14-24-00797-CR

IN THE COURT OF APPEALS

FOR THE FOURTEENTH DISTRICT OF TEXAS

VAN HENRY BRISBON

Appellant

v.

THE STATE OF TEXAS

Appellee

On Appeal from Cause Number 1873773
From the 184th District Court of Harris County, Texas

BRIEF FOR APPELLANT

ORAL ARGUMENT NOT REQUESTED

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PRESIDING JUDGE:	Hon. Hazel Jones 174th District Court Harris County, Texas 1201 Franklin Ave., 19th floor Houston, Texas 77002
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STATEMENT REGARDING ORAL ARGUMENT

Counsel believes oral argument is not necessary to the resolution of this case after remand, and is not requesting oral argument.

STATEMENT OF THE CASE

Mr. Van Brisbon was charged with the capital murder of L.J.[1] (C. R. at 7). After a jury trial, Brisbon was found guilty of capital murder and sentenced to life imprisonment without parole in the Texas Department of Corrections – Institutional Division. (C.R. at 175. No motion for new trial was filed. This appeal follows.

ISSUES PRESENTED

> Issue One: The trial court erred in denying Appellant's Motion to Suppress because the probable cause affidavit failed to establish a nexus between Appellant's cell phone and any criminal activity.
>
> Issue Two: Trial counsel rendered ineffective assistance of counsel by failing to properly assert a challenge for cause against Juror Number 7 after she indicated that she could not impartially judge the credibility of the witnesses.

STATEMENT OF FACTS

The complainant in this case, Brisbon's stepdaughter, died from a gunshot wound amidst an argument in the middle of the night. Though her mother and sister had tried diligently (by telephone and in person, respectively) to coordinate her leaving the scene, and though police were on the scene for eight minutes before the shots rang

[1] The complainant and her family will be identified only by their initials throughout the brief.

out, the worst possible outcome occurred. The State's theory supporting capital murder was the allegation of an attempted sexual assault, but Brisbon's DNA was excluded from the suspected locations and, other than the gunshot and graze wounds, no injuries were present. The State's theory was presented through evidence of Internet pornography searches and the condition in which the complainant's body was found.

Appellant's Testimony

Brisbon testified he first met L.Y. at his daughter's family reunion.[2] After the reunion, they would see each other at his daughter's house where they began talking and eventually began dating.[3] At the time, Brisbon was living with his sister but then moved to a one-bedroom apartment where L.Y and her daughters, LJ. and K.H. moved in shortly thereafter.[4] In 2018, Brisbon purchased a home on Canton Trace in Humble, Harris County.[5]

Brisbon testified the family lived a typical family life and when asked about his relationship with L.J, the complainant, he described it as a "pretty good father-daughter relationship."[6]

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[2] RR9:11-12

[3] RR9:12

[4] RR9:13-14

[5] RR9:15

[6] RR9:18

The day before the incident, Brisbon went into L.J.'s room to look for his Advil and while there, he found a little marijuana cartridge for liquid marijuana, a single brown pill, four empty edible marijuana packs and two vape pens.[7] He was surprised and a little upset because he did not know L.J.to use drugs.[8] Brisbon took the marijuana cartridge and the brown pill from her room and left the empty edible packages and vape pens.[9] He planned to talk to L.J. about the situation before he told her mother but did not talk to L.J. that day.[10] On cross-examination, Brisbon agreed part of the reason he did not tell L.Y. immediately was because she was already in Austin for training.[11] However, when confronted with the Ring camera footage showing L.Y. leaving the house on Thursday, the morning of the incident, Brisbon acknowledged he might have been wrong about the timing after two and half years.[12] In her testimony, L.Y. agreed Brisbon had spoken to her about L.J. using drugs while she was in Austin.[13]

On the morning of the incident, Brisbon got up around his normal time close to 5:00 a.m. and checked in with his workplace.[14] At that point in time, K.H. no longer

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[7] RR9:26

[8] RR9:19 & 26

[9] RR9:28

[10] RR9:27-28 & 97

[11] RR9:96-97

[12] RR9:109

[13] RR7:106-107

[14] RR9:20

lived with the family.[15] L.J. went to school and Brisbon eventually went to work as normal.[16]

L.J. was already at home when Brisbon arrived and they spoke briefly before he showered put on a T-shirt and shorts that he normally wore around the house.[17] Brisbon called his outfit his "lazy boy clothes" and stated his habit was to wear the same clothes for two or three days unless he did something around the house that made him sweat and then he would get fresh clothes.[18] He does not wear underwear when in his lazy boy clothes.[19] At some point L.J. asked to go play ball and Brisbon gave her permission to do so.[20] He then began preparing dinner but stopped to go the store and buy a bottle of Jack Daniels.[21] When he returned, he finished preparing dinner, ate, and then had a drink as was customary.[22]

When L.J. returned home, Brisbon asked her to sit down and talk and showed her the baggie with the cartridge he found.[23] When she denied it was hers, he told her

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[15] RR9:20-21

[16] RR9:22-23

[17] RR9:24 & 29

[18] RR9:24-25

[19] RR9:119

[20] RR9:30

[21] RR9:30

[22] RR9:30-31

[23] RR9:32

he also found a pill and the empty edible packages after which she admitted the items were, in fact, hers.[24] The two had a conversation, and Brisbon told her he was going to tell her mother.[25] Brisbon testified L.J. asked for the items back so she could destroy them and he told her no.[26] She went to her room while he went to the garage to hide the items.[27] Brisbon estimated this conversation occurred around 6 or 7 p.m.[28]

Brisbon began collecting items in the garage, getting ready for the contractors who were coming to repair the back door.[29] He then went back into the house and moved some things around and L.J. stayed in her room.[30]

Around 9:30 p.m., Brisbon was sitting in the front living room when he began searching a couple of pornographic websites.[31] He testified his searches only lasted for about 20 to 30 minutes.[32] Brisbon admitted to typing in some things but denied ever intentionally searching the word "stepdaughter."[33] Brisbon assumed that the

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[24] RR9:33

[25] RR9:34-36

[26] RR9:36-37

[27] RR9:36-37

[28] RR9:36.

[29] RR9:37

[30] RR9:48

[31] RR9:49

[32] RR9:49-50

[33] RR9:50 & 129

stepdaughter was a pop up and that is how the search appeared on his phone.[34] On cross-examination, Brisbon did not recall typing searches such as "fucking stepdaughters" or "daddy loves his little princess's pussy.com" and stated those are not the type of searches he would do.[35] When asked if his phone would have evidence of searches such as "naughty daughter seduces stepdad" or "daddy banging daughter before school," Brisbon said he could not say if it would be on his phone or not.[36] He stated it might have popped up but he did not recall typing in such searches.[37]

Brisbon also entered a search involving nudity paired with L.J. and K.H.'s names. Brisbon explained that a couple of years before the shooting, L.Y. had been told there was a nude photo on the internet of one of the children.[38] He investigated but could not verify the photo's existence.[39] Brisbon also looked for any photos of L.J. at that same time and explained "big daddy" was a nickname L.J. used for herself.[40] The phone records did not show a time for when these searches occurred.[41] On rebuttal L.Y.

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[34] RR5:50

[35] RR9:129-130

[36] RR9:131

[37] RR9:129-132

[38] RR9:51-52

[39] RR9:51-52

[40] RR9:52-53

[41] RR7:109, SX298 slide 14

testified L.J. never went by "Big Daddy" and Brisbon was the one who told her about the possibility of nude photos on the internet not the other way around.[42]

After browsing the internet, Brisbon started watching TV and instead of going to check on L.J., he texted her.[43] When she did not respond he assumed she was asleep and he continued watching TV before he nodded off.[44] About an hour later, Brisbon woke up and went to his bedroom.[45] He came back out his bedroom and went to L.J.'s room because he had seen her packing things from her dresser into a backpack.[46] Brisbon asked L.J. what was going on and L.J. responded she was going to her sister's house.[47] He did not hear L.J. talking to her mother on the phone or anyone ask him to leave L.J.'s room.[48] Brisbon testified L.J. said L.Y. gave her permission to leave and then he and L.J. "went back and forth."[49] Brisbon then called L.Y. who told him she would have to call him back.[50] L.J. then began walking down the hallway with her bags

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[42] RR9:172-173

[43] RR9:53

[44] RR9:54

[45] RR9:54

[46] RR9:54

[47] RR9:56

[48] RR9:56

[49] RR9:56-57

[50] RR9:58

towards the front door.[51] Brisbon guessed this was around "12:30-ish or 12:40-ish."[52] He told L.J she could not leave the house and they were both in the front room "going back and forth."[53]

Brisbon testified L.J. sat on the edge of the couch and at some point, L.J. heard something outside, peeked out the blind and told him someone was outside.[54] He got out of the chair he was sitting in and saw the shadows of two people.[55] He asked L.J. if she knew who it was and she said "no."[56] At that time Brisbon did not know K.H. was already on the way to pick up L.J.[57] Nor did he know the two shadows were police officers, instead he believed it was someone trying to burglarize his home.[58]

It was then when Brisbon went to his gun from the master bedroom.[59] He did not know the exact time but estimated it was close to 1:00 a.m.[60] Brisbon testified he bought his gun for home protection in approximately 2009 while living in Atlanta after

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[51] RR9:58-59

[52] RR9:57

[53] RR9:59-60

[54] RR9:60 & 143

[55] RR9:60

[56] RR9:61

[57] RR9:60

[58] RR9:60-61

[59] RR9:61 & 44-45

[60] RR9:61

someone had broken into his home.[61] He said the gun was normally kept in the gun case with the trigger lock in the master bedroom, but on the night of the shooting it had been under the mattress in a holster where he put it the weekend before.[62]

When he returned to the front room, L.J. asked him why he had the gun and he responded that he did not know what was going on outside and asked her again if she knew, to which she responded "no."[63] At this point, Brisbon realized L.J. was on the phone, and asked her who she was talking to and did she know who was outside.[64] L.J. said she did not know who was outside and did not tell him who was on the phone.[65] Brisbon tried to take the phone and she began screaming.[66] Brisbon testified she had not screamed before this and testified he believed most of the screams heard on State's Exhibit 505 were occurring while he was trying to take the phone.[67] L.J. tried to hide the phone behind her back and he was trying to reach behind her to get it.[68] Brisbon stated the gun was still in his right hand as the two struggled over the phone.[69] On cross-

