

NO. 14-24-00372-CR

IN THE COURT OF APPEALS
FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT
OF TEXAS AT HOUSTON

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14th COURT OF APPEALS
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DEBORAH M. YOUNG
Clerk of The Court

NATHAN NICHOLS

APPELLANT

VS.

THE STATE OF TEXAS

APPELLEE

APPELLANT'S BRIEF

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LIST OF PARTIES

The Appellant is Nathan Nichols.

The Appellant's trial counsel is Paul Matthew Morgan.

The Appellant's appellate counsel is Crespín Michael Linton.

The Trial Judge is The Honorable Nikita V. Harmon.

The appellate attorney representing the State is Jessica Caird, Assistant District Attorney, Harris County, Texas.

TABLE OF CONTENTS

List of Parties	i
Table of Contents	ii
Table of Citations	v
Preliminary Statement	1
Statement of Facts	1
Pretrial Hearings – Speed Trial Requests	1
Trial Phase	1
A. State’s Witnesses	1
1. Osiel Lopez	1
2. Maritza Ayala	2
3. Shirley Uriegas	3
4. Alexandra Lehosky	5
5. Corinne Zelanis	5
6. Aaron Riffe	5
7. Dr. Rafael Garcia	9

8. Loandra Pellot-Vazquez	10
9. Katie Clark	10
10. Hannah Wines	17
11. Phillip Smith	17
12. Deron Smith	19
13. Ashleigh Wilson	20
14. Joshua Thomas	22
15. Michael Nicotra	24
 B. Jury's Verdict	 26
 C. Trial Court's Sentence	 26
 Points of Error	 27
 Point of Error Number One	 28
 Argument and Authorities on Point of Error Number One	 28
 Point of Error Number Two	 34
 Argument and Authorities on Point of Error Number Two	 34

Point of Error Number Three	40
Argument and Authorities on Point of Error Number Three	40
Point of Error Number Four	46
Argument and Authorities on Point of Error Number Four	46
Conclusion	51
Certificate of Compliance	51
Certificate of Service	51

TABLE OF CITATIONS

CASES

Barker v. Wingo , 407 U.S. 514, 530 (1972).....	42
Brooks v. State , 323 S.W.3d 893 (Tex. Crim. App. 2010).....	28
Delacerda v. State , 425 S.W.3d 367, 393 (Tex. App. – Houston [1 st Dist.] 2011, pet. ref'd).....	48
Galvez v. State , 962 S.W.2d 203, 205 (Tex. App. - Austin 1998, pet. ref'd).....	38
Jones v. State , 944 S.W.2d 642, 647 (Tex. Crim. App. 1996).....	29
Martinez v. State , 327 S.W.3d 727, 736 (Tex. Crim. App. 2010).....	36
Matson v. State , 819 S.W.2d 839, 846 (Tex. Crim. App. 1991).....	28

Montgomery v. State , 810 S.W.2d 372, 386 (Tex. Crim. App. 1990).....	35
Porter v. State , 634 S.W.2d 846, 849 (Tex. Crim. App. 1982).....	43
Ramson v. State , 920 S.W.2d 288, 302 (Tex. Crim. App. 1994).....	43
Segundo v. State , 270 S.W.3d 79, 87 (Tex. Crim. App. 2008).....	36
Sheffield v. State , 189 S.W.3d 782, 793 (Tex. Crim. App. 2006).....	46
Thomas v. State , 126 S.W.3d 138, 142 (Tex. App. – Houston [1 st Dist.] 2008, pet. ref'd).....	36
Tienda v. State , 358 S.W.3d 633, 642 (Tex. Crim. App. 2012).....	48
Wicker v. State , 667 S.W.2d 137 (Tex. Crim. App. 1984).....	28

Zamarano v. State , 84 S.W.3d 643 (Tex. Crim. App. 2002).....	42
---	----

STATUTES

Texas Constitution, Art. I, Sec. 10.....	41
U.S. Constitution, Amend. VI.....	41
Tex. Pen. Code §19.02(b)(1) (West 2024).....	29
Tex. Pen. Code §19.03(a)(2) (West 2024).....	29
Tex. Rule of Evid, Rule 404(b) (West 2024).....	35
Tex. Rule of Evid, Rule 609(a) (West 2024).....	36
Tex. Rule of Evid, Rule 801(d) (West 2024).....	46
Tex. Rule of Evid, Rule 801(d) (West 2024).....	46

Tex. Rule of Evid, Rule 802 (West 2024).....	46
Tex. Rule of Evid, Rule 803(6) (West 2024).....	47
Tex. Rule of Evid, Rule 901(a) (West 2024).....	48
Tex. Rule of Evid, Rule 902(10) (West 2024).....	47
Tex. Code Crim. Proc., Art. 38.22 (West 2024).....	48
Tex. Code Crim. Proc., Art. 38.23 (West 2024).....	49

PRELIMINARY STATEMENT

On October 17, 2022, Nathan Nichols (Nichols) was indicted for the felony charge of Capital Murder. On May 3, 2024, a jury found Nichols guilty of Capital Murder. On May 3, 2024, the trial court assessed a sentence of Life without parole in the Texas Department of Criminal Justice. Appellant Moore perfected his appeal on May 3, 2024. (TR. at 531)

STATEMENT OF FACTS

PRETRIAL HEARINGS – SPEEDY TRIAL REQUESTS

On April 20, 2023, August 25, 2023, and November 29, 2023, Appellant requested a speedy trial, and the trial court denied each of these requests, including the request to dismiss the case based on speedy trial violations. (R.R. Vol. 2 at 7), (R.R. Vol. 3 at 10), and (R.R. Vol. 4 at 10).

TRIAL PHASE

A. State's Witnesses

1. Osiel Lopez

Houston Police Department Officer Osiel Lopez testified that he was dispatched at 8:02 p.m. on February 21, 2022 to a shooting at the

Meadow Creek Apartments located at 2060 Allen Genoa #32 in Houston, Texas. (R.R. Vol. 7 at 35-38) Lopez stated that he found an unresponsive male who had been shot and who was lying on a stairwell. (R.R. Vol. 7 at 42) He identified the deceased as Kendall Deray Lee whose date of birth was July 3, 1974. (R.R. Vol. 7 at 48) Lopez explained that he spoke with the leaseholder of apartment number 32 named Aaron Riffe who showed him a cell phone video of the Nest camera mounted on the outside of that apartment unit. (R.R. Vol. 7 at 49) He mentioned that he found a 9 millimeter fired casing and then contacted HPD's homicide division who sent Investigators Nicotra and Clark to the crime scene. (R.R. Vol. 7 at 52-53)

2. Maritza Ayala

Maritza Ayala testified that on February 21, 2022 that she worked for the Houston Forensic Science Center and was dispatched to 2060 Allen Genoa #32 where she arrived at 9:15 p.m. to process the crime scene. (R.R. Vol. 7 at 57-60) Ayala stated that she photographed the crime scene, collected evidence, and documented the scene. (R.R. Vol. 7 at 61-65) She explained that she collected an Apple cell phone, 5 swabs from the front door and interior hallway, and a buccal swab from

Riffe for DNA testing. (R.R. Vol. 7 at 82-84) Ayala testified that she also collected 2 fired cartridges and a set of keys. (R.R. Vol. 7 at 87) She admitted that no fingerprints were taken from the crime scene. (R.R. Vol. 7 at 90)

