No. 14-24-00346-CR

IN THE FOURTEENTH COURT OF APPEALS
FOR THE STATE OF TEXAS

Jerome Moore,

Appellant,

vs.

The State of Texas,

Appellee.

BRIEF FOR APPELLANT

Jeffrey R. Newberry
Texas Bar No. 24060966
University of Houston Law Center
4170 Martin Luther King Blvd.
Houston, Texas 77204-6060
Tel. (713) 743-6843
Fax (832) 842-4671
Email jrnewber@central.uh.edu

Oral Argument Requested

Identity of Parties and Counsel

So the members of this Honorable Court can determine disqualification and recusal, Appellant certifies the following is a complete list of the parties and their attorneys in accordance with Texas Rule of Appellate Procedure 38.1(a).

1. Appellant

Jerome Moore
TDCJ Number 02505277
Wynne Unit
810 FM 2821
Huntsville, Texas 77349

2. Counsel for Appellant

Jeffrey R. Newberry
Texas Bar No. 24060966
University of Houston Law Center
4170 Martin Luther King Blvd.
Houston, Texas 77204-6060
Tel. (713) 743-6843

3. Counsel for Appellant at trial

Terrence A. Gaiser
Texas Bar No. 07572500
P.O Box 272247
Houston, Texas 77277-2247
Tel. (713) 225-0666

Allen Isbell
Texas Bar No. 10431500
2016 Main, Ste. 110
Houston, Texas 77002
Tel. (713) 236-1000

4. Counsel for State on appeal

Jessica Alane Caird
Texas Bar No. 24000608
Harris County District Attorney's Office
500 Jefferson St., Ste. 600
Houston, Texas 77002-7368
Tel. (713) 274-5800

5. Counsel for State at trial

Keaton Forcht
Texas Bar No. 24087531
Napoleon Stewart
Texas Bar No. 24086894
Harris County District Attorney's Office
1201 Franklin, Ste. 600
Houston, Texas 77002
Tel. (713) 274-5800

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BRIEF FOR APPELLANT

TO THE HONORABLE JUDGES OF THE FOURTEENTH COURT OF APPEALS:

Statement of the Case

On August 20, 2021, Appellant Jerome Moore was charged by a grand jury for the April 5, 2021, aggravated robbery of Keith Ward (C.R. at 7). The guilt phase of Moore's trial began on April 29, 2024 (III R.R. at 16). The following day, Moore was found guilty as charged in the indictment (IV R.R. at 44-45, C.R. at 238). The following week, the trial court sentenced Moore to life in prison (VI R.R. 61, C.R. at 241).

Trial counsel filed Moore's notice of appeal on May 6, 2024 (C.R. at 247). The following week, the trial court appointed the undersigned to represent Moore on appeal (C.R. at 249). Undersigned Counsel did not file a motion for new trial or any other post-trial motion in the trial court. Counsel now files Appellant's Brief.

Statement Regarding Oral Argument

Earlier this year, the Texas Court of Criminal Appeals (CCA) reversed this Court's opinion in *Stocker v. State*, 656 S.W.3d 887 (Tex. App.—Houston [14th Dist.] 2022), *rev'd*, 693 S.W.3d 385 (Tex. Crim. App. 2024). In its opinion, the CCA made clear that an affidavit used to establish probable cause to search a cell phone did not *necessarily* need to include any facts about how the phone was used during (or shortly before or after) the commission of the crime being investigated. Notwithstanding this recent opinion, the CCA's earlier opinion issued in *Baldwin v. State*, 664 S.W.3d 122, 131 (Tex. Crim. App. 2022), makes clear that the affidavit must contain more than boilerplate and must establish that there is some nexus between the phone and the crime being investigated.

In this case, the affidavit at issue contains more than mere boilerplate, but it contains no facts about the specific device which was searched (i.e., Moore's phone). Counsel believes both that this case (specifically, the first claim raised herein) will provide this Court an opportunity to address the issue and that oral argument would assist the court.

