Affirmed and Memorandum Opinion filed December 31, 2024.

In The

Fourteenth Court of Appeals

NO. 14-23-00657-CR

RAMON CARLOS HERNANDEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 1703438

M E M O R A N D U M O P I N I O N

Appellant Ramon Carlos Hernandez was involved in a shooting at a northwest Houston motel and charged with felony murder. A jury found Appellant guilty of the charged offense and assessed punishment at 35 years' confinement. Raising five issues on appeal, Appellant challenges (1) the sufficiency of the evidence underlying his conviction, (2) the warrant for and subsequent search of a cell phone found at the scene of the shooting, and (3) the admission of certain cell phone records. Appellant also asserts he received ineffective assistance of counsel

at trial.

For the reasons below, we overrule Appellant's issues on appeal and affirm the trial court's judgment.

BACKGROUND

Shortly after midnight on April 10, 2020, a shootout occurred on the third floor of the HomeTowne Studios motel located in northwest Houston. One person was shot and killed at the scene. A second person ("Complainant") was shot and killed as he was driving away from the motel in a black Toyota Corolla.

During the subsequent investigation, Houston Police Detective Lovelace interviewed Appellant. Appellant told Detective Lovelace that he and several associates were at the HomeTowne Studios the night of the shooting. Appellant said a shootout ensued with other motel guests; during the shootout, Appellant's friend Rocket was shot and killed. Appellant said he grabbed a gun that fell from Rocket's waistband and made his way down the stairs to the motel parking lot. Appellant got in his friend's tow truck and the two drove out of the motel parking lot. Appellant told Detective Lovelace that he fired several gun shots from the tow truck's passenger window as the truck exited onto the roadway.

Appellant was arrested and charged with felony murder in connection with Complainant's death. *See* Tex. Penal Code Ann. § 19.02(b)(3). Appellant proceeded to a seven-day jury trial, during which the jury heard testimony from 14 witnesses. After the parties rested, the jury deliberated and found Appellant guilty of the charged offense. The jury assessed punishment at 35 years' confinement. Appellant timely appealed.

ANALYSIS

Appellant raises five issues on appeal and asserts:

1. the evidence is legally insufficient to maintain his conviction;
2. the search of the black LG phone found at the scene of the shooting exceeded the scope of the search warrant;
3. the search warrant for the black LG phone failed to establish an independent nexus between Appellant and the phone as necessary to authorize a search;
4. the black LG phone's records were admitted through an improper witness; and
5. Appellant received ineffective assistance of counsel during trial.

We consider these issues individually below.

I. Legal Sufficiency

In his first issue, Appellant argues the evidence is legally insufficient to show that he fired the shot that killed Complainant.

A. Standard of Review and Governing Law

In a legal sufficiency review, we consider the evidence in the light most favorable to the verdict to determine whether any rational finder of fact could have found the essential elements of the offense beyond a reasonable doubt. *Chambers v. State*, 580 S.W.3d 149, 156 (Tex. Crim. App. 2019); *see Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (plurality op.) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In our analysis, we defer to the trier of fact to fairly resolve conflicts in the witnesses' testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson*, 443 U.S. at 318-19). When the record contains conflicting inferences, we presume the trier of fact resolved any such conflicts in favor of the prosecution and defer to that resolution. *Padilla v. State*, 326 S.W.3d 195, 200 (Tex. Crim. App. 2010).

Circumstantial evidence is direct proof of a secondary fact that, through

logical inference, demonstrates an ultimate fact to be proven. *Rivera–Reyes v. State*, 252 S.W.3d 781, 787 n.3 (Tex. App.—Houston [14th Dist.] 2008, no pet.). Circumstantial evidence is as probative as direct evidence in establishing guilt, and circumstantial evidence alone can be sufficient to prove guilt. *Hooper*, 214 S.W.3d at 13. The same standard of review is used for both circumstantial and direct evidence. *Id*. "Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction." *Id*.

We measure the sufficiency of the evidence by comparing it to the elements of the charged offense as defined by a hypothetically correct jury charge. *Hernandez v. State*, 556 S.W.3d 308, 312 (Tex. Crim. App. 2017). Here, Appellant was charged with felony murder. *See* Tex. Penal Code Ann. § 19.02(b)(3). A person commits felony murder if he "commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, the person commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual." *Id*. "Deadly conduct" is a felony offense; a person commits this offense if he knowingly discharges a firearm in the direction of (1) one or more persons, or (2) a vehicle and is reckless as to whether the vehicle is occupied. *Id*. § 22.05(a), (b).

B. Evidence

We excerpt relevant portions of the witnesses' testimony below.

Officer Ready

Officer Ready responded to reports of a shooting at the HomeTowne Studios shortly after midnight on April 10, 2020. According to Officer Ready, as he

approached the motel he "observed a black four-door vehicle off to the side of the road" that had "crashed into what appeared to be bushes or a tree." Officer Ready recalled that the car's "back windshield appeared to be shot out," with glass scattered on the vehicle's trunk and in its back seat. Officer Ready said the vehicle did not appear to have any other bullet strikes, nor were any firearms or fired casings recovered from the vehicle's interior.

