NO. 14-24-00436-CR

IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT OF TEXAS

ALEXANDER ORDONEZ,
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause Number 1710704
From the 208th District Court of Harris County, Texas

BRIEF FOR APPELLANT

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PRESIDING JUDGE:

Hon. Beverly Armstrong
208th District Court
Harris County, Texas

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not requested.

STATEMENT OF THE CASE

Mr. Alex Ordonez[1] was charged with the offense of murder in Cause No. 1710704. [CR38].[2] The indictment included two theories of commission, i.e., that the Defendant did ". . . unlawfully, intentionally and knowingly cause the death of [] Complainant, by shooting the Complainant with a deadly weapon, namely, a firearm;" and the defendant ". . . did then and there unlawfully intend to cause serious bodily injury to [] the Complainant, and did cause the death of the Complainant by intentionally and knowingly committing an act clearly dangerous to human life, namely by shooting the Complainant with a deadly weapon, namely, a firearm." [CR38]. Alex Ordonez entered a plea of "not guilty" [5RR24], and the jury found

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[1] Hereinafter Appellant Alex Ordonez will be referred to by his first name only ("Alex") to avoid confusion with his brother and co-defendant Kevin Ordonez.

[2] References to the Appellate Record will appear as:

1) Trial Reporters' Records Volumes 1-9 will appear as: [volume number + RR + page number]. E.g., for page 10 of the first volume: "[1RR2]," et seq.
2) References to the 1 volume Clerk's Record will appear as [CR + page number]. E.g. for page 20 of the Clerk's Record: "[CR20]," et seq.
3) State's Exhibits are abbreviated as "SX + exhibit number" and Defense Exhibits as "DX + exhibit number." E.g., for State's Exhibit 2: "[SX2]," et seq.

him guilty as charged in the indictment. [7RR144-47]. Alex Ordonezr elected to have his punishment assessed by the Court. [CR265]. The court assessed punishment at life in the Institutional Division of the Texas Department of Criminal Justice. [8RR59; CR292]. Alex Ordonez filed a timely notice of appeal. [CR300]. This brief is due filed on or before April 4, 2025.

ISSUES PRESENTED

POINT OF ERROR NUMBER ONE: THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING THE CONTENT OF A JAIL CALL FROM APPELLANT TO HIS MOTHER OVER OBJECTION TO RELEVANCE IN THAT APPELLANT'S ALLEGED ADMISSION THAT HE WAS "NOT INNOCENT OF THIS" WAS TAKEN OUT OF CONTEXT AND AMBIGUOUS AS TO MEANING.

POINT OF ERROR NUMBER TWO: THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING APPELLANT'S JAIL CALL TO HIS MOTHER IN THAT ANY PROBATIVE VALUE OF HIS AMBIGUOUS, ALLEGED ADMISSIONS OF HE WAS "NOT INNOCENT OF THIS" AND REFERENCES TO BOND WERE SUBSTANTIALLY OUTWEIGHED BY UNFAIR PREJUDICE IN VIOLATION OF RULE 403.

STATEMENT OF FACTS

A. Background:

Alex Ordonez:

Alex Ordonez, who turned 19 only a couple of weeks prior to complainant's shooting, is the oldest of three siblings. [8RR35]. After a serious accident in a

swimming pool, when Alex cracked his head at the age of 15-16, he started to struggle, experience headaches and would get mad. [8RR38, 40]. After his arrest in the instant case, he started taking medication in jail for PTSD, major depression and anxiety. [8RR40; 9RR-SX5]. At punishment, Alex's mother testified the medication has helped him "a lot." [8RR41-41; 9RR-SX5]. Having been convicted of the instant offense, Alex is serving a life sentence in prison. [8RR59; CR292].

Kevin Ordonez, Dayvon Gary, Ciara Garcia and Abigail Garcia:

Appellant Alex Ordonez and his younger brother Kevin Ordonez lived at home with their mother Doris Alvarez. [6RR64, 68-69]. For the time leading up to the shooting, and in the days after, Alex's friend Dayvon Gary was staying at Alex and Kevin's home. [6RR65, 68]. Dayvon had been living at Alex's house, and slept on the floor in Alex's room, since his own parents kicked him out because he did not have a job. [6RR65, 68, 103-04]. Davyon was dating Ciara Garcia, and at the time of the shooting, they were expecting a child. [5RR44, 6RR63, 71]. Alex was dating Abigail Garcia, who he met in high school. [5RR48; 6RR69]. Although both Ciara and Abigail had the same last name, "Garcia," they were not related. [6RR49, 55]. Ciara said she met Alex and Kevin through her boyfriend, Davyon. [5RR45, 47]. In fact, Ciara had been to Alex and Kevin's house before while visiting Dayvon there. [5RR46, 48].

On February 6, 2021, these five individuals were in the car when the complainant Cameron Stevens was shot and killed. [5RR59, 62]. Three of the five - Ciara, Dayvon and Abigail testified against Alex at his trial. [See 5RR41-86; 6RR16-116]. In exchange for her testimony, Ciara was provided use immunity related to having driven a stolen car, participated in an illegal gun sale and driven away from the scene of a murder. [5RR55, 73]. Dayvon Gary was offered use immunity for his testimony also. [6RR67, 101; DX2]. In addition to immunity for any role in the instant case, Dayvon had pled guilty to another aggravated robbery that occurred on February 5, 2021 - the day prior to the instant case. [6RR65-7, DX2]. Dayvon alleged he committed the February 5th robbery with Alex and Kevin Ordonez. [6RR66]. In fact, the record shows Dayvon was on probation for this aggravated robbery at the time of his testimony. [6RR65]. Abigail Garcia was not treated as having any culpability and testified against Alex also.

B. The Shooting of Complainant

On February 6, 2021, the evening of the shooting of the complainant in the instant case, Alex, Kevin, Dayvon, Ciara and Abigail were at Alex's and Kevin's house. [5RR50; 6RR87-88]. They were planning on going to a party that night, and took some Xanax ("bars"). [6RR87-8]. Everyone was under the influence of Xanax, except Ciara, who was pregnant. [5RR58].

