Case No.: 14-24-00183-CR

In the Fourteenth Court of Appeals for the State of Texas

DEWAYNE BATISTE,
APPELLANT

v.

THE STATE OF TEXAS,
APPELLEE.

Appealed from the 339th District Court, Harris County, Texas in trial court cause number 1719905, the Honorable Te'iva Bell presiding.

Appellant's Opening Brief

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STATEMENT CONCERNING ORAL ARGUMENT

Appellant does not request oral argument.

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Case No.: 14-24-00183-CR

In the Fourteenth Court of Appeals for the State of Texas

DEWAYNE BATISTE,
APPELLANT

v.

THE STATE OF TEXAS,
APPELLEE.

To the Honorable Justices of the Fourteenth Court of Appeals:

Dewayne Batiste, Appellant, presents this opening brief.

STATEMENT OF THE CASE

The State charged Appellant with Capital Murder for the murder of two people. TEX. PENAL CODE ANN. § 19.03(a)(7)(A). CR 16, 264. The case went to trial and a jury convicted Appellant. CR 261, 264. The trial court entered judgment and certified Appellant's right to appeal. CR 264, 269. Appellant timely filed a notice of appeal. CR 270-71.

ISSUES PRESENTED

Appellant presents two issues for appeal.

Issue One: The police agree that Desmond Hawkins committed this Murder. Appellant was not a principal to the crime and could have only been convicted as a party. The evidence did not allow a conviction as a party and therefore the evidence was insufficient to support the verdict.

Issue Two: The police illegally searched Appellant's phone. As a result the trial court partially suppressed the data recovered from the phone. Because the trial court could not parse what evidence from the phone came from the illegal search, the trial court should have suppressed all evidence from the phone.

STATEMENT OF FACTS RELEVANT TO ISSUES PRESENTED

In September 2020, Texas was beginning to lift its coronavirus restrictions, but many Texans remained at home; one person who remained at home was the State's best witness, Joshua Rugnao. Rugnao, however, could not testify Appellant shot the victims. Instead, the police eventually determined Desmond Hawkins shot the victims. 5 RR 65. Hawkins was convicted before Appellant and Mr. Hawkins was sentenced to life without the possibility of parole. 5 RR 65.

Hawkins committed the murders at the Reserve Apartments on Old Farm Road in Houston ("the Reserve") on October 26, 2020. 3 RR 25-6; 32-3; 100. A fence separates the Reserve from a neighboring complex. 3 RR 28. Periodically holes appear in the fence and children use the holes to move between complexes. 3 RR 61; 120; 122; 178; 179; 187; 189. Fredy Sanchez, an employee at the Reserve, testified that an outside company maintained the fence. 3 RR 100; 110. The fence had a hole when these shootings occurred. Sanchez did not know how or when the hole got into the fence. 3 RR 114. Sanchez thought Appellant was likely too large to have been able to crawl through the hole. 3 RR 118-19.

Menuell Solomon lived in the Reserve with his live-in girlfriend and her eleven-year-old son ("D.S."[1]).[2] 3 RR 28-9.

[1] D.S. is a minor. His full name is in the record. 3 RR 91.
[2] The live-in girlfriend, Krissi, died in a motorcycle collision a few months after October 26, 2020. 3 RR 65.

A. October 20, 2020

On the morning of October 20, 2020, Rugnao was in his garage playing video games when he heard "the gunshot." 3 RR 33-34. Rugnao went to his balcony and looked out. 3 RR 34. He saw someone "banging on [Solomon's] front door." 3 RR 35. The people banging on Solomon's door drove off when they noticed neighbors. 3 RR 35.

The police arrived and conducted a brief investigation. 3 RR 37. Officer C. Jarboe spoke with Solomon. 4 RR 67. Officer Jarboe received a cell phone and discovered a face mask and shell casings during this investigation. 4 RR 70. There was no evidence that the person who had the mask also had the cell phone and the police did not find Appellant's DNA on the mask. 4 RR 141. The cell phone was "unlocked" and so Officer Jarboe "looked through" it for almost an hour. 4 RR 77; SRR 8. During that hour, Officer Jarboe went through text messages, social media, photographs, etc. SRR 8-9. Officer Jarboe relayed the information he found in the phone to other officers who engaged in the investigation. SRR 9. Jarboe discovered an "Apple ID" of DewayneBatiste1980@gmail.com. 4 RR 78. Appellant's phone number was transferred to a new phone on October 20, 2024. 5 RR 120.

Officer Jarboe secured a recording from a Ring doorbell that he believed had a person on it that resembled Appellant. 4 RR 79-82. Jarboe testified Appellant weighed 318 pounds. 4 RR 83. Jarboe testified that the people involved in the

shooting on October 20 looked different than the people involved in the shooting on October 26. 4 RR 93. The police suspected Appellant of the shooting on October 20. 4 RR 171.

B. October 26, 2020

Rugnao was again in his garage on October 26, and again playing video games when he again heard gunshots. 3 RR 37. Rugnao looked in the direction of the shots but could not see anyone; he did, however, hear a car "take off in the apartments next door." 3 RR 38. Rugnao went outside, saw Solomon's car, found Solomon dead in the front seat, and found D.S. under Solomon. 3 RR 39-41. Rugnao had no information about whether Appellant participated in the shooting. 3 RR 57.

Sanchez, a repairperson, was one of the first people at the car and, when he arrived, D.S.—who had been shot—was still alive. 3 RR 106; 109. Officer T. Salameh responded to the shooting and found Sanchez holding D.S. 3 RR 127; 131. Salameh "noticed" two shell casings under "the deceased adult's foot, on the driver's side." 3 RR 136. Salameh also recovered a video from a "Ring doorbell camera." 3 RR 141. Salameh explained the video showed "three suspects coming from the direction of where the patrol vehicle is in this photo. And you can hear—you can see guns in their hands. You can hear shots being fired and then you can see those same three suspects then run back towards that same direction of where the patrol vehicle is." 3 RR 142. After viewing the video, Officer Salameh inspected the fence and

found a hole. 3 RR 142. On the other side of the fence was a parking lot. 3 RR 145. Salameh also found a security camera on the other side of the fence. 3 RR 147.

Betty Mireles, the manager of the apartment complex with the cameras Salameh located, provided the police with copies of the recordings. 3 RR 171. The recordings allowed the police to identify a black Pontiac and a red or white Toyota that they believed were "involved" in the shooting. 4 RR 95; 102. Officer Jarobe identified the driver of the white Toyota Camry as "darker skinned, heavier set black male. Tall in structure." 4 RR 102. Detective Lange testified the video showed Hawkins "interacting with the white Toyota Camry." 5 RR 48. Detective Lange testified that Hawkins did not go to the shooting in the "white Camry." 5 RR 67. Detective Lange could not testify that Appellant knew Hawkins on the day of the shooting. 5 RR 68. Lange testified that "one of the shooters" went "to the Toyota," but Lange could not identify people inside the Toyota. 5 RR 73-4. But, according to Lange, the driver of the Toyota "look[ed] like" Appellant. 5 RR 79-80.

Detective Lange spotted the Camry's license plate on the video Mireles provided. 5 RR 31. Around three hours after the shooting, the police located the white Camry. 4 RR 127. Officer S. Pena, operating in plain clothes and in an unmarked police car, followed the Camry. 4 RR 176; 179. Appellant was driving the Camry; Appellant stopped the Camry in the middle of a street, walked back to the

unmarked car, and yelled "why the *uck are you following me?" 4 RR 178. The police did not seize the Camry. 4 RR 134.

The police "connected" the black Pontiac with a person named Johnny Smith. 4 RR 108. Through an "ankle monitor," the police also identified Hawkins as a potential participant in the shooting. 4 RR 117; 164. GPS data from the new phone associated with Appellant and the ankle monitor on Hawkins were proximate to each other immediately prior to and after the shooting. 5 RR 138-41; 151.

Detective Lange testified that, based on his investigation, he believed Hawkins was responsible for the October 26th shooting. 5 RR 21. He also testified that the shell casings inside the car and outside the car came from the same gun. 5 RR 25. The gun was, however, a different gun from the one used on October 20. 5 RR 26.

C. Pretrial and Trial

The State charged Appellant with Capital Murder for the murder of two people. TEX. PENAL CODE ANN. § 19.03(a)(7)(A). CR 16, 264.

Appellant filed a motion to suppress. CR 158-63. Appellant supported the motion with an affidavit. CR 162-63. Appellant testified that on October 19th he lost his phone and sought to recover it. CR 163. When he could not find the phone, Appellant purchased a new phone. CR 163.

Appellant's affidavit also testified to the facts of the police investigation. CR 162.