On cross-examination, Ayala noted that she swabbed the exterior and interior of the front door, the hallway closet door, and a set of keys. (R.R. Vol. 7 at 101-103) She admitted that all the keys on the keychain were swabbed with only one swab. (R.R. Vol. 7 at 104) Ayala conceded that she did not dust for shoeprints on the front door or on the floor even though Riffe told her that the suspects had tried to kick in the front door. (R.R. Vol. 7 at 106-107)

3. Shirley Uriegas

Shirley Uriegas testified that on February 21, 2022 that she was living in apartment number 31 in the Meadow Creek Apartments with her husband, son, and daughter-in-law when she called 9-1-1 after hearing the loud sound of her neighbor's door being slammed and kicked at apartment number 32. (R.R. Vol. 7 at 112-116) Uriegas explained that while she was speaking to the 9-1-1 operator that she heard someone yell: "Open the door", "I'm going to shoot him", and "Give me the drugs." (R.R. Vol. 7 at 116) She admitted that she knew that Kendall Lee had

drugs in the apartment. (R.R. Vol. 7 at 116) Uriegas mentioned that she told the 9-1-1 operator that someone was trying to rob her neighbor, but she admitted that she was scared to peek out her window to see who was yelling. (R.R. Vol. 7 at 117) She testified that she finally looked out of her window after it got quiet and she saw 2 men in masks and with bags who walked to a white 4-door Chevrolet truck in the parking lot. (R.R. Vol. 7 at 118)

Uriegas stated that she and her husband opened the door to their second-floor apartment, walked into Lee's open apartment number 32, and saw both Lee and Riffe lying on the living room floor. (R.R. Vol. 7 at 122) She explained that Lee got up, stumbled out of his apartment, flipped over the stairs, and fell to the ground. (R.R. Vol. 7 at 123)

Uriegas stated that her son and daughter-in-law tried to stop Lee's bleeding before the paramedics arrived. (R.R. Vol. 7 at 123-125) She noted that Riffe asked her son to throw away a tray of Riffe's Marijuana into the apartment dumpster. (R.R. Vol. 7 at 128) Uriegas stated that her downstairs neighbor was a couple with two young children. (R.R. Vol. 7 at 129)

On cross-examination, Uriegas testified that the white truck drove away so fast that its tires squealed. (R.R. Vol. 7 at 132)

4. Alexandra Lehosky

Houston Forensic Science Center Crime Scene Investigator

Alexandra Lehosky testified that on February 21, 2022 that she and Maritza Ayala were dispatched to the Meadow Creek Apartments where she measured and sketched the crime scene inside and outside of apartment number 32. (R.R. Vol. 7 at 134-139) Lehosky stated that she saw the deceased Lee lying on the stairs of a stairwell. (R.R. Vol. 7 at 140) She explained that apartment number 32 was a 2-bedroom and 1 bath apartment. (R.R. Vol. 7 at 140)

5. Corinne Zelanis

Houston Forensic Science Center Officer Corinne Zelanis testified

that she extracted the video files from a DVR removed from apartment number 32. (R.R. Vol. 7 at 149-152)

6. Aaron Riffe

Aaron Riffe testified that he knew Kendall Deray Lee for about a

year and a half. (R.R. Vol. 7 at 155) Riffe explained that he and

Christopher Mitchell lived at 2060 Allen Genoa apartment number 32,

but that Lee did not live at the apartment. (R.R. Vol. 7 at 155) He noted

that he had a Nest doorbell camera on the front door and surveillance camera installed outside of the apartment. (R.R. Vol. 6 at 155) Riffe noted that Lee was the owner of the Nest account and gave him access to the account so he could watch the video. (R.R. Vol. 7 at 156-157) He admitted that Lee was a drug dealer who mainly sold pills with some cocaine and marijuana from the apartment which was strictly used for drug sales. (R.R. Vol. 7 at 160-161)

Riffe explained that as he was exiting his car after returning to the apartment on the evening of February 21, 2022 from delivering drugs to a client in Deer Park, Texas that someone grabbed his neck, put a gun against his ribs, and told him to be quiet or die. (R.R. Vol. 7 at 162-165) He stated that the person said: "If you make one sound I'm going to blow your fucking head off." (R.R. Vol. 7 at 166) Riffe noted that he had parked next to a white truck that had backed into the parking spot. (R.R. Vol. 7 at 168) He stated that the man who grabbed him at gunpoint and a second man made him walk them to his apartment. (R.R. Vol. 7 at 167-169) Riffe explained that once they reached the stairwell landing between the first and second floors that the man who was not wearing a mask saw the Nest camera and asked him how it worked. (R.R. Vol. 7 at 171) He testified that the lied to the man and told him that the camera

wasn't activated until they reached the second floor. (R.R. Vol. 7 at 171-172)

Riffe stated that the men ordered him to ask Lee to open the door, but Lee quickly closed the door after he saw the two men with guns. (R.R. Vol. 7 at 172) He described how they threatened to kill Lee, then repeatedly kicked the door, and finally shot through the door after they failed to kick it open. (R.R. Vol. 7 at 173) Riffe testified that the shooter was wearing a black hoodie, black pants, and black shoes. (R.R. Vol. 7 at 176) He described the man who initially grabbed him as wearing a black jacket with dark blue pants, and a gray hoodie. (R.R. Vol. 7 at 176) Riffe explained that after they broke into the apartment that they ordered him to lie next to Lee who was bleeding and pleading with the men to get him an ambulance. (R.R. Vol. 7 at 179-180) In response to their questioning, Lee told them that the drugs were located in a hallway closet. (R.R. Vol. 7 at 181) Riffe noted that they had a kilo of cocaine, marijuana, THC cartridges, Hydrocodone, and Somas in the apartment along with a Gucci handbag that contained money. (R.R. Vol. 7 at 184)

Riffe stated that Lee gave the men the keys to the hallway closet because it was locked. (R.R. Vol. 7 at 186) He claimed that Lee probably had between \$3,000.00 to \$5,000.00 in cash in the Gucci

handbag. (R.R. Vol. 7 at 189) Riffe stated that he called 9-1-1 after the men left. (R.R. Vol. 7 at 190) He explained that he was able to show the responding police officers the video of the robbery. (R.R. Vol. 7 at 191) Riffe identified a family picture of Lee and his daughter with that Gucci handbag. (R.R. Vol. 7 at 196) He explained that Lee hired him to deliver the drugs. (R.R. Vol. 7 at 198) Riffe noted that he was working in New York when he first learned that the police had arrest someone for Lee's murder. (R.R. Vol. 7 at 201)

On cross-examination, Riffe admitted that he and Lee were close friends. (R.R. Vol. 8 at 9) He noted that he was the leaseholder of apartment number 32, but allowed Lee to run his drug operations from this apartment. (R.R. Vol. 8 at 10) Riffe admitted that they still had a kilogram of cocaine at the apartment because Lee had restocked his supply only two days before he was killed. (R.R. Vol. 8 at 11) He denied that there were any guns in the apartment. (R.R. Vol. 8 at 12) Riffe admitted that he kept a cigarette in his mouth throughout the entire robbery. (R.R. Vol. 8 at 17) He believed that the two suspects knew that Lee operated from this apartment where he kept his drugs and money. (R.R. Vol. 8 at 18) Riffe described how they put the drugs into a trash bag and left the apartment with the trash bag full of drugs and

the Gucci handbag full of cash. (R.R. Vol. 8 at 21) He noted that the man who wore the white and gray hoodie returned to the apartment and ask if there was anything else. (R.R. Vol. 8 at 23) Riffe mentioned that they left the pain pills in the closet. (R.R. Vol. 8 at 26) He testified that he provided the police with the name of his co-tenant, Mitchell, because it seemed suspicious that he was absent during the robbery. (R.R. Vol. 8 at 29) Riffe admitted that he was homeless before Lee helped get his this apartment and a job delivering his drugs. (R.R. Vol. 8 at 30) He described Lee as his boss and his friend. (R.R. Vol. 8 at 31)