After taking Xanax, they did not go to the party, but instead went to an apartment complex for Kevin to sell a gun. [6RR21-22, 89]. Kevin was making all the arrangements with the buyer to sell the gun. [6RR26-27]. Ciara drove the white Malibu car to an apartment complex with Dayvon, Alex, Kevin and Abigail as passengers. [5RR59, 62]. Ciara was driving, and her boyfriend Dayvon was sitting in the front passenger seat, reportedly passed out from having taken Xanax. [5RR59, 70; 6RR22-24]. Alex was sitting in the back seat, in the middle, with Kevin and Abigail. [5RR59]. Abigail testified she was originally sitting behind the front passenger seat occupied by Dayvon. [6RR22-23]. Kevin Ordonez was originally sitting behind the driver, Ciara. [6RR23]. Ciara pulled into a parking spot in front of the Carriage Place Apartments. [5RR64]. She does not remember how long she was there in total, but knows it was less than an hour. [5RR64].

Kevin had a plan to sell the gun for $500. [6RR25]. Abigail witnessed Kevin texting the buyer back and forth, before the buyer came outside. [6RR25]. Kevin switched seats with Abigail so he would be on the same side of the car when the gun buyer approached. [6RR25]. Surveillance video from the Apartments show these movements going on inside the white car. [6RR157]. Specifically, Abigail switched places with Kevin in the backseat; Kevin got out of the car and walked around to get into her side, and Abigail hopped over Alex, who was still in the middle, to the other

side. [6RR24]. Abigail ended up behind Ciara, the driver, and Kevin ended up behind Dayvon, the front passenger. [6RR24].

Abigail testified Kevin and Alex both had guns on them. [6RR27]. Ciara testified there was a gun in the car but she did not know who had it in their possession. [5RR71]. Also, she did not know if there was more than one gun. [5RR71]. When lead investigator Deputy Viramontes interviewed Ciara on February 10, 2021 she was clear that Kevin was the one who was going to sell the gun. [7RR18]. In fact when Viramontes asked her how many guns there were, she responded "Kevin's gun." [7RR18]. Both Dayvon and his girlfriend Ciara testified Dayvon did not have a gun the night of complainant's shooting. [5RR70; 6RR96].

Abigail testified that when the prospective buyer, Cameron Stevens, came out, Kevin and the buyer argued over who was going to exchange what first. [6RR25-6]. Ciara and Dayvon testified the buyer walked up to the rear passenger side window and argued over exchanging the gun and money. [5RR64; 6RR106-07]. They were going back and forth. [6RR25]. Dayvon testified neither was letting go of the gun nor the money. [6RR92].

Abigail testified the buyer started walking away and Kevin got angry and was screaming in a loud voice. [6RR26; 106-07]. Abigail testified that at this point the buyer was standing on the sidewalk on the driver's side of the car, which, after having

switched seats with Kevin, was closest to her side of the car. [6RR28]. As the buyer walked off, Ciara started driving away. [6RR26; 108]. Abigail testified Kevin then tried to get out of the car - he hopped out for a second and then got right back in. [6RR 27]. The rear passenger door opening can be seen on the surveillance video only moments before the complainant's silhouette is seen dropping to the ground. [9RR-SX14 at 00:17]. Abigail said Kevin was going to run up on the buyer and take his money. [6RR27]. According to Abigail, Alex and Ciara both told Kevin not to get out of the car. [6RR27-8]. Kevin was yelling at the buyer, but Alex was yelling at Kevin. [6RR48]. When Kevin got back in the car, Alex and Kevin were now arguing, with Alex telling his brother to leave it alone with the buyer. [6RR47-8]. Alex was trying to calm Kevin down, keep Kevin from escalating the situation and told Kevin it was not worth it. [6RR46-7]. Ciara said when she drove off, someone inside her car told her to "hold up" and when she slowed down a gunshot went off. [5RR64-5]. Viramontes testified Ciara was clear in telling him that Kevin was the one who directed her to leave and then to stop the car. [7RR12]. Ciara and Viramontes both acknowledged the surveillance video shows the rear passenger door opening, even though Ciara claimed she was unaware of that at the time. [5RR69; 7RR12-13]. She does not recall if it was one or several shots fired. [5RR65]. Ciara did not know who shot the complainant out of the car or whether the windows were rolled down.

[5RR69].

Abigail also heard gunshots but did not know how many. [6RR30]. Further, Abigail said the shots fired came out from her side (the rear driver's side) of the car. [6RR31]. She did not actually see the shooting because Alex's left arm was covering her, and she turned her face away because she sensed there was going to be shots fired. [6RR30, 48-9]. She does not recall if it was one or several shots fired. [5RR65]. She testified Alex told the others not to talk about the shooting [6RR54]. She admitted telling investigator Viramontes that Alex remarked he could not believe he did that, and told Kevin he always makes him do "dumb shit" for him. [6RR54-55].

Dayvon testified that at the time of the shooting he did not know what was going on because he was on Xanax. [6RR95]. Ciara described Dayvon that night as "passed out off of Xanax in the front seat." [5RR70]. All the same, although Dayvon was adamant he was slouched over, when asked about his recollection of who did the shooting, Dayvon said Alex shot about 3-4 shots from inside the car, and Kevin shot once from inside the car. [6RR93, 110-111]. Also, Dayvon was shown a segment of the surveillance video wherein the white car can be seen driving by in the upper right corner of the screen, and four shots can be heard. [6RR95; 9RR-SX92, Murder_3 at 25:23]. He testified the shots in the video sound like what he heard in person.

[6RR94-95].

When asked if he expressed his anger at the shooters, Dayvon reiterated "[a]t that time I was -- I was barred, so I really didn't even know what was going on." [6RR95]. He said when he learned about what happened, he was angry because there was no reason to shoot. [6RR96]. He thought it was dumb, and that Kevin and Alex were dumb. [6RR96]. After the shooting, the group returned to Kevin and Alex's house. [5RR70; 6RR87]. Dayvon continued to live with Alex and Kevin after the shooting, until he was arrested. [6RR96-97]. On February 9, 2021, A few days after the complainant was shot and killed, Dayvon got his own gun, as Smith & Wesson 9, which he stashed, along with ammunition in the clip, in Alex's bathroom. [6RR111-12].

On February 6, 2021, Deputy Denesha Price of the Harris County Sheriff's Office was dispatched to the Carriage Place Apartments at 505 Wells Fargo Drive for an unknown medical emergency. [5RR29]. When she arrived, the complainant Cameron Stevens was lying on the ground, and EMS had already pronounced him deceased. [5RR32-3, 35]. Deputy Price placed crime scene tape around the scene to preserve it. [5RR35]. While securing the scene, Rosie Gibson, a witness, informed her she heard a "firecracker" sound around 2:00 a.m. and called 9-1-1. [5RR36].

