

No. 14-24-00235-CR
In the
Court of Appeals
For the
Fourteenth District of Texas
At Houston

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DEBORAH M. YOUNG
Clerk of The Court

—◆—
No. 1704625
In the 209th District Court
Of Harris County, Texas
—◆—

BICTOR GUZMAN
Appellant
V.
THE STATE OF TEXAS
Appellee
—◆—

APPELLANT'S BRIEF ON THE MERITS

—◆—

ABBIE RUSSELL
ATTORNEY FOR APPELLANT
State Bar No: 24072240
6140 Highway 6 S. Ste. 247
Missouri City, Texas 77459

ORAL ARGUMENT WAIVED

STATEMENT REGARDING ORAL ARGUMENT

Appellant does not request oral argument.

IDENTIFICATION OF THE PARTIES

Pursuant to TEX. R. APP. P. 38.2(a)(1)(A), a complete list of the names of all interested parties is provided below.

Complainant, victim, or aggrieved party:

Miguel Hernandez

Counsel for the State:

Kim Ogg — District Attorney of Harris County

Hector Garza, George Lindsey, & Xavier Stafford — Assistant

District Attorneys at trial

Appellant or criminal defendant:

Bictor Guzman

Counsel for Appellant:

Abbie Russell — Counsel on appeal

Kathryn Kahle & Stephanie Martin — Counsel at trial

Trial Judge:

Hon. Brian Warren — Presiding Judge

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TO THE HONORABLE COURT OF APPEALS:

STATEMENT OF THE CASE

Appellant was charged with engaging in organized criminal activity, and he entered a plea of “guilty” to the offense. (C.R.407; R.R.IV 15, 23). The trial commenced to the punishment phase of trial, and the jury sentenced Appellant to 25 years confinement in the Institutional Division of the Texas Department of Criminal Justice to be served consecutively with cause number 1759994. (C.R. 407-408; R.R.VII 35-36). Appellant filed a timely notice of appeal. (C.R. 428, 434-435).

STATEMENT OF FACTS

The Robberies

Alexander Xaminez Escun was from Guatemala, but lived and worked in Houston (R.R.V 90). On March 6, 2019, he was visiting a friend at the Happy Village apartment complex to lend him a suitcase for a trip (R.R.V 90-93). He arrived at the complex and talked with his friend, Carlos, and helped him charge the battery of his car, but told Carlos he needed to leave because it was late, and dangerous to be out late. (R.R.V 94). As he was leaving the complex he encountered a vehicle he described as Toyota 4-Runner or possibly a RAV4 (R.R.V 95). The vehicle looked like it was going to park behind Carlos’s vehicle. (R.R.V 95-96). Two people got out of the vehicle (R.R.V

96). He then heard Carlos screaming for help. (R.R.V 96). Mr. Escun was about 100 feet away. (R.R.V 96). He made his way over to Carlos after grabbing a broomstick from his car. (R.R.V 97). Carlos was on the ground with two men on top of him. (R.R.V 97). One man was digging in Carlos's pockets, and the other had his elbow to the back of Carlos's head striking his body with the man's knee. (R.R.V 97-98).

As Mr. Escun got closer, one man stood up and confronted him with a gun and asked him what he wanted. (R.R.V 98). Carlos and the other man were struggling, but Carlos was able to stand up. (R.R.V 98-99). Mr. Escun ran and one of the men followed him, but then the man abandoned his pursuit, and both men ran back to their vehicle. (R.R.V 98-99). Mr. Escun got back to Carlos and saw he was bleeding from the head; he had been pistol-whipped. (R.R.V 99). Carlos grabbed the broomstick, and ran towards the exit gate where the two men were trying to leave the complex. (R.R.V 100). Carlos was "furious" and began breaking the windows of the men's car with the broomstick. (R.R.V 100-101). The men took off, but they followed the men in Mr. Escun's car (R.R.V. 101). After a while the men didn't realize they were still being followed. (R.R.V 101). They followed them until police caught up, but he lost sight of the suspect's vehicle. (R.R.V 102). An ambulance was called, and it transported Carlos to the hospital. (R.R.V 103). While Mr. Escun was heading back to the apartment complex he saw the suspect's vehicle again, so he went back to where police were, and told them the suspect's location, and the police were able to detain the suspects. (R.R.V 104-105). Appellant was the person who attacked Carlos. (R.R.V 105-106).

Pedro Lopez worked in construction, and lived in southwest Houston. (R.R.IV 123). He lived in an apartment on December 29, 2020 (R.R.IV 124). He went out to throw out the trash. (R.R.IV 125). He was alone. (R.R.IV 125). He was approached by some people who demanded his money at gunpoint. (R.R.IV 126). Mr. Lopez told them he had no money. (R.R.IV 127). The man got in the car and left. (R.R.IV 127). Police showed up a few minutes later, and he told them what just occurred. (R.R.IV 127-128).

Miguel Angel Hernandez worked as the maintenance man at the Brickhaven Apartments in Houston for forty-two years (R.R.V 9-10). He was working on December 11, 2020. (R.R.V 10). He was robbed, and the robbery was captured on camera (R.R.V 10-11). There were three people in a blue BMW. (R.R.V 16). Mr. Hernandez was in a golf cart. (R.R.IV 17). They told him to stand still, “this is a holdup.” (R.R.V 18). They held a gun to his ribs. (R.R.V 18). They took his phone and wallet. (R.R.V 18-19). They took the \$600 he had for a Christmas present for his sister. (R.R.V 19). They spoke to him in Spanish. (R.R.V 19). After the incident he went to the officer to call the police. (R.R.V 20). He retired a couple of years after this incident. (R.R.IV 21-22).

Mr. Juan Peralta has lived in Houston since moving here from Mexico in 1995. (R.R.IV 23). He worked installing carpet. (R.R.IV 23). He lived at the Oaks Bissonnet Apartment Complex. (R.R.V 24). The incident on December 19, 2020, was recorded on surveillance video. (R.R.V 26). He was sitting outside waiting to be picked up for work. (R.R.V 28-29). Two people exited a vehicle with guns. (R.R.V 29-30). They

wanted money. (R.R.V 30). He was scared for his life. (R.R.V 30). They took \$60 from him. (R.R.V 30-31). The vehicle was a blue BMW. (R.R.V 31). One of the people was wearing Adidas sweatpants and a black sweatshirt. (R.R.V 35). The robbery affected him and stayed on his mind. (R.R.V 37-38).

