No. 01-24-00719-CR

In the Court of Appeals for the First District Houston, Texas

Jason Alexander Cisneros	§	**Appellant**
	§	
vs.	§	
	§	
The State of Texas	§	**Appellee**

Appellant's Brief

Appeal from the 230th District Court
Trial Cause No. 1693203
Harris County, Texas

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Oral Argument Requested

Identification of Parties

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Statement of the Case

Appellant, Jason Cisneros, was charged with Murder on October 8, 2015,[1] wherein it was alleged that he caused the death of Sierra Rhodd by shooting her with a gun and by intending to cause serious bodily injury, did cause her death by committing an act clearly dangerous to human life shooting the complainant with a firearm. The complaint alleged that Appellant had a prior felony conviction. (CR 10). The indictment returned on December 29, 2020 tracked the language in the complaint. (CR 29).

On September 13, 2023, Appellant was released from custody on bond. (CR 142).

A jury was selected on September 4, 2024. (CR 201).

The jury found Appellant guilty of manslaughter on September 12, 2024. (CR 272). The trial court assessed his punishment at 40 years in the Texas Department of Criminal Justice. (CR 278).

Notice of Appeal was timely given. (CR 285). The trial court certified that Appellant had the right to appeal. (CR 282).

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[1] Appellant was arrested on October 2, 2015, on a parole violator's warrant.

Statement Regarding Oral Argument

This case presents several issues that are rarely considered in Texas.

First, when determining if deadly conduct is a lessor included offense of murder, should that determination be made by considering the jury instruction that presents a theory of criminal responsibility pursuant to Tex. Penal Code § 7.02 (a) and (b) with deadly conduct as the underlying felony for both instructions. The felony offense of deadly conduct was the cornerstone of the jury instructions even though the jury could not consider it as a lessor included offense. And, Appellant was acquitted of murder and convicted of the only lessor included offense included in the instruction, manslaughter based on the proof presented at trial.

Second, this case presents an issue of first impression challenging the validity of the process for issuance of a parole violator's warrant. Appellant is challenging the determination by an unnamed analyst that a warrant for the arrest of a parolee may be issued without the presentation of any "reliable evidence" as required by Tex. Gov't. Code § 508.252.

Appellant believes that oral argument would benefit the Court's consideration of these issues and the other issues raised.

Issues Presented

Issue Number One

The evidence is legally insufficient to support the jury verdict that Appellant is guilty of the offense of manslaughter.

Issue Number Two

Trial court erred in overruling Appellant's requested instruction to include deadly conduct as a lessor included offense in its jury instructions.

Issue Number Three

Trial Court abused its discretion in overruling Appellant's Motion to Suppress Evidence derived from his arrest on October 2, 2020, based on a parole violator warrant issued on September 30, 2020, without determining whether the warrant was issued without reliable evidence that the person has exhibited behavior during the person's release that indicates to a reasonable person that the person poses a danger to society that warrants the person's immediate return to custody.

Issue Number Four

Trial court abused its discretion in overruling Appellant's objection to the search of cell phone to discover the IMEI code necessary to obtain a search warrant for the phone's digital data.

Issue Number Five

Trial Court erred in overruling Appellant's request for a mistrial after the investigating officer commented on Appellant's right to remain silent.

TO THE JUSTICES OF THE FIRST COURT OF APPEALS:

COMES NOW, JASON ALEXANDER CISNEROS, Appellant herein, by and through his attorney, STANLEY G. SCHNEIDER, and pursuant to TEX. R. APP. P. 38, files this Appellate Brief and would show the Court as follows:

Statement of Facts

A. Challenge to Issuance of Parole Violator's Warrant

A hearing was held incident to Appellant's Motion to Suppress Evidence (CR 221), challenging the issuance of a parole violator's warrant on September 30, 2020, which was executed on October 2, 2020. (3 RR 6). The parole revocation file was introduced into evidence as Defense Exhibit 1. (3 RR 7; 15 RR 162). The contents of the file include:

1. A parole revocation warrant was issued after Appellant was charged with capital murder (15 RR 162-0063), that was issued upon receipt of a criminal complaint and the reinstatement of his parole after Appellant was no-billed by a grand jury. (3 RR 7; 15 RR 162 - 0040-0063).

2. A second parole revocation warrant was issued in September

2020.[2] (3 RR 7). The file included the entire revocation process. The violation report details Appellant's parole history which includes a statement from Rosezita Jones that she received an email from Sergeant Francisco Garcia stating that Appellant was a suspect in the murder of Sierra Rhodd on September 15, 2020.[3] (15 RR 162-0024).

Defense Exhibit 2 (15 RR 163), detailed all of the communications between the Harris County Sheriff's Department and Appellant's parole officer. (3 RR 8). First, the sheriff's department requests that Appellant's parole officer provide Appellant's cell phone number. (3 RR 8). Deputies then ask how could a parole violator's warrant be issued. Appellant's parole officer requested the deputy provide an affidavit in which it details the justification for a warrant. An email was sent to Deputy Thompson requesting that specific details of the investigation be forwarded to the parole board. No affidavit or any details were submitted. (3 RR 8, CR 163, Defense Exhibit 2).

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[2] Parole records indicate that the warrant was issued on September 30, 2020 and executed on October 2, 2020. (15 RR 162-0002).

[3] The only email contained within the parole file from Francisco Garcia was an email dated September 30, 2020, in which the deputy asks Ms. Jones "were you able to create the blue warrant for Cisneros?" (15 RR 163).

Deputy Thompson, who was involved a capital murder investigation involving Appellant wrote a letter in which he detailed the capital murder investigation that resulted in Appellant being no-billed and states that Appellant was a suspect in another murder case. (3 RR 8; 15 RR 163). Based on Deputy Thompson letter, the parole violator's warrant issued.

The State called Rosezita Jones, who supervised Appellant on parole. (3 RR 15). Ms. Jones stated that a Deputy Anthony Thompson provided her information regarding a double shooting that resulted in a parole violator's warrant to be issued. (3 RR 15). In September 2020, Deputies Thompson and Garcia provided new information regarding Appellant. (3 RR 16).

On September 20, 2020, Thompson wrote a letter to the witness. (3 RR 18-19). In the letter, Thompson details the facts of the capital murder allegations against Appellant that resulted in a no-bill and the reinstatement of his parole. The letter concludes with the statement:

> I've spoken with homicide Investigator Frank Garcia, who informed me Cisneros is currently a suspect in another shooting that claimed the life of a young female who was shot in a drive-by. I also spoke with Investigator Cindy Routh -- spelled R-o-u-t-h -- who informed me Cisneros is a suspect in two other shootings. One being a drive-by on a house and the shooting of a male in a car who was severely injured.

(3 RR 18-19, Defense Exhibit 2).

Ms. Jones confirmed that was the only information she received that provided the basis for a violation report. (3 RR 19).

Ms. Jones did not remember who the warrant specialist was and who decided to issue a warrant for Appellant. (3 RR 22). Ms. Jones identified Defense Exhibit 1, as the waiver package resulting from the warrant issued for Appellant's arrest in September 2020. The file indicated that a parole violation warrant was issued previously on February 7, 2020, after a complaint was filed by law enforcement. (3 RR 24-25). A copy of the warrant for Appellant's arrest is included in the file. (3 RR 25). Appellant's parole was reinstated after the capital murder charge was no-billed by a grand jury. (3 RR 26).

The only new information that Ms. Jones sent to the warrant specialist on September 29, 2020, was that Appellant was a suspect in the murder of Sierra Rhodd. (3 RR 30). Her report states that she received an email from Sgt. Francisco Garcia that detailed the information about Appellant being a suspect. (3 RR 29). The only email that Ms. Jones received from Sgt. Garcia asked if she was able to generate a blue warrant. (3 RR 31). Ms. Jones stated that her parole file did not contain

any reliable information concerning the who, what, where or when any offense might have been committed by Appellant. (3 RR 35).

State's Exhibit 806 indicates that Deputy Devin Stephens wrote a report that Appellant was arrested on October 2, 2020, based on a parole violation. (3 RR 42).

The trial court overruled Appellant's objection to the offense report to consider evidence that was contained in the offense report, State Exhibit 808, that denied Appellant's right to confrontation and was hearsay. (3 RR 45). The State argued that it simply wanted to alert the trial court to information known to investigators. (3 RR 45).

Appellant argued that the issuance of a parole violator's warrant on September 30, 2020 violated Tex. Gov't. Code Section 508.252 which states that a warrant may issues upon presentation of reliable evidence. (3 RR 54). The trial court stated:

> And while I agree with defense that trying to get around a warrant for arrest by using parole stinks, I'm also bound by the Garrett case out of the Court of Criminal Appeals.

(3 RR 54).

The trial court denied the motion to suppress without a written order. (3 RR 55).

B. Trial on the Merits

After opening statements by both the State and Appellant, the first thing the jury heard was the 911 tape regarding the shooting of Sierra Rhodd.

Deputy Rachel Johnson was the first officer to arrive at 11227 Timber Crest Drive in Harris County, Texas on September 13, 2020. (4 RR 38). A diagram of the neighborhood was presented. Deputy Johnson testified that as she approached the Timber Crest address, a large man, not wearing a shirt and covered in blood, ran into the street, screaming and waiving his hands. (4 RR 40). The man was yelling "someone shot my daughter." (4 RR 40). The deputy stated that the scene was chaotic. (4 RR 40).

Deputy Johnson arrived at the scene at 11:06 p.m. She observed several bullets holes that went through the front windows into the victim's bedroom. (4 RR 44). She observed Michael Rhodd, the shirtless man, going into the residence. (4 RR 46).

When the deputy entered the house, she observed a young white female with a significant injury on the floor with a neighbor kneeling over her. The deputy observed blood and broken glass in Sierra's bedroom.

After viewing the interior of the house, the deputy helped mark the location of shell casings at the scene. (4 RR 49).

Deputy Johnson identified the people that were outside the residence including Tanner Rhodd's girlfriend. (4 RR 53). Tanner Rhodd did not follow the deputy's instruction to stay out of the house. (4 RR 54).

Deputy Johnson admitted that over half of her body camera recording of the scene was intentionally muted. (4 RR 58). The deputy admitted that she interviewed witnesses at the scene who were not documented in her report nor heard on her body camera.

Emely Jimenez testified that on September 13, 2020, she lived near Jones Road and 1960 area at 11314 Timber Crest in Houston, Texas. (4 RR 63). Ms. Jimenez stated that she was sitting at her computer when she heard what she thought were fireworks. (4 RR 65). She looked out her window and saw what was happening. She attempted to described the repeated sound that she heard that lasted approximately 4 minutes. (4 RR 68). She saw 20-25 flashing lights and two or three people running. (4 RR 69-70). She could not tell race or sex of the people. Ms. Jimenez also saw a black car and a red truck at the scene. (4 RR 78).

The next morning as she was dropping of her children, she saw a

motorcycle in the street. (4 RR 80). Ms. Jimenez confirmed that it was very dark outside when she saw the people running and heard the popping noise. She described one person as being scrawny and a kid. Ms. Jimenez told investigators that she thought that the black car she saw was a Nissan. (4 RR 86).

Oscar Gomez-Villatoro, a deputy with Harris County Sheriff Department, testified that on September 13, 2020, he was working patrol when he was dispatched to a location on Timber Crest off Jones Road at 11:02 p.m. He was instructed to be on the lookout for a red F-150 pickup truck. (4 RR 94).

Deputy Gomez-Villatoro stated that saw a red pickup truck on Glenora Drive heading south. He followed the red pickup truck as it was heading east on Tower Oaks Boulevard approximately 4 minutes after he heard the dispatch concerning the Timber Crest shooting. (4 RR 98). The truck was stopped was approximately one mile from the Timber Crest location. (4 RR 107).

The red pickup truck was being operated by Emma Presler. (4 RR 99). Other deputies stopped to assist in the investigation. No firearms were found in the truck. The truck was registered to Ms. Presler's

boyfriend, Austin McCalla. (4 RR 101). Ms. Presler was dressed all in black. (4 RR 108).