7. Dr. Rafael Garcia

Harris County Institute of Forensic Sciences Assistant Medical Examiner Rafael Garcia testified that he conducted an autopsy on Lee on February 22, 2022. (R.R. Vol. 8 at 34-39) Garcia stated that the cause of death was multiple gunshot wounds and the manner of death was homicide. (R.R. Vol. 8 at 42) He explained that there was a gunshot wound to Lee's left arm, to his chest, and to his abdomen. (R.R. Vol. 8 at 44-54) Garcia stated that the gunshot wound to the chest was the fatal wound. (R.R. Vol. 8 at 51) He testified that he recovered one bullet from Lee's chest and two bullets from an old wound to his

right thigh. (R.R. Vol. 8 at 58) Garcia noted that the toxicology report showed the presence of cocaine in Lee's blood. (R.R. Vol. 8 at 60)

8. Loandra Pellot-Vasquez

Tarrant County firearm and toolmark examiner Loandra Pellot-Vasquez testified that she tested 2 fired cartridge cases and a fired bullet removed from Lee's body. (R.R. Vol. 8 at 67-73) Vasquez stated that the two casings were 9 millimeter caliber Lugar shells which were both fired from the same unknown gun. (R.R. Vol. 8 at 76) She noted that the fired bullet was also a 9 millimeter caliber. (R.R. Vol. 8 at 77) Vasquez testified that she couldn't compare shell casings with a fired bullet. (R.R. Vol. 8 at 78) She agreed that a Baretta handgun can fire 9 millimeter shells. (R.R. Vol. 8 at 83)

9. Katie Clark

Houston Police Department Homicide Detective Katie Clark testified that she and Detective Nicotra were assigned to investigate Lee's murder on February 21, 2022 at the Meadow Creek Apartments. (R.R. Vol. 8 at 86-92) Clark stated that she saw the deceased Lee and two spent cartridges lying on the landing between the first and second floor of the stairwell. (R.R. Vol. 8 at 95-97) She noticed bullet strikes to the door and outside wall of apartment number 32, the broken door

frame, and a Nest camera. (R.R. Vol. 8 at 98) Clark testified that after Riffe gave them consent to enter the apartment that they saw blood on the couch, keys on the ground, a blue iPhone under the couch, a TV in the living room with live feed of the area outside the apartment, a hallway closet which contained a DVR system, and miscellaneous drugs. (R.R. Vol. 8 at 99) She suggested that an apartment which contained a TV with live feed of the area meant that the apartment was used for drug dealing. (R.R. Vol. 8 at 100)

Clark testified that she collected the iPhone, two 9-millimeter cartridge casings, keys, DVR system, 5 DNA swabs, and a hoodie. (R.R. Vol. 8 at 102) She noted that no firearms were collected in this investigation. (R.R. Vol. 8 at 107) Clark stated that her review of the video footage from that evening showed that the suspects never touched the door handle, but kicked and shot through the door. (R.R. Vol. 8 at 104) She noted that Lee had over \$1,000.00 in cash with him. (R.R. Vol. 8 at 108) Clark denied that she saw any shoe impressions on the door or in the apartment. (R.R. Vol. 8 at 109)

Clark testified that the Nest video showed two black males appear on the landing with one of them unmasked who then pulled on his mask after spotting the camera. (R.R. Vol. 8 at 112) She described the

unmasked black male wearing a white grayish True Religion hoodie with a dark colored U-shaped emblem, dark pants, and dark sneakers. (R.R. Vol. 8 at 113) Clark stated that the second suspect wore dark shoes, dark pants, a Nike hoodie with red lighting, and a mask. (R.R. Vol. 8 at 113) She said that the Nest recording shows that Lee threatened to call 9-1-1, but the suspect said that they didn't care and yelled "I'm going to kill this motherfucker if you don't open the door" and "I'm going to shoot through the front door if you don't open." (R.R. Vol. 8 at 119-120) Clark noted that the suspect in the light-colored hoodie held the gun in his left hand and shot through the door twice hitting Lee. (R.R. Vol. 8 at 121) She believed that this suspect who fired the gun into the apartment was Nathan Nichols. (R.R. Vol. 8 at 121)

Clark noted that this is her first murder investigation involving a left-handed suspect. (R.R. Vol. 8 at 122) She testified that the suspect Leroy Harris enters the apartment first and asks Lee for drugs and money while Nichols remained outside with Riffe. (R.R. Vol. 8 at 125) Clark stated that Leroy Harris was wearing the dark-colored Nike jacket, dark pants, and a mask. (R.R. Vol. 8 at 126) She noted that Lee told Harris that the drugs were in the closet and his bag was on the chair. (R.R. Vol. 8 at 134) Clark testified that the suspects were in the

apartment for less than a minute but noted that Appellant returned to the apartment and told Lee to “stay down bitch.” (R.R. Vol. 8 at 134-135) She stated that the video showed the Appellant fell down on the stairs when he returned to the apartment. (R.R. Vol. 8 at 136)

Clark testified that the suspects stole a Gucci crossbody bag, one of Lee’s cell phones, cocaine, and cash. (R.R. Vol. 8 at 137) She stated that Riffe told her that he did not recognize the suspects. (R.R. Vol. 8 at 137) She testified that a video from a nearby 76 gas station showed a white vehicle leaving the apartment at 8:02 p.m. with its headlights off. (R.R. Vol. 8 at 140) Clark admitted that the gas station video did not show the white vehicle’s license plate. (R.R. Vol. 8 at 140) She testified that she did not receive any location data on Lee’s stolen iPhone, but found texts message correspondence after the murder from February 23, 2022 through February 28, 2022 which revealed multiple phone numbers with a 409 area code which would include the city of Beaumont since some of contacts in Lee’s phone were labeled as “Beaumont.” (R.R. Vol. 8 at 145-146)

Clark testified that she contacted Beaumont Police Department Detective Phillips Smith who posted two portions of the Nest video and a screenshot from the Nest video onto the Beaumont Police Department

Facebook page which elicited many responses. (R.R. Vol. 8 at 152-154)

She stated that on June 15, 2022 a caller named Ashleigh Wilson identified Appellant as one of the suspects after viewing the Nest videos. (R.R. Vol. 8 at 155)

Outside the presence of the jury, Clark testified that Wilson was Appellant's parole officer. Over Appellant's objection, the trial court allowed Clark to testify that Wilson was employed as a parole officer. (R.R. Vol. 8 at 157-171)

Clark testified that Wilson told her that she was a parole officer and that she identified the unmasked robber as Appellant. (R.R. Vol. 8 at 172) She stated that she identified Appellant as one of the suspects in the video through his Texas Driver's License photo and through his Facebook photos. (R.R. Vol. 8 at 173) Clark testified that a Capital Murder charge was filed on July 14, 2022 and that Appellant was arrested in Beamont on July 18, 2022. (R.R. Vol. 8 at 175) She noted that Appellant's cellphone number of (409) 679-7832 was terminated on March 1, 2022. (R.R. Vol. 8 at 178) Clark stated that the subscriber information for this number showed the owner as Jayvonna Avery who had the same address as Appellant's business address for his line of clothing called Eunonia Kollektions. (R.R. Vol. 8 at 180)