The complainant Cameron Stevens' death was deemed a homicide and the

specific cause of death, a gunshot wound to the face near his eye, and neck. [6RR122]. According to the Medical Examiner, because the bullet went through the vertebral artery at the base of skull which feeds blood to the brain, the injury would have killed within "seconds to minutes." [6RR125-27; 9RR-SX88, SX100].

When shot, the complainant had two cell phones on him. [5RR136-37; SX35 and SX36]. Investigator Viramontes explained the same phone number, belonging to the complainant's mother Eva Stevens, kept calling one of the complainant's phones at the scene. [6RR151-52]. Because she lived there at the Carriage Place Apartment complex also, Viramontes informed her he believed the person deceased outside was her son, and through the description, he was able to obtain preliminary identification of the complainant. [6RR152].

C. The Investigation:

Surveillance video from the Carriage Place Apartments complex and S&B Contractors, a business across the street from the apartments, provided Viramontes a partial license plate number and enough information to determine the vehicle's make, model and year - it was a white 2012 Chevy Malibu [6RR155, 158-59]. With this information Viramontes learned the car had been reported as stolen the previous day during an aggravated robbery on Swinden Street. [6RR159]. Viramontes met with the complainants involved in that robbery, Raven Bell and Terrence Collins.

[6RR159-60, 162-63]. According to these two complainants, when their car was stolen, they had arranged a meeting with Kevin Ordonez to sell him marijuana. [6RR163].

1. The Prior February 5th Aggravated Robbery:

Raven Bell testified on February 5, 2021 her car was car jacked and her boyfriend Terrence Collins was shot. [6RR210]. They had gone to meet someone to sell them marijuana. [6RR211]. When Ms. Bell and Mr. Collins got there, the buyer, Kevin, asked if they had a charger he could use. [6RR211]. Bell and Collins looked in the car for a charger and when they looked up, Kevin had a gun pointed at their heads and two other guys were walking up to the car.[6RR211]. Mr. Collins's brother knew Kevin and Alex, which was how they connected for the marijuana sale. [6RR212]. Kevin ordered them out of the car. [6RR212]. Kevin tried to push Ms. Bell inside the car and that is when Mr. Collins tried to help her and got shot by Kevin. [6RR213].

Ms. Bell notified the police the car was stolen. [6RR216]. Initially, Bell and Collins lied and told police the meet-up had been an Uber Eats transaction. [6RR225]. When police could not find evidence of Uber Eats, Mr. Collins confessed it had been a dope deal. [6RR225]. A day or two after the car was stolen, Ms. Bell and Mr. Collins spotted the Malibu and called the police. [6RR218]. In a photo array, Ms. Bell

identified Kevin as the person who shot Collins. [6RR221]. Furthermore, Ms. Bell was clear that Kevin was the only person involved in arranging the marijuana buy. [6RR223]. Kevin was also the one who distracted them with asking for a phone charger. [6RR223].

Other evidence was presented at trial regarding the aggravated robbery of Raven Bell and Terrence Collins. Dayvon testified to his role in the incident: he went to the bayou with Alex and Kevin to meet with someone to buy drugs. [6RR73]. Kevin had been talking to Terrence Collins, so it was a planned meet-up. [6RR75-6]. Mr. Collins and Ms. Bell were in a white four-door sedan. [6RR75]. Dayvon testified that Kevin and Alex had guns with them. [6RR74]. Kevin approached the person in the car first, while Dayvon and Alex initially watched. [6RR73, 75]. Dayvon and Alex then approached the car while Kevin was talking to the driver. [6RR75]. The driver was shot in the leg, and then the driver and the girl who was with him got out of the car. [6RR74-75]. Dayvon, Alex and Kevin got in the car, and Davyon drove off. [6RR75]. State's Exhibit 103, the home surveillance video from 4030 Swindon Drive was admitted in evidence. [6RR78-80; 9RR-SX103].

Dayvon testified to what was depicted in SX103: Kevin can be seen crossing the street and walking toward the white car that they were meeting up with. [6RR80; SX103 at 00:15-22]. Dayvon identified Alex as the second person who entered the

picture on the surveillance video, wearing a red hoodie [6RR80-81; SX103 at 00:35], Dayvon was the taller one, wearing black, and following close behind. [6RR81; SX103 at 00:36]. Alex and Dayvon crossed the street toward the white car [SX103 at 01:05]. Dayvon testified the driver of the white car was wearing white, and he and the girl with him were forcibly removed from their car. [6RR82; SX103 at 01:14]. Next, he testified that Alex, Kevin and him drove away in the white car. [6RR82; SX103 at 1:34].

Neither Ms. Bell nor Mr. Collins knew the three males on the surveillance video of the aggravated robbery. [6RR163-64]. However, from the surveillance video, they identified Kevin as the person who they had been communicating with via Snapchat. [6RR163-64]. In a photo array, they also identified Kevin as the person who shot them. [6RR165].

Similarly, Viramontes learned Kevin was also the person communicating with Cameron Stevens, the decedent, to sell the gun. [7RR9]. Viramontes explained they never recovered a cell phone related to Kevin. [7RR10-11]. Furthermore, law enforcement was unable to recover the communications between Kevin and Mr. Collins as they occurred on a platform like Instagram or Snapchat that does not save or store communications. [7RR9-11]. Importantly, Viramontes was clear that they found no communications between Alex and any of the complainants. [7RR13].

Homicide Detective David Crain obtained the surveillance video from 4030 Swindon of the February 5th aggravated robbery wherein the white Malibu was stolen. [5RR89-90]. On February 9, the day after obtaining the Swindon surveillance video, Detective Crain recovered the actual Malibu from Hanover Square. [5RR91]. The Malibu was towed to the vehicle processing center. [5RR93].

2. Forensic Evidence:

A few days after the shooting, Crime Scene Investigator Mark McElvany, who had been dispatched to the scene at the Carriage Place Apartments, was asked to process the white Chevy Malibu which had been taken to the evidence processing facility. [5RR136-37, 139]. Processing the vehicle entails photographing it, taking DNA samples and obtaining latent prints from outside and inside. [5RR141].