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[61] RR9:43

[62] RR9:44-45

[63] RR9:62

[64] RR9:62

[65] RR9:62

[66] RR9:63

[67] RR9:62, 66-67 & 80

[68] RR9:63-64

[69] RR9:64

examination, he agreed his prior testimony never included a statement that L.J. had the phone behind her back.[70]

Brisbon testified L.J. was very territorial about her things and she was scratching and clawing at his hand when he was trying to get her phone.[71] During this time L.J. was screaming at him and eventually the phone slipped out of both their hands and flew across the room.[72] He stumbled backwards over L.J's shoes and backpack and the gun went off as he was falling backwards.[73] When asked if he pulled the trigger, Brisbon stated "not that [he was] aware of" but that "could have been inadvertently pulled."[74] He admitted in his prior sworn statement he "admit[ed] that [his] finger must have been on the trigger."[75]

When he regained his balance, Brisbon saw L.J. was ok and that she had her hands over her ear screaming.[76] Brisbon testified he looked at the gun and noticed it had not fully ejected and stated he started racking the gun to unstick it.[77] He did not know how many times he racked the gun and at the time he did not know that an

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[70] RR9:140

[71] RR9:64-65

[72] RR9:64-67

[73] RR9:66-67

[74] RR9:68

[75] RR9:147

[76] RR9:67, 82 & 148

[77] RR9:68

unfired cartridge had popped out.[78] Brisbon was scared, his mind "running a hundred miles an hour" and did not know who was outside his home.[79] After he racked the gun a few times, it fired a second time.[80] Brisbon told the jury he believed the shot was the result of an accidental discharge.[81]

Brisbon responded by putting the gun down and walking towards the front door.[82] He testified he heard a "boom, boom, boom" and opened the door.[83] On cross-examination, he admitted he did not hear the "boom boom" on the officer's bodycam but insisted that he heard something that night, like knocking on the door.[84]

Brisbon could not see who was outside because of the lights and stated he did not know it was police until they finally identified themselves.[85] Brisbon had trouble unlocking the glass door and as he pushed it open, the officer grabbed him and pulled him out.[86] Brisbon explained to the jury that when he said "Do what you got to do" he was trying to say do what you have to do "just don't shoot" but he did not get that part

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[78] RR9:69

[79] RR9:69

[80] RR9:69

[81] RR9:90

[82] RR9:69

[83] RR9:70 & 150

[84] RR9:160

[85] RR9:70

[86] RR9:71

of the sentence out because the officers put him on the ground, cuffed him and took him to a patrol car.[87]

At this point, Brisbon did not know L.J. had been shot.[88] He assumed the police were questioning her while he was in the patrol car and that she would be going with her sister when they finished.[89] He denied hearing Deputy Palacios respond "yes" to Deputy Ballard's question regarding injuries or Deputy Gomez saying "the girl inside" while he was standing by the patrol car after being detained.[90] Brisbon stated he was not paying attention to what the officers were saying unless directed at him.[91]

Brisbon was also asked about his thoughts about his DNA on his and L.J.'s shorts, and under her fingernails in addition to her panties being found around her ankles.[92] He testified during their struggle over the phone, L.J. had scratched him.[93] As far as the semen on his shorts, he stated things happen as a man.[94] Brisbon did not have an explanation for L.J.'s pants being pulled down but stated he did not pull them down

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[87] RR9:71-72

[88] RR9:71

[89] RR9:71-72

[90] RR9:151-152

[91] RR9:153

[92] RR9:90-91

[93] RR9:91

[94] RR9:91

or sexually assault her.[95] He stated the shooting was an accident and denied having any intent to kill L.J.[96]

Complainant's Mother

L.Y. testified she started working for Delta Airlines in April of 2022 and would travel to Austin for training.[97] When she was in Austin, L.J. would stay at the house with Brisbon.[98] On the day of the incident, L.Y. was in Austin for training.[99] She and Brisbon had several conversations throughout the day, including one where he asked her what they were going to do about L.J.'s drug usage; however the couple did not really discuss the topic, nor did Brisbon provide any details on the subject.[100] That evening, they had a couple of Facetime calls regarding L.Y. getting off work and L.Y. letting him know she had reached her hotel.[101]

L.Y. also talked with L.J. a couple of times that day including once around 9:35 p.m. as she was getting ready for bed.[102] L.Y. testified L.J. was normally asleep by 10:30

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[95] RR9:90, 95 & 4

[96] RR9:4-5

[97] RR7:104

[98] RR7:105

[99] RR7:107

[100] RR7:106-107 & 201

[101] RR7:164-167

[102] RR7:168

p.m.[103] At 11:26 p.m., LY. received a Facetime call from L.J. that Brisbon was standing in her room in the dark and asked L.Y. to tell him to get out of her room.[104] L.Y. testified it was not normal for Appellant to enter L.J.'s room and just stand in the dark.[105] L.Y. told Brisbon to leave and she heard him say in a normal voice "Oh, you're talking to your mom."[106] L.Y. testified Brisbon left the room as she heard the door close.[107]

L.J. also called L.Y. at 11:31 p.m., but L.Y. did not remember why.[108] L.Y. called her back at 11:37 p.m.[109] During one of these calls L.Y. testified she heard Brisbon tell L.J. to "get out."[110] L.Y. admitted that Brisbon was not cursing, or physically grabbing L.J. to shove her out.[111]

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[103] RR7:111

[104] RR7:111-112 & 169.

[105] RR7:169

[106] RR7:113 & 205

[107] RR7:114

[108] RR7:171

[109] RR7:171-172

[110] RR7:172

[111] Initially, L.Y. had testified this statement occurred after L.Y. told L.J. that she had not reached K.H. yet. But when going over the exact timeline of calls from the phone records L.Y. called K.H. at 11:41 p.m. after the third phone call with the complainant. RR7:117, 127, 172-173 & 214.

At 11:51 p.m., L.Y. began texting L.J. who stated she was ok and that Brisbon had not been back to her room.[112] L.Y. told L.J. to pack her bags, and texted K.H. at 12:04 a.m. to pick up L.J.[113] K.H. Facetimed her back at 12:05 a.m.[114]

At 12:12 a.m., L.J. Facetimed L.Y. again for thirty-five minutes because L.J. asked her to stay on the phone.[115] L.J. told L.Y. that Brisbon was acting delusional.[116] On direct examination, L.Y characterized L.J. as being frightened, so she decided to return to Houston and tried to contact K.H. again.[117] On cross-examination, however, L.Y. testified L.J. looked normal as she was packing her things.[118]

L.Y. testified she did not know where Brisbon was during the videocall, but that she could hear some loud noise like banging in the background.[119] L.Y. did not hear Brisbon yelling or cussing and stated there was nothing to suggest he was even around L.J. at that point.[120] Brisbon had not returned to L.J.'s room nor had he hit her.[121] L.Y.

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[112] RR7:174

[113] RR7:118 & 174-175

[114] RR7:174-175

[115] RR7:176, 215 & 223

[116] RR7:176

[117] RR7:177

[118] RR7:207

[119] RR7:121

[120] RR7:207 & 215

[121] RR7:208

testified the phone records indicated that Brisbon video called her while she was on the phone with L.J. and it was answered, but she did not remember talking with him and said her voicemail may have answered the call.[122] However, the forensic phone examiner testified that Facetime calls do not leave voicemails, that the call is either answered or not.[123]

L.Y. was back on the phone with L.J. within a minute.[124] This call lasted eleven minutes, until 12:59 p.m.[125] At some point, L.J. told L.Y. that K.H. was outside and she started walking towards the front door with her backpack and suitcase.[126] Brisbon asked L.J. where she was going.[127] She did not answer the first two times, but then said her sister was outside.[128] L.Y. testified Brisbon responded "No, the fuck you're not."[129] L.Y. stated she could see Brisbon as he "snatched the phone."[130]

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[122] RR7:182 & 208-209

[123] RR8:165

[124] RR7:216

[125] RR7:217

[126] RR7:122 & 183

[127] RR7:123 & 184

[128] RR7:123 & 184

[129] RR7:123

[130] RR7:125

L.Y. testified L.J. yelled that Brisbon had a gun but never said anything about him trying to touch or attack her or that he was taking off his clothes.[131] L.J. did not even say that Brisbon was "coming at [her] with a gun."[132] L.Y. agreed that during the call Brisbon was not raping or hitting L.J., nor was he yelling and screaming at her.[133] But L.Y. did say he "jerked her" because the phone was going moving all around.[134] L.Y. asked Brisbon to let L.J. go and then the phone disconnected.[135]

L.Y. began trying to reach 911 but, as she was out of town, she was connected to the Austin 911 at 12:59 a.m.[136] L.Y. called K.H. to call 911.[137] L.Y.'s attempts thereafter to reach either L.J. or Brisbon were unsuccessful.[138] The police arrived at the home eight minutes later at 1:08 a.m.[139]

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[131] RR7:210 & 217

[132] RR7:210

[133] RR7:217

[134] RR7:222

[135] RR7:125 & 184-186

[136] RR7:186-187

[137] RR7:128 & 187

[138] RR7:128

[139] RR7:217

Complainant's Sister

K.H. testified that evening before she got off her shift at 11 p.m., she spoke briefly with L.J. who told her that "something was off."[140] K.H. testified her phone records indicated a missed call from L.J. at 11:30 p.m.[141]

Around midnight, K.H. was cooking dinner when her mother called her and told her she needed to go pick up L.J.[142] K.H. and her boyfriend stared driving to the home and she called L.J. but L.J. did not answer.[143] At 12:33 a.m., L.J. texted K.H. asking about her whereabouts, and she responded that she was twenty-five minutes away.[144] At 12:59 a.m. K.H. texted L.J. she was pulling up even though she had not reached the street yet.[145]

While driving in the neighborhood, K.H. got a call from her mom who told her to call 911 because Brisbon had a gun and L.J. was screaming.[146] K.H. testified she called 911 at 1:02 a.m.[147] K.H. stopped before reaching the home to wait on the police to