Over Appellant's hearsay objection, Clark testified that Appellant's Facebook page had a photograph of him wearing a white True Religion hoodie. (R.R. Vol. 182-189) She stated that a Facebook picture from October 15, 2021 showed him with a beard and wearing a white True Religion hoodie and eating with his left hand. (R.R. Vol. 8 at 191-192) Clark also showed a picture from Appellant's Facebook posted on July 6, 2022 which showed him without a beard which was shortly after the Nest video was posted on the Beaumont Police Department's Facebook page. (R.R. Vol. 8 at 195) She noted that Appellant's Facebook picture of him in his True Religion hoodie had been deleted. (R.R. Vol. 8 at 197)

Clark testified that a Capital Murder charge was filed against Leroy Harris on March 2, 2024, after Harris had been arrested in Beaumont in December of 2023 for another murder. (R.R. Vol. 8 at 202-203) She stated that a man named Joshua Thomas, who was a witness to Harris' Beaumont murder case, provided information that Harris was involved in the killing of Lee. (R.R. Vol. 8 at 204) Clark also identified both Appellant and Harris as the two suspects in Lee's killing from viewing the Nest video. (R.R. Vol. 8 at 205) She stated that an investigation of

the co-tenant Christopher Mitchell determined that he had no involvement in Lee's killing. (R.R. Vol. 8 at 206)

On cross-examination, Clark admitted that she never showed Riffe a photo array for the purposes of identifying the suspects because she believed that his viewing of the Nest video tainted his ability to make a proper identification. (R.R. Vol. 8 at 225) She stated that Lee's second cell phone was located in his Gucci bag and that telephone number was provided to her by Riffe. (R.R. Vol. 8 at 227) Clark conceded that she did not know if the Appellant's Facebook account was actually his account or an account created by someone else and that she had no personal knowledge of the photographs posted to that account. (R.R. Vol. 8 at 238) She admitted that people can post pictures of other people to their own Facebook page. (R.R. Vol. 8 at 240) Clark conceded that True Religion is a popular designer brand that anyone can purchase online. (R.R. Vol. 8 at 242) She admitted that the picture of the True Religion hoodie in Facebook post shows a zipper but the Nest video does not show a zipper on that True Religion hoodie. (R.R. Vol. 8 at 242) Clark conceded that Riffe can't identify Appellant as one of the robbers even though he saw the suspects in person. (R.R. Vol. 8 at 247) She admitted that the Facebook picture of Appellant without a

beard and posted on July 6, 2022 could have been an old picture. (R.R. Vol. 8 at 249) Clark admitted that she had looked at Riffe's cellphone on the night of the murder, but she did not collect his phone to conduct a forensic examination of its contents. (R.R. Vol. 8 at 257) She claimed that Christopher Mitchell was ruled out as a suspect because he did not match the description of either suspect. (R.R. Vol. 8 at 262)

10. Hannah Wines

Houston Forensic Science Center Biologist Hannah Wines testified that she performed DNA analysis of the exterior closet door swab, the interior closet door swab, keys swab, the exterior front door handle, and the interior front door handle. (R.R. Vol. 9 at 6-13) Wines explained that she found the DNA of Riffe and Lee on the various items but not Appellant's DNA. (R.R. Vol. 9 at 14-28) On cross-examination, she admitted that Appellant was not a contributor to every sample she tested. (R.R. Vol. 9 at 52)

11. Phillip Smith

Beaumont Police Department Detective Phillip Smith testified that he received some video clips of a Houston homicide from Detective

Nicotra which he posted on the police department's Facebook website on June 15, 2022. (R.R. Vol. 10 at 9-13) Smith informed Nicotra that Appellant was identified as one of the robbers in the video clip, and he assigned Sergeant Simpson to investigate Appellant. (R.R. Vol. 10 at 14) He testified that he identified Appellant from his Facebook photographs and local database photographs. (R.R. Vol. 10 at 15) Smith explained that Appellant had posted a photograph of himself on July 6, 2022 with a Hookah pipe at the Hookah lounge he owned in Beaumont. (R.R. Vol. 10 at 18) He noted that a local parole officer named Ashleigh Wilson provided him with an affidavit on June 16, 2022 in which she identified Appellant as a suspect based on her viewing of the video clip posted on the Beaumont Police Department's Facebook website. (R.R. Vol. 10 at 19)

Smith testified that he assisted in the arrest of Appellant on July 18, 2022 in Beaumont. (R.R. Vol. 10 at 127-128) He believed that Appellant is the same person seen in the Nest video based on his Facebook pictures and meeting him in person. (R.R. Vol. 10 at 23) Smith testified that he knows Appellant's brother Darrell and denied that Darrell was one of the suspects in the Nest video. (R.R. Vol. 10 at 25) He claimed that he was 100% positive that Appellant is one of the

suspects in the Nest video. (R.R. Vol. 10 at 26) Smith testified that he believed that the second suspect in the video was Leroy Harris who is also from Beaumont and who owns a 2014 Chevrolet 4-door white Texas Edition pickup truck. (R.R. Vol. 10 at 27) He noted that he saw Harris' truck parked at his mother house around June 15, 2022. (R.R. Vol. 10 at 27)

On cross-examination, Smith admitted that he provided information to the Houston detectives and did not subpoena Facebook for records on Appellant's Facebook IP address. (R.R. Vol. 10 at 29) He claimed that he realized that Appellant was one of the suspects after viewing the entire Nest video. (R.R. Vol. 10 at 35)

12. Deron Simpson

Beaumont Police Department Sergeant Deron Simpson testified that he investigates suspects' social media to help solve crimes. (R.R. Vol. 10 at 40-159) Simpson stated that he located a social media page for Appellant on Facebook. (R.R. Vol. 10 at 44) He explained that he was familiar with Appellant because Appellant had opened a Hookah bar in July of 2022 with his brother Darrell Lewis. (R.R. Vol. 10 at 45) Simpson mentioned that the Nest video showed that the shooter was

left-handed and a picture from Appellant's Facebook showed him eating with his left hand. (R.R. Vol. 10 at 46-47) He noted that all of Appellant's pictures on his Facebook showed him with a beard, and further noted that Appellant had deleted a picture of him with a thick beard and wearing a True Religion hoodie. (R.R. Vol. 10 at 48)

Simpson believed that Appellant wore black Nike Huaraches tennis shoes in his Facebook pictures which appear to be the same shoes worn by Appellant in the Nest video. (R.R. Vol. 10 at 49-58) He added that it is very uncommon to see a left-handed shooter. (R.R. Vol. 10 at 62) Simpson believed that Appellant was one of the suspects in the Nest video based on his comparisons with Appellant's Facebook photos. (R.R. Vol. 10 at 63) He denied that Appellant's brother is seen in the Nest video. (R.R. Vol. 10 at 65)

On cross-examination, Simpson admitted that there are probably millions of these black Huaraches shoes in existence and they are not the only shoe with a backstrap. (R.R. Vol. 10 at 67-69)

13. Ashleigh Wilson

Outside the presence of the jury, Appellant objected to Wilson testifying that she was Appellant's parole officer because this was eliciting testimony of an extraneous offense in which the prejudicial

effect outweighed the probative value. (R.R. Vol. 10 at 73-74) The prosecutor argued that this testimony should be admitted because Appellant is contesting identity. (R.R. Vol. 10 at 76) The trial court overruled Appellant's objection under Rule 404(b)(2) of Texas Rules of Evidence for the purpose of identity. (R.R. Vol. 10 at 76)

