and applications of law to undisputed facts and implications by counsel, which do not, by themselves, raise a disputed fact issue. **[*49]** Accordingly, appellant was not entitled to an *Article 38.23(a)* instruction. *See* TEX. CODE CRIM.

PROC. ANN. art. 38.22; *Oursbourn, 259 S.W.3d at 176*; *see also Brooks v. State, No. 13-20-00085-CR, 2021 Tex. App. LEXIS 4837, 2021 WL 2461062, at *11 (Tex. App.—Corpus Christi—Edinburg June 17, 2021, no pet.)* (mem. op., not designated for publication) (noting that *Article 38.23* jury instructions predicated on matter of law matters are not appropriate absent the existence of question of fact). We overrule this issue.

VI. CONCLUSION

We affirm the trial court's judgment.

CLARISSA SILVA

Justice

Do not publish.

Tex. R. App. P. 47.2 (b).

Delivered and filed on the

28th day of August, 2023.

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6/5/2024 **COA Case No. 13-18-00614-CR**
ALCALA, ELOY HERACLIO Tr. Ct. No. CR-4969-10-F PD-0119-24
On this day, the Appellant's petition for discretionary review has been refused.
Deana Williamson, Clerk

VICTORIA GUERRA
ATTORNEY AT LAW
3219 N. MCCOLL ROAD
MCALLEN, TX 78501
* DELIVERED VIA E-MAIL *

Alcala v. State

Court of Appeals of Texas, Thirteenth District, Corpus Christi - Edinburg

July 24, 2014, Delivered; July 24, 2014, Filed

NUMBER 13-12-00259-CR

Reporter
2014 Tex. App. LEXIS 7949 *; 2014 WL 3731733

ELOY HERACLIO ALCALA, Appellant, v. THE STATE OF TEXAS, Appellee.

Notice: PLEASE CONSULT THE TEXAS RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

Subsequent History: Petition for discretionary review refused by *In re Alcala, 2014 Tex. Crim. App. LEXIS 1951 (Tex. Crim. App., Dec. 17, 2014)*

Prior History: **[*1]** On appeal from the 332nd District Court of Hidalgo County, Texas.

Alcala v. State, 2013 Tex. App. LEXIS 13924 (Tex. App. Corpus Christi, Nov. 14, 2013)

Core Terms

Investigator, truck, interrogation, gunshots, murder, video, responded, guilt, gun, right to counsel, crime scene, parked, rights, happened, inside, invoked, blood, questions, talk, neighbor, scene, arrived, driving, trial court, walked, drove, van, circumstances, caliber, commission of the offense

Case Summary

Overview

HOLDINGS: [1]-The evidence was sufficient to sustain defendant's capital murder conviction under *Tex. Penal Code Ann. § 19.03* because bullets were discovered in defendant's truck that matched casings found at the crime scene, and a shoe print with the victim's blood was discovered on the passenger side of defendant's truck; [2]-Defendant's *U.S. Const. amend. V* right to counsel was violated when the investigator continued the interrogation; while defendant's initial question, "should I have an attorney" was not a clear invocation of his right to counsel, his subsequent statement indicated that he wanted an attorney because he was not aware of the circumstances of the crime; [3]-The error in admitting the statement was not harmless under *Tex. R. App. P. 44.2* because there were no eye-witnesses and no evidence of violent threats made by defendant, and a murder weapon was never recovered.

Outcome

The judgment was reversed and remanded for a new trial.

Counsel: FOR APPELLANT: Hon. William L. Hubbard, Attorney at Law, McAllen, TX.

FOR STATE: Hon. Rene A. Guerra, Criminal District Attorney, Hidalgo County Courthouse, Edinburg, TX; Hon. Glenn W. Devino, Assistant District Attorney, Edinburg, TX.

Judges: Before Chief Justice Valdez and Justices Rodriguez and Garza. Memorandum Opinion by Chief Justice Valdez.

Opinion by: ROGELIO VALDEZ

Opinion

MEMORANDUM OPINION

Memorandum Opinion by Chief Justice Valdez

Appellant, Eloy Heraclio Alcala, appeals his conviction for capital murder. *Tex. Pen. Code Ann. § 19.03* (West, Westlaw through 2013 3d C.S.). By three issues, which we have reordered, Alcala contends that: (1) the evidence was insufficient to support the jury's verdict; (2) the trial court erred by denying his motion to suppress a video of a police interrogation; and (3) the

trial court erred by denying his motion to suppress evidence obtained from an illegal search of his house. We reverse and remand for a new trial.

I. Background

At trial, the State offered witness testimony and physical evidence in support of its allegation that Alcala committed capital murder either as the principal or as a party, in tandem with his son, Eloy Jiovanni Perez Alcala (Jiovanni).[1]

A. [*2] Officer Enrique Ontiveros

Officer Enrique Ontiveros testified that on October 8, 2010, while on patrol of the area of Pharr known as "Las Milpas," at approximately 1:34 a.m., he heard three gunshots. Officer Ontiveros drove toward the area where he believed the shots were fired. Subsequently, dispatch directed Officer Ontiveros to an intersection where reports indicated there were "two men down." Officer Ontiveros testified that the dispatcher advised responding officers to be on the lookout for a "gray or light colored truck." Upon arriving at the crime scene, he discovered a brown minivan and "two men down." He testified that he made contact with Arturo Arredondo, who lived "right in front of the crime scene." From Arredondo, he obtained information that the suspect vehicle was a white Dodge Ram pickup truck and relayed this information to dispatch.

The State admitted a video from Officer Ontiveros's dashboard camera into evidence and played it for the jury. As Officer Ontiveros was approaching the crime scene, the camera captured a light-colored Dodge truck parked on the side of the road, but Ontiveros testified that he did not notice the truck when he passed it.

At the scene, Ontiveros **[*3]** spoke with Marisela Garcia, who arrived in an SUV after Officer Ontiveros. She identified herself as the mother of one of the victims, David Garcia. She stated that she had been looking for her son, who had been drinking all day and had gone for a walk. Officer Ontiveros testified that he observed two spent bullet casings and a pink receipt at the crime scene.

B. Officer Jose Alejandro Luengo

Officer Jose Alejandro Luengo testified that he responded to the dispatch call regarding "two men down" in order to "back up" Officer Ontiveros. The trial court admitted a video captured by Officer Luengo's dashboard camera, and the State played the video for the jury. Officer Luengo testified that the video revealed a white Dodge pickup truck with its driver's side door ajar parked on the roadway near the crime scene. This image was captured at 1:39 a.m. Officer Luengo explained that when he arrived at the crime scene with Officer Ontiveros, he discovered the two victims laying near the brown van "with blood around their heads and what appeared—gunshot wounds." Officer Luengo testified that he observed bullet casings, but was not involved in collecting any evidence. He testified that he then assisted **[*4]** with the search for a white Dodge pickup that had been reported as the suspect vehicle and that the officers discovered a vehicle matching that description parked in the driveway of a nearby house. He further explained that the vehicle parked in the driveway was the same vehicle that the dashboard camera recorded parked on the roadway.

C. Arturo Arredondo

Arturo Arredondo testified that he lives near the scene of murder. Appellant is his son's godfather. Arredondo was awakened by the sound of two gunshots at "around 1:00 to 1:30" on the night of the murder. He walked to his window and observed a "kind of white creamy" truck with a Ram emblem on the back driving away from the area. Arredondo testified that it was dark and that he "didn't see the whole truck." Arredondo watched the truck head south and turn right. On cross-examination, Arredondo clarified that he did not know if the truck he saw was "the Alcala truck" and agreed that there were several Dodge pickup trucks belonging to neighbors in the area. In front of his house, Arredondo also saw a van with its lights on and "somebody was on the floor." He then called 911.

D. David Garza

David Garza lived across the street from Alcala's **[*5]** house at the time of the alleged murder. In the early morning hours, Garza's family received a call from

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[1] Previously, we issued an opinion affirming the Jiovanni's conviction for the murder, either as a principle or a party, of the victims in this case. *Alcala v. State, S.W.3d , No. 13-12-00173-CR, 2013 Tex. App. LEXIS 13924, 2013 WL 6053837 (Tex. App.—Corpus Christi Nov. 14, 2013, pet. ref'd)*.

his sister-in-law informing them that Alcala's son, Jiovanni, "was out in the street yelling that he was going to kill that damn dog." Garza testified that he owns a dog and was concerned that Jiovanni wanted to kill his dog. He went outside and watched Alcala's truck drive "around the corner on Laurel." He neither saw who was driving the truck, nor whether there were any passengers. Garza testified that the truck "stopped by [victim David Garcia's] house." On cross-examination, Garza clarified that he did not actually see the truck stop at Garcia's house, but that the truck stopped at some point before leaving the neighborhood.

Garza testified that he then went back into his house to use the restroom. While he was in the restroom, he heard three gunshots. On cross-examination, defense counsel asked if he heard the gunshots forty-five minutes to an hour after he went inside the house; Garza responded, "Yes. More or less, yes." He testified that he ran to his bedroom window to see what was going on, but he "couldn't see anything." Then he saw Alacala's truck drive up to and park on **[*6]** the street in front of Alcala's house. Garza testified that Jiovanni exited the passenger side of the vehicle and walked towards his own car, a Cadillac, that was parked on the property. Jiovanni popped the hood of his Cadillac and then closed the hood. After a police car drove by, Alcala moved his truck into the driveway without turning on the headlights. Garza found it suspicious that Alcala failed to turn on his headlights.

Garza and his wife went outside, and Garza asked Alcala, "What happened?" and "Why was Jiovanni yelling?" Garza testified that Alcala responded, "Oh, it's just that they were fighting with him and—but I already took care of that." Garza's wife informed Alcala that they had heard gunshots. Garza testified that Alcala responded, "Really?" and "Well, I don't know." Alcala told Garza and his wife that he would see them in the morning because he had to work early in the morning. Alcala then went inside his house. Garza found it unusual that Alcala was not concerned because "every time something strange would happen like dogs barking—or loud noises or whatever, [Alcala] would shine a big old spotlight and he'd shine the spotlight to see what was going on in—in the neighborhood **[*7]** or in the area." On cross-examination, Garza testified that, at the time, Alcala was calm.

Garza testified that Alcala closed his gate and turned off the utility light over his storage area. Garza also observed two or three officers on the street near his house that were touching another white Dodge pickup truck that was similar to Alcala's truck. Garza heard the officers ask the owner if he had just gotten there and heard the owner respond that the truck had been there for a couple of hours. Garza testified that he and his wife walked over to the neighbor's property and that he directed the officers to Alcala's truck. The officers entered Alcala's property and started touching the truck. One of the officers interviewed Garza about what he had seen that night.

E. Marisela Garcia

Marisela Garcia, the mother of victim David Garcia, testified that on the night of her son's death, he arrived home around 12:00 or 1:00 a.m. He had been working in the fields that day with his cousin, victim Victor De La Cruz. Marisela heard David's truck arrive at their house, but when he did not come inside, she "got up to see why he wasn't coming in." Marisela testified that she opened the door to her house **[*8]** and discovered David fighting Jiovanni inside of a white car. She and a neighbor were able to separate the two men. Marisela brought David inside the house. She believed he had been drinking. She asked him, "Why are you fighting? You are friends." Marisela testified that David responded, "Look at what they did to me." She testified that David "was full of blood, a cut that he had on his forehead was bleeding a lot." David informed Marisela that they were fighting because "a female had honked at him." David then left the house and told Marisela that he would be back. Marisela testified that, as he was walking away from the house, Jiovanni, who was now driving his own car, "steered his car towards" David. David, however, continued walking away from the house.

Marisela testified that later, Jiovanni returned to her house with Alcala. They arrived in a white truck that Alcala was driving. Marisela testified that she "thought they had come to do something to us, because they both got there asking for [David.]" She testified that Jiovanni told her that they were looking for David's wife, and Alcala asked to speak to Marisela's husband. She recalled that they were both angry, but neither threatened **[*9]** to hurt her or any member of her family. Marisela explained to Jiovanni and Alcala that neither her husband nor David was at the house and asked them to "leave it until tomorrow . . . . You can talk tomorrow once you are calmer." Marisela testified that Jiovanni responded, "Whether it's today or tomorrow, something is going to happen."

Marisela testified that Jiovanni and Alcala then left the house, with Alcala driving the white truck and Jiovanni in the passenger seat. She stated that they were traveling south when they left the house. She did not see the truck turn. "Immediately" after, Marisela saw Victor De La Cruz's van pass by her house, also heading south. She saw that Victor was driving the van but could not see whether David was in the van. She then stated, "When the van passed by, I was outside so that when the van passed by and almost—when it made a turn, I do not know how many minutes, I heard some gunshots." On cross-examination, defense counsel asked Marisela if she heard gunshots "quite a bit later" after she saw the van pass by her house; she responded, "It was almost — it was almost instantly when the van passed. It could have been a matter—it was when the van passed **[*10]** by we heard the gunshots when we are talking outside, and that's when the police passed by very fast."

Marisela testified that when she heard the gunshots, "I felt that it could have been my son." She saw a policeman drive by "very fast" and asked a neighbor to take her to the scene of the crime. Marisela testified, "when I saw them there, lying there, I thought immediately that it had been Jiovanni because he is the one that had fought with him."

F. Janie Arrellano

Janie Arrellano testified that she is an ID Tech with the Pharr Police Department. She reported to the crime scene on October 8, 2012. At the scene, she recovered two bullet casings and a pink receipt. Arrellano was also present at the search of Alcala's residence. At the residence, Arrellano photographed two vehicles parked in the driveway, a white truck and a white Cadillac. Arrellano observed blood "that was practically all over" the Cadillac. The trial court admitted a video of the search of Alcala's property, and the State played it for the jury. As the video played, Arrellano testified that there were several pink receipts located in Alcala's truck. She testified that "[t]o my—to my opinion, I thought to myself they **[*11]** were kind of—looked like the same—kind of the—the receipt we had found at the crime scene." She stated that all of the receipts that were found were from "Matt's Building and Materials." Arrellano testified that live rounds of bullets were found, one in a cup holder and several in the back of the truck. There was also a backpack with magazine clips. All of the bullets found in the truck were .40 caliber Winchester Smith & Wesson bullets. Arrellano testified that the casings from the crime scene were also .40 caliber Winchester Smith & Wesson.

Arrellano testified that the white Dodge Ram was processed at the police station. As the video played, she identified blood that was found on the step outside of the truck leading to the passenger seat. Arrellano was not sure whose blood it was. The blood on the step appeared in a pattern that was similar to a pattern on the sole of a pair of shoes found in Jiovanni's room.

G. Officer Juan Manuel Quilantan

Officer Juan Manuel Quilantan testified that he headed to the scene of the crime after Officer Ontiveros asked "dispatchers if they had received any calls for shots fired." Upon arriving at the scene, Officer Quilantan made contact with Officer **[*12]** Ontiveros. Officer Quilantan testified that the suspect vehicle had been identified as a white Dodge Ram; he further testified that he was not aware of any eye-witnesses to the shooting. At the scene, Officer Quilantan observed two bullet casings and a receipt laying near one of the casings. Officer Quilantan "got other officers to assist [him]" in searching the neighborhood for the suspect vehicle. They discovered a white pickup truck parked on the street. At the time, Officer Quilantan was with Officer Luengo and Officer Galavis.[2] Officer Quilantan testified that he touched the hood of the vehicle to determine if it had recently been driven and found that it was "cold, cold as can be." This indicated to Officer Quilantan that it had not recently been driven; he therefore believed that it was not the suspect vehicle.