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[140] RR7:255

[141] RR8:70

[142] RR7:257 & 262

[143] RR7:270; RR8: 70

[144] RR8:71

[145] RR7:270; RR8: 72

[146] RR7:270-271

[147] RR8:42-43

arrive.[148] She drove to the house when the police arrived and got out and spoke to the officer on the scene.[149] K.H. could hear her sister screaming and told the officers she had the garage code, but the officers did nothing with that information.[150] After talking to the officer, she went back to her car as instructed.[151] She called her mom, and while on the phone she heard two gunshots.[152]

First Responders

Harris County Constable Joshua Alfaro was dispatched to the home on Canton Trace regarding a disturbance.[153] Dispatch advised him the call did not come from anyone in the home, but the reporting party would be waiting at the home in a black Honda Civic.[154] Upon arriving, Alfaro approached the home without lights or sirens to maintain "the element of surprise" and did not park his vehicle directly in front of the residence.[155] He did not see the black Civic.[156]

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[148] RR8:44

[149] RR8:44

[150] RR8:46

[151] RR8:46

[152] RR8:49-51

[153] RR3:52-54

[154] RR3:54 & 82

[155] RR3:53

[156] RR3:54

Alfaro exited his vehicle and as he approached the residence, he heard a female screaming from inside the house.[157] The recording from Alfaro's body cam captured the scream and was admitted over objection as State's Exhibit 500.[158] The footage shows Alfaro arriving at 1:08 a.m. and approaching the home.[159] Corporal Johnson[160] arrives and Alfaro tells him he heard a female scream.[161] Another scream is heard and Alfaro goes to the front door.[162] Alfaro testified he tried to open the framed glass door in front of the front door but it was locked.[163] However, neither officer knocks or announce their presence outside the home.[164] Instead, both officers go to the front of the house and then go to the back of the house and then back to the front.[165]

Alfaro testified regarding the multiple screams the officers heard while outside the home. Despite the screaming, the officers did not try to make entry or kick in the

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[157] RR3:54

[158] RR3:56 & 58

[159] SX 500, 1:08:13-1:09:10

[160] Footage from Officer Johnson's body cam was also introduced as State's Exhibit 501.The footage is essentially the same as Alfaro's and will only be cited to point the Court to information not discussed regarding Alfaro's video. RR4:34.

[161] RR3:51; SX500, 1:09:12-1:09:23

[162] SX500, 1:09:23-1:09:29

[163] RR3:98

[164] RR3:85-86; RR4:73; SX 500, 1:09:23-1:09:29

[165] SX500; R.R4:73-74

door or even announce their presence over the PA system during the eight minutes between when they arrived and when Brisbon is detained.[166]

Officer Johnson's body cam video shows Johnson speaking with K.H., the complainant's sister, who tells Johnson L.J. and Brisbon are the only people in the home.[167] K.H. offers to tell Johnson the code to open the garage but stated she did not have a key to the door.[168] Instead of opening the garage door, Johnson goes to the outside of the garage door and instructs Alfaro to watch the back door.[169] Shortly after, Alfaro returns to the front and tells Johnson he heard a male ask where his keys are.[170] A few seconds later, Johnson tells Alfaro "they're just screaming at each other."[171] Johnson could hear two voices and shuffling around but could not determine the exact movement.[172]

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[166] RR3:85 & 89; RR4:77

[167] RR4:38 & 78; SX501, 1:12:06

[168] SX501, 1:12:13-1:12:15; RR4:78

[169] SX 501, 1:12:35

[170] SX501, 1:13:27

[171] SX501, 1:13:42-1:13:45

[172] RR4:79

Immediately after, a gunshot can be heard on the recordings.[173] The officers do not enter the home, and a second gunshot is heard.[174] Alfaro testified that after the second shot, he heard "what appear[ed] to be a thud on the wall."[175]

A few moments after the second gunshot, Brisbon opens the front door.[176] Johnson yells at Brisbon to show the officers his hands.[177] Initially Brisbon just stands at the door and Johnson could not see his right hand.[178] Brisbon then looks down to the right in the direction of where the complainant's body was lying.[179] Brisbon unlocks the storm door and comes out and is detained.[180] Brisbon was fully clothed and did not resist arrest but had "the odor of an alcoholic beverage emitting from his person."[181]

Johnson immediately entered the home after Brisbon exited.[182] Johnson saw a female with a gunshot wound to her head "slumped over."[183] Johnson believed the

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[173] SX500, 1:13:44; SX501, 1:13:46

[174] RR3:90; RR4:81; SX500, 1:15:24

[175] RR3:100; SX500, 1:15:25

[176] SX500, 7:57-8:30; SX501, 1:16:14

[177] RR4:48

[178] RR4:49-50

[179] RR4:53-54

[180] SX500, 7:57-8:30; RR3:58 & 66

[181] RR3:94-95, 99; RR4:94

[182] SX501, 1:16:49-1:17:07

[183] RR4:35

wound to be fatal due to the position of the body and amount of blood.[184] Johnson told deputies Gomez and Palacios, who had arrived on the scene, to detain Brisbon.[185]

Alfaro and Gomez entered the home to assist Johnson in making sure no one else was hiding inside.[186] When Alfaro entered the home, he saw a female with a gunshot wound to the head lying on the ground.[187] The female was curled up into a ball and her shorts were down.[188]

After clearing the scene, Johnson started making calls to the Homicide and Crime Scene Units while Alfaro was stationed to guard the front door.[189] EMS was allowed to enter the home and assess L.J.[190] EMS determined L.J.'s injuries were "not compatible with life" and left without touching the body.[191]

Johnson was the more senior officer between him and Alfaro.[192] When asked about breeching the doors to the home, Johnson testified they did not do so because the glass storm door on the front door was locked and to kick through the glass and

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[184] RR4:36

[185] RR4:36

[186] RR3:61; RR4: 37; SX500, 9:00–10:23

[187] RR3:60

[188] RR3:60

[189] SX500, 10:23; RR3: 60-61; RR4:56

[190] RR3:62

[191] RR3:63

[192] RR3:51

then kick the wood door in would risk injury to the officers and would alert whoever was inside the home.[193] Similarly, Johnson stated if the officers had kicked in the back door it could be problematic as someone could be waiting to ambush the officers, or there could be something blocking the door from fully opening and if so then the person inside is alerted and the officer cannot go forward.[194] Johnson testified the potential for an ambush would also be true if he had gotten the code and opened the garage door.[195] Johnson believed the best option was to wait for additional units.[196] On cross-examination, Johnson agreed he and Alfaro were whispering and not using a flashlight much so that the persons inside would not be alerted to his location.[197] However, he would not agree that the persons inside might have thought he was an intruder stating because there was a camera at the front door and if the person looked at that time his uniform was visible.[198]

Both Deputy Alfaro and Deputy Johnson were asked about improperly working firearms during cross-examination. Alfaro explained to the jury that based on his experience firearms can jam and malfunction and can "stovepipe."[199] Stove piping is

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[193] RR4:40

[194] RR4:41-42

[195] RR4:43

[196] RR4:43-44

[197] RR4:43-44

[198] RR4:75-76

[199] RR3:93

when a cartridge fails to eject from the gun causing it to get jammed.[200] One must rack the gun (manually slide the gun slide) in order to eject the jammed round which causes a second live round to brought up.[201] Johnson explained a "misfeed" occurs when a bullet does not go all the way into the chamber of the gun which can happen for various reasons.[202] Johnson testified State's Exhibits 52, 53, 55 and 56 show the gun in the condition it was found, which showed what could be a misfeed.[203] Johnson agreed that a misfeed can be caused by mishandling of the slide of the gun.[204]

Deputies Gomez and Palacios were the next officers to arrive.[205] Gomez arrived eleven minutes after hearing the dispatch call over the radio and after the first gunshot[206] Gomez's bodycam shows that as he is approaching the house, a gunshot is heard.[207] Gomez watches the gate from the backyard which slams a few seconds later.[208] He tells

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[200] RR3:93

[201] RR3:93-94

[202] RR4:87-88

[203] RR4:102-103

[204] RR4:101

[205] RR4:150-151

[206] RR4:141, 145-147, 156

[207] SX503, 1:15:24

[208] SX503, 1:16:05

the others it was only the wind.[209] A few moments later, Brisbon exits the home and is detained.[210]

Gomez helps clear the house and then returns to assist Palacios with taking Brisbon to a patrol car.[211] Gomez does a pat down search and secures bags over Brisbon's hands.[212] Gomez testified Brisbon was not crying, did not asked about L.J., or react when Gomez told Sergeant Ballard L.J.'s injuries were life-threatening.[213]

CSU and Collection of Evidence from Scene

Crime Scene Investigator Deputy Mark McElvany arrived at the scene at approximately 6:15 a.m.[214] McElvany and Crime Scene Investigator Travis Kirkley began documenting the scene and taking photographs.[215] In the foyer of the home, there was a suitcase with clothing in it, and a black backpack containing a laptop and schoolwork.[216] To the left of the foyer is a formal living room which appeared to have

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[209] RR4:157

[210] SX503, 1:16:40-1:16:55

[211] SX503, 1:17:20-1:18:49

[212] RR4:164-166

[213] RR4:166-167

[214] RR3:120

[215] RR3:122-123

[216] RR3:127, 152, 197

been disturbed and a lamp had been knocked to the ground.[217] L.J.'s body was on the floor next to a sofa.[218] Her shorts and underwear were around her ankles.[219]

A 9-millimeter pistol and a whiskey glass were on an end table by the couch and a whiskey bottle was on the floor near it.[220] Two fired cartridge cases and an unfired bullet were found on the floor of the living room.[221] McElvany testified the gun showed a "misfeed."[222] Two "bullet defects" were found in a wall above the body.[223] Kirkley opined one hole exhibited features that the bullet was "tumbling" when it hit the wall, which is more consistent with having passed through the complainant.[224] The other hole appeared to have come from a bullet that did not hit anything before hitting the wall.[225] There were no other bullet strikes in the room.[226]

There were also bloodstains on one of the walls. Kirkley testified he watched the bodycam footage and heard the two gunshots and a thud which helped him form an