During the course of Gomez-Villatoro's investigation of the red pickup truck and Ms. Presler, he learned that there was a warrant for her arrest. He returned her to the Timber Crest location so that homicide detectives could interview her. Ms. Presler's hands were bagged so that they could be tested for gunshot residue. The deputy believed that the red pickup truck was involved in the shooting. (4 RR 108). Gomez-Villatoro admitted that he muted his dash cam so that it would not record what was being said by witnesses or other deputies. (4 RR 114).

The State's next witness was Gary Clayton, a latent print examiner and forensic investigator for the Harris County Sheriff Department. He testified concerning his role in the investigation of a shooting at 11227 Timber Crest Drive. Upon arrival, he was given a description of the scene. Mr. Clayton conducted a walk-through the location and marked items that might need to be collected.

He identified a picture of a .223 caliber shell casing that was recovered. (4 RR 134). State's Exhibits 110 and 111 were demonstrative aids created by the witness depicted where each of the shell casing were

recovered. There were two .223 shell casings near a tree in the front yard which was in front of Sierra Rhodd's bedroom window. Frontier 5.56 cartridge casings were also recovered which is typically fired from an AR-15 type weapon. (4 RR 141). An LC 19 cartridge casing was also recovered. (4 RR 145). S&B 6.5 Creedmoor cartridge casings were recovered. (4 RR 150). S&B .38 special cartridge casings were also recovered. (4 RR 152). Based on the cartridge casings recovered, Mr. Clayton opined that there were potentially three or four different weapons used at the scene. (4 RR 152). Pictures were introduced of all of the shell casings recovered at the scene.

He also collected a Remington 870 shotgun near a motorcycle. (4 RR 167). The shotgun was loaded with Federal 20 gauge shotgun shells. (4 RR 169).

A pistol was recovered in a closet in the residence. Extensive pictures were introduced that showed the holes in curtains windows and the walls of the house.

He conducted a GSR test on Emma Presler's hands when she was returned to the scene of the shooting. (4 RR 174-175).

Timothy Hayes, a homicide detective with the Harris County Sheriff

Department, testified that in the early morning hours of September 14, 2020, he was dispatched to a scene at 11227 Timber Crest Drive where Sierra Rhodd was shot. (4 RR 217).

The first persons he spoke to were Krystalee Rhodd and Michael Rhodd, Sierra's parents. He also spoke to Sierra's brother, Tanner Rhodd that night. Tanner was also interviewed multiple times. (4 RR 230). Det. Hayes did not think that Tanner was forthcoming in his information. The only person that he did not speak to who was in the house at the time of the shooting was Tanner's girlfriend.

After her arrest, Det. Hayes spoke to Emma Presler for about an hour. (4 RR 225). Over hearsay objections, Det. Hayes testified that he started investigating Appellant, Tajae Burleson, Xavier Fletcher and Andre Colson after speaking to Emma Presler. (4 RR 229).

Det. Hayes also spoke to a witness named Israel Rivera. Det. Hayes showed Mr. Rivera a picture of Austin McCalla (4 RR 230) and Trinity Haggerton. (4 RR 231, 232). Det. Hayes received information that Tanner Rhodd was having problems with Trinity Haggerton.

Det. Hayes stated that on September 15, 2020, Sgt. Frank Garcia received an anonymous tip concerning the shooting. (4 RR 235). Deputy

Hayes assembled a photo array involving Appellant. (4 RR 236). He showed it to Israel Rivera on September 15, 2020, who identified him as the man he saw with Trinity Haggerton in front of his house.

On September 16, 2020, Det. Hayes went to the Montgomery County Jail and spoke to an inmate named Keith Golden. (4 RR 244). Someone that knew him contacted Det. Hayes.

Det. Hayes spoke to Golden about individuals who were already suspects in this case. (4 RR 249). After speaking to Golden, there were three phone numbers that were important to the investigation. Det. Hayes also spoke to Abigail Ross in her attorney's office. (4 RR 251). She was present at the Rhodd home on the night of the shooting.

Det. Hayes stated that it was his opinion that the dark colored vehicle at the Rhodd home on September 14th belonged to Appellant. (4 RR 254). He believed that Austin McCalla was riding the motorcycle.

Appellant was detained on October 2, 2020 and Andre Colson was detained and interviewed by the detective. (4 RR 255). While interviewing Colson, Colson signed a form consenting to the search of his cell phone. (4 RR 260).

Over hearsay and confrontation objections, Det. Hayes presented

information resulting from the download of Andre Colson's phone. (5 RR 29). Colson's phone number was 346-710-0913. On Colson's phone, a picture was discovered of Colson, Xavier Fletcher and Appellant. (5 RR 31-32). Based on the witnesses that he interviewed, Det. Hayes stated that he received information regarding three vehicles: a motorcycle left at the scene, a red pickup truck operated by Emma Presler and a gray small HHR operated by Appellant. (5 RR 32). Det. Hayes believed that the vehicles were involved in the shooting. (5 RR 33).

Appellant was not charged with the murder of Sierra Rhodd until after Det. Hayes spoke to Emma Presler, Andre Colson and reviewed the content of Colson's phone. (5 RR 41). Both Presler and Colson had been charged with the murder of Sierra Rhodd. (5 RR 42).

Det. Hayes testified that Tanner Rhodd was not truthful during his interviews. Tanner didn't tell Det. Hayes that the gun in his room was stolen or that he committed a robbery. (5 RR 45-46). Tanner identified Tajae Burleson and Trinity Haggerton as suspects. (5 RR 46-47).

Det. Hayes stated that on September 14th, witnesses described seeing a red truck at the scene. Emma Presler was stopped a block away in a red truck. Witnesses observed someone wearing black that looked

like a kid running around after the shooting. Det. Hayes stated that Presler was wearing black and looked like a kid when she was stopped. (5 RR 67) Even though initially arrested, charges against Presler were dismissed after a finding of no probable cause. (5 RR 68).

Based on witness accounts at the shooting scene, investigators began looking for a black toyota. Joshua Sample and Israel Rivera place Appellant in a gray Nissan near their home shortly after the shooting with Trinity Haggerton on Tower Oaks Road. (5 RR 72, 73).

While Rivera told Det. Hayes that Appellant was driving a grey nissan, Det. Hayes showed him a picture of a black toyota. (5 RR 76). It was clear that Sample and Rivera saw the same vehicle which was not black. They both identified a man and both identified Trinity Haggerton. And, Trinity Haggerton was not a suspect in this case. (5 RR 80). Det. Hayes was told that the vehicle seen by Sample and Rivera had a partial license plate of MM which was not Appellant's vehicle. (5 RR 82).

Mark Schmidt, a detective with the Harris County Sheriff Department, testified as the custodian of records of the inmate phone system. (5 RR 105). Det. Schmidt stated he research the phone number 281-854-5983 within the inmate phone system. According to Det.

Schmidt, that number had been called sixteen times and only three calls were accepted. He then provided the call recordings to Det. Hayes. (5 RR 107).

Keith Golden, a former friend of Appellant's, identified Appellant's phone number in 2020 as 281-854-5983. (5 RR 133).

Det. Hayes was recalled as a witness. (5 RR 133).

State's Exhibit 188 was identified as an extraction report from the cell phone of Andre Colson that included a conversation with a phone number 281-854-5983. (5 RR 137). The text exchange between Colson and Appellant occurred on September 13, 2020 at 10:16 a.m. that said "Zay just got robbed." The response was "they took the 9 millimeter." (5 RR 143). To which Colson responded "have to report stolen." Appellant stated "I'm about to go right over there." (5 RR 143). Andre Colson then texts Appellant saying "Come get me. Fuck that. Ima spray their shit up. RNS. Fuck that dumb shit." (5 RR 144). Appellant responded "I was thinking the same thing." Colson says "He said it's a bunch of dudes with AR-15's." (5 RR 144). The last message from Colson on the 13th was "Play get 'em gone is active." (5 RR 144). That message was sent at 7:21 p.m.

Det. Hayes opined that the text exchange between Colson and Appellant was evidence that they were planning the shooting. (5 RR 145). "Spray their shit up" was what Det. Hayes observed at the shooting scene he investigated.

Det. Hayes did not know how many search warrants were issued for phone numbers associated with Appellant. He admitted that he did not know if Appellant was the person texting with Colson on September 13th as set out in State's Exhibit 188.

Det. Hayes stated that Mrs. Rhodd told him that there were many people that wanted to hurt Tanner. Defense exhibit 20 was played for the jury. The video was made on September 13, 2020. The video shows what appears to be Tanner Rhodd's bedroom. (5 RR 153). The video then shows what could be the inside of a gun store. Hours before the shooting Tanner Rhood is advertising the sale of full clipped 9 millimeter pistol with an extended magazine. (5 RR 154). No ammunition was collected at the Rhodd house after the shooting.

Israel Rivera testified that he lives on Tower Oaks Boulevard in Cypress, Texas and that Timber Crest Drive is the street directly north of his street. (5 RR 163). On Sunday night of September 13, 2020, Rivera

was getting ready to lay down for the night when he heard what he first thought were firecrackers, but were really gunshots of different caliber weapons. (5 RR 164). When he heard the gunshots, he ran to look out the front windows. He went outside and found the street empty. He then heard a commotion across the street on Timber Crest. He heard screaming and stood on a neighbor's fence to see and hear what was going on. (5 RR 167). He heard someone yelling "they shot my baby." (5 RR 169).

When he walked back to his house, he found someone in his front yard ditch. He observed a white male power walking along the street towards Jones Road. (5 RR 170). He identified McCalla as the person depicted in State's Exhibit 177, as the man he saw walking on his street right after hearing shots.

He later saw a dark colored car that appeared to be like a hatchback parked in front of his yard. (5 RR 172). He told detectives it was a smoke gray two door sedan. The picture shown to Rivera on September 15, 2020, resembled the car that he saw on September 13th. A short woman wearing a white top and black bottom got out of the vehicle. Rivera identified the woman depicted in State's Exhibit 178 as being the person

who got out of the vehicle.

The car was facing Jones Road and the woman opened the passenger door. Rivera saw a man sitting in the driver's seat. Before the car sped off, Rivera's neighbor walked over and asked what was going on. Rivera was shown a photo spread. He identified Appellant's picture as the person who was stopped in a vehicle in his driveway. Rivera did not recognize Appellant in the courtroom. (5 RR 190).

Rivera stated that Mr. Sample yelled out the letters "MM" as the first two letters on the vehicle in the front of Rivera's house. (5 RR 191). Rivera stated that when he saw the lady in his front yard, he got his handgun and brandished it outside. Rivera further stated that no one in the car showed a gun back to him. (5 RR 194). Rivera told Det. Hayes that the vehicle in front of his house was a Nissan or Infiniti. (5 RR 198).

Robert Miller, a deputy with Harris County Sheriff's Office, who was assigned to a joint task force that runs warrants, testified that on October 2, 2020, he was part of a team that executed a warrant for the arrest of Appellant. (5 RR 202). The trial court granted Appellant a running objection to any testimony from Deputy Miller concerning Appellant's arrest based on the prior hearing held concerning validity of the parole

warrant arrest. (5 RR 204).

Appellant was driving a black Toyota when he was stopped. (5 RR 207). Colson was a passenger in the vehicle. (5 RR 208). Deputy Miller retrieved a handgun from Colson's pocket.

The State called Devin Stephens, a deputy with Harris County Sheriff's Office was part of the team that arrested Appellant. (4 RR 215). The license plate on Appellant's vehicle was NKK6423. (4 RR 217). The vehicle was transported to the Sheriff's Office for processing of evidence. (4 RR 219).

The State called Cory Davis, who in October 2020, was a crime scene investigator working for the Harris County Sheriff's Department, to testify that he placed the black Toyota driven by Appellant into a processing bay. The trial court granted a running objection to the witness' testimony concerning the processing of the vehicle. (5 RR 224).