Benjamin Pelico was the complainant in the robbery that occurred on December 21, 2020 (R.R.IV 46-47). He was cleaning out his truck after work when he realized people had come up behind him. (R.R.IV 104). Mr. Pelico drove a red Nissan Titan. (R.R.IV 106). The people attacked him from behind. (R.R.IV 110-111). They told him not to move. (R.R.IV 111). They went through his pockets, took his wallet, and ripped his chain off him. (R.R.IV 112). Then, they instructed him to take them to his apartment. (R.R.IV 112). He gave them the wrong apartment number because his family was in the apartment. (R.R.IV 113). There were three attackers, and he got into the truck with them. (R.R.IV 113). Mr. Pelico was sitting behind the passenger seat. (R.R.IV 113). The front passenger was pointing something at him that “looked like a weapon.” (R.R.IV 115). It was a gun. (R.R.IV 115). It was pointed at Mr. Pelico the whole time. (R.R.IV 115). They took the keys to Mr. Pelico’s truck and drove it without permission. (R.R.IV 115-116). They did not get to Mr. Pelico’s apartment because he gave them the wrong apartment number. (R.R.IV 117). They took Mr. Pelico out of the truck and told him to give them access to his apartment. (R.R.IV 118). They went to an apartment door, but the door wouldn’t open because it wasn’t Mr. Pelico’s apartment. (R.R.IV 120).

He did not take them to his apartment because his family was in there. (R.R.IV 121). They never returned Mr. Pelico's keys, and he had to have new keys made. (R.R.IV 121).

Rodil Martin Lopez-Rodriguez was from Honduras. (R.R.V 39-40). When he worked, he did yard work. (R.R.V 40). He lived and worked with his cousin, Emerson Rodriguez, on December 23, 2020. (R.R.V 41). It was evening time, and his cousin went out to take out the trash. (R.R.V 41). He was sitting in his chair when his cousin came back with another person. (R.R.V 41-43). The man had a gun pointed at his ribs. (R.R.V 43). He said if they didn't give him all their money he would shoot them. (R.R.V 43). He told Mr. Lopez-Rodriguez to kneel on the floor. (R.R.V 43). He told the man he had less than \$200 in his car, and gave him the keys to retrieve it out of the car, which he did, and then he left. (R.R.V 43-44). He also took his phone and never returned the car keys. (R.R.V 44). Mr. Lopez-Rodriguez was scared. (R.R.V 44). This incident affected him "psychologically," and caused him to be fearful. (R.R.V 44-45). He met with police and was able to identify the man that came into the apartment, but not the man that was outside that he only saw running away. (R.R.V 47).

Mr. Anthony Redmond worked in IT consulting and lived in Houston for 13 years. (R.R.V52-53). He went for a walk on the evening of December 21, 2020 (R.R.V 53). As he was walking, he saw an SUV drive past him, and it pulled towards him and stopped. (R.R.V 56-57). Two men got out of the SUV pointed guns at him, and demanding money. (R.R.V 57) The driver of the vehicle, Appellant, approached him and put the gun to his left temple. (R.R.V 57-60). He told them he did not have money.

(R.R.V 58). The men searched his pockets and took a pair of earbuds they found while speaking in Spanish to each other. (R.R.V 58). They took his car keys as well. (R.R.V 59). He told them to give him back his keys, and Appellant asked if there was anything inside his car. (R.R.V 60). When he said there wasn't in the car, Appellant refused to return the keys. (R.R.V 60). Mr. Redmond then pointed out that the keys were no good to them if they didn't know where the car was or what it looked like. (R.R.V 60). Appellant "paused, dropped the keys" and then they both got back into the SUV and left the area. (R.R.V 60). The incident was captured on video. (R.R.V 61-62). He purposefully backed up to an area where he knew a camera would capture what happened. (R.R.V 64). When Mr. Redmond made the police report, he stated that he did not know if the guns were real. (R.R.V 66). When he testified previously in October of 2022 he could not identify Appellant, but at this trial he could. (R.R.V 66).

Guadencio Cruz lived in Houston on December 11, 2020 (R.R.V 68-69). He was working as a cook, and returned home from work on that day. (R.R.V 69-70). He parked his car and started walking towards his apartment. (R.R.V 71-72). He noticed an SUV parked backwards, it was purple or blue. (R.R.V 72). Two men approaching him; the shorter one searched his pockets, while the taller one put a gun to his head. (R.R.V 73). Mr. Cruz was thinking about how close he was to his family in their apartment. (R.R.V 73). They took all his belongings, including his cell phone, and even asked for the passcode. (R.R.V 73-74). They told him to walk slowly, and not turn around or they would shoot him. (R.R.V 74). The men ran towards their vehicle, and Mr. Cruz ran

towards the security guards at the complex. (R.R.V 74-75). The complex did not have working surveillance cameras. (R.R.V 75). Appellant was the person who held a gun to his head, and the gun he held to his head was State's exhibit 21. (R.R.V 76-77). The gun came out from the North Face hoodie that was State's exhibit 78. (R.R.V 77).

Mr. Ricardo Vasquez was from El Salvador and has lived in Houston since 1999 (R.R.V 78-80). He worked for an employment agency, and was working on December 27, 2020. (R.R.V 80). He left work at noon, visited a friend, and then went to get some tacos, but the taco trailer was closed when he arrived. (R.R.V 81). He stayed in the taco trailer parking lot even though it was closed because he was standing outside his car talking on the phone with his brother. (R.R.V 83). A blue or gray SUV pulled into the parking lot. (R.R.V 84). A man appeared in front of him demanding money and holding a knife. (R.R.V 85). He was speaking in Spanish. (R.R.V 85). Mr. Vasquez fell and dropped his cell phone, and the money fell from his pocket. (R.R.V 86). The man took \$460 from him. (R.R.V 86). A second man was present, and he was armed with a gun. R.R.V 86). The guy with the knife asked for Mr. Vasquez's car keys. (R.R.V 87). He got halfway inside the vehicle, and Mr. Vasquez slammed the door on him, and tried to run away, but he fell again in fear. (R.R.V 87). The guy with the knife was yelling "catch him" and the guy with the gun said "I'm going to destroy him." (R.R.V 87). Mr. Vasquez hide between cars in the parking lot. (R.R.V 86). The guy with the knife was wearing a black sweatshirt with a hood. (R.R.V 86-87). The guy with the gun was taller and

wearing a sweatshirt or blue shirt. (R.R.V 88). Mr. Vasquez thought he was going to die. (R.R.V 88).