According to Officer Ready, when he approached the car he saw that its "driver [was] unresponsive in the driver's seat and there [was] blood on his shirt." Officer Ready said the vehicle was still turned on, with both its lights and windshield wipers operating. Officer Ready recalled trying to open the vehicle's doors but finding only the rear passenger door unlocked. Officer Ready testified that he and other officers pulled Complainant from the driver's seat and placed him on the ground. Officer Ready said Complainant had a gunshot wound to the back of the head and remained unresponsive while officers performed CPR.

Admitted during Officer Ready's testimony was video footage from the HomeTowne Studios' outdoor surveillance camera. Reviewing the footage captured shortly after midnight, Officer Ready testified that it showed a dark-colored car coming into view. According to Officer Ready, the car in the surveillance footage appeared to be the same color as Complainant's Toyota Corolla and had a similar rear-light pattern. Officer Ready opined that the car appeared to be traveling at "a faster than normal pace" and "sw[ung] out through" the motel parking lot exit, traveling south. Officer Ready said a tow truck is seen coming into view seven seconds later and making a left turn out of the motel parking lot, traveling north. Officer Ready testified that, while the tow truck was completing the left-hand turn, the truck's passenger window was "pointed towards where [he] found that crashed-out Toyota Corolla."

Also admitted during Officer Ready's testimony was a demonstrative showing relevant distances. According to the demonstrative, approximately 300 feet separated the HomeTowne Studios' parking lot exit and the location where Complainant's Toyota Corolla veered off the roadway and into the bushes.

Officer Borak

Officer Borak also responded to the reports of a shooting at the HomeTowne Studios. According to Officer Borak, police previously had responded to "numerous calls" at the motel involving "[a]ssaults, thefts, robberies, [and] narcotics." Officer Borak described the scene as "chaotic" with "[l]ots of people walking around, you know, trying to point to where we need[ed] to go."

Officer Borak said he proceeded to the motel's third floor, where he saw "a victim with an injury laying on the ground." According to Officer Borak, there was "ammunition all in the hallways" as well as a gun on the ground. Officer Borak said two cell phones were recovered from the scene of the shootout.

Tanya Cook

Tanya Cook said she was homeless in April 2020 and had been living at the HomeTowne Studios. Describing the location as a "high drug area," Cook said it was "convenient" for her since she was doing methamphetamine "[e]very single day, 24 hours a day."

Describing the hours preceding the shootout, Cook said she was in a motel room on the third floor with two men: Rob and Buddha. Cook said she had been dating Buddha for about two weeks at this point and "[e]very day he got more violent and seemed more paranoid and more crazy." Cook recalled that Buddha was using crack cocaine and methamphetamines during this time at "a much higher frequency than typical users."

According to Cook, she previously had asked J-Dawg (another motel guest and Cook's drug dealer) to periodically check in on her in her motel room to make sure everything was fine. J-Dawg came by the room while Cook, Buddha, and Rob were inside; according to Cook, this made Buddha "angry." Cook testified that Buddha began "calling people" to come to the motel, telling them "we're about to go to war." Cook recalled that Buddha also told people to bring their "toys," which she explained was "another word for guns." Cook said Buddha had a gun on him and she was "scared that he [was] going to shoot J-Dawg." Cook said Buddha seemed "very angry and very frantic."

According to Cook, their friend Cali showed up at the motel room with at least two guns and, shortly thereafter, Rocket and Misty arrived. Cook said everyone in the room was using methamphetamines. Cook said the next person to arrive at the motel room was Appellant. Cook testified that Buddha was talking to the group of men, "basically trying just to convince everyone that these — that J-Dawg and his friends, that they somehow want beef with them."

Cook said that Buddha, Cali, Rocket, and Appellant left the motel room and she "immediately heard a bunch of gunshots before the door was even closed." Cook remained in the motel room until Buddha returned and told her that they needed to leave. According to Cook, she and Buddha ran from the motel but were apprehended by police officers a short distance away.

Cook said she saw Appellant again the day after the shooting, when police officers dropped her and Buddha off at the HomeTowne Studios. According to Cook, she told Appellant that she "didn't say [his] name" Cook said she saw Appellant again some time later and he told her "[p]lease don't testify against me."

Cook said she did not mention Appellant in her first interview with police shortly after the shootout because she "was scared of him." Cook did not mention

Appellant's involvement in the shootout until her next police interview in October 2020.

Dr. Lopez

Dr. Lopez is a medical examiner and testified about the autopsy she performed on Complainant.

Reviewing an x-ray of Complainant's head, Dr. Lopez said Complainant died from a gunshot wound to the head. Dr. Lopez said the bullet entered Complainant's head through his right occipital scalp and traveled "back to front, right to left, and upward" before becoming lodged in his frontal lobe. Dr. Lopez said the entry wound was "atypical or oval shaped," which indicates the bullet hit "an intermediary target before it struck the back of [Complainant's] head." After reviewing evidence from the crime scene, Dr. Lopez said she concluded that the bullet "went through the windshield of a car and then entered the back of [Complainant's] head."

