NO. 14-24-00699 -CR

IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT OF TEXAS

JARVIS HICKERSON,
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause Number 1534489
From the 177th District Court of Harris County, Texas

BRIEF FOR APPELLANT

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ORAL ARGUMENT NOT REQUESTED

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PRESIDING JUDGE:

Hon. Judge Robert Johnson
177th District Court
Harris County, Texas

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Federal Cases

State Cases

Statutes and Rules

Constitutions

STATEMENT REGARDING ORAL ARGUMENT

The undersigned attorney does not request oral argument.

STATEMENT OF THE CASE

Mr. Hickerson was charged with the offense of Capital Murder in Cause No. 1534489. [CR25]. Specifically, the indictment alleged:

> ...JARVIS HICKERSON, hereafter styled the Defendant, heretofore on or about September 19, 2016, did then and there unlawfully, while in the course of committing and attempting to commit retaliation against Amalia Alexander, intentionally cause the death of Amalia Alexander by an unknown manner and means.

[CR25].[1] The indictment included two enhancement paragraphs for prior convictions, to which Mr. Hickerson pleaded true, and were found true: for felon in possession of a weapon in Cause No. 1135095 and evading arrest/detention with a vehicle in Cause No. 1369709, both in the 263rd District Court in Harris County. [CR25; CR526]. Mr. Hickerson entered a plea of "not guilty" to capital murder [5RR34], and was found guilty by the jury of capital murder as charged in the indictment. [11RR4; CR526].

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

- Trial Reporters' Records Volumes 1-7 will appear as: [volume number + RR + page number]. E.g., "[1RR 2]," et seq.
- References to the Clerk's Record will appear as [CR + page number]. E.g., "[CR1]," et seq.
- State's Exhibits are abbreviated as "SX1," et seq.; and Defense Exhibits as "DX1," et seq.

Mr. Hickerson's sentence of life in the Texas Department of Criminal Justice without parole was automatic upon conviction, and pronounced in court on September 18, 2024. [11RR6]. Mr. Hickerson filed a timely notice of appeal. [CR533]. No motion for new trial was filed. Appellant's brief was due filed in this Honorable Court on June 23, 2025. Appellant timely filed a motion requesting an extension of time to July 8, 2025.

ISSUES PRESENTED

POINT OF ERROR NUMBER ONE: THE TRIAL COURT REVERSIBLY ERRED WHEN IT OVERRULED APPELLANT'S CONFRONTATION CLAUSE OBJECTIONS PER FORFEITURE BY WRONGDOING AND ADMITTED THE SUBSTANCE OF THE COMPLAINANT'S 9/12/201 TESTIMONIAL STATEMENT MADE TO LAW ENFORCEMENT, REDUCED TO WRITING, ADMITTED AS STATE'S EXHIBIT 33 AND READ TO THE JURY.

POINT OF ERROR NUMBER TWO: THE TRIAL COURT REVERSIBLY ERRED WHEN IT OVERRULED APPELLANT'S CONFRONTATION CLAUSE OBJECTIONS PER FORFEITURE BY WRONGDOING AND ADMITTED THE SUBSTANCE OF THE COMPLAINANT'S TESTIMONIAL REQUEST FOR EMERGENCY PROTECTIVE ORDER WHICH WAS TESTIFIED TO BY LAW ENFORCEMENT AND ADMITTED AS STATE'S EXHIBIT 34.

POINT OF ERROR NUMBER THREE: THE TRIAL COURT REVERSIBLY ERRED WHEN IT OVERRULED APPELLANT'S CONFRONTATION CLAUSE OBJECTIONS PER FORFEITURE BY WRONGDOING AND ADMITTED THE COMPLAINANT'S TESTIMONIAL STATEMENT TO THE PROSECUTOR THAT APPELLANT TOLD HER IF SHE EVER CALLED THE POLICE HE WOULD SHOOT UP HER HOUSE.

POINT OF ERROR NUMBER FOUR: THE TRIAL COURT REVERSIBLY ERRED WHEN IT OVERRULED APPELLANT'S CONFRONTATION CLAUSE OBJECTIONS PER FORFEITURE BY WRONGDOING AND ADMITTED THE COMPLAINANT'S TESTIMONIAL STATEMENT TO THE PROSECUTOR THAT THE COMPLAINANT REQUESTED A "NO CONTACT" ORDER AS A CONDITION OF APPELLANT'S BOND.

STATEMENT OF FACTS

1. September 12, 2016

Harris County Sheriff's Deputy Christopher Batey responded to the complainant's apartment on September 12, 2016 at 12:03 a.m.. [7RR31-32]. When he arrived, he witnessed the complainant standing outside an apartment in building 9, yelling, "That's him. That's him." [7RR37-39]. She was running toward a white Ford F250 pick-up truck with a temporary Texas buyer's tag. [7RR38-9].

Deputy Batey stopped the truck and spoke to the driver, Mr. Hickerson, who told Batey he had an argument with the complainant, who he had been dating for five months, because he reached over her plate of food at IHOP. [7RR44-45]. Mr. Hickerson told Deputy Batey the complainant made a scene at the restaurant, so he took her apartment keys to go retrieve his belongings. [7RR44-45].

Deputy Batey took the complainant's statement at the scene. The State questioned Batey about details of what the complainant told him, and Defense counsel

objected to violations of hearsay, confrontation, and 403. [7RR48]. The State argued that the complainant's statements to Batey, which were also memorialized in a written statement [see 12RR–SX33] were admissible through forfeiture by wrongdoing. [7RR48]. The trial court overruled the defense objections and made a finding Appellant forfeited his rights to object to violations of Confrontation. [7RR29, 48]. The jury heard the following, pursuant to the trial court's ruling:

> "Jarvis and I went to eat dinner at IHOP. I was on the phone. The waiter served our food. Jarvis reached over to grab syrup and reached over my plate. I moved my plate and then he elbowed my left forearm and asked me what that was about to. I told him it was rude to reach over someone's food. He then struck me in the head causing me pain. I screamed, 'Why would you hit me?' He proceeded to stand on the seat kicking and kneeing me causing pain to my arms and thighs. He got down and began to turn away, but turned back around and said, 'Give me them keys.' And I put my hands up in defense to protect my face and said, 'These are my keys.' He snatched the keys out of my hand cutting my finger causing me pain. Then he left. I told the waiter to call the police and I called a ride. My ride came first. I left and went home noticing his truck parked outside of my apartments. He was packing his things. He came to the car and I stood in the parking lot and told him to give me my keys. He said nothing. I went to my neighbor house and called the police, because I was scared to go into my home alone with him. The police came and I came outside of my neighbor's home. Jarvis has threatened my life, my sister's and nephew's lives. I am in fear of what he will do now. He threatened to have his friend, Big Marcus or Colon, to shoot up my house and my sister's house and said they don't care about shit, kids and all."

[7RR49, 55, 57-58; See 12RR– SX33]. At defense counsel's request, the court granted a running objection to the contents of the complainant's statement. [7RR57]. Deputy

Batey testified the complainant had cuts on her hands and an injury to her left thigh which were enough to cause pain and were caused by Appellant. [7RR61-622RR-SX18, SX19]. The District Attorney accepted charges in the misdemeanor assault case. [7RR62].

While inside the complainant's apartment, Batey noticed property damage, which the complainant reported was caused by Mr. Hickerson. [7RR12]. Batey documented the damage to: a 46 inch flat screen television knocked off of its stand [7RR62-63; 12RR– SX21]; a broken bathroom mirror [7RR63; 12RR– SX22]; glass on the bathroom floor [7RR63; 12RR– SX26]; the bed in the bedroom in a state of disarray with women's clothing strewn on it [7RR64; 12RR– SX24]; and a damaged table, with a glass top that should have been on it. [7RR65-66; 12RR– SX27]. The damages to the apartment were estimated at $750.00, and the District Attorney accepted charges for misdemeanor criminal mischief. [7RR67].

Also, over objections to Confrontation, inter alia, Batey testified the complainant said she was scared of Appellant and she wanted to file for a protective order, and Batey assisted her with the process and filling out State's Exhibit 34. [7RR48, 69; 12RR-SX34]. Over defense counsel's continued objections State's Exhibit 34 the complainant's request for an emergency protective order stating "victim is in fear for her life" was admitted. [7RR70, 72; 12RR– SX34]. Hickerson was

arrested at the scene on September 12, 2016 for both charges. [7RR77-78].

The next day, September 13, 2016, Harris County Assistant District Attorney (ADA) Emily Thompson was assigned to Mr. Hickerson's misdemeanor assault family case and criminal mischief case. [8RR43-44]. ADA Thompson spoke to the complainant that morning, prior to Hickerson appearing on that morning's docket. [8RR45]. Over defense counsel's continued objections Confrontation and hearsay, Thompson testified she went through the assault and criminal mischief complaints, State's Exhibits 35 and 36, and State's Exhibit 37, the MOEP. [8RR47-48].

Over defense counsel's continued objections [8RR62], ADA Thompson was permitted to testify per forfeiture by wrongdoing, that in her conversation with the complainant, she expounded on her written statement that Hickerson threatened to shoot up her house, to add "That the Defendant had told her in the past if you ever call the police on me I will shoot up your house." [8RR63]. Over defense counsel's objections to a violation of Hickerson's right of confrontation [8RR47], Thompson testified that the complainant wanted a "No Contact" order [see State's Exhibit 37] and Thompson assisted her with this. [8RR54]. Defense counsel requested and was granted a "continuing objection" and ADA Thompson testified a "No Contact" order was entered as a condition of Hickerson's bond [8RR54-55] and he was released on bond on September 13, 2016. [8RR66].

Hickerson appeared in misdemeanor court again on September 19, 2016 on the assault and criminal mischief cases. [8RR69]. ADA Thompson admitted it was early in the case, and no one was talking about possible incarceration at either Appellant's September 13th arraignment or at his September 19th court appearance [8RR73]. According to Thompson, the complainant intended to pursue the prosecution. [8RR75].

2. The Days Leading Up to the Complainant's Disappearance

The complainant stayed with her younger sister Laura Alexander[2] and her two sons for several days after the September 12, 2016 incident [5RR68-69] because according to Laura, she did not feel safe at her own apartment. [5RR66-67]. The complainant worked two jobs as a certified nursing and medication assistant – one at a nursing home in Houston, and the other at ICES, a holding facility for immigrants in Conroe, Texas. [5RR58, 100-101]. While the complainant stayed with her sister, she continued to go to work and would either get dropped off by Mr. Hickerson, or take Ubers because her car was not working. [5RR77].

During the time the complainant stayed with her, Laura testified Mr. Hickerson would come to her apartment to see the complainant, and stand outside. [5RR72-73,

[2] In that the complainant and her sister had the same last name, "Alexander," Laura Alexander will be referred to as simply "Laura," or "complainant's sister" to avoid confusion.