The Investigation and Prosecution

Officer Ricky Lopez had been with the Houston Police Department for 9 years, was assigned to the South Gessner Crime Suppression Unit in December of 2020. (R.R.IV 34-36). On December 11, 2020, he became aware of an aggravated robbery that occurred at 8900 Fondren Road in Harris County, Texas. (R.R.IV 36). There was a blue BMW seen on surveillance video. (R.R.IV 36). On video, three males are seen getting out of the vehicle and robbing the maintenance man with a gun. (R.R.IV 36-37). One male was “tall, wearing a gray hoodie, black Adidas pants with the white stripes down the side.” (R.R.IV 37). This suspect had a handgun, and was also seen putting the maintenance man “in a headlock” while the other two males went through his pockets. (R.R.IV 37). The maintenance man was named Miguel Hernandez. (R.R.IV 38). Law enforcement began searching for robberies with a similar “MO.” (R.R.IV 38). A similar robbery occurred on December 19, 2020 at 7003 Bissonnet Street. (R.R.IV 39). A blue BMW drove past the complainant, Juan Peralta, and stopped. (R.R.IV 3, 419). Two males exited the vehicle, both with guns. (R.R.IV 39). The taller suspect pointed the gun at the Mr. Peralta’s head, and then they searched his pockets. (R.R.IV 39-40). The surveillance video of this incident captured the license plate of the vehicle. (R.R.IV 41). The vehicle that appears in the December 11th and December 19th surveillance videos appear to be the same vehicle. (R.R.IV 42). The two robbery locations are very close to

each other. (R.R.IV 42). The two suspects in Mr. Peralta's robbery matched the description of two out of the three suspects in the robbery of Mr. Hernandez. (R.R.IV 43). They search for additional robbery victims. (R.R.IV 43). They learned of additional robberies. (R.R.IV 43-44).

On December 21, 2020 at 6550 Bellaire Boulevard, a robbery occurred at an apartment complex involving three suspects and a blue BMW (R.R.IV 43-44). The complainant arrived in a truck, parked, and then went to retrieve something from the passenger side (R.R.IV 44). The blue BMV was positioned in a way to block the view of what the suspects were doing. (R.R.IV 44). The three people appearing on surveillance video committing these robberies multiple times shows that they are organized. (R.R. IV 45). Two suspects approached Mr. Pelico initially, and the third one followed shortly behind. (R.R.IV 47-48). Mr. Pelico was in a blind spot, so the video did not show what they did when they got to Mr. Pelico. (R.R.IV 48). Then, one suspect walked towards the apartment complex (R.R.IV 48). The suspect returned to Mr. Pelico's truck, and he and the two suspects drove away in his truck. (R.R.IV 48). They only drove a short distance and stayed in the complex parking lot (R.R.IV 49). The taller suspect stayed in the vehicle with Mr. Pelico while the other two suspects went to search. (R.R.IV 50). They then returned to Mr. Pelico's vehicle (R.R.IV 50-51). The back door of the truck could not be opened unless the front door was opened because of the design of the truck. (R.R.IV 51). The tall suspect opened the front passenger door allowing Mr. Pelico to get out of the vehicle, and they walked back to where they were

initially looking for Mr. Pelico's apartment. (R.R.IV 51-52). They left without finding his apartment. (R.R.IV 52). The taller suspect had a gun. (R.R.IV 53). The taller suspect was wearing a gray hoodie similar to the one that appears in the surveillance video of the robbery of Mr. Hernandez (R.R.IV 53). Another suspect was wearing a black North Face hoodie. (R.R.IV 53). The license plate of the Blue BMW was NKL9950. (R.R.IV 56). The robberies, the vehicle, and the suspects in all the robberies matched. (R.R.IV 56). The identities of the suspects were not known at this point in the investigation. (R.R.IV 56).

Officer Lopez found out about another robbery on December 29, 2020, that occurred at 8800 Fondren Road. (R.R.IV 56-57). He was conducting surveillance and located the blue BMW. (R.R.IV 57). The taller suspect was with another shorter suspect. (R.R.IV 57-58). The taller suspect was driving. (R.R.IV 58). The tall suspect was Bictor Guzman, Appellant. (R.R.IV 58). The vehicle turned into an apartment complex. (R.R.IV 59). Officer Lopez lost sign sight of the vehicle for a short period of time, and when they found the vehicle, they saw two suspects running towards it. (R.R.IV 59). Appellant was wearing the same gray hoodie previously worn in robberies. (R.R.IV 59-60). The other suspect was wearing the same black hoodie. (R.R.IV 59-60). They jumped into the blue BMW and drove off quickly (R.R.IV 60). Officer Lopez radioed to other officers that the vehicle was leaving. (R.R.IV 61). Officer Lopez saw a Hispanic male in the complex parking lot who looked upset. (R.R.IV 61). The man pointed in the direction the blue BMW drove in, and said "[t]hey robbed me." (R.R.IV 62). Officer

Lopez relayed that information to the other officers, they told the him to stay put, and they went to assist the other officers. (R.R.IV 62). The blue BMW had been stopped by other officers. (R.R.IV 62-63). There was some delay, but all occupants of the blue BMW eventually exited the vehicle, and were detained. (R.R.IV 63-64). They went back, and picked up the complainant, Pedro Lopez-Rodriguez, and brought him to where the vehicle had been stopped. (R.R.IV 64-65). The did a live show-up, and Mr. Lopez-Rodriguez identified the suspects (R.R.IV 65-67). Mr. Lopez-Rodriguez was taken back home, and the blue BMW was towed. (R.R.IV 67). Two firearms were located in the vehicle along with a lot of property: ID's, chains, phones, keys, and an ipad. (R.R. 68). The vehicle stopped by police had the license plate NKL9950. (R.R.IV 75). It was a BMW X3. (R.R.IV 75). There was a gun between the passenger door and the passenger seat. (R.R.IV 75). Two guns were recovered from the vehicle. (R.R.IV 75-76). Appellant was in the driver's seat when the vehicle was stopped. (R.R.IV 79). The larger of the guns, a Hi-Point pistol, was loaded. (R.R.IV 79-80). Appellant was wearing the same Adidas pants he was wearing on December 11th robbery (R.R.IV 81). A title to a vehicle, not belonging to the BMW, was found in the BMW with miscellaneous items and multiple cell phones, and wallet. (R.R.IV 82-83). The wallet did not belong to Appellant. (R.R.IV 83).

Officer Lopez recognized Appellant's voice in jail calls, as well as the voice of his co-defendant, Victor Gonzalez (R.R.IV 85-86). Appellant was interviewed about the robberies. (R.R.IV 89). Appellant identified his co-actors as Alexis Romero and Victor

Gonzales. (R.R. IV 89). The details of the robberies Appellant gave matched up with what Officer Lopez knew from his investigation. (R.R.IV 89-90). Alexis Romero was also a gunman in the robberies. (R.R.IV 91-92). No gun was ever fired during the robberies. (R.R.IV 91-92). Appellant initially “played like he didn’t know” but when confronted with photographs, he admitted his involvement. (R.R.IV 94-95). The smaller gun, that was found in the driver’s side door, was not loaded (R.R.IV 96). The defendant was driving the vehicle when he was stopped by police. (R.R.IV 95-96).

