No. 01-24-00769-CR

In The Court of Appeals
For the Fourteenth District of Texas

Larry Wayne Richard
Appellant

v.

The State of Texas
Appellee

On Appeal from Cause Number 1829949
From the 487th District Court of Harris County, Texas

Brief for Appellant

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

This case presents questions about timely disclosures under Article 39.14, and the trial court's discretion in the face of untimely disclosures that harm the defendant. The decisional process will be significantly aided by oral argument.

STATEMENT OF THE CASE

Mr. Richard was indicted for aggravated assault of a family member on October 25, 2023. (C.R. 79). Trial commenced on October 7, 2024. (3 R.R. 1). On the same day, a jury found Mr. Richard guilty as charged in the indictment. (C.R. 275). The same jury assessed punishment at 40 years confinement in the Texas Department of Criminal Justice — Institutional Division. (C.R. 287). Notice of appeal was filed on October 8, 2024. (C.R. 294).

ISSUES PRESENTED

1. The State violated article 39.14 with the untimely disclosure of material evidence.

2. The trial court erred by admitting the harmful, untimely disclosed material evidence.

STATEMENT OF FACTS

Larry Richard and Julie Oppenheim began a dating relationship in 2011, and shared a home together. (3 R.R. 68). On July 30, 2023, Julie Oppenheim headed to work as a manager for Domino's Pizza. (3 R.R. 45). While she was at work, Mr. Richard called, saying he needed money. (4 R.R. 69). Initially, Ms. Oppenheim refused, and the couple argued. (4 R.R. 70). Several hours later, Ms. Oppenheim reconsidered and called Mr. Richard to tell him he could have some of the money he requested. (4 R.R. 72).

At the end of her workday, Ms. Oppenheim was concerned that Mr. Richard was still upset, and she called the police to request an escort home. (4 R.R. 74-75). Ultimately, Ms. Oppenheim decided to go home without a police escort to give Mr. Richard the money they had discussed. (4 R.R. 77). When she arrived home, Mr. Richard was waiting in his car in the driveway. (4 R.R. 77). He exited his car and went to Ms. Oppenheim's car and began an argument with her. (4 RR. 77). Mr. Richard threatened

Ms. Oppenheim with a gun and struck her multiple times. (4 R.R. 77-78). Security cameras at the home recorded some of the incident. (4 R.R. 81; SX 5).

They briefly went inside the house and continued to argue while Mr. Richard continued to display the firearm. (4 R.R. 84). Mr. Richard had Ms. Oppenheim accompany him to his friend's house and a convenience store before returning home. (4 R.R. 88). When they returned home, police officers were waiting. After speaking with Mr. Richard and Ms. Oppenheim, the officers arrested Mr. Richard for aggravated assault. (4 R.R. 89).

Trial Proceedings

On August 8, 2023, defense counsel filed a general discovery request in compliance with Tex. Code Crim. Proc. Art. 39.14 ("Article 39.14"), requesting a wide variety of potential evidence, including "tangible things that constitute material evidence." (C.R. 51-52.).

Over one year later, and 3 days before jury selection began, the State disclosed recordings of three jail calls between Mr.

Richard and Ms. Oppenheim. (4 R.R. 30-31). The recordings were made on May 2, 2024, May 23, 2024, and September 23, 2024. (4 R.R. 27). Defense counsel requested any additional jail call recordings and received no response from the State. (4 R.R. 33). Defense counsel was never given any additional jail call recordings and was never told if any additional jail call recordings existed. (4 R.R. 33-34). It is unknown how many jail call recordings existed between Mr. Richard and Ms. Oppenheim, but it is more than three. (4 R.R. 52).

Jury selection occurred on Thursday, October 3, 2024, and testimony began on Monday, October 7, 2024. The State presented a brief punishment case, including judgment and sentences from Mr. Richard's prior convictions, a small amount of testimony from Ms. Oppenheim, and three recordings of jail calls between Mr. Richard and Ms. Oppenheim.