The State recalled Gary Clayton. (5 RR 227). The trial court granted a running objection to Gary Clayton's testimony based on the legality of the parole violator's warrant. (5 RR 229). Clayton explained that when the Toyota was seized, he processed it, which meant an examination of it for evidence. Clayton stated he photographed the

vehicle, examined it for DNA and attempted to obtain fingerprints. (5 RR 233-234).

Clayton testified that a shell casing, that was not visible, was discovered on the outside of the vehicle in the right below the windshield wiper on the driver's side. (5 RR 235). State Exhibit 225 is the shell casing recovered from the windshield area of Appellant's vehicle. Appellant's renewed objection was overruled. (5 RR 237). Clayton opined that the casing found in the windshield area was consistent with a casing found at the murder scene on September 13th. The casing was processed for fingerprints and DNA. He never processed a gray Nissan Altima.

The State called Gregory Bryan, a deputy sheriff assigned as an investigator in the violent crime unit with the Harris County Sheriff's Office. Bryan testified concerning his involvement with the arrest of Jason Cisneros. He obtained the consent of Andre Colson to searched Colson's apartment. (6 RR 14).

The State called Texas Ranger Christopher Rainwater. He testified about his search of an apartment at 714 University Drive in Prairie View, Texas belonging to Andre Colson. He located two different pistol boxes and numerous kind of ammunition. (6 RR 18).

Rainwater stated he collected the following: A Springfield Armory pistol box, which would have included a 9 millimeter pistol. (6 RR 20). A box for a Ruger pistol. (6 RR 21). He recovered both pistol boxes, two boxes that were empty of 5.7 by 28 millimeter FNH 14 ammunition, five unfired shotgun shell rounds, six unfired .22 caliber cartridges, three unfired .40 caliber cartridges, one unfired .45 caliber auto federal cartridge, one unfired .45 Remington cartridge and one unfired 6.5 Creedmoor Hornady cartridge. (6 RR 23).

The State called Abigail Ross, a friend of Tanner Rhodd. She testified that in September 2020, she had known Tanner for several months. She did not know his sister Sierra.

Ms. Ross stated that on the weekend of September 13th, she went to a La Quinta Hotel. She thought that she was at the hotel on Saturday night. She met up with a man named Xavier who she knew as Joker. (6 RR 34). She identified Appellant as someone who came by the room on Saturday night.

Ms. Ross further stated that on Sunday morning, they smoked a blunt and were watching television. (6 RR 41). There was other drugs out on the bed and counters. She did Xanax as well as smoked weed. (6 RR

42). At some point that morning, Tanner came to their hotel room. (6 RR 43). Tanner and Joker were showing each other their guns. (6 RR 43).

She explained that Tanner texted her on Sunday morning wanting to hang out since everyone in his room was asleep. (6 RR 44). Tanner smoked a blunt with them and left. (6 RR 45). Tanner came back to the room with two other girls. (6 RR 43).

When she heard a knock at the door, Xavier opened it and saw two girls standing there. (6 RR 47). Then three guys, Tanner was one of them, came rushing into the room. (6 RR 48). They took Xavier's money, guns and drugs. She remembered seeing Xavier was on the ground being kicked. (6 RR 50). After the men left the room, Xavier went to the bathroom coughing up blood. (6 RR 52). Xavier called someone on the phone. (6 RR 52). The trial court overruled Appellant's hearsay objection to testimony concerning what Ms. Ross heard Xavier say on the phone. (6 RR 53).

Ms. Ross stated she heard Xavier say someone needs to die over this. (6 RR 54).

Xavier tried to contact her later that day after she left the hotel. In her original statement to law enforcement, Ms. Ross stated that Xavier

said to her that someone had to die and did not mention the phone call. (6 RR 77).

The State called Tanner Rhodd, Sierra's brother. He testified that in 2020 when the shooting occurred he was 15 years old. Tanner stated that no promises were made to him in exchange for his testimony. (6 RR 87). He stated he was testifying so that he could get justice for his sister. (6 RR 87).

Tanner testified that in 2020, he was not going to school, he was hanging with a bad crowd and he was using and selling drugs. (6 RR 88). And due to those things, he created a number of enemies. (6 RR 89). His father knew what he was doing and made excuses for him. His mother suspected but was never told. Tanner denied ever receiving threats from anyone but there were several times when his mother called the police. (6 RR 90).

Tanner denied being a member of the 10K gang. (6 RR 91). He started a click called SAT with two friends. (6 RR 92). One of his friends died from a drug overdose. (6 RR 93).

Tanner stated that on September 13, 2020, he was at the La Quinta Hotel off of 1960 and 290. He stated that at that time, it was a place

where minors could pay $70 for a room and party. (6 RR 94). That morning, he went to a room where Abigail Ross was with Xavier Fletcher, who introduced himself as Joker. (6 RR 96). Tanner got Xavier's phone number that morning and identified it as 470-399-3189. Tanner stated he had known Abigail Ross. She had been to his home and was a good friend. He had never met Xavier before that morning.

After he smoked weed with Abigail and Xavier, Tanner left their room. He then went back to the room to rob Xavier. (6 RR 99).

Tanner, along with a friend named Geo, another guy and two women decided to rob Xavier because Abigail and Geo were together at the time and Abigail was at a hotel with another guy. (6 RR 100). They stole drugs, money and a firearm. Abigail denied knowing Geo.

Tanner stated they were all armed and assaulted Xavier. Tanner kicked him while he was on the ground. (6 RR 101). They left the hotel together and Tanner was dropped off at his house. He borrowed his mother's car to pick up his girlfriend and they returned to the house. (6 RR 192).

Tanner stated that when he got back to his house, he posted a picture of himself with a gun on Snapchat. He kept his gun in a safe in

his room that he shared with his father. (6 RR 106).

Later that night, Tanner and his girlfriend were lying in his bed watching a movie when he heard gunshots. He had never heard that many guns going off. It sounded like fireworks. (6 RR 109). The drywall started flying apart. He threw his girlfriend under the bed and he grabbed his gun and ran outside. His sister's room was in the front of the house and he knew that she was in bed when the shooting started.

When he ran outside with a gun, he fired it three times in attempt to frighten the shooters. (6 RR 110). Afterwards, he hid the gun so that he would not get in trouble. (6 RR 114). He heard the motorcycle crash and saw red taillights down the street. He then went to his sister's room and saw his father lifting her up and place her on the floor by the front door.

Tanner blamed himself for his sister's death. He stated that she died because of what he did. (6 RR 118).

The text message contained in State's Exhibit 188 that said "Damn Zay just got robbed" was consistent with the robbery occurring on the morning of September 13th of Xavier Fletcher. The text that refers to a 9 millimeter is consistent with the weapon that Tanner stole. (6 RR 122).

Tanner stated he was high on Fentanyl and Xanax at the time of the shooting. He lied to the police because he did not want to get himself in trouble for committing a robbery.

Tanner identified a picture of Trinity Haggerton as someone he had a problem with and that he sold marijuana to. Trinity lived in the same general area that Tanner lived. (6 RR 125).

Tanner admitted that he lied to law enforcement and to prosecutors during the investigation. He was always high and he did not tell the truth until he got sober. He did not tell the police that he fired a gun that night. The police kept coming back to him. He told the police that he had been involved in a drug deal that had gone wrong. And that somebody tried to sell him some bad drugs.

There were at least two other groups of people who threatened to shoot up Tanner's house. (6 RR 136). He told Det. Hayes that he had problems with the 10K gang. He was having problems with a man named Wetta, who was in jail for murder and a guy named Dre with 10K. (6 RR 138). At the time of the shooting, Tanner was on probation for arson. (6 RR 144). Tanner told three stories about the robbery that took place at the La Quinta Hotel. He admitted that he continued to lie until May

2023, about a year prior to the trial.

Tanner admitted that he put a gun in Joker's face. He told Xavier that he would kill him if he moved. (6 RR 156).

Tanner stated his father was a member of the Aryan Brotherhood. (6 RR 158). Tanner listed all of the people that he had problems. He admitted that there were multiple calls to law enforcement for service based on assaults and burglaries occurring. (6 RR 163-164). In addition, there was a call for service for an aggravated assault and terroristic threats made in April 2020 and June 2020, as well as suspicious vehicles in the vicinity. (6 RR 165).

In addition to not being charged with aggravated robbery, Tanner was not charged with stealing a firearm, unlawful possession of a firearm and aggravated assault charges were dismissed. (6 RR 167). The prosecutor told Tanner that he would not be prosecuted for the aggravated robbery. (6 RR 172).

The State called Ruben Martinez, a peace office and investigator with the Harris County District Attorney Office. Officer Martinez testified that in 2020, he was assigned to the homicide division of the Harris County Sheriff's Department. Officer Martinez stated he

performed a cell phone extraction on a red iPhone that was introduced as State's Exhibit 192, a phone belonging to Tanner Rhodd. State Exhibit 195 is the Cellebrite phone extraction report for Tanner's phone which included a single contact number 470-399-3189, which was entered on the morning of September 13th.

The State called Jason Schroeder, the director of the trace evidence laboratory at the Harris County Institute of Forensic Sciences. He testified about gunshot residue and testing performed related to the death of Sierra Rhodd. He reviewed a report of gunshot residue testing in a F-150 pickup truck which indicated that there was no gunshot residue in the passenger compartment. (6 RR 204).

The State called David Pierre, a retired investigator with the Harris County Sheriff's Department. He stated he was assigned to the fugitive transport division that transported Xavier Fletcher from Monterey, California to Houston. When he took custody of Fletcher, he was given a black LG cell phone. Upon arrival in Houston, he gave the cell phone to Frank Garcia, another investigator. Neither the phone or pictures of the phone were introduced into evidence.

The State called Francisco "Frank" Garcia, one of the lead

investigators for the Harris County Sheriff's Office. He testified concerning his participation in the investigation of the shooting of Sierra Rhodd. At the time of the trial, Garcia was an investigator with Harris County District Attorney's Office. He responded to the Rhodd house in the early morning hours of September 14th of 2020. He spoke to Sierra's parents and Tanner Rhodd.

He stated that Emma Presler was detained close to the scene on the night of the shooting. Presler was returned to the Rhodd home and Garcia was given custody of her phone. (8 RR 36). A search warrant was obtained to extract the contents of her phone. (8 RR 37). Garcia spoke to Presler for about an hour and then she was taken to the homicide office.

When Presler was detained, she was driving a red Ford F-150. A warrant was obtained authorizing the search of the truck. (8 RR 40). After speaking to Presler, Garcia started investigating a number of individuals including Appellant.

As a result of Garcia's conversation with Presler, he prepared a photo array to be shown to Israel Rivera. He was not present when it was shown to Rivera by Investigator Hayes. Garcia learned that Austin McCalla owned the truck that was being driven by Presler when she was

detained. (8 RR 42).

Garcia started looking for surveillance videos from the area. He was investigating a dark vehicle, a motorcycle and a red F-150. Garcia reviewed the surveillance video from the Scottish Inn at 11275 Jones Road which faces Jones Road. On the video, a dark car could be seen being followed by a motorcycle and a red truck traveling on Jones Road toward Timber Crest. The same apparent vehicles appear on a video obtained from 11040 Timber Crest at approximately 10:57 p.m. (8 RR 48). The truck and car could be seen on video leaving the neighborhood at 10:58:38. (8 RR 50). A motorcycle was found crashed in front of the Rhodd home.

A surveillance video from a business EMI was introduced that showed a light skinned male walking down the street on his cell phone. (8 RR 52). Garcia believed that McCalla was riding the motorcycle seen at the murder scene. (8 RR 53). Garcia believed that McCalla was the person seen on the EMI video. Austin McCalla was also charged in connection with the murder of Sierra Rhodd. (8 RR 54).

Garcia testified that Appellant lived in a neighborhood directly across the street from the victim's neighborhood. One of the names that came up in the investigation was Trinity Haggerton, who was never

intervirwed by law enforcement. (8 RR 59).

Garcia interviewed Tajae Burleson as a possible suspect in the murder. Burleson came to Garcia's office to speak to him. There was no substantive evidence linking him to the murder. (8 RR 60).