Officers Segura and Rosales were the other case agents. (R.R.IV 96-98). Officer Segura testified at trial. There was a spike in aggravated robberies in December of 2020 involving a vehicle described as a blue SUV or blue BMW. (R.R.VI 11-12). There were two to three suspects, all Hispanic males, with at least one being described as taller, and the other shorter. (R.R.VI 12). The suspects all tended to be Hispanic males in “lower level apartment complexes” who were walking to or from their vehicle in the parking lot. (R.R.VI 12). They were able to develop a license plate for the vehicle, that was NKL9950. (R.R.VI 12-13). Officers Segura and Lopez were conducting surveillance in the area on December 29, 2020. (R.R.VI 15-16). As they were parking in an apartment complex that saw Alexis Romero and Appellant running fast towards the blue BMW SUV. (R.R.VI 16-17). They discovered that an aggravated robbery just occurred in that complex. (R.R.VI 17). They radioed to other officers who stopped the suspects nearby. (R.R.VI 17-18). The officers spoke with the robbery victim, and brought him to the scene to identify the suspects, and charges were accepted. (R.R.VI 18-19). Appellant

and Alexis Romero were interviewed. (R.R.VI 19; State's exhibit 99). They learned about a number of robberies during this interview. (R.R.VI 23-24). They learned about the March 6, 2019 robbery of Alexander Escun. (R.R.VI 23-24). Appellant was on bond for this aggravated robbery when the 2020 aggravated robberies were committed. (R.R.VI 25). They learned about the December 11, 2020, robbery of Miguel Hernandez that involved a gun and the blue BMW SUV. (R.R.VI 25). Then another December 11, 2020, robbery of Guadencio Cruz. (R.R.VI 26). This robbery also involved a gun, and a vehicle described as an "older BMW SUV." (R.R.VI 26). The next robbery occurred on December 21, 2020, and the victim was Anthony Redmond. (R.R.VI 26). A gun was pointed at Mr. Redmond's head, and blue BMW SUV was used. (R.R.VI 27). Benjamin Pelico was robbery on December 21, 2020 as well, but this robbery was also an aggravated kidnapping because Mr. Pelico's freedom was restricted. (R.R.VI 27-28). A gun and blue SUV were used as well. (R.R.VI 28). Mr. Rodil Lopez was robbed on December 23, 2020. (R.R.VI 28-29). This robbery became a home invasion with a gun. (R.R.VI 29). They learned through surveillance video that a blue BMW was used in this incident. (R.R.VI 29).

Another robbery occurred on December 23, 2020. (R.R.VI 30). The victim was Carlos Rivera. (R.R.VI 30). Then another robbery on December 27, 2020, of Rodil Lopez. (R.R.VI 30). On December 27, 2020, the robbery of Ricardo Vasquez occurred. (R.R.VI 30). A knife and a firearm were used during this robbery. (R.R.VI 31). Pedro Lopez was robbed on December 29, 2020. (R.R.VI 31). This robbery occurred while

officers were conducting surveillance. (R.R.VI 3-32). The suspects fled in the BMW. (R.R.VI 31-32). Officers met with Mr. Lopez, who appeared visibly shaken. (R.R.VI 32). Two guns were located in the vehicle once detained by police. (R.R.VI 32). A red iphone was taken during the robbery of Mr. Cruz, and Appellant claimed a red iphone was found in his vehicle was his. (R.R.VI 33-34; State's exhibit 34). A lot of the victims described the taller suspect wearing a gray hoodie/ sweatshirt, and the black Adidas pants were seen multiple times on surveillance video. (R.R.VI 35-36). Juan Peralta was robbed on December 19, 2020, and that robbery involved two firearms, and blue BMW SUV. (R.R.VI 36-37).

Victor Gonzales is the third suspect in the robberies. (R.R.VI 39). Appellant is referred to as "B" in jail calls. (R.R.VI 39-40). Victor Gonzales had not yet arrested been Appellant and Alexis Romero were arrested. (R.R.VI 41). Appellant described the undercover vehicles to Victor Gonzales in jail calls to him. (R.R.VI 41). Victor Gonzales appears in surveillance video with Appellant. (R.R.VI 43). Appellant told Victor there was an investigation and undercover officers working to investigate and capture them. (R.R.VI 43-44). Appellant refers to the blue BMW SUV as his car. (R.R.VI 46). Appellant and Alexis Romero are cousins. (R.R.VI 49-49). Appellant said on a jail call, "[t]hat money, we spent it on the drugs and shit." (R.R.VI 50). Appellant showed no remorse during the interview with Officer Segura. (R.R.VI 52). No shots were ever fired during any of these robberies. (R.R.VI 55). During Appellant's interview with law

enforcement, he admitted involvement in several robberies, and claimed ownership of the blue BMW SUV and the two firearms. (R.R.VI 56).

A traffic stop on the blue BMW was conducted around December 26, 2020, to identify the people in the car. (R.R.VI 59-60, 74). Appellant and Victor Gonzalez were in the car at the time. (R.R.VI 60). No one was arrested because they didn't have probable cause. (R.R.VI 61). The small gun was not loaded, and the larger gun was loaded, but a round was not chambered. (R.R.VI 67). There were a number of the cases where the victim could not identify any suspect so not every victim was shown a photospread, and somewhere shown photospread, but could not identify anyone. (R.R.IV 68-69). Officer Segura did not take part in the investigation of the robbery of Mr. Escun. (R.R.VI 68).

Mr. Ivan Pena was an inmate in the Harris County Jail. (R.R.VI 76-77). He has extensive criminal history including felony convictions and a prior trip. (R.R.VI 77-78). He was also in a gang. (R.R.VI 78). He was never promised anything for his testimony. (R.R.VI 79-80). He was housed with Appellant in an outlying jail in Louisiana. (R.R.VI 80-81). They were in a cell together. (R.R.VI 81). Appellant had a shank. (R.R.VI 82-83). It was 6 to 8 inches in length, and was silver with a white handle. (R.R.VI 84). Shanks are for protection. (R.R.VI 84-85). Appellant said he was going to use it "to shank that bitch." (R.R.VI 88). He believes "that bitch" referred to the "DA." (R.R.VI 88). He believed this meant the DA was a female. (R.R.VI 88). Inmate Pena told police because he has female family members, and would want others to do the same for him

to prevent harm. (R.R.VI 89). The attack was supposed to happen in the courtroom. (R.R.VI 89). The shank was aluminum to avoid detection by metal detectors. (R.R.VI 89-90). Detention officers don't search people well in jail. (R.R.VI 90). They talked about the shank on January 8th. (R.R.VI 90-91). Inmate Pena saw Appellant again in early January at JPC (Joint Processing Center). (R.R.VI 97-98). Appellant had the shank with him in his waistband. (R.R.VI 98). Mr. Pena waited several days to report it. (R.R.VI 98). He didn't learn of the plan with the shank until the day before or the day of reporting the shank to law enforcement. (R.R.VI 98).