76]. The complainant told Laura that the defendant proposed to her right outside the apartment. [5RR76]. When this proposal happened, the complainant was not back together with Mr. Hickerson. [5RR103]. According to Laura, the complainant did not accept the proposal or want to reconcile with Appellant. [5RR103]. She also said she never saw Appellant lay his hands on the complainant or threaten her. [5RR92-93].

Although many of Mr. Hickerson's outgoing texts to others, including the complainant, were deleted, the texts that were produced show that between September 15 and 16, 2016, Mr. Hickerson mentioned not wanting to go back to jail and asked if the complainant would sign the papers to help him. [8RR129-130; 15RR–SX392, see e.g. messages 1, 2, and 6]. The complainant responded she was not going to sign papers. [15RR– SX392, message 3]. No texts from Appellant show anger toward the complainant. [See 15RR– 392]. After many texts of Hickerson apologizing and begging the complainant not to leave him, later texts between September 17 and 18, 2016 show a reconciliation between them, where texts become sexual in nature and they expressed affection for each other. [See 15RR– SX392, internal pages 9-12, messages 104-152]. Then on September 19, 2016 around 5:02 p.m. the complainant and Appellant started arguing again over Hickerson's alleged infidelity. [15RR–SX392, internal pages 12-15, messages 153-188]. Former Harris County District Attorney's Office Investigator Jude Vigil acknowledged some texts showed arguing

between the two over cheating and jealousy issues. [9RR101]. However, he was clear nothing in the texts between Hickerson and the complainant showed there was a threat. [9RR97]. Similarly, Deputy Miller acknowledged the messages between Hickerson and the complainant showed jealousy between them over issues of fidelity. [9RR147-9]. After such an argument, one of Appellant's final texts on September 19, 2016 at 5:46 p.m. shows Hickerson planned on stopping by the complainant's apartment and collect his belongings. [15RR– SX392, internal pages 18, message 187]. After 5:48 p.m. September 19, 2016, there were no further calls or texts between Mr. Hickerson and the complainant. [15RR– SX392, internal page 15, message 188].

3. The Last Time the Complainant Was Seen or Spoken To:

Laura testified the last time she saw or spoke to the complainant was late on September 19, 2016. [5RR78]. Call detail records[3] for both Mr. Hickerson and the complainant showed them in the area of Laura's 18203 Westfield Place residence at 11:30 p.m. on September 19, 2016. [9RR41; 15RR–SX399, slide 34]. Laura was asleep and the complainant came and woke her up. [5RR78]. The complainant asked Laura if she wanted Hickerson to take her boys to school the next morning, to which

[3] Call detail reports (CDRs) were obtained for: Jarvis Hickerson, phone number 832-970-3316; and the complainant's two phone numbers – 832-989-1620 and 346-770-7901. [9RR32-33].

Laura said, “no.” [5RR78-79]. The complainant was with Hickerson and told Laura she was leaving with him. [5RR79]. Call detail records showed Appellant and the complainant left Laura’s residence just after midnight, early on 9/20/2026. [9RR42]. Surveillance video from the complainant’s apartment complex showed Appellant’s truck entering the complex shortly thereafter on 9/20/2016 at 12:40 a.m. [9RR43, see 15RR–SX399, slide 36]. Apartment surveillance video then shows Hickerson’s white truck leave the complainant’s apartments 3:04 a.m. with an empty truck bed. [9RR43; see 15RR–SX399, slide 37, slide39]. During this same time frame, at 4:10 a.m., Hickerson’s call detail records show his cellular device ping just north of The Woodlands, and then start pinging in a southbound direction, to reenter the Cypress Lakes Apartments with an empty bed at 4:23 a.m. [9RR43-44; see 15RR–SX399, slide 38]. Consistent with the surveillance video, at 5:02 a.m. on 9/20/2016, Hickerson’s truck left the complainant’s apartment, with testimony that the surveillance video shows the truck bed is not empty. [9RR44; see 15RR–SX399, slide 40]. Appellant’s records showed his cellular device ping at 5:03 a.m. in the area consistent with the Cypress Lakes Apartments, and then traveled south to the area of 6605 Cathcart Drive, Houston, Texas. [9RR44. [9RR44-45; 15RR–SX399, slide 41]. Both Hickerson's phone and the complainant's device with the phone number ending in “7901" pinged together at the Cathcart Drive location. [9RR45].

During the day on 9/20/2016, Laura's boys were supposed to see the complainant, and she did not show up. [5RR80]. Sammie Marth, a former employee of the rehabilitation nursing facility, Legend Northwest, where the complainant worked testified that personnel records [5RR148, 150; 12RR– SX43] showed the last day the complainant worked was 9/19/2016 from 7:00 a.m. to 2:06 p.m.[5RR153]. While she was scheduled to work on 9/20/2016 at 6:00 a.m., the complainant did not show up or call in. [5RR153, 156]. She never returned to work or picked up her last paycheck. [5RR153-54].

The complainant frequently changed her phone number, so Laura tried to call the complainant at all her phone numbers but could not reach her. [5RR77, 80]. Next, Laura called Mr. Hickerson because he was the last person she knew the complainant had been with, the previous night. [5RR80]. He told Laura the complainant had taken an Uber to work. [5RR81]. The complainant's bank records showed no signs of the complainant having taken an Uber to work that day. [See 9RR131-132]. After talking with Hickerson, Laura received a follow up text stating he called to the complainant's work and they told him the complainant did not show up to work that day. [5RR81]. Laura said she thought it was suspicious that Hickerson included in his text a screen shot of the complainant's work number on his phone's outgoing call list. [5RR82]. Thereafter, Laura called the complainant's work supervisor, and law enforcement was

notified. [5RR82-83]. Apartment security let Laura inside the complainant's apartment, which she described as a wreck. [5RR83].[4]

4. The Missing Person Report

On September 21, 2016, Harris County Sheriff's Office Deputy Christopher Cooper responded to the complainant's Cypress Lake Apartment Complex for a missing person report regarding the complainant, which had been called in by complainant's friend, Tammy Young. [5RR47-8]. Ms. Young informed him that Jarvis Hickerson was the last person to have contact with the complainant. [5RR49]. Deputy Cooper contacted Mr. Hickerson who said he took the complainant to her sister's home and then dropped her off back at her apartment at 12:30-1:00 a.m. because he had to go to work that morning. [5RR50]. Hickerson told Cooper that he tried to contact the complainant at her place of work, but they told her she was a no-show. [5RR50-51]. Cooper then obtained an NCIC missing persons number for the complainant. [5RR51].

On September 22, 2016, Harris County Sheriff's Sergeant Thomas Pate andhis partner Pat Shifani were assigned to the complainant's case. [5RR114, 119, 131]. Pate conducted a welfare check at the complainant's apartment [5RR120-21] and obtained

[4] There was also testimony and evidence presented that the complainant's apartment was a mess after the September 12, 2016 criminal mischief.

surveillance video from the apartment complex. [5RR170-71; 12RR– SX42].

On September 21, 2016 prosecutors asked Mike Terry, a former investigator in the Harris County District Attorney's Office [6RR166, 169] to assist in the searching for the complainant because her family was concerned about her. [6RR172]. Terry searched for Mr. Hickerson hoping he could help him locate the complainant. [6RR172-73]. On September 23, 2016, Investigator Terry went to Mr. Hickerson's father Earl Hickerson's house. [6RR173]. There, he learned from neighbors that Appellant would come by the house periodically to borrow a trailer.[5] [6RR173, 176]. Parked close to that house, Terry saw Mr. Hickerson in his white truck with paper plates. [6RR178]. Hickerson was with another person named Marcus Washington. [6RR179]. Terry stopped the truck and Hickerson told Terry he was on his way to Lone Star Ford to return the white truck for a refund. [6RR178-79].

5. Mr. Hickerson's phone and call detail records showed Mr. Hickerson's movements around the time of the complainant's disappearance.

Terry collected Appellant's iPhone, SX13. [6RR181, 5RR134]. Thereafter, investigator Schifani obtained a search warrant for Mr. Hickerson's phone. [5RR132; 7RR15-16]. As referenced *supra*, call details reports and phone extractions were

[5]Mr. Hickerson's phone showed his business "Jay Landscaping" as the device owner. [8RR123-24]. The trailer was later described as having landscaping tools on it. [9RR31]. Furthermore, call detail records showed images related to some of Hickerson's clients who were in Conroe, Texas. [9RR75-76; 15RR– DX2, DX3].

completed on Mr. Hickerson's device and both of the devices with phone numbers associated with the complainant. [9RR32-33].

The call detail records were presented and evaluated with regard to the other evidence. These showed that on September 21, 2016, the complainant's device for the "7901" phone number pinged in an area of The Woodlands, just south of Conroe, Texas at 10:06 a.m. [9RR46; 15RR–SX399, slide 45]. The same day, at 10:47 a.m., Mr. Hickerson's device pinged at a location just north of Conroe, and at 10:50 a.m., the complainant's "7901" cellular device pinged off the same tower. [9RR46; 15RR–SX47]. The significance of this to the State's case was that the location of these pings were close to the location where the complainant's remains were ultimately found. [9RR46-47; 15RR– SX399, slide 46 and 47]. Just before 11:00 a.m., call detail records show Hickerson's device left the area just north of Conroe, Texas and traveled south on IH-45, passing the Woodlands at 11:00 a.m. [9RR48-49; 15RR– SX399, slide 48]. By 11:51 a.m., Mr. Hickerson's device was at an area consistent with 6606 Cathcart Drive, not far from 763 Marjorie Street. [9RR49; 15RR–SX399, slide 49].

On Thursday September 22, 2016, Hickerson's phone traveled from the south part of Houston to the area consistent with Cathcart Drive where it remained from 1:24 a.m. to 7:23 a.m. [9RR49-50; 15RR– SX399, slide 51]. Although there was no location data between 1:24 a.m. and 7:23 a.m., at 7:23 a.m. on September 22nd,

Hickerson's device pinged just north of Conroe again. [9RR50-1]. Thus, Hickerson's device was back in the same area where the complainant's body was ultimately found. [9RR51]. The complainant's "7901" device also pinged in that same area north of Conroe at 8:29 a.m., and at 8:34 a.m., Mr. Hickerson's device pinged in the same area, before heading south again. [9RR51; 15RR– SX399, slide 53]. At 9:47 a.m. on September 22, 2016 Mr. Hickerson's device returned to the 6605 Cathcart Drive location. [9RR52]. Within 20 minutes of arriving, Mr. Hickerson's device shows incoming and outgoing calls with Big Marcus and Gary. [9RR52]. Immediately after talking with Big Marcus, Hickerson's device calls Carol Lonestar, and then received a message from Fidel Garcia of Lone Star Ford. [9RR53-54].