On December 4, 2023, the trial court found Appellant did not "abandon" the phone, and then granted the motion in part and suppressed "evidence found in the hotel room & hotel observations." SRR 13; CR 161. Appellant asked the trial court to exclude everything recovered from the phone except for "[t]he name and the cell phone number," but the trial court refused. SCRR 16. Trial began, but the trial court had to order a mistrial. 3 RR 9. The trial court carried the ruling on the motion to this trial. 3 RR 9.

During this trial, the police testified to recovering Appellant's cell phone on October 20. 4 RR 76. Officer Jarboe testified that he recovered the phone and that it was "unlocked." 4 RR 76. Officer Jarboe went through the digital parts of the phone and specifically into the "settings" and found that the phone was associated with the Apple ID: DewayneBatiste1980@gmail.com. 4 RR 77-78. Using that Apple ID, which Jarboe believed was a first name, last name, and year of birth, the police identified Appellant as the owner of the phone and a potential perpetrator of the events on October 20. 4 RR 78; State's Ex. 403. The investigation of the phone resulted in the phone's IMEI number.

Testimony established that on October 20 Appellant's phone number was transferred to a new phone. 5 RR 127. Using the information from the old phone and

the new one, the police tracked Appellant's movement on October 26. 5 RR 132-33. During closing argument, the State emphasized this movement to the jury. 6 RR 42-44.

D. Verdict and Sentence

The jury convicted Appellant and the trial court imposed the mandatory sentence of life in prison without the possibility of parole. 6 RR 48; 7 RR 4.

SUMMARY OF THE ARGUMENT

The police agree that Desmond Hawkins committed the shooting. 5 RR 65. Mr. Hawkins was convicted before Appellant and Mr. Hawkins was sentenced to life without the possibility of parole. 5 RR 65. The charge, however, allowed Appellant to be convicted as a party. CR 253. The jury convicted Appellant, but the evidence was insufficient to support a conviction as a party or a principal. The evidence did not allow a conviction as a party because there was no evidence: 1) knew the shooter had a gun before the shooting on October 26; 2) expected, planned, or anticipated a shooting on October 26; 3) knew that the shooter would confront the victim as opposed to doing something else (such as theft, harassment, intimidation, etc.) inside of the neighboring complex; or even 4) Appellant knew the victim had been shot when he left the neighboring apartment complex.

On October 20, 2020—six days before the shooting here—the police found Appellant's phone at the scene of a shooting. 4 RR 70. The cell phone was "unlocked" and so police officers "looked through" it for fifty-nine minutes. 4 RR 77; SRR 8. The police found helpful evidence that directed them to Appellant. Appellant moved to suppress the evidence from the illegal search. SRR 4-30. The trial court granted the motion in part. CR 161. The trial court, however, should have suppressed all evidence from the phone because the court had no evidence of what

was obtained from the illegal search and what was recovered after a warrant was issued.

ARGUMENT

APPELLANT'S FIRST ISSUE

The evidence was insufficient to establish Appellant committed this offense. There is no claim Appellant was a principal, instead the only way for the jury to have convicted Appellant was through the law of parties. Yet the evidence did not allow a conviction as a party.

I. Standard of Review

This Court reviews the legal sufficiency of the evidence by considering all the evidence produced at trial—in the light most favorable to the verdict—to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Herrera v. State*, No. 05-22-00015-CR, 2023 WL 4286019, at *2 (Tex. App.—Dallas June 30, 2023, no pet.) (mem. op., not designated for publication) citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010)). In conducting a legal-sufficiency analysis, this Court's role is to provide a due process safeguard, ensuring only the rationality of the trier of fact's finding of the essential elements of the offense beyond a reasonable doubt. *Id.* (citing *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988)). In doing so, this Court gives deference to the responsibility of the factfinder to fairly resolve conflicts in testimony, to weigh evidence, and to draw reasonable inferences from the facts. *Id.* This Court defers to the factfinder's

resolution of conflicting evidence unless the resolution is not rational. *Id.* (citing *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007)). Even so, this Court's duty requires it to ensure that the evidence presented supports a conclusion that the defendant committed the criminal offense for which he was accused. *See id.*

Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can establish guilt. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). An inference, including one from circumstantial evidence, is a conclusion reached by considering other facts and deducing a logical consequence from them. *Id.* at 16. On the other hand, speculating is mere theorizing or guessing about the possible meaning of the facts and evidence presented. *Id.* A conclusion reached by speculation may not be completely unreasonable, but it is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt. *Id.*

In 2010, in *Brooks*, the Court of Criminal Appeals acknowledged that no meaningful distinction existed between a factual-sufficiency analysis and a legal-sufficiency analysis. In reaching this conclusion, this Court wrote:

> the factual-sufficiency standard from *Watson* may be reformulated as follows: 'Considering all of the evidence in the light most favorable to the verdict, was a jury rationally justified in finding guilt beyond a reasonable doubt.' This is the *Jackson v. Virginia* legal-sufficiency standard. There is, therefore, no meaningful distinction between the *Jackson v. Virginia* legal-sufficiency standard and the *Clewis* factual-sufficiency standard, and these two standards have become indistinguishable.

Brooks v. State, 323 S.W.3d 893, 902 (Tex. Crim. App. 2010).

In *Adames*, the Court of Criminal Appeals explained that in a federal due process evidentiary sufficiency review, a reviewing court must view all the evidence—and not just the evidence that supports the verdict. *Adames v. State*, 353 S.W.3d 854, 860 (Tex. Crim. App. 2011). This evidence is viewed in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.*

The Court of Criminal Appeals explained in *Hooper* that in making a legal-sufficiency determination,

> Juries are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions. To correctly apply the *Jackson* standard, it is vital that courts of appeals understand the difference between a reasonable inference supported by the evidence at trial, speculation, and a presumption. A presumption is a legal inference that a fact exists if the facts giving rise to the presumption are proven beyond a reasonable doubt. For example, the Penal Code states that a person who purchases or receives a used or secondhand motor vehicle is presumed to know on receipt that the vehicle has been previously stolen, if certain basic facts are established regarding his conduct after receiving the vehicle. A jury may find that the element of the offense sought to be presumed exists, but it is not bound to find so. In contrast, an inference is a conclusion reached by considering other facts and deducing a logical consequence from them. Speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented. A conclusion reached by speculation may not be completely unreasonable, but it is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt. (emphasis added).

Hooper, 214 S.W.3d at 15–16.

The Court continued:

> Without concrete examples, it can be difficult to differentiate between inferences and speculation, and between drawing multiple reasonable inferences versus drawing a series of factually unsupported speculations. This hypothetical might help clarify the difference. A woman is seen standing in an office holding a smoking gun. There is a body with a gunshot wound on the floor near her. Based on these two facts, it is reasonable to infer that the woman shot the gun (she is holding the gun, and it is still smoking). Is it also reasonable to infer that she shot the person on the floor? To make that determination, other factors must be taken into consideration. If she is the only person in the room with a smoking gun, then it is reasonable to infer that she shot the person on the floor. But, if there are other people with smoking guns in the room, absent other evidence of her guilt, it is not reasonable to infer that she was the shooter. No rational juror should find beyond a reasonable doubt that she was the shooter, rather than any of the other people with smoking guns. To do so would require impermissible speculation. But, what if there is also evidence that the other guns in the room are toy guns and cannot shoot bullets? Then, it would be reasonable to infer that no one with a toy gun was the shooter. It would also be reasonable to infer that the woman holding the smoking gun was the shooter. This would require multiple inferences based upon the same set of facts, but they are reasonable inferences when looking at the evidence. We first have to infer that she shot the gun. This is a reasonable inference because she is holding the gun, and it is still smoking. Next, we have to infer that she shot the person on the floor. This inference is based in part on the original inference that she shot the gun, but is also a reasonable inference drawn from the circumstances. (emphasis added).

Id. at 16.

This Court measures the sufficiency of the evidence against the elements of the offense as defined by the hypothetically correct jury charge for the case. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997).

In *Griffith*, a 2019 unpublished case from the Court of Criminal Appeals, the Court considered an argument like the one presented here. *Griffith v. State*, No. PD-0639-18, 2019 WL 1486926, at *1 (Tex. Crim. App. Apr. 3, 2019) (mem. op., not designated for publication). The intermediate-appellate court affirmed the trial court's verdict, on the charge of continuous sexual assault of a child, but the Court of Criminal Appeals reversed because the evidence failed to show a second assault before the victim's fourteenth birthday. *Id*. at *5. The Court reformed the judgment to reflect a conviction for first-degree Aggravated Sexual Assault of a Child. *Id*.