The State attempted to introduce the recordings during punishment on Tuesday, October 8, 2024. Defense counsel timely and specifically objected to the admission of the recordings on the

ground that they were untimely disclosed, when an Article 39.14 compliant discovery request had been on file months before the recordings existed. (4 R.R. 26, 30, 32). Defense counsel specified that the admission of the calls would be harmful because they would be unable to fully review the calls, prepare a defensive strategy for the calls, and, without additional call information, would be unable to address issues of optional completeness or prepare any mitigation. (4 R.R. 33-34).

The trial court established that defense counsel's receipt of the discovery was untimely and that defense counsel only had access to jail call recordings released by the State. (4 R.R. 30-31, 33-34). The trial court then overruled the objection and denied any remedies such as a continuance or exclusion, stating, "Why wasn't this taken up before, if you needed more time?" (4 R.R. 31). Defense counsel objected again before the three recordings were played for the jury, and the trial court expressed displeasure over defense's objection, seeming to indicate that objecting at the time the evidence was offered was untimely, stating "If there was a dispute

over jail calls you-all wanted me to hear, this should have already been taken care of. Play the jail calls and move on." (4 R.R. 34).

The three recordings presented by the State included Mr. Richard telling Ms. Oppenheim that if he went to prison, he was going to spend his time thinking about sexually assaulting and then murdering her. (4 R.R. 78). In the first half of its closing, the State reviewed the charge, reviewed the criminal history, and then focused on the recordings. (4 R.R. 78-80). The State used the content of the recordings as its main call for a lengthy sentence:

> What you have heard is one of the most atrocious, inflaming, enraging, and concerning sets of facts most of us can imagine. This is not a one-time deal. This is who he chooses to be. This is who he is. And when you listen on that jail call, he's yelling at her. He's raging at her. "Shut up. Shut up and listen to me. Shut up and listen." So if we all just do what he says and we shut up and listen, we can hear him telling us exactly what kind of person he is and exactly what kind of sentence he needs the 12 of you to give him. (4 R.R. 80).

The State's punishment rebuttal was almost entirely focused on the content of the recordings:

> Because you heard the jail calls. You heard him say several times that, 'I'm going to kill you when I get out. I'm going to kill you.' It's pretty clear what he

> wants to do. The only people that can keep her safe is you. (4 R.R. 85).
> …
> And if you recall, "bitch" every other word. (4 R.R. 86).
> …
> But, remember, I just want you to keep in mind, we're here to keep Ms. Oppenheim safe. We're here to keep that family safe. So I just trust you and plead with you to get that done. Thank you. (4 R.R. 88).

SUMMARY OF THE ARGUMENT

1. The State violated Tex. Code. Crim. Proc. Art. 39.14 when a discovery request by defense counsel was filed in August of 2023, with a specific request for any items material to the State's case, and the State 1) delayed disclosure of two May 2024 jail call recordings by nearly five months; 2) failed to disclose any additional jail call recordings at the specific request of defense counsel; and 3) delayed disclosure of a third jail call recording by seven days. The three disclosed recordings were not provided to defense counsel until three days before trial, and the additional recordings were never disclosed.

The combination of untimely and failed disclosures harmed Mr. Richard because defense counsel was unable to adequately prepare for a defense where the recordings were in evidence, and the recordings were inflammatory and central to the State's punishment case. It is not reasonable to assume the recordings had no effect or only a slight effect on the jury's sentencing.

2. The trial court erred when it admitted the three harmful recordings. The trial court had full knowledge of the State's untimely disclosures on the three recordings, its lack of disclosure on other recordings, and the harmful nature of the calls. Despite knowing this, the trial court ruled the three recordings admissible. The trial court's ruling was outside the zone of reasonable disagreement because it opted to take no corrective action in the form of exclusion or a continuance, and Mr. Richard was harmed as a result of this erroneous admission. It cannot be said that the inflammatory calls had little or no effect on the jury's sentencing decision. When the error is harmful, the case must be remanded.

ARGUMENT AND AUTHORITIES

POINT OF ERROR NUMBER ONE

THE STATE VIOLATED ARTICLE 39.14 WITH THE UNTIMELY DISCLOSURE OF MATERIAL EVIDENCE.