Issues Presented

- Did the trial court err in admitting evidence obtained by searching Moore's cell phone when the affidavit used to secure the search warrant contained no specific facts about how Moore used his phone and only conjecture about how it might have been used and, if so, did this error contribute to Moore's conviction?
- Did the prosecutor's statement during closing argument alleging that the victim did not testify at trial because he was scared of Moore (when no evidence presented at trial suggested he was) affect Moore's substantial rights?

Statement of the Facts

Jerome Moore was released from Harris County Jail on May 27, 2020, under bond conditions that required him to wear a GPS monitor

on his ankle (VII R.R. at State's Ex. 104). Moore had been arrested and charged with capital murder for a triple murder that occurred on July 4, 2016 (V R.R. at 135-36).

Moore remained out of jail on bond on April 5, 2021. On that day, Keith Ward was robbed at gunpoint by Jayden Bolden and an accomplice who was never identified. Ward was at the Galleria Mall with his girlfriend, Johntal Taylor, their one-year-old son, and Landis Godwin, a cameraman which Ward had hired to shoot a music video (III R.R. at 48-50). The group finished shooting at the mall and decided to move to another location to get some footage of Ward in front of an elegant house in a nearby neighborhood (III R.R. at 53-56). Ward, Taylor, and their son, drove in a Rolls Royce, which they rented for the occasion, to a house on Lana Lane while Godwin followed in his Mercedes Benz (III R.R. at 56). When they arrived on Lana Lane, Ward and Godwin exited their respective vehicles while Taylor remained in the Rolls Royce with her child (III R.R. at 60).

Shortly after the two men exited their vehicles, a white sedan pulled up near their vehicles (III R.R. at 60-61). Two masked men jumped out of the white sedan and ran up to Ward and Godwin (III R.R.

at 62). The men held both Ward and Godwin at gunpoint and one of the masked men, who was later identified as Jayden Bolden, took Ward's Rolex watch (III R.R. at 64, 96-97). Just then, Taylor, who was still in the Rolls Royce taking care of her child, looked up and saw Bolden pointing a gun at Ward and asking for money (III R.R. at 62-64). She reached into her bag and pulled out her own handgun (III R.R. at 64). She then fired shots out of the car's window toward Bolden, who fired back as he ran away (III R.R. at 65-67). No one was injured by the exchange of gunfire, but a few of the bullets entered the back of the Rolls Royce (III R.R. at 67-69).

During this exchange, according to data generated from his GPS monitor, Moore was at 3104 Midlane, which was about 180 feet from where Ward's Rolex was stolen in front of the house on Lana Lane (III R.R. at 104-105, 158).[1]

Exactly one month later, on May 5, 2021, HPD officers from several local units conducted surveillance in the Galleria area targeting

[1] The GPS data appears to have been obtained on May 20, 2021 (VII R.R. at State's Ex. 35). This date was two weeks after HPD officers arrested Moore and seized his cellphone in connection with an attempted robbery at Johnny Dang & Co. jewelry store. *See infra*.

a group who had committed several robberies that targeted customers from the mall (V R.R. at 73-74). The officers noticed a silver Chevrolet Trax driving around the area with a fictitious license plate (V R.R. at 76). While conducting surveillance on the Trax, other members of the team identified a black Dodge Challenger that was registered to Moore (V R.R. at 76-77). The officers followed the vehicles which left in tandem and drove to the Johnny Dang & Co. jewelry store near the Galleria (VII R.R. at Def.'s Ex. 1). The vehicles parked in the store's parking lot and officers observed Terrell Hunt exit the Trax and enter the Charger. *Id*. The two vehicles (Moore driving the Challenger and Delesay Williams driving the Trax) then proceeded to leave the parking lot following a newer model SUV. *Id*.