In *Griffith*, the Court of Criminal Appeals explained why the evidence failed to support the verdict. The Court wrote:

> Part of the problem with the dates in this case is a disconnect between the case that the State believed that it could prove, and the evidence that it presented to the jury. The State believed that it could show that the first of the Frost incidents occurred before A.G.'s birthday on April 4, 2013. There were lengthy pretrial arguments about the timeline presented by the State, but that evidence was never presented to the jury. At the pretrial outcry hearing, Bailey testified that the victim told her about four incidents. The first was the Dawson incident in 2012. The second incident occurred in the house in Frost. The third time happened six or seven months after the second time, and the fourth time happened "a couple of weeks" after the third time. A.G. also told Bailey that the fourth incident was three weeks before the December 30 interview. Bailey testified that A.G. used the term "a couple of weeks" in a conversational manner, and did not necessarily mean a literal two week period. The State clarified that the fourth assault happened between Thanksgiving and Christmas. The victim did not use any holidays or events to set a date for the third assault, but she did say that

> it happened when she was being home schooled and it was "hot outside."
>
> Using these time periods, the State attempted to count back from the date of the forensic interview. The State's theory was that the fourth assault happened in early December or late November. "A couple of weeks" earlier would put the third incident in mid-November, but the prosecutor took the "couple of weeks" comment and seemed to stretch that time, arguing that the third incident took place in October or even September—as much as eight weeks before the fourth incident—because other evidence showed that A.G. was being home schooled and that it was "hot outside" at the time. Based on this interpretation, and counting back another six or seven months from September, the prosecutor put the second incident in February or March. This would have been before A.G.'s fourteenth birthday in April. The State's proposed timeline was fiercely contested at the pretrial hearing, with the defense accusing the State of "messing" with the dates to try and place the second incident before A.G.'s fourteenth birthday. The State's timeline at the pretrial outcry hearing was plausible, and the jury might have used these dates to reasonably infer that the second assault occurred before A.G.'s fourteenth birthday, but the problem is that none of this evidence was presented to the jury. A jury cannot make inferences based on evidence that they never heard.

Id. at *13-*15.

The Court correctly determined that the evidence did not support the verdict, reformed the conviction to reflect a conviction for the lesser included offense of first-degree Aggravated Sexual Assault of a Child and remanded for a new sentencing hearing. *Id*. at *5.

II. Elements of the Hypothetically Correct Charge

To establish the offense of Capital Murder, the State had to prove: Appellant: 1) committed Murder as defined under Section 19.02(b)(1); and 2) murdered more than one person during the same criminal transaction. TEX. PENAL CODE ANN. §§ 19.02(b)(1); 19.03(a)(7)(A).

The charge allowed the jurors to find Appellant guilty under the "law of parties." CR 253.

III. "Law of Parties"

A. General Law

"Evidence is sufficient to convict under the law of parties if it shows the defendant is physically present at the commission of the offense and encouraged the commission of the offense either by words or other agreement." *Trenor v. State*, 333 S.W.3d 799, 806–07 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (citing *Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1994)); *see Goggins v. State*, 541 S.W.3d 318, 321 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd) ("Mere presence of an accused at the scene of an offense will not support a conviction under the law of parties, but it is a circumstance that combined with other facts may show the accused was a participant."); *see also Ranson v. State*, No. 2018 WL 2022691, at *4 (Tex. App.—Eastland Apr. 30, 2018, pet. dism'd) (mem. op., not designated for publication).

Because an agreement between parties to act together in a common design can rarely be proven by words, the State often may rely on the parties' actions, shown by direct or circumstantial evidence, to establish an understanding or common design to commit the offense. *Miller v. State*, 83 S.W.3d 308, 314 (Tex. App.—Austin 2002, pet. ref'd); *see Gross v. State*, 380 S.W.3d 181, 186 (Tex. Crim. App. 2012); *Walter v. State*, 588 S.W.3d 682, 688 (Tex. App. 2019); *Trenor*, 333 S.W.3d at 805–06. Events that occurred before, during, and after the commission of the crime are relevant in determining whether an individual functioned as a party. *Walter*, 588 S.W.3d at 688; *Payne v. State*, 194 S.W.3d 689, 694 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd); *see Goff v. State*, 931 S.W.2d 537, 545 (Tex. Crim. App. 1996).

B. Article 7.02 of the Penal Code

Under Article 7.02, a person can be responsible for a criminal act even if another person committed the criminal offense. TEX. PENAL CODE ANN. § 7.02. To impute criminal responsibility here the evidence had to establish Appellant acted with intent to promote or assist the commission of the offense because he solicited, encouraged, directed, aided, or attempted to aid the other person to commit the offense. TEX. PENAL CODE ANN. § 7.02(a)(2).

C. Case Examples

1. *Gross v. State*

Gross originated out of this Court and the Court of Criminal Appeals affirmed this Court's opinion in 2012. *Gross*, 380 S.W.3d at 187. *Gross* involved a murder of Corkney Lee by Gross's brother-in-law, John Jones. *Id*. at 183. Gross was driving when Jones "had words" with Lee. *Id*. Gross and Lee stopped at a gas station. *Id*. Jones exited the car, took a shotgun owned by Gross, and shot Lee. *Id*. Gross then drove himself and Jones to Jones's grandmother's home where Jones got out of Gross' car. *Id*. Jones took the gun with him. *Id*.

A jury convicted Gross and he appealed. *Id*. This Court found the evidence insufficient to support the verdict under the law of parties. *Id*. The Court of Criminal Appeals agreed with this Court and held:

> Here, the State focuses on Appellant's post-offense conduct, which is relevant, but cannot stand alone. *See Morrison*, 608 S.W.2d at 235. *There must also be sufficient evidence of an understanding or common scheme to commit a crime*. *Guevara*, 152 S.W.3d at 49. The evidence does not indicate that Appellant anticipated that Jones would shoot Lee. Although he testified that he assumed that Jones knew that the shotgun was in the truck, there is no evidence that he assisted or encouraged Jones to kill Lee. As we held in *Randolph v. State*, to support the conviction of one who starts or participates in a fight with the victim for the subsequent shooting of the victim by another as the altercation progressed, "the very least that is required is encouragement of the commission of the offense by words or by agreement made prior to or contemporaneous with the act." 656 S.W.2d 475, 477 (Tex. Crim. App. 1983) (reversing conviction because there was no evidence that the defendant was aware that his son would kill the victim, but where there was evidence of a subsequent agreement to fabricate a story to defend the son).

> Appellant's testimony at trial, which was supported by an officer's testimony and not contradicted by the State, indicates that Lee and his passenger started the argument, not that Appellant engaged Lee in the altercation, as the State suggests. The evidence also does not support the State's theory that Appellant intentionally continued the verbal altercation outside of the vehicle in order to distract Lee and give Jones the opportunity to load the weapon unnoticed. *Although Appellant's presence at the scene may contribute to a finding of guilt, mere presence, even when coupled with flight from the scene, is insufficient to support a conviction as a party to the murder. Thompson*, 697 S.W.2d at 417. There must be other facts to show that the accused participated in the offense. *Beardsley v. State*, 738 S.W.2d 681, 685 (Tex. Crim. App. 1987). The State speculates that Appellant and Jones decided to kill Lee while driving to the gas station, but the evidence does not support this scenario.
>
> Juries are permitted to draw reasonable inferences from the evidence, but they are not permitted to draw conclusions based on speculation. *Hooper v. State*, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007). Speculation is the mere theorizing or guessing about the possible meaning of the facts and evidence presented. *Id*. at 16. On the other hand, "an inference is a conclusion reached by considering other facts and deducing a logical consequence from them." *Id*. A conclusion that is reached by speculation may not seem completely unreasonable, but it is not sufficiently based upon facts or evidence to support a conviction beyond a reasonable doubt. *Id*.
>
> *Although the jury is free to make inferences from the evidence presented, the conviction here was based on pure speculation. Viewed cumulatively, the evidence did not demonstrate a prior or contemporaneous plan between Appellant and Jones to commit the murder. Therefore, the evidence was legally insufficient to support Appellant's conviction for murder as a party*.

Id. at 188. (emphasis added).

2. *Hoang v. State*

In *Hoang v. State*, the First Court of Appeals concluded that evidence was sufficient to support the appellant's conviction as a party to Murder when the appellant assisted the shooter by giving him the loaded firearm that killed the victim; the appellant drove his car parallel to, close to, and at about the same speed as the victim's car, which enabled the shooter to be in a position to shoot the victim; the appellant drove away from the location after the shooting; and, the appellant tried to cover up the crime . 263 S.W.3d 18, 23 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd).

3. *Miller v. State*

In *Miller*, the Third Court of Appeals determined that a witness's testimony that the appellant, the driver of a vehicle, "pulled along the left side of [the victim's] car 'very slowly' before the passenger fired a fatal shot" and then "immediately fled the scene" provided evidence that the appellant "aided [the shooter] by positioning the [vehicle] to facilitate the shooting." 83 S.W.3d at 314.