Fingerprints

Fingerprints from the Malibu's B-pillar, i.e., the metal pillar between the driver's window and left rear passenger's window, were lifted and compared to Alex's known fingerprint. [5RR114, 117]. Detective McElvany explained these prints were lifted were from the exterior of car as depicted in State's Exhibit 58, and not the interior. [5RR172; 9RR-SX58]. Deputy Medina testified Alex could not be excluded from the latent print lifted from the driver's side B-pillar of the white Malibu. [5RR118]. A 9 mm cartridge case was recovered next to a seat buckle in the Malibu's

back seat. [5RR142; 9RR-SX43, SX44]. State's Exhibits 45 and 46 depict another 9 mm. cartridge case on the rear passenger side. [5RR143; 9RR-SX45, SX46]. A third 9 mm cartridge was recovered from under the rear passenger side seat. [5RR147; 9RR-SX50]. Additionally, State's Exhibit 47 depicts a defect in the door frame where a bullet hit it. [5RR143; 9RR-SX47].

Lack of DNA Evidence

The weapons recovered from the residence and the casings found inside the white Malibu were swabbed for DNA, the results of which did not prove helpful in the case investigation. [7RR36-7].

Evidence Pursuant to Execution of The Search Warrant: Cell Phones and Firearms

On February 10, Detective Crain obtained information from investigators to draft a search warrant for Alex's home at 4243 Heritage Stone. [5RR93]. There were three legal adults living at 4243 Heritage Stone - Alex who was 19, Kevin who was 17 and their mother Doris. [7RR15-16]. The mother was able to consent to the search of the home's common areas, but not to the bedrooms belonging to the other adults in the home. [7RR16]. Both the mother and Alex consented to the search, but Kevin did not. [7RR17]. Because Kevin did not consent to the search of his room, law enforcement obtained a search warrant. [7RR38]. No cell phone for Kevin was

recovered during the search. [7RR38]. Viramontes said without knowing what phone belonged to Kevin, and what was on that phone, they were unable to get a warrant. [7RR38]. Alex, on the other hand, consented to a search of his phone. [7RR30]. Law enforcement did a phone extraction to obtain the information from Alex's phone. [7RR30-31].

The weapons recovered from the residence at 4243 Heritage included a Smith and Wesson 9 mm handgun belonging to Dayvon Gary. [5RR95, 98; 9RR-SX24; 7RR37]. A Glock 48 was found in Alex's brother Kevin's room. [7RR37]. No gun was found in Alex's room. [7RR37]. However, Dayvon testified Alex had owned a Glock 19, which he identified as being depicted in a photograph which was admitted without objection as State's Exhibit 104. [6RR83-85]. State's Exhibit 104 was later withdrawn by agreement, and replaced with a clearer photograph, State's Exhibit 109. [7RR142; 9RR-SX109]. Dayvon testified the Glock 19 in the photograph was Alex's gun which he had at the time of the aggravated robbery when the car was stolen. [6RR86].

State's Exhibit 109, a photo alleged to have been of a Glock 19 belonging to Alex, was obtained via an extraction of Alex's cell phone. [7RR33-35; 6RR83]. District Attorney investigator Zachary Caldwell testified he evaluated the digital evidence in this case, including downloading data from devices to generate a report via Cellebrite. [7RR76]. The Cellebrite report revealed that State's Exhibit 109 was

taken with Alex's iPhone and it had been created on 11/5/2020 at 8:42:09 a.m. [7RR79-80]. The firearm depicted in SX109 was not recovered during the search or Alex's home, therefore nor was it compared to the shell casings that were found inside the Malibu.[7RR35-36]. The gun depicted in State's Exhibit 109, which was not recovered but depicted on Alex's phone, also had a laser attached. [7RR41]. Dayvon also testified the gun had a "flash," which he further described as a blue laser. [6RR85]. Dayvon claimed to have seen the blue laser being used. [6RR86]. An empty box for the blue laser gun was found in Alex's room [7RR40-41; 9RR-SX80]. According to Dayvon, Alex got rid of the Glock 19 depicted in the photograph and no longer owned it when the police executed the search warrant of his home. [6RR113]. But after getting rid of that gun, Alex got another gun, an XD .45. [6RR114].

Ballistics:

Sean Tokay, a firearm toolmark examiner with ATF examined the Smith and Wesson 9 millimeter pistol [SX24], a magazine for that pistol and 6 unfired millimeter cartridges.[7RR54-55; 9RR-SX98]. He also evaluated the fired copper-jacketed bullet, which was labeled as ME1 and submitted by the Medical Examiner's office on February 7, 2021. [7RR56]. Tokay testified the initial analysis of the fired bullet fragment received from the Medical Examiner's office and his test fires from the Smith and Wesson 9 millimeter pistol, were different, thereby showing the bullet had

not been fired from that weapon. [7RR58-60].

On February 25, 2021, additional evidence, the Glock pistol [SX81] was submitted for testing and it too showed different rifling system markings, which eliminated the fired bullet fragment as having been fired from the Glock 48. [7RR63]. Accordingly, Tokay determined neither the Glock 48 nor the Smith and Wesson were responsible for either the fired bullet fragment removed from complainant's body, or the three cartridge cases found in the Malibu that were analyzed. [7RR64-65].

In his report, Tokay stated two of the cartridge cases labeled D1 and D2 were identified microscopically as having been fired in the same unknown firearm. [7RR65; 9RR-SX99]. The third casing, D3, was fired in a different unknown firearm. [7RR66; 9RR-SX99]. Tokay determined all three casings shared the same class characteristics and "...could have been fired in a Glock, Smith & Wesson Sigma series, Polymer80, or Springfield Armory brands of 9 millimeter semi-automatic pistols." [7RR67].

He testified if, hypothetically, the projectile and the three casings- items D1, D2, or item D3 - were fired to have been fired from the same unknown firearm, the "only firearm in that database with that combination of class characteristics would be a Glock. [7RR67-68]. Specifically, he explained older model Glocks used standard polygonal rifling, which was the same rifling seen on the recovered casings. [7RR69]. Looking at the photo of the Glock from Alex's phone, SX109, Tokay said it could be

an older model with the rifling observed on the bullet fragment, but he did not know as he hid not analyze the Glock in SX109. [7RR70]. He also admitted that any of the hundreds of millions of pre-Gen 5 Glocks would have those same set of class characteristics. [7RR71].

As for the physical evidence submitted to him, Tokay was clear there was no relationship between the two weapons submitted to him, and the fired evidence, i.e., the bullet fragment and three casings. [7RR73].