The firearm found in Andre Colson's possession at the time fo his arrest was later linked to the murder scene. (8 RR 62). Appellant's vehicle was searched. Garcia testified that Appellant's vehicle was consistent with the description of the dark colored vehicle seen at the murder scene. (8 RR 63).

A search warrant was obtained for Appellant's cell phone. (8 RR 63). A copy of the search warrant was introduced. Appellant renewed his objection to testimony regarding the content of the search warrant seized at the time of his arrest. The trial court overruled the objection. The trial court did grant a running objection to all testimony concerning the content of the Appellant's cell phone based on the legality of his arrest. (8 RR 64).

On Andre Colson's phone, the number 281-854-5983 was listed in the contacts as belonging to Jay. (8 RR 65).

Garcia reviewed text messages on Colson's phone between Colson and Jay which included references to Zay being robbed and the theft of a

9 millimeter handgun. Garcia believed that text message provided a link between the murder scene and the robbery at the La Quinta Hotel earlier in the day on September 13th. The text messages included statements consistent with a house being sprayed by bullets. (8 RR 67).

Surveillance video was obtained from Shoot Point Blank Gun Store. On September 7, 2020, Jason Cisneros and Andre Colson enter the store to purchase firearms. Surveillance video shows that they arrived at the store in the same vehicle that Appellant was operating when he was arrested on October 2nd. Appellant was the registered owner of the black vehicle that he was driving. Colson purchased an AR-22 and a 5.7 pistol. (8 RR 72). When Colson is paying for the weapons, it appears that Appellant is giving him money. Garcia stated that a Ruger 5.7 matches some of the fired shell casing found at the scene of the murder. (8 RR 73).

On September 11, 2020, Andre Colson purchased two 9 millimeter Springfiled Armory pistols at Shoot Point Blank. State Exhibits 176 and 200 are the weapons that were purchased by Colson. (8 RR 75).

Garcia stated that AR assault rifles, 9 millimeter pistols and a 5.7 pistol were used to cause the death of Sierra Rhodd. The rifles were never found. The motorcycle found at the scene did not have any compartments

that would allow the carrying of weapons. (8 RR 78). No weapons were found in the vehicle that Presler was operating. (8 RR 79).

Based on Garcia's conversation with Xavier Fletcher, he decided to not file charges against Tanner Rhodd. (8 RR 81).

Garcia was shown a map of the area around the Rhodd home. He pointed out that Timber Crest Drive is perpendicular to Jones Road and Tower Oaks Boulevard runs parallel to Timber Crest Drive. Tower Oaks Boulevard and Timber Crest Drive do not connect. (8 RR 81).

Josh Sample and Israel Rivera were interviewed by law enforcement within twenty-four hours after the shooting. They provided a description of a dark gray or charcoal vehicle that they believed was related to the investigation. (8 RR 92). They saw the vehicle within minutes of the shooting. They provided the first three letters of the license plate. Those letters did not match the vehicle that belonged to Appellant. (8 RR 93).

Garcia was given the names of Tajae Burleson, with the 10K gang; Trinity Haggerton, who might have been associated with the 10K gang; and Jeffery Holmes, as possible suspects by the Rhodd family. (8 RR 94). Appellant's name was not given. It became evident during the investigation that Tanner Rhodd was dealing drugs and firearms. He

would post videos baiting people to come and get him. (8 RR 96). When Burleson was interviewed, he admitted being in the area near the Rhodd house and hearing the shots on the night of the shooting. (8 RR 98). After interviewing Burleson, there was no other follow-up investigation of him. (8 RR 98).

Garcia stated that when Emma Presler was stopped on September 13th, she was at Glenora Drive and Tower Oaks Boulevard in a red F-150 pickup truck, which was consistent with the description given by witnesses. She was also dressed in black and witnesses also stated that the shooters were dressed in black. (8 RR 101). Presler gave various statements. Based on his conversation with Presler, her proximity to the scene, her communications with Austin McCalla, Presler was charged with murder. (8 RR 102). A judge found that no probable cause existed for Presler to be arrested and prosecutors dismissed the charges. (8 RR 102-103). The charges were never refiled despite a continued investigation of Presler.

Critical to Garcia's investigation of Appellant, was the identification of him provided by Israel Rivera. (8 RR 105). Israel Rivera's identification of Appellant was important to Garcia's theory that

Appellant was responsible with others for the death of Sierra Rhodd. (8 RR 108). His theory of the case was that Appellant with others, drove a black vehicle to the Rhodd residence and committed the shooting. (8 RR 108). A photo array was shown to Rivera who identified Appellant and a picture of Trinity Haggerton. (8 RR 109).

Garcia admitted that Rivera's description of a smoke gray vehicle being driven by Appellant does not fit his theory of the case. (8 RR 110). The vehicle seen by Rivera and Sample had different license plates than Appellant's vehicle.

Garcia reviewed a surveillance video Defense Exhibit 22 that showed a pickup truck, a motorcycle and a black car moving north on Jones Road. The video was taken from the Scottish Inn. The vehicles were heading in the direction of Timber Crest Drive.

A few minutes later, the same car and truck are seen on the video driving south on Jones Road. Four minutes later, a grey car that is not the same car as the black vehicle previously viewed is seen heading south on Jones Road. (8 RR 114).

Garcia viewed a surveillance video from Celaya Tire Shop that is located at the corner of Tower Oaks Boulevard and Jones Road. (8 RR

115). On the video, a dark car, possibly a black sedan is seen at 22:56:25. It is followed by a motorcycle and a red truck. (8 RR 117). The three vehicles are traveling northbound on Jones Road. At 10:56, the vehicles can be seen turning onto Timber Crest. At 11:03, a grey car is seen.

At 10:59:59, a black sedan and a red truck are seen going southbound on Jones Road. At 11:03, a grey car is seen turning onto Tower Oaks Boulevard from Jones Road. (8 RR 124).

The timing of the gray car turning onto Tower Oaks Boulevard is consistent with when Israel Rivera identified Appellant as being in a gray car minutes after the shooting. (8 RR 127). Garcia did not think that Appellant being in a gray car was inconsistent with his theory of the case. Appellant being seen in a grey car is not inconsistent with his being present at the scene. It placed Appellant in the vicinity of the murder when it occurred.

In order for Garcia to get the IMEI number from Appellant's phone, he had to open sim card holder, remove the sim card and then read the IMEI number. That number is not readily apparent on the outside of the phone. (8 RR 136). No forensic evidence linked Appellant to the offense. (8 RR 137-138). He stated that he did not have time to interview Trinity

Haggerton. (8 RR 138). Garcia suggested that Appellant left the scene in one vehicle, switched vehicles, picked up Trinity and went looking for Austin McCalla. (8 RR 140).

Unsolicited, Garcia stated:

> "I don't know what happened. Jason's the one that knows what happened."

(8 RR 141).

While Garcia did not have time to talk to Trinity, he did have time to take measurements at the scene four years later. (8 RR 142).

The trial court overruled Appellant's objection to the introduction of Appellant's cell phone seized when he was arrested. (8 RR 150). A running objection was granted by the trial court concerning the content of Appellant's phone. (8 RR 153).

After explaining how he had to open the sim card holder and remove it to view the IMEI number of the phone seized from Appellant's vehicle, Garcia used a magnifying glass to read the IMEI number. Garcia also identified State Exhibit 225 as the 5.7 shell casing found on the vehicle operated by Appellant. (8 RR 155).

Garcia acknowledged that his theory of the offense was that at

10:56:25 the caravan of three vehicles turned onto Timber Crest. Three and half minutes later a black car and red truck are viewed leaving the neighborhood without the motorcycle. Garcia's theory included Appellant operating the black car. (8 RR 156). His theory also includes Israel Rivera seeing Appellant in a different car with Trinity Haggerton several minutes later. (8 RR 158, 161). The surveillance videos shows the black car entering and leaving Timber Crest Drive. (8 RR 163).

The State called Dr. Roger Milton, an assistant medical examiner at the Harris County Institute of Forensic Sciences. (8 RR 167). Dr. Milton testifed that the cause of death to Sierra Rhodd was multiple gun shot wounds. (8 RR 189).

The State called Tammy Lyons, a firearms examiner with the Harris County Institute of Forensic Sciences. Ms. Lyons testified concerning her examination of ballistic evidence and firearms associated with a specific investigation being conduct by the Harris County Sheriff Department. The reports were identified as State's Exhibits 293 through 298. (8 RR 197). The trial court overruled Appellant's hearsay objection. (8 RR 198).

In State's Exhibit 293, item 79 was identified as a Springfield Armory 9 millimeter luger pistol. (8 RR 205). Three of the cartridge

casing, items 40, 41, and 42 recovered at the scene were fired from that weapon. (8 RR 206, 207). Ms. Lyons stated that the shell casing found on Appellant's vehicle and a shell casing found at the scene of the shooting were fired from the same weapon. (8 RR 219). Ms. Lyons stated that at the most there were six or seven different weapons fired at the scene. (8 RR 221).

The State called Krystalee Rhodd, the mother of Sierra Rhodd. (10 RR 10). She began her testimony by describing her family. Then she talked in detail about her daughter, Sierra Rhodd.

Prior to September 13th, Ms. Rhodd reported that she would call the police if she saw something in the neighborhood. Prior to September 13th, she never reported people firing gunshots at her home. (10 RR 12). The calls for service to her home often involved disputes that she had with her ex-husband, Michael. (10 RR 13).

Earlier on the 13th, Ms. Rhodd and Sierra ran a number of errands. After dinner, Ms. Rhodd and Sierra went into Sierra's bedroom. Ms. Rhodd stated she and Sierra slept in the same room. (10 RR 14). Ms. Rhodd left the bedroom to watch the news. (10 RR 15). Shortly after the 10 p.m news came on, her son, her ex-husband and her son's girlfriend

were in the house. Her son, Tanner and his girlfriend, Reagan were in his bedroom watching a movie. Tanner's room is directly across the hall from Sierra's.

As she was watching the news, she thought that she heard fireworks. (10 RR 17). Her husband threw her on the ground. She saw a bullet hole in the chair where she was sitting. (10 RR 19). Her husband Michael yelled for everyone to get down. Then, the front door blew apart. She then ran into her daughter's bedroom and found her daughter dead. Her husband told Tanner to start shooting and she sat on the floor with her daughter. She was unaware that her husband and son owned firearms.

The police were called. Sierra was picked up in attempt to get her into a car to take her to the hospital. She was placed on the floor by the front door. (10 RR 20).

When the police arrived, Ms. Rhodd gave them names of people that might have shot up her house and killed her daughter. She told the police that a few months before the shooting, Tajae Burleson broke into her home. (10 RR 22). At that time, she was unaware of Tanner's involvement in a robbery at the La Quinta Hotel on September 13th. (10

RR 23). Tanner did not tell her about the robbery.

Ms. Rhodd confirmed that prior to the shooting, she was having problems with her son Tanner. He was hanging out with the wrong people. She worked and her husband stayed home with the kids. Some of the police calls were related to her husband. He had been arrested for assaulting her. (10 RR 28). Ms. Rhodd let her husband back into the house after the assault so that he could provide protection for her. (10 RR 28).

Her husband was not allowed to have a firearm because of the domestic assault issues. (10 RR 29). She did not know that Tanner had guns in the house. Ms. Rhodd did not approve of some of Tanner's friends. Tanner's drug problem started with marijuana and escalated to fentanyl. Ms. Rhodd was doing everything she could to rein Tanner in. At the time of the shooting, Ms. Rhodd believed that he was enrolled in school and playing football. (10 RR 32).

She stated that Tajae Burleson threw a brick through a bedroom window of their home. (10 RR 33). Because of that incident, Tanner beat up Burleson. Tanner was charged with assault. Tanner was on probation for arson and then filed on for assault. Ms. Rhodd testified that Burleson

was threatening her family over the internet. (10 RR 42). Burleson had posted on the internet that he was going to kill white boy and his family. (10 RR 43). Ms. Rhodd knew Trinity Haggerton and knew that she drove a gray car. (10 RR48).

