

NO. 01-24-00010-CR

**IN THE FIRST COURT OF APPEALS
HOUSTON, TEXAS**

FILED IN
1st COURT OF APPEALS
HOUSTON, TEXAS
9/30/2024 8:45:20 AM
DEBORAH M. YOUNG
Clerk of The Court

RONALD LEE DEROUEN,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

APPELLANT'S BRIEF

On Appeal from Cause No. 90645-CR
300th Judicial District Court of Brazoria County, Texas

Michael C. Diaz
State Bar No. 00793616
125 E. Cedar St., Ste C
Angleton, Texas 77515
Tel: (281) 489-2400
mjoeldiaz@sbcglobal.net
ATTORNEY FOR APPELLANT

ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

Pursuant to TEX. R. APP. P. Rule 38.1(a), appellant certifies that the following is a complete list of the parties to the final judgment and the names and addresses of counsel in the trial and on appeal:

APPELLANT: Ronald Lee Derouen

COUNSEL FOR APPELLANT: **Law Office of Michael Diaz**
Michael Diaz
125 E. Cedar St., Ste C
Angleton, TX 77515

COUNSEL FOR THE DEFENDANT:
Shawn McDonald & Phoebe Smith
77 Sugar Creek Center Boulevard, Suite 230
Sugar Land, TX 77478

COUNSEL FOR THE STATE OF TEXAS:
Brazoria County District Attorney's Office
Tom Selleck
111 East Locust, Room 408A
Angleton, TX 77515

COUNSEL FOR THE STATE OF TEXAS (TRIAL):
Brazoria County District Attorney's Office
Ciera Abernathy & David Tamez
111 East Locust, Room 408A
Angleton, TX 77515

TRIAL JUDGE: The Honorable Chad D. Bradshaw
Presiding Judge 300th District Court
Brazoria County, Texas

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests oral argument in this case. Pursuant to the TEX. R. APP. P. 9.4(g) and 38.1(e), Appellant requests oral argument to benefit this Court for the following reasons:

The evidence and testimony in this case is highly prejudicial to the Appellant and the circumstances in which this case was developed would be explained better if oral argument granted.

TABLE OF CONTENTS

IDENTITY OF PARTIES AND COUNSEL	ii
REQUEST FOR ORAL ARGUMENT	iii
TABLE OF CONTENTS.....	iv
INDEX OF AUTHORITIES.....	vi
STATEMENT OF THE CASE.....	1
STATEMENT OF ISSUES PRESENTED.....	1
1. <i>The trial court erred by allowing evidence of multiple instances of extraneous offenses that significantly harmed appellant in which any probative value was substantially outweighed by the undue prejudice.</i>	1
2. <i>The trial court erred and abused its discretion by admitting a surveillance video without proper authentication.</i>	1
STATEMENT OF FACTS	2
SUMMARY OF THE ARGUMENT	18
ARGUMENT	19
1. Appellant’s Point of Error 1	19
2. Appellant's Point of Error 2	34
CONCLUSION AND PRAYER FOR RELIEF	42
CERTIFICATE OF COMPLIANCE.....	43
CERTIFICATE OF SERVICE	44

INDEX OF AUTHORITIES

CASES:

<i>Barshaw v. State</i> , 342 S.W.3d 91 (Tex. Crim. App. 2011)	19
<i>Coble v. State</i> , 330 S.W.3d 253 (Tex. Crim. App. 2010)	19
<i>De La Paz v. State</i> , 279 S.W.3d 336 (Tex. Crim. App. 2009)	19
<i>Druery v. State</i> , 225 S.W.3d 491 (Tex. Crim. App. 2007)	36
<i>Fowler v. State</i> , 544 S.W.3d 844 (Tex. Crim. App. 2018)	35, 36
<i>Fowler v. State</i> , No. 06-16-000038-CR *10 (Tex. App.—Texarkana) (2018), on remand	30, 41
<i>Guevara v. State</i> , NO. 14-18-00144-CR *3 (Tex. App.—Houston [14th] 2020), not published	35
<i>King v. State</i> , 953 S.W.2d 266 (Tex. Crim. App. 1997)	35
<i>Montgomery v. State</i> , 810 S.W.2d 372 (Tex. Crim. App. 1990), on reh'g (1991)	20, 30
<i>Robinson v. State</i> , 236 S.W.3d 260 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd)	19
<i>Taylor v. State</i> , 268 S.W.3d 571 (Tex. Crim. App. 2008)	19
<i>Tienda v. State</i> , 358 S.W.3d 633 (Tex. Crim. App. 2012)	27, 36
<i>Tillman v. State</i> , 354 S.W.3d 425 (Tex. Crim. App. 2011)	19
<i>Walker v. State</i> , 321 S.W.3d 18 (Tex. App.—Houston [1st Dist.] 2009, pet. dismiss'd)	19

CODES, RULES, AND CONSTITUTIONAL PROVISIONS:

Tex. R. Evid. 401	21
Tex. R. Evid. 403	21
Tex. R. Evid. 404	21
Tex. R. Evid. 901	35
Tex. R. Evid. 901(b)(4).....	35
TEX. R. APP. P. 44.2(b).....	19, 35

STATEMENT OF THE CASE

On August 6, 2020, Ronald Lee Derouen, Appellant, was indicted for the felony offense of Aggravated Robbery. (CR 1 at 9). The offense was alleged to have been committed on or about February 5, 2020. (CR 1 at 9). On December 11, 2023, Appellant plead not guilty to the indictment. (RR 3 at 7). On December 14, 2023, the Appellant was found not guilty of the offense of Aggravated Robbery, but found guilty of the lesser included of Robbery, by the Jury. (RR 6 at 49). On December 14, 2023, Appellant was assessed a twenty-year (20) sentence, in the Texas Department of Criminal Justice-Institutional Division, by the Jury. (RR 7 at 32).

On December 14, 2023, Appellant timely filed his notice of appeal. (CR 1 at 250).

ISSUES PRESENTED

Point of Error One: THE TRIAL COURT ERRED BY ALLOWING EVIDENCE OF MULTIPLE INSTANCES OF EXTRANEIOUS OFFENSES THAT SIGNIFICANTLY HARMED APPELLANT IN WHICH ANY PROBATIVE VALUE WAS SUBSTANTIALLY OUTWEIGHED BY THE UNDUE PREJUDICE.

Point of Error Two: THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY ADMITTING A SURVEILLANCE VIDEO WITHOUT PROPER AUTHENTICATION.

STATEMENT OF FACTS

Extraneous Pre-trial Hearing

Steven Hooper

Steven Hooper (“Hooper”) is a robbery detective with the Houston Police Department assigned to a special task force named Violent Offender Squad in February of 2020. (RR 4 at 7-8). Hooper began investigating a string of robberies commencing on December 9, 2019, and ending with a Houston Police Department arrest case on February 7, 2020. (RR 4 at 8 and 49). Hooper described a series of 28 robberies, including suspect detail, he had investigated. (RR 4 at 8-49). Hooper testified that a vehicle developed with a license plate, when the license plate information was ran, it came back to the Appellant, Ronald DeRouen. (RR 4 at 50). Hooper testified that when he received the suspect’s name, he looked up the description of the defendant and there were similar aspects of some of the reports of the previous robberies. (RR 4 at 51-52). For instance, the height, weight, age in some of them were similar, and throughout the investigation of the robberies he noticed a modus operandi. (RR 4 at 52). After associating the vehicle with the Appellant, on February 6th and 7th, officers with the Tactical Surveillance Team started doing rolling surveillance of that vehicle. (RR 4 at 51). On February 6, 2020, officers doing the rolling surveillance following the vehicle, the black Maxima, to three different restaurants off of the East Freeway. (RR 4 at 54). In all three of those cases, the

driver of the vehicle appeared to them to be doing surveillance on the businesses, since he was pulling up in the parking lot, sitting there for a bit, then go to the next restaurant and do the same thing. (RR 4 at 54). The individual driving the vehicle drove back to the location on Beemer where the vehicle had been at the beginning of the surveillance. (RR 4 at 54).