The officers then walked towards Alcala's residence. Officer Quilantan testified, "That's when we spot the truck." He explained that it was difficult to see because it was a dark area inside the property and there was a tree blocking the way. The property was enclosed completely by a metal fence. Officer Quilantan remembers seeing **[*13]** someone looking through the blinds from a window in Alcala's house. There was also a Cadillac CTS parked inside the property. The two officers decided to walk onto the property "just to eliminate any possible person of interest." Officer Quilantan touched the hood and grille of the white Dodge Ram, and it was warm. Sergeant Castillo then arrived at Alcala's house and asked Officer Quilantan if he had "seen the inside of the car." Officer Quilantan testified, "And that's when we found the—back portion

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[2] Officer Galavis also testified at trial.

of the front headrest of the car full of blood." On cross-examination, Officer Quilantan testified that, using a flashlight, he looked through the passenger side window of the Dodge Ram and observed a live round of ammunition.

The officers then decided to speak with the owners of the property. The officers knocked on the door and spoke with Alcala. The officers asked to speak to Jiovanni, and they read Jiovanni his *Miranda* rights. Officer Quilantan could not remember if he could see any visible injuries on Jiovanni. He testified that Alcala was "being cooperative a hundred percent" and that Alcala told Jiovanni, "Hey, tell them the truth."

The officers found Jiovanni's girlfriend in his **[*14]** room. They read her *Miranda* rights and transported her to the police department for further questioning. Officer Quilantan also discovered brown boots in Jiovanni's room. After reviewing a picture of the boots, Officer Quilantan explained that the soles of the boots had a distinctive pattern, what he described as a "'K'—it looks like 'K's' with a little oval." As Arrellano testified earlier in the trial, the pattern on the bottom of the shoes matched a bloody foot print discovered on the step leading to the passenger door of Alcala's pickup truck.

H. Sergeant Daniel Leal

Sergeant Daniel Leal responded to Officer Ontiveros's call to dispatch and arrived at the scene after it had been secured. He testified that he was unaware of any eye-witness to the shooting. Sergeant Leal joined the other officers at Alcala's home after they had discovered and examined the white Dodge Ram in the driveway. He recalled that Sergeant Castillo made the decision to knock on Alcala's door. Sergeant Leal testified that Alcala answered the door and was cooperative with them. He had Alcala sign a consent form allowing the officers to search his house and the Cadillac and white Dodge Ram in the driveway. The **[*15]** State offered and the trial court admitted into evidence the consent to search form signed by Alcala. Sergeant Leal testified that Alcala also gave his consent to search verbally.

Alcala then told the officers where to find several items that he said might interest them. Specifically, he instructed them to look underneath the backseat of the Dodge Ram where the officers found a duffle bag with magazines of ammunition. Alcala also voluntarily informed the officers that he had a ".40 caliber short rifle" in the house. Alcala retrieved the rifle from a closet in his bedroom and gave it to Sergeant Leal. Because .40 caliber bullet casings were found at the scene of the murders, the officers originally believed that this was the murder weapon, but, as revealed later at trial, after the police completed lab analysis, they eventually discounted this rifle as the murder weapon.

Alcala also voluntarily turned over a nine-millimeter rifle to Lieutenant William Ryan.[3] The prosecutor showed Sergeant Leal photographs of ammunition collected from the Dodge Ram. Leal identified the ammunition as .40 caliber Smith & Wesson hollow-point bullets. On cross-examination, Sergeant Leal testified that there **[*16]** were no weapons found in the truck, only ammunition.

I. Sergeant David Castillo

Sergeant David Castillo originally reported to the scene of the crime, but quickly proceeded to Alcala's house. At Alcala's house, he interviewed Jiovanni. Jiovanni was holding an icepack over his eye, but Sergeant Castillo observed no other injuries. Sergeant Castillo asked Jiovanni why there was blood in his car, to which he responded that he had been involved in an altercation with David Garcia earlier that day. Sergeant Castillo then ceased questioning Jiovanni and advised that he be transported to the police station.

J. Investigator Michael Perez

Investigator Michael Perez was designated the lead investigator at the crime scene. He observed .40 caliber bullet casings and a pink receipt on the ground and testified that there were no eye-witnesses to the shooting at the crime scene. Investigator Perez proceeded to the police station after being informed that two suspects had been transported there.

Investigator Perez was informed that a .40 caliber rifle had been recovered from the suspects' home. He explained that he originally believed that the .40 caliber rifle **[*17]** was the murder weapon. However, he later learned that after the gun was submitted for analysis, lab testing concluded that it was not the murder weapon. He testified that the officers should have performed a more thorough search for more weapons at Alcala's house.

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[3] Lieutenant Ryan also testified at trial.

K. Alcala's Interrogation Video

Investigator Robert Vasquez testified that he was involved in the interrogation of Alcala at the police station. He read Alcala his *Miranda* warnings and asked him questions. Subsequently, the State recalled Investigator Perez, who testified that he was also present and asked Alcala questions during the interrogation. The video of the interrogation was admitted into evidence and played for the jury.

During the interrogation, Alcala explained that Jiovanni woke him up around 11:30 or 11:45 p.m. to inform him that he had been in an altercation with David Garcia. Jiovanni had lacerations and was bleeding form his head. Jiovanni informed Alcala that David was insulting him and his girlfriend. Alcala explained to the investigators that Jiovanni was very upset. Alcala observed blood in Jiovanni's car. Alcala tried to stop Jiovanni from leaving the house to confront David. Jiovanni got back in his car **[*18]** and drove away, but quickly made a u-turn and returned to Alcala's house. Jiovanni repeatedly told his father that he was worried that, "They're going to come over here." Alcala told Jiovanni, "you know what, son, let's go talk" and drove Jiovanni to Marisela and David Garcia's house. Alcala stated his intention was just to "talk to them." Alcala put his .40 caliber rifle in the back seat of his car when he drove to the Garcia's house, but he told the investigators that the gun never left the car. He informed the investigators that he put the gun in the car "for protection" and explained that investigators recovered the gun from the house because he always brings the gun back in the house when he goes to sleep.

Alcala explained that after he and Jiovanni arrived at the Garcia's house, Marisela Garcia informed them that David was drunk and "making a bunch of problems." During the conversation, Alcala observed "a sillhoutte walking" down the street. Marisela informed them that it was David. Alcala told Jiovanni to leave him alone. Jiovanni walked towards the silhouette but turned around and did not exchange words with David Garcia. Jiovanni was crying, and he and Alcala apologized. Another **[*19]** man arrived and told Alcala that David Garcia was "very drugged up, and he's all beat up, and that happens to him."

Alcala stated that he apologized and shook hands with Marisela, then drove Jiovanni back to their house. He stated that he parked his truck "inside the property." When asked why one of the officer's dashboard videos showed his truck parked outside of his property, Alcala responded, "It must have been outside the property for maybe five, ten minutes, when I opened the gate . . . ." Investigator Perez informed Alcala that it was obvious the truck was outside and either Alcala or Jiovanni moved it inside the property. Alcala responded, "I'm a hundred percent positive that the truck did not move." However, later during the interrogation, Alcala explained that he parked outside of the house, went inside his house to talk to his wife leaving the truck parked outside of the gate, then went back outside and moved the truck inside the property. Alcala stated that after he parked his truck inside the property, he initially left the gate open and went back in the house to make sure everything was okay, then returned outside to close the gate.

Alcala initially told the investigators **[*20]** that he did not speak to any of his neighbors after returning from the Garcia's house. Investigator Perez responded, "You're lying again," and told Alcala that his neighbor, Garza, had informed the police that he spoke with Alcala while Alcala was locking his gate. Alcala explained that he spoke with Garza, but "this is when the fight was happening" between Jiovanni and David Garcia. Investigator Perez informed Alcala that Garza claimed that the conversation occurred after he heard gunshots. Alcala responded, "that's impossible," but later stated that Garza had asked him whether he had heard any gunshots. Officer Perez replied, "So obviously it happened after the gunshots, not during the fight, you already lied again." Alcala told the officers that he did not hear the gunshots, and when Garza informed him about the gunshots, he did not attempt to investigate the circumstances further. Investigator Vasquez asked, "Officer that was getting to the location, heard the gunshots, your neighbor who was probably inside heard gunshots, Marisela's house heard the gunshots, but you didn't hear them?" Alcala responded, "I didn't hear them."

Alcala explained that he keeps a .40 caliber Kal-Tec sub **[*21]** 2000 rifle by his side while he sleeps. Alcala stated that the gun was with him at all times that night. He stated that he uses Winchester hollow-point .40 caliber rounds. He told the officers that he fired the gun earlier that day at his father's property. Alcala stated he practiced his shooting because he has a deer lease and he loves to go hunting, but then explained that he does not use the .40 caliber rifle to go hunting. Alcala initially stated that the officers should be able to find casings at the property. Later during the interrogation, Alcala informed the officers that they may not be able to find casings because when he was done shooting, he

gathered the casings and threw them in a nearby ditch.

The investigators continued to ask Alcala questions about his son, and Investigator Perez repeatedly told Alcala he was lying and that he was changing his story, which Alcala, in turn, repeatedly denied. Specifically, Alcala stated, "but, I'm sorry sir, but I don't—I don't believe in that. You're—you're actually wanting for me to admit to something that I have not done, to draw a conclusion and to put a stop to it . . . ." When Investigator Perez accused Alcala of driving to the **[*22]** Garcias' house to protect his son, Alcala responded, "I spoke to the family." Throughout the interrogation, Alcala consistently denied any involvement in the deaths of the victims.

Following the publication of the video, the State asked Investigator Perez, "When you entered the room and when you were questioning Alcala, what were you thinking at that point?" Investigator Perez responded, "After lie, after lie, things that weren't adding up, that's what we were trying to work ourselves to, try to get him to understand that we did have people telling us different stories from what he was claiming." Investigator Perez explained that he raised his voice during the questioning because "obviously we were proving him wrong, he still didn't understand and that's the reason why my voice was raised." Investigator Perez testified regarding the following inconsistencies in Alcala's answers during the interrogation: (1) Alcala initially stated that his truck was never parked outside the gate, but when the investigators informed him that the police had dashboard camera video and statements from his neighbor to the contrary, he changed his story; (2) Alcala originally denied that he had spoken to **[*23]** a neighbor, but then changed his story when the investigators informed him that they had interviewed his neighbor, Garza; (3) Alcala initially claimed that he never saw any police units pass by his house, but later admitted that he did; (4) Alcala changed his description of the color of his truck from "vanilla" to "yellow"; (5) Alcala claimed he had been practicing shooting in anticipation of going deer hunting with a .40 caliber rifle that he later admitted he did not use for deer hunting; (6) Alcala explained that the officers would be able to find casings where he had been practicing his shooting, but when Investigator Perez stated that he was going to search for the casings, Alcala stated that he had thrown them in the water. Investigator Perez testified that he found it suspicious that Alcala admitted that he brought a gun to confront the victim's mother at 1:00 a.m. The State also elicited testimony from Investigator Perez indicating that, during the interrogation, Alcala explained that there is a gun safe in his house, and that he owns multiple guns that were not turned over to the police. Investigator Perez explained that he did not order a search of the safe after he learned **[*24]** about it because the "officers did not secure the location."

During cross-examination, Investigator Perez admitted that, at that point, the investigation was focused on Jiovanni because he had fought with one of the victims earlier in the evening and therefore had "more motive" to commit murder.

L. Other Witnesses

Norma Jean Farley, M.D, a forensic pathologist for Hidalgo County, testified that David Garcia was shot through the mouth and died from blood loss. Dr. Farley testified that Victor de la Cruz sustained fatal gunshot wounds to his head and chest.

In addition, the State elicited testimony from: Jose Angel Zuniga, forensic scientist for the Texas Department of Public Safety (TDPS); Vanessa Nelson, section supervisor for the serology/DNA section of the TDPS Crime Laboratory; Carlos Vela, latent print examiner for the TDPS Crime Laboratory; Dr. Richard Parent, firearms and tool marks examiner for the TDPS Crime Laboratory; and Cyrstina Vachon, forensic scientist in the trace evidence section of the Bexar County Criminal Investigation Labratory. These witnesses testified that reports and analysis of the evidence in this case established that: (1) blood from the shoeprint discovered **[*25]** on the passenger side of Alcala's Dodge Ram was consistent with the DNA profile of David Garcia; (2) blood found on Jiovanni's jeans discovered in his room was consistent with the DNA profile of Victor de la Cruz; (3) there was gunshot residue on Alcala's left hand and on Jiovanni's blue jeans; (4) the bullet casings found at the crime scene were the same make and caliber as the bullets discovered in Alcala's truck; and (5) the bullets found at the crime scene could not have been fired by the .40 caliber rifle recovered from Alcala's house.

M. The Verdict

The trial court, in its charge, instructed the jury to find Alcala guilty if he either caused the death of the victims by shooting them or "with the intent to promote or assist the commission of the offense by [Jiovanni], by encouraging, directing, aiding or attempting to aid [Jiovanni] to commit the offense of causing the death" of the victims. The jury found Alcala guilty of capital

murder and assessed punishment at life in prison.

II. Sufficiency of the Evidence

By his first issue, Alcala contends that the evidence was legally insufficient to support the jury's verdict. We disagree.

A. Standard of Review and Applicable Law

When we review **[*26]** the sufficiency of the evidence to support a verdict under the sufficiency standard set out in *Jackson v. Virginia*, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Clayton v. State, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007)* (citing *Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*). "This standard accounts for the fact[-]finder's duty to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id.* (quotations omitted). "[W]e 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." *Id.* (quotations omitted). "Our review of all of the evidence includes evidence that was properly and improperly admitted." *Id.* "When the record supports conflicting inferences, we presume that the fact[-]finder resolved the conflicts in favor of the prosecution and therefore defer to that determination." *Id.* "Direct and circumstantial evidence are treated **[*27]** equally." *Id.* "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." *Id.*

We measure the sufficiency of the evidence by the elements of the offense as defined by a hypothetically correct jury charge. *Malik v. State, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)*. "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." *Villarreal v. State, 286 S.W.3d 321, 327 (Tex. Crim. App. 2009)* (quotations omitted).

In relevant part, the Texas Penal Code provides, "A person commits an offense 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." *Tex. Penal Code Ann. § 19.03(a)(7)(A)*. Under *Section 19.02(b)(1) of the Texas Penal Code*, a person commits murder if he "intentionally or knowingly causes the death of an individual." *Id. § 19.02(b)(1)* (West, **[*28]** Westlaw through 2013 3d C.S.).