Ashleigh Wilson testified that she is currently a CPS caseworker, but she used to work as a parole officer in Beaumont. (R.R. Vol. 10 at 78-79) Wilson stated that Appellant was released from prison on parole on October 8, 2021, and that she began supervising him as his parole officer in January of 2022. (R.R. Vol. 10 at 80) She noted that she met him in person for his parole meetings on January 3, 2022 and February 3, 2022. (R.R. Vol. 10 at 81) Wilson explained that she discovered that Appellant had a child with one of her cousins named Charde Dixon. (R.R. Vol. 10 at 81) She stated that she is familiar with Appellant's Facebook page and knew that he owned a Hookah lounge in Beaumont. (R.R. Vol. 10 at 86)

Wilson testified that on June 15, 2022 at 11:32 a.m. that a very upset Dixon contacted her by Facebook messenger which prompted her to view the video clippings posted on the Beaumont Police Department Facebook page. (R.R. Vol. 10 at 89-93) She stated that the man who

had not worn a mask and who fired the gun was Appellant. (R.R. Vol. 10 at 94) Wilson explained that she gave an affidavit to the Beaumont Police Department and then spoke with Houston Police Department Detectives Clark and Nicotra on June 16, 2022. (R.R. Vol. 10 at 95-96)

On cross-examination, Wilson admitted that she only met Appellant twice. (R.R. Vol. 10 at 97) She claimed that the robber was Appellant based on his file photographs and his Facebook pictures. (R.R. Vol. 10 at 101)

14. Joshua Thomas

Joshua Thomas testified that he is currently in the Harris County Jail with the following 5 pending felony charges in Jefferson County, Texas: three Possession of a Controlled Substance charges, an evading arrest charge, and Possession of a Prohibited Substance in a Correctional Facility. (R.R. Vol. 10 at 104-105) Thomas noted that he is an habitual offender who is on parole for an 8-year prison sentence in May of 2020 for the Possession of a Controlled Substance. (R.R. Vol. 10 at 105-108) He testified that in December of 2023 that he met with Beaumont Police Detective Torres about providing information concerning Harris who he had known his entire life by the nickname of

Thug. (R.R. Vol. 10 at 111-112) Thomas claimed that he had information about two murders that happened in Beaumont and in Houston. (R.R. Vol. 10 at 114) He stated that Harris owned a 4-door white truck with a Texas symbol on its side, and Appellant was known by the nickname of Detroit. (R.R. Vol. 10 at 115-116)

Thomas testified that Houston Police Department detectives interviewed him concerning Lee's murder and showed him a photo array in which he identified Appellant as one of the robbers. (R.R. Vol. 10 at 118-119) He stated that he recognized Appellant from the various Facebook pictures admitted into evidence. (R.R. Vol. 10 at 122)

Thomas testified that he entered into a plea bargain deal with the Jefferson County District Attorney's office that he would receive 10 years Deferred Adjudication community supervision for 3 of his felony charges and a dismissal of the other 2 felony charges in exchange for his truthful testimony against Appellant and Harris in their murder cases. (R.R. Vol. 10 at 123-124) He admitted that he would be sentenced to a minimum of 25 years in prison if he violated his community supervision. (R.R. Vol. 10 at 124) Thomas agreed that he had to testify truthfully in both the Harris and Jefferson County murder cases to receive the community supervision deal. (R.R. Vol. 10 at 125-126) He claimed to recognize

Harris and Appellant, Harris' voice, and Appellant as the shooter after viewing the Nest video clips. (R.R. Vol. 10 at 127-129) Thomas stated that he recognized Appellant because he wasn't wearing a mask. (R.R. Vol. 10 at 130) He testified that he is scheduled to be sentenced later this month. (R.R. Vol. 10 at 131)

On cross-examination, Thomas admitted that Appellant was already charged with murder when he saw the Nest video clips on a friend's phone. (R.R. Vol. 10 at 133) He conceded that he was a career drug dealer who is an habitual criminal because he has been to prison twice. (R.R. Vol. 10 at 134) Thomas admitted that he demanded probation for his felony cases from Detectives Clark and Nicotra in exchange for his testimony against Appellant and Harris. (R.R. Vol. 10 at 137) He stated that he had been released on parole on October 1, 2022. (R.R. Vol. 10 at 138) Thomas claimed that his drug of choice is synthetic marijuana. (R.R. Vol. 10 at 143) He denied that if he didn't testify that he would go to prison. (R.R. Vol. 10 at 145)

15. Michael Nicotra

Houston Police Department Detective Michael Nicotra testified that he worked on this homicide case with Detective Clark. (R.R. Vol. 10 at 148-149) Nicotra noted that that he owned a Beretta which was the gun

used by Appellant in Lee's killing. (R.R. Vol. 10 at 159) He believed that Riffe's viewing of the Nest video would have tainted his identification of the suspects in a photo array. (R.R. Vol. 10 at 164) Nicotra testified that a Texas Vehicle Registration showed that Thomas purchased a 2014 Chevrolet Silverado Texas Edition on August 8, 2021. (R.R. Vol. 10 at 166-168) He noted that that this style of truck has "Texas Edition" in chrome letters attached to both front doors of the truck. (R.R. Vol. 10 at 169) Nicotra testified that Thomas identified Appellant as the shooter from a photo array shown to him by a Beaumont police officer. R.R. Vol. 10 at 172-173) He stated that he is 100 percent positive that Appellant is the shooter seen in the Nest video. (R.R. Vol. 10 at 174) Nicotra noted that Appellant has braided hair and no beard for his jury trial. (R.R. Vol. 10 at 175)

On cross-examination, Nicotra admitted that it would surprise him that Thomas saw the Nest video clippings posted on the Beaumont Police Department's Facebook website. (R.R. Vol. 10 at 178) He conceded that Riffe's photo array identification, but not Thomas's photo array identification, would have been tainted even though both saw the Nest video clippings. (R.R. Vol. 10 at 180) Nicotra conceded that Riffe

was the only eyewitness to the murder and offered to view a photo array to help the police. (R.R. Vol. 10 at 183-185)

The State rested. (R.R. Vol. 10 at 188)

The Defense rested. (R.R. Vol. 10 at 191)

B. Jury's Verdict

The jury found Appellant Nichols guilty of Capital Murder. (R.R. Vol. 10 at 235)

C. Trial Court's Sentence

The trial court assessed a sentence of automatic Life in the Texas Department of Criminal Justice. (R.R. Vol. 10 at 236)

POINTS OF ERROR

POINT OF ERROR ONE:

The Evidence Was Insufficient To Support Appellant's Conviction For Capital Murder.

POINT OF ERROR TWO:

The Trial Court erred by allowing evidence of an Extraneous Offense.

POINT OF ERROR THREE:

The Trial Court erred by denying Appellant's motion to dismiss based on Speedy Trial violations.

POINT OF ERROR FOUR:

The Trial Court erred by failing to exclude Facebook photographs.

POINT OF ERROR NO. 1

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTIONS FOR MURDER

Appellant contends that the State has not proven its case beyond a reasonable doubt because the State has failed to show beyond a reasonable doubt that Appellant killed Kendall Deray Lee.