The State called Matthew Gray, an expert on cell phone data analysis. State Exhibit 309 was identified as Emma Presler's cell phone. Gray performed an analysis of the extraction from that phone. (10 RR 64). State Exhibits 312 and 234 were extractions of call logs and text messages from Emma Presler's phone and introduced into evidence. (10 RR 69). The extraction report indicates a phone call to a Jason Cisneros at 281 - 854 -5983 at 2:51 p.m. which lasted five seconds. (10 RR 72). The phone records indicate a phone call to Austin McCalla. There was a phone call between Emma Presler and Appellant's phone at 10:44 p.m. on September 13, 2020.

Presler's phone contacted Appellant's phone immediately after the shooting which that lasted 3 seconds. (10 RR 75). There were several other calls and then there was a call with Austin McCalla around 11 p.m.

State's Exhibit 234 showed a text message that between Presler and Appellant on September 13, 2020 at 4:30 p.m. There is another message

at 6:20 p.m. that says "So you're not coming." (10 RR 80). Appellant then sent Presler his address at 10407 Rippling Fields Drive, Houston, Texas 77064. (10 RR 81). At 8:57 p.m., Presler asked if they were meeting at Appellant's house. Presler texted Appellant at 9:23 p.m that she was justing pulling off on bike to meet. At 11:14, Presler texted Appellant that she had just been pulled over by the police. (10 RR 84).

Over Appellant's objection, the State introduced an extraction of Appellant's phone. (10 RR 86). The extraction reports a number of phone calls between Appellant's phone and a phone number identified as New Ondre. (10 RR 93). The communications between Presler and Appellant are not found on his phone. (10 RR 94). The State offered the extraction reports from Appellant's phone as Exhibits 256 and 316 over Appellant's prior objection. (10 RR 95). The extraction report indicates that Appellant received a text that said "Report that 9 stolen bro." (10 RR 98).

According to Presler's cellular phone, it is located at I-10 and Barker Cypress Road in Katy, Texas at 1:20 a.m. Xavier Fletcher's phone is located at 13290 FM 1960. (10 RR 113). At 9:52 a.m., Fletcher calls Appellant's device which is consistent with being located at 13290 FM 1960. (10 RR 114). A call from Fletcher to Appellant at 10:02 a.m. is

consistent with him being robbed on the morning of September 13, 2020. (10 RR 115). And, Fletcher's phone location is consistent with being at the hotel.

At 10:45 p.m., Presler's phone is in the area near Appellant's home. McCalla and Presler are within a mile of the Sierra Rhodd shooting scene at 11 p.m. (10 RR 118). Presler sent Appellant a text message to Appellant at 11:07 p.m.

The witness never examined any phone records of Trinity Haggerton during his investigation. (10 RR 139).

The Defense called Kalan Turner, a Detective with the Harris County Sheriff's Office. Det. Turner was assigned to the scene at Timber Crest on September 13, 2020. He was assigned to document the investigation. He was assigned the task of locating any pertinent surveillance videos. First, he looked on Timber Crest. (10 RR 154). He then followed Timber Crest to Jones Road and looked for videos from businesses. He also investigated possible videos on Tower Oaks Boulevard which is a street south of Timber Crest. (10 RR 156).

The surveillance video at HS Insurance Agency, Defense Exhibit 30, shows a black car and a red truck leaving Timber Crest towards Jones

Road. (10 RR 161). The vehicles were seen at 11 p.m. (10 RR 161). He obtained video from Celeya Tire which was located at Tower Oaks Boulevard and Jones Road. There was a video from Scottish Inn which is located at Neeshaw and Jones.

The video from Celaya Tire shows a black car, motorcycle and red Ford F-150 heading northbound on Jones road as they passed Tower Oaks. Appellant's vehicle in which he was arrested in October 2nd, appeared to the same vehicle that was seen on surveillance videos near Timber Crest. (10 RR 166). The surveillance video from Celaya Tire shop shows a different vehicle turning left off Jones Road onto Tower Oaks. (10 RR 168). That vehicle is different than the vehicle seen following the red truck. (10 RR 168).

Issue Number One Restated

The evidence is legally insufficient to support the jury verdict that Appellant is guilty of the offense of manslaughter.

A. Statement of Facts

Appellant adopts the statement of facts heretofore presented.

B. Argument and Authorities

1. Summary of the Argument

Based on the jury instructions submitted by the trial court, Appellant asserts that the evidence is legally insufficient to support the jury verdict. There is no evidence that Appellant was present at the murder scene, possessed or fired a firearm on September 13, 2020, or committed any act in furtherance to any agreement to commit deadly conduct or committed any act to aid encourage solicit another to commit the murder.

The record reflects that he owned a black vehicle and that a black vehicle was seen driving to and leaving the murder scene. There were text messages between Appellant and other alleged co-conspirators on September 13th. There was no evidence from which a rational trier of fact could find the essential elements of the offense of manslaughter beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 318-19 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

2. Standard of Review

The "*Jackson v. Virginia* legal-sufficiency standard is the only

standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt." *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). A reviewing court must assess all the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 318-19 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). The reviewing court must give deference to the jury's responsibility to fairly resolve conflicting testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Hooper*, 214 S.W.3d at 13.

3. Application of Facts to Standard of Review

In the instant case, Appellant was convicted of the offense of manslaughter. The jury instructions authorized the jury to convict Appellant if it found that Appellant recklessly caused the death of Sierra Rhodd by shooting her with a firearm or acted as a party and encouraged Colson, Fletcher, Presler or McCalla to commit the offense or entered into

an agreement to commit the felony offense of deadly conduct by discharging a firearm at or in the direction of 11227 Timber Crest and pursuant to that agreement, if any, they did carry out their conspiracy by shooting Sierra Rhodd. (CR 265-266).

Appellant asserts that there is no evidence that he was at the Rhodd home on September 13, 2020. He also asserts that there is no evidence that he did any act as a party or co-conspirator in the commission of any offense for which he could be held criminally responsible.

The evidence reflects that three vehicles turned onto Timber Crest from Jones Road. A motorcycle was found in a ditch. Surveillance videos show two vehicles a black car and a red truck leaving the scene of the shooting.

Minutes after the shooting, Appellant was seen one block away from the shooting, in a grey car with Trinity Haggerton, who was never interviewed nor testified at trial.

The only evidence that the jury might infer guilt were text messages between Appellant and Colson about "spraying" a house and messages that Presler was going to meet Appellant at his house.

The State might argue that it was Appellant in the black vehicle

that was seen on the surveillance videos but there is no evidence that he was operating that vehicle on that day. Appellant being in a grey vehicle immediately after the shooting negates any inference that he was driving his black car on September 13th. The State might also argue that the casing found on his windshield shows that his vehicle might have been present at the scene of the shooting but there is no evidence that place Appellant in his black vehicle on September 13th. No evidence was presented as to how or when the casing found its way to the windshield of Appellant's car.

More importantly, there is no evidence that Appellant fired a shot on September 13th or aided or encouraged someone to shoot into the house or that he conspired with anyone to commit the offense of deadly conduct. Based on *Jackson* and its progeny, the evidence is legally insufficient to support the jury verdict for the offense of manslaughter.

Issue Number Two Restated

Trial court erred in overruling Appellant's requested instruction to include deadly conduct as a lessor included offense in its jury instructions.

A. Statement of Facts

1. Trial Objections

Appellant objected to the jury instructions by stating the instructions amended the indictment and created a fatal variance between the indictment and the jury charge presented. (11 RR 5). Appellant also requested that trial court include an instruction on the lessor included offense of deadly conduct based on the jury charge. (11 RR 9).

The State argued that deadly conduct was not a lessor included offense of murder as charged in the indictment. Appellant argued that based on the conspiracy theory of criminal responsibility, deadly conduct was a lessor included offense. (11 RR 13-14).

The trial court overruled the objection. (11 RR 15).

The trial court included the lessor included offense of manslaughter and included the deadly conduct/conspiracy language in that instruction. Appellant again objected to the inclusion of the language. (11 RR 16).

2. The Indictment

The language in the indictment charging Appellant with murder tracked Tex. Penal Code § 19.02 (b)(1) and (2).

3. Jury Instructions

The trial court's instructions defined three felony offenses that the jury needed to consider during its deliberation: murder, manslaughter and deadly conduct. (CR 254-255). In addition to instructions pertaining to murder and manslaughter, the instruction contained three distinct theories of criminal responsibility. The instructions authorized a conviction if the jury found that Appellant acted either as a principle, a party or joined a conspiracy to commit the offense of deadly conduct and in furtherance of that conspiracy to commit deadly conduct one of several co-conspirators killed Sierra Rhodd. (CR 257-258). The concept of transfer intent was also included in the instructions.[4]

a. Definitions in the Instructions

The jury instructions contained two distinct definitions of culpable mental states for the jury consideration. One definition of knowingly and recklessly for murder (CR 256) and another definition of those terms that was applicable to deadly conduct. (CR 256).

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[4] The instructions include language that the intended victim of the shooting was Sierra Rhodd's brother Tanner.

i. Murder

The Court instructed the jury that:

The definitions of intentionally or knowingly relative to the offense of murder are as follow:

A person acts intentionally, or with intent, with respect to a result of his conduct when it is his conscious objective or desire to cause the result.

A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

ii. Deadly Conduct

The definition of knowingly relative to the offense of deadly conduct are as follows:

A person acts knowingly, or with knowledge, with respect to the nature of his conduct he is aware of the nature of his conduct.

The definition of recklessly relative to the offense of deadly conduct are as follows:

A person acts recklessly, or is reckless with respect to the result of his conduct when he is when he is aware of but consciously disregards a substantial and unjustifiable risk that the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise as viewed from the defendant's standpoint.

(CR 256).

iii. Criminal Responsibility as Co-Conspirator

In regards to the instructions for a person's responsibility for a felony committed by a coconspirator, the instructions included:

> The defendant may be responsible for a murder committed by someone else, even though the defendant himself did not knowingly or intentionally cause the death of an individual, because the defendant joined an unlawful conspiracy. At least one member of the unlawful conspiracy must have intentionally or knowingly caused the death of an individual before the defendant can be responsible for murder.
>
> A member of a conspiracy to commit one felony offense is guilty of another felony offense committed by one of his coconspirators when that other felony offense was committed in furtherance of the original unlawful conspiracy and was one that should have been anticipated as a result of the unlawful conspiracy. Under those circumstances, all coconspirators are guilty of the felony offense actually committed by one member of the conspiracy, though the rest of them had no intent to commit it.
>
> Deadly conduct is a felony offense.
>
> **Definitions**
>
> *Conspiring with Others to Commit a Felony Offense*
>
> A defendant conspires with others to commit a felony offense if –
>
> 1. the defendant intends that a felony offense be committed;
>
> 2. the defendant agrees with one or more that one or more of them engage in conduct that constitute the felony offense; and

3. one or more of them performs an overt act in pursuance of the agreement.

Intent That a Felony Offense Be Committed

A person intends that a felony offense be committed when it is his conscious objective or desire that the felony offense be committed.

The defendant may be responsible for a murder committed by someone else even though the defendant did not knowingly or intentionally cause the death of an individual because the defendant encouraged aided solicited other to commit the offense or joined an unlawful conspiracy. At least one member of the unlawful conspiracy must have intentionally or knowingly caused the death of an individual before the defendant can be responsible for murder...

Before you would be warranted in finding the defendant guilty of the offense of murder, you must find from the evidence beyond a reasonable doubt that on or about the 13th day of September 2020, in Harris County, Texas, the defendant is guilty of murder, either as the primary actor, as a party, or as a coconspirator.