Dr. Lopez also noted that there was "no soot or stippling around the entrance wound," which suggests a "distant range of fire." According to Dr. Lopez, if Complainant had been shot by a person sitting in the back seat of his car, she would expect to see soot or stippling on the injury. Dr. Lopez said she did not know the exact distance from which the gun was fired but opined that it was "greater than 2 and a half to 3 feet away."

Melissa Nally

Melissa Nally is a firearms examiner with the Houston Forensic Science Department. As part of her analyses, Nally said she examines "land and groove impressions" on bullets to determine whether they were fired by the same firearm.

With respect to this case, Nally said she examined the bullet recovered from

Complainant's head as well as bullets and cartridge casings recovered from the scene of the shootout at HomeTowne Studios. According to Nally, her analyses showed that the bullet recovered from Complainant's head was fired by the same gun that shot a bullet into the wall in the area where the HomeTowne Studios shootout occurred.

J-Dawg

The jury also heard testimony from J-Dawg, who described the events that preceded the shootout. According to J-Dawg, he had been "hanging out" with Complainant in their motel room earlier in the day. J-Dawg said he and Complainant were "pals" and had grown up together. J-Dawg did not recall seeing Complainant during the shootout but thought he may have been downstairs "chilling in the parking lot."

J-Dawg did not remember who was with Buddha during the shootout nor did J-Dawg know if one of the men was Appellant. J-Dawg said he did not know who shot Complainant.

Detective Lovelace

Detective Lovelace was assigned to investigate Complainant's murder. Reviewing photographs from the scene of Complainant's car crash, Detective Lovelace testified that there was no damage to the Toyota Corolla aside from "the back busted-out window." Detective Lovelace said no firearms were recovered from the vehicle. According to Detective Lovelace, nothing from the scene led him to believe the bullet that hit Complainant had been fired from inside the vehicle. Detective Lovelace opined that "the shooting and the wreck happened real close in time."

Detective Lovelace also reviewed the video footage from the HomeTowne

Studios' outdoor surveillance camera from shortly after midnight the night of the shooting. Describing the footage, Detective Lovelace said a car that appears to be a dark-colored Cadillac is seen leaving the motel parking lot, followed six seconds later by two light-colored four-door vehicles. According to Detective Lovelace, 11 seconds later a "dark-colored four-door that resembles [Complainant's] Toyota Corolla" is seen exiting the parking lot. Detective Lovelace testified that the vehicle "appears to be traveling at a very — a faster pace than you normally would drive through a parking lot, like it's trying to get out of there." Detective Lovelace says the vehicle makes a right turn and heads south — towards the location where the Toyota Corolla is later found crashed into a bush.

Seven seconds later, the footage shows a darker-colored tow truck exiting the motel parking lot. According to Detective Lovelace, the tow truck makes a left turn out of the parking lot and travels north. Describing its path, Detective Lovelace said the truck "appears to slow down a little bit before making the turn." Detective Lovelace testified that, as the tow truck made the turn, its passenger window would have had a view of the Toyota Corolla's rear windshield.

According to Detective Lovelace, he received Appellant's phone number during the investigation and reached out to Appellant to request a meeting. Detective Lovelace said he first met with Appellant on October 14, 2020, and recorded their interview. Detective Lovelace said Appellant was not in custody during the meeting and that Appellant left on his own following the meeting's conclusion. Detective Lovelace met with Appellant a second time one week later; Appellant still was not in custody and left voluntarily after the meeting's conclusion.

Recordings of both interviews were admitted into evidence. At the first interview, Appellant told Detective Lovelace he was planning to meet Rocket at

HomeTowne Studios the night of the shooting. According to Appellant, when he arrived at the motel some "black guys" were arguing with Buddha. Appellant said he went to Buddha's motel room with several other people, including Rocket. Appellant said Buddha told the others he was planning to "fight" and had a gun in the motel room. Appellant said he did not arrive at the motel intending to get into an altercation; he only was planning to meet Rocket.

Appellant recalled that he, Buddha, Cali, and Rocket exited the motel room and immediately were confronted with gunfire on the third floor balcony. Appellant said he threw himself to the floor and saw Rocket fall down next to him after being shot. Appellant remembered dropping his cell phone next to Rocket.

Appellant said he then retrieved a gun that had fallen to the floor of the third floor balcony, ran down the motel's stairs, and got in Cali's tow truck. Appellant recalled seeing a red or black car exiting the parking lot at the same time as the tow truck was leaving. Appellant said he "fired a shot" into the air as he was leaving in the tow truck but did not hit any cars. When asked about the gun's whereabouts, Appellant said it was no longer in his possession.

At his second interview with Detective Lovelace, Appellant again discussed the events that transpired at HomeTowne Studios the night Complainant was shot. Appellant said he did not have a gun when he, Buddha, Cali, and Rocket exited the motel room. Appellant said he retrieved a gun from the balcony floor after the shooting started, fired "two-to-three warning shots" in the third floor hallway, and ran downstairs towards the motel parking lot. Appellant said he left the parking lot in Cali's tow truck.