On February 7, 2020, the same officers began the rolling surveillance again early that morning and watched the driver of the vehicle go to the same three restaurants as on February 6th. (RR 4 at 55). The driver ended up at a Burger King located at 10205 East Freeway, where he is observed exiting the vehicle and approaching the door of the business but finds it locked; then, goes to another, gets back in his vehicle, leaves and goes to one of the other businesses down the road, and then ends up back at the Burger King. (RR 4 at 55). At that point, the male exits the vehicle, approaches the door of the Burger King, finds it open, and enters the business. (RR 4 at 56). The male suspect approaches the employees and displays a handgun and forces them to the back of the business, taking money from the cash registers, as well as a bank bag from the safe and forces the employees to the cooler, then leaves the location. (RR 4 at 56). Houston Police Department officers had been positioned in a place where they were able to see that a robbery was occurring so once the suspect left, they took him into custody in his vehicle. (RR 4 at 56). Hooper testified that the suspect was wearing a gray hoodie with a blue Polo emblem, dark-

colored pants, black shoes with a silver placard or whatever on the tongue of the shoe. (RR 4 at 56). Hooper testified that the clothing description was similar to the previous three or four robberies that he had investigated. (RR 4 at 57). He listed the following incident had similar clothing, gray hoodie with blue emblem, and similar vehicle:

1. HPD incident 1308057 – Burger King on Longpoint;
2. 48134-20 – Jack in the Box on Dairy Ashford;
3. 157052-20 – Jack in the Box on Westheimer;
4. Burger King robbery occurring on February 7; and
5. The Charged case (Pearland) (RR 4 at 57).

Hooper testified that the shoes were collected during the investigation, and they matched the surveillance video, which he described as black shoes with a silver emblem on the top of the shoe. (RR 4 at 57-58). Hooper stated there were 18 cases in which a black Nissan Altima or similar vehicle was described as consistent with the investigation, in 12 robberies a plastic bag was being used during the robberies, and in 18 the suspect would force employees into a cooler or backroom. (RR 4 at 58). Later, Hooper testified that he did not break the cases down to separate the cooler from backroom. (RR 4 at 73). He continued by stating that in his 19 years of investigating robberies, the *modus operandi* stuck out as being unique in that it was not common that people were forced into freezers, nor was bringing a plastic bag for

just money. (RR 4 at 58). Hooper then testified to a number of discrepancies between the height and weight of the suspect between the first three cases he had investigated. (RR 4 at 62). Another case in which there was inconsistencies involved two black males rather than one. (RR 4 at 63). The identities and descriptions in the robbery investigations that Hooper had testified to have a range from the suspect being 5'7" to 6'5", 150 to 220 pounds. (RR 4 at 66). Hooper testified that the Appellant was arrested in a 2013 black Maxima, and many of the descriptions in the robberies that listed suspect as being in a Nissan Altima or an SUV were wrong. (RR 4 at 70). Hooper testified that he did not run a search warrant on the suspect's house to find the clothing in the residence that would match the description of clothing seen on the videos or described by witnesses. (RR 4 at 71-72). Appellant was charged in three cases in Harris County for Aggravated Robbery. (RR 4 at 74). When the cases were submitted Hooper knew that a BB gun was involved, and Appellant was arrested with it. (RR 4 at 75). Detective Hooper testified that the percentage of Aggravated Robbery cases that are male is in the upper 90th percentile; the percentage of black males in Aggravated Robbery cases is 70 to 80 percent range; the percentage of robbery cases involving the height range of 5'7" and 6'5" is close to 100 percent; the percentage of Robbery cases with the age between 20 and 55 is in the upper 90 percent; the percentage of an Aggravated Robbery cases using a handgun is between 70 and 80 percent; and lastly, that the percentage of Aggravated

Robbery cases with someone weighing between 150 and 220 pounds is at least 50 percent, if not more. (RR 4 at 81-82). Detective Hooper testified that he did not investigate the charged offense from February 5th but was given a report of that case along with a photo. (RR 4 at 82). Hooper testifies that on February 5, 2020, a lone male, 6', 150 to 180, wearing a gray Polo hoodie, black pants, dark shoes, mask with a black and white pattern, sunglasses, used a white plastic bag to open the door, and entered the Burger King business with a handgun, demanded money from the store, after receiving the money he ordered all of the employees to the freezer; the vehicle description is a dark-colored Nissan Altima, four-door. (RR 4 at 82-83). Hooper testified that this description and motus operandi was similar to the other string of robberies that he was investigating in that a plastic bag was used, it was a lone male, at a fast-food restaurant, almost exclusively in the morning. (RR 4 at 83).

The Trial Judge ruled that he was going to let in the three offenses in which the Appellant was convicted. (RR 4 at 106).

Guilt/Innocence Testimony

Gloria Valdez-Torres

Gloria Valdez ("Valdez") is the Burger King store manager for the location of 3503 East Broadway, Pearland, Texas, Brazoria County. (RR 4 at 126). On February 5, 2020, Valdez was working the morning shift with the cook, Ana Maribel Orellana. (RR 4 at 127). At around 6:30, she testified to thinking she saw a customer

coming from the front doors of her lobby wearing a grayish hoodie, mask, sunglasses, and black pants. (RR 4 at 128). Valdez could not see a face and testified that the person started walking towards the front register, once the light hit him, she saw him walking in and pulling a gun out of his hoodie pocket. (RR 4 at 128-129). The individual walked to the counter and said, "Give me the money", so she took him towards the back and headed towards the safe. (RR 4 at 129). On the way towards the safe, she tells Maribel that they were getting robbed, and the individual says, "follow her", Valdez did not turn around, she kept walking, and in the office she put in the numbers to the safe. (RR 4 at 130-131). When she opened the safe it contained quarters, dimes, nickels, and pennies, there was a top safe that required a key which she had to get from the front of the store. (RR 4 at 132-133). Valdez told the individual that she would need to go to the front, she started walking out and heard him say, "Stop there", when she turned around she heard the back door close. (RR 4 at 133). After Valdez pulled out the box for the second safe and said, "this is all we have", he told her to go to the cooler. (RR 4 at 134). Valdez recalls being in the cooler for a minute or two, then heard a noise, realizing she had the headset on so she asked if they could call 911, she was getting robbed. (RR 4 at 135). Valdez got out of the freezer, went to the office, checked the camera to see if he was still there, did not see anybody and she called 911 letting them know she had just been robbed. (RR 4 at 136). Valdez testified that when officers came in, then put yellow

tape up, and did not let anyone in, meanwhile she and Maribel were sitting down and doing the report. (RR 4 at 150).