4. *Garcia v. State*

The State charged Simon Garcia with the murder of Samuel Wass. *Garcia v. State*, 486 S.W.3d 602, 604 (Tex. App.—San Antonio 2015, pet. ref'd). Garcia relied on *Gross* to argue the evidence was legally insufficient to support the verdict. *Id*. at 612-13. The San Antonio Court of Appeals rejected this reasoning. *Id*. The evidence at trial was:

- Each of the eyewitnesses pointed to Simon as being the driver of the vehicle;
- Domingo Perales, who had known Simon his entire life, and Simon's own father, identified Simon as driving away from the scene shortly after the shooting;
- Another witness, this one who knew none of the individuals involved, identified Simon as the driver and as the individual fighting with Wass immediately prior to the shooting;
- This same witness also identified Simon as telling the shooter it was "time to leave;"
- Additionally, a good Samaritan who came to Wass's aid testified that Wass identified Simon as the responsible person; and,
- The jury also heard testimony regarding Simon's and Wass's extensive history, including allegations that Wass had stolen Simon's truck six months before the shooting.

Id. at 613.

The San Antonio Court reasoned:

> The *Gross* case is clearly distinguishable. Here, Simon had known Wass for years and they had a long and acrimonious history. There were numerous altercations between the two individuals and several statements by Simon that he was "going to get [Wass] someday."
>
> The testimony was also replete with examples of Simon's involvement in the offense. Simon drove the vehicle and stopped beside the vehicle

> in which Wass was sitting. Unlike *Gross*, where the victim started the altercation, Wass's vehicle was stopped; Wass elected to stop his truck, exit the truck, walk around to Wass's vehicle, and partake in a verbal altercation. Wass further identified Simon, and not the passenger, as the responsible party. Simon started the verbal altercation, and by all accounts, Simon directed the shooter when it was time to leave. Unlike *Gross*, Simon was not merely present at the scene of the crime and there was no evidence Simon attempted to stop the shooter or that he appeared surprised by the shooting. *Cf. id*. at 187. Simon, not the co-defendant, had the history with Wass and Simon had the motive to harm or "get even" with Wass, and he drove the vehicle away from the scene.

Id.

II. Facts

The murders occurred in the Reserve. 3 RR 25-6; 32-3; 100. A fence separates the Reserve from a neighboring complex. 3 RR 28. A hole was in the fence on October 26. 3 RR 114. Sanchez did not think Appellant would have been able to crawl through the hole. 3 RR 118-19. Solomon lived in the Reserve. 3 RR 28-9; 91.

A. October 20, 2020

On the morning of October 20, 2020, Rugnao heard "the gunshot." 3 RR 34. Rugnao went to his balcony and looked out. 3 RR 34. He saw someone "banging on [Solomon's] front door." 3 RR 35. The people banging on Solomon's door drove off when they noticed neighbors. 3 RR 35.

The police arrived and investigated. 3 RR 37. During the investigation Officer Jarboe found or received a cell phone, a face mask, and shell casings. 4 RR 70. The

cell phone was "unlocked" and so Officer Jarboe "looked through" it. 4 RR 77. Jacobs discovered an "Apple ID" of DewayneBatiste1980@gmail.com. 4 RR 78.

Officer Jarboe secured a recording that he believed had a person on it that resembled Appellant. 4 RR 79-82. Jarboe testified Appellant weighed 318 pounds. 4 RR 83. Jarboe testified that the people involved in the shooting on October 20 looked different from the people involved in the shooting on October 26. 4 RR 93. The police suspected Appellant of the shooting on October 20, 2020. 4 RR 171.

B. October 26, 2020

On October 26, 2020, Rugnao again heard gunshots. 3 RR 37. Rugnao looked in the direction of the shots but saw no one; he did, however, hear a car "take off in the apartments next door." 3 RR 38. Rugnao went outside, saw Solomon's car, found Solomon dead in the front seat, and found D.S. under Solomon. 3 RR 39-41.

Detective Lange's investigation led him to the conclusion Hawkins responsible for the October 26th shooting. 5 RR 21. He also determined that the gun used on October 20 was not the gun used on October 26. 5 RR 25-26.

Officer Salameh responded to the shooting and found Sanchez holding D.S. 3 RR 127; 131. Salameh also recovered a video from a "Ring doorbell camera." 3 RR 141. After viewing the video, Officer Salameh inspected the fence and found a hole. 3 RR 142. On the other side of the fence was a parking lot. 3 RR 145. Salameh also found a security camera on the other side of the fence. 3 RR 147.

The recordings from this camera allowed the police to identify a black Pontiac and a red or white Toyota that they believed were "involved" in the shooting. 4 RR 95; 102; 171. Officer Jarobe identified the driver of the white Camry as "darker skinned, heaver set black male. Tall in structure." 4 RR 102. Detective Lange testified the video showed Hawkins "interacting with the white Toyota Camry." 5 RR 48. Detective Lange testified that Hawkins did not go to the shooting in the "white Camry." 5 RR 67. Detective Lange could not even testify that Appellant knew Hawkins on the day of the shooting. 5 RR 68. Lange testified that "one of the shooters" went "to the Toyota," but he could not identify people inside the Toyota. 5 RR 73-4. But, according to Lange, the driver of the Toyota "look[ed] like" Appellant. 5 RR 79-80.

Detective Lange used the video to find the Camry's license plate number. 5 RR 31. Three hours after the shooting, Officer Pena spotted the white Camry. 4 RR 127. Officer Pena, operating in plain clothes and in an unmarked police car, followed the Camry. 4 RR 176; 179. Appellant was driving the Camry; Appellant stopped the Camry in the middle of a street, walked back to the unmarked car, and yelled "why the *uck are you following me?" 4 RR 178. The police did not seize the Camry. 4 RR 134.

The police "connected" the black Pontiac with a person named Johnny Smith. 4 RR 108. Through an "ankle monitor" the police also identified Hawkins as a

potential participant in the shooting. 4 RR 117; 164. GPS data from the new phone associated with Appellant and the ankle monitor on Hawkins were proximate to each other immediately prior to and after the shooting. 5 RR 138-41; 151.

IV. Application of Law to Fact

When a charge allows for a conviction as a principal or a party this Court may affirm on either ground. *Hanson v. State*, 55 S.W.3d 681, 690 (Tex.App.—Austin 2001, pet. ref'd).

A. The indictment and charge

The indictment alleged Appellant caused the death of Soloman and D.S. by shooting them with a gun. CR 16. The charge explained that a person can be guilty of the criminal offense as a party to the criminal act. CR 253. The charge also explained that a person is criminally responsible 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. Mere presence alone will not constitute one a party to an offense." CR 253.

B. The jury could not have convicted Appellant as a principal

The evidence was conclusive that Appellant was not present when the shooting on October 26th occurred, and that he did not "pull the trigger." To convict Appellant as a principal, the evidence would have had to show Appellant:

(1) intentionally or knowingly causes the death of an individual;

> (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual;
>
> (3) 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; or
>
> (4) knowingly manufactures or delivers a controlled substance included in Penalty Group 1-B under Section 481.1022, Health and Safety Code, in violation of Section 481.1123, Health and Safety Code, and an individual dies as a result of injecting, ingesting, inhaling, or introducing into the individual's body any amount of the controlled substance manufactured or delivered by the actor, regardless of whether the controlled substance was used by itself or with another substance, including a drug, adulterant, or dilutant.

And that "(7) the person murders more than one person: (A) during the same criminal transaction; or (B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct." TEX. PENAL CODE ANN. §§ 19.02(b)(1)-(4); 19.03(a)(7)(A)-(B).

In this case, there was no such evidence and even the witnesses for the State testified Appellant was not the shooter, and thus by implication did not commit Murder or Capital Murder as a principal. 5 RR 21.

C. The jury could not have convicted Appellant as a party

The jury could convict Appellant as a party if and only if the evidence showed Appellant and another person had an understanding or common design to commit the offense. *Trenor*, 333 S.W.3d at 806–07; *Goggins*, 541 S.W.3d at 321 ("Mere

presence of an accused at the scene of an offense will not support a conviction under the law of parties, but it is a circumstance that combined with other facts may show the accused was a participant."); *Ranson*, 2018 WL 2022691, at *4; CR 253.

To carry this burden, the State could rely on Appellant's actions before, during, or after the commission of the crime to establish an understanding or common design to commit the offense. *Miller*, 83 S.W.3d at 314; *Gross*, 380 S.W.3d at 186; *Walter*, 588 S.W.3d at 688; *Trenor*, 333 S.W.3d at 805–06; *Payne*, 194 S.W.3d at 694; *Goff*, 931 S.W.2d at 545.