D. Defendant's Post Arrest Statements:

1. Conversations with Co-Defendants in the Interview Room:

Alex was arrested at his house, barefoot, and wearing only shorts and a T-shirt. [7RR19]. Along with Dayvon and Kevin, Alex was in custody in the police station interview room for more than 11 hours. [7RR19]. When Dayvon was brought to the police station for a statement, he was placed in a room next to Alex on one side, and Kevin on the other. [6RR99]. When Alex and the others were talking to each other through the walls, their conversation was being audio and video recorded. [7RR20-21]. Dayvon admitted to assuming there were cameras in the interview rooms. [6RR112-13]. Viramontes testified at 7:00 Alex acknowledged knowing there was a camera in the room while talking with Dayvon. [7RR24]. Alex talked about a hole in the ceiling and indicated his belief they are being recorded. [7RR26; SX106 at

7:16:58]. Dayvon testified Alex told him "I'm sorry I fucked up." [6RR99].

Their conversation was admitted and published as State's Exhibit 106: they expressed being upset and frustrated with how long they were there. [6RR193-94; 7RR22]. Alex expressed concern for his younger brother Kevin. [SX106 at 45:43]. Playing Alex's recorded statement, State's Exhibit 106, Deputy Viramontes explained Alex said he was going to be charged with murder and Kevin will be charged with attempted murder.[6RR203]. Alex said "I shot him in the head." [6RR204; SX106 at 1:06:25]. Alex can also be heard telling Dayvon he was upset that they didn't make any money. SX106 at 1:04:25]. He also says they only found the Glock Smithy. [6RR203-4].

2. Defendant's Bail Call From Jail:

Deputy Ontiberos, a custodian of records for telephone calls made in the Harris County Jail, testified to a call made by Alex Ordonez on February 19, 2021. [6RR133-35]. The call was made from the SPN number of Alex Ordonez within the jail to an account registered with Securus belonging to Doris Ordonez. [6RR137]. This was during the time when in-person visitation was forbidden due to Covid-19 protocols. [6RR139]. The contents of the call surrounded bail. [6RR11-12]. Viramontes summarized the call as Alex asking for his mother to bond him out before his bond were to increase, and for his statement that they were "not innocent."

[6RR200].

State's Exhibit 90, the Spanish language jail call between Alex and his mother, and State's Exhibit 91, the Spanish-English transcription of that call were admitted over defense counsel's continued objections to relevance and unfair prejudice. [6RR198].

SUMMARY OF THE ARGUMENT

The trial court admitted evidence of a jail call from Alex to his mother regarding bond. The call occurred during the time Covid-19 procedure prevented in-person visitation at the Harris County Jail. In the call, Alex was frustrated by his mother's questions and repeatedly told her he would explain things in person, and not over the jail phone, as he pleaded with her to bond him out. At the time, Alex faced at least three separate charges for three different transactions, and was being threatened in the instant case with capital murder charges; he stated his bond would soon be increased from $300,000.00 to $500,000.00. He also stated twice "we are not innocent of this." Over counsel's objections to relevance and unfair prejudice per Rule 403, the jail call was admitted for Alex's alleged admission of guilt. The content of the call, including the statement "we are not innocent of this" was irrelevant in that: the whole context of the conversation pertained to bond and why his bond was so high; Alex had multiple pending charges in addition to the instant case, and; it was unclear what he

was referring to when claiming not to be innocent of "this." In one instance Alex said "[w]e are not innocent of this, they have already said that," which was clearly not Alex making an admission of guilt, but rather, Alex trying to explain to his mother the reasons for his high bond. The content of the call, and Alex's remarks about not being innocent were not sufficiently related to the charge in question, to be relevant. Therefore, the trial court abused its discretion in admitting the irrelevant conversation.

Furthermore, any probative value of Alex's jail call and its contents were outweighed by unfair prejudice. Alex's statements "we are not innocent of this," were not admissions but explanations to his mother regarding why his bond had been set so high. Even if considered to be admissions, Alex had multiple charges, and in the context of his conversation, the statements were not clearly related to the charged offense. Thus, they had no probative value. In that the State had other evidence related to the charged offense, the State did not need this evidence. Alex's overall behavior on the call was prejudicial to him in that he was agitated with his mother, who was trying to help him. The State capitalized on this at argument and described Alex's behavior on the call as "selfish." Furthermore, the call was about his bond, how it was set, and why Alex's bond was so high and about to be increased. This evidence was confusing to a lay person, and the jury was not equipped to evaluate it. Any probative value of the jail call and its contents were outweighed by unfair prejudice. Thus, the

trial court abused its discretion in admitting it over appellant's objections.

ARGUMENT

POINT OF ERROR NUMBER ONE: THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING THE CONTENT OF A JAIL CALL FROM APPELLANT TO HIS MOTHER OVER OBJECTION TO RELEVANCE IN THAT APPELLANT'S ALLEGED ADMISSIONS THAT HE WAS "NOT INNOCENT OF THIS" WAS TAKEN OUT OF CONTEXT AND AMBIGUOUS AS TO MEANING.

A. Relevant Facts for Points of Error One and Two:

Appellant filed a motion in limine regarding, *inter alia*, any references to alleged inculpatory statements made in jail calls or mail. [CR229]. At a pre-trial hearing regarding this motion, the State contended it had provided the defense notice of a jail call between Alex and his mother, that had been translated from Spanish to English and certified. [4RR9; See also 9RR-SX91]. Further, the State promised to approach prior to evidence being presented regarding this call. [4RR9].

Later in trial, outside presence of the jury, the court considered the February 19, 2021 jail call between Alex and his mother. [6RR6]. The State argued it wanted to admit the call because Alex tells his mother "[w]e are not innocent of this." [6RR6].

Alex's reference to "we are not innocent" appeared in the conversation twice. First, on page 4 Alex asks his mother to bail him out and says "...we are not innocent. I already told you that. And I am going to tell you again. I'll explain everything when

I see you in person, but you have to get me out. Because if you don't my bond is going to get higher." [9RR-SX91 at p. 4 of 12]. Later in the conversation, with mounting frustration about bond, Alex said again "[w]e are not innocent of this, they already said that. We can't do anything anymore." [9RR-SX91 at p. 9 of 12].