After observing both the Trax and the Challenger follow the SUV for over ten minutes and run a red light, the officers performed a vehicle containment technique and stopped both Moore and Williams vehicles on the Westpark tollway. *Id*. Four cell phones, including Moore's, were seized, and the suspects were taken to an ATF facility for interviews (VII R.R. at Def.'s Ex. 1). During his interview, Wlliams informed officers that Hunt and Moore (who were in Moore's

Challenger) had been acting as scouts, looking for potential robbery victims, while he drove the Trax with Frank Brown (who had a gun) as a passenger. *Id.* Based on this information, Detective Sergeant Gray wrote and signed affidavits, which were subsequently used to obtain warrants to search Moore's and the other suspects' cell phones (VII R.R. at Def.'s Ex. 1). For probable cause, Gray simply stated that, based on his experience, suspects often use cell phones to communicate. *Id.* Gray stated in his affidavit that, because the suspects were in two different vehicles and working in tandem, he believed that they were communicating with their cell phones and likely used their phones to communicate prior to the offense. *Id.*

Trial counsel filed a motion to suppress the evidence acquired pursuant to the warrant on April 24, 2024 (C.R. at 203-05). Trial counsel argued that Gray's beliefs were insufficient to show probable cause to search Moore's phone, noting that "the instant case suffers from the same defects as in *State v. Baldwin*[,] 664 S.W.3d 122 (Tex. Crim. App. 2022)" (C.R. at 204, II R.R. at 117-18). The trial court denied the motion to suppress, allowing the State to introduce evidence

acquired by searching Jerome Moore's phone. (III R.R. at 13, C.R. at 219-30 (the trial court's findings of fact and conclusions of law)).

At trial, the State argued that Moore acted as a lookout during the commission of the April 5, 2021, robbery (III R.R. at 17). The State offered text messages and pictures obtained from Moore's phone, as well as the information acquired from his GPS monitor to place him at the Galleria while Kieth Ward and his group were shooting a music video (III R.R. at 109, 149). The State argued that several text messages sent by Moore to a number, which officers believed belonged to Bolden, suggested that Moore was in communication with Bolden and that they, together, chose to rob Ward (Vol. III, R.R. at 110–123). These messages include a discussion of Ward and that Landis (i.e., the cameraman) drove a Benz (III R.R. at 119-22). Moore's GPS monitor also showed that he was driving around the Galleria area before driving to the address on Midlane where he remained during the robbery (III R.R. at 104, 153-58).

On April 30, 2024, Jerome Moore was found guilty by a jury of aggravated robbery (IV R.R. at 45). During his closing on guilt, Counsel for the State stated that Keith Ward, the victim of the robbery, did not

testify at trial because he was "scared of Jerome Moore" (IV R.R. at 34). Trial counsel promptly raised an objection to the prosecution's statement, which was sustained by the court (IV R.R. at 34). Trial counsel subsequently moved for a mistrial, but the motion for mistrial was denied (IV R.R. at 34).

The following week, the trial court sentenced Moore to life in prison (VI R.R. at 61, C.R. at 241).

Summary of the Argument

The probable cause affidavit used to secure the warrant to search Moore's phone did not contain any specific facts about how Moore used his phone and only conjecture about how he might have used his phone. Because the affidavit did not establish a nexus between the phone and the crime being investigated, the subsequent search of the cell phone and use of the evidence obtained from the phone at trial violated Moore's Fourth Amendment right to be free from unlawful searches and seizures.

Although there was no evidence presented to the jury about why Keith Ward (i.e., the victim of the April 5 robbery) did not testify at trial, during closing argument, Counsel for the State argued it was

because Ward was scared of Moore. Though the trial court sustained trial counsel's objection, this type of severe misconduct by the State is not of the type which can be cured with an instruction to disregard, and the trial court erred by subsequently denying trial counsel's motion for a mistrial.

Argument

I. Because the probable cause affidavit used to obtain a warrant to search Moore's cell phone did not establish a nexus between the phone and the May 5, 2021, attempted robbery, the trial court erred in admitting evidence obtained from the phone at trial.