"A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both." *Id. § 7.01(a)* (West, Westlaw through 2013 3d C.S.). "A person is criminally responsible for an offense committed by the conduct of another if . . . acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense." *Id. § 7.02(a)(2)* (West, Westlaw through 2013 3d C.S.). "In determining whether the accused participated as a party, the court may look to events occurring before, during and after the commission of the offense, and may rely on actions of the defendant which show an understanding and common design to do the prohibited act." *Ransom v. State, 920 S.W.2d 288, 302 (Tex. Crim. App. 1994)* (en banc) (quotations omitted). Under the law of parties, proof of motive is admissible as a circumstance indicating guilt. *Harris v. State, 727 S.W.2d 537, 542 (Tex. Crim. App.1987)*; *Miranda v. State, 813 S.W.2d 724, 733 (Tex. App.—San Antonio 1991, pet. ref'd)*

"[D]irect evidence **[*29]** of the elements of the offense is not required." *Hooper v. State, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007)*. "Juries are permitted to make reasonable inferences from the evidence presented at trial, and circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor." *Id.* "Circumstantial evidence alone can be sufficient to establish guilt." *Id.* Therefore, the lack of direct evidence that Alcala shot either of the victims is not dispositive. *See Guevara v. State, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004)* ("[T]he lack of direct evidence is not dispositive of the issue of a defendant's guilt.").

B. Discussion

As an initial matter, it is undisputed that David Garcia and Victor de la Cruz were the victims of a double-murder. The State presented evidence that David Garcia was shot through the mouth and that Victor de la

Cruz was shot in the head and the chest. Both men died as a result of their gunshot wounds. Dr. Farley testified that the cause of death for both men was homicide. *See* Tex. Penal Code Ann. § 19.02(b)(1) (defining "murder"); Medina v. State, 7 S.W.3d 633, 637 (Tex. Crim. App. 1999) (en banc) (explaining that "specific intent to kill may be inferred **[*30]** from the use of a deadly weapon, unless in the manner of its use it is reasonably apparent that death or serious bodily injury could not result") (quoting Godsey v. State, 719 S.W.2d 578, 580-81 (Tex. Crim. App. 1986)).

Further, the evidence showed that Alcala's son, Jiovanni, was injured in an altercation with one of the victims on the night of the murder; that Jiovanni was overheard at Alcala's house loudly threatening, "I'm going to kill that damn dog"; and that, after hearing his son's statements, Alcala retrieved his gun, drove his son back to the victim's house, and asked to speak with the victim. A jury could reasonably infer that Alcala possessed a motive to commit the murders, either as a principal or a party, in order either to protect his son or to exact revenge on his son's assailant. *See* Clayton, 235 S.W.3d at 781 ("[A]lthough motive is not an element of murder, it may be a circumstance that is indicative of guilt.").

Moreover, there was testimony establishing that Alcala drove his truck in the same direction that the victims drove just before the gun shots were heard; that a witness observed a truck matching the description of Alcala's truck drive away from the scene immediately **[*31]** after he heard gunshots; and that Alcala's neighbor observed Alcala's truck return to Alcala's house shortly after he heard gunshots. This evidence supports an inference that Alcala was in the same place at the same time as the victims when the murders occurred and demonstrates that Alcala had the means and opportunity to commit the murders. *See* Temple v. State, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013) ("Although motive and opportunity are not elements of murder and are not sufficient to prove identity, they are circumstances indicative of guilt."); Wolfe v. State, 917 S.W.2d 270, 275 (Tex. Crim. App.1996) (upholding murder conviction where defendant "was seen within a few blocks of the crime scene shortly before and shortly after the murder").

The State also presented physical evidence showing that bullets were discovered in Alcala's truck that matched casings found at the crime scene; that receipts found in Alcala's truck were similar to those found at the crime scene; that a shoe print with victim David Garcia's blood was discovered on the step leading to the passenger side of Alcala's truck and matched a shoe recovered in Jiovanni's room, and that victim Victor de la Cruz's blood **[*32]** was found on Jiovanni's jeans. In addition, the gunshot residue indicating that Alcala had fired a gun on the day of the murder further supports an inference that he shot one or both of the victims. *See* Mowbray v. State, 788 S.W.2d 658, 663 (Tex. App.—Corpus Christi 1990, pet. ref'd) (affirming a conviction in part because gunshot residue was found on the sleeve of the appellant's nightgown); *see also* Firo v. State, No. 13-03-122-CR, 2004 Tex. App. LEXIS 1588, 2004 WL 305977, at *3 (Tex. App.—Corpus Christi Feb. 19, 2004, no pet.) (mem. op., not designated for publication) (affirming a murder conviction in part because gunshot residue was found on the appellant's sweatshirt).

Moreover, Alcala's actions after the murders were committed support an inference that he was involved in the murders either as the shooter or part of a common understanding or design with Jiovanni. *See* Hinojosa v. State, 4 S.W.3d 240, 253 (Tex. Crim. App.1999) (describing defendant's suspicious behavior following murder as a circumstance of guilt); *Ransom, 920 S.W.2d at 302* ("In determining whether the accused participated as a party, the court may look to events occurring before, during and after the commission of the offense, and may rely **[*33]** on actions of the defendant which show an understanding and common design to do the prohibited act."). Alcala's neighbor, David Garza, testified that Alcala's truck returned to Alcala's house soon after gunshots were fired. Alcala admitted that when he returned home, he first parked the car on the street outside his house, but then returned to the car and moved it back inside the property. Garza testified that Alcala moved his truck inside his gate after a police car passed the house, that Alcala did not turn on the truck's headlights, and that Alcala turned off the light over his utility area, which was usually left on overnight. *See* Guevara, 152 S.W.3d at 50 ("Attempts to conceal incriminating evidence . . . [are] circumstances of guilt.") Garza also testified that it was unusual that Alcala did not seem concerned that gunshots had been fired because Alcala was usually proactive in investigating suspicious activity in the neighborhood.

Finally, the jury observed the video recording of the statement Alcala made to police.[4] In the video,

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[4] While we later conclude that the trial court erred by failing to suppress the video of Alcala's statement, we still consider it as evidence in our sufficiency review. *See* Conner v. State, 67

Investigator Perez repeatedly pointed to inconsistencies in Alcala's explanations and directly accused him of lying. Further, at trial, Investigator **[*34]** Perez testified that Alcala made multiple inconsistent statements, and that during the interrogation, the investigators were "proving him wrong." As the United States Supreme Court has stated, the jury "may regard false statements in an explanation or defen[s]e made or produced as in themselves tending to show guilty." *Wilson v. United States, 162 U.S. 613, 621, 16 S. Ct. 895, 40 L. Ed. 1090 (1896)*. The Texas Court of Criminal Appeals has indicated that this approach is appropriate when "the fact that a crime has occurred was established by other evidence." *Hacker v. State, 389 S.W.3d 860, 872 (Tex. Crim. App. 2013)*. The jury was therefore entitled to infer that the inconsistent statements made by Alcala in relation to his actions before and after the murder were evidence of his guilt. *See Wilson, 162 U.S. at 621*; *Hacker, 389 S.W.3d at 872*.

Considering the foregoing evidence, we hold that a rational juror could conclude, beyond a reasonable doubt, that Alcala was responsible for killing David Garcia and Victor de la Cruz, as the primary actor, under the law of parties, or both. *See Tex. Penal Code Ann. § 7.01(a)*. This was not "a determination so outrageous that no rational trier of fact could agree." *Wirth v. State, 361 S.W.3d 694, 698 (Tex. Crim. App. 2012)*.

Alcala's first issue is overruled.

III. Motion to Suppress Police Interrogation Video

By his second issue, Alcala argues that the trial court erred by failing to suppress the video of Alcala's police interrogation. Alcala claims that he invoked his right to counsel before providing statements, but that the investigator continued the interrogation. Alcala argues that his statements at the interrogation were used to incriminate him at trial when the video was played for the jury, the State elicited testimony from the investigators involved in the interrogation, and the State made multiple references to the interrogation **[*36]** during closing arguments.

At a suppression hearing held prior to trial, the State admitted a video of the interrogation into evidence. The State also admitted a transcript of the interrogation for the trial court to review. During the interrogation, while Investigator Vasquez was reading Alcala his *Miranda* rights, the following exchange occurred[5]:

> [Investigator Vasquez]: Down here it says, If so, would you like to waive your rights? Meaning I'll—yes, you want to give me your side of the story regarding what happened.
>
> [Alcala]: Sir, if this is happening, should I have an attorney then?[6]
> [Investigator Vasquez]: Do you want an attorney, or do you want to consult an attorney, or what is it that you want to do?
>
> [Alcala]: Yeah. Cause I mean, I'm not aware of what you just told me that—my son said—I don't—[inaudible due to overlapping voices].
> [Investigator Vasquez]: Look, this is—this is—let me just explain to you so you know what's going on . . . .

Investigator Vasquez proceeded to explain the circumstances of the murder. He informed Alcala that there had been an altercation between Alcala's son, Jiovanni, and one of the victims and that "there's witnesses that observed what had taken place." After which the following exchange occurred:

> [Investigator Vasquez]: I need to ask you some questions about what happened. I want to know what happened. I want to know what your involvement is with that incident.
>
> [Alcala]: Mm-hmm.
> [Investigator Vasquez]: Okay, and the only way for me to do that is to read you your rights, get your side of the story regarding what happened, okay?

S.W.3d 192, 197 (Tex. Crim. App. 2001) ("When conducting a sufficiency review, we consider all the evidence admitted, whether proper or improper."); *Dewberry v. State, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999)* **[*35]** ("[W]hen conducting a legal sufficiency review, this Court considers all evidence in the record of the trial, whether it was admissible or inadmissible.").

[5] The following exchange is taken from the transcript admitted by the State at the suppression hearing.

[6] We note that there is some dispute over whether Alcala asked, "should I have an attorney?" or whether he asked "can I have an attorney?" The reporter's **[*37]** record from when the video was played at trial states, "can I have an attorney?" but the transcript of the interview, admitted by the State during the suppression hearing, reflects that Alcala asked, "should I have an attorney." We decline to make a determination regarding which word Alcala used because it would not affect our ultimate conclusion in review of the totality of the circumstances that he did invoke his right to an attorney.

[Alcala]: Okay.
[Investigator Vasquez]: Cause your son is blaming you for some of those things that I said happened—

[Alcala]: That's what **[*38]** I don't understand—
[Investigator Vasquez]: Okay. So you do have an option, uh, you have the right to consult with an attorney if that's what you so choose, uh, I'll get a hold of your attorney. We're still going to come back in here and we'll get your side and clarify what your involvement is with this incident. Basically that's it. I want to hear your side. I want you to share with me what — what happened uh, tonight. Either you're a witness to what happened, or you're a suspect to what happened. Either or. You understand?

[Alcala]: Yeah, I understand.
[Investigator Vasquez]: So, if—would you like to continue, do you want to give me your side of the story?

[Alcala]: Yes, I will give you my side—my side of the story.

[Investigator Vazquez finished reading Alcala his Miranda rights.]
[Investigator Vasquez]: —uh, what I read to you? It says, If so, would you like to right—waive your rights? Meaning, yes you're going to waive your rights, yes you're going to waive your right to consult with an attorney at this point, and yes you want to give me your side of the story regarding what happened. Do you want to do that?

[Alcala]: Yeah. Mm-hmmm.

Alcala proceeded to sign the form provided by Investigator **[*39]** Vasquez indicating that he had been read his *Miranda* rights, and the investigators continued the interrogation.

A. Standard of Review & Applicable Law

In reviewing claims concerning Miranda violations and the admission of statements made as the result of custodial interrogation, we conduct a bifurcated review. Guzman v. State, 955 S.W.2d 85, 89 (Tex.Crim.App.1997). "[W]e measure the propriety of the trial court's ruling with respect to alleged Miranda violations under the totality of the circumstances, almost wholly deferring to the trial court on questions of historical fact and credibility, but reviewing de novo all questions of law and mixed questions of law and fact that do not turn on credibility determinations." Leza v. State, 351 S.W.3d 344, 349 (Tex. Crim. App. 2011).

When a defendant asks for a lawyer, a police interrogation must cease until counsel has been provided or the defendant initiates further communication with the police. Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981); Davis v. State, 313 S.W.3d 317, 339 (Tex. Crim. App. 2010). To trigger law enforcement's duty to terminate the interrogation, a defendant's request for counsel must be clear, and the police are not required **[*40]** to attempt to clarify ambiguous remarks. Davis v. United States, 512 U.S. 452, 461-62, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994); Davis, 313 S.W.3d at 339. Whether a statement referring to a lawyer constitutes a clear request for counsel depends on the statement itself and the totality of the circumstances surrounding the statement. Davis, 313 S.W.3d at 339. "We look to the totality of circumstances to determine whether any statement referencing counsel was really a clear invocation of the Fifth Amendment right; we do not look to the totality of the circumstances, however, to determine in retrospect whether the suspect really meant it when he unequivocally invoked his right to counsel." Gobert, 275 S.W.3d 888, 893 (Tex. Crim. App. 2009). The test is objective: whether the defendant articulated his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. *Id.*

Subsequent statements by a suspect may be used to show that he (a) further initiated conversation or (b) affirmatively waived the right he had previously invoked Edwards, 451 U.S. at 485; Muniz v. State, 851 S.W.2d 238, 253 (Tex. Crim. App.1993). Subsequent **[*41]** statements do not render an unequivocal request for an attorney ambiguous. Smith v. Illinois, 469 U.S. 91, 98, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984). "[T]he impetus for the remarks must come from the suspect, not from police interrogation or conduct that is the functional equivalent of interrogation." Martinez v. State, 275 S.W.3d 29, 35 (Tex. App.—San Antonio 2008, pet. struck). "Once a suspect has clearly invoked his right to counsel, no subsequent exchange with the police (unless initiated by the suspect) can serve to undermine the clarity of the invocation." Gobert, 275 S.W.3d at 894-95 (determining that the appellant did not waive his right to counsel when immediately after he clearly invoked right to counsel, he told the police that he was willing to talk to them in response to their questions "you don't want to talk?" and "you don't want to talk to us?").

In *Smith v. Illinois*, the United States Supreme Court reversed the Illinois Supreme Court and found that a suspect invoked his right to an attorney when an officer informed him of his *Miranda* rights and the suspect responded "yeah, I'd like to do that." *469 U.S. at 96*. The Court found that the statement was a clear and unequivocal request for counsel and that **[*42]** the lower courts had improperly "construe[d] Smith's request for counsel as "ambiguous" only by looking to Smith's subsequent responses to continued police questioning . . . ." *Id.*

In *State v. Gobert*, the Texas Court of Criminal Appeals reversed an appellate court's finding that a suspect had not invoked his right to counsel. *275 S.W.3d at 893*. The court reasoned:

> Immediately following the administration of his *Miranda* rights, upon being asked whether he understood them, the appellee unequivocally stated that he did not want to 'give up any right' in the absence of a lawyer. Under the circumstances, we may safely assume he meant 'any' of the rights that had just been read to him, and that the lawyer he referred to was the counsel to which the officers had just informed him he was legally entitled.

Id. The court continued, stating that:

> Just because a statement is conditional does not mean it is equivocal, ambiguous, or otherwise unclear. The only aspect of the appellee's statement that was tentative was whether he would in fact be willing to 'give up' any of his *Miranda* rights. What was absolutely crystal clear about his statement was that he did not desire to do so (or to be pressured **[*43]** by the police to do so) in the absence of counsel. It was more than sufficient to alert the interrogating officers that if they desired to speak with the appellee further, in an attempt to persuade him to waive any of the other rights that *Miranda* confers upon him, then they must first afford him the right to have counsel present during that attempt. Before they could take advantage of the appellee's apparent amenability to talk, and thereby forego his constitutional right to stand mute, the interrogating officers were obliged to abide by his clearly stated condition . . . .