Ana Maribel Orellana Debolanos

Ana Maribel Orellana Debolanos (“Maribel”) is a cook at Burger King in Pearland and testified using an interpreter. (RR 4 at 152-153). Maribel testified that she heard someone talking, but she does not speak English, then she saw him and her manager coming, and her manager said, “they’re robbing us”. (RR 4 at 155). Maribel described the person as having his face covered, and said it was “a white sweater with this thing like this” (indicating something that cannot be seen on the record), his face being covered and having a gun. (RR 4 at 155). Maribel testified that she walked where he told her to walk and he led them to the office, where he stood by the door, she stood to the side, and the manager was opening the box. (RR 4 at 156). Maribel testified that she did not understand what he told her manager because she does not speak English, but she saw the manager stand up leave and he followed her. (RR 4 at 157). Maribel testified that she stood there standing and when he told her to go (indicating) she went in front and then she went out of there, left, went crazy and pushed the door and left, escaping to the street, she ran, screamed, and hollered at the cars for them to stop, but nobody did. (RR 4 at 158). When she started to react, she heard her manager hollering at her to come back, once they were

together the police came. (RR 4 at 159). Maribel testified that an officer arrived to interpret for her and her statement was brief. (RR 4 at 161).

Michael Pace – Authentication of Surveillance Video

Peace Officer Michael Pace (“Pace”) was assigned to patrol on February 5, 2020, during the day shift, being from 6:00 a.m. to 6:00 p.m. (RR 4 at 170-171). Officer Pace received a call for service around 6:30 a.m. for an armed robbery that had taken place at Burger King in the 3500-block of Broadway, Brazoria County, Texas. (RR 4 at 171). Pace interviewed Valdez and learned that in the morning a man had gone to the Burger King, pulled out a handgun, demanded money from Valdez, took her into the office, had her open the safe, take money out, and then took Valdez to the freezer to leave her in there before he left the scene. (RR 4 at 172-173). After securing the scene, Pace was advised by Valdez that Burger King has surveillance, so he went back to review the surveillance, and retrieved a copy of the video. (RR 4 at 174). Pace points out, seeing on Channel 13 of the surveillance, a dark-colored, four-door vehicle pulling into the parking lot which he describes as a Nissan, possibly an Altima, and the Suspect getting out of that vehicle. (RR 4 at 184-185). On channel 5 of the video, Officer Pace states that he sees the Suspect entering the store grabbing at his waistband, with no part of their face being visible, then going over the counter. (RR 4 at 182). Through the use of the video, Pace describes seeing the Suspect wearing a gray hoodie, brandishing a black semiautomatic pistol,

and having a white bag in his hand. (RR 4 at 178-179). Pace testifies that through his 22 years of police experience he can look at the gun and tell it is a semiautomatic gun. (RR 4 at 195). Then after being pointed out that Pace did not actually examine the gun, he states “for the purposes of an armed robbery, the common person would assume that that is a real firearm. Therefore, by the look of that firearm, that makes that, for the essence of reporting, a semiautomatic firearm.” (RR 4 at 196). Additionally, Pace describes the Suspect’s shoes being black and from another camera angle there being a white emblem on the Suspect’s shoe. (RR 4 at 180 & 183). Pace testifies to seeing the Suspect, on video, take money from Valdez and put his weapon away. (RR 4 at 180-181). On Channel 13, Pace describes the Suspect entering the vehicle, starting it, leaving the scene, and observes no license plate on the front or rear of the vehicle. (RR 4 at 186).

Crystal Rodriguez

Crystal Rodriguez, a crime scene investigator with the City of Pearland testified that on February 5, 2020 she got a callout at 6:50 a.m. and was in route to the dispatch location at approximately 7:25 a.m., and upon arrival at approximately 7:35 a.m. she observed several patrol vehicles in front of a Burger King, and the front entrance being sealed off with yellow crime scene tape. (RR 4 at 197-199 & 205). Sergeant Walker briefed her on the incident and after she began taking exterior photographs of the building, walked into the establishment and continued to

document the scene through photography, in addition to noticing any kind of physical evidence that would need further processing and collection. (RR 4 at 199). Through her testimony, the State was able to admit scene photographs. (RR 4 at 200). One picture documented the physical address of the location, another the front entrance, and others were the entirety of the inside of the restaurant, Rodriguez testified that her attention was drawn to the front entrance door, focusing inside the kitchen area, which was accessible to the employees, and the office where the money safe was kept. (RR 4 at 201-202). Rodriguez testified that she documented the path of travel she took in order to reach the office, a set of keys with a red lanyard that was on top of a steel-top tabletop inside the kitchen area, the scene she saw once she approached the office where the money safe was kept, and the interior of the safe. (RR 4 at 202-203). During the processing of the scene, Rodriguez attempted to locate developed latent prints on several areas of the establishment, including several items that were found within the money safe and outside of the money safe. (RR 4 at 203). Rodriguez described processing items with a chemical called ninhydrin, and in this case was able to find one print developed on the cardboard box but was not able to connect that latent print with anyone. (RR 4 at 205). Rodriguez testified that on February 13 she transported the developed ninhydrin print to Brazoria County Sheriff's Office in order to be analyzed by the latent print examiner. (RR 4 at 206). Rodriguez testified that because she is not a certified latent print examiner she is

trained to process and lift prints, but if she were to lift a print, she would have to take the print to someone else to compare. (RR 4 at 209). To get information on what items she would need to be fingerprinting to try to identify a suspect she would get with the primary responding officer, which could be the sergeant on scene or the case detective which would discuss what happened in the scene; this information can be based on witness statements, surveillance videos, first responding officer's observations. (RR 4 at 210). Rodriguez testified that Sergeant Walker briefed her on the scene upon arrival, their conversation was not long, and she did not learn about items that could be of interest in lifting prints, she had learned that the subject forced a female employee into opening the safe. (RR 4 at 211). Officer Pace was the case officer who told her which items he would like to have fingerprinted. (RR 4 at 212). Rodriguez stated that she collected a cardboard box that was located on top of the countertop for additional processing in a more controlled environment, however, no prints developed. (RR 4 at 234). Rodriguez made a determination on her own to lift prints from certain items, she processed many items, but did not get a lift on the prints, except for a blue box that depicted a hundred dollars in nickels. (RR 4 at 216-223). Rodriguez took the print to the sheriff's department, she transferred the latent prints to the latent print examiner, the examiner analyzed the print to see if it was of evidentiary quality in order to be put into a database, which means there has to be significant print for the computer to be able to identify it, and the print Rodriguez

lifted was not attempted to be matched because it did not have sufficient evidentiary quality. (RR 4 at 239). Rodriguez testified that at the time she had been on scene, she had not seen the surveillance video. (RR 4 at 246). She testified that to collect touch DNA, a sterile cotton swab is used, the swab is hydrated for dry evidence, and the swab is placed over the surface of the item to collect any possible touch DNA. (RR 4 at 237-238). Rodriguez testified that the time it takes to collect touch DNA depends on the surface area, and how large or small the item is, and whether it is dry or wet. (RR 4 at 238). She stated that she did not attempt to collect touch DNA on a few items she knew the Suspect had touched. (RR 4 at 235). The State showed her State's exhibit 4, to which she stated she had never seen the video before and after she stated that the suspect did not touch anything in the snippet she saw (RR 4 at 243), he did not touch the door (RR 4 at 244), he touched the boxes with a bag (RR 4 at 244); After she watched the video, Rodriguez testified that the suspect did not touch anything with his bare hands. (RR 4 at 246).