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[217] RR3:128-129 & 197

[218] RR3:134; SX46

[219] RR3:145

[220] RR3:134-135

[221] RR3:144

[222] RR3:135

[223] RR5:209

[224] RR5:211-212

[225] RR5:211; SX60 & SX61

[226] RR5:213

opinion the blood patterns were of a cessation pattern.[227] Kirkley further opined that L.J. was standing upright when the final shot was fired and the thud heard was consistent with what caused the dent in the wall.[228] Over objection, Kirkley testified the evidence was consistent with the prosecution's hypothetical that L.J. was standing in the upright position, shielding herself with her hands and with her head tilted to look away as the bullet struck her.[229] On cross-examination, Kirkley admitted that numerous organizations have questioned the validity of blood spatter collection and at least one study has called blood spatter collection or bloodstain pattern analysis "dubious."[230] He further admitted the National Academy of Sciences casts doubt on the entire discipline, and that the error rate in bloodstain pattern analysis is somewhere between 50 to 64 percent, depending on the surface.[231]

Other evidence found in the house included multiple cell phones and a pistol case with a loaded magazine and pistol lock.[232] One phone was found on the opposite end of the couch from L.J's body.[233] Two phones belonging to Brisbon were found:

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[227] RR5:222

[228] RR5:223 & 225

[229] RR5:227-228

[230] RR6:16

[231] RR6:18-20

[232] RR3:145 & 163

[233] RR3:145

one in the den or back living room and one in the master bedroom.[234] The pistol case was found in the master bedroom.[235] The key to the pistol lock was not found.[236] A purple holster was also found on the bed.[237]

McElvany attempted to get fingerprints from the firearm, magazine and cartridges but was not able to obtain any results.[238] He also collected DNA swabs from 1) the pistol's trigger; 2) the whiskey glass; 3) the pistol's grips; 4) the mouth of the empty Jack Daniels bottle from the kitchen trash; 5) the pistol's magazine; and 6) the pistol's slide.[239] The swabs were forwarded to the Institute of Forensic Science for testing. [240] McElvany also forwarded the pistol, the magazine, the cartridges in the pistol, the live round found in the foyer, the two fired cartridge cases, the pistol magazine and cartridges from the case found in the bedroom to the firearms lab.[241]

Autopsy

Medical Examiner, Paulann Maclayton performed the autopsy of L.J. and determined the cause of death to be a gunshot wound to head and the manner as

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[234] RR3:155 & 165

[235] RR3:163

[236] RR3:164

[237] RR3:161

[238] RR3:170-172

[239] RR3:190

[240] RR3:190

[241] RR3:191

homicide.[242] Maclayton opined the lack of stippling, soot, or other abrasions surrounding the entrance wound indicated the gun was at least at least 2 feet away when it was fired.[243]

The autopsy did not reveal any injuries or bruising to the majority of L.J.'s body including her genital area, anus, or her waist area where her shorts would have normally rested.[244] Nor were there any scratches of significance or anything that would indicate any sort of struggle.[245] None of L.J.'s clothing was torn or ripped nor was there any indication that they had been torn off her.[246]

The only injuries other than those on the head (which were most likely caused by the shooting) were abrasions to complaint's left hand and forearm, "graze wounds" on the left pinkie finger and right hand, an injury to the complainant's lip and a chipped tooth.[247] Maclayton testified the injuries to the hands could have been caused by the bullet if L.J. had her hands over her ears, but opined it was more likely the graze wounds happened at the same time as opposed to the bullet entering and exiting the skull.[248] As to the lip injury and chipped tooth, she opined both could have been caused by blunt

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[242] RR5:64

[243] RR5:58 & 107-108

[244] RR5:95-98 & 109

[245] RR5:96 & 98

[246] RR5:110

[247] RR5:68-74, 77-78, 107-108

[248] RR5:105 & 119

force trauma that occurred shortly before death, and was consistent with a strike by a hand or object to the face.[249] However, on cross-examination she agreed she could not say for certainty how and when the bruise occurred or whether L.J. had the chipped tooth before her death.[250]

Maclayton testified the toxicology report did not indicate the any stimulants in the complainant's blood at the time of her death.[251] However, on cross-examination, she admitted the blood was not tested for marijuana, Xanax, fentanyl or any other "downers."[252]

Firearm evidence

Firearms Examiner Raquel Pipkin tested the gun found at the home and compared the fired cases to it.[253] Pipkin described the gun as a double action 9-millimeter Luger pistol with a long pull.[254] Pipkin explained "double action" means pulling the trigger accomplishes two things: 1) it cocks the hammer and 2) the hammer

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[249] RR5:78 & 116

[250] RR5:112

[251] RR5:85-86

[252] RR5:106

[253] RR5:142

[254] RR5:147

is released to strike the firing pin.[255] A "long pull" describes the distance a trigger has to travel before the gun discharges.[256]

As part of her testing, she conducted a dry fire of the weapon and found it to be functioning as it should.[257] Pipkin determined the "trigger pull" or the amount of force required to pull the trigger of the gun was 8.99 pounds compared to a 5 to 7-pound trigger pull on most police officer's weapons.[258]

Pipkin testified when trying to determine if casings or bullets were fired from a certain firearm, ammunition similar to evidence in the case is fired from the firearm in question three times into a water tank and then compared to the evidence in the case.[259] Pipkin testified three test fires is the standard across the firearm identification field.[260] Pipkin determined the fired casings found in the living room were fired from the gun found at the home.[261] She further opined the live round found in the living room was not a misfire as there were no markings on it such as a firing pin strike or indention.[262]

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[255] RR5:147

[256] RR5:150

[257] RR5:150

[258] RR5:149

[259] RR5:141-142

[260] RR5:142

[261] RR5:146

[262] RR5:154-155

Misfeed vs. misfire vs. bump fire vs. hang fire

Pipkin explained a "misfeed" is when a cartridge fails to load into the chamber properly and stated it is usually caused due to a problem with the magazine itself or the orientation of the cartridges in the magazine, but it can happen if one slow-racks the slide.[263] She testified the normal way to clear a misfeed is to drop the magazine and then rack the slide to discharge the magazine.[264] The reason one drops the magazine is to prevent mistakenly loading another round while trying to alleviate the malfunction occurring in the firearm.[265] Pipkin admitted if a second round is loaded and the trigger is pulled an accidental fire could occur.[266]

Pipkin distinguished a misfeed from a misfire stating a misfire is when the firing pin strikes the primer and it fails to fire.[267] The trigger must be pulled in order for a misfire to occur.[268] Older ammunition can result in problems with firing including a misfire.[269] She further distinguished a misfire from a "stovepipe" stating a misfire

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[263] RR5:151-152

[264] RR5:152

[265] RR5:152 & 161

[266] RR5:161

[267] RR5:153

[268] RR5:174

[269] RR5:170

involves a live round whereas a stovepipe involves a spent round where the casing is stuck.[270]

Pipkin explained a firing pin failure is when the firing pin fails to detonate the primer.[271] She stated firing pins can get stuck, normally due to debris buildup in the firing pin channel or around the firing pin screen.[272] Pipkin testified there was not notable debris on the gun when she received it but admitted she did not know how many times it had been cleaned or who maintained it or even how old the gun or ammunition was.[273]

Pipkin testified a bump fire uses the recoil of the firearm to fire several rounds, mimicking the capabilities of fully automatic firearms.[274] When asked if a round was in the chamber and one banged the back of the gun, would it be possible for an accidental discharge, Pipkin testified that did not happen in this case and insisted the gun in the case functioned as designed.[275] However, she admitted she only fired it three times and did not bump the back of the gun.[276] On redirect, Pipkin testified that bumping a gun

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[270] RR5:153

[271] RR5:164

[272] RR5:164

[273] RR5:165, 170 & 175

[274] RR5:162

[275] RR5:171-172 & 178

[276] RR5:172 & 179

usually only results in a discharge when the gun has a free-floating firing pin – something this firearm did not have.[277]

Finally, Pipkin explained a hang fire occurs when the firing pin strikes the primer, but there is a delay before the gun actually fires.[278] In order to have a hang fire, the trigger must have been pulled.[279] The safety protocol for a hang fire is to point the gun in a safe position and wait 60 seconds before attempting to clear the gun because it could go off.[280] Pipkin testified it is not possible to know if a bullet or cartridge is the result of a hang fire, and she could not say whether either of the spent cartridges were the result of a hang fire.[281]

DNA evidence

DNA Analyst Tammy Taylor compared several items collected to the DNA profile of L.J. and Appellant.[282] There was insufficient male DNA on the swabs collected from L.J.'s vagina, anus, mouth, vulva or perineal area for Taylor to be able to create a DNA profile.[283] L.J.'s underwear initially presumptively tested positive for

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[277] RR5:180-182

[278] RR5:162 & 173

[279] RR5:173

[280] RR5:163

[281] RR5:173

[282] RR6:51

[283] RR6:55-56; SX917

semen.[284] However, Taylor testified vaginal fluid, breast milk or sweat can cause a positive result.[285] The confirmatory test did not find any semen on the underwear and Brisbon was excluded as a contributor of any DNA on the underwear.[286] Taylor testified Brisbon was excluded as a contributor of the DNA from the fingernail scrapings and clippings from complainant's right hand but it was 329,987 times more likely that the DNA mixture from the left-hand clippings came from L.J. and Brisbon than someone else.[287]

Brisbon's semen was found on the inside front of his shorts.[288] Brisbon's T-shirt presumptively tested positive for semen but further testing did not confirm the presence of semen.[289] L.J. was excluded as the contributor of blood found on the front right collar area of the T-shirt.[290]

Swabs from the gun found at the home were submitted to the DNA lab. Taylor testified the swab collected from the trigger did not contain any DNA and the swabs

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[284] RR6:56

[285] RR6:57

[286] RR6:57-58

[287] RR6:60-62

[288] RR6:63 & 68

[289] RR6:71

[290] RR6:108

from the pistol grips and slide contained a mixture of DNA from multiple individuals but due to insufficient data no comparisons could be made.[291]

Two years later, Taylor reevaluated the swabs from the pistol grips and slide.[292] A comparison still could not be performed on the grips but the new testing found moderate support to include L.J. as a contributor to the DNA on the slide of the weapon.[293] Taylor also examined four fingernail clippings previously submitted and swabs from the mouthpiece of the Jack Daniels bottle.[294] The clippings tested in 2024 were not the same clippings and scrapings previously tested.[295] Taylor testified L.J. was excluded as a contributor and there was moderate support (430 on 2 to ≥ 1,000,000 scale) to include Brisbon as a contributor.[296] No comparison was made on the swabs from the whiskey bottle.[297]