Id. at 893-94.

In contrast, in *Davis v State*, the court of criminal appeals found that a suspect's statement, "I should have an attorney" was not a clear invocation of his right to counsel. *313 S.W.3d at 341*. The court reasoned that this statement "was not in the form of a request, nor did appellant expressly say that he wanted a lawyer." *Id.* Moreover, Texas courts have held that suspects' questions regarding their rights to counsel that do not affirmatively communicate a request to consult with an attorney are not clear invocations of the suspect's right to counsel. *See Mbugua v. State, 312 S.W.3d 657, 665 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd)* **[*44]** (holding that a suspect did not invoke his right to counsel when he asked, "Can I have him present now?" after he was informed of his right to an attorney); *Gutierrez v. State, 150 S.W.3d 827, 832 (Tex. App.—Houston [14th Dist.] 2004, no pet.)* (holding that a suspect did not invoke his right to counsel when he asked, "Can I wait until my lawyer gets here?").

B. Discussion

As an initial matter, we agree with the State that Alcala did not unambiguously request an attorney when he asked Investigator Vasquez, "Should I have an attorney?" Texas case law clarifies that such a question is not sufficiently clear to demonstrate that a suspect is invoking his right to an attorney. *See Davis, 313 S.W.3d at 341*; *Mbugua, 312 S.W.3d at 665*; *Gutierrez, 150 S.W.3d at 832*. However, immediately following Alcala's question, Investigator Vasquez asked Alcala, "Do you want an attorney, or do you want to consult an attorney, or what is it that you want to do?" Appellant responded, "Yeah. Cause I mean, I'm not aware of what you just told me that—my son said—I don't—[inaudible due to overlapping voices]." Alcala's statement was an unambiguous, affirmative response to Investigator Vasquez's question asking if **[*45]** he wanted an attorney and was therefore a clear invocation of his right to consult with counsel. *See Smith, 469 U.S. at 96*.

The State argues that the last part of Investigator Vasquez's compound question, "what is it you want to do?" was the question that elicited the response, "yeah." However, we conclude that this is not a reasonable interpretation of the statement because "what is it you want to do?" is not a "yes or no" question. Moreover, under the totality of the circumstances, the context of Alcala's statements further indicates that, by responding in the affirmative, he was clearly requesting to invoke his right to consult with an attorney. *Davis, 313 S.W.3d at 341* (explaining that "courts have suggested that surrounding circumstances were highly relevant considerations"). While Alcala's initial question, "should I

have an attorney" was not a clear invocation of his right to counsel, it does indicate that he initiated the discussion regarding his right to counsel; Alcala therefore likely understood Investigator Vasquez's question and was interested in invoking his right to counsel even before it was asked.

In addition, immediately after responding, "yeah," Alcala stated, "Cause **[*46]** I mean, I'm not aware of what you just told me that—my son said—I don't—[inaudible due to overlapping voices]." Appellant appeared to be attempting to explain why he wanted an attorney, but Investigator Vasquez interrupted him before he completed his statement. At the hearing on the motion to suppress, Investigator Vasquez explained that he continued speaking to Alcala because, "He says that he was not aware of what I had just told him. So I continued to explain to him what I was talking about." Alcala's statement indicated that he wanted an attorney because he was not aware of the circumstances of the crime or of what his son had said about him, as was revealed shortly thereafter when he stated, "that's what I don't understand" in response to Investigator Vasquez's claim that "your son is blaming you for some of those things that I said happened." Alcala's explanation for invoking his right to counsel neither indicated that he was unable to understand the investigator's question, nor rendered his affirmative response to Investigator Vasquez's question ambiguous.

Further, while we agree with the State's contention that, "It is beyond reasonable dispute that [Alcala] was advised of, **[*47]** and understood his rights" before the interrogation continued, the investigating officer was required to cease the interrogation until counsel was provided or Alcala initiated further conversation. *See Smith, 469 U.S. at 93*. It is undisputed that Alcala's subsequent statements, like in *Smith* and *Gobert*, were made in response to Investigator Vasquez's prompting.[7] *See Id. at 93*; *Gobert, 275 S.W.3d at 894-95* (determining that the appellant did not waive his right to counsel when immediately after he clearly invoked right to counsel, he told the police that he was willing to talk to them in response to their questions, "you don't want to talk?" and "you don't want to talk to us?"). Here, no counsel was provided before Investigator Vasquez further explained the circumstances of the alleged murder and continued to ask Alcala if he wanted to proceed with the interrogation. Because, given the totality of the circumstances, we find that Alcala issued an unambiguous affirmative response when Investigator Vasquez asked him if he wanted to consult with an attorney, we conclude that his Fifth Amendment right to counsel was violated when the investigator continued the interrogation. *See Edwards, 451 U.S. at 484-85*; **[*48]** *Davis, 313 S.W.3d at 339*.

C. Harm

The admission of evidence in violation of a defendant's Fifth Amendment right to counsel is subject to harm analysis. *Ramos v. State, 245 S.W.3d 410, 419 (Tex. Crim. App. 2008)*. However, because it is constitutional error, we can find the error harmless only if we conclude, beyond a reasonable doubt, that it did not contribute to the conviction or punishment. *See Tex. R. App. P. 44.2(a)*.

In determining whether constitutional error in the admission of evidence is harmless, we consider several factors, including the following: the importance of the evidence to the State's case; whether the evidence was cumulative of other evidence; the presence or absence of other evidence corroborating or contradicting the evidence on material points; the overall strength of the State's case; and any other factor, as revealed by the record, that may shed light on the probable impact of the error on the mind of the average juror. *Clay v. State, 240 S.W.3d 895, 904 (Tex. Crim. App. 2007)*. **[*49]** In addition, we may consider: the source and nature of the error; the emphasis placed upon the evidence by the State; the weight a juror may have placed on the evidence; and whether finding the error harmless would encourage the State to repeat the conduct. *Harris v. State, 790 S.W.2d 568, 587 (Tex. Crim. App. 1989)*.

In *McCarthy v. State*, the court of criminal appeals held that the admission of a defendant's statement in violation of her constitutional rights was not harmless error even though it found "that the State offered ample evidence of [the defendant's] guilt from sources independent of her statement." *65 S.W.3d 47, 52 (Tex. Crim. App. 2001)*. In *McCarthy*, the defendant did not confess to the crime during her statement, but "the State relied on appellant's statement extensively, both during its case-in-chief and during its closing arguments." *Id.* The court reasoned that at closing arguments, the "inadmissible statements became the rhetorical strawman that the State effectively decimated." *Id. at 53*.

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[7] On appeal, the State does not argue that Alcala initiated any further conversation. Moreover, at oral argument, it conceded that Alcala's subsequent statements would not render a clear invocation of Alcala's right to an attorney invalid.

Ultimately, the court determined that it could not "conclude, beyond a reasonable doubt, that the admission of appellant's unconstitutionally obtained statement did not contribute **[*50]** to the jury's verdict of guilty." *Id. at 56*.

To begin our analysis in the present case, we consider the emphasis placed by the State on the inadmissible statement, whether the information obtained during the statement was cumulative of other evidence, and the overall importance of the statement to the State's case. *Clay, 240 S.W.3d at 904*. Here, like in *McCarthy*, the State relied on the erroneously admitted statement to prove Alcala's guilt. *See 65 S.W.3d at 52*. The State played the video of Alcala's interrogation for the jury, and Investigator Perez testified extensively regarding inconsistencies in Alcala's statements. He explained that these inconsistencies led him to be suspicious that Alcala was responsible for the murders. Perez also testified that Alcala provided unreasonable explanations for his actions after the murders were committed.

During its closing argument, the State emphasized its assertion that the inconsistencies in appellant's statement proved his guilt[8]:

> You heard the statement. And the statement that was given voluntarily, the statement was given after his warnings were read to him. You saw that. He gave that statement willingly. And now, as far as that statement **[*51]** is concerned, there are a lot of inconsistencies and those inconsistencies were actually pointed out by Investigator Perez but you can see them yourself, and I ask you to remember, in that interview, he said that rifle was not used. That rifle was not used.

The State expressly referred to Alcala changing his story, asserting that it was evidence that he was not telling the truth during the interrogation. As explained in our sufficiency review, the jury was entitled to regard any statements they found inconsistent as evidence of appellant's guilt. *See Wilson, 162 U.S. at, 621*; *Hacker, 389 S.W.3d at 872*.

Moreover, during the interrogation, Alcala admitted that he brought a gun with him when he drove his son to look for David Garcia. This was the only evidence presented by the State to show that Alcala brought a gun with him on the night of the murders, and the State used it to create an inference that he intended to use it. The State also referred to Alcala's statements about the gun during closing arguments:

> At first he says he didn't take a firearm. Later on in his interview he admits, Yes, I did take a firearm. But what firearm did he say he took. The .40 caliber rifle. Oh, I took it for protection, because he is going to go and reason with the family that time of the early morning.

The State derided **[*53]** appellant's explanation for his actions on the night of the murder and, like in *McCarthy*, the "inadmissible statements became the rhetorical strawman that the State effectively decimated." *See 65 S.W.3d at 53*. More importantly, the State relied on this vital information obtained from Alcala's statement to suggest that because Alcala brought a gun to confront the victims, he intended to commit the murders.

Regardless, without disputing the emphasis it placed on the interrogation or the importance of the information obtained from Alcala's statements, the State argues that "other evidence of [Alcala's] guilt was so overwhelming as to render any error in admitting his statements to be harmless." We disagree.

The court of criminal appeals in *Wesbrook v. State* explained the role of the totality of the State's evidence in our harmless error review as follows:

> An appellate court should not focus on the propriety of the outcome of the trial. Instead, the appellate court should calculate as much as possible the probable impact of the error on the jury in light of the existence of other evidence. While the most significant concern must be the error and its effects, the presence of overwhelming evidence **[*54]** supporting the finding in question can be a

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[8] Notably, the State relies, in part, on Alcala's statements during the interrogation to support its argument that the evidence was sufficient to support Alcala's conviction. In its appellate brief, the State directs us to the following inconsistencies in Alcala's statement that it asserts "defy logic and common sense": (1) Alcala's assertion that he had been shooting a firearm not suitable for hunting in preparation to hunt deer; (2) Alcala's initially claim that the officers could find spent casing at the location to verify that he had been shooting, followed by his explanation that they **[*52]** could not be found because he had thrown the spent casing in a canal; (3) Alcala's statement that he had returned home before gunshot fire was heard was contradicted by other witnesses; and (4) Alcala's claim that he didn't hear the gunshots, "despite their being loud enough to be heard by his neighbor and by the patrolling police officer." The State also contends Alcala's admission that he brought a gun when he spoke with Marisela Garcia was evidence supporting the jury's finding of guilt.

> factor in the evaluation of harmless error. If an appellate court rules that an error is harmless, it is in essence asserting that the nature of the error is such that it could not have affected the jury. Stated in an interrogatory context, a reviewing court asks if there was a reasonable possibility that the error, either alone or in context, moved the jury from a state of nonpersuasion to one of persuasion as to the issue in question.

29 S.W.3d 103, 119 (Tex. Crim. App. 2000) (en banc) (citations omitted).

In other words, as the United States Supreme Court has clarified, we do not premise our harm analysis for constitutional error on an examination of whether the State presented sufficient evidence, absent the erroneously admitted statement, for a rational jury to find the defendant guilty. *Satterwhite v. Texas, 486 U.S. 249, 258-59, 108 S. Ct. 1792, 100 L. Ed. 2d 284 (1988)* ("The question, however, is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'"); *see also Brooks v. State, 132 S.W.3d 702, 708 (Tex. App.—Dallas 2004, pet. ref'd)* **[*55]** ("The fact that the legally admitted evidence is sufficient to support the verdict does not demonstrate the error was harmless."). Instead, we must consider whether such evidence was overwhelming as a factor in our ultimate determination of whether the erroneously admitted evidence "could not have affected the jury." *See Wesbrook, 29 S.W.3d at 119*; *see also Garcia v. State, No. 04-08-00677-CR, 2010 Tex. App. LEXIS 1683, 2010 WL 816202, *5 (Tex. App.—San Antonio Mar. 10, 2010, no pet.)* (mem. op., not designated for publication) (determining that the admission of a defendant's confession was harmless error when multiple witnesses testified they had observed the defendant aim and fire a gun at [the victim's] vehicle and where at least two of these witnesses expressly testified they "got a really good look at" the defendant or remembered his face "perfectly").

In the present case, the State relied on circumstantial evidence to prove Alcala's guilt. There were no eye-witnesses, there was no evidence of violent threats made by Alcala, a murder weapon was never recovered, and the State argued that the evidence it presented indicated that two people, both Alcala and his son, were present at the scene of the crime and **[*56]** could have committed the murders. Especially given the emphasis placed on the interrogation video and the importance of the information obtained from Alcala's statement to the State's case, we conclude that other circumstantial evidence indicating Alcala's guilt was not sufficiently overwhelming for us to determine, beyond a reasonable doubt, that the erroneous admission of Alcala's statement did not contribute to the jury's verdict. *See Tex. R. App. P. 44.2(a)*. Accordingly, we sustain Alcala's second issue.[9]

IV. Conclusion

We reverse the judgment of the trial court and remand for a new trial.

ROGELIO VALDEZ

Chief Justice

Do not publish.

Tex. R. App. P. 47.2(b).

Delivered and filed the

24th day of July, 2014.

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[9] Because we have determined that the trial court's judgment must be reversed and are remanding this case for a new trial based on Alcala's second issue, we decline to address Alcala's third issue, whether the trial court erred by denying his motion to suppress evidence obtained from an illegal search of his house. *See Tex. R. App. P 47.1* ("The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal."). At a new trial, the trial court must make a new determination on any new objection or motion seeking to suppress evidence. *See id. 21.9(b)* ("Granting a new trial restores **[*57]** the case to its position before the former trial, including, at any party's option, arraignment or pretrial proceedings initiated by that party.").

Alcala v. State

Court of Appeals of Texas, Thirteenth District, Corpus Christi - Edinburg

November 14, 2013, Delivered; November 14, 2013, Filed

NUMBER 13-12-00173-CR

Reporter
476 S.W.3d 1 *; 2013 Tex. App. LEXIS 13924 **; 2013 WL 6053837

ELOY JIOVANNI PEREZ ALCALA, Appellant, v. THE STATE OF TEXAS, Appellee.

Subsequent History: Petition for discretionary review refused by *In re Alcala, 2014 Tex. Crim. App. LEXIS 697 (Tex. Crim. App., May 7, 2014)*

Related proceeding at *Alcala v. State, 2014 Tex. App. LEXIS 7949 (Tex. App. Corpus Christi, July 24, 2014)*

Prior History: **[**1]** On appeal from the 332nd District Court of Hidalgo County, Texas.