Here, the evidence suggests Appellant was present and part of the attempted confrontation on October 20. 4 RR 78. The evidence also suggests Appellant was across the fence and in a different apartment complex when the shooting on October 26th occurred. 5 RR 146.The evidence allowed for the idea that Appellant followed the black car to the neighboring complex and drove around the complex, and then the cars, with the shooter in one, drove together from the scene. 5 RR 144-46; 149; 151.

Appellant does not contest that a gun was used but contends the evidence could not establish that he knew a gun would be used or that a murder or murder(s) would occur. The evidence fails because it does not establish Appellant: 1) knew the shooter had a gun before the shooting on October 26; 2) expected, planned, or anticipated a shooting on October 26; 3) knew that the shooter would confront the

victim as opposed to doing something else (such as theft, harassment, intimidation, etc.) inside of the neighboring complex; or even 4) Appellant knew the victim had been shot when he left the neighboring apartment complex.

These facts render this case like *Gross*, where:

- The evidence did not indicate that Appellant anticipated that Jones would shoot Lee; and,
- Although Appellant testified that he assumed that Jones knew that the shotgun was in the truck, there is no evidence that he assisted or encouraged Jones to kill Lee.

Gross, 380 S.W.3d at 187.

For the same reason, the evidence is different from the evidence in *Hoang*, *Miller*, or *Garcia*. These three cases abound with evidence that the appellant participated in a common scheme to commit the ultimate crime.

In *Hoang*, the evidence was the appellant assisted the shooter by giving him a loaded firearm that killed the victim; the appellant drove his car parallel to, close to, and at about the same speed as the victim's car, which enabled the shooter to be in a position to shoot the victim; the appellant drove away from the location after the shooting; and the appellant tried to cover up the crime. *Hoang*, 263 S.W.3d at 23.

In *Miller*, the evidence was that the appellant, the driver of a vehicle, "pulled along the left side of [the victim's] car 'very slowly' before the passenger fired a

fatal shot" and then "immediately fled the scene" provided evidence that the appellant "aided [the shooter] by positioning the [vehicle] to facilitate the shooting." *Miller*, 83 S.W.3d at 314.

And in *Garcia*, the evidence was:

- Each of the eyewitnesses pointed to Simon as being the driver of the vehicle;
- Domingo Perales, who had known Simon his entire life, and Simon's own father, identified Simon as driving away from the scene shortly after the shooting;
- Another witness, this one who knew none of the individuals involved, identified Simon as the driver and as the individual fighting with Wass immediately prior to the shooting;
- This same witness also identified Simon as telling the shooter it was "time to leave;"
- Additionally, a good Samaritan who came to Wass's aid testified that Wass identified Simon as the responsible person; and,
- The jury also heard testimony regarding Simon's and Wass's extensive history, including allegations that Wass had stolen Simon's truck six months before the shooting.

Id. at 613.

Here, however, the evidence did not support the inference Appellant and another person had an understanding or common design to commit the offense. *Trenor*, 333 S.W.3d at 806–07; *Goggins*, 541 S.W.3d at 321 ("Mere presence of an accused at the scene of an offense will not support a conviction under the law of parties, but it is a circumstance that combined with other facts may show the accused was a participant."); *Ranson*, 2018 WL 2022691, at *4.

Here the evidence was:

- Appellant had a similar body-type to a shooter from October 20.
- Appellant's phone was discovered after the shooting on October 20, but there was no evidence of when it was dropped or lost on October 20.[3] 4 RR 78.
- The events of October 20 did not result in a death. State's Ex. 126.
- Hawkins was the shooter on October 26. 5 RR 21.
- Appellant was not present at the Reserve when the shooting occurred on October 26. 5 RR 144-46; 149; 151.
- Appellant was present in the neighboring complex when the shooting occurred. 5 RR 144-46; 149; 151.

[3] A juror could infer that because Appellant got a new phone on October 20 that he lost his phone on October 20. There was no evidence of *when* Appellant lost his phone on October 20.

- Appellant was driving a white Carola that followed a black Pontiac to the scene of the shooting. The shooter came and went in the black Pontiac. 5 RR 144-46; 149; 151.

This evidence, however, does not demonstrate that Appellant had an understanding or common design to commit this offense. *Trenor*, 333 S.W.3d at 806–07; *Goggins*, 541 S.W.3d at 321 ("Mere presence of an accused at the scene of an offense will not support a conviction under the law of parties, but it is a circumstance that combined with other facts may show the accused was a participant."); *Ranson*, 2018 WL 2022691, at *4. Instead, this evidence is of mere presence. There is no evidence Appellant knew or should have known shooters would go from one complex to the other, that there was a hole that allowed movement between complexes, or that if Appellant knew of a planned confrontation on October 26, that guns were involved or going to be involved. Instead, the evidence merely showed Appellant came to the neighboring complex with the shooter, was present in the neighboring complex when the shooting occurred and left when the shooter left. This is inadequate to establish Appellant was a party to the offense. Thus, the evidence here was legally insufficient to support the verdict.

V. Conclusion

Appellant asks this Court to vacate the judgment and render judgment of acquittal or, in the alternative, to render judgment for a lesser included offense and remand for a new sentencing hearing.

APPELLANT'S SECOND ISSUE

The district court erred when it only partially granted Appellant's motion to suppress because the court could not parse what evidence came from the illegal search.

I. Standard of Review

A trial court's ruling on a motion to suppress is reviewed under a bifurcated standard. *Martin v. State*, 620 S.W.3d 749, 759 (Tex. Crim. App. 2021); *Majano v. State*, No. 14-21-00684-CR, 2023 WL 2585916, at *2 (Tex. App.—Houston [14th Dist.] Mar. 21, 2023, pet. ref'd). This Court must give almost total deference to the trial court's determination of historical facts and to the trial court's application of law to fact questions that turn upon credibility and demeanor. *Alford v. State*, 358 S.W.3d 647, 652 (Tex. Crim. App. 2012). This deferential standard similarly applies when the trial court's determinations are based on a recording admitted into evidence at a suppression hearing. *See Montanez v. State*, 195 S.W.3d 101, 109 (Tex. Crim. App. 2006); *Matthews v. State*, 513 S.W.3d 45, 62 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd).

A trial court abuses its discretion if the decision falls outside the zone of reasonable disagreement—that is, the ruling was "so clearly wrong as to lie outside the zone within which reasonable people might disagree." *Henley v. State*, 493

S.W.3d 77, 83 (Tex. Crim. App. 2016). (quotation omitted); *Stone v. State*, 635 S.W.3d 763, 769 (Tex. App.—Houston [14th Dist.] 2021, pet. ref'd).

II. Law

A. Standard of review

The Fourth Amendment protects against unreasonable searches and seizures by government officials. U.S. CONST. amend. IV; *Wiede v. State*, 214 S.W.3d 17, 24 (Tex. Crim. App. 2007); *Martinez v. State*, 689 S.W.3d 30, 38–46 (Tex. App.—Fort Worth 2024, pet. ref'd); *Hardy v. State*, No. 14-22-00636-CR, 2024 WL 1207849, at *3 (Tex. App.—Houston [14th Dist.] Mar. 21, 2024, pet. ref'd).

When a defendant seeks to suppress evidence based on an alleged Fourth Amendment violation, the defendant initially bears the burden of proof to show a constitutional violation. *State v. Martinez*, 569 S.W.3d 621, 623-24 (Tex. Crim. App. 2019). The defendant meets his initial burden by establishing that a search or seizure occurred without a warrant. *Id*. at 624. If the defendant meets this burden, then the burden then shifts to the State to produce a warrant or show the reasonableness of the search or seizure. *Id*.

B. Cell phone evidence

In *Riley*, the Supreme Court, in a case about a search incident to arrest, held authorities must obtain a search warrant before searching the digital contents of a cell phone. *Riley v. California*, 573 U.S. 373, 378–81, 134 S. Ct. 2473, 2480–82,

189 L. Ed. 2d 430 (2014) . Chief Justice Roberts, writing for the Court, described the term "cell phone" as a "misleading shorthand" for a device that has "immense storage capacity" and is, effectively, a "minicomputer[] that also happen[s] to have the capacity to be used as a telephone. [Cell phones] could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers." *Id*. at 393. Chief Justice Roberts then observed that one of the most notable and distinguishing features is that a search of the digital data held in cell phone allowed "[t]he sum of an individual's private life [to] be reconstructed through a thousand photographs labeled with dates, locations, and descriptions." *Id*. at 394.

The Court explained that the Constitution allows law enforcement officers to disconnect the phone from its cellular network to prevent remote "wiping" by turning the phone off, removing its battery, or placing the phone in an enclosure that isolates it from remote access. *Id*. at 390. And the Court explained the Constitution allowed "[l]aw enforcement officers remain free to examine the physical aspects of a phone to ensure that it will not be used as a weapon—say, to determine whether there is a razor blade hidden between the phone and its case." *Id*. Thus, a physical search, but not a digital search, is permitted incident to arrest. *Id*.