Deputy Anthony Ramirez works with the Harris County Sheriff's Office at the jail. (R.R.VI 101). He received intel of a weapon in the jail. (R.R.VI 105). He was directed to a cellblock or a pod, but the intel, and they searched all the beds in that pod. (R.R.VI 106-107). He located a long hard object inside a mattress. (R.R.VI 107-108; State's exhibit 100). It was a shank. (R.R.VI 109; State's exhibit 109). The commissary bag under the bunk belonged to Appellant. (R.R.VI 109-110). It was determined from video surveillance that the bunk belonged to Appellant. (R.R.VI 110-111). Deputy Ramirez never saw the shank on Appellant. (R.R.VI 115). The cavity in the mattress was sewn back together. (R.R.VI 116). It is possible the shank was in the mattress before the mattress was given to Appellant. (R.R.VI 115).

Celvin Johbany Euceda is Appellant's younger brother. (R.R.VI 118). He spoke to Appellant on jail calls while awaiting trial. (R.R.VI 118). Appellant called him after work almost daily. (R.R.VI 119). He spoke to Appellant on calls on March 9 and 10th of

2024. (R.R.VI 120; State's exhibit 98 and 101). On the call, Appellant can be heard saying, "I brought it from over there." (R.R.VI 125). They were laughing with each other on the calls. (R.R.VI 126-127). He has four siblings. (R.R.VI 128). Appellant is the oldest. (R.R.VI 128-129). He and Appellant are really close, and Appellant was the only one who would take Mr. Euceda out to do things before he was locked up. (R.R.VI 129). Appellant lived with him when they were growing up when Mr. Euceda was ages 5 to 15. (R.R.VI 130). Appellant was a father figure to him. (R.R.VI 130). Appellant has a son. (R.R.VI 130-131). His son is Isaac, and he is three years old. (R.R.VI 130-131). Appellant was proud of his son, and would bring him to his grandmother's house to show him off to his family. (R.R.VI 131). Their grandmother, Maria Romero, raised Appellant when he was young. (R.R.VI 131). This whole ordeal has been hard on the family. (R.R.VI 131-132). Appellant was working with his dad at the time of the robberies. (R.R.VI 134). Appellant and whole family are hard-working people. (R.R.VI 135).

Sarah Neyland is an Assistant District Attorney with the Harris County District Attorney's Office. (R.R.VI 138). She prosecuted Appellant and his co-defendants. (R.R.VI 140-141). Alexis Romero and Victor Gonzalez pled guilty and were sentenced by the Judge. (R.R.VI 141). Mr. Romero was sentenced to 30 years in prison, and Mr. Gonzalez was sentenced to 20 years in prison. (R.R.VI 141-142). She handled the trial on his aggravated robbery cases back in October of 2022. (R.R.VI 144, 156). That jury assessed a punishment of 20 years. (R.R.VI 144, 152). She offered him 30 years on his

other cases. (R.R.VI 145). She was removed from the cases because she learned Appellant had a shank “that he planned to use to murder me.” (R.R.VI 145). She believed Appellant could carry out the threat. (R.R.VI 148-149).

Defense case

Edgar Euceda is Appellant’s younger brother (R.R.VI 158). Mr. Euceda is involved in many activities in school, and is a successful young person. (R.R.IV 159). Appellant was like a father to him growing up. (R.R.VI 160). He was the stand in parent because Mr. Euceda’s mom was always working. (R.R.VI 160). Appellant would bring his young son around the family as well. (R.R.VI 160). Appellant took him to meet Calvin’s son as well. (R.R.IV 160-161). Appellant would give him money and take him to and from school. (R.R.VI 161-162). Appellant went to live with his father when he was 16 years old because their house was too crowded. (R.R.VI 162-163). Family was very important to Appellant. (R.R.VI 164). Mr. Euceda testified in the first trial. (R.R.VI 169-170).

Maria Romero, Appellant’s grandmother, was like a second mother to him. (R.R.VII 7). Appellant cares for his little sister, Daniela, tremendously. (R.R.VII 10). Appellant helped Ms. Romero out a lot when she had knee surgery. (R.R.VII 11-12). When Appellant was living with his dad, his cousin, Alexis Romero, “taught him bad things.” (R.R.VII 12). Mr. Romero’s other daughter, Zulma, is Alexis’s mom, but was in a relationship with Appellant’s dad. Alexis had to move in with Alexis’s mom and

Appellant's dad because he does not live to work. (R.R.VII 13-14). Appellant started getting in trouble when he lived with his dad and Alexis was in his life. (R.R.VII 14).

SUMMARY OF THE ARGUMENT

The trial court erred by admitting State's exhibits 70 and 98 into evidence as the predicate had not been laid, and the voices not identified. The trial court erred by excluding testimony about from inmate Pena about racial tensions within the jail which would have rebut the State's theory that the only reason Appellant had the shank was to murder the prosecutor. If the trial court had not erred, and this testimony would have been allowed the jury would have heard that Appellant might have had to shank for protection, and not to hurt the prosecutor as the State alleged. The trial court erred ordering that Appellant's sentences run consecutively 4 months before the prior started. Lastly, the trial court erred by making improper comments in the presence of the jury.

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POINT OF ERROR ONE

The trial court erred by admitting State's exhibits 68, 69, 70 and 98 into evidence as the predicate had not been laid, and the voices not identified.

Preservation of Error

Preservation of error is a systematic requirement. *Bekendam v. State*, 441 S.W.3d 295, 299 (Tex. Crim. App. 2014). The purpose of requiring an objection is to give the

parties and the trial court the opportunity to see the error and correct it. *Id.* Thus, objecting with specificity is a “prerequisite to presenting a complaint for appellate review.” Tex. R. App. Proc. 33.1. Appellant preserved this error for appeal by lodging objections under rule 901 to jail calls and authentication of voices in States’s exhibits 68, 69, 70, and 98. (R.R.V 121-124).

Standard of Review

The standard of review of a trial court's decision to admit or exclude evidence under an abuse of discretion standard. *Rhomer v. State*, 569 S.W.3d 664, 669 (Tex. Crim. App. 2019); *Coble v. State*, 330 S.W.3d 253, 272 (Tex. Crim. App. 2010); *Cameron v. State*, 241 S.W.3d 15, 19 (Tex. Crim. App. 2007) (citing *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991)); *Walter v. State*, 581 S.W.3d 957, 977 (Tex. App.-Eastland 2019, pet. ref'd). This same standard applies when we review a trial court's decision to admit or exclude extraneous evidence. *De La Paz v. State*, 279 S.W.3d 336, 343 (Tex. Crim. App. 2009).