Appellant said he shot the gun into the air when the tow truck was leaving the HomeTowne Studios parking lot. Appellant denied shooting the gun towards a vehicle. Appellant recalled seeing a maroon Cadillac leaving the parking lot at the

same time. Appellant denied shooting towards a black Corolla, although he acknowledged he fired his gun in the same direction the Corolla later was found crashed into a bush.

Finally, cell phone records from the black LG cell phone were admitted during Detective Lovelace's testimony and show as follows:

- From approximately 10:45 p.m. to midnight the night of the shooting, Appellant received multiple phone calls from Buddha.
- At approximately 10:45 p.m. that same night, Rocket sent Appellant an instant message asking "U at hometowne?" followed by a second message from Rocket saying, "I'm here." At 11:12 p.m., Appellant texted Rocket: "On my way."
- Earlier that evening, Appellant sent his wife a text message saying "Today I'm going to shoot dow [sic] mf." This text was followed by two messages stating "That's why I'm at war" and "With the Black guys."

C. Application

Viewed in the light most favorable to the jury's verdict, the evidence is legally sufficient to support Appellant's conviction for felony murder. *See* Tex. Penal Code Ann. § 19.02(b)(3); *Chambers*, 580 S.W.3d at 156.

The evidence shows that Complainant died from a gunshot wound to the back of the head. The evidence also shows that Complainant sustained this injury while he was driving a black Toyota Corolla and that the bullet traveled from outside the vehicle, through the Corolla's back windshield, and into Complainant. Investigating officers did not find any evidence suggesting the bullet was fired from inside the vehicle.

Video footage from the HomeTowne Studios' outdoor surveillance camera showed a "dark-colored four-door that resembles [Complainant's] Toyota Corolla" leaving the motel parking lot shortly after midnight. Detective Lovelace testified

that the vehicle was traveling quickly "like it's trying to get out of there." The vehicle turned right and traveled south, towards the location where the Toyota Corolla later was found crashed into a bush.

Several seconds after the dark-colored car turned right, the footage shows a darker-colored tow truck also exiting the motel parking lot. The tow truck makes a left turn out of the parking lot and travels north; Detective Lovelace said the truck "appears to slow down a little bit before making the turn." According to Detective Lovelace, as the tow truck made the turn its passenger window would have had a view of the Toyota Corolla's rear windshield.

In her testimony, Cook said Appellant was present at the HomeTowne Studios the night of the shootout. Similarly, Appellant told Detective Lovelace in his interviews that he was at the motel. Appellant also told Detective Lovelace he fled the motel after the shootout and, on his way towards the stairs, grabbed a gun laying on the ground and fired several shots into the hallway. Appellant said he got in the passenger side of Cali's tow truck and Cali drove them away from the motel. As the tow truck exited the parking lot, Appellant said he fired several shots from the tow truck's passenger window.

Finally, testimony from firearms examiner Nally showed that the bullet recovered from Complainant's head was fired by the same gun that shot a bullet into the wall in the area where the HomeTowne Studios shootout occurred.

Considered together, this evidence is legally sufficient to support Appellant's conviction for felony murder. *See* Tex. Penal Code Ann. § 19.02(b)(3); *Chambers*, 580 S.W.3d at 156. Specifically, the evidence supports a finding that Appellant "commit[ted] a felony," *i.e.*, "deadly conduct" by knowingly discharging a firearm in the direction of Complainant's car as Complainant and Appellant were exiting the HomeTowne Studios' parking lot in their respective

vehicles. *See* Tex. Penal Code Ann. § 19.02(b)(3); *see also id*. § 22.05(a), (b) (a person commits the offense of "deadly conduct" if the person discharges a firearm in the direction of people or an occupied vehicle). The evidence also supports finding that, during the commission of this offense, Appellant ultimately caused Complainant's death. *Id*. § 19.02(b)(3).

Challenging this conclusion, Appellant argues that there was no expert testimony "regarding the trajectory of the fatal bullet, where it was fired from, when it was fired, or the mechanics of hitting a target almost 400 feet away using a .38-caliber-family handgun." But Appellant does not cite any case law or other authority to support his contention that expert testimony was necessary to establish these facts. *See* Tex. R. Evid. 702.

Moreover, Appellant explored this line of argument during his cross-examination of the State's witnesses. For example, Appellant's counsel asked Detective Lovelace whether the bullet that allegedly killed Complainant was "kind of a crazy shot," to which Detective Lovelace said, "Yes, ma'am." Similarly, while questioning Dr. Lopez, Appellant's counsel asked, "Do you know what distance that this gun was — or this bullet was shot at?" Dr. Lopez responded: "No, I do not. It is greater than 2 and a half to 3 feet. It could be greater than that." And Appellant's counsel cross-examined at length Melissa Nally, the State's firearms examiner. Therefore, the evidence on this point was presented to the jury and it was within the jury's province to determine whether the evidence showed beyond a reasonable doubt that Appellant fired a gun from the tow truck that hit Complainant in the back of his head. *See Hooper*, 214 S.W.3d at 13.