The Court also discussed other constitutional exceptions such as exigency. *Id*. at 402, 134 S. Ct. at 2494; *see Akins v. State*, 573 S.W.3d 290, 296 (Tex. App.—

Beaumont 2019, pet. ref'd) (distinguishing *Riley* because it "did not involve the issue of whether the defendant had abandoned the device that was searched").

Except for these limited, non-digital searches, *Riley* holds that the Constitution requires law enforcement to secure a warrant before searching a cellular phone. *Riley*, 573 U.S. at 403, 134 S. Ct. at 2493, 2495. The Court precluded any ambiguity and held, "[o]ur answer to the question of what police must do before searching a cell phone seized incident to arrest is ... simple—get a warrant." *Id*.

The Texas Court of Criminal Appeals addressed the warrant requirement for cell phone evidence in 2014. *See State v. Granville*, 423 S.W.3d 399, 402 (Tex. Crim. App. 2014) (rejecting the prosecutor's argument "that a modern-day cell phone is like a pair of pants or a bag of groceries, for which a person loses all privacy protection once it is checked into a jail property room"); *Wiltz v. State*, 595 S.W.3d 930, 934 (Tex. App.—Houston [14th Dist.] 2020, pet. ref'd) ("Courts have held that (1) one has a subjective expectation of privacy in the contents of one's cell phone, and (2) society recognizes this expectation of privacy as reasonable and legitimate. Yet, one may lose a reasonable and legitimate expectation of privacy in the contents of one's cell phone if one abandons the phone.").

In *Granville*, law enforcement arrested the appellant for causing a disturbance on a school bus, and his cell phone was taken from him during booking and placed into the jail property room. *Id*. Later that day, an officer investigating a different

potential offense retrieved the cell phone and examined its contents without first obtaining a warrant. *Id*. Instead, the officer simply turned the phone "on" and "went through it until he found the photograph he was looking for, ... took the phone to his office, and printed a copy of the [offending] photograph." *Id*. The police later relied on the seized photo to charge the appellant with a state-jail felony; the appellant moved to suppress the photograph based on the illegal search of his phone. *Id*. The trial court granted the motion; the court of appeals and Court of Criminal Appeals affirmed. *Id*. at 402, 417.

In deciding suppression was appropriate, the Court of Criminal Appeals explained that while a person may have a reasonable and legitimate expectation of privacy in his cell phone's contents, "he may lose that expectation under some circumstances, such as if he abandons his cell phone, lends it to others to use, or gives his consent to its search." *Id*. at 409 (internal footnotes omitted). The Court added that without violating the Fourth Amendment, "the officers could have reasonably inspected the outside of appellant's cell phone; they could have tested it for fingerprints or DNA material because portions of the cell phone are routinely exposed to the public." *Id*. at 416. That is, there is a significant distinction between the cell phone's exterior and its digital contents. *Id*.

In *Wiltz*, Chief Justice Frost wrote for the Court in a cell phone suppression case. *Wiltz*, 595 S.W.3d at 934. In *Wiltz*, the appellant was a suspect in a series of

robberies. *Id*. When the police stopped the car Wiltz was in, the driver stopped the car and then fled. *Id*. As the police chased the driver, Wiltz fled and never returned to the abandoned car. *Id*. Wiltz left his cellphone in the car when he fled. *Id*. Chief Justice Frost held "[b]ecause Appellant abandoned the cell phone in his open car when he fled from the police, we conclude he lacked standing to challenge the constitutionality of the cell phone search. We affirm." *Id*.

C. Non-digital intrusion

Courts around the country have found methods of non-digital intrusion appropriate to learn the identity of the owner of a phone. *Ward v. Lee*, No. 19-CV-03986 (KAM), 2020 WL 6784195, at *1 (E.D.N.Y. Nov. 18, 2020); *United States v. Robinson*, No. 16-CR-545 (ADS) (AYS), 2019 WL 1211431, at *12 (E.D.N.Y. 2019) (report & recommendation), *United States v. Quashie*, 162 F. Supp. 3d 135, 140 (E.D.N.Y. 2016), *United States v. Vega-Cervantes*, No. 1:14-CR-234-WSD, 2015 WL 4877657, at *16 (N.D. Ga. Aug. 13, 2015) (op. & order), and *United States v. Andrade*, No. 18-145-JJM-LDA, 2022 WL 179341, at *3 (D.R.I. Jan. 20, 2022) (order) (holding that the defendant's challenge to the removal of the cell phone's back cover to find its serial number and to apply for a search warrant was not an illegal warrantless search "because law enforcement already legally had the device[ ] following the inventory search and [because] the law does not require a warrant when 'police did not search digital content within the phone[ ] but rather checked

the phone for its serial number, written in a space behind the battery pack'" (quoting Ward, 2020 WL 36784195, at *8)).

Likewise, the South Carolina Supreme Court has held, under *Riley* and the Fourth Amendment, a limited search of a SIM card to establish ownership is distinct from examining a phone's contents. *State v. Moore*, 429 S.C. 465, 471, 839 S.E.2d 882, 885 (2020). In *Moore*, the defendant left his "flip phone" at a crime scene, and in the investigation that followed, officers removed the phone's SIM card to determine ownership and then obtained a warrant to search the phone's contents. *Id*. at 885.

The court held that under these circumstances, the limited search of the SIM card for purposes of identification was reasonable and did not contravene the Fourth Amendment. *Id*. at 888. The court stated, "To the extent [the defendant] retained an expectation of privacy in his cell phone left next to the victim's body, that expectation of privacy was diminished to the point that the finder could properly examine the item in a manner limited to determining the owner." *Id*.

The First Court of Appeals addressed a similar issue in 2019. *Oseguera-Viera v. State*, 592 S.W.3d 960, 965–66 (Tex. App.—Houston [1st Dist.] 2019, pet. ref'd) (holding grocery store employee-defendant's objective expectation of privacy in his mislaid cell phone containing child pornography was limited by the police officer's ability to access the unlocked and not-password-protected cell phone—once a

customer had turned it in—to determine ownership and noting that the court was not deciding "the extent to which an officer may review the contents of a cell phone to determine its owner"). This Court has never relied on *Oseguera-Viera*.

The Corpus Christi Court of Appeals rejected the State's reliance on *Oseguera-Viera*, in the search of a flash drive. *Salinas v. State*, 625 S.W.3d 203, 215 (Tex. App.—Corpus Christi–Edinburg 2021, pet. ref'd). In *Salinas*, the appellant claimed he lost a flash drive, and the police found a flash drive in Salinas' truck. *Id*. The court explained "The misplacement or loss of personal property may diminish an individual's expectation of privacy because a party who finds the property may examine and search the property to determine its owner. *See, e.g., Kane v. State*, 458 S.W.3d 180, 185 (Tex. App.—San Antonio 2015, pet. ref'd). However, there are no such facts here undermining Salinas's expectation of privacy because the thumb drive was in his truck, and no third party would have to look through its contents to determine who it belonged to and return it to Salinas." *Id*.

D. Abandonment

Even if opening the digital contents of a cellular phone to obtain the identification of the owner was an improper search, Appellant still had to prove that he had a reasonable expectation of privacy in the phone at the time of the contested search to establish standing to bring his suppression motion. *See Wiltz*, 595 S.W.3d

at 934 ("[O]ne may lose a reasonable and legitimate expectation of privacy in the contents of one's cell phone if one abandons the phone.").

When a defendant voluntarily abandons property, he lacks standing to contest the reasonableness of the search of the abandoned property. *Id.* Property is abandoned if (1) the defendant intended to abandon the property and (2) his decision to abandon the property was not due to police misconduct. *Swearingen v. State*, 101 S.W.3d 89, 101 (Tex. Crim. App. 2003).

Abandonment is primarily a question of intent. *McDuff v. State*, 939 S.W.2d 607, 616 (Tex. Crim. App. 1997). Intent to abandon may be inferred "from words spoken, acts done, and other objective facts and relevant circumstances." *Id*. The issue is not abandonment in the "strict property-right sense[ ] but rather whether the accused ha[s] voluntarily discarded, left behind, or otherwise relinquished his interest in the property so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search." *Id*.; *see Matthews v. State*, 431 S.W.3d 596, 609–10 (Tex. Crim. App. 2014) (holding that the appellant intended to abandon any expectation of privacy in the van he left behind when, while being detained, he took off running and left the keys in the vehicle's ignition); *cf. State v. Dixon*, No. 13-09-00445-CR, 2010 WL 3419231, at *7 (Tex. App.—Corpus Christi–Edinburg Aug. 27, 2010, pet. ref'd) (mem. op., not designated for publication) (stating that the cell phone was not abandoned when it was preceded by

an unlawful act—theft of the phone—by a third person, who later provided the phone to the police).