On September 22, 2016, Mr. Hickerson's phone texted Adrian Castillo, "I miss you." [9RR15; 15RR– SX400, message number 385]. Deputy Miller investigated this and spoke to her, but it did not lead to anything helpful for the investigation. [9RR15].

***Mr. Hickerson's white Ford F250 truck was searched and investigated*:**

From viewing the surveillance video, Sgt. Pate learned a 4-door 2012 Ford F250 was linked to the case. [5RR125, 128; 6RR27-29, 31]. Pate learned from District Attorney investigator Mike Terry that the truck belonged to Mr. Hickerson and was going to be turned in at the dealership. [5RR126]. He went to the Lone Star Ford dealership and located the truck with VIN 1FT7W2869CEC41669, outside with paper

plates. [5RR126; 6RR27-29,31; 12RR-SX81]. Although he was unable to collect the truck at that time because it had already been sold, he noticed it was a bit messy on the inside and was clean and still wet on the outside. [5RR128-130]. Thereafter, Pate learned who the new owner of the truck was, and had it picked up on September 30, 2016 so that the truck could be processed for evidence, such as blood and fingerprints. [5RR130].

Investigator Mark McElvany with the Harris County Sheriff's Office's CSI Unit obtained voluntary consent from the truck's new owner [6RR21, 23; 12RR-SX59], and searched the truck for latent blood. [6RR24-25]. Although he assumed the truck was washed and detailed prior to sale [6RR47-48], McElvany sprayed Blue Star, a substance that would show any latent blood that had been cleaned up. [6RR38-39]. However, no latent blood was discovered on the truck's interior or exterior. [6RR38-39, 43-44, 53]. Initially, McElvany believed they had discovered a bone in the truck bed, but it turned out to be an animal fragment. [6RR33]. A photo of the truck's bed liner showed an area of reddish brown discoloration. [6RR33-34; 12RR-SX70]. He took a sample of that area. [6RR34]. He also sprayed Blue Star on the inside and outside of the truck to determine whether latent blood was present, and there was no chemical reaction indicating blood. [6RR43-44]. McElvany testified he took 9 swabs looking for DNA in the truck [6RR38, 44], which he claimed were sent to the medical

examiner's office for further analysis. [6RR51]. All the same, Harris County Institute of Forensic Sciences [HCFSI] DNA analyst Victoria Wamsley testified that there were no items submitted for DNA testing that came from the truck. [7RR133].

Law enforcement also obtained Cypress Lake Apartment Complex's surveillance video showing when a white truck entered and exited that apartment complex, and at trial this was admitted as State's Exhibit 42. [5RR170; 12RR– SX42].

7. The Complainant's apartment was searched and investigated

Elias Rivera, a crime scene investigator with the Harris County Sheriff's Office, became involved in the complainant's missing persons case on October 5, 2016. [7RR137]. He was asked to assist homicide in processing the complainant's apartment for latent blood stains and to search for evidence related to a missing person or homicide. [7RR138-39]. Knowing nothing about the case, he was briefed by the homicide investigators at the scene. [7RR138]. Rivera described the apartment as being disorganized. [7RR141-42, 163]. Items were scattered around the apartment, on the floor and on the furniture. [7RR169]. He learned that the complainant's father and sister had been to the apartment prior to their arrival, and he had no idea what, if anything had been moved or touched. [8RR24]. Also, the electricity in the apartment had been turned off. [7RR164]. He photographed the apartment, and had another deputy create a video of the apartment. [7RR143]. State's Exhibits 201 through 294,

386 and 199 were admitted as depicting the apartment. [7RR144-45]. Photos were taken of any entrances, any surveillance cameras, and lighting at the scene. [7RR149-50]. Rivera testified there were signs that indicated a potential struggle: the damaged television with a footprint on it, a broken mirror, raised seat cushions, and the minimal Blue Star reaction indicating the possibility of blood. [8RR30; 7RR159]. However, testimony was clear that the mirror and TV were broken on September 12, 2016, and all of that was already attributed to Appellant's criminal mischief case. [7RR81]. There were clothes, handbags and bedding strewn on the sofa. [7RR158-59]. There was a mattress on the living room floor, with brown stains all over it. [7RR161]. The stains did not look like blood to Rivera. [8RR25].

In the bathroom, the mirror had been broken and a portion was missing. [7RR165]. Rivera was informed that was broken sometime in the past. [8RR27]. There were very small fragments of glass on the cabinet. [7RR165]. Discoloration or possible blood was on the tub. [7RR166]. He tested the areas with Blue Star, the chemical which reacts when sprayed on an area with possible presence of latent blood. [7RR180]. Although cleaning supplies can cause false positives, two areas, one near the bathtub and one near the kitchen sink, reacted as flourescents, i.e., very weak, faint positive Blue Star reactions. [7RR181-82]. Rivera explained he swabbed various pieces of evidence using a Q-tip type instrument. [7RR185]. He transported these back

to their office in paper evidence bags. [7RR186]. In the bedroom, there was clothing, shoes and other items strewn around the room. [7RR170; 14RR-SX253, SX254]. In a trash can, there was a note that read, "To my fiance from you. Man, you love you!" [7RR177-78].

Eight days after his first trip to the complainant's apartment, Rivera made a second trip on October 13, 2016, this time with a more senior CSI and when there was more light. [8RR34, 36]. This second trip was out of an abundance of caution in case they missed anything the first time. [8RR34, 37]. State's Exhibit 259 shows two cell phones on a shelf which were collected the second time Rivera went to the apartment. [7RR173; 8RR29; 13RR-SX174]. While he collected more evidence there the second time, nothing turned out to be helpful in terms of showing signs of a struggle, or locating the complainant. [8RR34].

8. Mr. Hickerson's Marjorie Street Address was searched and investigated.

Investigator Rivera was also asked to process a scene at another address; 763 Marjorie Street. [7RR191]. He described the property as dilapidated, with feces, clothing, food and trash scattered around the exterior. [7RR192]. Rivera identified State's Exhibits 295-381 as depicting the Marjorie Street scene. [7RR192; 196]. Specifically, Rivera was directed to search a utility trailer on the property, along with

tools to see if he could identify any blood evidence or other evidence related this investigation. [7RR193]. The Ranch King trailer was in fair condition with a license plate and VIN on it.[7RR201; 15RR– SX322]. Next to it were three wheelbarrows side-by-side, laying upside down. [7RR199]. Investigator Rivera examined a large blue tarp and one small gray tarp for DNA. [8RR13, 33]. Stains on the gray tarp, along with the axe and other pieces of evidence were processed for blood and came back negative. [8RR33]. Rivera stated there were strands, which were tested and turned out to be fibers, on a black and red shovel at Marjorie Street. [8RR20-21]. Despite the forensic testing, none of the evidence processed on Marjorie street assisted in locating the complainant. [8RR33; 7RR20].

Deputy Miller also explained he learned Mr. Hickerson had a U-Haul storage unit, which he investigated. [9RR12]. He was unable to find anything of evidentiary value either at the storage unit, or in surveillance video of the unit. [9RR12].

9. Discovery of the Complainant's Skeletal Remains

a. The location: Conroe, Texas

On November 30, 2016 a man walking his dog in Conroe, Texas discovered possible human remains in a field between a church and the wood lines. [6RR55]. Detective Cook of the Conroe Police Department's CSI Unit testified when the patrol division arrived at the scene they believed they found a human skull. [6RR55-56].

State's Exhibit 97 was the GPS coordinates of where evidence was located.[6] [6RR63].

Cook testified that the area, as depicted by SX83, looks more developed in 2024 than it was in 2016. [6RR60]. In 2016, there were no buildings, other than the church. [6RR64]. Also, the old service road that existed in 2016, is no longer there and was now grown over with trees and brush. [6RR65, 109]. Cook described the old makeshift roadway as the beginning of a driveway that might one day serve as an extension of the road. [6RR108; 13RR-SX123, SX124].

***b. Processing the Scene**:*

When the call came in, Cook walked to the location of the remains, but it was too dark to take useful photographs. [6RR 69, 71; 13RR– SX84-SX96]. During the night, only the skull and 2-3 ribs were found. [6RR 79]. State's Exhibit 94 shows the skull that was found. [6RR75]. Cook received his Sergeant's permission to wait until the next day to process the scene during daylight, and to let Cook contact a forensic anthropologist to assist them. [6RR68]. The remains were roped off and an officer remained on the scene to guard it through the night. [6RR74, 76]. Cook had been

[6]Exhibit 95 was a photo of the GPS coordinates, with the date and time it was taken. [6RR70]. Exhibit 96 was a pin drop of the location. [6RR 70]. The red dot on State's Exhibit 83 marked the area where Detective Cook responded to. [6RR56, 58]

informed that only weeks earlier Harris County had been in the area searching a pond for a cell phone for a missing person's case. [6RR110]. Therefore, Harris County was also contacted when the human remains were found. [6RR111-12]. On December 1, 2016 , Deputy Miller with the Harris County Sheriff's Office responded to the scene in Conroe. [9RR16-17].

In the morning, Montgomery County Forensic Science Center ME officers arrived at the scene. [6RR 77]. With them was forensic anthropologist Dr. Bytheway of the Southeast Texas Applied Forensic Science Center. [6RR66-67, 77]. More bones were recovered, including the mandible, left femur, scapula, right femur and os coxae, and lumbar. [6RR80-81]. Because many bones were still missing, they brought a cadaver dog out who found more bones and a shallow grave that also included clothing. [6RR82-83]. Several articles of clothing, including a shirt, underwear and pants were found in the grave. [6RR102]. The shirt may have been pink and white but with fluids from the body decomposition, it was hard to tell. [6RR104-05]. A longer bone was found inside the shirt, and jeans were found with a bone inside them. [6RR105-06]. Also recovered were several finger bones, and multiple fingernails. [6RR103, 107]. Hair was located approximately 21" deep in the grave. [6RR105]. The overall depth of the grave was three feet, the width was three feet, and the length was six feet. [6RR120]. The dirt in the grave site was mixed with clay, and would have

been heavy to shovel. [6RR120-21].

Dr. Bytheway suspected the scattering of the remains was due to scavenging animals.[6RR114]. Cartilage was missing on the nose and teeth, from decomposition or from animals. [6RR90]. The medical examiner Dr. Pinneri testified the sacrum, the pelvis and the long bones showed signed of animal activity. [6RR141]. The fact cervical bones, rib ends and different vertebra were missing also served as indicia of animals having scavenged and carried away these bones. [6RR141].