Appellant also argues on appeal that there were other people that potentially could have fired the shot that killed Complainant. However, the State is not required to disprove every conceivable alternative to a defendant's guilt. *Ramsey*

v. State, 473 S.W.3d 805, 808 (Tex. Crim. App. 2015). Moreover, the State's witnesses testified at length regarding (1) the other potential suspects that were identified, (2) their investigations into those suspects, and (3) the reasons why those suspects were ruled out.

In sum, legally sufficient evidence supports Appellant's conviction for felony murder. *See* Tex. Penal Code Ann. §§ 19.02(b)(3), 22.05(a), (b). We overrule Appellant's first issue.

II. Warrant For and Subsequent Search of the Black LG Phone

In his second and third issues, Appellant asserts that (1) the search of the black LG phone found at the scene of the shooting exceeded the warrant's scope, and (2) the nexus between Appellant and the black LG phone was insufficient to justify a search warrant.

A. Governing Law

Under the Fourth Amendment, law enforcement may not embark on "a general, evidence-gathering search, especially of a cell phone which contains 'much more personal information . . . than could ever fit in a wallet, address book, briefcase, or any of the other traditional containers.'" *State v. Granville*, 423 S.W.3d 399, 412 (Tex. Crim. App. 2014) (quoting *United States v. Wurie*, 728 F.3d 1, 9 (1st Cir. 2013)); *see also Butler v. State*, 459 S.W.3d 595, 601 n.3 (Tex. Crim. App. 2015) (acknowledging that both the United States Supreme Court and the Texas Court of Criminal Appeals have recognized that cell phone users have a reasonable expectation of privacy in the content of their cell phones). Accordingly, the search of a cell phone generally requires a warrant. *Granville*, 423 S.W.3d at 417.

A warrant will issue upon probable cause and must particularly describe the

place to be searched and the things to be seized. *See* U.S. Const. amend. IV. "Probable cause exists when, under the totality of circumstances, there is a fair probability or substantial chance that contraband or evidence of a crime will be found at the specified location." *Bonds v. State*, 403 S.W.3d 867, 873 (Tex. Crim. App. 2013). To comply with the Fourth Amendment, a search warrant must describe the things to be seized with sufficient particularity to avoid the possibility of a general search. *Diaz v. State*, 604 S.W.3d 595, 605 (Tex. App.—Houston [14th Dist.] 2020), *aff'd*, 632 S.W.3d 889 (Tex. Crim. App. 2021).

The particularity requirement may be satisfied by cross-referencing a supporting affidavit that describes the items to be seized. *Id*. (citing *United States v. Richards*, 659 F.3d 527, 537 (6th Cir. 2011)). The affidavit is interpreted in a non-technical, commonsense manner drawing reasonable inferences from the facts and circumstances contained within the four corners of the affidavit. *See State v. Elrod*, 538 S.W.3d 551, 554 (Tex. Crim. App. 2017); *Bonds*, 403 S.W.3d at 873. Read together, a warrant and supporting affidavit satisfy the Fourth Amendment's requirements when they contain facts sufficient to show that (1) a specific offense has been committed, (2) the property or items to be searched for or seized constitute or contain evidence of the offense or evidence that a particular person committed it, and (3) the evidence sought is located at or within the thing to be searched. *See* Tex. Code Crim. Proc. Ann. art 18.01(c); *Luckenbach v. State*, 523 S.W.3d 849, 854 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd).

With respect to computers and other electronic devices like cell phones, case law requires that warrants affirmatively limit the search to evidence of specific crimes or to specific types of materials. *Diaz*, 604 S.W.3d at 605. If a warrant permits a search of "all computer records" without further description or limitation, it will not meet Fourth Amendment particularity requirements. *Id*. However, a

search of computer records that is limited to those related to the offense set forth in the affidavit is appropriately limited. *Id*.

B. A Sufficient Nexus Between Appellant and the Phone Justified the Warrant's Issuance

Two warrants were issued with respect to the black LG phone: one in October 2020 and a second in November 2022. In his third issue, Appellant asserts that the State improperly relied upon information obtained via the 2020 search warrant to support its request for the 2022 warrant. Without this improperly-obtained information, Appellant argues, the 2022 warrant and supporting affidavit lack the nexus necessary to support issuing a search warrant. *See State v. Aguirre*, 5 S.W.3d 911, 913-14 (Tex. App.—Houston [14th Dist.] 1999, no pet.) ("[I]f the evidence supporting the warrant was improperly obtained, the evidence obtained from executing the warrant was the fruit of an illegal search and was properly suppressed.").