An appellate court will not reverse a trial court's decision to admit or exclude evidence, and there is no abuse of discretion, unless that decision lies outside the zone of reasonable disagreement. *Beham v. State*, 559 S.W.3d 474, 478 (Tex. Crim. App. 2018); *De La Paz*, 279 S.W.3d at 343-44; *Cameron*, 241 S.W.3d at 19; *Martin v. State*, 173 S.W.3d 463, 467 (Tex. Crim. App. 2005); *Walter*, 581 S.W.3d at 977. Additionally, the court of appeals must uphold a trial court's evidentiary ruling if it is correct on any

theory of law that reasonably finds support in the record and is applicable to the case. *Henley v. State*, 493 S.W.3d 77, 93 (Tex. Crim. App. 2016); *Gonzalez v. State*, 195 S.W.3d 114, 125-26 (Tex. Crim. App. 2006); *Willlover v. State*, 70 S.W.3d 841, 845 (Tex. Crim. App. 2002); *Dering v. State*, 465 S.W.3d 668, 670 (Tex. App.-Eastland 2015, no pet.).

Analysis

Rules 901 and 902 of the Texas Rules of Evidence control how a proponent may authenticate or identify evidence. TEX. R. EVID. 901, 902. Rule 901 mandates that the proponent of the evidence "produce evidence sufficient to support a finding that the item is what the proponent claims it is" and then lists non-exclusive examples of sufficient evidence. TEX. R. EVID. 901. Rule 902 provides an exclusive list of certain items that are "self-authenticating" and "require no extrinsic evidence of authenticity in order to be admitted." Rule 901's non-exclusive list provides some of these examples indicate the need for *extrinsic* evidence, like opinion testimony comparing the item with a "specimen" the court has deemed genuine or identifying a person's voice. TEX. R. EVID. 901(b)(3), (5). Other examples, however, do not require or contemplate the need for extrinsic evidence. Because of this requirement, the State must have provided testimony from a witness who had actual knowledge of the voices on these jail calls. The State failed to do this. Deputy Ontiveros, the sponsoring witness for State's exhibits 68, 69, 70 and 98, the jail calls, testified that he had never spoken to Appellant or Victor

Gonzales, and could not attest to whether or not the voices in the jail calls were these two men or not (R.R.V 122-124, 127-128). Deputy Ontiveros also admitted that since inmates in the Harris County Jail “SPN swap” it was possible that the jail calls contained in State’s exhibits 70 and 98 were the conversations of other inmates using Appellant’s SPN number. (R.R.V 129). Specifically, Deputy Ontiveros was asked, “s[s]o you –sitting here today, you’re not testifying at all to the fact that these calls are definitely between Bictor Guzman and Victor Gonzales, right?” (R.R.V 129). And Deputy Ontiveros replied, “No, ma’am.” (R.R.V 129). Deputy Ontiveros’ admission to not being able to identify the voices on these calls was insufficient to authenticate the calls, and thus the trial court should have ruled State’s exhibits 68, 69, 70 and 98 as inadmissible.

Harm Analysis

According to Rule 44.2 of the Texas Rules of Appellate Procedure, reversible error occurs in a criminal case for any error, other than constitutional error, that affects the substantial rights of the defendant. TEX. R. APP. P. 44.2(b). In other words, reversal is warranted if the trial court’s order had a “substantial influence on the outcome of the proceeding.” *Burnett v. State*, 88 S.W.3d 633, 637 (Tex. Crim. App. 2002) (internal quotation marks omitted). Upon review, if the appellate court has “a grave doubt” that the trial court’s decision was not harmless, the appellant must win. *Id.* at 637-38. Because there is no doubt that trial court abused its discretion, the trial court’s judgment must be reversed.

Appellant was harmed by the erroneous admission of State's exhibits 68, 69, 70, and 98 because the content of the jail calls was very damaging because Appellant talks about the police investigation surrounding the robberies, his codefendants, and even seems to be trying to give his co-defendant, Victor Gonzales, information to evade capture from the investigating officers. (R.R.VI 39-45). In a jail call Appellant takes ownership of the blue SUV at the center of these investigations, and acknowledges being stopped by police on a traffic stop some time before his arrest. (R.R.VI 46-48). Appellant states that they spent the money taken in the robberies "on drugs and shit." (R.R.VI 49-50). In State's exhibit 98, Appellant tells his brother he brought a shank from one jail into another jail." (R.R.VI 125-127). Considering Appellant was accused of plotting to harm the prosecutor, this erroneously admitted jail call was not harmless. Appellant's point of error should be sustained.

POINT OF ERROR TWO

The trial court erred by excluding testimony about from inmate Pena about racial tensions within the jail which would have rebut the State's theory that the only reason Appellant had the shank was to murder the prosecutor.

Preservation of Error

Preservation of error is a systematic requirement. *Bekendam v. State*, 441 S.W.3d 295, 299 (Tex. Crim. App. 2014). The purpose of requiring an objection is to give the parties and the trial court the opportunity to see the error and correct it. *Id.* Thus,

objecting with specificity is a “prerequisite to presenting a complaint for appellate review.” Tex. R. App. Proc. 33.1. Appellant attempted to elicit testimony about racial tensions in the jail, and the State to the relevance of this testimony, and the trial court sustained the objection. (R.R.VI 94).

Standard of Review

The standard of review of a trial court's decision to admit or exclude evidence under an abuse of discretion standard. *Rhomer v. State*, 569 S.W.3d 664, 669 (Tex. Crim. App. 2019); *Coble v. State*, 330 S.W.3d 253, 272 (Tex. Crim. App. 2010); *Cameron v. State*, 241 S.W.3d 15, 19 (Tex. Crim. App. 2007) (citing *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991)); *Walter v. State*, 581 S.W.3d 957, 977 (Tex. App.-Eastland 2019, pet. ref'd). This same standard applies when we review a trial court's decision to admit or exclude extraneous evidence. *De La Paz v. State*, 279 S.W.3d 336, 343 (Tex. Crim. App. 2009).

An appellate court will not reverse a trial court's decision to admit or exclude evidence, and there is no abuse of discretion, unless that decision lies outside the zone of reasonable disagreement. *Beham*, 559 S.W.2d at 478; *De La Paz*, 279 S.W.3d at 343-44; *Cameron*, 241 S.W.3d at 19; *Martin*, 173 S.W.3d at 467; *Walter*, 581 S.W.3d at 977. Additionally, the court of appeals must uphold a trial court's evidentiary ruling if it is correct on any theory of law that reasonably finds support in the record and is applicable to the case. *Henley v. State*, 493 S.W.3d 77, 93 (Tex. Crim. App. 2016); *Gonzalez v.*

State, 195 S.W.3d 114, 125-26 (Tex. Crim. App. 2006); *Willlover v. State*, 70 S.W.3d 841, 845 (Tex. Crim. App. 2002); *Dering v. State*, 465 S.W.3d 668, 670 (Tex. App.-Eastland 2015, no pet.).