The small, makeshift roadway that existed in 2016 was not too far from the place where the shallow grave was located. [6RR107; 13RR–SX122]. In fact, the grave site was visible from the makeshift roadway that existed back in 2016. [6RR115]. Cook made a note in his report that the makeshift roadway was close to the grave, as he saw a manhole sewer cover on the roadway, directly across from the grave. [6RR112]. Although this passage was narrow, Cook believed it was still wide enough that it could have been driven upon by a truck. [6RR112, 119]. He explained that if one was driving on the paved portion of the road, they could continue driving along the makeshift road. [6RR112-13]. Due to the level of decomposition of the human remains, and the fact only bones were found, it was clear to Detective Cook that much time had passed so he did not investigate recent use of the roadway. [6RR117-18]. Also, due to the large amount of brush, he did not look for tire marks.

[6RR119-120]. Detective Cook measured and photographed anything of interest found in the grave. [6RR101]. But all skeletal remains were brought back to the forensic center, while non-skeletal evidence was collected by police. [6RR100].

On December 6, 2016, dental records helped to presumptively identify the remains as being those of the complainant. [9RR17].

c. Autopsy:

Montgomery County forensic pathologist Dr. Kathryn Pinneri assisted Dr. John in the autopsy on Case Number 16-0469, which was the number assigned to the human remains later identified as the complainant. [6RR127, 129-30]. Dr. Pinneri authenticated the autopsy report which was admitted as State's Exhibit 157, along with autopsy photographs. [6RR136-37; 13RR– SX157, SX158-SX195, SX197]. Because the case involved only skeletal remains, the autopsy report included a forensic anthropology report by Dr. Bytheway. [6RR, 132,137-38, 149]. In the instant case, both Dr. Pinneri and Dr. Bytheway were at the scene working with law enforcement. [6RR132-33]. Also, as part of the autopsy, the anthropologist laid out the bones and identified which bone belonged where on the body. [6RR150].

d. Cause of Death: Undetermined

Dr. Pinneri explained it is difficult to determine cause of death when dealing with skeletal remains, so it is often "undetermined," as it was in this case. [6RR156].

While the remains were a "fairly complete skeleton," it was missing some key bones, particularly the left side ribs which protect the heart and lungs. [6RR152]. Since trauma to either of those organs can cause death, the bones around them might show markers of such trauma. [6RR152]. Without those bones, it was not possible to assess this. [6RR152]. They took a lot of x-rays of the skeletal remains looking, to no avail, for indicia of projectiles, knife tips, and any unique appearances of the frontal sinuses. [6RR155]. In certain situations, the latter can be compared to prior sinus x-rays for identification. [6RR155].

Similarly, trauma to the brain can cause death. [6RR152]. The skull, which houses the brain, was intact and upon opening it, there was no sign of skeletal trauma to it. [6RR153]. The skull contained some severely decomposed tissue inside it, which they retained in case DNA analysis was requested. [6RR134]. However, due to decomposition, there was no way to know if there was any soft-tissue damage to the skull. [6RR153].

Due to being only skeletal remains, the autopsy in the instant case engaged scientific method to identify the subject: dental records were used for presumptive identification. [6RR138-39]. DNA comparison was used to make a positive identification. [6RR139].

Skeletal remains present challenges in determining proximate postmortem

interval, or time between when the person went missing to when they were found. [6RR146]. In this case, Dr. Pinneri could not determine when the complainant died. [6RR147].

e. Manners of Death: Undetermined

The manner of death, or circumstances under which the death occurred, could be by natural death, by accident, by suicide, by homicide, or undetermined. [6RR157]. In the instant case, the manner was labeled as "undetermined" because they were unable to determine the cause of death based on the fact only skeletal human remains were available. [6RR157-58]. Pinneri explained that the presence of a shallow grave is suggestive of homicide [6RR158-59], but without a cause of death, she would characterize it as undetermined. [6RR161].

10. DNA:

Harris County Institute of Forensic Sciences DNA analyst Victoria Wamsley made findings in Mr. Hickerson's case, which she memorialized in a report, SX387. [7RR85; 15RR-SX387]. The DNA comparison done in this case involved three known DNA sources and one alternate known source. [7RR91]. Jarvis Hickerson's DNA, labeled K2, meaning "Known-2," was submitted in a buccal swab by law enforcement. [7RR92]. Known source K3 was the complainant's DNA which was obtained from a tooth discovered with her skeletal remains, which was labeled K1-T. [7RR94]. The

alternate known source, labeled AK-1, came from a toothbrush taken from the complainant's residence. [7RR95]. The donor of the DNA on the tooth (K1-T) was not the donor of the DNA on the toothbrush taken from the complainant's residence. [7RR96]. Evidence collected in the investigation was compared to the known DNA sources. The first step in the testing was serology, i.e., the collection of biological fluid like blood or semen. [7RR102]. Once that evidence was collected, it was subjected to a presumptive test to determine if that fluid is blood or semen. [7RR102-3]. Some of the landscaping tools, including a Fiskars head shears tested presumptively positive for blood, but no DNA was found. [7RR104-105, 129-130]. Similarly, the hand saw and black and red grip shovel were presumptively positive for blood, but there was no DNA. [7RR130]. Ms. Wamsley was clear that although the swabs of some items tested presumptively positive for blood, none revealed DNA that could be compared. [7RR131]. The dark stains on the complainant's carpet tested presumptively negative for blood. [7RR116]. For the most part, there was either no DNA detected at all on the swabs that were analyzed, or the DNA found could not be compared. [7RR107, 118]. Swabs taken from evidence in the complainant's bathroom revealed very strong support for Mr. Hickerson's inclusion. [7RR132]. However, Wamsley said this would make sense since Hickerson stayed at the complainant's apartment. [7RR132].

11. No other suspects were meaningfully investigated

According to her sister Laura, the complainant had problems with other boyfriends in the past, but not Mr. Hickerson. [5RR96]. The complainant's past boyfriend Brandon Gardner hurt the complainant when they dated. [5RR96]. The complainant dated Brandon sometime around 2008, but Laura was not sure when they broke up. [5RR108]. It was her belief Brandon moved back to Wisconsin in 2010 or 2011 and she had no reason to believe Brandon had anything to do with this. [5RR108]. Deputy Miller learned about Brandon Gardner, a former romantic partner of the complainant, and the fact he had prior police reports of domestic abuse. [9RR10]. Although he did not speak with Gardner, based only on what Laura told him, Miller did not consider Gardner a suspect in this case. [9RR10-11, 25]. The complainant was not dating anyone other than Mr. Hickerson around the time of her disappearance. [5RR96, 109].

However, before dating Mr. Hickerson, the complainant dated Dexter Murray in 2014. [5RR88]. During the period of time she disappeared, the complainant was talking to Dexter, and other friends by phone. [5RR95]. Dexter was like a brother to Laura, and when the complainant went missing, Laura provided Dexter's Florida contact information to the police. [5RR89]. She also spoke to Dexter, and he had no information regarding the complainant's whereabouts. [5RR89]. Miller said other past partners of the complainant, including Talvery Hooker, were also ruled out as

suspects. [9RR11].

Miller said nothing in his investigation pointed to any other suspect, but he admitted he never obtained the Uber records from September 19, 2016. [9RR26]. Also, although Miller was provided information that the complainant hung around rappers, and was told to investigate someone named J. Prince, but he did not because he was still stuck on Hickerson as a suspect. [9RR27-28].

SUMMARY OF THE ARGUMENT

Forfeiture by wrongdoing only applies when at least one of the reasons for the defendant's alleged harm or murder of the witness is to prevent them from testifying. However, the existence of a history of domestic violence and an allegation of recent assault, or even a pending charge of assault, in the background of a murder case does not automatically establish the grounds for forfeiture by wrongdoing. To hold otherwise would create a bright line rule vitiating the presumption of innocence and Confrontation Clause rights of an accused charged with murder under those circumstances. Appellant's expression of not wanting to return to prison and asking the complainant, without success, to consider signing papers to help him, in the context of the greater weight of evidence pertaining to his desire to reconcile with the complainant – and their ultimate reconciliation and break-up, fails to establish by a preponderance of the evidence that Appellant was motivated to kill the complainant to prevent her from testifying at any potential misdemeanor assault and/or criminal mischief proceedings. Thus, the trial court committed reversible error when it determined Appellant forfeited his Confrontation objections with regard to the admission of the complainant's testimonial statement to officers at the scene, memorialized in SX33, and read to the jury, and her alleged oral statement to the prosecutor on Appellant's pending assault case. With regard to the latter, the

complainant's alleged statement to the prosecutor that in the past, Appellant threatened to shoot up her house if she ever called the police served as the evidence of retaliation supporting the capital murder charge. These statements were made in the context of preparing for Appellant's prosecution and were testimonial. So too was the complainant's Request for Magistrate's Order for Emergency Protection [7RR70, 72; 12RR–SX34], and accordingly, his Appellant's objections were meritorious.

ARGUMENT[7]

POINT OF ERROR NUMBER ONE: THE TRIAL COURT REVERSIBLY ERRED WHEN IT OVERRULED APPELLANT'S CONFRONTATION CLAUSE OBJECTIONS PER FORFEITURE BY WRONGDOING AND ADMITTED THE SUBSTANCE OF THE COMPLAINANT'S 9/12/201 TESTIMONIAL STATEMENT MADE TO LAW ENFORCEMENT, REDUCED TO WRITING, ADMITTED AS STATE'S EXHIBIT 33 AND READ TO THE JURY.

POINT OF ERROR NUMBER TWO: THE TRIAL COURT REVERSIBLY ERRED WHEN IT OVERRULED APPELLANT'S CONFRONTATION CLAUSE OBJECTIONS PER FORFEITURE BY WRONGDOING AND ADMITTED THE SUBSTANCE OF THE COMPLAINANT'S TESTIMONIAL REQUEST FOR EMERGENCY PROTECTIVE ORDER WHICH WAS TESTIFIED TO BY LAW ENFORCEMENT AND ADMITTED AS STATE'S EXHIBIT 34.

POINT OF ERROR NUMBER THREE: THE TRIAL COURT REVERSIBLY ERRED WHEN IT OVERRULED APPELLANT'S CONFRONTATION CLAUSE OBJECTIONS PER FORFEITURE BY WRONGDOING AND ADMITTED THE COMPLAINANT'S TESTIMONIAL STATEMENT TO THE PROSECUTOR THAT APPELLANT TOLD HER IF SHE EVER CALLED THE POLICE HE WOULD SHOOT UP HER HOUSE.

POINT OF ERROR NUMBER FOUR: THE TRIAL COURT REVERSIBLY ERRED WHEN IT OVERRULED APPELLANT'S CONFRONTATION CLAUSE OBJECTIONS PER FORFEITURE BY WRONGDOING AND ADMITTED THE COMPLAINANT'S TESTIMONIAL STATEMENT TO THE PROSECUTOR THAT THE COMPLAINANT REQUESTED AND OBTAINED A "NO CONTACT" ORDER AS A CONDITION OF APPELLANT'S BOND.