Taylor also tested three new items: L.J.'s shirt, bra and shorts.[298] Testing did not confirm semen on any of the clothing and the only indication of Brisbon's DNA was

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[291] RR6:77, 97 & 108-109

[292] SX918

[293] RR6:113

[294] RR6:80-81

[295] RR6:93

[296] The range of support is as follows 2 to 99 is considered limited support, 100 to 9,999 is moderate support, 10,000 to 999,999 is strong support and 1,000,000 or more is strong support. SX918 page 7; RR6:93 & 112

[297] SX918

[298] RR6:83

that there was moderate support (207 on 2 to ≥ 1,000,000 scale) to include him as a contributor to the mixture on the inside crotch of the shorts.[299] The bra and shirt contained DNA from an unknown contributor.[300] Taylor testified it could have been transferred from other items.[301]

Taylor testified DNA can be transferred onto an item without even touching the item.[302] She explained this can happen when DNA on an item comes into contact with a different item and the DNA transfers to the second item.[303] Taylor agreed it would be reasonable to expect an individual's DNA to be "everywhere in the house" when people live together - especially if the laundry was being done together.[304] However, L.J.'s mother testified each member of the family did their own laundry.[305]

Cell Phones, iPad and Ring Camera Obtained

Homicide Detective Abigail Talip was the lead detective. After meeting with Alfaro, she interviewed the complainant's mother and sister separately.[306] During the

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[299] RR6:83-88; SX918

[300] RR6:84 & 116

[301] RR6:116

[302] RR6:116

[303] RR6:116-117 & 123

[304] RR6:117-118

[305] RR7:156-157

[306] RR7:19-21

interviews, she obtained consent to search their cell phones.[307] Talip took the phones to the office to perform digital forensic extractions on them.[308] The complainant's sister, K.H., accompanied Talip to the station and waited while the extraction was being done.[309]

In addition to downloading information from the women's cell phones, Talip downloaded over thirty videos from the home's Ring camera.[310] Footage from several videos showing L.J. and Brisbon coming and going from the home were introduced as State's Exhibits 508 through 514.[311] On cross-examination, Talip agreed the Ring footage did not show anything out of the ordinary, but showed what appeared to be a regular school day.[312]

Cell phone and iPad extraction and analysis

Matthew Gray, an investigator in the digital forensic unit at the District Attorney's office, testified his division extracts data from cell phones and other electronics.[313] After the extraction is done, his division often analyzes the data and

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[307] RR7:21

[308] RR7:21-23

[309] RR7:24

[310] RR7:29

[311] RR7:31

[312] RR7:52

[313] RR8:86

prepares demonstratives based on their analysis.[314] Gray analyzed the data from four devices: L.J.'s Ipad, Brisbon's phone, and the phones of L.J.'s mother and sister.[315] Gray compiled reports from the devices limiting the information to a certain time frame.[316] Gray also prepared a PowerPoint that was offered for demonstrative purposes only.[317]

Gray testified the extraction captured web searches made on Brisbon's phone.[318] Several searches for surveillance cameras were found. Only one could be dated and it was a search done in August 2021, eight months prior to the shooting.[319] Some included the words "spy cameras" while others merely searched for "security wireless surveillance cameras.[320]

There were also general internet searches including L.J's and K.H's names, some of which included sexual terms and/or specified nude photos.[321] None of these searches were dated and Gray explained this can occur when a search is archived because it is no

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[314] RR8:86-87

[315] RR8:90; SX920

[316] RR8:99

[317] So the Court is aware, the PowerPoint contains adult pornographic images blown up from the thumbnail size photos in the report admitted into evidence as State's Exhibit 926. Also, if the exhibit is opened a video begins to autoplay on Slide 29. RR8:102-103; SX928.

[318] RR8:108

[319] RR8:113-116, 166

[320] RR8:113-115; SX923

[321] RR8:108 & 112

longer linked with the phone's clock database.[322] Several other searches included searches of pornographic sites using L.J.'s name.[323] Gray also searched pornographic sites using her name and found several but none depicted her.[324] Gray agreed it is possible that videos could be uploaded and then erased for many different reasons, such as the lack of proper licensing, avoiding legal litigation, or the person who uploaded the video removes it.[325]

Gray's PowerPoint included a timeline starting at 7:57 p.m. on April 28, 2022, and integrated phone calls from all of the devices and the internet searches found on Brisbon's phone.[326] The timeline starts with three Facetime calls between Brisbon and the complainant's mother.[327] Eighteen minutes later - at 9:47 and 24 seconds - there is a search for "spy pussy" which produces several pornographic sites.[328]

Gray testified he could tell when a specific site was actually visited because evidence "is brought over from that website that stays on that phone [and] we call those cached images."[329] Gray further explained "cache images" are picture previews given

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[322] RR8:109

[323] RR8:110-111

[324] RR8:111

[325] RR8:111

[326] RR8:116

[327] RR8:117

[328] RR8:120

[329] RR8:121

with a small narrative similar to a selectable menu.[330] The cached images happen within milliseconds of each other.[331]

During Gray's testimony, he discussed each slide from State's Exhibit 928, the power point he made.[332] On the PowerPoint Gray placed a red box around the search results that were actually visited.[333] From 9:46:21 p.m. to 10:19:15 p.m. the phone registered nineteen (19) searches for adult pornographic material.[334, 335]

Gray could not testify if a website was accessed on seven of the searches.[336] Of the remaining searches, Gray believed the website was accessed and testified sometimes the images will autoplay, but he could not tell if any of the videos in the cached images were actually clicked on.[337] Despite this, Gray's PowerPoint contains blown up versions

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[330] RR8:121

[331] RR8:122

[332] RR8:121-141

[333] RR8:121, 133 & 136

[334] RR8:152; SX928

[335] Gray testified the following searches were found on Appellant's phone: "spy pussy" RR8:120; "oficina amateur spy pussy" twice RR8:122 & 126; "Craiglists for sex hookup for local sex fates in under 20 minutes" RR8:125); "Tuckingstepdaughter.com" twice RR8:127 & 131); "Fuckings stepdaughter videos on xvideo.com RR8:127-128; "Daddy Loves His Lil Princess's Pussy" RR8:129; Family Strokes – Horny Step Siblings Get Interrupted While Banging by their alluring Stepmom RR8:131; American Free Live Sex Cams with Naked Girls/Stripchat RR8:131; "masterbating mom" RR8:134; "mom maturbating on XNXX.com" RR8:134; fucking drunk RR8:135; Enjoy Drunk Mother Let S Son Fuck Hardcore Movies RR8:135; Mommy and Step-Son Share a Couch Mandy Flores RR8:135; Busty Milf Handjob and Pussy rubbing xnxx2.video twice RR8:136-137.

[336] Seven is the number of searches in the timeline on the PowerPoint without a red box.

[337] One might liken this to a search for chicken dinner recipes that results in a listing of numerous recipes with photos yet the individual only clicking the one recipe he desired to cook. RR8:122-123, 139 & 168.

of thumbnail cached images from State's Exhibit 926.[338] Regarding the timing between the searches, Gray guessed about why some searches were close together and others were further apart, but ultimately stated he did not know.[339] Gray admitted that only two minutes of the thirty-five minutes involved any searches concerning step-daughters.[340]

Continuing the timeline, Gray testified that Brisbon texted L.J. asking if she was awake about twenty minutes after the last web search.[341] L.J. first called her mother approximately 47 minutes later.[342] Gray testified the records reflect numerous calls and texts between L.J., L.Y, and K.H.[343] L.Y's records showed calls to L.J. and Brisbon were not answered.[344] The records also show the texts between L.Y. and L.J. about K.H. picking her up and the text from L.Y. asking K.H. to call 911.[345] Gray testified the records show K.H.'s phone called 911 at 1:02 a.m.[346]

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[338] RR8:123; SX928 demonstrative

[339] RR8:137-138

[340] RR8:179 & 181

[341] RR8:141

[342] RR8:141

[343] RR8:141-147

[344] RR8:148-150

[345] RR8:143 & 150

[346] RR8:148

Testimony concerning Alleged Bad Acts by Appellant

L.Y. told the jury about an incident two months before when L.J. found a recording device in her room.[347] L.Y. confronted Brisbon about where the device came from and why it was there.[348] He responded he did not know what L.Y. was talking about and took the device away.[349]

When asked about spy cameras, Brisbon explained that before they started remodeling, L.Y. and he had talked about getting cameras for the house.[350] They looked and only found bulky cameras and he began looking for smaller cameras on the internet like the ones his brother had.[351] He denied placing a camera in L.J.'s room or trying to eavesdrop on his children.[352] On rebuttal L.Y. testified she and Brisbon never had any conversations regarding placing spy cameras in the house.[353]

K.H. told the jury about two times when Brisbon had taken her phone from her and thrown it. The first instance occurred in the garage.[354] K.H. testified Brisbon

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[347] RR7:219-221

[348] RR7:220-221

[349] RR7:221

[350] RR9:77

[351] RR9:77-78

[352] RR9:78

[353] RR9:172

[354] RR8:62

accused her of having a boyfriend which she denied.[355] He then "snatched her phone," threw it on the ground breaking it and then slapped her.[356] The second incident occurred in 2020 in her bedroom.[357] K.H. had just taken a shower and was sitting on her bed in a towel looking at her phone.[358] She testified Brisbon came into her room, accused her of being on Facetime with a boy, and then grabbed the phone from her hand and threw it against the wall.[359] Her mom came to the room and Brisbon told her that K.H. was on Facetime with a boy which K.H. denied.[360] According to K.H., her mom looked at the phone and did not find anything to which Brisbon replied K.H. had deleted it.[361] On cross-examination, Brisbon testified he did not do the things K.H. testified about.[362]

Rebuttal regarding pornographic searches

On rebuttal, Gray testified his analysis of Brisbon's phone search history resulted in 222 searches Gray described as "incestual-type" or involving family relationships."[363]

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[355] RR8:62

[356] RR8:62-63

[357] RR8:65-66

[358] RR8:66

[359] RR8:66

[360] RR8:68

[361] RR8:68

[362] RR9:124

[363] RR9:174-175 & 183

Of those, only eight (8) have any dates associated with them.[364] Gray explained two reasons there might not be dates would be if the user deleted the browsing history or used a privacy browsing mode.[365] Several searches include sexual terms in combination with "stepdaughter" or daughter.[366] Gray opined these searches were not all "pop-ups" or advertisements because one porn site is not going to advertise on a different porn site.[367] Gray agreed the report does not indicate who used the phone for any search done, only that it was done.[368]

After hearing closing arguments and deliberating the jury found Brisbon guilty of capital murder as charged in the indictment.[369] The trial court sentenced Brisbon to life without parole..[370]

SUMMARY OF THE ARGUMENT

Appellant's internet search history and phone contents were searched pursuant to a search warrant. The affidavit in support of the search warrant did not establish probable cause to believe evidence of a crime would be found within the phone. The affidavit failed to provide a nexus between Appellant's phone and any criminal activity.