Dalton Webb

Dalton Webb ("Webb") an officer with the Houston Police Department assigned to a Violent Crime Task Force was involved in the arrest of Ronald DeRouen. (RR 5 at 8-9). Webb testified to having witnessed Appellant committing Aggravated Robbery. (RR 5 at 10). Webb testified to having conducted surveillance on the vehicle, observed it park in the parking lot and the single occupant of the vehicle

exit the vehicle and enter the Burger King. (RR 5 at 11). Via radio Webb received a play-by-play of what was going on inside the business, that a robbery was taking place. (RR 5 at 12). After the robbery was completed Webb testified that the Appellant exited the Burger King, walked back to his vehicle, and his unit did a vehicle containment technique where they boxed in the vehicle to avoid car chases and avoid putting any of the public in danger. (RR 5 at 13). Webb testified that he was wearing video recording equipment which captured both the initial takedown of the suspect and the actions that they took afterwards. (RR 5 at 14). The State offered video labeled Exhibit 6, which trial counsel objected to and the Court overruled. (RR 5 at 15). The video and what Webb testified took place on February 7, 2020 in Harris County. (RR 5 at 16). The video depicts a Burger King and shows the suspect which turned out to be the Appellant. (RR 5 at 19). Webb was tasked with inventorying the vehicle, and as part of the inventory he collected a gun and turned it into the robbery investigator and tagged into Houston Police Department's property room. (RR 5 at 19-20). Webb brought the gun to trial and the State marked it as exhibit 7 and it was admitted. (RR 5 at 20). Webb testified to having initially believed the gun to be a Beretta semiautomatic handgun. (RR 5 at 22). Webb testified that the gun was an airsoft gun, and in his professional experience he had seen aggravated robbery suspects or robbery suspects use them in the past. (RR 5 at 36-37). He testified that BB guns are capable of causing death or serious bodily injury. (RR 5 at 38). In his

10-year career he had never seen someone that had suffered serious bodily injury as a result of a BB gunshot. (RR 5 at 47). Webb testified at the time he found the gun it could not fire a BB because there was no BB with the gun. (RR 5 at 43). He stated that he cleared the gun to make sure it was safe, took the magazine out to make sure there was nothing in the chamber, then racked the slide to make sure there was not one in the chamber, then pulled the trigger to clear it. (RR 5 at 38). Webb testified that he never test fired the gun, only function tested it. (RR 5 at 43).

Khanh Tran

Officer Khanh Tran (“Tran”), a TAC and gang investigator with the Houston Police Department, testified to being assigned to assist a task force operation for an aggravated robbery suspect on February 7, 2020. (RR 5 at 49). Tran testified that when he got to the Burger King off of I-10 the suspect was not in custody at that time, they were putting hands on the suspect as he rolled up, they were getting him out of the vehicle. (RR 5 at 50). Tran identified the Appellant as the person who had been arrested on February 7th. (RR 5 at 50). Tran testified as to receiving the gun that had been used and the articles of clothing, including shoes, that Appellant had been wearing. (RR 5 at 51, 53, and 54). The State used Exhibit 4 to question Tran, which Tran testified that, through his visual comparison, the articles of clothing that the Suspect in Exhibit 4 was wearing on the top of his body matched those of Exhibit

8, as well as Exhibit 12, which was the gun, and Exhibit 10, which was the shoes. (RR 5 at 54-57).

James Minshe

James Minshe (“Minshe”), a crime scene investigator for the Brazoria County Sheriff’s Office, testified to the uniqueness of fingerprints. (RR 5 at 64). Minshe took a sample from the Appellant and compared them to the unknown fingerprints in States Exhibit 18 and 19. (RR 5 at 67 and 68). Trial Counsel for Appellant renewed his previous objections based on prejudicial value 403, and 404(b), extraneous offenses, the Trial Court overruled the objections. (RR 5 at 69). Minshe’s opinion was that the three prints that were compared in the packet, Exhibit 18 and 19 (Judgement and Sentencing), the first and third print were found to be a match, and the second print was found to have insufficient detail to compare. (RR 5 at 69). The trial court admitted Exhibit 18 and 19 over the objection based on 404 and 403(b) of Appellant’s trial counsel. (RR 5 at 78).

Steven Hooper

Steven Hooper (“Hooper”) an officer with the Houston Police Department’s robbery division was assigned to the robbery division in February 2020, in his assignment he is not an initial responding officer. (RR 5 at 80 and 83). Hooper testified that on February 1, 2020 he was assigned a case for aggravated robbery for a Jack in the Box at 901 Dairy Ashford Road in west Houston, Harris county. (RR 5

at 84). He described the robbery as being at 6:28 a.m. Hooper testified to having investigated robberies on February 1, 3, and 7, of 2020, and being aware of a robbery that occurred in Pearland at Burger King on February 5, 2020. (RR 5 at 123). Using Exhibit 4, the video from the Robbery on February 5, 2020, Hooper testified that the Suspect appeared to have a handgun, the shoes the suspect was wearing were black and appeared to have a silver placard or something on top of the shoe. (RR 5 at 124). Hooper testified that the shoes from the video appeared to be the same shoes that match State's Exhibit 10 (February 7, 2020, robbery). (RR 5 at 124-125). Hooper compared the mask the suspect is wearing in State's Exhibit 4 with what Appellant wore in State's Exhibit 12, which appeared to be a blue and white mask and stated they appeared to be the same pieces of cloth in both exhibits. (RR 5 at 125). Hooper testifies to seeing a gray hoodie with a Polo emblem on State's exhibit 4 from the aggravated robbery occurring on February 5, 2020 and states that it appears to be the same hoodie worn in State's exhibit 8, which was from the hoodie collected on February 7, 2020. (RR 5 at 126-127). Hooper testified that in his 19 years of experience it is common that someone cover their face and their whole body in an attempt to not get caught, but the suspect with a plastic bag is rare because in most robberies they will stick cash in pockets or something like that. (RR 5 at 128-129). Hooper testified to the case numbers and dates for robberies on Exhibits 26, 27, and 28; he told the jury that Exhibit 26 was for the State of Texas versus Ronald

DeRouen, the agency was Houston Police Department, arrest date on February 7, 2020, charge of robbery, which he compared to State's Exhibit 19 which he stated was the judgment of conviction by court with a guilty plea to robbery by threats for the offense dated February 7, 2020. (RR 5 at 132-134). Hooper also testified to States Exhibit 28 which was State of Texas versus Ronald DeRouen, charge of robbery, date of offense February 1, 2020, when compared to State's Exhibit 19, he stated it was also Ronald DeRouen with a guilty plea to the offense of robbery by threats on February 1, 2020. (RR 5 at 134-135). Hooper also testified that Appellant plead guilty to robbery by threats for the date of offense on February 3, 2020. (RR 5 at 136). Hooper testified to listening to 911 calls and stated that Appellant had stated that he was at the Burger King when responding to a female about where he was at when he was arrested. (RR 5 at 141-142). Hooper stated this conversation was consistent with Appellants arrest on February 7, 2020. (RR 5 at 142).

SUMMARY OF THE ARGUMENT

The trial court erred by allowing evidence of multiple instances of extraneous offenses that significantly harmed appellant in which any probative value was substantially outweighed by the undue prejudice.

The trial court erred and abused its discretion by admitting a surveillance video without proper authentication.

ARGUMENT AND AUTHORITIES

I. APPELLANT'S POINT OF ERROR ONE:

THE TRIAL COURT ERRED BY ALLOWING EVIDENCE OF MULTIPLE INSTANCES OF EXTRANEOUS OFFENSES THAT SIGNIFICANTLY HARMED APPELLANT IN WHICH ANY PROBATIVE VALUE WAS SUBSTANTIALLY OUTWEIGHED BY THE UNDUE PREJUDICE.