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[7] Points of Error Number One, Two, Three and Four each present separate instances of the same error, and where possible, will be briefed together to avoid unnecessary repetition.

A. *Standard of Review:*[8]

The decision to admit or exclude evidence is reviewed for an abuse of discretion. *Pittman v. State*, 321 S.W.3d 565 (Tex. App.—Houston [14th Dist.] 2010, no pet). See also *Bullock v. State*, 706 S.W.3d 838, 842 (Tex. App.—Houston [1st Dist.] 2023, pet. ref'd)("holding [b]ecause the forfeiture by wrongdoing doctrine concerns the admission of otherwise inadmissible evidence, we review a trial court's admission of evidence under the doctrine for an abuse of discretion). "The test for whether the trial court abused its discretion is whether the action was arbitrary or unreasonable." *State v. Mechler, 153* S.W.3d 435, 439 (Tex. Crim. App. 2005). "An appellate court should not reverse a trial judge whose ruling is within the zone of reasonable disagreement." *Id.* However, whether a statement is testimonial or non-testimonial is reviewed de novo. *Wall v. State,* 184 S.W.3d 730, 742 (Tex. Crim. App. 2006).

B. The Applicable Law Regarding Confrontation*:*

"In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him." U.S. Const. amend. VI. See also TEX. CONST. ART. I, § 10. The Confrontation Clause "provides a simple yet unforgiving

[8] Applicable to Points of Error Numbers One, Two, Three and Four.

rule: the State may not introduce a testimonial hearsay statement unless (1) the declarant is unavailable to testify and (2) the defendant had a prior opportunity to cross-examine the declarant." *Trigo v. State*, 485 S.W.3d 603, 609-610 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd), *quoting Lee v. State*, 418 S.W.3d 892, (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd). "The main purpose behind the Confrontation Clause is to secure for the opposing party the opportunity of cross-examination because that is 'the principal means by which the believability of a witness and the truth of his testimony are tested.'" *Johnson v. State*, 490 S.W.3d 895, 909 (Tex. Crim. App. 2016), *quoting Davis v. Alaska*, 415 U.S. 308, 316 (1974).

"The Confrontation Clause does not prohibit any use of testimonial hearsay; it only prohibits the use of testimonial hearsay to prove the truth of the matter asserted." *Wood v. State*, 299 S.W.3d 200, 213 (Tex. App.—Austin 2009, pet. ref'd), *citing Crawford v. Washington*, 541 U.S. 36, 59, fn. 9 (2004). "'Testimonial' statements include those statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Williams v. State*, 513 S.W.3d 619, 637 (Tex. App.—Fort Worth 2016, pet. ref'd), *citing Crawford*, 541 U.S. at 52 and *Paredes v. State*, 462 S.W.3d 510, 514 (Tex. Crim. App. 2015). "The Court of Criminal Appeals has summarized three kinds of testimonial statements: (1) ex parte in-court testimony or its functional equivalent,

i.e., pretrial statements that declarants would expect to be used prosecutorially; (2) extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, or prior testimony; and (3) statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Trigo*, 485 S.W.3d at 610 (internal quotations omitted), *quoting Langham v. State*, 305 S.W.3d 568, 576 (Tex. Crim. App. 2010). In regard to nontestimonial versus testimonial statements, the United States Supreme Court has observed:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. 813, 822 (2006).

"The Court in *Davis* articulated a non-exhaustive list of factors to consider when determining whether statements were made during an ongoing emergency, including: (1) whether the situation was still in progress; (2) whether the questions sought to determine what is present happening as opposed to what has happened in the past; (3) whether the primary purpose of the interrogation was to render aid rather than to memorialize a possible crime; and (4) whether the events were deliberately recounted

in a step-by-step fashion." *Kinnett v State*, 623 S.W.3d 876, 909 (Tex. App.—Houston [1st Dist. 2020, pet. ref'd), *citing Davis*, 547 U.S. at 830-832 and *Vinson v. State*, 252 S.W.3d 336, 339 (Tex. Crim. App. 2008).

1. ***The complainant's statements to officers on 9/12/2016,[9] as testified to by law enforcement and admitted as State's Exhibit 33 were testimonial and their admission violated the Confrontation Clause.***

2. ***The complainant's request for an emergency protective order, as testified to by law enforcement and admitted as State's Exhibit 34[10] was testimonial and its admission violated the Confrontation Clause.***

As stated *supra*, the complainant made a detailed statement to officers orally, which was also reduced to writing and entered in evidence as State's Exhibit 33. [12RR– SX33]. The statement was also read to the jury over counsel's objections to, *inter alia*, Confrontation.. [7RR49, 55, 57-58]. As discussed in the facts, supra, the complainant's statement alleged details about Mr, Hickerson's assault of her and alleged threats he made to her. [See 12RR–SX33]. Specifically, the statement says, "Jarvis has threatened my life, my sister's and nephew's lives. I am in fear of what he will do now. He threatened to have his friend, Big Marcus or Colon, to shoot up my

[9] These facts and analysis, regarding the complainant's statements on 9/12/2016 is applicable to Point of Error One.

[10] These facts and analysis, regarding the complainant's request for an emergency protective order is applicable to Point of Error Two.

house and my sister's house and said they don't care about shit, kids and all." [7RR49, 55, 57-58; See 12RR– SX33]. Officer Batey, who responded to the scene testified the complainant's written statement was "100 percent" consistent with what she told him at the scene. [7RR48]. Additionally, as addressed by Point of Error Number Two, over defense counsel's objections regarding violations of confrontation [7RR48, 72], Deputy Batey testified the complainant told him at the scene that she was afraid of Mr. Hickerson and wanted a protective order. [7RR48, 69].

In general, a statement is testimonial if a reasonable person would have understood that law enforcement officers were conducting a criminal investigation and collecting evidence for the purpose of prosecution. *Allison v. State*, 666 S.W.3d 750, 762 (Tex. Crim. App. 2023)(citing *Wall v. State*, 184 S.W.3d 730, 745 (Tex. Crim. App. 2006)). However, this Honorable Court, quoting the United States Supreme Court's *Davis v. Washington* opinion, explained:

> Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Dixon v. State, 244 S.W.3d 472, 482 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd)(*citing Davis v. Washington*, 547 U.S. 813, 821–29, 126 S.Ct. 2266, 2273–74,

165 L.Ed.2d 224 (2006). According to *Davis*, the following are significant in determining whether the primary purpose of the declarant's out-of-court statement was to meet an ongoing emergency:

1) Was the statement necessary to enable police to resolve the present emergency rather than simply learn what happened in the past? *Davis.* 547 U.S. at 814.

2) Is the emergency still in progress? Would a reasonable listener to the out-of-court statement recognize the declarant was facing an ongoing emergency? *Davis*, 547 U.S. at 827.

3) Is the declarant expressing "imminent danger" or making a "call for help against a bona fide physical threat." *Id.*

4) Viewed objectively, were the out of court statements necessary to be able to resolve the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past? *Id.*

Per the *Davis* factors analysis employed by this Honorable Court in *Dixon v. State*, the complainant's statement to Deputy Batey and his partner, which were reduced to writing in State's Exhibit 33 and read to the jury [7RR49, 55, 57-58] were testimonial and not in response to an ongoing emergency. See *Dixon v. State*, 244 S.W.3d 472, 486 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd). In *Dixon*, Officer

Russell met with complainant following her 9-1-1 call, wherein she reported that Dixon had assaulted her. *Id.* The *Dixon* Court held the complainant's statements in the 9-1-1 call were non-testimonial because "when viewed objectively, [they] were made under circumstances indicating that the primary purpose of the interrogation was to enable the police to meet an ongoing emergency, rather than simply to learn what had happened in the past." *Id,* at 485 (citing *Davis,* 126 S.Ct. at 2277, 2279 for the premise that what begun as an interrogation to determine the need for emergency assistance quickly evolved into a police investigation conducted for the primary purpose of collecting information for a future prosecution). Of significance to the instant case however, when the officer in Dixon was dispatched to meet the complainant in person, statements under those circumstances were considered testimonial.[11] *Id.* In so deciding, the court considered both the fact Dixon was not at the scene, when Officer Russell arrived, *Id.,* at 486; and the fact the primary purpose of the interrogation was to gather information about past events potentially relevant to a later criminal prosecution. *Id.*, at 486-87. Similar to the facts of *Dixon*, when Deputy Batey arrived at the complainant's apartment, Hickerson was already leaving the apartment in his truck, and was no longer an imminent threat to the complainant. [See 7RR40-41].

[11] Although the *Dixon* Court held the testimonial statements were erroneously admitted, they held it was harmless beyond a reasonable doubt as the the officer's testimony was not important to the State's case and cumulative of other evidence. *Dixon*, 244 S.W.3d at 487.

Deputy Batey stopped Appelllant's truck and removed him from his truck. [7RR40]. Batey questioned Hickerson first [7RR43], and then secured Hickerson in the care of another officer while he continued to obtain the complainant's oral and written statements. [7RR47;12RR–SX33]. Under similar circumstances, the court in *Vinson v. State* held that once the appellant had been "secured" at the scene under officer supervision, and in that case– placed in a patrol car, the complainant's statements to law enforcement "... concerning the details of the assault were testimonial in nature and thus inadmissible under *Crawford.*" *Vinson v. State*, 252 S.W.3d 336, 341 (Tex. Crim. App. 2008). Also,over counsel's objections to a violation of confrontation, Batey testified the complainant was afraid of Appellant and wanted a protective order. [7RR48, 69]. Batey provided details of the complainant's allegations and paperwork on the protective order to the district attorney's intake office, and charges against Appellant were filed that same night. [7RR59-60, 78].

Thus, Per the *Dixon* Court's analysis, the complainant's statement to Deputy Batey, which was reduced to writing, admitted as SX33 and read to the jury was testimonial, and its admission violated Mr. Hickerson's Sixth Amendment[12] right of Confrontation. Additionally, Batey's testimony about the complainant's fear of Appellant, her request for a protective order, and the protective order itself, admitted

[12]U.S. CONST. AMEND. VI.

as State's Exhibit 34 was testimonial and its admission violated the Confrontation Clause.

3. The complainant's statements to ADA Thompson[13] that Appellant threatened to shoot up her house if she called the police on him was testimonial and its admission violated the Confrontation Clause.

4. The complainant's statements to ADA Thompson[14] that Appellant requested a "No Contact" Order as a condition of Appellant's bond was testimonial and its admission violated the Confrontation Clause.