Core Terms

truck, hearsay, Investigator, murders, street, gunshots, recovered, dog, kill, fight, inside, front, shot, trial court, talking, blood, scene, dad, daughter-in-law, weapon, guilt, night, shooting, arrived, bullets, matched, parked, witnesses, crime scene, caliber

Case Summary

Overview

HOLDINGS: [1]-The evidence was sufficient to support defendant's capital murder conviction under *Tex. Penal Code Ann. § 19.03(a)(7)(A)* (Supp. 2011) where the victims died of their gunshot wounds, they were arguing with the shooter before they were killed, evidence placed defendant at the scene of the crime and showed he had the opportunity to commit the murders, the victims were shot with a.40 caliber firearm and a.40 caliber handgun was recovered from defendant's home, defendant manifested by word and deed his intent to cause one victim's death, and defendant fled the scene after the murders; [2]-Statements by three witnesses that defendant was outside yelling something about killing a dog were not inadmissible hearsay because they were offered to show what was said rather than for the truth of the matter stated therein.

Outcome

Judgment affirmed.

Counsel: FOR APPELLANT: Abigail R. Schette, McAllen, TX.

FOR THE STATE: Rene A. Guerra, Criminal District Attorney, Edinburg, TX; Glen W. Devino, Assistant District Attorney, Edinburg, TX.

Judges: Before Justices Benavides, Perkes and Longoria. Opinion by Justice Longoria.

Opinion by: NORA L. LONGORIA

Opinion

[*4] Opinion by Justice Longoria

A jury found Eloy Jiovanni Perez Alcala guilty of capital murder involving a double-homicide, and because the State did not seek the death penalty, the trial court assessed a life sentence. *See Tex. Penal Code Ann. § 12.31(a)(2)* (West 2011); *id. § 19.03(a)(7)(A)* (West Supp. 2011). Alcala now appeals his conviction by four issues, which we have reordered as follows: (1) the evidence is insufficient to support his conviction because the State failed to establish that he shot either of the victims or that he was a party to the capital murder; (2) the trial court erred in admitting the hearsay testimony of David Garza; (3) the trial court violated Alcala's Sixth Amendment **[*5]** right to confront and cross-examine witnesses by admitting hearsay statements through the testimony of David Garza; and (4) the trial court erred in allowing Janie Arrellano of the Pharr Police Department to testify as an expert. For the reasons set forth below, we affirm the judgment of the trial court.

I. Background

At trial, the State offered **[**2]** physical evidence and the testimony of a number of different witnesses in support of its case. These witnesses included police officers, investigators, eyewitnesses, and experts. The following evidence and testimony are relevant to the issues raised by Alcala in this appeal. *See* Tex. R. App. P. 47.1.

A. Officer Enrique Ontiveros

At approximately 1:30 a.m. on October 8, 2010, Officer Enrique Ontiveros of the City of Pharr Police Department was in his police cruiser patrolling an area of the city known as "Las Milpas." He had the windows down when he heard what sounded like three gunshots. He radioed the police dispatcher to ask if there had been any reports of gunshots heard in the area of the 500 block of Dicker Road. The dispatcher responded, "Negative." Officer Ontiveros then advised the dispatcher that he was going to investigate the gunshots he heard. While he was en route, a "hot call" or emergency call went out over the radio advising all patrol officers of reports of "gunshots and two men down" at the intersection of Santa Monica Street and Sabino Avenue, located in a small subdivision northeast of Officer Ontiveros's position. Officer Ontiveros turned north onto Laurel Street, **[**3]** then east onto Santa Monica Street, and proceeded toward the intersection with Sabino Avenue.

The police cruiser in which Officer Ontiveros was travelling was equipped with a dashboard video camera ("dash-cam") that was activated when Officer Ontiveros turned on his vehicle's police sirens. The dash-cam was wirelessly connected to a microphone Officer Ontiveros was wearing that night. At trial, the video from the dash-cam was played for the jury. As Officer Ontiveros was approaching the scene of the crime, the dash-cam captured an image of what appeared to be a white Dodge truck parked on the side of the road on the 700 block of Santa Monica Street, about two blocks away from the scene of the crime. Although he had no reason to know it at the time, the white Dodge truck was about to become the focus of an intense police investigation and manhunt.

Officer Ontiveros was the first officer to arrive at the scene. When he arrived, he discovered "two bodies," "two men down." One body was "right in front" of a brown minivan that was parked by a stop sign at the intersection. The van's headlights were on, and the engine appeared to be running. The second body was also near the van. Both men **[**4]** appeared to have sustained fatal gunshot wounds to the head.

Officer Ontiveros called for backup. Then, he walked over to 901 Santa Monica Street, a house "right in front of . . . where" he discovered the lifeless bodies of the two men—later identified as David Garcia and Victor de la Cruz. He "spoke to the resident owners there," a husband and wife. The husband, Arturo Arredondo, told him that he was asleep in bed when his wife woke him up to tell him that there were some people arguing outside in the street. Then, he heard the gunshots. He went outside and "saw a white truck leaving [the] location." It was a four-door Dodge truck. Officer Ontiveros asked Arredondo how he knew it was a Dodge truck, and "he said because he got to observe the Dodge emblem on the tailgate." **[*6]** At that point, Officer Ontiveros radioed dispatch and reported Arredondo's description of the suspect's vehicle.[1]

Officer Ontiveros also spoke to "several [other] witnesses [who were] around that area." Two men who were also standing outside reported that they were inside their residence when they heard gunshots. "[T]hey came out and that's when they **[**5]** saw the two bodies on the ground." "[A]nother lady . . . told . . . [Officer Ontiveros] the same thing[:] that they just heard the gunshots and then all of a sudden she just saw the emergency vehicles there."

As Officer Ontiveros was securing the scene, a vehicle approached, and he stopped it "because . . . [he] didn't want [any]body to cross through there to where the bodies were . . . ." One of the occupants of the vehicle was a woman named Maricela Garcia. She told Officer Ontiveros that one of the victims was her son. "And so . . . [he] just told the driver, 'Okay. Just stay here behind . . . the scene. Don't come to the scene."

On the dash-cam video, Maricela Garcia is heard saying, "[T]here was a boy there and the boy's father." She continued, "I do not know who they are. I don't know them." Then, she added, "I think one of the boys had fought with him. . . We saw them - - I saw them pass by." After that, an unidentified speaker—possibly, Maricela Garcia—is heard telling Investigator Michael Perez of the Pharr Police Department, "He lives right

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[1] Arturo Arredondo also testified as a witness for the State at trial.

[]here ... [i]n [sic] the street like the last house over there."[2] Investigator Perez asked, "He lives right there on this street?" And **[**6]** the unidentified speaker answered, "Yes." Then, Investigator Perez is heard saying, "Possible suspect resides here on this street, talking about a white Dodge [truck] as well. And they are the ones that they are saying they were arguing with. They are the same ones."

Shortly thereafter, Investigator Perez is heard summing up what the police knew at that point:

> So they got into . . . a fight. See what happened is that this victim here, the one in the yellow, he was already at home. He had just gotten home from work. . . Right here on Laurel [Street], a female came over to visit him, but that female used to be with the guy that lives at the daycare. She passed by his house, by the suspect . . . at his house. . . And they started fighting. They were fighting along with the father.

"Two lives for a woman," one of the officers remarked. A second officer asked, "Who are these guys?" A third officer answered, "It looks like they were, like, subcontractors or something." Then, reading from a pink receipt recovered from the crime scene, the same officer said, "Matt's Cash & Carry."

B. Maricela Garcia

The State called Maricela Garcia as a witness. **[**7]** She lives on Laurel Street, near the entrance to the neighborhood and several streets away from where the murders occurred. She testified that on Friday, October 7, 2010, her son, David Garcia, had been working in a field with his cousin, Victor de la Cruz. David left for work early in the morning, and "[t]hey were getting out late . . . [because] he stayed there talking with somebody." Maricela was "laying down watching television," waiting for David to return home. She heard the sound of David's truck approaching, but she "stayed laying down to see if he would **[*7]** knock on the door." When she "didn't hear him knock on the door, . . . [she] got up." She did not recall what time it was, but "it was late." She estimated it was "[m]aybe 1:00."

She went outside and saw that David was inside a white car fighting with Alcala. She was familiar with Alcala and identified him in the courtroom. David and Alcala were also familiar with each other. According to Maricela, "They were friends since they were small. They went to school [together] since they were small." "[T]hey would get together. Sometimes [David] ... would play - - go play at ... [Alcala's] house." Alcala's house was just down the street, **[**8]** at the intersection of Laurel Street and Santa Monica Street.

A neighbor helped Maricela separate the two men. David "was full of blood." Maricela took him inside and "scolded him." She "went ahead and told him, 'If you're friends, why are you fighting?'" David answered, "[I]t was a misunderstanding." Then, he explained that what happened was that "he was coming into the neighborhood when he heard a car honk at him and he thought it was somebody that wanted to fight with him." So then he followed the car until he discovered that the person driving the car was Alcala's girlfriend. At apparently the same time, Alcala emerged from his house and learned what had happened. David apologized to him and "asked him to forgive him because he . . . did not know it was a girl, he thought it was a man." Then, the two men began fighting.

After giving his mother this version of events, David said, "I'll be back," and he went outside, still bleeding from a wound to the forehead. Maricela "told him not to leave," but "[h]e went outside walking . . . by the side of the road." According to Maricela, "that's when . . . [Alcala] drove by and steered the car towards him, . . . driving the car at a high rate **[**9]** of speed." Alcala was in the same car that he was in when the two men had been fighting moments earlier. He then drove off.

About ten minutes later, Alcala returned to Maricela's house, this time with his father. "[T]hey were both angry . . . [and] upset." They were driving a different vehicle, "a white vehicle, [a] Dodge." Alcala asked for David. Maricela said David was not there. Alcala then told Maricela that he knew David had a wife and daughter. He pointed at Maricela's daughter and asked if she was David's wife.[3] Then, Alcala's father asked where Maricela's "husband was, that he wanted to speak to ... [her] husband." She "told him that . . . [her] husband was not there, that he was out working." She asked "why they wanted to talk to them." Then, she asked why Alcala "had steered the car towards . . . [David], what if . . . [he] would have killed him." At this point, Alcala told her, "Whether it's today or tomorrow, it's going to be his turn." She told him, "[W]ait, son, maybe for tomorrow because you are upset. I'll take him to your house tomorrow." The men "appeared to be very upset" when

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[2] Investigator Michael Perez also testified at trial.

[3] Maricela's sister and her neighbor were also outside and witnessed the encounter.

they departed.

Maricela **[**10]** stayed outside, "waiting for [her] . . . son to see how he would return." She saw "a van pass[] by with Victor [de la Cruz] and . . . [her] son." The van "went around the neighborhood . . . [, and then] turned back." Maricela testified that, at this point, she was "outside and heard some gunshots." "Immediately . . . [she] thought it was them . . . , that they were fighting." At about the same time she heard the gunshots, she "saw a police officer drive by . . . [and] asked the neighbor to please take . . . [her] because **[*8]** maybe it was them." When they got to the scene of the shooting, David and Victor "were already laying down," dead. She felt like her "soul had ended." She approached the policeman, Officer Ontiveros, and said that one of the victims "was [her] . . . son."

C. David Garza

The State also called David Garza as a witness. Garza lives directly across the street from the Alcalas' house. He has known Alcala's father for seventeen to twenty years. Both men were part of the neighborhood watch. The following exchange occurred during his direct examination by the State at trial:

> Q Let me take you back, sir, to October 8th of 2010 of last year around 1:00 in the morning. What were **[**11]** you doing that evening, sir?
> A We were asleep. And my sister-in-law, she called us and my daughter-in-law answered the phone and she came to our room and says - -
>
> > [Alcala's Attorney]: Objection, hearsay, Your Honor.
> > The Court: Overruled at this point. Go ahead sir, go ahead.
>
> A She says that - - that [Alcala] . . . was outside of my - - on - - front of my yard, on the street that - - yelling that he was going to kill the dog.
> The Court: Okay. Ask another question please.
> [The State]: Yes, sir.
> Q At this point, after gaining this information from your . . . daughter?
> A My daughter-in-law.
> Q Your daughter-in-law. Did she wake you up from your sleep?
> A Yes.
> Q Your daughter-in-law?
> A Yes.
> Q So you were asleep at this point, your daughter-in-law gets a phone call, she comes out to you and wakes you up?
> A Right. We woke up with the telephone.
> Q The telephone woke you up, not your daughter?
> A Yeah - - well, the phone rang and we woke [up], but my daughter-in-law picked up the phone.
> Q Okay. And after making contact with your daughter-in-law, what did you do after that?
> A I looked out the window because my wife told me that - -
>
> > [Alcala's Attorney]: Objection again, hearsay, Your Honor.
> >
> > The Court: Well, at this **[**12]** point it's overruled.
>
> A And I woke up and I looked out the window and - - my window is right in front by the street, and I seen . . . [Alcala] in front of my yard. And my dog was barking and that's when I went down to see, you know, why he wanted to kill the dog because he was yelling something about killing the dog.
> Q Okay. So you had a dog outside and he was yelling that he wanted to kill the dog?
>
> A He said, "*Voy a matar*" - - I don't know how to say it in English, but - -
> Q You can say it in Spanish.
> The Interpreter: I am going to kill that dog.
> The Court: Damn dog.
> The Interpreter: - - damn dog.
> Q And so you heard that?
> A I thought ... he was going to kill my dog, right.
> Q But you heard him yell that?
>
> **[*9]** A No. That's what my sister-in-law was telling me by the phone. When I went down, I thought he was going to kill my dog, because that's what I heard from the phone.
> Q Okay. After you went downstairs, what did you do?
>
> A I went downstairs and . . . I went outside, but by the time I got outside, . . . [Alcala] wasn't out there anymore.
> Q Where was he?
> A He - - I seen the truck pulled - - pull out of their house.
> Q Well, you saw which truck?
> A His dad's.
> Q What color is it?
>
> A It's like a beige, like a beige **[**13]** color.

Q Beige?
A Dodge.
Q Cream?
A Like a cream, yeah, cream, beige.
Q Okay. And it's a Dodge?
A Right. It's four door.

Garza then proceeded to testify that he saw the cream or beige colored Dodge truck go down Laurel Street, towards David's house, and that when the truck reached about that area, he saw its brake lights. Then, the vehicle went dark, and Garza went back inside his house. He was using the restroom when he heard three gunshots. He looked outside and saw the white Dodge truck parked by the mailbox in front of Alcala's house. He watched as Alcala exited the truck, approached a second vehicle parked in the driveway, opened and closed the hood of the vehicle, and then disappeared into the house. At this point, a police unit drove by with its emergency lights activated. It was Officer Ontiveros responding to the call, which is when his dash-cam captured the image of the white Dodge truck parked on the side of the road.

After Officer Ontiveros had passed, Alcala's father drove the truck onto his property and into a dark area near a tree. This struck Garza as "odd" because Alcala's father had the vehicle's headlights off when he was moving the truck onto his property. "[I]t was dark, **[**14]** [and] . . . common sense tells you to turn on the light[s] to pull into your driveway so you won't hit your gate or your fence or . . . anything."