A. Legal standard

"Under Texas law, to search a person's cell phone after a lawful arrest, a peace officer must submit an application for a warrant to a magistrate." *Baldwin v. State*, 664 S.W.3d 122, 131 (Tex. Crim. App. 2022); Tex. Code Crim. Proc. art. 18.0215(a). The application must state the facts and circumstances that provided the applying officer with probable cause to believe that: 1) criminal activity has been, is, or will be committed; and 2) the phone is likely to produce evidence in the investigation of the criminal activity. *Id.* art. 18.0215(c)(5). "Probable cause exists when, under the totality of the circumstances, there is a

fair probability that . . . evidence of a crime will be found" on the phone. *Baldwin,* 664 S.W.3d at 130 (citing *State v. Duarte*, 389 S.W.3d 349, 354 (Tex. Crim App. 2012).

The duty of a reviewing court is to ensure the magistrate had a substantial basis from which to conclude probable cause existed. *Id.* "Reviewing courts must give deference to a magistrate's probable cause determination." *Id.* (citing *State v. McLain*, 337 S.W.3d 268, 271-72 (Tex. Crim. App. 2011)). When reviewing a trial court's ruling on a motion to suppress, this Court reviews the trial court's findings of fact for an abuse of discretion but reviews the trial court's application of the law to the facts de novo. *Lerma v. State*, 543 S.W.3d 184, 189-90 (Tex. Crim. App. 2018).

Determinations regarding whether an affidavit supports probable cause are constrained to the four corners of the affidavit. *McLain*, 337 S.W.3d at 271-72. The supporting affidavit must contain facts sufficient to establish:

(1) that a specific offense was committed;

(2) that the property or items to be searched for or seized constitute evidence of the offense or evidence that a particular person committed it; and

(3) that the evidence sought is located at of within the thing to be searched.

Tex. Code Crim. Proc. art. 18.01(c). Conclusory allegations alone are insufficient to support a finding of probable cause. *Baldwin*, 664 S.W.3d at 132 (citing *Illinois v. Gates*, 462 U.S. 213, 239 (1983)). The affiant must establish a nexus between the offense allegedly committed the item or place to be searched. *See id.*

In *Baldwin*, the Texas Court of Criminal Appeals (CCA) reviewed a Harris County district's court order granting a motion to suppress, which was reviewed, on appeal, by this Court. *Baldwin*, 664 S.W.3d at 123. The CCA granted review in the case to answer the question of "under what circumstances may boilerplate language about cell phones be considered in a probable cause analysis." *Id.* The boilerplate language about cell phones contained in the probable cause affidavit at issue in *Baldwin* included statements such as: cell phones "are capable, receiving, sending, or storing electronic data," cell phones "are commonly used to communicate," and that "incoming and outgoing text messaging . . . could contain evidence related to" the investigation. *Id.* at 126. The CCA held that "boilerplate language may be used in an affidavit for the search of a cell phone, but to support probable cause,

the language must be coupled with other facts and reasonable inferences that establish a nexus between the device and the offense." *Id.* at 123.

Shortly after the CCA issued its opinion in *Baldwin*, this Court issued its opinion in *Stocker v. State*, 656 S.W.3d 887 (Tex. App.—Houston [14th Dist.] 2022), *rev'd*, 693 S.W.3d 385 (Tex. Crim. App. 2024). *Stocker* suggests that this Court interpreted Baldwin's nexus requirement (that the affidavit supporting an application for a warrant for the search of a cell phone must "establish a nexus between the device and the offense" being investigated) means the affidavit must contain facts suggesting the phone was used during (or shortly before or after) the crime being investigated occurred. *Stocker*, 656 S.W.3d at 902.

In its opinion reversing and remanding this Court's opinion in *Stocker*, the CCA made clear that, while reliable information suggesting a cell phone was used during the crime being investigated could be used to establish a nexus between the phone and crime, its decision in *Baldwin* does not require such a showing. *Stocker v. State*, 693 S.W.3d 385, 387-88 (Tex. Crim. App. 2024).