We disagree. Neither the 2022 search warrant nor its supporting affidavit rely on information obtained pursuant to the 2020 warrant as justification for the phone's search. Read together, the 2022 search warrant and supporting affidavit state as follows:

- The black LG phone was "believed to contain evidence of the felony offense of Deadly Conduct or Murder."
- Two cell phones were found at the scene of the April 10, 2020 shootout at HomeTowne Studios in northwest Houston. One of the phones was later identified as belonging to Rocket, who sustained a fatal gunshot wound during the shooting.
- A second deceased male was found in a Toyota Corolla approximately 300 feet from the HomeTowne Studios' parking lot exit.
- Following the shootout, police interviewed Buddha. The night of the shooting, Buddha was staying at the motel with Cook and called his friend Cali to "come back him up because there was trouble with

black guys at the motel." Cali arrived with Appellant and all the men met in Buddha's motel room. The men "left their room to confront the black guys" and a shootout ensued.

- Buddha provided officers with Appellant's phone number. This number matched the phone number for the black LG phone found at the scene.
- On October 14, 2020, Detective Lovelace interviewed Appellant. Appellant said he was at the motel the night of the shootout and "admitted to firing a handgun after being shot at by the other males." Appellant said he "dropped his cell phone somewhere on the third floor" during the "chaos." Appellant also admitted to firing two shots in the direction of a vehicle as he was leaving the motel parking lot.
- Detective Lovelace "kn[ew] from experience" that it was common for a suspect engaged in criminal activity to "communicate about their motives and/or plans via text messaging, phone calls, emails, or through other communication programs/applications/platforms."
- Detective Lovelace believed that the black LG phone's "electronic data, incoming and outgoing calls, incoming and outgoing text messages, e-mails, video recordings and voicemail messages" therefore contained evidence related to the investigation.

These facts establish a sufficient nexus between the black LG phone and the shooting at the HomeTowne Studios. Specifically, these facts show that a specific offense (*i.e.*, murder) had been committed and that the black LG phone was associated with Appellant and therefore likely to contain evidence relevant to the charged offense. *See* Tex. Code Crim. Proc. Ann. art 18.01(c); *Luckenbach*, 523 S.W.3d at 854.

We overrule Appellant's third issue.

C. The Search of the Black LG Phone Did Not Exceed the Scope of the Warrant

In his second issue, Appellant asserts that the search of the black LG phone exceeded the scope of the search warrant. Again, we disagree.

As set out above, the search warrant authorized law enforcement to search for and seize any evidence of "the felony offense of Deadly Conduct or Murder." The warrant also stated that the following specific types of cell phone data were authorized to be searched:

- "All photographs/videos in storage;"
- "Text or multimedia messages (SMS and MMS);"
- "Call history or call logs;"
- "E-mails;"
- "Instant messaging, or other related forms of communication;"
- "Internet browsing history;"
- "Global Positioning System (GPS) data;"
- "Contact information including e-mail addresses, physical addresses and phone numbers;"
- "Voicemail messages or telephone recordings;"
- "Audio/video recordings sent or received by the device;"
- "Stored Documents;"
- "Computer files or fragments of files;" and
- "Tracking data and way points."

We previously have held that a warrant permitting a search of similarly-delineated cell phone record categories "was not an overboard general search" because, as here, the warrant's scope was ultimately limited to relevant evidence pertaining to specific crimes. *See Diaz*, 604 S.W.3d at 605-07.

To support his contention that the search of the black LG phone exceeded the warrant's scope, Appellant generally asserts that the search yielded "a 17,000-page report." But Appellant does not point to any evidence in the record showing the search of the black LG phone exceeded any of the enumerated categories. Moreover, the only evidence admitted at Appellant's trial fell within these

categories and, as required by the warrant, was relevant to "the felony offense of Deadly Conduct or Murder." Accordingly, the record does not support Appellant's contention that the search of the black LG phone exceeded the scope of the search warrant.

We overrule Appellant's second issue.

III. Admission of the Black LG Phone's Records

As discussed above, the trial court admitted into evidence certain records from the black LG phone including Appellant's call log and text messages sent and received in the hours before and after the shooting at HomeTowne Studios. Before the cell phone records were offered into evidence, the State called as a witness Jude Vigil, an investigator in the Houston Police Department's Digital Forensics Investigations Unit. Investigator Vigil used the digital investigation platform Cellebrite to perform a forensic download on the black LG phone and testified at trial regarding this process and the results thereof.

In his fourth issue, Appellant asserts that "[t]he Cellebrite extraction from the black LG phone was admitted through an improper witness." Citing the standards governing the admission of expert testimony, Appellant contends that the trial court had an insufficient basis to conclude that Investigator Vigil was qualified to sponsor the forensic evidence. We disagree.

Under Texas Rule of Evidence 104(a), the trial court has discretion to determine preliminary questions regarding the admission of evidence. Tex. R. Evid. 104(a). These questions may include whether the evidence is relevant in making the existence of any fact of consequence more or less probable. *See* Tex. R. Evid. 401, 402. For evidence to be relevant it must be authentic — that is, what the proponent claims it to be. Tex. R. Evid. 901(a); *Tienda v. State*, 358 S.W.3d

633, 638 (Tex. Crim. App. 2012). In determining whether evidence is authentic, "the trial court itself need not be persuaded that the proffered evidence is authentic;" rather, it must only decide "whether the proponent of the evidence has supplied facts that are sufficient to support a reasonable jury determination that the evidence he has proffered is authentic." *Tienda*, 358 S.W.3d at 633 (citing *Druery v. State*, 225 S.W.3d 491, 502 (Tex. Crim. App. 2007)).