Harris County Assistant District Attorney Emily Thompson, who was assigned to Mr. Hickerson's misdemeanor assault family case and criminal mischief cases called the complainant to discuss the complaints that had been filed in the assault and criminal mischief cases, and the emergency protective order. [8RR43-44, 46]. These items were entered in evidence as State's Exhibits 35, 36, and 37 respectively. [8RR47-48]. Also, over continued objections [8RR60-62], Thompson testified the complainant told her that Appellant had told her in the past that if she ever called the police on him, he would shoot up her house. [8RR63]. The complainant's alleged oral statement to the prosecutor differed from her written statement which was the subject

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[13] This analysis, regarding the complainant's statement to ADA Thompson about Appellant threatening to shoot up her house if she called the police on him, is applicable to Point of Error Three.

[14] This analysis, regarding the complainant's statement to ADA Thompson about wanting a No Contact Order as a condition of Appellant's bond is applicable to Point of Error Four.

of Point of Error Number One, in that it added information about Mr. Hickerson's alleged threat: the complainant's written statement, admitted as State's Exhibit 33, included a generic statement that Mr. Hickerson had threatened her life and her sister and nephew's lives, and that he "threatened to have his friend Big Marcus or Colan to shoot up [her] house and[her] sister's house and said they don't care about shit kids and all." [12RR–SX33], internal page 2]. However, Appellant's alleged threat to the complainant, as documented in her written statement, provided no context for the alleged threat- i.e., there is nothing to suggest under what circumstances Big Marcus or Colan would shoot up their homes, and certainly nothing to suggest it was related to the complainant's status as a witness or for reporting an offense. [See 12RR–SX33]. On the other hand, the complainant's alleged oral statement to the prosecutor was specific that Hickerson had told her in the past that he would shoot up her house **if she ever called the police on him**. [8RR62]. Thus, the statement to the prosecutor was, according to trial prosecutors, "different." [8RR62]. When defense counsel objected to ADA Thompson testifying about the complainant's alleged statement, the State explained the statement to the prosecutor was different because it "...goes directly to her fear and to the retaliation." [8RR62]. The Statement itself was gathered by law enforcement, i.e., the prosecutor, in an effort to prepare evidence for use in court. [see 8RR45-46].

As discussed, supra in the context of Points of Error Number One and Two, a statement is testimonial if a reasonable person would have understood that law enforcement officers were conducting a criminal investigation and collecting evidence for the purpose of prosecution. *Allison v. State*, 666 S.W.3d 750, 762 (Tex. Crim. App. 2023)(citing *Wall v. State*, 184 S.W.3d 730, 745 (Tex. Crim. App. 2006)). ADA Thompson stated that when she called the complainant, a Magistrate's Order for Emergency Protection had already been granted. [8RR45].Thompson's call to the complainant was made prior to the morning docket specifically to discuss next steps in Mr. Hickerson's charged cases. [8RR45]. One such "next step," which they spoke about, would be the potential of a "No Contact Order" which Thompson likened to a protective order. [8RR53]. In the instant case, the complainant's alleged statement to ADA Thompson was made, not in the mix of an ongoing emergency, but when Hickerson was in jail, with pending charges. [8RR44, 51]. ADA Thompson admitted to eliciting the complainant's alleged statement that in the past Appellant threatened to shoot up her house if she called the police [8RR62] in the context of the investigating the facts of Hickerson's pending cases and what bond conditions should be recommended in Mr. Hickerson's court case that morning. [8RR54-55]. The *Davis* Court held statements are testimonial,

"when the circumstances objectively indicate ... that the primary purpose

> of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

Davis, 547 U.S. at 822. *See also Gutierrez v. State*, 516 S.W.3d 593, 597 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd). To the extent one might argue the complainant's alleged statement was not testimonial because it was made in the context of requesting a no contact order, not only is there no support for such an argument, but *Langham v. State* explained that the "primary purpose" of interrogation does not refer to the purpose "first in time" but rather, "first in importance*." Langham v. State*, 305 S.W.3d 568, 578-79 (Tex. Crim. App. 2010)(explaining by "primary" purpose, the Supreme Court in *Davis* meant the "first in importance" among multiple, potentially competing purposes). In that regard, *Langham* evaluated a confidential informant's statements to law enforcement who were seeking information about a location to secure a search warrant. *Id.*, at 579-80. The intermediate court of appeals had held the informant's statements were not testimonial because in that case, the detective's "primary" purpose was simply to gain information about the goings-on at an address in order to get a search warrant. *Id.* Disagreeing, the Court of Criminal Appeals reversed the lower court's holding:

> A search warrant is never an end in itself. While securing a search warrant may have been [law enforcement's] "first-in-time" objective in talking to his confidential informant about the activities at [the location], potentially securing a conviction and punishment for those involved was

> his "first-in-importance" objective. We conclude that the out-of-court statements were testimonial for Confrontation Clause purposes.

Langham v. State, 305 S.W.3d 568, 579–80 (Tex. Crim. App. 2010). Given Mr. Hickerson's pending assault and criminal mischief cases, any no contact order discussed by the complainant and ADA Thompson, was not an end in itself either, even if it was a "first-in-time" objective. *See Id.*, 579-80 The prosecutor's "first-in-importance" objective was to gain case information to potentially secure a conviction and punishment for the perpetrator. *See Id,* at 580.

As such, the complainant's alleged out-of-court statement to ADA Thompson, that provided the case evidence in support of retaliation, was testimonial, and its admission violated Mr. Hickerson's Sixth Amendment right of Confrontation.

C. The Law Regarding Forfeiture by Wrongdoing:[15]

"[T]he United States Supreme Court has recognized that two forms of testimonial hearsay statements may be admitted even though the defendant has no opportunity to confront the declarant: declarations made by a declarant who was facing imminent death and was aware he was dying, and declarations made by a declarant whose unavailability the defendant procured." *Shepherd v. State*, 489 S.W.3d 559, 573 (Tex. App.—Texarkana 2016, pet. ref'd), *citing Giles v. California*,

[15] Applicable to Points of Error Numbers One, Two, Three and Four.

554 U.S. 353, 358 (2008). The latter is known as the doctrine of forfeiture by wrongdoing. *See Gonzales v. State*, 195 S.W.3d 114 (Tex. Crim. App. 2006) (recognizing doctrine of forfeiture by wrongdoing and applying it to bar a Sixth Amendment confrontation claim) and *Colone v. State*, 573 S.W.3d 249, 264 (Tex. Crim. App. 2019) ("Courts have widely accepted the doctrine to reject both hearsay and confrontation claims."). "The doctrine is based on the principle that 'any tampering with a witness should once [and] for all estop the tamperer from making any objection based on the results of his chicanery." *Colone*, 573 S.W.3d at 264. "Under forfeiture by wrongdoing, the defendant is barred from asserting the right of confrontation when he has wrongfully procured the unavailability of the witness." *Shepherd*, 489 S.W.3d at 573. "Under *Giles*, this exception applies only 'when the defendant engaged in conduct designed to prevent the witness from testifying.'" *Id.*, *quoting Giles*, 554 U.S. at 359. "Further, the United States Supreme Court requires that there must be some showing by the proponent of the statement that the defendant **intended to prevent the witness from testifying**." [16]*Id.*, *citing Giles*, 554 U.S at 361-362. "However, forfeiture by wrongdoing applies even when the defendant has multiple reasons for harming the witness, as long as one of the reasons is to prevent her from testifying." *Id.* (citations omitted). The doctrine of forfeiture by wrongdoing

[16] All emphasis supplied, unless otherwise indicated.

has been codified in Texas Code of Criminal Procedure Article 38.49, whose requirements substantially comply with the U.S. Supreme Court's holding in *Giles*.

Both the United States Supreme Court and the Texas Court of Criminal Appeals have concluded that domestic violence conduct may sometimes be relevant to determining whether particular conduct was designed to prevent a witness from testifying:

> Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.

Brown v. State, 618 S.W.3d 352, 356 (Tex. Crim. App. 2021), *quoting Giles*, 554 U.S. at 377. While prior domestic abuse can be relevant to a defendant's intent, intent to keep the witness from testifying is still essential to application of the forfeiture doctrine. *Giles*, 554 U.S. at 376 (making clear that while domestic violence is an intolerable offense the standards of the Confrontation Clause apply and there is not "...a special, improvised, Confrontation Clause for those crimes...").

D. The Court's Finding of Forfeiture by Wrongdoing In Appellant's Case Was Erroneous:[17]

The Court conducted a hearing wherein the State presented evidence to the trial court in support of its request the court find Mr. Hickerson forfeited his rights to object to testimonial hearsay as violative of the Confrontation Clause and rules of hearsay. [6RR193]. Specifically, the State relied upon the following evidence:

The State requested the Court consider all evidence presented that on September 12, 2016 the complainant called the police and complainant's sister to tell them Mr. Hickerson assaulted her and that Hickerson was then charged with assault family member and criminal mischief. [6RR196]. Also, the State offered State's Exhibit 511, the complainant's statement given to Deputy Batey about the assault and criminal mischief, at the scene. [6RR206]. The entire statement, SX33,was read into the record, but in it, she stated, "Jarvis has threatened my life, my sister's and nephews' lives. I am in fear of what he will do now. He threaten to have his friend, Big Marcus or Colon, to shoot up my house and my sister's house and said they don't care about shit, kids and all." [6RR207]. However, in this statement, there was no indication when Hickerson's alleged threat was made, or in what context. [see 12RR–SX33]. Also, State's Exhibit 512, the complainant's request for magistrate's order of emergency

[17] Applicable to Points of Error Numbers One, Two, Three and Four.

protection was admitted. [6RR208]. In it, the officer stated his belief Appellant would be a further danger to the complainant because of "a history of violence and victim is in fear for her life." [15RR–SX512]. The State offered SX509, SX510 and SX512 as evidence the complainant requested to transfer apartments because she feared Mr. Hickerson. [6RR204-205].

To support its contention Appellant was responsible for the murder of complainant, the State submitted SX501 – SX508, screen shots from surveillance videos of the complainant's apartment complex. [6RR196]. They argued these screen shots showed Hickerson's truck arrived at the apartment complex early on September 20, 2016 and there was nothing in his truck bed when it arrived, or when it left soon after. [6RR195]. The State argued screen shot 507 showed the truck arrive back at the complainant's apartment complex at 4:23 a.m., again with an empty truck bed. [6RR196]. Then screen shots SX508 showed that 45 minutes later, at 5:02 a.m., that truck left the apartments, this time with an unknown large and bulky object that the state contended was consistent with the size of a human body. [6RR196]. The State also proffered information from the call detail records that on the days surrounding when the complainant was reported missing, Hickerson's phone number ending in "3316" traveled toward Conroe and ultimately pinged less than a mile from where the complainant's remains were found. [6RR208-09]. The State submitted SX500, the

probable cause affidavit in support of Mr. Hickerson's arrest warrant. [6RR210]. This included information that complainant was last seen with Appellant; that Appellant has a history of family violence; that complainant's missing phone with a number ending in "7901" was last active in Conroe, Texas and Appellant's phone was at a nearby location; that complainant's skeletal remains were found in a shallow grave in Conroe, Texas. [15RR–SX500].