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[364] SX929

[365] RR9:179

[366] RR9:179-183

[367] RR9:184

[368] RR9:187-189

[369] RR10:108

[370] RR10:110-111

Appellant was also denied effective assistance of counsel when counsel failed to move to strike a juror who could not judge a law enforcement officer's credibility with impartiality and that individual served as a juror in this case.

ARGUMENT

Issue One: The trial court erred in denying Appellant's Motion to Suppress because the probable cause affidavit failed to establish a nexus between Appellant's cell phone and any criminal activity.

Relevant Facts

Brisbon's Motion to Suppress alleged the affidavit in support of the search warrant[371] to search Brisbon's phone was insufficient to establish probable cause as required by the Fourth Amendment and Tex. Code Crim. Proc. articles 1.06 and 18.01.[372] Relying on *State v. Baldwin,* 664 S.W.3d 122 (Tex. Crim. App 2022), Brisbon argued the language in the affidavit was boilerplate, conclusory and did not provide a nexus between his phone[373] and the allegations.[374] A hearing was held outside the

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[371] During the hearing both parties referenced a warrant. The State offered to provide the trial court with a copy of the warrant. RR4:234. Defense counsel specifically stated the warrant was a part of Exhibit A to Defense Exhibit 1. RR2:235. Despite this, Exhibit A does not include the warrant and it is not elsewhere in the record. Counsel will be requesting the record be supplemented with the warrant.

[372] DX1

[373]Trial counsel stated the motion only went to Brisbon's phone and the State conceded Brisbon had standing. RR4:239-240

[374] RR4:229 & 231

presence of the jury. No witnesses were called but trial counsel moved to enter his motion and the supporting affidavit by Deputy Abigail Talip.[375]

Evidence to be Suppressed

In an attempt to meet their burden of proof that Brisbon sexually assaulted L.J. or attempted to, the State introduced evidence taken from Brisbon's phone.[376] State's Exhibits 922, 923, 926 and 927 were admitted over defense objection.[377] Exhibit 922 is a "general" report of the web searches conducted on Brisbon's phone.[378] Exhibit 923 is a report for web history searches for spy cameras.[379] Exhibit 926 are cache images from the phone, while State's Exhibit 927 is the web history for April 28-29, 2022.[380]

Digital forensic investigator Gray testified one phone could have "tens of thousands of pages" and that State's Exhibits 920 through 927 were created by narrowing down the data using a specific date range and "things related to this

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[375] The record does not reflect the motion and affidavit were actually admitted but the court and the parties treated them as if they were and as such this Court may consider them on appeal. *See Cornish v. State,* 848 S.W.2d 144, 145 (Tex. Crim. App. 1993); *Heberling v. State,* 834 S.W.2d 350, 356 (Tex. Crim. App.1992). 4RR:236

[376] Digital Forensic Investigator Gray analyzed the data and compiled reports from four devices: L.J.'s iPad, Brisbon's phone, and the phones of L.J.'s mother and sister. RR8:90 & 99; SX920-927

[377] RR8:98

[378] RR8:97

[379] RR8:94

[380] RR8:95-96

offense."[381] Gray prepared a PowerPoint as a demonstrative aid showing the different websites listed when the phone was searched, including any cache photographs.[382]

The web history from Brisbon's phone shows searches on different social media websites using L.J.'s and K.H.'s names, sometimes paired with sexual terms or the term "nude photos."[383] Gray could not testify as to when the searches containing the girls' names were conducted.[384] There were also searches for the terms "spy cameras" and "security wireless surveillance cameras"[385] However, only one search could be dated, and it was a search done in August 2021, eight months prior to the shooting.[386]

Finally, a search of the phone revealed that on the night of the incident, several searches were made for pornographic material and the phone contained cached photos as a result of those searches.[387] The photos depict adult actors, but several of the titles and searches include purported incestual themes, such as "Fucking stepdaughter videos" and "Daddy Loves His Lil Princess's Pussy."[388]

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[381] RR8:99

[382] RR8:102-103; SX928

[383] RR8:110-112

[384] RR8:108

[385] RR8:113-115; SX293

[386] RR8:113-116, 166

[387] RR8:120, 122, 125-129, 131 & 134-137

[388] See footnote 338

Brisbon testified in his own defense. He admitted searching pornographic websites, but denied ever intentionally searching the word "stepdaughter."[389] Brisbon assumed that the stepdaughter website was a pop up and that is how the search appeared on his phone.[390] On cross-examination, Brisbon did not recall typing searches for incest-themed content and stated those are not the type of searches he would do.[391] When asked if his phone would have evidence of searches such as "naughty daughter seduces stepdad" or "daddy banging daughter before school," Brisbon said he could not say if it would be on his phone or not.[392] He stated it might have popped up but he did not recall typing in such searches.[393]

In rebuttal, the State recalled Gray to testify.[394] Gray testified his analysis of Brisbon's phone search history resulted in 222 searches Gray described as "incestual-type" or "involving family relationships."[395] Of those, only eight (8) have any dates associated with them.[396] Several searches include sexual terms in combination with

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[389] RR9:49-50 & 129

[390] RR5:50

[391] RR9:129-130

[392] RR9:131

[393] RR9:129-132

[394] RR9:174

[395] RR9:174-175 & 183

[396] SX929

"stepdaughter" or daughter.[397] Gray opined these searches were not all "pop-ups" or advertisements because one porn site is not going to advertise on a different porn site.[398]

Standard of Review

A trial court's denial of a motion to suppress is generally reviewed under a bifurcated standard of review. *Stocker v. State,* --S.W.3d--, No. 14-21-00412-CR, 2025 WL 1033949, at *2–3 (Tex. App.—Houston [14th Dist.] Apr. 8, 2025, pet. filed June 11, 2025) citing *Igboji v. State*, 666 S.W.3d 607, 612 (Tex. Crim. App. 2023). The court of appeals reviews "a trial court's determination whether a specific search or seizure was reasonable under a *de novo* standard but [the reviewing court gives] trial courts almost complete deference in determining historical facts that depend on credibility and demeanor." *Id.*

Applicable Law

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

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[397] RR9:179-183

[398] RR9:184

This right is also embodied in art 1 section 9 of the Texas Constitution[399] as well as being codified in art 1.06 of the Code of Criminal Procedure. [400] Both the Supreme Court and the Court of Criminal Appeals have recognized the pervasive nature cell phones have in our daily lives. *See Carpenter v. United States,* 585 U.S. 296, 311 (2018); *Riley v. California*, 573 U.S. 373, 385 (2014); *Wells v. State*, -- S.W.3d --, No. PD-0669-23, 2025 WL 980996, at *8 (Tex. Crim. App. Apr. 2, 2025), reh'g denied, No. PD-0669-23, 2025 WL 1699563 (Tex. Crim. App. June 18, 2025). As such, a warrant based on probable cause is generally required prior to searching a cell phone. *Riley v. California,* 573 U.S. 373, 386 (2014); *See also State v. Granville*, 423 S.W.3d 399, 408 (Tex. Crim. App. 2014).

Probable cause exists when, under the totality of the circumstances, there is a fair probability or substantial chance that contraband or evidence of a crime will be found in a particular location. *State v. Baldwin*, 664 S.W.3d 122, 130 (Tex. Crim. App. 2022). In other words, there must be "a sufficient nexus between criminal activity, the things to be seized, and the place to be searched." *Stocker v. State,* No. 14-21-00412-CR, 2025

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[399] "The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation." Tex. Const. art. I, § 9.

[400] The people shall be secure in their persons, houses, papers and possessions from all unreasonable seizures or searches. No warrant to search any place or to seize any person or thing shall issue without describing them as near as may be, nor without probable cause supported by oath or affirmation. Tex. Code Crim. Pro. Ann. art. 1.06.

WL 1033949, at *5 (Tex. App. — Houston [14th Dist.] Apr. 8, 2025, pet. filed June 11, 2025) citing *Bonds v. State*, 403 S.W.3d 867, 873 (Tex. Crim. App. 2013).

In determining whether an affidavit provides probable cause to support a search warrant, an issuing court and a reviewing court are constrained to the four corners of the affidavit. *State v McLain*, 337 S.W.3d 268, 271–72. (Tex. Crim. App. 2011). The reviewing court is to examine the supporting affidavit to see if it recited facts sufficient to support conclusions (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 or within the thing to be searched. *Baldwin* at 130. "The focus is not on what other facts could or should have been included in the affidavit; the focus is on the combined logical force of facts that are in the affidavit." *Staley v. State*, -- S.W.3d --, No. 02-23-00053-CR, 2025 WL 727842, at *7 (Tex. App.—Fort Worth Mar. 6, 2025, pet. filed May 5, 2025) citing *State v.* D*uarte*, 389 S.W.3d 349, 354–55 (Tex. Crim. App. 2012).

However, conclusory allegations alone are not sufficient to support a finding of probable cause. *Baldwin* at 132 citing *Illinois v. Gates*, 462 U.S. 213, 238–39 (1983). Suspicion and conjecture do not constitute probable cause. *Baldwin* at 135. Nor is the mere possession of a device by a suspect generally enough. *Id.* at 134; *Stocker v. State,* -- S.W.3d--, No. 14-21-00412-CR, 2025 WL 1033949, at *5 (Tex. App. — Houston [14th Dist.] Apr. 8, 2025, pet. filed June 11, 2025).

In *Baldwin,* the Court 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. *Baldwin* at 123. In reaching a decision on the merits, the Court noted that the affidavit in question contained "nothing about the phone being used before or during the offense." *Id.* at 135.