Alcala's father was in the process of securing the gate to the fence that surrounded his property when Garza called out to him, "Eloy, what happened?" Alcala's father looked around and then came across the street to Garza's driveway, where the two men met. Garza asked, "Why was [Alcala] . . . yelling?" Alcala's father responded, "Oh, no . . . . [H]e was fighting. He had a fight with somebody and - - but I already took care of that." Garza's wife, who was also outside with the men, interrupted, "But we heard three gunshots." "Really?" he responded. Garza found it "odd" that Alcala's father was acting "like he was surprised" because the gunshots "were loud and it was ... quiet." Then, Alcala's father said, "Well, I don't know . . . [,] [b]ut I have to go to work in the morning and I'll see you-all guys later."

Garza explained that this was unusual "[b]ecause when the unit was over there, . . . where we heard the gunshots, he wasn't like interested in seeing what was going on or what had happened, right, over there in that corner." Garza continued, **[**15]** "And it surprised me because, you know, usually we would all go out, you know, [to] see what is going on and he wasn't interested." Instead, Alcala's father went inside the house and turned off all the lights, which was also unusual, according to Garza, because they typically left a light on outside by their storage unit. On this particular night, "everything was off." **[*10]** The house and the lot were both completely darkened.

D. Officer Juan Manuel Quilantan

Officer Juan Manuel Quilantan of the Pharr Police Department also testified for the State. At approximately 1:30 a.m. on October 8, 2010, he was on patrol when Officer Ontiveros radioed the "dispatcher to see if there were any calls for shots fired." Officer Quilantan immediately "started heading southbound on Cage [Boulevard] towards Las Milpas." When he arrived at the scene of the shooting, several officers had already arrived," including Officer Ontiveros. Officer Quilantan helped "block[] off any oncoming traffic." Then, he "started looking for bullet casings." He found one and marked its location. Another officer recovered a second casing, also marking its location. The third casing was never recovered.

From speaking to Officer Ontiveros, **[**16]** Officer Quilantan learned that the suspect's vehicle was a white Dodge truck and that the suspect lived within about "two blocks" of the crime scene, possibly next to a daycare facility. Officer Quilantan was familiar with Las Milpas because "rookies" in the Pharr Police Department are assigned to "Las Milpas to get to know how to . . . speak to the people . . . and get comfortable with them so when . . . [they] get back to Las Milpas, which is a high crime area, [they] . . . know . . . who to talk to and who not to talk to." From his previous experiences, Officer Quilantan was familiar with the daycare, and it got his attention.

Together with Officer Eric Galaviz and Officer Jose Luengo, both also of the Pharr Police Department, Officer Quilantan set out on foot to locate the suspect's vehicle. The officers initially spotted a white Dodge truck parked on the property located at 7002 Laurel Street. The truck was parked inside a hurricane fence, but the gate to the fence was locked. Officer Quilantan called out, shouting for the people inside to come outside. When no one answered, he got his baton and began "banging it on the gate." A few minutes later, people "started coming out." A **[**17]** woman appeared with

her husband and brother-in-law. She said she and her husband were the owners of the property. "After identifying everybody[,] . . . [the officers] ran . . . an inquiry on all three subjects, [and] they came out clean . . . ." Officer Quilantan "touched the hood of the truck[,] . . . [a]nd it was cold like it had not been touched, not been moved."

As Officer Quilantan was preparing to leave the property, "[s]omebody drove up to Officer Galaviz and said, 'That's not the vehicle. The vehicle is over here.'"[4] Officer Quilantan turned to look in the direction where the person had pointed and saw "there was another white Dodge Ram by a tree completely dark." The officers approached the property, which was enclosed by a chain-link fence, and discovered that the gate to the fence was unlocked. The truck "was parked inside the property by the tree, like real close to the tree." The address was "708 or 709 Santa Monica [Street]."

At this point, Officer Jesse Garza of the Pharr Police Department arrived at the scene. Together, he and Officer Quilantan **[*11]** went inside the property and touched the hood of the truck. It "was warm." Then, using a flashlight, Officer Quilantan "spotlighted the inside of the cabin of the truck [and] . . . was able to see . . . a live bullet . . . inside . . . [a] cup holder." Then, Officer Garza said, "Hey, you know what, somebody is looking at us." The house "had the lights off, but you could see a silhouette going like - - you know, looking at us," Officer Quilantan testified. He "spotlighted it, [but] that person was no longer there."

Officer Quilantan's attention then shifted to a pearl-colored Cadillac CTS that was also parked on the property, inside the chain-link fence. He "lit it up with [his] ... flashlight, [and he] . . . could see a lot of bloodstains." Sergeant David Castillo of the Pharr Police Department opened the door to the vehicle, and **[**19]** the officers "looked at the inside and it was just full of blood." "And then that's when several of [the officers] ... decided to do a knock and talk, which is talk to the owners of the residence and see what's going on."

E. Sergeant Daniel Leal

The State called Sergeant Daniel Leal of the Pharr Police Department as a witness. Sergeant Leal arrived at the crime scene after it had been secured. He spoke to Maricela Garcia and knew that David Garcia had been in a fight earlier in the evening. When he heard Officer Quilantan radio dispatch to report a vehicle matching the description of the suspect's vehicle, he travelled to the 700 block of Santa Monica Street, where he joined the other officers who were in the process of surrounding the Alcalas' home. They knocked on the front door, but initially, no one answered. Finally, Alcala's father came to the door.

Sergeant Leal requested consent to search the Dodge truck, the Cadillac CTS, and the residence. Alcala's father signed a written consent to search, which was admitted into evidence at trial. Then, the officers and investigators entered the house. According to Sergeant Leal, one of the officers asked Alcala's father if he had any weapons **[**20]** in the house, and Alcala's father indicated that there were several weapons in the house. He retrieved a short-barrel rifle from the closet in his bedroom and handed it to Sergeant Leal. Another officer, Lieutenant William Ryan, recovered a nine-millimeter handgun, which Alcala's father voluntarily provided.

F. Sergeant David Castillo

The State also called Sergeant David Castillo of the Pharr Police Department to testify as a witness. Sergeant Castillo arrived at the crime scene, and then, he made his way to the Alcalas' home, where the other officers reported finding a vehicle matching the description of the suspect's vehicle. Sergeant Castillo testified that the single round of ammunition found in the cup holder of the white Dodge truck parked on the Alcalas' property was for a .40 caliber handgun. According to Sergeant Castillo, Alcala's father "was asked if he had a .40 caliber handgun and he stated yes." This weapon was later recovered from inside the house. Alcala's father also cooperated with the police by pointing out where additional ammunition and magazines could be found in a backpack in the backseat of the white Dodge truck. Based on the information provided by Alcala's father, **[**21]** Sergeant Castillo was able to locate ammunition and magazines

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[4] Although Officer Quilantan did not know it at the time, the person who advised the officers that they were looking at the wrong truck was a member of David Garza's family. After Alcala's father had gone into his house, the Garza family had remained **[**18]** outside watching the investigation. They watched as the officers got sidetracked with the wrong vehicle. They knew the officers "never saw ... [the Alcalas'] truck because their truck [was] parked back towards this side. And it was dark."

for a .40 caliber handgun and for a rifle.

G. Officer Eric Galaviz

The State called Officer Eric Galaviz of the Pharr Police Department to testify as a witness. Officer Galaviz testified that he was with the other officers and investigators when they made contact with Alcala's **[*12]** father at the family's residence. The following exchange occurred on the State's direct examination:

> Q And can you describe that encounter to this jury?
>
> A What . . . I did was I asked the resident owner where his son was at. He said he was in his room, which was on the northwest corner of the residence. Me and Officer Jesse Garza went into that room and made contact with Mr. Alcala, Jr.
> I asked him to come out. I believe his girlfriend was in there also. I don't recall her name because I didn't identify her. As soon as we got him out, I did notice that he had a black eye on his - - I believe it was his right eye. He started asking me what was going on. I told him I didn't know, you know, that we are here doing an investigation. And at that point[,] Officer Quilantan read him his rights. . . As soon as he read him his rights, I walked out.

H. Lieutenant William [22] Ryan**

The State called Lieutenant William Ryan of the Pharr Police Department to testify as a witness. Lieutenant Ryan testified that he was present in the Alcalas' home when Alcala's father "passed over" the .40 caliber handgun.

I. Lieutenant William Thomas Edmundson, Jr.

The State called Lieutenant William Thomas Edmundson, Jr. of the Pharr Police Department to testify as a witness. Lieutenant Edmundson testified about the two shell casings that were recovered from the crime scene. He testified that they were for a .40 caliber weapon. "When [he] ... heard that there was a .40 caliber weapon that was recovered at the [Alcalas'] residence, . . . [he thought] [t]hat they probably recovered the murder weapon."

J. Investigator Janie Arrellano

The State called Investigator Janie Arrellano as a witness. She testified that she is a crime scene investigator employed by the Pharr Police Department. She photographed the scene where the shooting occurred. She also collected physical evidence, including the two spent shell casings recovered from the scene of the crime. She identified them as casings for .40 caliber hollow-point bullets. She testified that the ammunition was made by "Smith & Wesson **[**23]** Winchester." She also testified that one of the boxes of ammunition recovered from the Alcalas' white Dodge truck contained .40 caliber hollow-point bullets also made by Smith & Wesson Winchester.

K. Investigator Michael Perez

The State called Investigator Michael Perez of the Pharr Police Department as a witness. He testified regarding a statement made by Alcala after he was taken into custody and transported to the police station. During Perez's testimony, the trial court admitted into evidence a video recording of Alcala's statement, which was played to the jury in its entirety. Before the interrogation began, the following exchange took place between Alcala and an unidentified officer:

> Officer: That's it, man, you are just going to talk to him real quick. Give your side of the story or whatever.
>
> Alcala: I don't know. Like *me aguito* because he is my friend, like, I don't want to fight him, like, *me aguito*, but like *chingada madre pinche* vato. It's a trip. Oh, well, you know, sometimes friends fight friends. And I know his mom. I told him [sic] mom, "Mom, I'm sorry. I didn't want to disrespect, **[*13]** but I wanted to know why David did that because he was at my house."
>
> Officer: Wait until the **[**24]** investigator gets here, man, just tell him all that. . . .

Then, Investigator Perez arrived and initiated the interrogation. Initially, he focused on the altercation that occurred between David and Alcala earlier in the night. Alcala described having dinner with his girlfriend at Whataburger. They returned home in Alcala's car. According to Alcala, David then "peeled out" in front of Alcala's house, which prompted Alcala to follow David back to David's house. Then, according to Alcala, the following exchange occurred:[5]

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[5] The portions of the exchange that were in Spanish were not interpreted for the jury.

So I see him and I got ... there and I am like, "*Que onda, carnal*?" I was like, "*Que onda, guey*?" Like, "What's going on, bro?" Like, "*Pos que pinche onda*?" ... And I'm like, "*Oh, este vato*. Why are you talking to me like that way?"

And he was like, "*No, que tu y tu pinche* green car." And I'm like ... "*Como que mi pinche vieja, guey*? You are talking about my wife, Dude. Chill the fuck out, bro.

And he was like, "*No, que*" - - he's talking - - and he starts talking - - like telling me words because I guess he had backup in back of him. And he started telling me things. And I'm like, "Hey, bro, you know what, bro, like, we are in the same hood. We've known each other from when **[**25]** we were kids, but you need to chill the fuck out, *vato*."

So he was like, "*No, pos orale, simon*," like you know. And he kept on, "*No, y que me vale verga, y, pos, vajate a la verga, vajate a la verga, vajate a la verga* - -"

Alcala claimed that he was then assaulted by David and another man, "a *senior*," who was much bigger than he was—possibly Victor de la Cruz. Alcala described being punched in the face repeatedly, bleeding from the nose, unsuccessfully trying to fight back, and essentially, being the victim of an assault. According to Alcala, he returned to David's house with his father a short while later in an effort to resolve the conflict. When that attempt failed, he went home to have sex with his girlfriend, which is when the police arrived at his house. Unlike other witnesses who were interviewed by the police, Alcala did not report or acknowledge hearing gunshots. Investigator Perez also thought it was strange that Alcala would want to have sex with his girlfriend after being assaulted.

After getting Alcala's statement about what transpired before the shooting, Investigator Perez disclosed to **[**26]** Alcala the real reason for the interrogation:

Q What do you think the reason is that you are here for?
A Because I got in a fight.
Q Okay. Well, I am going to - - I am going to give you some news. There is two people that were murdered today, okay, they were shot. And it was real close to your house. And the person that was shot was your friend David and somebody else.
Hold on.
Those two people that got shot, they saw a white Dodge roll up to them and shoot them?
A Uh-huh.
Q A white Dodge that - - that matches your dad's truck and people already identified that truck. Okay.
A Uh-huh.
Q Second of all, the investigators that went to your house - -

[*14] A Uh-huh.
Q - - located a weapon - -
A Uh-huh.
Q - - and located bullets that matched the bullets - - the bullet casings that we found at the scene.
A Okay.
Q Okay. The other thing is we found evidence going into your car and blood there.
A Yeah.
Q So we - - we processed that vehicle as well for DNA.
A Okay.
Q And that's the reason why earlier today when I read you your rights, I asked you for DNA.
Did you have anything to do with those two murders?
A No, sir.

When Alcala did not confess, Investigator Perez made up a story about putting together a photo lineup that **[**27]** eyewitnesses had used to identify Alcala as the shooter. He made it seem like these witnesses had actually seen the shooting, even though that was not true. Ultimately, the phony photo lineup story did not work. Alcala continued to maintain his innocence.

Investigator Perez changed his approach. He began focusing on Alcala's father:

Q Two people are dead, dude.
A I didn't - -
Q One of them was your friend. One of them is your friend that is dead right now. Why? Because of something stupid that happened before this.
A Uh-huh.
Q And you are still sitting there lying to me when we know you were there.
A Where?
Q At the scene of the shooting, where else?
A No, sir.

Q Okay. So you are going to let your dad take the blame for this. Because your dad is not going anywhere tonight *tampoco*. He's going to go in the same way you're in. The same way.
A Okay.
Q So you're claiming that your dad is the one that

did this?
A My dad - - I don't know.
Q Okay. So you don't know if your dad did this or not?
A I don't know.
Q Is he capable of doing this?
A I don't know, bro. I don't know...
Q Just tell me exactly what happened, the reason why they got shot. That's all I need to know.
A I don't know...

Q [Y]our dad is here. **[**28]** He is already getting questioned. Your dad is going to turn around and say, "You know what, I didn't shoot."
What do you think he is going to say? Do you think he is going to take the blame for you? . . .
A Why would I risk my dad and tell my dad, "Dad, let's go kill these motherfuckers"? I know that - -
Q Out of anger. Out of anything. You guys got into a fight...
A Homie, I can tell you - - sir, I can tell you right now, sir, really I can - - I can take care of my own self. The only reason why I found my father is because my dad knows people around the neighborhood. Okay? . . .
Q All these [items of evidence] . . . came out of your house. I don't know if you understand that.
A For real?

[*15] Q Identical.
Yes.
A Wow.
Q Yeah, they are. Don't act stupid.
A I'm not. Oh, again, wow. Like, wow.
Q Okay.
A I'll be surprised.
Q I'm telling you. No, don't be surprised. That's what it is. . . . So you are still going to sit there and lie?
A Yeah.
Q You can make that dumb face all you want. When it comes down to the Court I will remember that.
A Okay. All right, bro.