In State's Exhibit 510, the State proffered texts between the complainant and Mr. Hickerson from the date of the assault on September 12, 2016 and the last day complainant was seen on September 19, 2016. [6RR197-98]. The State stressed messages that showed Hickerson told the complainant he does not want to go back to jail, asked the complainant to sign papers, ostensibly referring to affidavit of non-prosecution, and told her he would replace damaged property. [6RR198-99]. The messages also show the complainant telling Mr. Hickerson she would not sign papers. [6RR199].

After hearing evidence and argument, the trial court ruled Mr. Hickerson forfeited his right to object to violations of the Confrontation Clause and rules of hearsay with regard to the complainant's hearsay statements. [7RR29-30].

The defense argued the State does not "get to put anything they want into evidence, just because they believe they have evidence of murder." [6RR214]. Indeed,

forfeiture by wrongdoing only applies "when the defendant engaged in conduct designed to prevent the witness from testifying." *Giles*, 554 U.S. at 359, 128 S.Ct. 2678. See also *Shepherd v. State,* 489 S.W.3d 559, 573 (Tex. App.—Texarkana 2016, pet. ref'd). Further, the United States Supreme Court requires that there must be some showing by the proponent of the statement that the defendant intended to prevent the witness from testifying. *Giles*, 554 U.S. at 361–62, 128 S.Ct. 2678. Indeed a showing of intent is critical to forfeiture by wrongdoing and "[a] defendant does not forfeit the right of confrontation by merely engaging in conduct that causes the witness to be absent." *Render v. State*, 347 S.W.3d 905, 918 (Tex. App.—Eastland 2011, pet. ref'd)(citing *Giles*, 554 U.S, at 361). In discussing the requirement that an accused must have intended to prevent the witness from testifying, the Court of Criminal Appeals cited the advisory committee note for the federal codification of forfeiture by wrongdoing, which explained:

> If the defendant kills a declarant simply because he didn't like him, or because he was burned in a drug deal by him, then the defendant has not forfeited his right to object to the declarant's hearsay statement. It follows that the defendant in a murder case cannot be held to have forfeited his objection to hearsay statements made by the victim. The defendant might have murdered the victim, but he undoubtedly didn't murder the victim to prevent him from testifying in the murder trial.

Gonzalez v. State, 195 S.W.3d 114, 119 (Tex. Crim. App. 2006).

In *Colone v. State*, a case expressly relied upon by the trial court [7RR29-30],

in making a finding of forfeiture by wrongdoing, the evidence was clear as to Colone's intent to procure the witness's absence. See *Colone v. State*, 573 S.W.3d 249 (Tex. Crim. App. 2019). Colone was charged for capital murder for killing two individuals during the same criminal transaction. *Colone*, 573 S.W.3d at 253. The facts presented that one of the deceased ("Mary") had witnessed Colone commit an aggravated robbery and reported it to the police. *Id.* Colone was subsequently arrested for the aggravated robbery and then released on bond. *Id.* Thereafter, Colone went to Mary's house, accused her of "telling on him," and shot her and her daughter. *Id.* These acts were witnessed by Mary's boyfriend, who alerted police. *Id.* At trial, the State sought to present Mary's hearsay statements to police about Colone having committed the aggravated robbery, and the Court held the statements were admissible per forfeiture by wrongdoing, over Colone's Confrontation and hearsay objections. *Colone*, 573 S.W.3d at 264. In so holding, the *Colone* Court noted the case fell within the forfeiture by wrongdoing doctrine because:

> The victim was killed two days after Appellant was indicted, and Appellant was heard accusing the victim of "telling on him." From this evidence, a rational trier of fact could conclude that Appellant's killing of the victim was motivated, at least in part, by a desire to permanently silence her in order to prevent her from testifying at a future aggravated robbery trial.

Colone, 573 S.W.3d at 264. Indeed, not only was Colone heard accusing Mary of

"telling on him," but it was also "[a]t some point during this confrontation, the man[18] walked into the living room, drew and pointed a gun at Mary's daughter Briana, and fired two shots." *Colone,* 573 S.W.3d at 253. Soon after the witness reported the shooting, police discovered Mary and Briana dead. *Id.*

In the instant case, the evidence presented by the State in support of the court's finding of forfeiture by wrongdoing did not show Hickerson's vitriol toward the complainant as a witness, and there was nothing to suggest Hickerson intended to prevent the complainant from testifying. Instead, even though the State highlighted the several texts where Mr. Hickerson lamented to the complainant that he does not want to return to jail, and begged her to help him, none of the texts were threatening or bullying on this, or any issue, or suggested Hickerson would take wrongful action to procure her absence as a witness:

> a. 9/15/2016 Hickerson to Complainant: Mya I messed up big time I'm man to admit that but I can't stop crying please I REALLY need you just to get my mind back together I have to go to court Monday and I told u I don't wanna go to jail n willing to replace anything that's damaged I have no family or anybody to let me stay at there home them people tryna give me time I don't wanna go to jail Mya ***please help me get out of this if you don't wanna mess with me behind all this I surely understand your reason*** everytime a tear drops out my eye I think of everything I put u thru I'm sorry I have still have growing up to do because how I act is not right." [see SX392, message 1];

[18] Referring to Colone.

b. 9/15/2016 Hickerson to Complainant: "***If u can please signs those papers for me so I won't have to face jail time*** behind that stuff Mya." [SX392, message 6];

c. 9/15/2016 Hickerson to Complainant: telling her he does not have money for a lawyer. [SX392, message 5 and 11];

d. 9/15/2016 Hickerson to Complainant: "I don't wanna go to jail ***Mya u no I don't I'm not gonna do anything towards u no kind of way I promise*** that's like I say this really opened my eyes at really let me no I was being real foolish toward u I'm sorry." [SX392, message 24];

e. 9/15/2016 Complainant to Hickerson: The State presented texts that showed the complainant would not back down and intended to prosecute. The complainant tells Hickerson "I'm not signing no papers u beat me up on multiple occasions and never sorry ur just sorry u got caught stop running game." [SX392, message 3]. To this Hickerson responded, "Ok Mya u right n I no they class a misdemeanors..." [SX392, message 4, partially redacted in original].

None of the foregoing texts were threatening or suggested Appellant would do anything to the complainant to prevent her from testifying. On the contrary, they expressed contrition. Appellant was pleading with her, and promising no future violence rather than expressing the required showing of using violence to prevent future testimony. Furthermore, aside from these several texts wherein Appellant told the complainant he did not want to return to jail, *see supra*, the majority of texts, of which there were many, were about other issues in the relationship, without any reference to Appellant's pending charges. For example, as trial defense counsel noted, there were arguments about infidelity, and the complainant not wanting to have sex

with Appellant. [6RR215]. But the majority of Appellant's texts focused on Appellant saying he missed the complainant and he wanted to reconcile with her:

a. 9/15/2016 Hickerson to Complainant: "Mya I care about u n love u a lot..." [SX392, message 12];

b. 9/15/2016 Hickerson to Complainant: "How Mya I have to see u I can't continue like this wit now where to go n feeling sad crying I now u still love me thru all my flaws." [SX392, message 14];

c. 9/15/2016 Hickerson to Complainant: Hickerson asked the complainant how she is getting to work and school, and when she responded "Uber," not knowing what that was, and thinking it was person, he was jealous. [SX392, message 32-37]. When she inquired why he was asking her, he responded "I'm still your man Mya that's the only reason I ask you that..." [SX392, message 38-39];

9/15/2016: When the complainant said Hickerson is not her man, Hickerson responded "So you really gonna leave me Mya? I will accept time apart which I think is fair for us because I need to get serious help n Jesus n u need your space I respect that Mya I do but I wouldn't wanna live... it's hard on me right now ... I can't even slop crying I'm going thru so much...Mya please don't leave me u ALL I have I'm lost out here barely have gas n can't even take a bath I really love u n still wanna be with u please don't break my heart baby just let me fix it and show u &he Man U first met which u were so In love with PLEASE." [SX392, message 41];

d. 9/15/2016 Hickerson to Complainant: Hickerson begs the complainant to give him two weeks so he can show her proof in his actions that he will be better, saying "I can't live without you Mya...," and stating he wants to marry her. [SX392, message 43];

e. 9/16/2016 Hickerson to Complainant: I just pray to God u don't move on without me or with someone else I feel all your pain baby this hurts me a lot..." [SX392, message 55];

9/16/2016 Hickerson to Complainant: Hickerson texting the complainant his prayer that he control his anger and attitude and asking for a second chance with the complainant because he "... can't live without her and feels like I'm dying inside for my foolish actions." [SX392, message 56];

f. 9/16/2016 Hickerson to Complainant: Hickerson texts the complainant his prayer God brings them back together, telling her he loves her. [SX392, message 57];

g. 9/16/2016 Hickerson to Complainant: In response to the complainant accusing him of more instances of abuse, Hickerson responded: "So u done with me Mya? U not gonna ever love me or be wit me again?" [SX392, message 76];

h. 9/16/2016 Hickerson to the Complainant: "...I haven't ate slept or nothin or even going to work cause I can't live without u or function right I need you Mya." [SX392, message 78];

i. 9/16/2016 Hickerson to the Complainant: "I no u still love me but it just makes me cry when u say u gone I don't know what to do at all." [SX392, message 79];

j. 9/16/2016: When the complainant tells Appellant he needs to get a cheap room and have time to himself, Appellant responded: "I will get help I will even put your name on me to show u I love u n it's real I need to get baptized n really cry out to u Mya u all I have n will NEVER let you go I promise that." [SX392, message 80-81];

k. 9/16/2016 Hickerson to Complainant: "I'm about to start me whole life over starting today I can't live alone or without u." [SX392, message 88];

l. 9/16/2016 Hickerson to Complainant: "I'm not gonna give up Ima keep pushing just when God brings u back in my life...I will be better when u first met me." [SX392, message 89];

m. 9/16/2016 Hickerson to Complainant: "When I get myself right n become a better person wit a better attitude will u give me another chance wit u Mya." [SX392, message 91];

n. 9/16/2016 Hickerson to Complainant: "Will you Mya... Don't forget me." [SX392, message 92-93];

In other texts, Hickerson pleaded with the complainant to allow him to stay with her, as he had nowhere else to go, no place to shower, and no food to eat. None of these texts threatened the complainant or suggested Appellant would commit any wrongdoing to keep the complainant from testifying:

a. 9/15/2016 Hickerson to Complainant: " I don't have nothing right now Mya can u at least give me a key to take a bath n rest please Mya." [SX392, message 17];

b. 9/15/2016 Hickerson to Complainant: "I no u hurt and mad at me but sill you're a wonderful person wit a big heart please can I state [sic] there till I get my shit together PLEASE." [SX392, message 18];

c. 9/15/2016 Hickerson to Complainant: "So why can't u let me clean up the mess n shower there please Mya I barely have money for food I can't get a room." [SX392, message 21];

d. The next day, on 9/16/2016 Hickerson texted the Complainant : "I don't have no where to stay Amalia." [SX392, message 65];

e. 9/16/2016 Hickerson to Complainant Hickerson acknowledged the complainant was mad at him and asked "as a friend I'm asking u can u please let me stay there till the end of the month please." [SX392, message 67];

Texts on September 17, 2016 revealed Mr. Hickerson and the complainant

reconciled. [15RR–SX392, see internal page 9]. It is clear the complainant welcomed Appellant back in the apartment.[19] Appellant sent some sexually explicit texts to the complainant.[20] In other texts, he said he was waiting on the results, referring to testing for STDs.[21] Then, on September 19, 2016 the complainant's message number 153 showed the complainant and Appellant argued over complainant's concerns Appellant was unfaithful to her, and more texts about their sex life. [see 15RR–SX392, internal pages 12-15, messages 153-188]. In these texts there were no references to the complainant testifying, no threats or anything to suggest Appellant would commit any wrongdoing to prevent the complainant from testifying. Instead, when it was clear the complainant was done with the relationship, Mr. Hickerson acknowledged the relationship's end, told her he needed to retrieve his things and apologized for lying to her. [15RR–SX392, internal page 15, messages 187-188].