Liability as a Party

If you find from the evidence beyond a reasonable doubt that on or about the 13th day of September, 2020, in Harris County, Texas, Andre Colson, and/or Xavier Fletcher, and/or Emma Pressler, and/or Austin McCalla did then and there ***unlawfully, while in the course of committing or attempting to commit the felony offense of deadly conduct discharging a firearm at or in the direction of 11227 Timber Crest Drive, Houston, TX 77065,*** intentionally caused the death of Sierra Rhodd by shooting Sierra Rhodd with a deadly weapon, namely a firearm, and that the defendant, Jason Alexander Cisneros, with the intent to promote or assist the commission of the offense, if any, solicited, encouraged, directed, aided or attempted to aid Andre Colson, and/or Xavier

Fletcher, and/or Emma Pressler, and/or Austin McCalla to commit the offense; or

Liability as co-conspirator

Before you find the defendant guilty as a co-conspirator, you must find from the evidence beyond a reasonable doubt that the defendant, Jason Alexander Cisneros, and Andre Colson and/or Xavier Fletcher and/or Austin McCalla and/or Emma Pressler ***entered into an agreement to commit the felony offense of deadly conduct by discharging a firearm at or in the direction of 11227 Timber Crest Drive, Houston, TX 77065,*** and pursuant to that agreement, if any, they did carry out their conspiracy, and that in Harris County, Texas, on or about the 13th day of September 2020, while in the course of committing such deadly conduct by discharging a firearm at or in the direction of 11227 Timber Crest Drive, Houston, TX 77065, Andre Colson and/or Xavier Fletcher and/or Austin McCalla and/or Emma Pressler intentionally caused the death of Sierra Rhodd by shooting Sierra Rhodd with a deadly weapon, namely a firearm; and the murder of Sierra Rhodd was committed in furtherance of the unlawful' purpose and was an offense that should have been anticipated by the defendant as a result of carrying out the conspiracy, and unless you so find, then you cannot convict the defendant of the offense of murder.

If you find from the evidence beyond a reasonable doubt that on or about the 13th day of September, 2020, in Harris County, Texas, the defendant, Jason Alexander Cisneros, entered into an agreement with Andre Colson, and/or Xavier Fletcher, and/or Emma Pressler, and/or Austin McCalla ***to commit the felony offense of deadly conduct by discharging a firearm at or in the direction of 11227 Timber Crest Drive, Houston, TX 77065***, as alleged in this charge, and pursuant to that agreement they did carry out their conspiracy, and while in the course of committing said conspiracy, Andre Colson, and/or Xavier Fletcher, and/or Emma Pressler, and/or

Austin McCalla intentionally caused the death of Sierra Rhodd by shooting Sierra Rhodd with a deadly weapon, namely a firearm,.

Therefore, if you find from the evidence beyond a reasonable doubt that on or about the 13th day of September, 2020, in Harris County, Texas, the defendant, Jason Alexander Cisneros, did then and there unlawfully, ***while in the course of committing or attempting to commit the deadly conduct by discharging a firearm at or in the direction of 11227 Timber Crest Drive, Houston, TX 77065,*** intentionally cause the death of Sierra Rhodd by shooting Sierra Rhodd with a deadly weapon, namely a firearm, and the murder of Sierra Rhodd was committed in furtherance of the conspiracy of deadly conduct and was an offense that should have been anticipated by the defendant as a result of carrying out the conspiracy then you will find the defendant guilty of murder.

Unless you so find from the evidence beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant and you will next consider whether the defendant is guilty of the lesser offense of manslaughter.

Therefore, if you find from the evidence beyond a reasonable doubt that on or about the 13th day of September, 2020, in Harris County, Texas, the defendant, Jason Alexander Cisneros, did then and there unlawfully, recklessly, as that term is herein before defined, cause the death of Sierra Rhodd, by shooting Sierra Rhodd with a firearm; or if you find from the evidence beyond a reasonable doubt that on or about the 13th day of September, 2020,in Harris County, Texas, Andre Colson, and/or Xavier Fletcher,and/or Emma Pressler, and/or Austin McCalla, did then and there unlawfully, recklessly, as that term is hereinbefore defined, cause the death of Sierra Rhodd, by shooting Sierra Rhodd with a firearm, and that the defendant, Jason Alexander Cisneros, with the intent to promote or assist the commission of the offense, if any, solicited, encouraged, directed, aided or attempted to aid Andre Colson, and/or Xavier Fletcher, and/or Emma Pressler, and/or Austin McCalla to commit the offense,

if he did; or if you find from the evidence beyond a reasonable doubt that the defendant, Jason Alexander Cisneros, and Andre Colson, and/or Xavier Fletcher, and/or Emma Pressler, and/or Austin McCalla ***entered into an agreement to commit the felony offense of deadly conduct by discharging a firearm at or in the direction of 11227 Timber Crest Drive, Houston, TX 77065, and pursuant to that agreement, if any, they did*** carry out their conspiracy and that in Harris County,Texas, on or about the 13th day of September, 2020, while in the course of committing such deadly conduct by discharging a firearm at or in the direction of 11227 Timber Crest Drive, Houston, TX 77065, Andre Colson, and/or Xavier Fletcher, and/or Ema Pressler, and/or Austin McCalla did then and there unlawfully, recklessly,as that term is hereinbefore defined, cause the death of Sierra Rhodd, by shooting Sierra Rhodd with a firearm, and the manslaughter of Sierra Rhodd was committed in furtherance of the conspiracy and was an offense that should have been anticipated by the defendant as a result of carrying out the conspiracy, then you will find the defendant guilty of manslaughter.

If you have a reasonable doubt as to whether the defendant is guilty of any offense defined in this charge then you will acquit the defendant and say by your verdict "Not Guilty."

(CR 258-266)(emphasis added).

B. Arguments and Authorities

1. Summary of the Argument

Even though the State argued that Appellant was guilty as a co-party and not as a principal in causing the death of Sierra Rhodd, (11 RR 61), the State argued that based on the indictment, which charged

Appellant with murder as defined by Tex. Penal Code § 19.02 (b)(1) and (2), deadly conduct was not a lessor included offense. Given the jury instructions concerning criminal liability of Appellant as either a party, Tex. Penal Code § 7.02(a) and a co-conspirator, Tex. Penal Code § 7.02(b) and the agreement/conspiracy to commit the felony offense of deadly conduct, the lessor included offense of deadly conduct should have been included in the instructions. Deadly conduct was the cornerstone of the prosecution as evidence by the evidence, jury instructions and final arguments.

Because Appellant's request for the lessor included offense of deadly conduct was denied, Appellant's conviction must be reversed.

2. Standard of Review

Appellate review is based on a two-step analysis to determine whether an instruction on a lesser-included offense should be given to the jury. *Cavazos v. State*, 382 S.W.3d 377, 382 (Tex. Crim. App. 2012); *Rousseau v. State*, 855 S.W.2d 666, 673 (Tex. Crim. App. 1993). To determine whether an offense qualifies as a lesser-included offense under a statute, an appellate court must use a cognate-pleadings approach. *Ex*

parte Watson, 306 S.W.3d 259 (Tex. Crim. App. 2009) (op. on reh'g).

In *Watson*, *supra* at 273, the Court of Criminal Appeals explained that:

> An offense is a lesser-included offense of another offense, under Article 37.09(1) of the Code of Criminal Procedure, if the indictment for the greater-inclusive offense either: 1) alleges all of the elements of the lesser-included offense, or 2) alleges elements plus facts (including descriptive averments, such as non-statutory manner and means, that are alleged for purposes of providing notice) from which all of the elements of the lesser-included offense may be deduced. Both statutory elements and any descriptive averments alleged in the indictment for the greater-inclusive offense should be compared to the statutory elements of the lesser offense. If a descriptive averment in the indictment for the greater offense is identical to an element of the lesser offense, or if an element of the lesser offense may be deduced from a descriptive averment in the indictment for the greater-inclusive offense, this should be factored into the lesser-included-offense analysis in asking whether all of the elements of the lesser offense are contained within the allegations of the greater offense.

As stated in *Watson*, the elements of the lesser-included offense do not have to be pleaded in the indictment if they can be deduced from facts alleged in the indictment. *Id.*

In this situation, the functional-equivalence concept can be employed in the lesser-included-offense analysis. When utilizing functional

equivalence, the court examines the elements of the lesser offense and decides whether they are "functionally the same or less than those required to prove the charged offense." *McKithan v. State,* 324 S.W.3d 582, 588 (Tex. Crim. App. 2010) (citing *Farrakhan v. State*, 247 S.W.3d 720, 722-23 (Tex. Crim. App. 2008)); *Jacob v. State*, 892 S.W.2d 905, 908 (Tex. Crim. App. 1995); *Hall v State*, 225 S.W.3d 524 (Tex. Crim App. 2007).

If this analysis supports a determination that the requested lesser offense is a lesser-included offense, the court will move to the second step of the test and consider whether a rational jury could find that, if the defendant is guilty, he is guilty only of the lesser offense. *Hall*, 225 S.W.3d at 536; *Rousseau*, 855 S.W.3d at 673.

This is a fact determination and is based on the evidence presented at trial. If there is evidence that raises a fact issue of whether the defendant is guilty only of the lesser offense, an instruction on the lesser-included offense is warranted, regardless of whether the evidence is weak, impeached, or contradicted. *Cavazos*, 382 S.W.3d at 383.

Shooting a gun in the direction of a house presents facts that would

support a conviction for deadly conduct.

3. A Deadly Conduct Instruction Was Required

There are a number of competing legal concepts that must be considered that are based on the State's discretion in seeking an indictment.

Typically, a comparison of the elements of the lessor included offense with the offense alleged in the indictment is the first step in the appellate analysis of whether a lessor included offense is required to be included in the charge. However, an indictment does not have to include all of the elements of criminal responsibility that should be considered in determining whether a lessor should be included. There is no requirement that an indictment allege that the accused acted as a principal, a party or a co-conspirator in an indictment. *See Teamer v. State*, 429 S.W.3d 164, 175 n.3 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *Hayes v. State*, 265 S.W.3d 673, 678-79 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd); *see also Ladd v. State*, 3 S.W.3d 547, 564 (Tex. Crim. App. 1999); *Garcia v. State*, 486 S.W.3d 602, 608 (Tex. App. San Antonio, 2015).

The State cannot avoid submission of a lessor included offense of

deadly conduct in a murder prosecution if the facts support a jury determination that the accused is guilty only of deadly conduct when it requests its inclusion in the jury charge as part of an instruction on co-conspirator responsibility.

The instant jury instruction reads like it is based on a felony murder indictment pursuant to Tex. Penal Code § 19.02 (b)(3) and predicated on the felony offense of deadly conduct.

Thus, Appellant asserts that based on the jury charge submitted, the felony offense of deadly conduct became the cornerstone of the trial court's instructions and evidences the State's theory of prosecution. The factual basis for the prosecution was that multiple shots were randomly fired into a house from multiple weapons at 11 o'clock at night by multiple people. The conduct underlying the prosecution was ostensibly "deadly conduct".

And, the record reflects that there is **no direct evidence** that Appellant was presented at the scene of the shooting or that he fired a weapon on September 13, 2020, or even possessed a weapon on September 13, 2020.

Admittedly, deadly conduct is not a lessor included offense of murder if the indictment alleges that murder as defined by Tex. Penal

Code § 19.02 (b)(1) or (2). However, it is a lessor included offense of murder if the indictment alleges felony murder with deadly conduct as the underlying predicate offense as defined by Tex. Penal Code § 19.02 (b)(3). *See Barfield v. State*, 202 S.W.3d 912, 914 n.1 (Tex. App.--Texarkana 2006, pet. ref'd); *Yandell v. State*, 46 S.W.3d 357, 361 (Tex. App.--Austin 2001, pet. ref'd); *Rodriguez v. State*, 953 S.W.2d 342 (Tex. App.--Austin 1997, pet. ref'd); *see also Johnson v. State*, 4 S.W.3d 254, 255-58 (Tex. Crim. App. 1999) (felony murder does not require proof of any additional dangerous act beyond that covered by underlying felony).

A person commits deadly conduct under Section 22.05 by knowingly discharging a firearm at or in the direction of one or more individuals. *See* Tex Penal Code § 22.05 (b)(1); *Miles v. State*, 259 S.W.3d 240, 246-247 (Tex. App. 2008).