The interrogation ended shortly thereafter. Alcala never confessed to any knowledge or involvement in the murders. However, at the end of the interrogation, **[**29]** Investigator Perez asked Alcala if he was "still going to sit there and lie" and Alcala answered "yeah."

Investigator Perez also testified regarding the pink receipt from Matt's Cash & Carry that was recovered from the scene of the crime. According to Perez, at least seven similar receipts from the same business were discovered on the floorboard near the front passenger seat of the white Dodge truck belonging to Alcala's father. A bloody shoeprint was also observed on the passenger-side doorstep. Based on this evidence, Investigator Perez believed that a passenger had exited the vehicle at the crime scene, inadvertently causing the receipt to fall out of the truck. Investigator Perez also believed that the passenger then stepped in the blood of one of the victims before climbing back into the vehicle using the doorstep. Based on all information acquired through the police investigation, Investigator Perez believed that Alcala and his father were both involved in the murders of David Garcia and Victor de la Cruz.

L. Crystina Vachon

The State called Crystina Vachon as a witness. She testified that she is employed by the Bexar County Criminal Investigation Laboratory in San Antonio. Her **[**30]** area of expertise is forensic science, and she works in the trace evidence section. In connection with the investigation into the double homicide involving David Garcia and Victor de la Cruz, she used an electron microscope to test various skin and clothing samples collected by the Pharr Police Department for evidence of gunpowder residue.

Vachon's testing revealed "three particles containing lead, barium, and antimony and two particles containing lead and antimony on the left hand of ... [Alcala's father]." According to Vachon, this indicated that he may have discharged a firearm, handled a discharged firearm, or been in close proximity to a firearm that was discharged. No similar evidence was detected in the samples taken from Alcala's hands. However, she testified that such evidence is "delicate" and can be lost if an individual washes his hands or takes a shower.

Vachon tested the black muscle shirt that Alcala was wearing on October 8, 2010. One sample from the shirt had "five particles containing lead, barium and antimony, one particle containing lead and antimony, and four particles containing barium and antimony." A second sample from the same shirt had "three particles containing **[**31]** lead, barium, and antimony, two particles containing lead and antimony, and three particles containing barium and antimony." According to Vachon, this "indicates that the shirt may have come in contact with a discharged firearm or was in close proximity to a discharging firearm." **[*16]** Similar

evidence was recovered from the blue jeans that Alcala was wearing that night and from the blue jeans, grey shirt, and jacket Alcala's father was wearing, again indicating that these articles of clothing may have been in close proximity to a discharged firearm.

M. Vanessa Nelson

The State called Vanessa Nelson as a witness. She is employed by the Texas Department of Public Safety Crime Laboratory in Hidalgo County. She is assigned to the "Serology/DNA" section. She is a supervisor in that department, but she also "work[s] cases." She testified that various samples were submitted to her for DNA (deoxyribonucleic acid) testing by the Pharr Police Department in connection with the double-homicide involving David Garcia and Victor de la Cruz. These items included blood samples from David Garcia and Victor de la Cruz, the weapons recovered from Alcala's father, and the clothing worn by Alcala and his father **[**32]** on the night of the murders, as well as swabs taken from various places, such as different areas inside and outside of the white Dodge truck and the Cadillac CTS.

The results of Nelson's testing showed that blood consistent with the DNA profile of David Garcia was found on the passenger-side doorstep of the white Dodge truck belonging to Alcala's father and on a pair of shoes recovered from the Alcalas' home.[6] The jeans Alcala was wearing that night had blood consistent with the DNA profile of Victor de la Cruz.

N. Norma Jean Farley, M.D.

The State also called Norma Jean Farley, M.D. as a witness. She served as the forensic pathologist for Hidalgo County. She performed autopsies on David Garcia and Victor de la Cruz. She testified that David Garcia **[**33]** was twenty-one years of age and that Victor de la Cruz was thirty-five and that the cause of death for both men was homicide. She testified that David Garcia was shot through the mouth. The bullet "didn't actually enter the part of the brain where the skull sits." Instead, the bullet "actually entered the head and then travelled into the neck where it transected the internal - - left internal carotid artery." He died from blood loss. Dr. Farley testified that Victor de la Cruz sustained one gunshot wound to the head and a second to the chest. Both wounds were fatal. She could not determine the order in which the wounds were inflicted.

O. The Jury's Verdict

The jury found Alcala guilty of capital murder. The State did not seek the death penalty, and Alcala was given a life sentence. He subsequently filed this appeal.[7]

II. Sufficiency of the Evidence

In his first issue, Alcala contends that the evidence is insufficient to support the jury's verdict because the State failed to establish that he shot either **[**34]** of the victims or that he was a party to the capital murder.

[*17] A. Standard of Review

When we review the sufficiency of the evidence to support a verdict under the sufficiency standard set out in *Jackson v. Virginia*, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Clayton v. State, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007)* (citing *Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*). "This standard accounts for the fact[-]finder's duty to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id.* (quotations omitted). "[W]e 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." *Id.* (quotations omitted). "Our review of all of the evidence includes evidence that was properly and improperly admitted." *Id.* "When the record supports conflicting inferences, we presume that the fact[-]finder resolved the conflicts in favor of the prosecution

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[6] There was no direct testimony that the shoes belonged to Alcala; however, they were recovered from his bedroom. Investigator Janie Arrellano testified that the shoes matched the bloody shoeprint discovered on the passenger-side doorstep of the white Dodge truck belonging to Alcala's father. Alcala's attorney objected to this testimony, but the trial court overruled his objection. Alcala challenges this ruling in his fourth issue in this appeal.

[7] In a separate trial, Alcala's father, Eloy Heraclio Alcala, Sr., was also tried and convicted for capital murder. His appeal is pending before this Court in cause number 13-12-00259-CR.

[35]** and therefore defer to that determination." *Id.* "Direct and circumstantial evidence are treated equally." *Id.* "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." *Id.*

B. Applicable Law

We measure the sufficiency of the evidence by the elements of the offense as defined by a hypothetically correct jury charge. *See* Malik v. State, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). "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." Villarreal v. State, 286 S.W.3d 321, 327 (Tex. Crim. App. 2009) (quotations omitted).

In relevant part, the Texas Penal Code provides, "A person commits an offense 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." Tex. Penal Code Ann. § 19.03(a)(7)(A). Under Section 19.02(b)(1) of the Texas Penal Code, **[**36]** "A person commits an offense if he . . . intentionally or knowingly causes the death of an individual." *Id.* § 19.02(b)(1) (West 2011).

"A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both." *Id.* § 7.01(a) (West 2011). "A person is criminally responsible for an offense committed by the conduct of another if . . . acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense." *Id.* § 7.02(a)(2) (West 2011). "In determining whether the accused participated as a party, the court may look to events occurring before, during and after the commission of the offense, and may rely on actions of the defendant which show an understanding and common design to do the prohibited act." *Ransom v. State, 920 S.W.2d 288, 302 (Tex. Crim. App. 1994)* (en banc) (quotations omitted).

C. Discussion

Alcala argues that the evidence is insufficient for two reasons: (1) there was no direct evidence that he shot either of the victims; and (2) there was no direct evidence **[*18]** that he encouraged, **[**37]** promoted, or assisted his father in committing the murders. We conclude that the evidence is sufficient to support the jury's verdict.

We begin by noting that "direct evidence of the elements of the offense is not required." Hooper v. State, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007). "Juries are permitted to make reasonable inferences from the evidence presented at trial, and circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor." *Id.* "Circumstantial evidence alone can be sufficient to establish guilt." *Id.* Therefore, the lack of direct evidence that Alcala shot either of the victims is not dispositive. *See* Guevara v. State, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004) ("[T]he lack of direct evidence is not dispositive of the issue of a defendant's guilt."). More importantly, there was sufficient circumstantial evidence to establish that David Garcia and Victor de la Cruz were murdered and that Alcala was responsible for the murders. *See id.*

First, the evidence established that David Garcia was shot through the mouth and that Victor de la Cruz was shot in the head and the chest. Both men died as a result of their gunshot wounds. Dr. Farley testified **[**38]** that the cause of death for both men was homicide. From this, a rational juror could find that David Garcia and Victor de la Cruz were the victims of a double-murder. *See* Tex. Penal Code Ann. § 19.02(b)(1) (defining "murder"); Medina v. State, 7 S.W.3d 633, 637 (Tex. Crim. App. 1999) (en banc) (explaining that "specific intent to kill may be inferred from the use of a deadly weapon, unless in the manner of its use it is reasonably apparent that death or serious bodily injury could not result") (quoting Godsey v. State, 719 S.W.2d 578, 580-81 (Tex. Crim. App. 1986)).

Second, the evidence established that David Garcia and Victor de la Cruz were both shot with Smith & Wesson Winchester hollow-point bullets fired from a .40 caliber weapon. Eyewitnesses reported hearing three gunshots fired in succession, indicating that the men were shot sequentially, not at the same time. Based on the foregoing, a rational juror could infer that the same weapon may have been used to kill both men and that there may have been only one shooter.

Third, the evidence established that, in the moments before they were killed, David Garcia and Victor de la

Cruz were involved in a loud argument with the shooter **[**39]** and possibly someone else. From this, a rational juror could infer that the men probably knew their killer. *See* Fischer v. State, 268 S.W.3d 552, 554 (Tex. Crim. App. 2008) ("Evidence was also presented from which a rational jury could find that the victim probably knew her killer.").

Fourth, the evidence established that David Garcia knew Alcala and that they were "friends." The evidence also established that Alcala was involved in an argument with David Garcia that took place earlier that night. The evidence, particularly Alcala's statement to the police, indicated that Victor de la Cruz was also present during the argument between David Garcia and Alcala and that Alcala was therefore familiar with Victor de la Cruz as well.

Fifth, the evidence placed Alcala at the scene of the crime and established that he had the opportunity to commit the murders. *See* Temple v. State, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013) ("Although motive and opportunity are not elements of murder and are not sufficient to prove identity, they are circumstances indicative of guilt."). David Garza testified that he saw the Dodge truck belonging to Alcala's father travel in the direction of David Garcia's **[*19]** house **[**40]** minutes before he heard gunshots. Maricela Garcia testified that Alcala and his father arrived at her house in a Dodge truck and were looking for David minutes before she heard gunshots. Arturo Arredondo testified that after he heard gunshots, he went outside and saw a white Dodge truck drive off in the direction of Alcala's house. When the police arrived at Alcala's house, the hood of the truck was still warm, as if it had been driven recently.

At the crime scene, the police recovered a pink sales receipt from Matt's Cash & Carry. They found at least seven similar receipts from the same business on the front floorboard of the white Dodge truck that belonged to Alcala's father. As Investigator Perez testified, this indicated that Alcala had exited the vehicle at the scene of the crime, causing the receipt to inadvertently fall out of the truck. This theory was further supported by the bloody shoeprint found on the passenger-side doorstep of the vehicle that matched the DNA of David Garcia, as well as the shoes recovered from Alcala's bedroom, which also had blood matching the DNA of David Garcia. There was also blood discovered on Alcala's jeans that matched the DNA of Victor de la **[**41]** Cruz. Finally, there was evidence of gunpowder residue found on Alcala's clothing, indicating that he had recently been in close proximity to a firearm that was discharged. Based on the foregoing, a reasonable juror could find that Alcala was present at the scene of the crime and had the opportunity to commit the murders. *See* Wolfe v. State, 917 S.W.2d 270, 275 (Tex. Crim. App. 1996) (upholding murder conviction where defendant "was seen within a few blocks of the crime scene shortly before and shortly after the murder").

Sixth, the evidence established that Alcala had the means to commit the murders. *See* Rios v. State, 846 S.W.2d 310, 313 (Tex. Crim. App. 1992) (considering defendant's possession of murder weapon "several weeks prior to the killings" as evidence of guilt). The victims were shot with a .40 caliber firearm, and the police recovered a .40 caliber handgun from the Alcalas' house. Furthermore, the shell casings recovered from the crime scene were for Smith & Wesson Winchester .40 caliber hollow-point bullets. Identical ammunition was recovered from the white Dodge truck belonging to Alcala's father. Based on the foregoing, a rational juror could find that the .40 caliber **[**42]** handgun recovered from the Alcalas' home was, in fact, the weapon used to murder David Garcia and Victor de la Cruz. Furthermore, a rational juror could also find that Alcala had access to, if not possession of, the murder weapon when the murders occurred. *See* Madden v. State, 799 S.W.2d 683, 692 (Tex. Crim. App. 1990) (en banc) (upholding murder conviction and noting "[p]erhaps most damaging is the evidence that appellant was in possession of the .22 caliber murder weapon").

Seventh, the evidence established that Alcala had a motive for committing the murders. *See* Clayton, 235 S.W.3d at 781 ("[A]lthough motive is not an element of murder, it may be a circumstance that is indicative of guilt."). Earlier in the evening, David allegedly disrespected Alcala by "peeling out" in front of his house. Then, after that, David allegedly disrespected Alcala's girlfriend by saying something about her "*pinche* green car."[8] According to the statement Alcala made to the police after the murders, David and a second man, possibly Victor de la Cruz, then assaulted Alcala in front of David's house. Disrespected and injured in the **[*20]** two encounters with David, Alcala returned to David's house seeking a third **[**43]** encounter, this time with the help of his father. When that failed, the men left "very upset" and "angry." Moments later, gunshots were heard and David Garcia and Victor de la Cruz were found dead in the street.

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[8] "*Pinche*" is a Spanish word that was not defined for the jury.

Eighth, the evidence established that before the murders, Alcala manifested, by word and by deed, his intent to cause the death of David Garcia. *See* Tex. Penal Code Ann. § 19.02(b)(1). The men had been in at least two intense encounters on the night of the murders. At least one of the encounters involved physical violence that caused bodily injuries to both men. Furthermore, just minutes before the murders, Alcala told David's mother, "Whether it's today or tomorrow, it's going to be his turn." This statement is particularly significant because Alcala made it after David's mother complained that Alcala had nearly hit and killed David with his vehicle just minutes before the shooting, which is also evidence that Alcala intended to cause the death of David Garcia. *See* Ross v. State, 133 S.W.3d 618, 624 (Tex. Crim. App. 2004) (upholding conviction for capital murder after noting that "[a]ppellant threatened . . . [the **[**44]** victim] with violence not long before she was murdered"). In talking to David's mother, Alcala expressed more than mere indifference to causing David's death. A rational juror could conclude that his remark and behavior were evidence of Alcala's intent to cause David's death. *See* Turner v. State, 600 S.W.2d 927, 929 (Tex. Crim. App. 1980) ("[T]he Court has consistently held that knowledge and intent can be inferred from conduct of, remarks by and circumstances surrounding the acts engaged in by an accused . . . .").

Ninth, the evidence established that Alcala fled the scene after David Garcia and Victor de la Cruz were killed. *See* Clayton, 235 S.W.3d at 780 ("We have recognized that a fact[-]finder may draw an inference of guilt from the circumstance of flight."). David Garza testified that after he heard gunshots, he looked outside and saw Alcala exit from the passenger side of his father's white Dodge truck, which was parked in the street with the headlights off. Alcala opened and closed the hood to his Cadillac CTS and then disappeared inside the house. *See* Hardesty v. State, 656 S.W.2d 73, 78 (Tex. Crim. App. 1983) (upholding conviction where "appellant tried to avoid police apprehension").