At least one court—the Fourth Circuit—has stated that abandonment of a phone should not be "casually inferred" because people routinely lose or misplace their cell phones, the simple loss of a cell phone does not entail the loss of reasonable expectation of privacy in the digital data on that phone. *United States v. Small*, 944 F.3d 490, 503 (4th Cir. 2019). In *Small*, officers found a cell phone as they searched for the defendant, who had fled from the police in a stolen vehicle. *Id*. at 496. One of the investigators observed that the phone was receiving calls from someone identified on its screen as "Sincere my Wife." *Id*. Without obtaining a warrant, the investigator used the phone to call "Sincere" back. *Id*. Sincere informed the investigator that the phone belonged to her husband. *Id*. Police obtained a photo of him; found that it matched security footage captured during the defendant's flight from the police; and from this evidence, concluded that Sincere's husband was the driver of the stolen vehicle. *Id*. Officers used the phone three more times without obtaining a warrant—first to call Sincere to see if the defendant had returned home; next to answer Sincere's call; and then to remove the phone's back casing and battery to locate its serial number and other identifying information. *Id*.

The defendant argued that the four warrantless searches of his phone violated the Fourth Amendment. *Id*. at 498. The district court concluded that no warrant was

required because he had abandoned his phone. *Id*. The Fourth Circuit affirmed, noting that an abandonment finding is based not on whether all formal property rights have been relinquished but on whether the complaining party retains a reasonable expectation of privacy in the articles alleged to have been abandoned based on the defendant's actions and intentions. *Id*. at 502, 505. Specifically, it noted that the defendant had tossed aside other personal items—a shirt and a hat, located fifty yards from the phone—while fleeing to evade capture and abandoned his vehicle. *Id*. at 503. The court concluded that based on these circumstances, the district court's inference of abandonment seemed sensible because a cell phone's GPS tracking can "lead you to a defendant," making it credible that a fleeing suspect might intentionally discard his phone. *Id*. The court added that while phones sometimes slip out of pockets, shirts do not accidentally fall off their wearers at the same moment as hats and that cars do not ditch themselves after a crash. *Id*. "The fleeing suspect's relinquishment of the car, the hat, and the shirt near where the cell phone was found support[ed] the district court's finding of abandonment." *Id*.

Texas courts have held that when a defendant leaves his cell phone at a place where he had no right to be, he loses any legitimate expectation of privacy in that phone. *See Martinez v. State*, No. 08-14-00130-CR, 2016 WL 4447660, at *4 (Tex. App.—El Paso Aug. 24, 2016, pet. ref'd) (mem. op., not designated for publication) (stating that the appellant had no expectation of privacy in a cell phone that he left

at a murder scene); *Edwards v. State*, 497 S.W.3d 147, 161 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd) (holding that the appellant had abandoned his cell phone at the scene of the robbery when he left the phone on top of the vehicle in which he had ridden to the scene and then had fled on foot); *Royston v. State*, No. 14-13-00920-CR, 2015 WL 3799698, at *4 (Tex. App.—Houston [14th Dist.] June 18, 2015, pet. ref'd) (mem. op., not designated for publication) (holding that the appellant had abandoned his phone by "surreptitiously" placing it in a public dressing room on record mode and then walking away from not only the phone but also the store).

Making no attempt to recover a phone dropped at a crime scene may signal abandonment. *See State v. Brown*, 423 S.C. 519, 815 S.E.2d 761, 764-65 (2018). In *Brown*, a burglar broke into the victims' home while they were away and dropped his cell phone by the window that he had broken to gain entry. *Id*. at 762. The police took the phone and secured it in the evidence room. *Id*. Six days later, an officer retrieved the phone; guessed the code to unlock the screen; looked through the "contacts;" found a person listed as "Grandma;" and entered her number into a database that identified a list of her relatives, including a man matching the age of the person on the phone's background screen (the defendant). *Id*. at 762–63. After identifying the defendant, the police took the phone to his home and told him that it had been found at a burglary scene. *Id*. at 763. The defendant admitted that it was

his phone but claimed that he had lost it a day after the burglary. *Id*. He was charged with burglary, and the trial court found that he had no reasonable expectation of privacy in the phone's digital information because he had abandoned the phone. *Id*.

The court noted that—at least until the time of the burglary—the defendant had enjoyed Fourth Amendment protection for his phone's digital information because he had put a lock on the phone's screen. *Id*. at 764. The court also presumed that he did not intentionally leave his cell phone at the crime scene because "he must have known that doing so would lead to the discovery that he was the burglar." *Id*. But then the phone sat in the evidence locker at the police station for six days, and the record did not reflect that the defendant did anything during that time to try to recover his phone: There was no evidence that he tried to call or text the phone to see if someone would answer or that he attempted to contact his phone's service provider for information on the phone's whereabouts. *Id*. at 764–65. Instead, he contacted his service provider and canceled his phone's cellular service. *Id*. at 765.

The defendant's decision not to attempt to recover the phone equated to the phone's abandonment. *Id*. at 765.

Flight also signals abandonment of an expectation of privacy. *Wiltz*, 595 S.W.3d at 935. In *Wiltz*, the appellant was handcuffed after a traffic stop. *Id*. Before he fled, he retained the privacy protections in his cell phone afforded by law. *Id*. But when he opted to flee the scene and leave his cell phone behind, he "intentionally

gave up any privacy rights to information on the cell phone." *Id*. (noting that *Riley* did not address the abandonment doctrine or any standing issue and "explicitly left the door open for other case-specific exceptions").

III. Facts

Appellant moved to suppress. CR 158-63. Appellant supported the motion with an affidavit. CR 162-63. Appellant testified:

> On October 19, 2020 I lost my phone. I went back and retraced my steps looking for it. I believe I may have left it at the convenience store on the counter while purchasing snacks. I returned to the store but could not locate it. I began calling my phone number to see if anyone would answer. After a few days I went to AT&T and got a new phone.

CR 163.

Appellant's affidavit also testified to the facts of the police investigation:

> The following facts are derived from both the HPD offense reports and officer worn bodycam video. On October 20, 2020 at approximately 11:45 am, HPD Officers Cody Jarboe, Officer J. Cole and other member of law enforcement were dispatched to a shooting in progress call located at 2525 Old Farm Road in Houston Texas. Upon arrival Officer Jarboe was approached by alleged complainant Menuell Solomon. Mr. Solomon stated "two killers" that almost killed me, they shot and the shell is on the ground. He continues stating that it was a grey Lexus with paper tags.
>
> He states that he didn't get the tag number. But, I got the phone. (Later determined via the bodycam video that the phone was seen lying on the ground by a neighbor who notified Mr. Solomon's girlfriend. The girlfriend later gives the cell phone to Mr. Solomon) Mr. Solomon had already began to go through the phone. Officer J. Cole takes the phone from Menuell Soloman and begins searching through the text messages. Shortly thereafter, Officer Jarboe and J. Cole are in the patrol car going

> through the text messages and numerous other data in the phone. Officer continues to search the cell phone while broadcasting information from the cell phone search over the radio. Officer Jarboe states that the phone is abandoned. The phone is continuously ringing. Officer Jarboe and others can be heard on bodycam video saying that "he is looking for his phone" They continue to search the phone for the approximately 59 minutes. At this point it appears as though Office Jarboe turns the volume off on his body cam and covers the video screen for approximately 9 minutes. After the volume and video are resumed he confirms to Mr. Solomon that he spoke with the District Attorney's Office and "WERE GOING TO HAVE TO GETA SEARCH WRRANT FOR THAT PHONE BEFORE WE CAN GO ANY FURTHER."

CR 162.

On December 4, 2023, the trial court granted the motion in part and suppressed "evidence found in the hotel room & hotel observations." CR 161. Trial started, but the trial court had to order a mistrial. 3 RR 9. The trial court carried the ruling on the motion to suppress over from the prior trial. This included the rulings on the motion to suppress. 3 RR 9.

During the second trial, the police testified to recovering Appellant's cell phone on October 20. 4 RR 76. Officer Jarboe testified that he recovered the phone and that it was "unlocked." 4 RR 76. Officer Jarboe went through the digital parts of the phone and specifically into the "settings" and found that the phone was associated with the Apple ID: DewayneBatiste1980@gmail.com. 4 RR 77-78. Using that Apple ID, which the officer believed was a first name, last name, and year of birth, the police identified Appellant as the owner of the phone and a potential

perpetrator of the events on October 20. 4 RR 78; State's Ex. 403. The investigation of the phone resulted in the phone's IMEI number.[4]

Testimony established that on October 20 there was a new communication with Appellant's phone number but on a new phone. 5 RR 127. Using the information from the old phone and the new one, the police tracked Appellant's movement on October 26. 5 RR 132-33. During closing argument, the State emphasized this to the jury. 6 RR 42-44.