Standard Of Review

This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011); *Walker v. State*, 321 S.W.3d 18, 22 (Tex. App.—Houston [1st Dist.] 2009, pet. dism'd). A trial court abuses its discretion when its decision is “so clearly wrong as to lie outside the zone within which reasonable people might disagree.” *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008). Generally, the erroneous admission of evidence is nonconstitutional error. *Coble v. State*, 330 S.W.3d 253, 280 (Tex. Crim. App. 2010); *Robinson v. State*, 236 S.W.3d 260, 269 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd). Under Rule 44.2, this Court must disregard “[a]ny [non-constitutional] error . . . that does not affect substantial rights.” TEX. R. APP. P. 44.2(b); *Barshaw v. State*, 342 S.W.3d 91, 93–94 (Tex. Crim. App. 2011). This Court has upheld a trial court's evidentiary ruling if it was correct on any theory of law applicable to the case. *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009). However, this does not mean that the decision is not subject to

meaningful review. The Court of Criminal Appeals elaborated on the meaning of this standard of review in *Montgomery v. State*, 810 S.W.2d 372, 392–93 (Tex. Crim. App. 1990), on reh'g (1991), holding the following: “Therefore we hold that where relevant criteria, viewed as objectively as possible, lead to the conclusion that the danger of unfair prejudice substantially outweighed the probative value of the proffered evidence, the appellate court should declare that the trial court erred in failing to exclude it. Relevant criteria gleaned from the authorities include, inter alia, that the ultimate issue was not seriously contested by the opponent; that the State had other convincing evidence to establish the ultimate issue to which the extraneous misconduct was relevant; that the probative value of the misconduct evidence was not, either alone or in combination with other evidence, particularly compelling; that the misconduct was of such a nature that a jury instruction to disregard it for any but its proffered purpose would not likely have been efficacious. Accordingly, when the record reveals one or more such relevant criteria reasonably conducing to a risk that the probative value of the tendered evidence is substantially outweighed by unfair prejudice, then an appellate court should conclude that the trial court acted irrationally in failing to exclude it, and thus abused its discretion. The trial court has no ‘right to be ‘wrong’ if that means to admit evidence which appears to the appellate court, affording all due deference to the trial court's decision, nevertheless to be substantially more prejudicial than probative.

Texas Rules of Evidence Rule 401. Test for Relevant Evidence

Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.

Texas Rules of Evidence Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, or Other Reason

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence.

Texas Rules of Evidence Rule 404. Character Evidence; Crimes or Other Acts

(b) Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses; Notice in Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On timely request by a

defendant in a criminal case, the prosecutor must provide reasonable notice before trial that the prosecution intends to introduce such evidence—other than that arising in the same transaction—in its case-in-chief.

EXTRANEOUS OFFENSES

During a hearing outside the presence of the jury, the State attempted to introduce 27 instances of extraneous offenses, all robberies, allegedly committed by the Appellant. Detective Steven Hooper, with the Houston Police Department, testified to a string of robberies that occurred in the Houston area, some in the southeast part of Houston. The first two occurring on December 9, 2019. The last occurred on February 7, 2020. After argument, the trial court ruled that three of the 27 robberies that occurred in *Harris County* were admissible. The three that were ruled admissible were three robberies in which the Appellant pled guilty to the offense.

After testimony and argument from both sides. The Court ruled as follows:

“**THE COURT:** Well, I don't intend to -- I'm not going to let them all in. I think that's just inviting unnecessary error. I mean, it's just -- I'm not going to do it. Okay. So, the -- so, the one that he was -- the one that he was convicted -- so, one of them he was convicted and the description of the vehicle was a gray Nissan; however, it also contained pushing the employees to the back and the bag that was brought. **MS. ABERNATHY:** Yes, sir. **THE COURT:** So, I'm going to allow

those offenses. **MS. ABERNATHY:** Those three? **THE COURT:** Those three. With regard to 403 weighing, I find that the -- that the evidence that has been presented and its necessity for the purposes of identification, at least at this point -- that's what I'm finding -- that that probative value outweighs any prejudicial effect that the evidence could have on the jury. Now, just bear in mind, opening statements are not -- is not evidence. So, as -- who is going to be your first witness? Or do you not want to say? **MS. ABERNATHY:** The victims. **THE COURT:** Okay. **MS. ABERNATHY:** They are here. **THE COURT:** I think it's going to be difficult for the Court to weigh 403 and to weigh the effect of the extraneous offenses until the case really develops. But at this point I'm going to allow you to at least mention in your opening statements those ones that I just mentioned, those offenses, but not the others at this time. At this time I'll make that finding with regard to 403. If after some evidence is presented and you go to admit it -- Mr. McDonald, State goes to admit those issues actually into evidence, if you'll let -- let us know that that is what you're going to do, you can make another objection, if you would like, and I can reconsider my ruling. But -- (RR 4 at 106-107).

FINGERPRINTS/JUDGEMENTS AND SENTENCES

DIRECT EXAMINATION BY MS. ABERNATHY TO WITNESS

JAMES MINSHEW:

Q. (BY **MS. ABERNATHY**) I am showing you what has been marked for identification purposes as State's Exhibit 18. Do you recognize this? A. Yes. Q. And what is this? **MR. MCDONALD:** Judge, I don't know what she's talking about. So, I don't know -- this is the known? **MS. ABERNATHY:** Yes. **MR. MCDONALD:** Okay. I'm good. A. This is fingerprints, the -- the sample that I took this morning. Q. (BY **MS. ABERNATHY**) And how do you identify this? A. I have signed it, and I also had the gentleman sign it after I took his prints. **MS. ABERNATHY:** Tender and offer State's Exhibit 18. (Discussion between counsel.) Q. (BY **MS. ABERNATHY**) So, did you have an unknown to compare this known to? A. Yes. Q. Okay. And is that the documents in State's Exhibit 19? A. Yes. Q. And so, were you able to compare the known to the unknown in State's 18 to 19? A. Yes. Q. And did you come to an opinion? A. Yes. Q. And was that opinion verified by two others as per y'all's standard operating procedures? A. Yes. Q. And what was that opinion? **MR. MCDONALD:** Judge, I'm going to object. I'm going to renew my previous objections that we had outside the presence of the jury. I'll renew this is 403 objection to prejudicial value, as well as 404(b) extraneous offenses, Judge. **THE COURT:** Thank you. Those objections will be overruled. (RR 5 at 67-69).

THE COURT: All right. Record will reflect the jury is outside of the courtroom. The purpose is for Ms. Abernathy to ask some more questions with regard to the exhibits for foundation purposes. You may proceed. **MS.**

ABERNATHY: May I approach the witness again, Your Honor. **THE COURT:**
You may.