The state argued the recording should come in as an admission and in support of this, they cited to several things: first, in response to his mother asking what happened, Alex said he went to court and cannot see his brother Kevin because people are talking and saying Alex killed someone [6RR6-7; 9RR-SX91 at p. 2 of 14]; second, in referencing bond, Alex said "right now, they gave me a chance of $300,00 with that, I killed somebody" [6RR7; 9RR-SX91 at p. 7 of 14]; and then, on page 9 of 14, box 112 of the transcript of the call, Alex said "we are not innocent of this." [6RR7; 9RR-SX91 at p. 9 of 14]. The state argued the entire call should be admissible because, in their estimation, the "this" they were not innocent of was referring to either the murder or the aggravated robbery, which the court had ruled would be admissible. [6RR8].

Appellant responded that it was unclear what offense Alex was referring to when he said "we are not innocent of this" in that there were at least three potential charges [6RR8]. In fact, early on in the call he says "...they charged me with killing someone and the other thing." [9RR-SX91 at p. 2 of 12]. In addition to the fact there

were several offenses Alex was being investigated for, at the time of the call, Alex was also being threatened with capital murder charges for the instant case. [6RR11]. As defense counsel explained, the call was related to bond, and juries are not privy to the concepts involved in setting bonds and the differences in bonds, depending on the particular charge in question. [6RR11-12]. Furthermore, defense counsel explained that in the call with his mother Alex:

> ...is predominantly concerned with making bond and whether his mom would make bond, and a mom who does not know what he is charged with. At that time, he had a number of different charges coming out of at least three different transactions. One of which he was innocent of, but he didn't understand why he was being charged and he was actively charged at the time of this phone call and didn't know what the resolution was going to be of that.

[6RR8]. Defense counsel argued Alex's statements were not admissions but made in the context of explaining to his mother how the bond was set and why the bond is so high. [6RR8]. As for the second reference to "we are not innocent of this," had the State cited the entire statement in question, it would have read as follows: "[w]e are not innocent of this, ***they have already said that.***" [9RR-SX91 at p. 9 of 14][emphasis supplied]. In other words, Alex's statement, when looked at in full context of the sentence wherein it was spoken, is not an admission by Alex, but a quote as to what someone, i.e., "they" have already said to him in the context of his bond. [See 9RR-SX91 at p. 9 or 14]. In that Alex's alleged admissions in the call are unclear what Alex

is referring to, Appellant objected that the statements were not relevant, and that per the Texas Rule of Evidence 403's balancing test, Alex's statements in the call were irreparably prejudicial, likely to confuse the jury, and deprive him of a fair trial. [6RR9-10].

The court reserved ruling on the matter to allow the parties to provide additional research, but indicated it was inclined to let it in. [6RR13-14]. Neither party provided any additional information, and State's Exhibit 90, the jail call from Alex to his mother, and State's Exhibit 91, a certified translation of the jail call from Spanish to English was admitted over defense counsel's continued objections. [6RR198; 9RR-SX90, SX91]. Deputy Viramontes identified the voices on the call as being those of Alex and his mother Doris. [6RR197]. Over Appellant's objections, Viramontes further summarized the call, stating it related to Alex asking for his mother to bond him out before his bond gets higher, and that Alex admitted they were not innocent. [6RR200].

The tone of Alex's conversation with his mother was also fueled with frustration and was unfairly prejudicial in that it portrayed him as disrespectful to his mother: investigator Viramontes described Alex's tone toward his mother as "agitated" [6RR200]; and defense counsel explained Alex had to repeatedly tell his mother he wanted to explain the bond situation in person and could not do it over the phone

[6RR9-10]. What is more, the State capitalized on this during closing argument:

> And before I move on, did you notice the difference in his tone when he was talking to his mother versus when he was talking to Dayvon and Kevin? He was asking for his mother to do an impossible thing, and that is to gather money that they probably didn't have to bond them out because of something that he did, and to get himself out of jail... He was being selfish and his mother was trying to help and he was still being needy.

[7RR136-37].

B. Standard of Review:

A court of appeals reviews a trial judge's decision to admit or exclude evidence under an abuse of discretion standard. *Henley v. State*, 493 S.W.3d 77, 82–83 (Tex.Crim.App. 2016). A trial judge abuses his discretion when his decision falls outside the zone of reasonable disagreement. *Id.* at 83. In order to reverse a trial court's decision, the court of appeals "must find the trial court's ruling was so clearly wrong as to lie outside the zone within which reasonable people might disagree." *Id. (quoting Taylor v. State*, 268 S.W.3d 571, 579 (Tex.Crim.App. 2008)).

C. Analysis:

Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Henley v. State*, 493 S.W.3d 77, 83-84 (Tex. Crim. App. 2016)(citing TEX. R. EVID. 401 ("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."). The Court of Criminal Appeals has said "[i]t is important, when determining whether evidence is relevant, that courts examine the purpose for which the evidence is being introduced. It is critical that there is a direct or logical connection between the actual evidence and the proposition sought to be proved." *Layton v. State,* 280 S.W.3d 235, 240(Tex. Crim. App. 2009)**(***citing Moreno v. State*, 858 S.W.2d 453 (Tex.Crim.App.1993).

In the instant case, the State offered Alex's phone call and its contents as evidence of an admission of guilt by Appellant; the State argued it wanted to admit the call because Alex tells his mother "[w]e are not innocent of this." [6RR6]. Defense counsel argued the statements were not clear as to meaning, because they were spoken in the broader context of explaining to his mother what he knew about why his bond was set so high. [6RR11]. In one of the two instances where Alex says "we are not innocent of this," it is clear he is not making an admission, but rather explaining his bond: "[w]e are not innocent of this, *they have already said that*." [emphasis supplied][See 9RR-SX91 at p. 9 of 14]. Defense counsel also explained the "this" Alex was referring to was unclear: at the time, Alex had at least three other possible charges, and the State was threatening capital murder charges in the instant case which

would also increase the bond. [6RR11]. In fact, early on in the call Alex said "...they charged me with killing someone *and the other thing*." [emphasis supplied][9RR-SX91 at p. 2 of 12]. Defense counsel argued:

> If this comes in before the jury, the unfairness of confusion with respect to the jury, they don't understand that he's been charged with other things, nor should they understand that. This will confuse them. This is not clear what he's talking about. It is perfectly capable that -- or able that he is denying one and admitting to another, or denying both, or admitting to both. We don't know. It is unclear. And to put this before this jury unfairly prejudices this defendant. I'd argue that it is not relevant.

[6RR9].