Analysis

Evidence is relevant if it has any tendency to make a fact of consequence to the determination of the action more or less probable than it would be without the evidence. TEX. R. EVID. 401. "Generally, all relevant evidence is admissible." *Layton v. State*, 280 S.W.3d 235, 240 (Tex. Crim. App. 2009) (citing TEX. R. EVID. 402). Because Rule 403 favors the admissibility of relevant evidence, it is presumed that relevant evidence will be "more probative than prejudicial." *Montgomery*, 810 S.W.2d at 389; see TEX. R. EVID. 403; see also *De La Paz*, 279 S.W.3d at 343. Even "marginally probative" evidence should be admitted if "it has any tendency at all, even potentially, to make a fact of consequence more or less likely." *Fuller v. State*, 829 S.W.2d 191, 198 (Tex. Crim. App. 1992), *abrogated on other grounds by Riley v. State*, 889 S.W.2d 290, 301 (Tex. Crim. App. 1993).

The State's witness, Inmate Pena, testified on direct examination that someone might have a shank in their waistband "[j]ust in case anything happened." (R.R.VI 84). Inmate Pena also testified that Appellant had the shank because he had a plan to "shank a bitch" which Inmate Pena interpreted to be the prosecutor. (R.R.VI 88). On cross examination, Inmate Pena admitted that the LaSalle jail, where he was house with

Appellant, was a dangerous place. (R.R.VI 93). He also stated that inmates may have shanks for protection, and offered the fact that protection is needed “[b]ecause it gets real racial out there. The Mexicans and the African American people.” (RR.R.VI 94). Appellant then asked whether that “[a]re sometimes problems between those two different groups of people at LaSalle?” (R.R.VI 94). The State objected to relevance, and the trial court sustained the objection for the reason that “[h]e has zero legal right to have a shank, whatever his reason was. Whether he thinks he has a good is not a defense to a criminal act.” While it may not be a defense to a criminal act, it was relevant to a fact of consequence, which was did Appellant have the shank? This trial was about what punishment the jury should assess, and whether Appellant had the shank for protection or to commit an assault is absolutely information the jury was entitled to assess when deciding punishment.

Harm Analysis

According to Rule 44.2 of the Texas Rules of Appellate Procedure, reversible error occurs in a criminal case for any error, other than constitutional error, that affects the substantial rights of the defendant. TEX. R. APP. P. 44.2(b). In other words, reversal is warranted if the trial court’s order had a “substantial influence on the outcome of the proceeding.” *Burnett v. State*, 88 S.W.3d 633, 637 (Tex. Crim. App. 2002) (internal quotation marks omitted). Upon review, if the appellate court has “a grave doubt” that the trial court’s decision was not harmless, the appellant must win. *Id.* at 637-38. Because there is no doubt that trial court abused its discretion, the trial court’s judgment

must be reversed. It cannot be said that the exclusion of testimony about the racial violence in jail was harmless when it prevented Appellant from being able to present to the jury an alternative theory for Appellant had a shank in jail that would have been mitigating punishment evidence. Appellant's point of error should be sustained.

POINT OF ERROR THREE

The trial court erred ordering that Appellant's sentences run consecutively.

Standard of Review

An appellate court reviews a trial court's stacking order for an abuse of discretion. *See Beedy v. State*, 194 S.W.3d 595, 597 (Tex. App.-Houston [1st Dist.] 2006), *aff'd*, 250 S.W.3d 107 (Tex.Crim.App.2008); *Harvey v. State*, 821 S.W.2d 389, 392 (Tex. App.-Houston [14th Dist.] 1991, pet. ref'd). A trial court abuses its discretion when it fails to apply the law correctly or when no reasonable view of the record could support the trial court's decision. *See Nicholas v. State*, 56 S.W.3d 760, 764 (Tex. App.-Houston [14th Dist.] 2001, pet. ref'd).

A trial court's authority to stack is provided by statute. When interpreting a statute, we apply a de novo standard of review, mindful that our primary objective is to ascertain and give effect to the intent of the legislature. *See Nguyen v. State*, 359 S.W.3d 636, 641-42 (Tex. Crim. App. 2012). We focus on the literal text of the statute, applying the plain and ordinary meaning of the words that have been used, unless doing so yields an absurd result. *See Tex. Gov't Code* § 311.011; *Ex parte Ervin*, 187 S.W.3d 386, 388

(Tex. Crim. App. 2005). If the statute is clear and unambiguous, we must presume that the legislature meant what it expressed. *See Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991).

A trial court abuses its discretion when it applies an erroneous legal standard or when no reasonable view of the record supports the trial court's conclusion under the correct law and facts viewed in the light most favorable to its legal conclusion. *DuBose v. State*, 915 S.W.2d 493, 497-98 (Tex. Crim. App. 1996), *overruled on other grounds*, by *Guzman v. State*, 955 S.W.2d 85, 90 (Tex. Crim. App. 1997). An abuse of discretion generally will be found only if the trial court imposes consecutive sentences where the law requires concurrent sentences,^[4] where the court imposes concurrent sentences but the law requires consecutive ones,^[5] or where the court otherwise fails to observe the statutory requirements pertaining to sentencing.^[6] In short, so long as the law authorizes the imposition of cumulative sentences, a trial judge has absolute discretion to stack sentences. *Quintana v. State*, 777 S.W.2d 474, 480 (Tex. App.-Corpus Christi 1989, pet. ref'd) (citing *Smith*, 575 S.W.2d at 41 and *Carney v. State*, 573 S.W.2d 24, 27 (Tex. Crim. App. 1978)).

Analysis

According to Texas Code of Criminal Procedure Sec. 42.08 “(a) When the same defendant has been convicted in two or more cases, judgment and sentence shall be pronounced in each case in the same manner as if there had been but one conviction. Except as provided by Subsections (b) and (c), in the discretion of the court, the

judgment in the second and subsequent convictions may either be that the sentence imposed or suspended shall begin when the judgment and the sentence imposed or suspended in the preceding conviction has ceased to operate, or that the sentence imposed or suspended shall run concurrently with the other case or cases, and sentence and execution shall be accordingly...”

Texas Penal Code Sec. 3.03 applies to “offenses arising out of the same transaction...[w]hen the accused is found guilty of more than one offense...” Article 42.08 and Section 3.03 are *in pari materia* because they both control the trial court's authority to order concurrent or consecutive sentences. *See Barrow v. State*, 207 S.W.3d 377, 380 (Tex. Crim. App. 2006) (“[T]he Texas Legislature has assigned the decision to cumulate, *vel non*, in Section 3.03 of the Penal Code and Article 42.08 of the Code of Criminal Procedure, to the trial court.”).