While this Court has not had an opportunity issue a new opinion in *Stocker*, it has had an opportunity to revisit the issue in the time since the CCA issued its opinion. Specifically, in *Magee v. State*, No. 14-23-00396-CR, 2024 WL 3980248 (Tex. App.—Houston [14th Dist.] Aug. 29, 2924, no pet. h.) (mem. op.), this Court reiterated that an affidavit "must *usually* include facts that a cell phone was used during the crime or shortly before or after." *Magee*, 2024 WL 3980248, at *6 (emphasis added). Rather that citing *Baldwin* for this proposition, the Court cited its 2020 opinion issued in *Diaz v. State*, 605 S.W.3d 595, 603 (Tex. App.—Houston [14th Dist.] 2020), *aff'd*, 632 S.W.3d 889 (Tex. Crim. App. 2021). *Id.* In *Diaz*, this Court held that the affidavit at issue was sufficient to establish that the phone at issue was used during (or shortly before or after) the crime being investigated even though it did contain material evidence that the phone was used during the crime. Specifically, this Court found that the fact that the phone was recovered from the scene of the crime to be sufficient to establish the required nexus and support a reasonable inference that the phone was used during the crime being investigated (or shortly before or after). *Diaz*, 605 S.W.3d at 604-05.

The El Paso Court of Appeals has similarly had an opportunity to address this issue in the time since the CCA issued its opinion in *Stocker*. Specifically, in *McDonald v. State*, No. 8-23-00133-CR, 2024 WL 3744421 (Tex. App.—El Paso Aug. 9, 2024, no pet. h.) (mem. op., not designated for publication), the El Paso Court held that the affidavit at issue established a nexus between the crime and the Appellant's cell phone because it contained specific allegations about how the appellant used his phone in connection with the case, including that a witness, with whom the appellant was known to communicate with via text messages, told officer that the appellant had confessed to her. *McDonald*, 2024 WL 3744421, at *9-10.

While its opinion was issued prior to the CCA's opinion in *Stocker*, the First Court of Appeals appears to agree with the El Paso Court. Specifically, the First Court of Appeals has found that an affidavit which contains facts about the suspect's use of his phone (even if not specifically about his use of the phone to commit the crime being investigated) can establish the nexus required by *Baldwin*. *See Navarrete-Torres v. State*, No. 01-21-00322-CR, 2024 WL 1265389, at *9 (Tex. App.—Houston [1st Dist.] Mar. 26, 2024, no pet.).

In short, even after the CCA issued its opinion in Stocker, the courts of appeal (including this one) continue to require that a probable cause affidavit seeking a warrant to search a cell phone must contain some specific facts about the actual device, even if not establishing the device was used in the crime being investigated.

B. The affidavit at issue contains no specific facts about Moore's phone.

The affidavit at issue in this case relies primarily on a boilerplate statement that "it is common for suspects . . . to communicate about their plans" via cell phones. (VII R.R. at Def.'s Ex. 1). As explained above, boilerplate language is insufficient on its own to support probable cause. *Baldwin*, 664 S.W.3d, at 134. Specific facts that connect the item to be search to the alleged offense "are required." *Id.*

The affidavit does contain specific information about both Williams' and Hunt's phones. Specifically, the affidavit recounts that Williams told investigating officers that, prior to the May 5 attempted robbery, Hunt called Williams to ask if he wanted to make some money (VII R.R. at Def.'s Ex. 1). Counsel believes this would likely be sufficient to establish a nexus between the May 5 attempted robbery and

Williams' and Hunt's phones. However, the affidavit simply contains no facts whatsoever about Moore's use of his cell phone.