In *Stocker,* the Court clarified probable cause can be established without necessarily showing that the cell phone was directly used in the commission of the offense for which the accused is on trial. *Stocker v. State*, 693 S.W.3d 385, 388 (Tex. Crim. App. 2024). The Court found a nexus requirement can be met if the affidavit contains facts that indicate use of a cell phone in connection with "an offense under investigation." *Id.*

Analysis

Talip's affidavit is several pages long and includes photos of the four devices found in the home.[401] In the affidavit, Talip discusses her training and then states her belief probable cause exists based on five pages of facts.[402] Talip averred she had reason to believe Brisbon committed the offense of murder and then proceeded to detail facts of what was observed and recovered at the scene by law enforcement, the medical

[401] DX1

[402] DX1 p13-17

examiner's determination that the complainant died from a single gunshot wound and the results of Talip's interviews of the complainant's mother and sister.[403]

L.Y., the complainant's mother, had told Talip about her video call conversations and texts with the complainant and her sister K.H. on the night of the shooting.[404] The affidavit also details that "prior to the shooting"… "the defendant called [L.Y.] asking her about what they planned on doing about the decedent's drug problem" and L.Y. told him she "did not have a drug problem."[405] Similarly, the affidavit relays that K.H informed Talip about L.Y. instructing her to pick up the complainant and the details regarding texts and calls between K.H. and the complainant.[406]

The affidavit also includes that K.H. told Talip that her sister had told her that Brisbon "once placed an audio recorder in her room."[407] K.H. further stated that Brisbon had "touched her vagina and placed his fingers in her vagina when she woke up from her sleep" when she had been living with the family.[408] K.H. was unaware if her sister was sexually abused by Brisbon.[409]

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[403] DX1 pp13-15.

[404] DX1

[405] DX1 p14

[406] DX1 p14-15

[407] DX1 p15

[408] DX1 p15

[409] DX1 p15

The affidavit then discusses, based on Talip's training and experience and speaking with experts, why electronic devices must be secured, how experts can recover data from such devices even if deleted and how phones are capable of making audio recordings, sending texts and keeping call and Facetime logs.[410] The affidavit states Talip is aware that Android phones are capable of making video calls, and that iPhones, Android phones and iPads are capable of storing pictures.[411]

Regarding the devices to be searched, the affidavit contains the following two paragraphs:

> It is also your Affiant's belief, based on his/her training and experience, that the search and forensic examination of that digital device(s) will lead to evidence of the defendant's plan and scheme to commit the offense of murder on April 29, 2022 and other crimes such as sexual assault, indecency with a child, and sexual assault of a child under 17 of age.[412]
>
> It is your Affiant's belief, based on her training and experience, that the search and forensic examination of the digital devices will lead to identification of the person alleged to have committed the offenses of murder, sexual assault, indecency with a child, and sexual assault of a child under 17. Affiant's belief is based on the fact that the defendant audio recorded the decedent which affiant knows Apple iPhones and Android phones are capable of recording audio, the defendant spoke to the decedent's mother on his cell phone in the hours prior to her shooting, the decedent used Facetime to contact her mother and sister – which affiant knows is capable on an iPad, iPad [sic], and/or Android.[413]

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[410] DX1 p15-16

[411] DX1 p16

[412] DX1 p16

[413] DX1 p17

The affidavit does not provide a nexus between Brisbon's phone and criminal activity. The affidavit contains a lot of words about what phones can do and how important it is to secure phones and what can be retrieved from a phone, but all of this is nothing more than boilerplate language that would apply in any case where law enforcement seeks a warrant to search the contents of a phone. Until the last two paragraphs on page 16 and 17, with one exception - that Brisbon called L.Y. earlier in the day - nothing in the affidavit mentions Brisbon using a phone at all. It provides no connection between the phone and any criminal activity and is not sufficient to provide probable cause under *Baldwin* or *Stocker*.

Admittedly, the last two paragraphs do at least state the Affiant believes there will be evidence found that relates to a criminal offense. However, the first paragraph is conclusory. It states it is the affiant's belief that a search of the phone "will lead to evidence of the defendant's plan and scheme to commit the offense of murder on April 29, 2022 and other crimes such as sexual assault, indecency with a child, and sexual assault of a child under 17 of age." The affidavit does not say how, or why the affiant believes this to be true. It simply declares it so and, as such, is conclusory and fails to support a finding of probable cause. *Baldwin* at 122, citing *Illinois v. Gates,* 462 U.S. 213, 239 (1983).

The second paragraph specifies the items the Affiant bases her beliefs on:

1) the fact that the defendant audio recorded the decedent which affiant knows Apple iPhones and Android phones are capable of recording audio;

2) the defendant spoke to the decedent's mother on his cell phone in the hours prior to her shooting; and

3) the decedent used Facetime to contact her mother and sister – which affiant knows is capable on an iPad, iPad [sic], and/or Android.[414]

The first and third items do not contain any information that Brisbon's phone was used. Starting with the third statement, it is irrelevant to Brisbon's motion. In all fairness to the officer, the affidavit was made in support of searching the contents of four devices, including the complainant's iPad and phone, and would provide a nexus to those devices. Clearly, however, the third item has nothing to do with Brisbon and cannot provide any sort of nexus between Brisbon's phone and criminal activity.

As to the first statement regarding the audio recorder, when looking at the rest of the affidavit there is but one line of "facts" regarding the audio recording which states:

> During affiant's interview with K.H., affiant learned that decedent told K.H. that the defendant *once placed* an *audio recorder* in her room.[415]

First, the language is "once placed." There is no time associated with when this action allegedly occurred. It is true under *Stocker* it is not required that the phone be used immediately before, during or immediately after the alleged crime in order for there to

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[414] DX1 p17

[415] DX1 p15 (emphasis added)

be a nexus showing. *Stocker v. State,* 693 S.W.3d 385 (Tex. Crim. App. 2024). However, without any time reference, how can the alleged placing of an audio recorder at some point in history relate to the 2022 capital murder or alleged attempted sexual assault? Any inference by a magistrate connecting the two events is pure speculation. This is improper. *See Baldwin* at 135. Additionally, the language refers to an audio recorder. It does not say "phone". It does not say Brisbon was recording the complainant with his phone. It does not even say a recording was made. It says the defendant "*placed* an audio recorder" in the complainant's room. The fact that a phone can record is boilerplate language and irrelevant if a phone was not used. There is also nothing in the affidavit to the effect that the alleged recorder was somehow synced with Brisbon's phone. In fact, there is not even anything to say the recorder actually recorded anything to be found. While a magistrate can make reasonable inferences from the information in making a probable cause determination, "[s]uspicion and conjecture do not constitute probable cause." *Id.* As in *Baldwin*, the facts in the affidavit regarding the audio recorder amount to nothing more than mere suspicion.

This leaves the entirety of the determination of probable cause resting on the fact that Brisbon made a phone call to L.Y. This is the only reference within the affidavit that Brisbon ever used his phone at all. This phone call is only mentioned twice in the affidavit. The first time is a two-sentence paragraph on page 14 which states:

> Prior to the shooting, affiant learned from [L.Y.] that the defendant called [L.Y.] asking her about what they planned on doing about the decedent's

> drug problem. [L.Y.] told affiant that the decedent did not have a drug problem.[416]

The second time is found in the above cited paragraph listing what the Affiant's beliefs were based on[417] and essentially just repeats the information on page 14.

As with the statement regarding the audio recorder, there is nothing within the four corners of the affidavit indicating exactly when the phone call occurred. The affidavit merely states "prior to the shooting." Even assuming it is reasonable to infer the call was somewhat close in time to alleged offense, the statement does not even reference any type of allege crimes committed by Brisbon.

There were no statements in the affidavit that Brisbon somehow used the phone to prepare for the shooting or the alleged attempted sexual assault. The only statement indicates Brisbon used his phone for its original purpose – to communicate with others. To find probable cause based on one phone call about a couple's child is tantamount to saying anytime a phone is present or used a warrant to examine the contents would be proper.

A comment made by the trial court during the motion to suppress hearing is telling. In asking the State what their best evidence was to show there was evidence of a crime on the phone, the following was said:

> THE COURT: ...—so, one, you said there's some evidence that relates

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[416] DX1 p14

[417] DX1 p17

to the mother and the defendant, defendant called the mother from his phone at a certain time prior to the murder – alleged murder that related to some issue with drug use, which came out during the time. It some kind of way came out, in the opening or –

[STATE]: That's correct.

THE COURT: -- testimony. So that seems like that's relevant to this particular offense. *I'm not sure how she tied it all in to – with the magistrate*. But what else – what else do you have?

[STATE]: That affidavit also talks about – that was our best evidence *in the affidavit*, Your Honor. And it shows also the phones were there at the same time that the murder occurred.[418]

The court is bound by the four corners of the affidavit. The "best evidence" the State had was a phone call. When a district court states they do not know how it [the phone call] was "tied it all in" this is an indication of the lack of a nexus between Brisbon's phone and an alleged criminal offense.

The affidavit did not provide sufficient facts to establish a nexus between Brisbon's phone and any alleged criminal activity and as such fails to provide probable cause to support the search warrant authorizing the search of Brisbon's phone. Thus, the trial court erred in denying the motion to suppress.

[418] RR4:239-240 (emphasis added).

Harm

Constitutional errors are subject to a harm analysis under TEX. R. APP. P. 44.2(a). "[T]he harm analysis for the erroneous admission of evidence obtained in violation of the Fourth Amendment must be Rule 44.2(a)'s constitutional standard." *Hernandez v. State,* 60 S.W.3d 106, 108 (Tex. Crim. App. 2001). A judgment must be reversed unless this Court determines "beyond a reasonable doubt that the error did not contribute to the conviction or punishment." *Holmes v. State,* 323 S.W.3d 163, 173-74 (Tex. Crim. App. 2009). "The State has the burden, as the beneficiary of the error, to prove that the error is harmless beyond a reasonable doubt." *Haggard v. State*, 612 S.W.3d 318, 328 (Tex. Crim. App. 2020), citing *Deck v. Missouri*, 544 U.S. 622, 635 (2005) and *Wall v. State*, 184 S.W.3d 730, 746 n.53 (Tex. Crim. App. 2006).