Even though neither felony murder or deadly conduct were alleged in the indictment, the trial court included deadly conduct as the centerpiece of the instruction as the predicate felony offense for Tex. Penal Code § 7.02(b) instruction. Appellant asserts that based on the jury instructions, deadly conduct should have been presented to the jury as a

lessor included offense for its consideration.

This Court must consider whether the § 7.02(b) instruction amended the indictment or acted as a variance from the offense charged in the indictment.

And as previously stated, the general rule is that when there is evidence that the defendant is guilty as a party or a conspirator, a trial court may charge the jury on the law of parties or conspiracy even if the indictment charges the defendant as a principal. *Swope v. State*, 805 S.W.2d 442, 444 (Tex. Crim. App. 1991); *Rosillo v. State*, 953 S.W.2d 808, 811 (Tex. App.--Corpus Christi 1997, pet. ref'd); *see Marable v. State*, 990 S.W.2d 421, 424 (Tex. App.--Texarkana 1999), aff'd, 85 S.W.3d 287 (Tex. Crim. App. 2002); *Miles v. State*, 259 S.W.3d 240, 244(Tex. App.2008); *see also* Tex. Penal Code § 7.01(c).

The evidence presented at trial reflects that the jury might have convicted Appellant only of deadly conduct if permitted. Thus, Appellant asserts that based on jury charge presented, which based on the law of criminal responsibility requested by the State in relation to the charged offense, deadly conduct should have been presented. The record reflects

that multiple people sprayed a house with bullets from multiple weapons. The evidence suggests who might have actually fired the weapons. The evidence to support only a conviction of the lessor offense of deadly conduct is firmly established in the record.

The issue for this Court to determine is whether the trial court should look to the accused possible criminal responsibility, as requested by the State, as a basis for submitting a lessor included offense. And, as a corollary, if this court rules that a lessor included offense inclusion in the instruction must be based on the actual indicted offense and not an allegation of criminal responsibility contained in the instructions, then Appellant asserts that the trial court impermissibly amend the indictment by including the 7.02(b) instruction.

The trial record is clear. Deadly conduct was raised by the evidence and defined in the instructions as a basis for a determination of Appellant's guilt of either manslaughter or murder. Deadly conduct was the cornerstone of the instruction yet the jury was not authorized to find Appellant guilty only of deadly conduct as raised by the evidence.

4. Harm

This Court must analyze harm regarding an erroneous refusal to

give a requested instruction on a lesser-included offense under the standard enunciated in *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g). Because Appellant preserved error by requesting the lesser-included instruction, this Court must reverse the conviction if the denial of the instruction resulted in some harm. *Cornet v. State*, 417 S.W.3d 446, 449 (Tex. Crim. App. 2013). "Some harm" means actual harm and "not just a theoretical complaint." *Id.* at 449-50. In evaluating whether some harm exists, this Court must "consider the totality of the record," including the "entire jury charge," "the state of the evidence, including the contested issues and weight of probative evidence," "the argument of counsel," and "any other relevant information revealed by the record of the trial as whole." *Id.* at 450.

When a lesser-included instruction is erroneously denied, the jury is also "denied the opportunity to consider the entire range of offenses presented by the evidence." *Saunders v. State*, 913 S.W.2d 564, 571 (Tex. Crim. App. 1995) (citation omitted). That is, when a lessor-included instruction raised by the evidence is denied, a jury, "believing the defendant to have committed some crime, but given only the option to

convict him of a greater offense, may have chosen to find him guilty of that greater offense, rather than to acquit him altogether, even though it had a reasonable doubt he really committed the greater offense." *Id.* (discussing rationale by Supreme Court in *Beck v. Alabama*, 447 U.S. 625, 634 (1980)).

The Court of Criminal Appeals has "routinely found 'some' harm, and therefore reversed, whenever the trial court has failed to submit a lesser included offense that was requested and raised by the evidence—at least where that failure left the jury with the sole option either to convict the defendant of the greater offense or to acquit him." *Id.* According to the court, "'some' harm occurs because the jury was not permitted to fulfill its role as fact finder to resolve the factual dispute whether the defendant committed the greater or lesser offense." *Id. Williams v. State*, 582 S.W.3d 612, 628-629 (Tex. App.2019).

In the instance case, Appellant was acquitted of murder. He was convicted of manslaughter. In its final argument, the State emphasized three points. First, Appellant joined a conspiracy to commit "this offense." (11 RR 43). Second, the State admitted that it could not prove Appellant

guilty as a principal actor. (11 RR 61). The State suggested that Appellant was guilty as a co-party or co-conspirator. (11 RR 61). Third, the State emphasized in arguments that Appellant stated in a text message that he wanted to "spray up house." (11 RR 63).

Given the evidence presented and the jury verdict, the conduct that the State prosecuted; i.e, a number of people sprayed a house with bullets and its final argument, deadly conduct should have been included in the instructions as a lessor included offense and not just the underlying offense for the conspiracy instruction. In other words, the co-conspirators committed deadly conduct.

It is very likely that Appellant would have been found guilty only of the lessor offense of deadly conduct rather than manslaughter as the jury rejected murder. Deadly conduct is a third degree felony. When enhanced, the maximum punishment that might have been assessed would be twenty years. Clearly, Appellant was harmed by the refusal to submit a lessor included offense. A new trial must be granted.

Issue Number Three Restated

Trial Court abused its discretion in overruling Appellant's Motion to Suppress Evidence derived from his arrest on October 2, 2020, based on a parole violator warrant issued on September 30, 2020, without determining whether the warrant was issued without reliable evidence that the person has exhibited behavior during the person's release that indicates to a reasonable person that the person poses a danger to society that warrants the person's immediate return to custody.

A. Summary of the Argument

Appellant asserts that the parole board lacked reliable evidence that Appellant exhibited behavior during his release that he posed a danger to society that warranted his return to custody based upon a statement that he was a suspect in a murder investigation. The issuance of the parole violator's warrant violated Tex. Gov't. Code § 508.252.

B. Statement of Facts

Appellant adopts the statement of facts heretofore presented.

C. Standard of Review

This Court reviews a trial court's suppression ruling under the abuse of discretion standard. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). Under this standard, almost total deference to a trial

court's determination of historical facts supported by the record, especially when the findings are based on an evaluation of credibility and demeanor. *Id*. However, the trial court's resolution of mixed questions of law and fact, which does not turn on an evaluation of credibility and demeanor, is reviewed de novo. *Id*.; *Diaz v. State*, 110 S.W.3d 181, 183 (Tex. App. 2003.

In this instance, a de novo review is necessary.

D. The Parole Violator Warrant Violates Tex. Gov't. Code § 508.252

This is a case of first impression as this Court must determine what is meant by "reliable evidence that the person has exhibited behavior during the person's release that indicates to a reasonable person that the person poses a danger to society that warrants the person's immediate return to custody" means. This Court must determine whether a statement that a parolee is a suspect in a specific murder investigation without additional facts constitutes "reliable evidence" to support the issuance of an arrest warrant.

Appellant asserts that the parole violator's warrant issued on September 30, 2020, that resulted in his arrest in his vehicle on October 2, 2020, violates Section 508.251 and 508.252 of the Texas Government

Code and that all evidence derived from that arrest must be suppressed.

Section 508.251 authorizes the Parole Division of the Texas Department of Criminal Justice to issue a warrant for the return of certain persons committed to its custody. Tex. Gov't. Code § 508.252 provides that a warrant may be issued in the following circumstances:

> (1) there is reason to believe that the person has been released although not eligible for release;
>
> (2) the person has been arrested for an offense;
>
> (3) there is a document that is self-authenticating as provided by Rule 902, Texas Rules of Evidence, stating that the person violated a rule or condition of release; or
>
> (4) there is reliable evidence that the person has exhibited behavior during the person's release that indicates to a reasonable person that the person poses a danger to society that warrants the person's immediate return to custody.

In *Diaz v. State,* 110 S.W.3d 181, 183 (Tex. App. 2003), the Court of Appeals noted that the Court of Criminal Appeals in *Garrett v. State,* 791 S.W.2d 137 (Tex. Crim. App.1990), which was relied upon by the trial court, was decided before the amendment to the statute that was applicable to Diaz's arrest.

In *Garrett*, Garrett challenged his arrest based on the State's failure

to produce a valid arrest warrant affidavit. At the time of Garrett's arrest, the issuance of a parole violator's warrant was governed by Article 42.18, § 14(a), V.A.C.C.P., which provides:

> A warrant for the return of a paroled prisoner . . . may be issued by the board in cases of parole or mandatory supervision, . . . **where there is reason to believe that he has committed an offense** . . . [or] violated a condition of his parole . . . . Such warrant shall authorize all officers named therein to take actual custody of the prisoner and return him to the institution from which he was released. (*Emphasis added*).

Garrett v. State, 791 S.W.2d at 138.

The Court noted in *Garrett* that:

> The opinions in *Morrissey*, *Latta*, *Rabb* and *Griffin*, indicate that probationers and parolees do not enjoy the same level of Fourth Amendment protection accorded defendants only suspected of a crime. This is not to say that a parolee has no constitutional rights against unreasonable arrest. Rather, as we stated in *Tamez v. State*, 534 S.W.2d 686, 692 (Tex. Cr. App. 1976):
>
> A diminution of Fourth Amendment protection and protection afforded by Article I, Sec. 9, Texas Constitution, can be justified only to the extent actually necessitated by the legitimate demands of the probation process. A probationer may be entitled to a diminished expectation of privacy because of the necessities of the correctional system, but his expectations may be diminished only to the extent necessary for his reformation and rehabilitation.

> Parolees and probationers are usually afforded the same guarantees of due process. *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). Thus, a parolee's arrest rights may be diminished to the extent required by the parole system, but not eliminated completely.

Garrett v. State, 791 S.W.2d at 140.

The Court of Criminal Appeals further stated that its obligation as a reviewing court was to determine whether the trial court had sufficient opportunity to determine whether there was a reason to believe that he violated his parole conditions when the warrant was issued. The Court in *Garrett* concluded that the State established that Garrett violated the conditions of his parole by presenting evidence from Garrett's parole officer who stated that specific conditions of his parole had been violated. *Garrett v. State supra.* Garrett did not address what "reasonable believe" existed that Garrett had committed an offense or violated his parole.

In this case, the evidence established the only "fact" to support the issuance of a parole violator warrant for Appellant was a statement by an officer that Appellant was a suspect in the murder of Sierra Rhodd. There was no other information contained in the parole file that indicated any actual facts that supported an inference why he might be a suspect in a

murder investigation or why he was a suspect of any crime. Without more, no reliable evidence was presented to the parole board to justify the issuance of a violator's warrant.

Even though the rights of a parolee may be diminished they are not eliminated completely. The trial court stated that based on *Garrett*, he denied the motion to suppress evidence. The trial court stated:

> Okay. I find that the testimony of Rosezita Jones was reliable, credible and truthful.
>
> And while I agree with defense that trying to get around a warrant for arrest by using parole stinks, I'm also bound by the Garrett case out of the Court of Criminal Appeals.
>
> There is nothing that would have prevented, you know, the Board of Pardons and Paroles to continue to follow a warrant or parole revocation even if a case is no-billed due to findings of no probable cause because the burden is lower.
>
> Furthermore, there is testimony of communications as to further facts. And that further facts would have been relayed in the regular course of business of the parole officer. Reasonable -- reason to believe is the same thing as a reasonable suspicion to investigate, that there is an investigation. If reasonable suspicion exists there, then it exists for the blue warrant. As such, the motion to suppress is denied.

(3 RR 54-55).

When the parole revocation warrant was issued, neither probable

cause or reasonable suspicion existed to arrest the Appellant on the charge of murder. No reliable evidence was presented to the parole board that he was a danger. No facts were presented to justify the issuance of a warrant. Unlike *Garrett,* there did not exist any evidence that Appellant violated a term of his parole or that any of the criteria of 508.252 existed.