It is clear from the trial court's findings of fact and conclusions of law that the trial court was well-aware of *Baldwin*'s requirement that an affidavit not be based on boilerplate language alone. The trial court's findings correctly noted that the affidavit contained specific facts about the crime beyond the boilerplate used in the affidavit (C.R. at 219-30). To Counsel, it appears the key finding in the trial court's findings is its finding that the investigating officer could reasonably infer that because Hunt called Williams before the May 5 attempt, he likely called Moore on his cell phone (C.R. at 223). Counsel believes that if the affidavit contained any facts at all about Hunt communicating with Moore on Moore's cellphone, the affidavit might be sufficient to establish the required nexus required by Baldwin. The affidavit, however, is devoid of any such fact or any information at all about Moore's use of his cell phone.

C. Because the trial court's error in admitting evidence from Moore's cell phone contributed to his conviction, this Court should reverse Moore's conviction.

Because the trial court's error in admitting evidence at trial obtained from Moore's phone Moore's Fourth Amendment right to be free from unreasonable searches and seizures, this Court should, after finding the trial court erred, conduct a constitutional harm analysis. *Stocker*, 656 S.W.3d at 902; *see also Hernandez v. State*, 60 S.W.3d 106, 108 (Tex. Crim. App. 2001) ("the harm analysis for the erroneous admission of evidence in violation of the Fourth Amendment must be Rule 44.2(a)'s constitutional standard"). Pursuant to Rule 44.2(a) of the Texas Rules of Appellate Procedure, this Court, if it finds the trial court erred, must reverse Moore's conviction "unless the [C]ourt determines beyond a reasonable doubt that the error did not contribute to the conviction." Tex. R. App. P. 44.2(a).

There can be no doubt that the evidence obtained from Moore's phone contributed to his conviction. The text messages between Bolden and Moore which the State used as evidence the two worked together in selecting Ward as a target were obtained by the State only from Moore's phone. Likewise, the picture of admitted at trial of Moore holding Ward's Rolex and also a stack of cash (presumably the profits from selling Ward's watch) were obtained by the State only from Moore's

phone. The only evidence presented at trial which the State obtained from a source other than Moore's phone was the GPS data which established he was near the Galleria and the house on Lana Lane at the relevant times.

II. Because the statement made by the State in closing argument (that Ward did not testify because he was scared of Moore) was improper and affected Moore's substantial rights, the trial court erred in denying Moore's motion for mistrial.

A. Legal standard

It is well established under Texas law that the State "may not imply that witnesses have been frightened from the courtroom by the defendant." *Johnson v. State*, 662 S.W.2d 368, 369 (Tex. Crim. App. 1984); *see also Thomas v. State*, 519 S.W.2d 430, 431 (Tex. Crim. App. 1975); *Salas v. State*, 403 S.W.2d 440, 441 (Tex. Crim. App. 1966) (Morrison, J., concurring). Permissible jury argument falls within one of four general areas: (1) summation of evidence; (2) reasonable deductions from the evidence; (3) answers to arguments of opposing counsel; and (4) pleas for law enforcement. *Dooley v. State*, 65 S.W.3d 840, 843 (Tex. App.—Dallas 2002, pet. ref'd). "It is improper argument to suggest a witness is afraid of the defendant absent supporting evidence in the

record." *Kelly v. State*, 463 S.W.3d 256, 270 (Tex. App.—Texarkana 2015, no pet.).

Under the Texas Rules of Appellate Procedure, this type of error is considered non-constitutional error and may only be disregarded if the error "does not affect [Moore's] rights." Tex. R. App. P. 44.2(b); *Freeman v. State*, 340 S.W.3d 717, 728 (Tex. Crim. App. 2011). "To determine whether [Moore's] substantial rights were affected, [this Court should] balance the severity of the misconduct (i.e., the prejudicial effect), any curative measures, and the certainty of conviction absent the misconduct." *Freeman*, 340 S.W.3d at 728.