The test for reviewing the insufficiency of the evidence where a defendant has been found guilty is for the reviewing court to determine whether, after viewing the relevant evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. **Brooks v. State**, 323 S.W.3d 893 (Tex. Crim. App. 2010) Thus, the issue on appeal is not whether the appellate court believes the State's evidence but instead believes the appellant's evidence outweighs the State's evidence.

Wicker v. State, 667 S.W. 2d 137, 143 (Tex. Crim. App. 1984) The verdict may not be overturned unless it is irrational or unsupported by proof beyond a reasonable doubt. **Matson v. State**, 819 S.W. 2d 839, 846 (Tex. Crim. App. 1991) The jury, as the sole judge of the facts, is entitled to resolve any conflicts in the evidence, to evaluate the

credibility of witnesses, and to determine the weight to be given any particular evidence. **Jones v. State**, 944 S.W. 2d 642, 647 (Tex. Crim. App. 1996)

Section 19.02(b)(1) of the **Texas Penal Code** provides that a person commits the offense of Murder if he intentionally or knowingly causes the death of an individual. (West 2024)

Section 19.03(a)(2) of the **Texas Penal Code** provides that a person commits the offense of Capital Murder if the person commits murder as defined under section 19.02(b)(1) and the person commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation, or terroristic threat. (West 2024)

The only evidence which shows that Appellant killed Kendall Deray Lee was the testimony of multiple witnesses who were not eyewitnesses to the crime but instead only identified Appellant from viewing a Nest doorbell video of the shooting.

Appellant contends that the following listed evidence so overwhelmingly outweighs the evidence which shows that he committed

Murder that the jury's verdict is unsupported by proof beyond a reasonable doubt.

- 1) Only eyewitness could not identify Appellant.
- 2) Appellant's DNA not found at the crime scene.
- 3) The murder weapon was not found.
- 4) Identification witnesses were not eyewitnesses.

1. Only eyewitness could not identify Appellant.

Detective Clark admitted that Riffe, the only eyewitness to the shooting, couldn't identify Appellant as one of the two suspects. (R.R. Vol. 8 at 247) Riffe admitted that he watched the Nest video of the shooting as he played it for the HPD detectives. (R.R. Vol. 7 at 157) He admitted that he saw the man who had originally not worn a mask hold him and Lee at gunpoint inside the apartment as the other suspect gathered the drugs and money. (R.R. Vol. 7 at 187 & 191)

2. Appellant's DNA not found at the crime scene.

Houston Forensic Science Center biologist Hannah Wines testified that she tested swabs for possible DNA taken of the exterior and interior of the front door handle, the exterior and interior of the hallway closet door, and Lee's keys. (R.R. Vol. 9 at 11-23) Wines admitted that Appellant was not a DNA contributor to every sample she tested.

3. Murder weapon was not found.

Firearm and toolmark examiner Loandra Pellot-Vazquez testified that she determined that the 2 cartridge cases found at the crime scene and the fired bullet obtained during Lee's autopsy were 9-millimeter caliber. (R.R. Vol. 8 at 70-77) However, she admitted that no gun was recovered for her to compare to the cartridges and bullet to determine if that gun fired the fatal bullet.

4. Identification witnesses were not eyewitnesses.

The following people identified Appellant as the shooter in the Nest video even though they admitted that they were not an eye-witness who was present for the shooting: 1) HPD Detective Clark (R.R. Vol. 8 at 173), 2) Beaumont Officer Smith (R.R. Vol. 10 at 23), 3) Beaumont Officer Simpson (R.R. Vol. 10 at 63), 4) Ashleigh Wilson (R.R. Vol. 10 at 94), 5) Joshua Thomas (R.R. Vol. 10 at 127-129), and 6) Detective Nicotra (R.R. Vol. 10 at 174)

The State failed to provide sufficient evidence that Appellant killed Kendall Deray Lee by failing to produce a single eyewitness to the shooting who could testify that Appellant fired the gun through the door which killed Lee. Riffe, the primary eyewitness, walked with the two

suspects from his car in the parking lot to Lee's apartment and witnessed the shooting of Lee and the theft of drugs and money from the apartment, yet he couldn't identify either of the suspects. In fact, he couldn't make an identification even after seeing the shooter without a mask on the stairwell landing and after seeing the shooter guarding the apartment entrance while the other suspect was gathering drugs and cash.

In addition, the next-door neighbor, who peeked out of her front window as the two suspects fled the scene, was also unable to identify either suspect.

The State also failed to show that Appellant was present for this robbery because his DNA was not found on any of the 5 swabs taken from the crime scene.

The State bases its entire case on identifying Appellant as the shooter from 6 witnesses who identified him after viewing the video of the robbery captured on the apartment's Nest doorbell ring camera. Appellant contends that their identifications are not reliable because they are based on viewing a grainy video instead of seeing him in person. Additionally, Appellant claims that 5 of the 6 witnesses' identifications are not reliable because their knowledge of Appellant's criminal history

as police officers and a parole officer have prejudiced their ability to make a detached and disinterested identification of the suspect. Appellant further contends that the sixth witness was a convicted felon who agreed to testify for the prosecution to save himself from a minimum 25-year prison sentence in exchange for 10 years of deferred adjudication probation to resolve 5 felony charges currently pending against him. The prosecution's purchasing of Thomas' testimony for his freedom from jail rendered his testimony untrustworthy and hardly a solid foundation for the conviction of a man for Capital Murder.

Even when viewing the evidence in the light most favorable to the jury's verdict, a rational trier of fact would not have found the essential elements of Capital Murder beyond a reasonable doubt. Therefore, the evidence is legally insufficient to sustain Appellant's conviction for Capital Murder.

POINT OF ERROR NO. 2

THE TRIAL COURT ERRED BY ALLOWING EVIDENCE OF AN EXTRANEIOUS OFFENSE

The trial court held a hearing outside the presence of the jury to consider the State's motion to allow the testimony of Ashleigh Wilson that she had been Appellant's parole officer in Beaumont, Texas. (R.R. Vol. 10 at 73-76) The State also contended that Appellant's parole status was admissible because Appellant was contesting the issue of identity which was an exception to the prohibition of using evidence of other crimes against a defendant. (R.R. Vol. 10 at 76) Appellant objected to Wilson's testimony that she had been his parole officer as more prejudicial than probative. (R.R. Vol. 10 at 74) The trial court overruled Appellant's objection to this testimony by stating that it was admissible for the purposes of identity. (R.R. Vol. 10 at 76) The trial court had previously rule that the prosecutor could ask Detective Clark that she found out that Wilson had worked as a parole officer, but prohibited the prosecutor from asking Wilson if she had been Appellant's parole officer. (R.R. Vol. 8 at 157-171)

Appellant contends that Wilson's testimony that she had been his parole officer was more prejudicial than probative because evidence of Appellant's status as a parole was 1) improper impeachment of a felony conviction, 2) not relevant because it was not a similar crime, and 3) status evidence is barred.