VOIR DIRE EXAMINATION BY MS. ABERNATHY:

Q. So, going back to State's Exhibit 19, you stated that y'all were able to identify the prints on -- or the first and third print as being a match to the known print. Right? A. Yes. Q. And that's the print of the defendant? Q. Do you see what the three prints relate to? **MR. MCDONALD:** Judge, just a second. I'm -- my concern is for appellate reasons I think she has all three judgments as the same exhibit. **MS. ABERNATHY:** It's a pen packet, yes. **MR. MCDONALD:** Are they judgments from Harris County? **MS. ABERNATHY:** They are. But because -- **MR. MCDONALD:** Can we separate them into different? **MS. ABERNATHY:** Sure. **MR. TAMEZ:** It's a single document. **MS. ABERNATHY:** Right. **MR. MCDONALD:** Oh, I thought they were just separate. It's a judgment with a print and a judgment and a print. **MS. ABERNATHY:** No, it's a pen packet with the three judgments. **MR. MCDONALD:** Can we separate those into three additional exhibits, understanding it's under the same pen packet? For appellate purposes, I -- **MS. ABERNATHY:** I can do them as A, B, and C. **MR. MCDONALD:** That's perfect, yeah, so we can differentiate the three rather than talking about one, two, and three. I just want a way to identify them specifically. **MS. ABERNATHY:** I can always identify them with cause number. **MR. MCDONALD:** That's fine, too.

If we can do that. Something where we know which one belongs to which one. That's great. **MS. ABERNATHY:** Okay. May I continue, Your Honor? **THE COURT:** You may. Q. (BY **MS. ABERNATHY**) So, we have the prints on one and three being related to the cause numbers -- A. May I? Q. Yes. A. I have the cause numbers on here. Q. Okay. The two that you identified as a match to the defendant, can you please state what those cause numbers are? A. Cause No. 166373101010. Q. And then for the third print? A. 166935901010. Q. And then the print for the second one that you were unable -- or that did not have enough detail? A. 166422201010. Q. Okay. And for looking at all three of these, do these appear to have been rendered on the same date? A. Is that the portion where it says: Date sentence imposed? Q. Yes. And then also -- let's do the date judgment entered on page 3 of each of these. A. Yes. Q. Okay. And then do these appear to be relating to the same defendant in each document? A. Yes. Q. And the judge presiding, is that the same judge on each judgment or each document? A. Yes. Q. So, does it appear that the Cause No. 1664222, leaving off the 0s and 1s, does it appear to be the same individual related to in each of the three documents? A. Yes. Q. And so, what is your opinion as it relates to the two, based on the documents? The second Cause No. 1664222? A. I'm sorry. I don't understand. Q. Does it appear to be consistent with those -- the individual in one and three that you've indicated were compared and matched to the defendant? A. Yes. **MS. ABERNATHY:** For

purposes of this hearing, pass the witness. **MR. MCDONALD:** Say that again?

MS. ABERNATHY: I said, for purposes of this hearing, I'll pass the witness. **MR.**

MCDONALD: Okay. Judge, I have no questions on voir dire, just some objections to the exhibits. If she wants to offer them outside the presence of the jury, it's fine

with me. **MS. ABERNATHY:** State will tender and offer State's 18 and 19. **MR.**

MCDONALD: Judge, my objection is, obviously, to Cause No. 1664222, there is insufficient print to identify my client as the subject of that judgment. I don't believe the predicate is sufficient to allow that judgment to be introduced into evidence. **MS.**

ABERNATHY: Additionally, if I may make one point? These are also considered a business record with the business records affidavit indicating all three cause numbers are related to Ronald DeRouen TDCJ/BPP Number 04070254 in all three cause numbers listed on the front of Exhibit 19. **THE COURT:** Is there some rule of procedure, rule of evidence, case law, substantive law that says in order for a judgment reporting to be -- a criminal judgment against the defendant to be admissible that there must be a match -- a fingerprint match? **MS. ABERNATHY:**

No, sir, just some indicia of the -- **THE COURT:** It's the same as the -- **MS.**

ABERNATHY: Right. **THE COURT:** -- requirements laid out in *Tienda*? *Tienda v. State* or *State v. Tienda*? **MS. ABERNATHY:** Don't catch me lying, sir. **THE**

COURT: Okay. I was just wondering if there is some magical criminal -- a penal code, code of criminal procedure, rule of evidence as it relates to criminal cases or

case law that says that you can't -- that a judgment cannot be admissible without proof that fingerprints are a match. **MS. ABERNATHY:** No, sir. That is just usually the most definitive way and the direct route there. **THE COURT:** All right. Do you know of any provision that I'm missing? **MR. MCDONALD:** Judge, I'm comfortable and in agreement. I don't think a fingerprint needs to be required. I think there just needs to be sufficient facts to establish it is the same defendant; and my argument is I don't believe this judgment does. That's my objection. **THE COURT:** All three judgments were rendered out of the same court? **MS. ABERNATHY:** Yes, Your Honor. On the same -- **THE COURT:** Same judge? **MS. ABERNATHY:** Yes, sir. **THE COURT:** Same date? **MS. ABERNATHY:** Yes, sir. **THE COURT:** Showing that the pleas were entered on -- to each on the same date? **MS. ABERNATHY:** Yes, sir. **THE COURT:** I'm going to overrule the objections and Exhibits 18 and 19 will be admitted. (State's Exhibit Numbers 18 and 19 admitted.) **MS. ABERNATHY:** Would you like me to reoffer them in front of the jury? Probably should. **THE COURT:** You can, or I can simply say that the two exhibits are admitted. If you want to reoffer and Mr. McDonald wants to make his objection in front of the jury, I just -- as long as it's not -- **MS. ABERNATHY:** I'll reoffer, Your Honor. **MR. MCDONALD:** Judge, I just, obviously, renew my objection to 404 and 403(b) that we've previously made. **THE COURT:** Yes. And I'm taking that as you're still maintaining that objection. **MR. MCDONALD:** Yes,

sir. **THE COURT:** Understanding that you have to make it or feel like you have to make it, I understand that. **MR. MCDONALD:** Can you give me a running objection to that? **THE COURT:** I'll give you a running objection with regard to the three that I've already ruled on. **MR. MCDONALD:** Yes, sir. Okay. Thank you.

THE COURT: But just for the record, again, the objections are overruled. **MR. MCDONALD:** Yes, sir. **THE COURT:** All right. Ready for the jury to be brought back in? **MS. ABERNATHY:** Yes, sir. **THE COURT:** All right. (Open court, defendant and jury present.) **THE COURT:** Record will reflect the jury is seated, attorneys for the State, attorneys for the defendant and defendant are present. You may proceed. **MS. ABERNATHY:** State reoffers State's Exhibits 18 and 19. **MR. MCDONALD:** Judge, I just renew my previous objections. **THE COURT:** Objection is overruled -- are overruled. 18 and 19 are admitted. (State's Exhibit Numbers 18 and 19 admitted.) (RR 5 at 70-78).

The trial court abused its discretion when it improperly permitted the State in an effort to rebut a defensive theory of identity, to introduce evidence of extraneous offenses, specifically State's exhibit 18, a fingerprint card and State's exhibit 19, a pen packet that contained judgments of convictions out of Harris County, over trial counsel's timely objection under Texas Rule of Evidence 404 and 403.

The primary purpose in excluding relevant evidence under Rule 403 is to prevent a jury that has a reasonable doubt of the defendant's guilt of the charged offense from convicting the defendant based solely on his criminal disposition or solely because he is a bad person. *Robbins v. State*, 88 S.W.3d 256, 263 (Tex. Crim. App. 2002). The Court of Criminal Appeals has discussed the weighing of the harm versus probative value in the relevant factors in *Montgomery v. State*, 810 S.W.2d 372, 389-90 (Tex. Crim. App. 1990) on rehearing (June 19, 1991); these factors include the following:

1. How compellingly evidence of the extraneous misconduct serves to make a fact of consequence more or less probable? A factor which is related to the strength of the evidence presented by the proponent to show the defendant in fact committed the extraneous offense *Fowler v. State*, No. 06-16-00038-CR *11 (Tex. App.—Texarkana) (2018), on remand; This is often a function of similarity of the extraneous transaction to the charged offense.