On appeal, we give deference to the trial court's ruling on a preliminary determination to admit evidence. The standard of review is abuse of discretion, and we will overturn the trial court's decision only if it is outside the zone of reasonable disagreement. *See Layton v. State*, 280 S.W.3d 235, 240 (Tex. Crim. App. 2009).

We previously have considered arguments similar to that which Appellant advances here. *See Rand v. State*, No. 14-16-00409-CR, 2017 WL 4273177, at *8 (Tex. App.—Houston [14th Dist.] Sept. 26, 2017, pet. ref'd) (mem. op., not designated for publication). In *Rand,* the appellant challenged the admission of certain cell phone records and argued that the State's sponsoring witness failed to establish the reliability of the underlying methodology used to download the data from his cell phone. *Id*.

Noting that cell phone extractions are "more technical than scientific," we held that "the proper reliability inquiry is a flexible one, focusing on whether (1) the field of expertise is a legitimate one, (2) the subject matter of the expert's testimony is within the scope of the field, and (3) the expert's testimony properly relies upon or utilizes the principles involved in the field." *Id*. (internal quotation omitted). Concluding that this showing was made, we pointed out that the sponsoring witness (1) was a digital forensic investigator who had completed the extraction process many times before, (2) was certified and had training in the

relevant field, and (3) testified that the extraction process had been verified and accepted by the scientific community. *Id*.

Two of our sister courts of appeal that more recently have considered this issue have held that expert testimony is not necessary to establish the reliability of cell phone data extracted via Cellebrite. *See Wright v. State*, 618 S.W.3d 887, 890-95 (Tex. App.—Fort Worth 2021, no pet.) (analogizing the use of Cellebrite to "bagging up evidence at a crime scene," the court held that expert testimony was not necessary to establish the program's reliability since it "simply copied data from one location to another"); *see also Villareal-Garcia v. State*, 671 S.W.3d 791, 793-94 (Tex. App.—Dallas 2023, no pet.) (adopting *Wright*'s reasoning and concluding that the lay witness provided an appropriate foundation for the admission of cell phone records extracted using Cellebrite).

Considered in light of these authorities, we conclude the trial court did not abuse its discretion by admitting certain portions of the Cellebrite extraction through Investigator Vigil's testimony. Testifying at trial, Investigator Vigil said he had spent approximately 30 years as a Houston police officer and currently was assigned to the Digital Forensics Investigations Unit. Investigator Vigil said he received two Cellebrite certifications approximately one year before Appellant's trial and was a Cellebrite Certified Operator and a Cellebrite Certified Physical Analyst.

Investigator Vigil said the black LG phone was his first Cellebrite extraction. Prior to this extraction, Investigator Vigil said he had done extensive work on "the mapping and analysis of cellular records," which also relied on cell phone extractions. Investigator Vigil testified that he previously had reviewed approximately 30 cell phone extractions and thousands of records. Investigator Vigil said he previously had testified 42 times regarding call detail records and the

contents thereof.

Describing the process he used on the black LG phone, Investigator Vigil said he connected the cell phone to an adapter that accessed the Cellebrite software, which then utilized several different methods to attempt to unlock the phone. Describing Cellebrite as an "extraction process," Investigator Vigil said the program is "designed so that it doesn't change or alter" the phone records. Rather, it "just reads, decodes, and then provides the information." At the conclusion of the extraction process, Investigator Vigil said he verified the output by comparing the device's serial number as provided by Cellebrite to the number on the back of the phone. Investigator Vigil testified that this was an acceptable method to verify the software's results.

Given Investigator Vigil's testimony regarding his experience with cell phone extractions in general and Cellebrite in particular, the simplicity of the extraction process, and the application of this process to the black LG phone, we conclude the trial court did not abuse its discretion in admitting Investigator Vigil's testimony and Appellant's cell phone records. *See Rand*, 2017 WL 4273177, at *8; *see also Villareal-Garcia*, 671 S.W.3d at 793-94; *Wright*, 618 S.W.3d at 890-95. We overrule Appellant's fourth issue.

IV. Ineffective Assistance of Counsel

In his final issue, Appellant asserts he received ineffective assistance of counsel during trial. To support this argument, Appellant points to an incident that occurred during defense counsel's cross-examination of Nally, the State's firearms examiner.

While questioning Nally about a firearm found at the scene of the

HomeTowne Studios shooting,[1] defense counsel questioned Nally regarding her examination of the gun's barrel and the rifling therein. During this line of questioning, defense counsel began striking the gun with a hammer. The State objected to defense counsel "tampering with [the] exhibit."