Evidence of extraneous offenses or bad acts that a defendant may have committed normally cannot be introduced to show that the defendant acted in conformity with his asserted criminal nature and therefore committed the crime for which he is on trial. **Montgomery v. State**, 810 S.W. 2d 372, 386 (Tex. Crim. App. 1990) Rule 404(b) of the Texas Rules of Evidence provides that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident...." **Rule 404(b) Tex. Rules of Evid.** (West 2024)

Rule 403 of the Texas Rules of Evidence provides that even if the evidence is relevant, the court may exclude the evidence if its probative value is substantially outweighed by the danger of unfair prejudice to the

defendant. “The general rule is that the defendant is to be tried only for the offense charged, not for any other crimes or for being a criminal generally. However, evidence of extraneous acts of misconduct may be admissible if (1) the uncharged act is relevant to a material issue in the case, and (2) the probative value of that evidence is not significantly outweighed by its prejudicial effect.” **Segundo v. State**, 270 S.W.3d 79, 87 (Tex. Crim. App. 2008) We review the decision to admit evidence of other crimes, wrongs, or acts under an abuse of discretion standard of appellate review. **Martinez v. State**, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010) “If there are sufficient common distinguishing characteristics between the extraneous offense and the charged offense such that the probative value of the evidence outweighs its prejudicial effect, the court may admit the evidence.” **Thomas v. State**, 126 S.W.3d 138, 142 (Tex. App. – Houston [1st Dist.] 2003, pet. ref’d)

APPELLANT’S PRIOR FELONY CONVICTION

Rule 609(a) of the Texas Rules of Evidence provides that a defendant can be impeached with evidence of a conviction for a felony or a crime of moral turpitude if he testifies at trial. **Rule 609(a) Tex. Rules of Evid.** (West 2024) However, Appellant never testified at trial to

subject himself directly to evidence of impeachment proffered by the prosecutor. Instead, the prosecutor sought to indirectly impeach Appellant with evidence of a prior felony conviction by having Wilson testify that she was Appellant's parole officer. While Wilson did not testify about the specific felony for which he was paroled, her testimony that she was his parole officer brought before the jury evidence of Appellant's prior felony conviction without having to follow the impeachment requirements in Rule 609 of the Texas Rules of Evidence.

NO EVIDENCE THAT FELONY CONVICTION SIMILAR TO MURDER

If the issue of identity is raised, then Rule 404(b) permits the introduction of extraneous offenses that are relevant to identity.

Segundo, at 86. "One of the main rationales for admitting extraneous-offense evidence is to prove the identity of the offender. Here, the theory of relevancy is usually that of *modus operandi* in which the pattern and characteristics of the charged crime and the uncharged misconduct are so distinctively similar that they constitute a "signature."

Segundo, at 88. In this case, no evidence of Appellant prior conviction for which he was on parole was admitted so the trial court had no

extraneous offense to compare to the current capital murder case to determine if both were similar for the purpose of proving identity.

STATUS EVIDENCE IS BARRED

Appellant contends that evidence that he was a parolee was highly inflammatory character evidence likely to cause an individual to be convicted for being a bad person apart from other evidence presented at trial. The Austin Court of Appeals reversed a robbery conviction and held that evidence of Appellant's gang membership was highly prejudicial and failed to show similarity to the charged offense of robbery to be admitted for the purpose of identifying the defendant as the robber. **Galvez v. State**, 962 S.W.2d 203, 205 (Tex. App. - Austin 1998, pet. ref'd) The Court in Galvez also rejected the State's contention that evidence of gang membership is not an extraneous offense which is subject to the restrictions of Rule 404 by ruling that Rule 404 bars such "status" evidence to prove that the accused acted in conformity with the character traits presented. **Galvez**, at 205. Appellant contends that evidence of his parole is "status" evidence just like the evidence of gang membership in Galvez. By admitting evidence

of his parole status, the trial court allowed evidence of bad character to distract the jury from considering whether he was guilty of murder.

HARM ANALYSIS

The specter of Appellant's parole status was highly prejudicial to Appellant and was so harmful and influential to the jury that it affected a substantial right to a fair trial and directly contributed to the conviction of Capital Murder under Tex. Rule of App. Proc. 44.2 when the only evidence pointing to Appellant's guilt was the testimony of people who made an identification from viewing a video. By allowing Wilson to testify that she had been Appellant's parole officer, the trial court guaranteed that the jury knew that Appellant had been to prison without Appellant having to take the witness stand to testify in his own defense. Appellant asserts that in the eyes of the jury the burden of proof shifted from the State to the Defense to counteract the fact that he had a felony conviction so that he no longer had a presumption of innocence. The stain of his past so corrupted the jury that he failed to receive a fair trial.

The trial court erred in admitting testimony from Wilson that she was his parole officer. Therefore, the court abused its discretion by allowing this prejudicial evidence to be admitted.

POINT OF ERROR NO. 3

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO DISMISS BASED ON SPEEDY TRIAL VIOLATIONS

Appellant contends that the trial court erred by denying his motion to dismiss based on the failure to have a speedy trial. On July 14, 2022, Capital Murder charges were filed against Appellant, on July 18, 2022, Appellant was arrested in Beaumont before being transferred to the Harris County Jail on July 22, 2022, on October 17, 2022 Appellant was indicted for Capital Murder, and finally on April 26, 2024 his jury trial began.

Between the date of indictment and the date of trial, Appellant asserted his right to a Speedy Trial on the following occasions:

- 1) 12/19/22 - Defendant's Motion For Speedy Trial (TR at 91)
- 2) 3/13/23 – Defendant's Objection To Reset (TR at 100)
- 3) 4/20/23 – Defendant's Second Objection To Reset (TR at 115)
- 4) 6/16/23 – Defendant's Motion To Dismiss For Speedy Trial Violations (TR at 122)
- 5) 8/23/23 – Memorandum Of Law In Support Of Defendant's Motion To Dismiss For Speedy Trial Violations (TR at 136)
- 6) 8/25/23 – Defendant's Third Objection To Reset (TR at 215)

7) 10/30/23 - Defendant's Supplemental Motion To Dismiss For Speedy Trial Violations (TR at 226)

8) 11/3/23 - Defendant's Fourth Objection To Reset (TR at 240)

The trial court denied Appellant's request for a Speedy Trial on April 20, 2023 and August 25, 2023. (R.R. Vol. 2 at 7 & R.R. Vol. 3 at 10) The trial court denied Appellant's motion to dismiss for Speedy Trial violations on November 29, 2023. (R.R. Vol. 4 at 10)

"In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law,....

U.S. Constitution, Amend. VI

Section 10 of Article I of the Texas Constitution guarantees the accused in all criminal prosecutions the right to a speedy trial. The United State Supreme Court identified 4 factors as part of a balancing test to determine if the defendant's right to a speedy trial has been violated: 1) length of delay, 2) the reason for the delay, 3) the defendant's assertion of his right, and 4) the prejudice to the defendant.

Barker v. Wingo, 407 U.S. 514, 530 (1972) In **Barker**, the Court identified three interests of the defendant which the speedy trial right

was designed to protect concerning the factor of prejudice to the defendant: (1) to prevent oppressive pretrial incarceration, 2) to minimize anxiety and concern of the accused, and 3) to limit the possibility that the defense will be impaired. **Barker**, at 532.

The Texas Court of Criminal Appeals applied the 4 factors set out in **Barker** and reversed a DWI conviction that took 4 years to get to trial by holding that a 4-year delay in prosecuting the case denied the defendant his right to a speedy trial even though he was not incarcerated during the 4 years leading to trial. **Zamorano v. State**, 84 S.W. 3d 643 (Tex. Crim. App. 2002)

Appellant contends that by balancing the 4 factors set out by the United States Supreme Court in **Barker** that he was denied a speedy trial, and the trial court erred by not dismissing his Capital Murder charge for the violation of his right to a speedy trial.

LENGTH OF DELAY

Twenty-three months passed from Appellant's arrest in Beaumont until the start of his jury trial. While Appellant acknowledges that 2-year pretrial delay was a shorter period of time than the 4-year delay which the Court in **Zamorano** found to be unjust, Appellant contends that his 2

year wait was equally unjust to him since he was incarcerated for the entire period of leading up to trial.