While prejudical and confusing to the jury, as argued *infra*, Alex's statement was also not relevant. Because of the confusion related to multiple charges and potential charges, it was not properly established that any alleged admission related to the charged offense. In *Tienda v. State*, the Court of Criminal Appeals was clear "[e]vidence has no relevance if it is not authentically what its proponent claims it to be. Rule 901(a) of the Rules of Evidence defines authentication as a 'condition precedent' to admissibility of evidence that requires the proponent to make a threshold showing that would be "sufficient to support a finding that the matter in question is what its proponent claims." *Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012). The trial court, as gate-keeper, must decide the preliminary question of whether the proponent of the evidence has supplied facts that are sufficient to support a

reasonable jury determination that the evidence he has proffered is authentic." *Tienda,* at 638. The review of a trial court's ruling on this question is deferential and provided it is "within the zone of reasonable disagreement," a reviewing court should not interfere. *Tienda*, at 638. However, the facts in the instant case show it was unclear what offense Appellant was referring to in his statement, or whether he was simply repeating to his mother what someone else told him in the context of his bond, i.e., "[w]e are not innocent of this, *they have already said that*," [see 9RR-SX91 at p. 9 of 14]. Thus, the proponent of the evidence failed to supply facts sufficient to support a reasonable jury determination that Alex's statements were the admissions of guilt to the charged offense, that the proponent alleged them to be. Accordingly, this Honorable Court should find the trial court abused its discretion in admitting evidence that was not relevant.

POINT OF ERROR NUMBER TWO: THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING APPELLANT'S JAIL CALL TO HIS MOTHER IN THAT ANY PROBATIVE VALUE OF HIS AMBIGUOUS, ALLEGED ADMISSIONS OF HE WAS "NOT INNOCENT OF THIS" AND REFERENCES TO BOND WERE SUBSTANTIALLY OUTWEIGHED BY UNFAIR PREJUDICE IN VIOLATION OF RULE 403.

A. *The Facts*: Please see Point of Error One*, supra* for the applicable facts.

B. *Standard of Review*: See Point of Error One, *supra,* for applicable Standard of Review.

C. Analysis:

As argued *supra*, although the jail call between Alex and his mother was not relevant, in *Inthalangsy v. State*, 634 S.W.3d 749, 758 (Tex. Crim. App. 2021) the Court explained "even when evidence is relevant, a court may exclude it '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.'" *Id*. (citing Tex. R. Evid. 403; and *Gigliobianco v. State*, 210 S.W.3d 637, 640–42 (Tex. Crim. App. 2006). Alex objected that this evidence, while not relevant, was also inadmissible per Rule 403 and if admitted, would unfairly prejudice him and confuse the jury. [6RR9]

The *Inthalangsy* Court explained "the fact that an item of evidence shows the defendant in a negative light is not sufficient to justify its exclusion on Rule 403 grounds: 'Almost all evidence offered by the prosecution will be prejudicial to the defendant. Only evidence that is unfairly prejudicial should be excluded.'" *Inthalangsy v. State*, 634 S.W.3d 749, 758 (Tex. Crim. App. 2021)(*citing DeLeon v. State*, 77 S.W.3d 300, 315 (Tex. App.—Austin 2001, pet. ref'd). Unfair prejudice is the "tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." *Montgomery v. State*, 810 S.W.2d 372, 389 (Tex. Crim. App. 1990), on reh'g (June 19, 1991). If the probative value of the evidence is

not substantially outweighed by the risk of unfair prejudice, the court should admit the evidence. *Id.*

A Rule 403 analysis generally balances the following four factors, though they are not exclusive: "(1) how probative the evidence is; (2) the potential of the evidence to impress the jury in some irrational, but nevertheless indelible way; (3) the time the proponent needs to develop the evidence; and (4) the proponent's need for the evidence." *Fish v. State*, 609 S.W.3d 170, 182 (Tex. App.—Houston [14th Dist.] 2020, pet. ref'd)(*citing Colone v. State*, 573 S.W.3d 249, 266 (Tex. Crim. App. 2019).

Consideration of the Rule 403 balancing factors in the instant case demonstrate that any probative value of the evidence in question was substantially outweighed by the danger of unfair prejudice:

1. Probative Value of the State's Evidence:

The State argued it wanted to admit the statements in the call as an admission of guilt because Alex tells his mother: "[w]e are not innocent of this" [6RR6]; "[t]here are people who are talking" [6RR7]; "they charged me with killing someone" [6RR7]; "[r]ight now, they gave me a chance of 300,000 with that, I killed somebody"[6RR7]. The state argued the entire call should be admissible because, in their estimation, the "this" they were not innocent of was referring to either the murder or the aggravated robbery, which the court had ruled would be admissible. [6RR8]. As argued at length

in the first Point of Error, because the conversation was about the specifics of his bond and why it was so high, and Alex had several pending charges, Alex's alleged admissions, i.e., "we are not innocent of this," were too vague to be relevant. See Point of Error Number One, *supra*. This factor weighs in favor of exclusion.

2. The State's Need For the Evidence:

The proponent's need for the evidence was low in that the State had presented other evidence pertaining to the instant charges that did not address bonds, other charges, or portray Alex with a prejudicial tone toward his mother when she was trying to help him: i.e., State's Exhibit 106, a recorded statement of Alex to co-defendants wherein Alex said he was going to take the murder charge because "I killed him" [SX106 at 51:67], and admitted to having shot the complainant in the head. [SX106 at 1:06:17].[3] Not only was State's Exhibit 106 admitted and published to the jury [6RR193-94], but the lead investigator Deputy Viramontes testified to these

[3]The defense theory of Alex's statements on the recording SX106 was that Alex was covering for his brother Kevin: He's trying to protect his little brother. "You know that 100% that both Dayvon and Alex knew they were being recorded...They talked about it not once, but twice at the beginning of these conversations, back and forth through the wall with all of that. [122-123; SX106 at 1:24:05]. Alex calls for Kevin and tells him "I'm coming clean. I love you." [SX106 at 34:10]; Alex tells Dayvon that Kevin was about to "take the fall" [SX106-34:46]; and "Y'll good though. I'm taking the murder charge because I did that." [9RR-SX106 at 49:21]. Alex also told Kevin they were all going to get charged "but I'm gonna take the murder charge. Yeah I killed him." [9RR-SX106 at 51:67]. Alex tells Dayvon he feels bad for Kevin because he's young. [9RR-SX106 at 01:02:16].

admissions by Alex also. [6RR203-204]. Thus, the State's need for admission of Alex's prejudicial jail call to his mother was low. This factor weighs in favor of exclusion. *See Gigliobianco v. State*, 210 S.W.3d 637, 641 (Tex. Crim. App. 2006)

3. Unfair Prejudice: The Potential to Impress the Jury in an Irrational and Indeliable Way:

As defense counsel stated, the entire phone call between Alex and his mother pertained specifically to bond. [6RR8]. At the time, Alex had at least three charges related to three separate transactions pending. [6RR8]. Defense counsel argued that Alex's statements were in the context of explaining bond to his mother, and

> If this comes in before the jury, the unfairness of confusion with respect to the jury, they don't understand that he's been charged with other things, nor should they understand that. This will confuse them. This is not clear what he's talking about.