A. Discovery Compliance Under Texas Code of Criminal Procedure Article 39.14

Article 39.14 specifies:

> [A]s soon as practicable after receiving a timely request from the defendant the state shall produce and permit the inspection and the electronic duplication, copying, and photographing, by or on behalf of the defendant, of any offense reports, any designated documents, papers, written, or recorded statements of the defendant or a witness, including witness statements of law enforcement officers but not including the work product of counsel for the state in the case and their investigators and their notes or report, or any designated books, accounts, letters, photographs, or objects or other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of the state or any person under contract with the state.." TEX. CODE CRIM. PROC. ANN. ART. 39.14(a).

The State's disclosure obligations were recently addressed in detail by the Court of Criminal Appeals in *Watkins v. State*, 619 S.W.3d 265 (Tex. Crim. App. 2021), and *State v. Heath*, 696 S.W.3d 677 (Tex. Crim. App. 2024). In *Watkins*, the State sought to

introduce booking records, pen packets, and judgments of prior convictions of the defendant as punishment exhibits. These records had not been previously disclosed to defense counsel, and defense counsel made a timely discovery request. The Court held that the phrase "constitute or contain evidence material to any matter involved in the action" in Article 39.14 encompasses anything that has a "logical connection to a fact of consequence". *Watkins* at 291.

"There are no distinct facts of consequence at punishment that proffered evidence can be said to make more or less likely to exist. *Id* at 290. Punishment phase facts fall within two categories: normative facts and subsidiary facts. *Id*. Normative facts are those that directly impact "the factfinder's normative response to the defendant." *Beham v. State,* 559 S.W.3d 474, 480 (Tex. Crim. App. 2018)(The subsidiary fact that a particular gang engages in criminal activity is related to the normative fact that the Defendant was a gang member; and helps the jury better understand why the State believes being a gang member should

weight against a defendant in punishment). An example of this is evidence that, beyond a reasonable doubt, the defendant previously committed an extraneous criminal offense. *Id.* This is a basis upon which a jury could legitimately form a clearer opinion as to the proper punishment for the defendant's conduct. Normative facts can therefore be thought of as "fact[s] of consequence" in the punishment context. *Id.* Subsidiary facts "do not by themselves impact a factfinder's normative response to the defendant," but are relevant insofar as they assist in "proving or disproving a normative fact." *Id.*

Punishment factors that can be logically classified as information about the defendant and the case that directly helps the jury to determine punishment (normative), or helping the jury to understand or provide context to facts and circumstances (subjective) are "material" to punishment. See *Watkins* at 290-291.

In *Heath*, the State sought to introduce a 911 call from the day of the charged offense that had been in the possession of law enforcement, and prosecutors were only made aware of the 911 six

days before trial. The 911 call was disclosed to defense when the State learned about the call, 18 months after trial counsel made a discovery request. The Court determined that in article 39.14, "the State" means "The State of Texas", which includes law enforcement officers. *Heath,* 696 S.W.3d at 698.

The *Heath* Court held that "as soon as practicable" was not dependent on when the prosecutor learned of the existence of evidence. Because there is no *mens rea* requirement in Article 39.14, the *Heath* Court reasoned that:

> [T]o the extent that the definition of "practicable" includes a "reasonableness" requirement, we interpret that to be a requirement of reasonable diligence on the part of the prosecutor to discover what items the State has in its possession that it intends to introduce at trial. While the prosecution may not be reasonably capable of producing evidence that has been lost or intentionally hidden by law enforcement, those are not the circumstances of this case. If a simple request to law enforcement for an item of discovery can result in its disclosure, as it did in this case, then disclosure is reasonably capable of being accomplished. *Id.* at 699-701.

Although there is no clear guidance on what qualifies as "as soon as practicable," the Court has noted that Article 39.14 is

typically violated when disclosure of readily available or discoverable items is delayed by months; with a particular emphasis on scenarios that result in disclosure occurring at or near the trial date.