As a result of the search, investigator's seized Appellant's cell phone and found a shell casing on his vehicle that was similar to shell casings recovered at the scene of the shooting. The trial court overruled Appellant's objection to the introduction of Appellant's cell phone seized when he was arrested. (8 RR 150). A running objection was granted by the trial court concerning the content of Appellant's phone. (8 RR 153).

Over Appellant's objection, the State introduced an extraction of Appellant's phone. (10 RR 86). Ms. Lyons opined that the shell casing found on Appellant's vehicle and a shell casing found at the scene of the shooting were fired from the same weapon. (8 RR 219).

In this instance, Appellant believes that the parole board was acting as an agent of law enforcement. Law enforcement did not have sufficient

evidence or facts to support a judicial determination of probable cause that would support the issuance of an arrest warrant. Law enforcement did not have even a reasonable suspicion to detain Appellant. The parole board's action without reliable information allowed law enforcement to accomplish what it could not do – legally detain or arrest Appellant.

The Fourth Amendment does not prohibit all searches and seizures, but only those that are unreasonable. *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1414 (1989). That is to say, "the permissibility of a particular practice 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *Id*. (quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)); *see also Maryland v. Buie*, 110 S. Ct. 1093, 1096-97(1990) (ratifying balancing test for Fourth Amendment purposes).

No reliable information was presented to Appellant's parole officer that identified any conduct that would justify the issuance of a parole violator's warrant. In denying Appellant's motion to suppress, the trial court speculated that the parole officer received further facts that justified the issuance of the warrant without noting what facts were presented

because none were included within the complete parole file. (3 RR 54-55). Thus, the trial court abused its discretion in denying Appellant's motion to suppress evidence.

Issue Number Four Restated

Trial court abused its discretion in overruling Appellant's objection to the search of his cell phone to discover the IMEI code necessary to obtain a search warrant for the phone's digital data.

A. Summary of the Argument

Appellant asserts that the opening of the sim card holder constitutes a search that required a warrant.

B. Statement of Facts

Appellant adopts the statement of facts heretofore presented. The record reflects that Appellant's cell phone was seized incident to his arrest on a parole violator's warrant on October 2, 2020. The trial court overruled Appellant's objection to the introduction of Appellant's cell phone seized when he was arrested. (8 RR 150). A running objection was granted by the trial court concerning the content of Appellant's phone. (8 RR 153).

Deputy Garcia testified that in order for him to obtain a search

warrant for Appellant's phone, he had to open sim card holder, remove the sim card to find the IMEI number and then read the IMEI number. The IMEI number is not readily apparent on the outside of the phone. (8 RR 134-136).

C. Standard of Review

This court's reviews a trial court's ruling on a motion to suppress for an abuse of discretion. This court must give almost complete deference to its "rulings on application of the law to questions of fact and to mixed questions of law and fact, if resolution of those questions depends on an evaluation of credibility and demeanor." *Arguellez v. State*, 409 S.W.3d 657, 662 (Tex. Crim. App. 2013) (quoting *Crain v. State*, 315 S.W.3d 43, 48 (Tex. Crim. App. 2010)). "[F]or mixed questions of law and fact that do not fall within that category, a reviewing court may conduct a de novo review." *Id*. (quoting *Crain*, 315 S.W.3d at 48). When the trial court does not make express fact findings, an appellate review must view the evidence in the light most favorable to the trial court's rulings and assume that it made implicit fact findings that find support in the record. *Id*. A trial court's decision will be upheld if it is correct on any applicable theory

of law. *Id.* at 662-63; *Harmel v. State*, 597 S.W.3d 943, 962 (Tex. App.2020).

D. Police had to search phone to locate IMEI number

The Fourth Amendment mandates that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The Amendment's "particularity requirement 'assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his powers to search.'" *Bonds v. State*, 403 S.W.3d 867, 874 (Tex. Crim. App. 2013) (quoting *Groh v. Ramirez*, 540 U.S. 551, 561, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004)); *Harmel v. State*, supra at 962.

The record reflects that when Appellant was arrested pursuant to a parole violator's warrant and multiple cell phones were recovered. The State wanted to obtain a search warrant to obtain the historical data from the phone. The IMEI identifying number was not readily viewable on the cell phone. The cell phone had to be searched to locate the IMEI number. That search was conducted without a warrant. The officer had to open

and remove the sim card in order to obtain the identifying number.

This was not a case where a phone was abandoned and law enforcement was attempting to locate the phone's owner. *See, e.g., Ward v. Lee*, No. 19-CV-03986 (KAM), 2020 U.S. Dist. LEXIS 216159, 2020 WL 6784195, at *8 (E.D.N.Y. Nov. 18, 2020) (mem. & order); *United States v. Pacheco*, No. 11-CR-121-A, 2015 U.S. Dist. LEXIS 68485, 2015 WL 3402832, at *6 (W.D.N.Y. May 27, 2015) (decision & order); *Martinez v. State*, 689 S.W.3d 30, 33 (Tex. App. 2024). The warrantless search of Appellant's phone for the IMEI identifier violated the Fourth Amendment.

E. Harm

When the error in question is constitutional, an appellate court 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). In applying the "harmless error" test, an appellate court must ask whether there is a "reasonable possibility" that the error might have contributed to the conviction. *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998) (op. on reh'g). Appellate analysis should not focus on the propriety of the

trial's outcome; instead, the appellate court should calculate as much as possible the probable impact on the jury in light of the existence of other evidence. *Wesbrook v. State*, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000). This Court must consider such things as the nature of the error, the extent to which it was emphasized by the State, its probable collateral implications, and the weight a juror would probably place on the error. *See Snowden v. State*, 353 S.W.3d 815, 821-22 (Tex. Crim. App. 2011); *Love v. State*, 543 S.W.3d 835, 846 (Tex. Crim. App. 2016).

In this case, the results of the phone extraction of Appellant's phone was introduced to show calls and text messages that Appellant received and made. In other words, the extraction information was used by the State to establish a conspiracy. During punishment, the phone extraction was used to substantiate the claim that Appellant was dealing drugs while on bond. (12 RR 12). The State presented evidence from the extraction report that contained thumbnail photographs of narcotics and weapon activity. This Court cannot say beyond a reasonable doubt that the error did not contribute to the jury's determination of guilt or the trial court's assessment of punishment.

Appellant's conviction must be reversed.

Issue Number Five Restated

Trial Court erred in overruling Appellant's request for a mistrial after the investigating officer commented on Appellant's right to remain silent.

A. Summary of the Argument

Appellant asserts that the unsolicited statement by the lead investigator constituted an impermissible infringement on Appellant's Fifth Amendment right to remain silent and not to testify which requires the reversal of Appellant's conviction.

B. Statement of Facts

The record reflects that during the testimony of Investigator Frank Garcia, one of the lead investigators for the Harris County Sheriff's Department, Appellant challenged the officer concerning the conflict arising from Israel Rivera's identification of Appellant in a grey car with Trinity Haggerton shortly after Rivera heard the gunfire. (8 RR 140). Appellant asked Garcia if Rivera's statement conflicted with his theory of the case that Appellant was present at the scene of the shooting and was driving his black car on September 13th while Rivera saw Appellant in a grey car. By his testimony, Garcia suggested that Appellant might have

left the scene in his own vehicle and quickly switched vehicles so that he could look for Austin McCalla. As trial counsel began to ask a question, the State objected. As soon as the trial court sustained the State's argumentative objection, the witness stated:

> A. I don't know what happened. Jason's the one that knows what happened.

(8 RR 141).

Appellant's Fifth Amendment objection was sustained. The trial court instructed the jury to disregard the witness' comment but overruled Appellant's request for a mistrial. (8 RR 141).

C. Argument and Authorities

1. Standard of Review

This Court must determine whether the trial court erred in denying a request for a mistrial. *Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009); *Sanders v. State*, 387 S.W.3d 680, 687 (Tex. App.—Texarkana 2012, pet. struck). This Court must consider "the evidence in the light most favorable to the trial court's ruling, considering only those arguments before the court at the time of the ruling." *Ocon*, 284 S.W.3d at 884 (citing *Wead* v. State, 129 S.W.3d 126, 129 (Tex. Crim. App. 2004)).

If the ruling was within the zone of reasonable disagreement, it must be upheld. *Id.; Sanders,* 387 S.W.3d at 687. Mistrial is only an appropriate remedy when the error is highly prejudicial and incurable. *Ocon,* 284 S.W.3d at 884 (citing *Hawkins v. State,* 135 S.W.3d 72, 77 (Tex. Crim. App. 2004)). "A mistrial is a device used to halt trial proceedings when error is so prejudicial that expenditure of further time and expense would be wasteful and futile." *Ladd v. State,* 3 S.W.3d 547, 567 (Tex. Crim. App. 1999). A mistrial is appropriate only "when the objectionable event is so emotionally inflammatory that curative instructions are not likely to prevent the jury from being unfairly prejudiced against the defendant." *Cano v. State,* 3 S.W.3d 99, 109 (Tex. App.—Corpus Christi 1999, pet. ref'd).

2. Comment on Right to Remain Silent and Not Testify

The Fifth Amendment of the United States Constitution "guarantees an accused the right to remain silent during his criminal trial and prevents the prosecution [from] commenting on the silence of a defendant who asserts the right." *Jenkins v. Anderson*, 447 U.S. 231, 235(1980); *Salinas v. State*, 369 S.W.3d 176, 177-78 (Tex. Crim. App. 2012) (noting

that the Fifth Amendment states that no person "shall be compelled in any criminal case to be a witness against himself" and that Supreme Court has "interpreted this as prohibiting the State from commenting on a defendant's refusal to testify at trial"). *Guzman v. State,* 591 S.W.3d 713, 725 (Tex. App. 2019). During a criminal prosecution, the State may not "comment on the failure of [the] accused to testify." *Bustamante v. State*, 48 S.W.3d 761, 764 (Tex. 2001). Doing so "violates the privilege against self-incrimination and the freedom from being compelled to testify contained in the Fifth Amendment of the United States Constitution and Article I, § 10 of the Texas Constitution." *Id*; *Barba v. State*, 486 S.W.3d 715, 720 (Tex. App. 2016).

In this case, Appellant was challenging the State's theory of their prosecution by pointing to the factual conflict between Deputy Garcia's testimony that Appellant's car was used by the co-conspirators to travel to the Rhodd house. Garcia opined that Appellant was present at the scene of the shooting yet was identified by Israel Rivera within minutes with Trinity Haggerton in a grey Nissan one block away from the Rhodd house.

Deputy Garcia's statement specifically was intended to cause the jury to consider Appellant's silence at the time of his arrest and trial. Garcia suggested that the jury draw an inference from Appellant's silence and his refusal to testify. *See Carter v. Kentucky*, 450 U.S. 288 (1981). It was clearly improper and intended to prejudice Appellant's right to a fair trial.

3. Harm

The comment on Appellant's failure to testify and remain silent violated his rights protected by the Fifth Amendment. Tex. R. App. P. 44.2(a) applies and requires this Court to determine beyond a reasonable doubt that Deputy Garcia's comment did not contribute to his conviction. In *Fahy v. Connecticut*, 375 U.S. 85, 88 (1963), the Supreme Court stated that the harmless-error rule is "not concerned . . . with whether there was sufficient evidence on which the [accused] could have been convicted" but rather whether the error might possibly have prejudiced the jurors' decision making. *See Snowden v. State*, 353 S.W.3d 815, 819 (Tex. Crim. App. 2011).

In this case, the State conceded that there was no evidence that Appellant acted as a principal. The State argued that Appellant conspired with others to shoot up the Rhodd house. The comment by Garcia was directed at that relationship and undermined Appellant's claim of innocence.

Prayer

Wherefore premises considered, Appellant prays that this Court reversed the judgment of the trial court and remand this cause to the trial court for a new trial.

Respectfully submitted,

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Certificate of Service

This is to certify that a true and correct copy of the attached and foregoing Appellant's Brief has been served on Harris County Assistant District Attorney Jessica Caird at caird_jessica@dao.hctx.net via electronic filing on April 11, 2025.

/s/ Stanley G. Schneider
Stanley G. Schneider

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