IV. Application of Law to Fact

A. Appellant met his initial burden

When a defendant seeks to suppress evidence based on an alleged Fourth Amendment violation, the defendant initially bears the burden of proof to show a constitutional violation. *Martinez*, 569 S.W.3d at 623-24. The defendant meets his initial burden by establishing that a search or seizure occurred without a warrant. *Id*. at 624. If the defendant meets this burden, the burden then shifts to the State to produce a warrant or show the reasonableness of the search or seizure. *Id*.

Here Appellant produced an affidavit that testified the search occurred without a warrant. CR 162-63. The State agrees the search occurred without a

[4] Generally the police will not require a warrant to get a IMEI number unless the number has to be recovered through digital data. *See Martinez v. State*, 689 S.W.3d 30, 38–46 (Tex. App.—Fort Worth 2024, pet. ref'd).

warrant. SRR 9 (arguing for abandonment not that the phone was searched with a warrant). Accordingly, Appellant met his burden. *Id*.

B. Appellant had a reasonable expectation of privacy in his phone

The State's case rests on the claim that Appellant owned the phone. 6 RR 37. Since *Granville*, courts have recognized that the Constitution provides a person who owns a phone has a reasonable expectation of privacy in the digital contents of that phone. *Riley*, 573 U.S. 378-81; *Granville*, 423 S.W.3d at 417 (holding "a citizen does not lose his reasonable expectation of privacy in the contents of his cell phone merely because that cell phone is being stored in a jail property room."). Accordingly, absent an exception, Appellant had a reasonable expectation of privacy in the phone. *Granville*, 423 S.W.3d at 417.

C. Appellant did not abandon the phone

Appellant has no reasonable expectation of privacy in property he abandons. *Matthews*, 431 S.W.3d at 608; *Wiltz v. State*, 609 S.W.3d 543, 545 (Tex. Crim. App. 2020) (Walker, J., dissenting from denial of petition for discretionary review).

Whether Appellant abandoned the phone is not determined by looking to civil law and to questions of property rights, instead the issue centers on whether Appellant intended to relinquish his or her interest in the property. *State v. Martinez*, 570 S.W.3d 278, 286 (Tex. Crim. App. 2019) (citing *McDuff*, 939 S.W.2d at 616).

"[A]bandonment consists of two components: 1) a defendant must intend to abandon property, and 2) a defendant must freely decide to abandon the property." *Comer v. State*, 754 S.W.2d 656, 659 (Tex. Crim. App. 1986) (op. on reh'g); *Wiltz*, 609 S.W.3d at 545 (Walker, J., dissenting). Importantly, the test for abandonment "does not begin with a presumption of abandonment which must be rebutted by proof of an intent not to abandon." *Martinez*, 570 S.W.3d at 286. Instead, affirmative proof of abandonment is required. *Id*.

Here, Appellant testified that he lost his phone on October 19, not that he abandoned it. CR 162-63. Further, Appellant testified that he went and looked for the phone and called it repeatedly. CR 162-63. The evidence establishes the police found the phone on October 20 and immediately searched it. CR 162-63; SRR 8. Further, when the police found the phone, they identified the phone by searching the digital portions of the phone (specifically the data in the "settings") instead of external information. 4 RR 77; CR 162-63.

The trial court found Appellant did not abandon the phone. SRR 13. The trial court stated, "I don't find it abandoned. I do find it mislaid" SRR 13. Precedent requires this Court to give almost total deference to the trial court's determination of historical facts and to the trial court's application of law to fact questions that turn upon credibility and demeanor. *Alford*, 358 S.W.3d at 652; *Montanez*, 195 S.W.3d at 109; *Matthews*, 513 S.W.3d at 62. Appellant provided evidence that he continued

to look for his phone even after he mislaid it. CR 162-63. There was no evidence that the person who had the mask the police recovered at the scene also had the cell phone and the police did not find Appellant's DNA on the mask. 4 RR 141; 5 RR 89. The trial court heard this evidence, weighed it, made a credibility determination, and found Appellant did not abandon the phone. SRR 13.

After applying the proper deference, this Court should find Appellant did not abandon his phone.

D. Exigent circumstances did not exist

Exigent circumstances are another exception to the rule for warrants. Yet when it comes to cell phone data, there are few "exigent circumstances." In *Riley*, Chief Justice Roberts explained that the concerns about data wiping, encryption, etc. are readily resolvable. *Riley*, 573 U.S. at 389-90. There was no concern about exigent circumstances and instead the police officer perused the phone for almost an hour without taking any steps to protect the data. SRR 8; CR 162-63. Accordingly, the exigent circumstances doctrine should not apply.

E. Accessing Appellant's digital data without a warrant violated the Constitution of the United States

In this case the police found the phone and then went through the digital contents for nearly an hour until a district attorney told the officers they needed a warrant. CR 162-63. The district attorney was correct. Since *Granville,* the digital

contents of a phone have been protected from a search without a warrant. *Granville*, 423 S.W.3d at 409; *Wiltz*, 595 S.W.3d at 935. Here, however, the police searched without a warrant. SRR 14. The search was therefore unlawful unless the State could prove an exception to the warrant requirement. *Martinez*, 569 S.W.3d at 623-24.

The trial court correctly determined that the fifty-nine minutes that the police searched the phone without a warrant constituted an illegal search. SRR 15. The trial court was right to suppress the material from the hotel, which sprang from the illegal search of the phone. SRR . 18. But the trial court erred by not suppressing everything else that was outside the effort to identify the owner of the phone. SRR 16.

The trial court erred in not suppressing everything else from the phone because the trial court could not identify what information was information the police secured in the fifty-nine minutes that they searched the phone. SRR 4-30. It is true that the police later obtained a warrant to continue searching the phone, but the trial court did not parse out what evidence was obtained from the illegal search and the search under the warrant. SRR 4-30. Thus, the trial court acted arbitrarily in allowing some data from the phone as evidence. Instead, the trial court should have required the State to demonstrate that the phone evidence it sought to admit was not tainted by evidence from the illegal search.

In *Jackson*, the Court of Criminal Appeals considered a similar issue. *State v. Jackson*, 464 S.W.3d 724 (Tex. Crim. App. 2015). Law enforcement, in *Jackson*,

placed an illegal tracking device on Appellant's car. *Id*. at 726. A police officer who was aware of the tracking device observed the appellant speeding and stopped him for the traffic violation. *Id*. The appellant consented to a search and the police found controlled substances. *Id*. The Court of Criminal Appeals found the independent stop and consent to search an intervening factor that was not a product of the "fruit-of-the-poisonous tree." *Id*. at 733.

In this case, the parties discussed intervening factors, but the evidence did not parse what was learned in the initial search of the phone and the reason for the later search. There was no evidence whether the officers would have applied for and secured a warrant without the information from the illegal search. SRR 4-30. There was no evidence that without the information from the illegal search the police would have connected Appellant to the phone (they connected the phone to Appellant by going through the "settings" feature inside the digital data of the phone). SRR 4-30. Without such evidence, the trial court could not parse phone data that haled from the illegal search from data that was a product of the subsequent search. Accordingly, the trial court erred in not suppressing everything from the phone other than lawfully obtained identification.

F. Harm

A violation of Appellant's Fourth Amendment rights is a constitutional violation. Under Rule 44.2(a), "the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment." TEX. R. APP. P. 44.2(a). *Glover v. State*, No. 01-22-00366-CR, 2024 WL 2751389, at *6 (Tex. App.—Houston [1st Dist.] May 30, 2024, no pet.). "The State, as the beneficiary of the error, has the burden of proving that the constitutional error was harmless beyond a reasonable doubt." *Id*. In this case the State cannot differentiate evidence that came from the nearly hour-long illegal search of the phone from evidence that came from the later search of the phone and therefore cannot show harm.

V. Conclusion

Appellant asks this Court to vacate the judgment and remand for a new trial with instructions to suppress all evidence that came from the illegal search of the phone.

PRAYER AND CONCLUSION

Appellant asks this Court to vacate the judgment and to render a judgment of acquittal. In the alternative, Appellant ask this Court to vacate the judgment and to enter a conviction for a lesser included offense or to find the evidence from the phone should have been suppressed, vacate the judgment, and order a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 9, 2024, that I delivered a true and correct copy of this brief via electronic commercial delivery to all parties of record.

/s/ Niles Illich
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CERTIFICATE OF COMPLIANCE

This is to certify that this brief complies with Rule 9.4 of the Texas Rules of Appellate Procedure because it is computer generated and includes 15,135 words as counted by the word count feature included with Microsoft Word (with no words excluded from the word count). This brief also complies with the typeface requirements because it has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman font for the text and 12-point Times New Roman font for the footnotes.

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