REASON FOR THE DELAY

On April 20, 2023, the prosecutor requested a continuance because she was waiting on DNA test results and cell phone evidence. (R.R. Vol. 2 at 6) On August 25, 2023, the prosecutor requested a continuance because she was still waiting on DNA test results and ballistic testing results. (R.R. Vol. 3 at 7) Finally, on November 29, 2023, the prosecutor requested a continuance because the ballistic testing had still not been completed. (R.R. Vol. 4 at 7)

Appellant contends that the prosecutor's request for a continuance on November 29, 2023 to give her more time to obtain ballistic testing results was not a sufficient reason to continue the case because the prosecutor knew that the murder weapon was never found so that no comparison testing could be performed to compare a weapon with the spent cartridges found at the crime scene or the fired bullet recovered from the deceased's body during the autopsy.

DEFENDANT'S ASSERTION OF HIS RIGHT

Appellant contends that he repeatedly asserted his right to a speedy trial beginning as early as December 19, 2022 after being incarcerated for 5 months and on 7 more occasions over the following year as previously set out in this brief. Appellant always asserted and never waived his right to a speedy trial. The requests for continuance came from the State and not from the defense.

PREJUDICE TO THE DEFENDANT

Appellant contends that he was prejudiced by the 2-year delay from his initial incarceration until the beginning of the trial. He asserts that his 2-year period of pretrial incarceration was oppressive because he was forced to wait in the county jail for a lengthy period of time because of a high bond which prevented him from being able to work and be with his family in preparation for his trial. In addition, this lengthy incarceration did not minimize but heightened his anxiety and concerns about preparing for a trial that could result in a lifetime prison sentence. Lastly, the 2-year pretrial incarceration impaired his ability to adequately assist his defense counsel in the preparation of his defense. The more time that passed from the date of his incarceration to the time of the trial

the more reduced his chances of finding and having available witnesses to testify on his behalf at trial.

In balancing the 4 **Barker** factors, Appellant contends that the lengthy 2-year delay was presumptively prejudicial, that the delay was the result of the State's negligence, that Appellant repeatedly asserted his right to a speedy trial, and finally the lengthy delay prejudiced Appellant in his defense.

Therefore, the trial court erred in denying Appellant's motion to dismiss based on Speedy Trial violations.

POINT OF ERROR NO. 4

THE TRIAL COURT ERRED BY FAILING TO EXCLUDE FACEBOOK PHOTOGRAPHS

Appellant objected to the admission of State Exhibits 185, 190-198 which were purported to be photographs of Appellant taken from Appellant's Facebook account as Hearsay and because the State failed to authenticate the photographs through the testimony of Detective Katie Clark because she was not the custodian of records for Facebook. (R.R. Vol. 8 at 185) The trial court overruled Appellant's objection. (R.R. Vol. 8 at 189)

The courts review a trial court's decision to admit or exclude evidence for an abuse of discretion. **Sheffield v. State**, 189 S.W.3d 782, 793 (Tex. Crim. App. 2006) The Texas Rules of Evidence defines hearsay as a statement other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted. **Tex. R. Evid. 801(d)** (West 2024) **Rule 802 of the Texas Rules of Evidence** provides that "[h]earsay is not admissible

except as provided by statute or these rules or by other rules prescribed pursuant to statutory authority.” (West 2024)

Rule 803(6) of the Texas Rules of Evidence provides that records of a regularly conducted activity are not excluded as hearsay if a custodian or other qualified witness testifies in court or executes an affidavit that complies with **Rule 902(10) of the Texas Rules of Evidence** to the following: 1) the record was made at or near the time by – or from information transmitted by – someone with knowledge, 2) the record was kept in the course of a regularly conducted business activity, and 3) making the record was a regular practice of that activity, and 4) the opponent fails to demonstrate that the source of information or the method of circumstances of preparation indicate a lack of trustworthiness.

In the present case, the State did not file the photographs of Appellant from his Facebook page with a business records affidavit signed by the custodian of the photographs employed by Facebook, but instead called Detective Clark to testify that she recognized Appellant from various photographs posted on Appellant’s Facebook page.

“To satisfy the requirements of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it to be.” **Tex. Rules Of Evid.** 901(a) (West 2024) Before being admitted into evidence, a photograph must ordinarily be shown to be a correct representation of the subject at a given time and the only identification or authentication required is that the offered evidence properly represents the person, object, or scene in question. **Delacerda v. State**, 425 S.W.3d 367, 393 (Tex. App. – Houston [1st Dist.] 2011, pet. ref’d) The proponent of photographs taken from a defendant’s social media page must show that there was sufficient circumstantial evidence to establish a prima facie case that a reasonable juror could have found that they were created and maintained by Appellant. **Tienda v. State**, 358 S.W.3d 633, 642 (Tex. Crim. App. 2012)

Appellant contends that the Court in **Tienda** affirmed the admissibility of photographs and messages from the defendant’s MySpace page because the prosecutor substantiated this evidence with the defendant’s MySpace Subscriber Report which listed his name, email address, and zip code to authenticate that the evidence originated from defendant’s MySpace account. In the current case, the

photographs contained only the name Nathan Nichols and no other identifying information to show that this was the defendant especially since Nathan Nichols is such a common name. Appellant contends that without additional identifying information, the State failed to provide sufficient circumstantial evidence to establish a prima facie case that these 10 photographs were created and maintained by Appellant.

These photographs should have been excluded as hearsay because Clark did not personally take photographs of Appellant and because she was not the custodian of records for these photographs. In fact, Detective Clark never testified that she had any knowledge of the accuracy and authenticity of the time stamp on the photographs to prove when the photographs were taken but only when posted on the Facebook page.

HARM ANALYSIS

The admission of these 10 photographs was highly prejudicial to Appellant and was so harmful and influential to the jury that it affected a substantial right to a fair trial and directly contributed to the conviction of Capital Murder under Tex. Rule of App. Proc. 44.2. Six witnesses identified Appellant as the shooter in the Nest video by claiming that the shooter was the same person shown in the Facebook photographs:

Clark, Smith, Simpson, Wilson, Thomas, and Nicotra. Without the Facebook photographs, Clark, Smith, Simpson, and Nicotra could not have identified Appellant as the shooter because they had never met Appellant before this investigation. Moreover, Wilson and Thomas, who both testified that they knew Appellant, would have been forced to make an identification of the shooter based solely on the grainy Nest video without the aid of the clearer Facebook photographs.

Because Detective Clark was not the custodian of records Appellant contends that the trial court erred in allowing this hearsay evidence from Detective Clark.

CONCLUSION

For the reasons stated, Appellant Nichols prays the Court to reverse and acquit or in the alternative to reverse and remand this cause for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Brief, as calculated under Texas Appellate Rule of Appellate Procedure 9.4, contains 10773 words as determined by the Word program used to prepare this document.

/s/ Crespin Michael Linton
Crespin Michael Linton

CERTIFICATE OF SERVICE

I do hereby certify that on this the 11th day of December 2024, a true and correct copy of the foregoing Appellant's Brief was served by E-service in compliance with Local Rule 4 of the Court of Appeals or was served in compliance with Article 9.5 of the Rules of Appellate Procedure delivered to the Assistant District Attorney of Harris County, Texas, 1201 Franklin, Suite 600 Houston, Texas 77002 at caird_jessica@dao.hctx.net.

/s/ Crespin Michael Linton
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