[6RR9]. Further, he repeatedly tells his mother he wants to explain it to her in person, but cannot do so on the phone.[4] [6RR9]. Thus, counsel argued:

> And so whatever he is admitting to, though, it is unclear what he is admitting to. And that's where the unfair -- unfairness of confusion comes from for this jury. It is unclear what he is admitting to.

[6RR10]. While the court expressed its belief Alex was referring to the murder by

[4]Deputy Ontiberos, a custodian of records for telephone calls made in the Harris County Jail, testified the call made by Alex Ordonez to his mother on February 19, 2021 was during the time when in-person visitation was forbidden due to Covid-19 protocols. [6RR133-35, 139].

virtue of his statement he was charged with killing someone, it also noted Alex's remark about being charge also with "...the other thing," which the court was "a little concerned about." [6RR10]. However, the court seemed to dismiss this concern regarding a charge for "...the other thing" simply because Alex mentioned being charged with the murder more than once. [See 6RR10-11].

Defense counsel argued that because Alex's statements were made in the context of explaining bond,

> "...that's not fair for a jury then to be given that statement. They don't understand the concept of bonds. They don't understand what the different proportions of bonds are and what it means. They don't understand any of that. They also don't understand that he was being threatened with being charged as a capital...And so again, it's not appropriate [for] that discussion [to] come in before them. But this defendant was being threatened with that. It would become a capital and that it could go higher. And so this conversation is very much focused on the bonds and why the bonds are the way they are."

[6RR11-12]. The problem expressed by defense counsel, i.e., that the jury is not equipped to evaluate conversations about bonds and how they are set, is also one that can render such evidence more prejudicial: "For example, 'scientific' evidence might mislead a jury that is not properly equipped to judge the probative force of the evidence." *Gigliobianco*, at 641. Similarly, the evidence of Alex's jail call about his

bond was prone to this problem in that it pertained to a complex set of facts[5] and their application to legal practices not readily understood by lay people.

The Texarkana Court of Appeals has addressed admission of bail bond information in the context of a Rule 403 objection. *Arroyo v. State*, 259 S.W.3d 831, 838 (Tex. App.—Tyler 2008, pet. ref'd). *Arroyo* acknowledged that "...bail bonds correlate with criminal charges, and such evidence could impress the jury in an irrational and indelible way. *Arroyo*, at 838. The court also noted most jurors lack knowledge about bail bonds, and those with more experience might draw adverse conclusions about the accused. *Id.* While the *Arroyo* Court ultimately held Rule 403 did not preclude the admission of the bail bond information per the facts of that case, the analysis employed by the court is instructive in Alex's case, which is distinguishable.

In *Arroyo*, the court found the bail bond information was probative of: 1) a contested issue at trial, i.e., where Arroyo lived; and 2) it also "...buttresse[d] the State's argument that Appellant's flight to Mexico was indicative of guilt. The more obligations a person has in Smith County, the less likely the person is to move to another country without a compelling reason." *Arroyo*, at 838. The *Arroyo* Court

[5] As defense counsel explained, at the time of his jail call about bond, Alex faced not only charges in the instant case, but three pending charges from three separate transactions. [6RR8].

reasoned that "[p]lacing Appellant near the scene of the shooting and explaining his flight to Mexico were two important features of the circumstantial part of the State's case. This evidence filled that role and was necessary." *Id.* at 838. In Alex's case, his statements "we are not innocent of this" were made in the specific context of his bond, when he was faced with not only the instant case, but other unrelated charges. Unlike the bail information in *Arroyo*, Alex's non-specific statement of not being innocent of "this," made in the context of explaining his high bond, failed to address or fill a specific need in the case and therefore, was not probative. *See Id.* Furthermore, the *Arroyo* Court held that in balancing the probative value of Arroyo's bond information against a risk of unfair prejudice, the probative value outweighed the latter: specifically, unlike Alex's bond, Arroyo's bail bonds in question were low ($1,000) and indicative of minor offenses. *Id.* The charges were also redacted. *Id.* Thus, the *Arroyo* court held the evidence would be unlikely to leave an impression on the jury that would overcome their judgment. *Id.* Alex's jail call conversation about bond presented very different facts: he was charged with multiple offenses and his bond was very high at $300,000.00, and for reasons he could not explain on the phone, were likely to be raised to $500,000.00. [6RR7; 9RR-SX91]. Furthermore, Alex is heard yelling at his mother on the jail call and during closing argument, the State argued Alex "...was asking his mother to an impossible thing, and that is to gather money that

they probably didn't have to bond them out because of something that he did..." and further, this evidenced Alex was "selfish." [7RR136-37]. This factor weighs heavily in favor of exclusion.

4. Amount of Trial Time Consumed:

The amount of time the State spent on presentation of the phone call between Alex and his mother was not inordinate. It involved two exhibits - the actual phone call between Alex and his mother, which was in Spanish [9RR-SX90] and the 14 page English transcription of the call. [9RR-SX91]. The custodian of records for telephone calls made in the Harris County Jail, Deputy Ontiberos, testified to the recording and preservation of the call. [6RR133-35, 139].Over defense counsel's objections, the lead detective Deputy Viramontes was also permitted to summarize the substance of the call. [6RR197-200]. The State also argued the evidence at closing. [7RR135-36]. This factor weighed only slightly in favor of exclusion.

Accordingly, consideration of the Rule 403 balancing test factors demonstrate the trial court abused its discretion in admitting the jail call and its contents in that any probative value was substantially outweighed by unfair prejudice.

PRAYER

Wherefore, Appellant prays that his judgment of conviction is reversed and remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I provided a copy of the foregoing brief to the Harris County District Attorney via service through exiling on the day the brief was filed.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3), undersigned counsel certifies that this brief complies with the type-volume limitations of Tex. R. App. Proc. 9.4(e)(I).

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