2. How strong is the evidence to show that the defendant in fact committed the extraneous conduct?

3. The potential for the extraneous conduct to impress the jury in some irrational but nevertheless indelible way.

4. How much trial time does the proponent need to develop evidence of the extraneous misconduct, such that the attentions of the factfinder will be diverted from the indicted offense?

5. How great is the proponent's need for the extraneous transaction?

ANALYSIS

Although the Texas Rules of Evidence 404(b) may allow evidence of identity to rebut a defensive theory, the State still must show that this extraneous evidence is necessary to prove the case that the Appellant is on trial for. Otherwise, this extraneous evidence becomes highly prejudicial under Texas Rules of Evidence 403.

In considering the factors, it is undisputed that the extraneous evidence which the trial court admitted involved three separate robberies out of Harris County. The first on February 1, 2020, the second on February 3, 2020, and the third being on February 7, 2020; however, the trial court also allowed the State to introduce a pen packet which contained these three separate robberies, all which the Appellant pled guilty to in Harris County.

The State did not need the pen packet which included the Harris County robbery convictions to prove that the Appellant committed aggravated robbery in Brazoria County, the case he was on trial for. A lengthy amount of trial time was taken up by the State to develop evidence of the extraneous offense. The State called Detective Hooper during a hearing outside the presence of the jury to determine the

admissibility of Harris County extraneous robberies allegedly committed by the Appellant. After the hearing, the Court ruled that the three Harris County robberies which the Appellant had pled to were admissible, however, without making any determination regarding the pen packet. During the trial, with the jury present the State called four witnesses to testify about the extraneous Harris County robberies that the Appellant was involved in on day 3 of the trial. In the State's closing it referred to the Appellant's extraneous conduct.

The Court could have imposed some type of limitations on the admissibility of the three Harris County robberies which did not include the pen packet. By not doing this, the Court in essence abused its discretion and allowed the Harris County robberies to become the focal point of the trial, which prejudiced the Appellant. Hooper could have simply provided additional testimony about the Harris County robberies, aside from the Court allowing the pen packet into evidence.

HARM

The State called Dalton Webb, with the Houston Police Department. Dalton testified as follows: We were doing surveillance on a vehicle that we had identified as a vehicle being used by a robbery suspect in multiple aggravated robberies in the Houston and Harris County area. (RR 5 at 10).

The State also called Khanh Tran, with the Houston Police Department, who was assigned to assist a task force operation for an aggravated robbery suspect in Harris County.

The State then called James Minshew, with the Brazoria County Sheriff's Department. Minshew, a crime scene investigator, was called only to testify to compare the Appellant's fingerprints, which he took from the Appellant that morning with the pen packet, which contained all three judgment and sentences for the robberies which the Appellant pled to in Harris County. Minshew testified that two of the three judgments in Harris County matched the fingerprint card of the Appellant. Minshew testified as follows: "There were three prints that we compared in the packet. The first print and third print were found to be a match, and the second print was found to have insufficient detail to compare". (RR 5 at 69).

The State called Hooper who testified in detail about the extraneous robberies that the Appellant pled to in Harris County, as follows: "**BY MS. ABERNATHY:** Q. Now, Detective Hooper, you said you had been investigating a robbery that occurred on February 1st, and what other dates -- what other robbery date ranges were you investigating, without going into detail? A. February the 1st of 2020, February the 3rd of 2020, and February the 7th of 2020." (RR 5 at 123).

Abernathy (**Closing**) Shawn talked about we, as the State, are hoping that it's not important enough. I highly disagree with that. This is an important decision.

This is an important set of facts we're asking you to talk about and asking you to base a verdict on. But do you know what wasn't there? That we didn't prove this beyond a reasonable doubt. Because everyone knows this defendant committed not one, not two, not three, but four robberies because the evidence has shown that. I'm going to take you to State's Exhibit 30. Actually, first, I'm going to show you State's 19 where it talks about on November 29th of 2021 Ronald DeRouen, this defendant, pled guilty to three different robberies in Harris County. Okay? And I'm going to play you a call, or a portion of a call, from October 2nd of 2022, almost an entire year after he had pled guilty in Harris County. (Playing audio.) **MS. ABERNATHY:** Right there. Almost an entire year after he pled guilty to his Harris County cases, that defendant is admitting on a jail call that he did this. He is saying -- he's not talking about any more Harris County cases. He's talking here, the charge that he is here for. He's talking about the gun ain't real. (RR 6 at 38-39).

“... Now, the defense wants to talk about how he pled to robbery. I’m not Harris County. I don't make their charging decisions, (RR 6 at 39).

“...All four of these robberies, he doesn't care who he hurts. Give me money. Give me the money. Get me the safe. Go to the cash registers. Give me the money. (RR 6 at 40).

“...You have judgments that the defendant pled guilty”. (RR 6 at 41).

Given this testimony, including the amount of time it took to obtain the testimony of the witnesses on day three of the trial, the testimony about the extraneous offenses when considered alongside the scope of the entirety of the guilt-innocence phase of trial, including the State's closing argument, the conclusion that can be made is that the testimony of these witnesses and the extraneous evidence had a substantial and injurious effect or influence in determining the jury's verdict. See TEX. R. APP. P. 44.2(b); *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). The trial court erred, awhile the Appellant suffered harm.

II. APPELLANT'S POINT OF ERROR TWO

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY ADMITTING A SURVEILLANCE VIDEO WITHOUT PROPER AUTHENTICATION.

STANDARD OF REVIEW:

"To satisfy the requirement 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 is." *Guevara v. State*, NO. 14-18-00144-CR *3 (Tex. App.—Houston [14th] 2020), not published, citing Tex. R. Evid. 901. "Authenticity may be established with evidence of 'distinctive characteristics and the like,' which include '[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances." *Id.* citing Tex. R. Evid. 901(b)(4). "Video recordings without audio

are treated as photographs and are properly authenticated when it can be proved that the images accurately represent the scene in question and are relevant to a disputed issue.” *Id.* citing *Fowler v. State*, 544 S.W.3d 844, 849 (Tex. Crim. App. 2018). “In a jury trial, it is the jury that ultimately determines whether an item of evidence is what its proponent claims; the trial court need only make the preliminary determination that the proponent of the item has supplied facts sufficient to support a reasonable jury determination that the proffered evidence is authentic”. *Id.* citing *Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012). “Conclusive proof of authenticity before the admission of disputed evidence is not required”; *Id.* “Rule 901 merely requires some evidence sufficient to support a finding that the evidence in question is what the proponent claims”. *Id.* citing *Fowler*, at 848. “The standard for admissibility is considered a liberal one”. *Id.* citing *Fowler*, at 849. “The trial court's determination of whether the proponent has met the threshold requirement is subject to appellate review for an abuse of discretion and should not be reversed so long as it is within the zone of reasonable disagreement”. *Id.* “There is no abuse of discretion if the trial court "reasonably believes that a reasonable juror could find that the evidence has been authenticated or identified." *Druery v. State*, 225 S.W.3d 491, 502 (Tex. Crim. App. 2007).

STATE'S EXHIBIT 4

Q. (BY MS. ABERNATHY) Officer Pace, I'm showing you what's been marked for identification purposes as State's Exhibit 4. Do you recognize this?