Tenth, **[**45]** unlike other witnesses, Alcala did not report hearing gunshots and expressed no interest in the police investigation taking place literally right outside his door. Instead, he maintained that he went home to have sex with his girlfriend, which Investigator Perez found implausible. *See* Guevara v. State, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004) ("[I]nconsistent statements . . . and implausible explanations to the police are probative of wrongful conduct and are also circumstances of guilt.").

In sum, the evidence established the following: (1) David Garcia and Victor de la Cruz were the victims of a double-homicide; (2) a single shooter used a .40 caliber weapon to kill both men; (3) the victims knew their killer; (4) Alcala knew the victims; (5) Alcala was present when the murders occurred; (6) the murder weapon was recovered from Alcala's home; (7) Alcala had a motive to kill the victims because David Garcia and a second man—possibly Victor de la Cruz—assaulted Alcala and disrespected him earlier that night; (8) Alcala manifested his intent to kill David Garcia by steering his vehicle toward David and telling David's mother that "[w]hether it's today or tomorrow, it's going to be his **[**46]** turn"; (9) Alcala fled the scene after the murders occurred; and **[*21]** (10) Alcala gave police an implausible explanation for what he was doing when the murders occurred.

Finally, we note that although Alcala did not testify at trial, the jury did view the video recording of the statement he made to the police on the night of the murders. The jury watched as Investigator Perez broke "the news" to him that his friend David and another man had been murdered. The jury saw his reaction. They were able to assess whether he was lying or telling the truth when he professed his ignorance. Most importantly, the jury watched as Investigator Perez asked him whether he had any involvement in the murders. They saw his reaction. They heard his denial. And ultimately, they found that he was lying.

The United States Supreme Court has stated that the jury may regard "false statements in explanation or defen[s]e made or procured to be made as in themselves tending to show guilt." Wilson v. United States, 162 U.S. 613, 621, 16 S. Ct. 895, 40 L. Ed. 1090 (1896). As Judge Learned Hand once wrote, a defendant's denial of wrongful conduct "may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is **[**47]** fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies." *See* Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952). Similarly, Judge Richard Posner has explained that a defendant does not have to testify—or in this case, give a statement to police—"but if he does and denies the charges and the jury thinks he's a liar, this becomes evidence of guilt to add to the other evidence." United States v. Zafiro, 945 F.2d 881, 888 (7th Cir. 1991), *aff'd on other grounds*, 506 U.S. 534, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993). The Texas Court of Criminal Appeals has cited these decisions and indicated that their approach is appropriate when, as here, "the fact that a crime had

occurred was established by other evidence." Hacker v. State, 389 S.W.3d 860, 872 (Tex. Crim. App. 2013).

Although no witness testified to seeing Alcala shoot either of the victims, after considering the combined and cumulative force of the incriminating evidence set forth above, a rational juror could conclude, beyond a reasonable doubt, that Alcala was responsible for killing David Garcia and Victor de la Cruz as the primary actor, under the law of parties, or both. *See* Tex. Penal Code Ann. § 7.01(a); *Ransom, 920 S.W.3d at 302* **[**48]** ("Evidence is sufficient to convict under the law of parties where the defendant is physically present at the commission of the offense and encourages its commission by words or other agreement."). This was not "a determination so outrageous that no rational trier of fact could agree." Wirth v. State, 361 S.W.3d 694, 698 (Tex. Crim. App. 2012). Accordingly, Alcala's first issue is overruled.

III. Hearsay Testimony

In his second issue, Alcala contends that the trial court erred in admitting the hearsay testimony of David Garza that Alcala was outside his house shouting that he was going to kill Garza's dog.

A. Applicable Law

"The hearsay doctrine, codified in Rules 801 and 802 of the Texas Rules of Evidence, is designed to exclude out-of-court statements offered for the truth of the matter asserted that pose any of the four 'hearsay dangers' of faulty perception, faulty memory, accidental miscommunication, or insincerity." Fischer v. State, 252 S.W.3d 375, 378 (Tex. Crim. App. 2008) (citing **[*22]** Tex. R. Evid. 801, 802).[9] "The numerous exceptions to the hearsay rule set out in Rules 803 and 804 are based upon the rationale that some hearsay statements contain such strong independent, circumstantial **[**49]** guarantees of trustworthiness that the risk of the four hearsay dangers is minimal while the probative value of such evidence is high." *Id.* "The twenty-four hearsay exceptions listed in . . . Rule 803 may be roughly categorized into (1) unreflective statements, (2) reliable documents, and (3) reputation evidence." *Id. at 379* (citing Tex. R. Evid. 803). "The rationale for all of the exceptions is that, over time, experience has shown that these types of statements are generally reliable and trustworthy." *Id.*

"The first set of hearsay exceptions, unreflective statements, are 'street corner' utterances made by ordinary people before any thoughts of litigation have crystallized." *Id.* "These unreflective statements used to be called '*res gestae*,' an imprecise Latin legalese term, because the speaker was not thinking about the legal consequences of his statements." *Id.* "In most instances, the speaker was not thinking at all; the statement was made without **[**50]** any reflection, thought process, or motive to fabricate or exaggerate." *Id.*

One of those "unreflective statements" exceptions to the hearsay rule is defined in Rule 803(1), the present sense impression: "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Tex. R. Evid. 803(1). "Statements that qualify under this exception are not excluded by the hearsay rule, even though the declarant is available." Fischer, 252 S.W.3d at 380.

B. Standard of Review

"The admissibility of an out-of-court statement under the exceptions to the general hearsay exclusion rule is within the trial court's discretion." Lawton v. State, 913 S.W.2d 542, 553 (Tex. Crim. App. 1995). The trial court will be "reversed only if the decision is outside the zone of reasonable disagreement." Salazar v. State, 38 S.W.3d 141, 151 (Tex. Crim. App. 2001). In other words, "before the reviewing court may reverse the trial court's decision, it must find the trial court's ruling was so clearly wrong as to lie outside the zone within which reasonable people might disagree." Taylor v. State, 268 S.W.3d 571, 578 (Tex. Crim. App. 2008); **[**51]** *see also* Pena v. State, 353 S.W.3d 797, 814 (Tex. Crim. App. 2011). Furthermore, "[i]t is well settled that an out-of-court 'statement' need not be directly quoted in order to run afoul of the hearsay rules." Head v. State, 4 S.W.3d 258, 261 (Tex. Crim. App. 1999).

C. Discussion

At trial, David Garza testified that, on the night of the murders, he was asleep when the telephone rang and

[9] "Hearsay" is "a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted." *See* Tex. R. Evid. 801(d). Hearsay is generally inadmissible. *See* Tex. R. Evid. 802.

woke him up. His daughter-in-law answered the phone. Then, she knocked on the door of his bedroom. Garza was about to testify to what his daughter-in-law told him when counsel for Alcala made a hearsay objection, which the trial court overruled. Garza then proceeded to testify, "She says that - - that [Alcala] ... was outside of my - - on - - front of my yard, on the street that - - yelling that he was going to kill the dog."

Later, Garza testified, "I looked out the window because my wife told me that - -" **[*23]** when Alcala's trial counsel made a second hearsay objection, which the trial court also overruled. Garza then proceeded to testify, "I woke up and I looked out the window and - - my window is right in front by the street, and I seen . . . [Alcala] in front of my yard. And my dog was barking and that's **[**52]** when I went down to see, you know, why he wanted to kill the dog because he was yelling something about killing the dog."

A few questions later, Garza explained that he did not hear Alcala yelling something about killing the dog: "That's what my sister-in-law was telling me by the phone. When I went down, I thought he was going to kill my dog, because that's what I heard from the phone." Counsel for Alcala did not object to this testimony.

Viewing the testimony as a whole, rather than in isolated parts, it is clear that Garza testified about three different out-of-court statements made by three different women: (1) one by his daughter-in-law; (2) a second by his wife; and (3) a third by his sister-in-law. Although there were three different statements by three different speakers, each woman said essentially the same thing: that Alcala was outside yelling something about killing Garza's dog.

On appeal, Alcala complains that each statement "constituted double hearsay and was not subject to any hearsay exception." *See* Sanchez v. State, 354 S.W.3d 476, 485-86 (Tex. Crim. App. 2011) (citing Tex. R. Evid. 805) ("When hearsay contains hearsay, the [Texas] Rules of Evidence require that each **[**53]** part of the combined statements be within an exception to the hearsay rule."). We agree with Alcala that each of the three statements contained an additional out-of-court statement by Alcala to the effect that he was going to kill Garza's dog. But this was not hearsay-within-hearsay. *See* Tex. R. Evid. 805.

First, "[i]t is well established that an extra-judicial statement or writing offered for the purpose of showing what was said rather than for the truth of the matter stated therein does not constitute hearsay." Crane v. State, 786 S.W.2d 338, 352 (Tex. Crim. App. 1990). Here, the statements by Garza's daughter-in-law, wife, and sister-in-law were offered to establish "the circumstances surrounding and leading to the shooting." *Id.* They established how Garza was awakened in the middle of night and why he was looking outside when he saw Alcala's father's white Dodge truck depart towards David Garcia's house. As such, the statements were offered for the purpose of showing what was said rather than for the truth of the matter stated therein. *See id.* Accordingly, they were not hearsay. *See id.*

Second, even assuming the statements were hearsay, they were not subject to the hearsay rule. *See* **[**54]** Tex. R. Evid. 802. The women were describing to Garza what they were hearing at the time. Therefore, their statements fall within the "present sense impression" exception to the hearsay rule. *See* Tex. R. Evid. 803(1) (defining "present sense impression" as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter").

Third, Alcala's statement about killing the dog was not hearsay. *See* Tex. R. Evid. 801(d). "Rule 801(e)(2)(A) plainly and unequivocally states that a criminal defendant's own statements, when being offered against him, are not hearsay." Trevino v. State, 991 S.W.2d 849, 853 (Tex. Crim. App. 1999) (citing Tex. R. Evid. 801(e)(2)(A)). "This rule recognizes that the out-of-court statements of a party differ from the out-of-court statements of non-parties, and raise different evidentiary **[*24]** concerns." *Id.* "A party's own statements are not hearsay and they are admissible on the logic that a party is estopped from challenging the fundamental reliability or trustworthiness of his own statements." *Id.* Furthermore, "party admissions, unlike statements against interest, need not be against the **[**55]** interests of the party when made; in order to be admissible, the admission need only be offered as evidence against the party." *Id.* Accordingly, Alcala's statement about killing Garza's dog was not hearsay. *See* Tex. R. Evid. 801(e)(2)(A).

Finally, even assuming the statements were hearsay and improperly admitted into evidence, the error was not reversible. *See* Tex. R. App. P. 44.2(b). Under the Texas Rules of Appellate Procedure, "Any other [non-constitutional] error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." *Id.* Alcala does not assert that this was constitutional error. *See* Johnson v. State, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998) (evaluating error in admission of hearsay testimony under the standard for non-

constitutional error). Therefore, we apply the "substantial rights" test, under which the error must be disregarded unless "the error had a substantial and injurious effect or influence in determining the jury's verdict." *King v. State, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997)*.

As set forth above, counsel for Alcala did not object when Garza testified that his sister-in-law told him that Alcala was shouting something about **[**56]** killing his dog. This was essentially the same as the testimony about what Garza heard from his wife and daughter-in-law, to which counsel for Alcala did object. Furthermore, "it is well settled that an error in admission of evidence is cured where the same evidence comes in elsewhere without objection . . . [because] defense counsel must object every time allegedly inadmissible evidence is offered." *Hudson v. State, 675 S.W.2d 507, 511 (Tex. Crim. App. 1984)*. Therefore, counsel's failure to object cured the error, if any, in the trial court's admission of the other statements into evidence. *See id.* The error, if any, was harmless. *See Tex. R. App. P. 44.2(b)*. Accordingly, Alcala's second issue is overruled.

IV. Alleged Violation of Alcala's Sixth Amendment Right

In his third issue, Alcala contends that the trial court violated his Sixth Amendment right to confront and cross-examine witnesses by admitting hearsay statements through the testimony of David Garza. *See U.S. Const., amend. VI*; *Crawford v. Washington, 541 U.S. 36, 51-52, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)*; *Sanchez, 354 S.W.3d at 485* ("In addition to the restrictions that the statute and the rules place on the admission of hearsay, the *Sixth Amendment to the federal Constitution* **[**57]** broadly limits the admission of hearsay by giving a defendant the right to be confronted with the witnesses against him."). However, Alcala's trial counsel only made a general hearsay objection to this testimony, which is not sufficient to preserve this issue for appeal. *See Reyna v. State, 168 S.W.3d 173, 179 (Tex. Crim. App. 2005)* ("An objection on hearsay [grounds] does not preserve error on Confrontation Clause grounds."); *Paredes v. State, 129 S.W.3d 530, 535 (Tex. Crim. App. 2004)* (holding that general "hearsay" objection "failed to preserve error on Confrontation Clause grounds") (citing *Tex. R. App. P. 33.1(a)(1)*). Accordingly, Alcala's third issue is overruled.

V. Testimony about Shoeprint

In his fourth issue, Alcala contends that the trial court committed reversible error in allowing Janie Arrellano to testify that the bloody shoeprint on the passenger-side **[*25]** doorstep of Alcala's father's white Dodge truck matched the shoes found in Alcala's bedroom because Arrellano was not qualified as an expert in the area of shoeprints. We disagree.

"This type of testimony has long been admissible, in Texas and elsewhere, by *either* lay or expert witnesses." *Rodgers v. State, 205 S.W.3d 525, 532 (Tex. Crim. App. 2006)* **[**58]** (emphasis in original). Furthermore, even assuming, *arguendo*, that the trial court erred in admitting Arrellano's testimony, the error was waived by counsel's failure to object. *See Tex. R. App. P. 33.1(a)(1)*. At trial, counsel for Alcala made the following objection: "Your Honor, if I may, Judge, I am going to object if she is going to give an opinion or if she'll be speculating as to if that is the same blood that matches the shoe on the rail, Judge." Counsel's objection was limited to Arrellano giving an opinion or speculating about whether the blood on the doorstep to the truck matched the blood on the shoes recovered from Alcala's bedroom. Counsel did not object to Arrellano stating her opinion that the bloody shoeprint matched the shoes recovered from Alcala's bedroom. *See Tex. R. Evid. 103(a)(1)*. Therefore, because counsel's objection at trial does not comport with the issue raised on appeal, the error, if any, was waived. *See Penry v. State, 903 S.W.2d 715, 729 (Tex. Crim. App. 1995)* ("Because ... [defendant's] trial objection does not comport with the issues raised on appeal, he has preserved nothing for our review."). Accordingly, Alcala's fourth issue is overruled.

VI. Conclusion

The **[**59]** judgment of the trial court is affirmed.

NORA L. LONGORIA

Justice

Publish.

Tex. R. App. P. 47.2(b).

Delivered and filed the

14th day of November, 2013.

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