Suggesting to the jury, without evidence, that a witness's fear of the defendant is what kept the witness from testifying at trial is severe misconduct. For example, in *Thomas*, the State suggested that the defendant's niece was afraid to testify during closing arguments. *Thomas*, 519 S.W.2d at 431. Counsel objected to the statement, and the Court overruled the objection. *Id.* Immediately after the objection was overruled, the prosecution further argued that it was reasonable to deduce that the witness was afraid of the defendant. The Court in *Thomas* found that this was reversable error because "[t]o argue that

witnesses have been afraid to appear is no less harmful than arguing that their testimony has been coerced." *Id.* The Court also found that "[t]o argue such facts, unsupported by the evidence, is to inject new and harmful facts alluding to conduct of the appellant for which he is not on trial." *Id.* Further, the Court stated that by continuing to discuss the witnesses fear after the objection, "the prosecutor only compounded the error and harm to the appellant." *Id.* at 432.

B. The State's improper argument that Ward was afraid to testify was severe misconduct that necessitated a mistrial.

The statements made by the State during closing arguments at Jerome Moore's trial amount to prosecutorial error that should be reversed by the Appellate Court. Like in *Thomas*, where the prosecutor alleged that a witness refused to testify because she was afraid of the defendant, the prosecution in Mr. Moore's case stated that Keith Ward did not testify because he was "scared of Jerome Moore" (IV R.R. at 34) ("Let me give you the reason Keith Ward didn't show up. He's scared of Jerome Moore."). Trial counsel objected, and the trial court sustained trial counsel's objection (IV R.R. at 34). Defense counsel moved for a mistrial, but the trial court denied the motion (IV R.R. at 34). Even

after the objection was sustained, trial counsel again suggested to the jury that the reason Ward did not testify was that he was afraid by reminding the jurors that, during voir dire, a potential juror suggested fear might be a reason for a victim to not testify (IV R.R. at 34-35, II R.R. at 71).

The State presented no evidence at trial that suggested in any way that Keith Ward did not testify because he was afraid of Moore. By making this argument, the prosecution injected new and harmful facts alluding to conduct of the appellant for which he was not on trial. He then further compounded the error and harm to Moore by continuing to discuss the witness's alleged fear after a sustained objection affecting Moore's substantial rights. *See Thomas*, 519 S.W.2d at 431-32. These arguments made before the jury are considered severe prosecutorial misconduct by the Court, and such error must be reversed on appeal when they affect the defendant's substantial rights. *See id.*; *Johnson*, 662 S.W.2d at 369–70. The trial court's sustaining the objection was not sufficient to cure the error. *See Lookabaugh v. State*, 352 S.W.2d 279, 279-80 (Tex. Crim. App. 1961) (finding reversal was required even after the trial court sustained trial counsel's objection to improper argument).

PRAYER

WHEREFORE, Appellant Jerome respectfully requests that this Court find his conviction and sentence should be vacated.

Respectfully Submitted,

/s/ Jeffrey R. Newberry

Jeffrey R. Newberry
University of Houston Law Center
Texas Bar No. 24060966
4170 Martin Luther King Blvd.
Houston, Texas 77204-6060
Tel. (713) 743-6843
Fax (832) 842-4671

Counsel for Jerome Moore

Certificate of Service

I certify that on the 25th day of November 2024, a true and correct copy of the above legal document was delivered to the following:

Jessica Alane Caird
Harris County District Attorney's Office
500 Jefferson St., Ste. 600
Houston, Texas 77002-7638
Tel. (713) 274-5800
Fax (979) 245-9409
Email caird_jessica@dao.hctx.net

/s/ Jeffrey R. Newberry

Jeffrey R. Newberry

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This Brief complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface using Microsoft Word for Mac, Version 16.91 in Century Schoolbook 14-point font for body text and 12-point font for footnote text. The Brief contains 4,402 words, excluding the parts exempted by Tex. R. App. P. 9.4(i)(1).

/s/ Jeffrey R. Newberry

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Jeffrey R. Newberry

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Jeffrey Newberry
Bar No. 24060966
jrnewber@central.uh.edu
Envelope ID: 94703419
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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Jessica Caird	24000608	caird_jessica@dao.hctx.net	11/25/2024 9:15:00 PM	SENT
Jeffrey RNewberry		jrnewber@central.uh.edu	11/25/2024 9:15:00 PM	SENT