B. The Recordings Were Material

The recordings were central to the State's punishment case, making them material. The State presented the recordings as a glimpse into the relationship between Mr. Richard and Ms. Oppenheim, and a look into Mr. Richard's character and nature. (4 R.R. 80, 85, 88). The recordings neatly fit the definition of normative facts, evidence that Mr. Richard was threatening Ms. Oppenheim during the pendency of his case directly impacts the jury's assessment of proper punishment for the charged offense.[1] The normative nature of the recordings makes them material and puts them subject to disclosure under Article 39.14.

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[1] It is unknown if the other calls between Mr. Richard and Ms. Oppenheim would be normative, subsidiary or otherwise because they were never disclosed to defense counsel for evaluation.

C. The State's Disclosure of the Three Recordings Were Not "As Soon As Practicable" in Violation of Article 39.14.

In the instant case, defense counsel made a request for discovery in August of 2023. (C.R. 51-52). Two of the recordings had been in the possession of the Harris County Sheriff's Office since May of 2024 and were not disclosed until September 30, 2024. (4 R.R. 22-25, 34). The last call occurred 7 days before the State's disclosure, and the State waited and sent this call along with the first two calls.

The State did not disclose the recordings to defense counsel until three days before trial. (4 R.R. 30-31). The recordings were not being secreted or concealed, but were readily available via request by the State. (4 R.R. 24). The recordings the State repeatedly quotes are the two earliest recordings, made on May 2 and May 13. (4 R.R. 34).

The issues in *Heath* are very similar, and *Heath's* holding firmly establishes that the State was required to disclose the calls as soon as practicable if they wanted to present them at trial. While disclosure of the last recording was significantly closer to

the time the recording was created, the State still delayed 7 days and waited to disclose all the recordings at once. The State failed to disclose the three recordings as soon as practicable and in doing so violated Article 39.14.

Additionally, after defense counsel was made aware of the existence of the three recordings, the State was asked to send any additional recordings between Mr. Richard and Ms. Oppenheim. Not only did the state fail to send the calls, but the State did not even acknowledge defense counsel's request. (4 R.R. 33-34). Until Ms. Oppenheim testified at trial, defense counsel was unsure if additional calls existed, but attempted to request them anyway. Additional calls did exist, and defense counsel was never given the opportunity to review them. (4 R.R. 34, 52).

If the scenario was that the last recording was the only one in existence, the evaluation of "as soon as practicable" might be different. The State's failure to disclose the first two recordings as soon as practicable, and its complete failure to disclose the additional calls that exist, demonstrate at the very least a lack of

diligence that encompasses the seven-day delay of the third recording, making disclosure on all three untimely. Although the State of Texas possessed the two most damaging recordings for nearly five months, it didn't disclose the readily available calls until three days before trial and failed to disclose any additional calls to the defense counsel — all in violation of Article 39.14.

MR. RICHARD WAS HARMED BY THE STATE'S VIOLATION OF ARTICLE 39.14.

A. Evaluating Non-Constitutional Error

This particular case involves non-constitutional error, and "any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." TEX. R. APP. P. Rule 44.2(b). If the reviewing court is unsure whether the error affected the outcome, it must treat the error as harmful — that is, as having a substantial and injurious effect or influence on the jury's verdict. *Solomon v. State*, 49 S.W.3d 356, 365 (Tex. Crim. App. 2001) (explaining that error does not affect substantial rights if the reviewing court has "fair assurance that the error did not influence the jury, or had but a slight effect" (citation omitted));

Ivey v. State, 250 S.W.3d 121, 126 (Tex. App.—Austin 2007)(explaining that, when assessing harm from improperly admitted evidence during punishment phase of trial, appellate courts ask whether defendant received longer sentence or was harmed as result of erroneously admitted evidence).

When a reviewing court cannot measure whether the error harmed substantial rights, the error cannot be disregarded as harmless, and a conviction should be reversed. *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)(applying rule 52(a) of federal rules of criminal procedure); *Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997); *McClellan v. State*, 143 S.W.3d 395, 402 (Tex. App.—Austin 2004).