The trial court excused the jury and asked defense counsel why he was hammering the firearm. In response, defense counsel stated:

> One, I would like to look at the barrel because no one has ever looked at the barrel in this. No. 2, I would like to check out where [the] pin and the springs are because I have a feeling that they've been tampered with and there's going to be a spot where you could see an automatic switch because — correct, this is an open bolt gun, right? They stopped manufacturing this gun in 2001, right? Manufactured in Sweden, right? An open bolt gun is an easy gun to make it fully auto. That's what happened with this. That's why it wouldn't shoot because you had to load it one at a time because the auto switch had been removed.

The trial court instructed defense counsel to limit his cross-examination to questioning the witness rather than altering the exhibit. Defense counsel continued his cross-examination and, at one point, again picked up the hammer. The State objected "to any tampering or taking apart of an admitted State's exhibit" and a juror said, "Judge, we're not comfortable either with all that going on." Ruling on the objection, the trial court noted that it "did not see [defense counsel] bring the hammer up to the State's exhibit." The trial court nonetheless instructed defense counsel to refrain from bringing the hammer near the firearm or counsel would be held in contempt.

We examine claims of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*,

[1] Ballistics testing performed on this firearm did not connect it to the bullet that killed Complainant.

appellant must establish that his trial counsel's representation was deficient and that the deficient performance was so serious that it deprived him of a fair trial. *Id*. at 687. Counsel's representation is deficient if it falls below an objective standard of reasonableness; this deficiency will only deprive appellant of a fair trial when counsel's performance prejudices appellant's defense. *Id*. at 688, 691-92. To demonstrate prejudice, appellant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. at 694. Failure to make the required showing of either deficient performance or sufficient prejudice defeats the claim of ineffectiveness. *Id*. at 697.

Our review of defense counsel's performance is highly deferential, beginning with a strong presumption that the attorney's actions were reasonably professional and were motivated by sound trial strategy. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994) (en banc). A sound trial strategy may be imperfectly executed, but the right to effective assistance of counsel does not entitle a defendant to errorless or perfect counsel. *See Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006). "[I]solated instances in the record reflecting errors of omission or commission do not render counsel's performance ineffective, nor can ineffective assistance of counsel be established by isolating one portion of trial counsel's performance for examination." *McFarland v. State*, 845 S.W.2d 824, 843 (Tex. Crim. App. 1992) (en banc), *overruled on other grounds by Bingham v. State*, 915 S.W.2d 9 (Tex. Crim. App. 1994) (en banc). "It is not sufficient that the appellant show, with the benefit of hindsight, that his counsel's actions or omissions during trial were merely of questionable competence." *Mata v. State*, 226 S.W.3d 425, 430 ((Tex. Crim. App. 2007). Rather, to establish that the attorney's acts or omissions were outside the range of professionally competent assistance, appellant must show that counsel's errors

were so serious that he was not functioning as counsel. *See Patrick v. State*, 906 S.W.2d 481, 495 (Tex. Crim. App. 1995) (en banc); *see also Walker v. State*, 676 S.W.3d 213, 221 (Tex. App.—Houston [14th Dist.] 2023, pet. ref'd) ("We will not find deficient performance unless counsel's conduct is so outrageous that no competent attorney would have engaged in it.").

Defense counsel's decision to hammer the firearm, although perhaps questionable, was not so outside the range of professionally competent assistance that it constitutes deficient counsel under *Strickland*'s standards. *See Strickland*, 466 U.S. at 687; *Patrick*, 906 S.W.2d at 495. As evidenced by defense counsel's questioning of Nally, defense counsel was hammering the gun in an attempt to examine the gun's barrel, which was relevant to his questions regarding the condition of the gun and the tests that were performed on it. Defense counsel reiterated this underlying strategy in his closing argument and told the jury:

> For some of you, I may have put you off when I disassembled the gun, but what I want you to do is I want you to turn over every bit of evidence that you're considering and go through it just as I did. Don't be satisfied with them saying that this is a gun. Tear it apart. Was it automatic? Is that why we're here? That's how much care you should give. I would give the exact same care to each and every one of you if you were looking at a shoplifting case. I ask that you give that to [Appellant].

Although it may have been imperfectly executed, the record supports the conclusion that defense counsel's hammering of the firearm was motivated by a sound trial strategy. *See Robertson*, 187 S.W.3d at 483.

The totality of defense counsel's representation also counsels against a finding of deficient representation under *Strickland*. Defense counsel thoroughly questioned potential jurors during voir dire. Trial lasted seven days and the State called 14 witnesses, all of whom were vigorously cross-examined by defense

counsel. Defense counsel lodged appropriate objections throughout trial and presented effective opening and closing statements. Therefore, judged in the context of the underlying proceedings as a whole, defense counsel's hammering of the firearm is an isolated instance of questionable judgment that does not render counsel's overall representation deficient. *See McFarland*, 845 S.W.2d at 843.

We overrule Appellant's fifth issue.

CONCLUSION

We affirm the trial court's judgment.

/s/ Meagan Hassan
Justice

Panel consists of Chief Justice Christopher and Justices Wise and Hassan.
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