In light of the fact the State presented no evidence during the forfeiture by wrongdoing hearing that Mr. Hickerson intended to prevent the witness from testifying, see *Giles*, 554 U.S. at 361–62, 128 S.Ct. 2678, the trial court erred in

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[19] Texts wherein the complainant tells Mr. Hickerson he cannot park in the apartment complex, has to wait until others leave, and that he will be bored without any TV to watch. [see 15RR–SX392, internal p.10, messages 106, 111 and 112].

[20]See 15RR– SX392, internal pages10-11, messages 119-123].

[21]See 15RR–SX392, internal page 10, message 121; internal page 12, messages 142, 146-150].

making a finding of forfeiture by wrongdoing.

E. Harm Analysis:

In *Langham v. State*, the Court of Criminal Appeals acknowledged any Confrontation Clause error to be of constitutional dimension, and therefore subject to a constitutional harm analysis. *Langham v. State*, 305 S.W.3d 568, 582 (Tex. Crim. App. 2010).

Harm standard for constitutional error under Texas Rule of Appellate Procedure 44.2(a).

"A Confrontation Clause violation is constitutional error that requires reversal unless we conclude beyond a reasonable doubt that the error was harmless." *Lee*, 418 S.W.3d at 899. *See also* TEX. R. APP. P. 44.2(a). "The State has the burden, as beneficiary of the error, to prove that the error is harmless beyond a reasonable doubt." *Haggard v. State*, 612 S.W.3d 318, 328 (Tex. Crim. App. 2020), *citing Deck v. Missouri*, 544 U.S. 622, 635 (2005) and *Wall*, 184 S.W.3d at 746 n. 53.

"In applying the 'harmless error' test, we ask whether there is a 'reasonable probability' that the error might have contributed to the conviction." *Love v. State*, 543 S.W.3d 835, 846 (Tex. Crim. App. 2006), *citing Mosley v. State,* 983 S.W.2d 249, 259 (Tex. Crim. App. 1998) (op. on reh'g). The analysis "should not focus on the propriety of the trial's outcome; instead, we should calculate as much as possible the probable

impact on the jury in the light of the existence of other evidence." *Id.*, *citing Wesbrook v. State*, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000). *See also Langham* (explaining "... the emphasis of a harm analysis pursuant to Rule 44.2(a) should not be on 'the propriety of the outcome of the trial.'"). The reviewing court must ask itself whether there is a reasonable probability that the *Crawford* error moved the jury from a state of non-persuasion to one of persuasion on a particular issue." *Scott v. State*, 227 S.W.3d 670, 690 (Tex. Crim. App. 2007). The question for the reviewing court is not whether the jury verdict was supported by the evidence, but "...the likelihood that the constitutional error was actually a contributing factor in the jury's deliberations in arriving at that verdict—whether, in other words, the error adversely affected the integrity of the process leading to the conviction." *Langham v. State*, 305 S.W.3d 568, 582 (Tex. Crim. App. 2010).

Relevant factors for a court should consider with regard to a Confrontation violation include:

> (1) the importance of the out-of-court statement to the State's case; (2) whether the statement was cumulative of other evidence; (3) the presence or absence of evidence corroborating or contradicting the statement on material points; and (4) the overall strength of the State's case.

Render, 347 S.W.3d at 918-919 (citations omitted).

"In performing a harm analysis, a reviewing court may also consider the source

and nature of the error, the amount of emphasis by the State on the erroneously admitted evidence, and the weight the jury may have given the erroneously admitted evidence compared to the balance of the evidence with respect to the element or defensive issue to which it is relevant." *Id., citing Scott*, 227 S.W.3d at 690. *See also Langham v. State*, 305 S.W.3d 568, 582 (Tex. Crim. App. 2010). "Whether a particular constitutional error is harmless beyond a reasonable doubt is determined by considering "any and every circumstance apparent in the record that logically informs" the analysis. Further, the evaluation is performed in a neutral manner, not in the light most favorable to the prosecution. *Hughes v. State*, 691 S.W.3d 504, 523 (Tex. Crim. App. 2024), reh'g denied (July 31, 2024)(citing *Snowden v. State*, 353 S.W.3d 815, 822 (Tex. Crim. App. 2011). Ultimately, after considering these various factors, the reviewing court must be able to declare itself satisfied, to a level of confidence beyond a reasonable doubt, that the error did not contribute to the conviction before it can affirm it. *Langham*, 305 S.W.3d at 582.

1. The trial court's erroneous admission of the complainant's testimonial statements to officers on 9/12/2016[22] and as memorialized in SX33 violated the Confrontation Clause and were not harmless beyond a reasonable doubt.

2. The complainant's request for an emergency protective order, as testified to by law enforcement and admitted as State's Exhibit 34[23] violated the Confrontation Clause and was not harmless beyond a reasonable doubt.

The complainant's testimonial hearsay statements to law enforcement at the scene, was memorialized in her written statement, SX33, and not only admitted but was read to the jury. Furthermore, her testimonial statement that she was afraid of Appellant and wanted a protective order was testified to by Deputy Batey, and the MOEP was admitted as SX34. [7RR48, 69; 12RR–SX34]. Considering the aforementioned *Davis* factors, the erroneous admission of these statements was not harmless beyond a reasonable doubt.

Without the erroneously admitted evidence, there was nothing before the jury to suggest that Hickerson intended to kill the complainant, and there was likewise no evidence to prove the predicate felony of retaliation. The State relied heavily on the complainant's statement to provide facts regarding the assault, which it contended was

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[22] This harm analysis, regarding the complainant's statements on 9/12/2016 is applicable to Point of Error One.

[23] This harm analysis, regarding the complainant's request for an emergency protective order is applicable to Point of Error Two.

the basis of Hickerson's alleged retaliation, the felony which elevated the charg to capital murder. The State argued to the jury "remember she stated in her own written statement..." she wanted a protective order, she feared for her life, appellant threatened to have his friends shoot up her house and her sister's house. [10RR48-49]. These factors supported retaliation. The State continued "we know exactly what Amalia Alexander would have told you, were she here today, because we have it in her own words. We have from handwriting. We have it from officers." [10RR49].

What is more, we know the weight the jury may have given these erroneously admitted statements, as testified to be Deputy Batey and admitted as State's Exhibits 33 and 34, because during deliberations, they sent a question to the court requesting, inter alia, "all of Amalia's statements in relation to the assault cases." [10RR91; CR514]. Thereafter, the court sent the requested exhibits. [10RR91; CR514].

Accordingly, the erroneous admission of complainant's statements was not harmless beyond a reasonable doubt.

3. ***The trial court's admission of the complainant's alleged testimonial statements to ADA Thompson[24] that Appellant threatened to shoot up her house if she called the police on him violated the Confrontation Clause and was not harmless beyond a reasonable doubt.***

4. The complainant's statements to ADA Thompson[25] that Appellant requested a "No Contact" Order as a condition of Appellant's bond violated the Confrontation Clause and was not harmless beyond a reasonable doubt.

Considering the State's theory of the case was Mr. Hickerson committed complainant's murder in the course of committing retaliation for her reporting the offenses of assault and criminal mischief, this testimonial statement by the complainant was of the utmost importance to the State's case. In fact, when the State was arguing for the court to admit the statement per the doctrine of forfeiture by wrongdoing, they admitted this: the defense argued that the complainant's alleged oral statement to the prosecutor, i.e. that Mr. Hickerson had told her in the past that he would shoot up her house if she ever called the police on him, was cumulative of the statement the complainant made to police which was memorialized in SX33. The State retorted that the complainant's statement to ADA Thompson was "different" from

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[24] This harm analysis, regarding the complainant's statement to ADA Thompson about Appellant threatening to shoot up her house if she called the police on him, is applicable to Point of Error Three.

[25] This harm analysis, regarding the complainant's statement to ADA Thompson about wanting a No Contact Order as a condition of Appellant's bond is applicable to Point of Error Four.

other evidence presented because, as the State explained, it "...goes directly to her fear and to the retaliation." [8RR62]. Additionally, in arguing to the jury that Mr. Hickerson's case involved retaliation, and it was capital murder, not murder, the State relied heavily on the complainant's alleged statement to ADA Emily Thompson to prove retaliation. The State argued to the jury that ADA Thompson "... had a conversation with Amalia. She said, 'I am in fear,' I think were here exact words. That the defendant had threatened her, which is why she is in fear and that if she calls the police, he, Jarvis Hickerson will shoot up her house." [10RR49].

Aside from this erroneously admitted statement, the only other evidence the State could muster to support their retaliation theory were a few texts, detailed supra, wherein Mr. Hickerson told the complainant he did not want to return to jail and asked, without threat or vitriol, if she would sign papers to help him. [8RR129-130; 15RR–SX392, see e.g. messages 1, 2, and 6]. Finally, like the other statements in Points of Error Number One and Two, we know the weight the jury gave these and all the erroneously admitted statements of the complainant because they requested access to "all of Amalia's statements in relation to the assault cases" during their deliberations. [10RR91; CR514]

Accordingly, the erroneous admission of complainant's statements was not harmless beyond a reasonable doubt.

PRAYER

Wherefore, Appellant prays that the judgment of the trial court herein be reversed and remanded for a new trial.

Respectfully submitted,
ALEXANDER BUNIN
Chief Public Defender
Harris County Texas

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