The "sentencing process consists of weighing mitigating and aggravating factors, and making adjustments in the severity of the sentence consistent with this calculus. Each item of testimony has an incremental effect; large segments of highly prejudicial, inadmissible testimony have a considerable effect, skewing the calculus and invalidating the result reached." *Vela v. Estelle*, 708

F.2d 954, 966 (5th Cir. 1983). The sentencing process loses its integrity if defense counsel is unable to evaluate evidence for a defense or prepare adequate mitigation. See *Williams v. Taylor*, 529 U.S. 362, 395-99 (2000)(discussing importance of mitigating evidence).

B. The Recordings Were Designed to Heavily Influence the Jury.

Mr. Richard's substantial rights were affected, and he was harmed. The State's presentation of the recordings was intended to have a marked effect on the jury. The recordings were the most aggravating factor in the State's punishment case. Almost the entirety of Ms. Oppenheim's punishment testimony was about the recordings. (4 R.R. 29-35). In closing, the State quotes the recordings to convince the jury that Mr. Richard is a continuously violent person, and uses the recordings to persuade the jury to 'start high' on the punishment range. (4 R.R. 87). The information in the recordings was not contained anywhere else in the State's case in chief, punishment case, and was not cumulative. Without the recordings, the State's punishment case would have been drastically different.

C. The Disclosure Violation Affected Mr. Richard's Ability to Present a Defense

The State's untimely disclosure prevented defense counsel from fully evaluating and preparing for the punishment phase of trial. By failing to disclose the first two recordings as soon as practicable, defense had no knowledge that any recordings existed. While the third call was certainly disclosed closer to the time it was made, defense counsel received the recordings all together a mere three days before trial began. Combined with the untimely disclosure of the two more damaging recordings and the complete lack of disclosure on any remaining recordings, the week-long delay on the third recording was untimely.

Mr. Richard's substantial rights were affected, as this Court cannot say with confidence that the recordings had no effect, or only a slight effect, on the jury's sentencing decision, especially given their central importance to the State's punishment case. Mr. Richard requests that this Court sustain his point of error and remand the case for a new sentencing hearing.

POINT OF ERROR NUMBER TWO

THE TRIAL COURT ERRED BY ADMITTING THE HARMFUL, UNTIMELY DISCLOSED EVIDENCE

A. Standard of Review

A trial court's ruling on a motion to admit evidence during the punishment phase, and to admit evidence in violation of 39.14, is reviewed for an abuse of discretion. *Ellison v. State*, 86 S.W.3d 226, 227 (Tex. Crim. App. 2002). The provisions of Article 39.14 apply to the punishment phase of trial. See *Watkins v. State*, 619 S.W.3d 265, 269 (Tex. Crim. App. 2021).

An abuse of discretion occurs when the trial court acts "arbitrarily or unreasonably" or "without reference to any guiding rules and principles." *State v. Hill*, 499 S.W.3d 853, 865 (Tex. Crim. App. 2016) (quoting *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990)). A trial court abuses its discretion when the decision made falls outside the zone of reasonable disagreement. *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003) (citing *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g)).

While this standard is deferential, it does not insulate the trial court's decision from reversal. *Montgomery v. State*, 810 S.W.2d 372,392 (Tex. Crim .App. 1991)(op. on reh'g). "Abuse of discretion does not imply intentional wrong or bad faith, or misconduct, but means only an erroneous conclusion." *Hebert v. State*, 836 S.W.2d 252, 255 (Tex. App.—Houston [1st Dist.]1992, pet. ref'd).

B. Non-Constitutional Error Harm Standards

"Generally, the erroneous admission or exclusion of evidence is non constitutional error ...." *Melgar v. State*, 236 S.W.3d 302, 308 (Tex. App.—Houston [1st Dist.] 2007 pet. ref'd); see *Solomon v. State*, 49 S.W.3d 356, 365 (Tex. Crim. App. 2001). "Erroneous exclusion of evidence can rise to the level of constitutional error ... when the excluded evidence 'forms such a vital portion of the case that exclusion effectively precludes the defendant from presenting a defense.' " *Wilson v. State*, 451 S.W.3d 880, 886 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd)(quoting *Potier v. State*, 68 S.W.3d 657, 665 (Tex. Crim. App. 2002)).