A. Yes.

Q. How do you recognize this?

A. My initials are on the DVD.

Q. Does this accurately depict the events that occurred on February the 5th of 2020?

A. Yes, ma'am.

MS. ABERNATHY: State tenders and offers State's Exhibit 4.

MS. SMITH: Your Honor, we object at this time to this particular exhibit. This witness cannot authenticate how this video was made.

MS. ABERNATHY: Can I ask a couple follow-up questions?

THE COURT: You may.

Q. (BY MS. ABERNATHY) Were you present when this video was downloaded?

A. Yes.

Q. And was the operator competent to operate that equipment?

A. Yes.

MS. ABERNATHY: State retenders and offers State's Exhibit 4.

MS. SMITH: We also object based on the fact that this particular witness cannot testify whether or not that equipment was in good working order, whether or not he had knowledge of how that equipment worked.

MS. ABERNATHY: I don't believe that is necessary for the foundation, as long as he can state that he was there and retrieved that video and it was in -- it was accurately placed onto a recording device -- or recorded device.

MS. SMITH: Additionally, Judge, he has no knowledge of whether or not it is a true and accurate depiction because he was not there at the time the video was being recorded.

THE COURT: Y'all approach. (Discussion at the Bench off the record.)
(Open court, defendant and jury present.)

Q. (BY **MS. ABERNATHY**) Officer Pace, when you were collecting this surveillance video, did you note the current date and time on this surveillance video being accurate with what the current date and time in real life that you were viewing it? Does that make sense? A. If -- I think --

Q. Did the video show the correct date and time in real time?

A. No.

Q. Okay. How was it off?

A. I want to say it was five to six minutes ahead.

Q. But was the date correct?

A. The date was correct.

Q. And it was just five to six minutes off?

A. Yes.

Q. Okay. And when you were -- did you view the surveillance images previous to actually getting a recording?

A. Yes.

Q. And who did you view those with?

A. Ms. Valdez.

Q. And was she present during the robbery?

A. Yes.

Q. And did she indicate to you that it was consistent on the video with what had actually occurred?

A. Yes.

MS. ABERNATHY: State retenders and offers State's 4.

MS. SMITH: We renew our objection, Your Honor, that this particular witness cannot authenticate, because he was not there at the time that it happened, that these events accurately depict what is on that disk.

THE COURT: All right. I'm going to overrule the objections. State's 4 is admitted. (RR 4 at 174-177).

Officer Pace could not properly authenticate State's exhibit 4, a surveillance video, which captured the robbery in question. Unlike *Guevara*, where this court upheld the trial courts decision and the facts demonstrated that (1) Sergeant made an in-person request of the owner from a specific date and timeframe; (2) video possessed date and time stamp; (3) the date and time was within approximately an hour of the time video was taken from another venue nor far from the store showing complainants, Guevara, and accomplices of Guevara leaving together, and (4) the video pulled showed Guevara in the parking lot where the murder had occurred; here, Officer Pace did not request the manager to pull up a specific timeframe, the time stamp on the video did not match the time of the robbery, the identity of the subject could not established by the video alone.

Officer Pace testified that the surveillance video was running five to six minutes ahead of time, it could be that the video recording was not in good working order. The time on the video does not correspond with the time that Officers say the crime took place. There is no testimony from the store manager or the owner concerning the workings, maintenance of the video equipment or even that the video equipment was in working condition, or whether there was an actual error with the time displayed on the surveillance video. The State had called the manager to testify in this case, the State could have and should have admitted this surveillance video through the manager, who could have testified whether the surveillance camera was

in good working condition, and whether there was an issue with the time on the surveillance video. Pace had no knowledge of whether or not the video was a true and accurate depiction because he was not there at the time the video was being recorded. Additionally, there is no testimony that State's Exhibit 4 was an exact duplicate of the video that was downloaded on February 5, 2020, there was no testimony that there had not been tampering with the video. Therefore, this Court should sustain the Appellants issue because the trial courts determination was not within the zone of reasonable disagreement. The Trial Court abused its discretion in overruling Appellants objection to the authentication of State's Exhibit 4.

HARM

To be admissible, the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury. *Fowler v. State*, No. 06-16-000038-CR *10 (Tex. App.—Texarkana) (2018), Opinion on remand.

The State called Detective Hooper, who investigated the Harris County robberies, to watch State's Exhibit 4 and compare what he saw on the video, with articles of clothing that were taken from Appellant in his Harris County arrest. (RR 5 at 123-128). Though Hooper was not at the scene of the Brazoria County robbery, nor were articles of clothing taken from the Appellant during the Brazoria County robbery, the State used State's Exhibit 4 to have Hooper testify that the shoes

appeared to match the shoes taken from the extraneous offense, the mask appeared to be the same mask as the extraneous offense, the cloth appeared to be the same as the extraneous offense, the gray hoodie appeared to be the same as the hoodie taken from the extraneous offense, and that the evidence from State's Exhibit 4 was similar evidence as the extraneous offense of February 7, 2020. (RR 5 at 123-149). The trial court's abused its discretion when it made the determination that the State has met the threshold requirement to admit the surveillance video from February 5, 2020, the Brazoria County robbery. The footage's time was incorrect, and Officer Pace made the decision on his own that it was off by a few minutes, when the recording device could have been malfunctioning, and not recording correctly. The State's Exhibit 4 created a prejudicial effect on the jury to determine that the Appellant was guilty in the case-in chief. The State did not have evidence to prove that any articles of clothing in the video surveillance from its case-in chief were the same as the articles of clothing from Appellant's arrest on February 7, 2020. This Court should find that the trial court abused its discretion in admitting State's Exhibit 4.

CONCLUSION AND PRAYER

WHEREFORE PREMISES CONSIDERED, Appellant, Ronald Lee Derouen respectfully asks that the judgment of the trial court be reversed and that a judgment of acquittal be entered or in the alternative that Appellant's sentence be set aside and for such other and further relief to which Appellant may be justly entitled.

Respectfully submitted,

/s/ *Michael C. Diaz*

MICHAEL C. DIAZ
State Bar No. 00793616
mjoeldiaz@sbcglobal.net

/s/ *Sarah A. Loera*

SARAH A. LOERA
State Bar No. 24124218
sarah@mphillipslaw.com
125 E. Cedar St., Ste C
Angleton, Texas 77515
(281) 489-2400 Telephone
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Brief is computer-generated, with those portions required to be counted containing 10,435 words according to the word-count function of the application used to create it and complies with the word-count requirements of Rule 9.4, Texas Rules of Appellate Procedure. It is printed in 14-point typeface, except for the footnotes, which are printed in 12-point typeface.

/s/ *Michael C. Diaz*

MICHAEL C. DIAZ

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument has been served on the opposing counsel of record listed below by electronic service on Monday, September 30, 2024.

Brazoria County District Attorney's Office

Thomas Selleck

Email: bcdaeservice@brazoria-county.com

/s/ Michael C. Diaz

MICHAEL C. DIAZ

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Mike Diaz on behalf of Michael Diaz

Bar No. 00793616

mjoeldiaz@sbcglobal.net

Envelope ID: 92578801

Filing Code Description: Brief Requesting Oral Argument

Filing Description: Appellant's Brief - Derouen

Status as of 10/1/2024 7:33 AM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Trey Picard	24027742	treyp@brazoriacountytx.gov	9/30/2024 8:45:20 AM	SENT
Thomas Selleck	18010500	Bcdaeservice@brazoriacountytx.gov	9/30/2024 8:45:20 AM	SENT