In the present case, the State filed a motion to cumulate sentence, requesting that the “Court cumulate the sentence assessed in this Cause with any sentence imposed in Cause number 175995, 1704623, 1704625, 1704418, and 1623822.” (C.R. 141). The State further alleged in their motion that “[t]hese offense did not arise out of the same transaction, stacking is appropriate pursuant to Texas Code of Criminal Procedure Sec. 42.08 and the Texas Penal Code Sec. 3.03 since the cases are not prosecuted in the same criminal action...” (C.R. 141). The trial court signed the State’s motion granting the motion the motion on December 7, 2023. (C.R. 142). The Judgement and Sentence in this cause states the following: “the court orders that the sentence in this conviction

shall run consecutively and shall begin only when the judgement and sentence in the following case has ceased to operate: cause number 1759994, a judgement dated 10/13/2022 ordering a sentence of 20 years TDC for the offense of agg robbery deadly wpn, in the 209th district court.” (C.R. 408-409). The date on this Judgement and Sentence was March 25, 2024. (C.R. 408-409).

A hearing was held on December, 7, 2023, and during this hearing the motion to stack was discussed. (R.R.II 4-11). The Judge’s signature granting the motion appears with the same date as this hearing, but the Judge did not orally rule on the motion in the hearing, but did, in fact, grant this motion 4 months prior to Appellant being convicted. (R.R.II 4-11).

While the trial court has broad discretion in deciding whether to cumulate sentencing, it is a clear abuse of that discretion to sign an order granting the State’s motion to cumulate sentencing 4 months before the trial commenced. Both Section 42.08 of the Texas Code of Criminal Procedure and Texas Penal Code Section 3.03 refer to when a defendant has been convicted, and when an accused has been found guilty. The trial court, by ordering sentences to cumulated four months before trial, and thus 4 months before Appellant pled guilty, and was convicted and sentenced, abused its discretion by violating the black and white letter of the law.

Since the trial court abused its discretion in ordering the sentences to be served consecutively, or “stacked”, the remedy is to reform the judgment deleting the cumulation order. *Beedy v. State*, 250 S.W.3d 107, 114-115 (Tex. Crim. App. 2008).

Appellant's point of error should be sustained, and the judgement reformed to remove the cumulative sentencing language, or order that the sentence in this cause be served concurrently with the sentence in cause number 1759994.

POINT OF ERROR FOUR

The trial court erred by making improper comments in the presence of the jury.

Analysis

"In the Texas adversarial system, the judge is a neutral arbiter between the advocates; he is the instructor in the law to the jury, but he is not involved in the fray." *Brown v. State*, 122 S.W.3d 794, 797 (Tex. Crim. App. 2003). The trial court shall deliver to the jury written instructions setting out the law applicable to the case; it should not express any opinion as to the weight of the evidence, summarize or repeat testimony of witnesses, or use an argument calculated to cause sympathy or ignite the ire of the jury. *Bartlett v. State*, 270 S.W.3d 150 (Tex. Crim. App. 2008). The jury, alone, is the exclusive judge of the facts, and the weight to be given the testimony of witnesses. *Id.* Article 36.14 is a reflection of the strict rules of what the trial court's duties are, and what the trial court's duties are. The reason for the rule is that an instruction or comment by the trial court to the jury on the weight of the evidence reduces the State's burden of proving guilt beyond a reasonable doubt to the jury's satisfaction. *Brown*, 122 S.W.3d at 798.

Article 38.05 of Texas Code of Criminal Procedure dictates that “[i]n ruling upon the admissibility of evidence the judge shall not discuss or comment upon the weight of the same or its bearing in the case, but shall simply decide whether or not it is admissible; nor shall he, at any stage of the proceeding previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the case.” *See also Brown*, 122 S.W.3d at 798. “Jurors are prone to seize with alacrity upon any conduct or language of the trial judge which they may interpret as shedding light upon his view of the weight of the evidence, or the merits of the issues involved.” *Id. quoting Lagrone v. State*, 84 Tex. Crim. 609, 615-616, 209 S.W. 411, 415 (1919). When a trial judge violates the prohibitions against extra-judicial comments, failure to object to said comments does not forfeit raising the issue on appeal. *Proenza v. State*, 541 S.W.3d 786, 789-790, 801 (Tex. Crim. App. 2017). Art. 38.05 compliance is “fundamental to the proper functioning of our adjudicatory system,” meaning it should “enjoy special protection” with other non-forfeitable rights. *Id.* at 799.

During voir dire, the trial court said, “[i]f and only if you find someone guilty will ***you hear about the rest of it.*** You’ll hear about all—***hopefully,*** we’ll hear about any good things someone has done in their life. Whether or not they’re a Boy Scout, whether or not they went to college, whether or not they helped old ladies cross the street, or any other good things you can stand on.” (R.R.III 26) (emphasis added). During testimony, the trial court, in ruling on objection said, “[t]here’s no door opened. She’s a prosecutor who has been ***alleged to have been the subject to a murder plot.***”

That's the only reason why –that's what she can testify to. If you have any questions about that, feel free.” (R.R.VI 155) (emphasis added). These two comments violated Art. 38.05, and harmed Appellant by conveying to the jury the trial judge's personal opinion on Appellant, the allegations against Appellant, and the lack of evidence that Appellant had redeeming qualities that warranted leniency. Appellant's point of error should be sustained.



CONCLUSION

It is respectfully submitted that all things are regular. If points of error one, two, and/or four are sustained, Appellant's punishment verdict should be reversed and remanded for a new punishment hearing. However, if only point of error three is sustained, this Court should reform the judgment to remove the cumulative sentencing language, and order the sentence in this cause to be served concurrently with the sentence in cause number 1759994.

/s/ Abbie Russell

ABBIE RUSSELL

Counsel for Appellant

6140 Highway 6 S. Ste. 247

Missouri City, Texas 77459

832-250-3312

attyabbierussell@gmail.com

CERTIFICATE OF COMPLIANCE

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/s/ Abbie Russell

Abbie Russell

Counsel for Appellant

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been mailed to the appellant's attorney at the following address on November 18, 2024:

Jessica Caird
Harris County District Attorney's Office

/s/ Abbie Russell
ABBIE RUSSELL
Counsel for Appellant
6140 Highway 6 S. Ste. 247
Missouri City, Texas 77002
832-250-3312
attyabbierussell@gmail.com

Date: November 18, 2024

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Bar No. 24072240

attyabbierussell@gmail.com

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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Jessica Caird	24000608	caird_jessica@dao.hctx.net	11/18/2024 10:38:58 AM	SENT