An appellate court must disregard a non-constitutional error that does not affect a criminal defendant's substantial rights. *Coble v. State*, 330 S.W.3d 253, 280 (Tex. Crim. App. 2010). Violations of statutory duties under Article 39.14 warrant a harm analysis. See *Watkins*, 619 S.W.3d at 269 (reversing because of an article 39.14 violation due to lack of disclosure and remanding to the court of appeals to analyze whether appellant was harmed by the lack of disclosure).

The reviewing court should consider the entire record and the nature of the error. In doing so, the Court must evaluate how the error relates to the evidence, the State's theory of the case, any defensive theories, the closing arguments, and, if applicable, voir dire. *Motilla v. State*, 78 S.W.3d 352, 355–56 (Tex. Crim. App. 2002); *Morales v. State*, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000).

If the reviewing court is unsure whether the error affected the outcome, the court should treat the error as harmful, that is, as having a substantial and injurious effect or influence in determining the jury's verdict. *Solomon v. State*, 49 S.W.3d 356,

365 (Tex. Crim. App. 2001)(explaining that error does not affect substantial rights if the reviewing court has "fair assurance that the error did not influence the jury, or had but a slight effect" (citation omitted)); *Ivey v. State*, 250 S.W.3d 121, 126 (Tex. App.—Austin 2007)(explaining that, when assessing harm from improperly admitted evidence during punishment phase of trial, appellate courts ask whether defendant received longer sentence or was harmed as result of erroneously admitted evidence).

When a reviewing court cannot measure whether the error harmed substantial rights, the error cannot be disregarded as harmless, and a conviction should be reversed. *Kotteakos v. United States*, 328 U.S. 750 (1946) (applying rule 52(a) of federal rules of criminal procedure); *Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997); *McClellan v. State*, 143 S.W.3d 395, 402 (Tex. App.—Austin 2004).

The "sentencing process consists of weighing mitigating and aggravating factors, and making adjustments in the severity of the sentence consistent with this calculus. Each item of testimony has

an incremental effect; large segments of highly prejudicial, inadmissible testimony have a considerable effect, skewing the calculus and invalidating the result reached." *Vela v. Estelle*, 708 F.2d 954, 966 (5th Cir. 1983). The sentencing process loses its integrity if defense counsel is unable to evaluate evidence for a defense or prepare adequate mitigation. See *Williams v. Taylor*, 529 U.S. 362, 395-99 (2000)(discussing importance of mitigating evidence).

C. Admission of the Recordings in Violation of 39.14 Was Outside the Zone of Reasonable Disagreement

When a violation of Article 39.14 occurs and defense counsel demonstrates harm caused by the violation, the trial court must take corrective action. In the instant case, the suitable course of action would have been to either exclude the recordings or grant defense counsel a continuance to review the calls and for the State to disclose the rest of the jail calls between Ms. Oppenheim and Mr. Richard for defense counsel to review. The trial court established the untimely disclosure, and defense counsel explained the harm from the violations. The trial court then took

no corrective action, made no findings, and admitted all three recordings. (4 R.R. 34).

Because the trial court made no findings, we review the record to determine if the trial court's decision was reasonable or unreasonable. The admission of the recordings was outside the zone of reasonable disagreement because when evidence is deemed to be in violation of 39.14 and harmful, it is not reasonable to admit the evidence. The trial court had all the requisite information to understand the situation and the harm the admission of the recordings posed to Mr. Richard's defense. The trial court knew:

1. The State's disclosure of the three recordings was untimely. (4 R.R. 30-31).
2. That defense made a timely objection. (4 R.R. 30).
3. There were other calls in existence that were never disclosed to defense. (4 R.R. 32-33).
4. That defense counsel had requested disclosure of the additional calls for examination. (4 R.R. 32-33).

5. That defense counsel had no way to access any of the calls if they were not disclosed. (4 R.R. 33).
6. The untimely disclosure was harmful to the defense because it affected their ability to prepare for the case. (4 R.R. 33-34).
7. The lack of disclosure of the other calls was harmful to defense because they were unable to determine if there was an issue with optional completeness or mitigation in relation to the three recordings. (4 R.R. 32-33).
8. The content of the calls was highly inflammatory. (4 R.R. 32).

The trial court seemed to suggest that defense counsel should have objected to the admissibility of the calls at some earlier point in time before the State attempted to admit the calls, but this cannot be a basis to admit harmful evidence that violates 39.14. (4 R.R. 31, 34). There is nothing in the record that indicates defense counsel previously waived any objections to the admissibility of the recordings, nor was there anything in the record to suggest the

case was set for a pre-trial hearing to resolve suppression issues where defense counsel waived any objections to the recordings.

Trial courts are not bound by pre-trial rulings or rulings on motions in limine. See *Geuder v. State*, 115 S.W.3d 11, 14-15 (Tex. Crim. App. 2003). The only time a trial court's ruling is truly solidified and the issue is preserved for review is when defense counsel objects at the time the evidence is offered. Defense counsel is under no obligation to address the inadmissibility of potential evidence before the State offers the evidence in trial. Here, defense counsel did not know when the State intended to admit the recordings or if the State intended to use the recordings at trial at all. Given the State's failure to respond to the request for additional calls, it was reasonable strategy for defense counsel to not address the disclosed recordings until the State attempted to introduce them at trial, particularly when the State had not made clear that it would introduce them at trial.

D. Mr. Richard Was Harmed by the Trial Court's Erroneous Admission of the Recordings

Mr. Richard's substantial rights were affected, and he was harmed. The State's presentation of the recordings was intended to have a major effect on the jury. The recordings were the most aggravating factor in the State's punishment case. Almost the entirety of Ms. Oppenheim's punishment testimony was about the recordings. (4 R.R. 29-35). In closing, the State quotes the recordings to convince the jury that Mr. Richard is a continuously violent person, and uses the recordings as a large part of the reason why the jury should start high on the punishment range. (4 R.R. 87). The information in the recordings was not contained anywhere else in the State's case in chief or punishment case and was not cumulative. Without the recordings, the State's punishment case becomes drastically different.

D. The Admission of the Recordings Negatively Affected Mr. Richard's Ability to Present a Defense

The State's untimely disclosure prevented defense counsel from fully evaluating and preparing for the punishment phase of trial. By failing to disclose the first two recordings as soon as

practicable, defense had no knowledge that the calls existed. While the third recording was certainly disclosed closer to the time it was made, the week-long delay cannot be viewed in a vacuum; it must be looked at in connection with the two disclosed recordings and the unknown number of undisclosed recordings that defense counsel specifically requested prior to trial. With the introduction of the recordings, defense counsel was well and truly hindered in preparing for the punishment phase of trial. The remedy should have been exclusion or a continuance. Full admission of the recordings was not a reasonable option.

There is no avenue for the trial court to have reasoned that the recordings were admissible given the known facts. It is impossible to say that the recordings had no or merely a slight effect on the jury's sentencing decision, given their content and the weight given to the recordings by the State. Mr. Richard requests that this Court sustain his point of error and remand the case for a new sentencing hearing.

CONCLUSION AND PRAYER

For the reasons stated above, Mr. Richard prays that this Honorable Court sustain his point of error, vacate his sentence and remand the case for further punishment proceedings pursuant to TEX. R. APP. PRO. 43.2(D).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing brief was electronically served via Texas e-file on the Harris County District Attorney on the day the brief was filed.

BreAnna Schwartz

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i) (3), undersigned counsel certifies that this brief complies with all form requirements of TEX. R. APP. PROC. 9.4.

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BreAnna Schwartz		breanna@schwartzlegaltx.com	4/28/2025 10:39:46 PM	SENT