This Court cannot find the admission of the cell phone evidence was harmless beyond a reasonable doubt. The data extracted from the phone was used as circumstantial evidence to prove Brisbon either sexually assaulted L.J. during the course of the alleged murder or attempted to.

The vast majority of the web history introduced involved searches of pornographic sites and was unfairly prejudicial to Appellant. Adult pornography in general is a divisive topic within our society. Some believe it is a perfectly acceptable part of life while others, despite its legality, find it and those who partake in it morally reprehensible. Here, just the words of the search topics themselves are disturbing as they relate to incestual behavior even though it should be presumed that the individuals

depicted in the photos and/or videos are only actors. The words themselves also invoke images of children (Daddy's Lil' Princess) although all the images depict adult actors.[419]

Additionally, the State did not just introduce the reports with small thumbnail images of the cached photos located on Brisbon's phone.[420] Instead, the digital forensic investigator prepared a demonstrative PowerPoint[421] that included enlarged images from the searches - including one video that autoplays over and over showing a semi-close up of a woman masturbating.[422] This PowerPoint would have been published to the jury by playing it on the large television screens in the courtroom.[423] The State then went through each slide in painstaking detail.[424] Additionally, later in trial when Brisbon testified, the State questioned him about several specific searches such as "fucking stepdaughter;" "daddy loves his little princess's pussy.com;" and "daddy banging daughter before school."[425]

In addition to using internet searches from the night of the shooting, on rebuttal the State introduced State's Exhibit 929.[426] Exhibit 929 shows search history from

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[419] SX298

[420] SX926

[421] SX298

[422] SX298 slide 29

[423] RR8:100

[424] RR8:108-115; 118-140

[425] RR9:129-132

[426] RR9:177

Brisbon's phone using terms such as "daughter," "stepdaughter," "dad," "mom" and "son."[427] Gray testified there were 222 searches that he described as "incestual-type" or involving family relationships."[428] Gray disputed Brisbon's theory that any "stepdaughter" type searches found must have been "pop-ups."[429]

At the very least, the searches and results would have incited an emotional reaction in the jury, and while the evidence may still be legally sufficient for a juror to find guilt, it is possible that - had the searches and results not been admitted - at least one juror may have found the State failed to prove its case. The search history allowed the State to deal a severe blow to Brisbon's credibility. By having concrete evidence indicating Brisbon may not have been a truthful person, it makes it more likely the jury discarded his testimony regarding the accidental discharge of the weapon. Additionally, the phone evidence allowed the State to paint Brisbon as someone with a specific sexual interest. This, when coupled with proof he researched a "spy camera," makes it more likely that a juror would view Brisbon in a way that would sway that juror to find he did at least attempt to sexually assault the complainant. Despite the fact the complainant did not make any such claims either prior to this night or even while on the phone with her mother a mere eight minutes before the police arrived, the phone evidence was

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[427] RR9:175

[428] RR9:174-175 & 183

[429] RR9:129-132 & 184

specifically used to destroy Brisbon's credibility.[430] It cannot be found beyond a reasonable doubt that this erroneously admitted evidence was harmless. *See McCarthy v. State,* 65 S.W.3d 47, 52 (Tex. Crim. App. 2001) (holding error was not harmless beyond a reasonable doubt despite the existence of other evidence showing the appellant's guilt). This Court should reverse and remand for a new trial.

[430] RR7:210 & 217

Issue Two: Trial counsel rendered ineffective assistance of counsel by failing to properly assert a challenge for cause against Juror Number 7 after she indicated that she could not impartially judge the credibility of the witnesses.

A. Relevant Facts

During voir dire, after asking which of the panel had law enforcement in their family[431], defense counsel then asked whether anyone would give officers automatic credibility stating:

> …Okay. For those that raised their hands[432], look the law says you've got to start everybody off equal. Okay? Period. You have to. But look, anybody who wears a robe in this building and they tell me to do something, I do it. Right? And then later on, maybe you find out it's Dress Like Judge Jones Day. Right? I don't care because that's how I'm trained. I'm conditioned to do that. That is my – that is who I am. I'm a lawyer to my bone, and you can't change that.
>
> Same thing with law enforcement. Who here, for those of you who raised your hands, says, "you know what, when I hear, "We call Officer So-and-So" – you've never seen him. You don't even have a visual on him yet And you haven't even heard a word out of his mouth. For those that raised your hand, who – and you know what the law says, you've got to start of equal. You can't give anybody more credibility without hearing the word out of their mouth.
>
> But who says, "Look, I back the blue. I don't care what they're going to say. Right out the gate, *I give him more credibility and I can't change that* because that's how I'm conditioned." If you raised your hand – you raise them if that's you. Anybody says, "You know what, if a cop is going to come testify, *I'm going to believe him before he*

[431] RR2:197-198

[432] Counsel was referring to his previous question as to who had law enforcement in their family. Juror No.7 did not raise her hand in response to that question. RR2:197-198.

> *opens his mouth just because he's a cop, period*?" And that's okay. Anybody?[433]

In response, Jurors No. 7 and 17 raised their juror numbered cards.[434] Trial counsel responded "We'll come back to you No. 7. 17, we got you" and then moved to a different topic.[435] The record does not reflect counsel further discussed the topic with Juror No. 7 after this.

When asked for any challenges to the jurors, trial counsel stated he wanted to challenge Juror No. 7 because he was "concerned about the ability to comprehend these proceedings" which the trial court ultimately denied.[436] Counsel did not urge a challenge regarding Juror No. 7's inability to be impartial as to the judging the credibility of an officer's testimony. Juror No. 7 served on the jury.[437]

B. Applicable Law and Standard of Review

Under *Strickland v. Washington*, 466 U.S. 668 (1984), an ineffective assistance of counsel claim is subjected to a two-step analysis whereby the appellant must show that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) but for counsel's unprofessional errors, there is a reasonable probability that the result

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[433] RR2:198-199 (emphasis added)

[434] Juror No. 17 was struck for cause for a multitude of reasons. RR2:216

[435] RR2:199

[436] RR2:256-257

[437] RR2:262

of the proceedings would have been different. *Strickland* at 687. An Appellant must prove ineffectiveness by a preponderance of the evidence. *Perez v. State*, 310 S.W.3d 890, 893 (Tex. Crim. App. 2010). When the record is silent, a reviewing court may not speculate to find trial counsel ineffective. *Ex parte Varelas*, 45 S.W.3d 627, 632 (Tex. Crim. App. 2001). "Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994), citing *Strickland*, 466 U.S. at 689. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Thompson* at 813. "An appellate court looks to the totality of the representation and the particular circumstances of each case in evaluation the effectiveness of counsel." *Id.*, citing *Ex parte Felton*, 815 S.W.2d 733, 735 (Tex. Crim. App. 1991).

"In the majority of cases, the appellant is unable to meet the first prong of the *Strickland* test – that trial counsel's representation fell below an objective standard of reasonableness-because the record on direct appeal is undeveloped." *Lopez v. State*, 565 S.W.3d 879, 886 (Tex. App.—Houston [14th Dist.] 2018, pet. ref'd), citing *Mata v. State*, 226 S.W.3d 425, 430 (Tex. Crim. App. 2007). "When the record is silent as to trial

counsel's strategy, we will not conclude that appellant received ineffective assistance unless the challenged conduct was 'so outrageous that no competent attorney would have engaged in it.'" *Id.*, quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). "That is, the record must show that counsel's performance fell below an objective standard of reasonableness as a matter of law and that no reasonable trial strategy could justify his deficient performance." *Dryer v. State*, 674 S.W.3d 635, 647 (Tex. App.—Houston [1st Dist.] 2023, pet. ref'd), citing *Lopez v. State*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011). Courts "generally will assume that counsel had a reasonable strategic motive if any reasonable trial strategy can be imagined." *Id.*, citing *Okonkwo v. State*, 398 S.W.3d 689, 693 (Tex. Crim. App. 2013). "[I]t is possible that a single egregious error of omission or commission by appellant's counsel constitutes ineffective assistance." *Thompson*, 9 S.W.3d at 813, citing *Jackson v. State*, 766 S.W.2d 504, 508 (Tex. Crim. App. 1985). "A single error does so only if it is both egregious and had a seriously deleterious impact on counsel's representation as a whole." *Dryer*, 674 S.W.3d at 647, citing *Frangias v. State*, 450 S.W.3d 125, 136 (Tex. Crim. App. 2013).

"The Sixth Amendment to the United States Constitution guarantees a trial before an 'impartial jury.'" *Drake v. State*, 465 S.W.3d 759, 763 (Tex. App.—Houston [14th Dist.] 2015, no pet.), citing U.S. CONST. AMEND. VI. "A defendant's right to a fair trial before an impartial jury is ingrained within our fundamental precepts of justice." *Id.*, citing *Armstrong v. State*, 897 S.W.2d 361, 368 (Tex. Crim. App. 1995). "The voir dire process is designed to effectuate a defendant's right to a fair trial by insuring, to the

fullest extent possible, that the jury will be intelligent and impartial." *Id.*, citing *Armstrong*, 897 S.W.2d at 368 and *Salazar v. State*, 562 S.W.2d 480, 482 (Tex. Crim. App. [Panel Op.] 1978). "The importance in selecting a jury cannot be overestimated in our judicial system since both the State and defendant have an interest in assembling a jury free of bias and prejudice." *Id.*, quoting *Price v. State*, 626 S.W.2d 833, 835 (Tex. App.—Corpus Christi 1981, no pet.).

The law provides that a juror is challengeable for cause under the following circumstance:

> That the juror has a bias or prejudice in favor of or against the defendant….

TEX. CODE CRIM. PROC. ART. 35.16(a)(9)

In addition, "a challenge for cause may be made by the defense" for the following reason:

> That he has a bias or prejudice against any of the law applicable to the case upon which the defense is entitled to rely, either as a defense to some phase of the offense for which the defendant is being prosecuted or as a mitigation thereof or of the punishment therefor.

TEX. CODE CRIM. PROC. ART. 35.16(c)(2)

"Bias" means "an inclination towards one side of an issue rather than to the other…(which) leads to a natural inference that (a juror) will not or did not act with impartiality." *Anderson v. State*, 633 S.W.2d 851, 853 (Tex. Crim. App. [Panel Op.] 1982), quoting *Compton v. Henrie*, 364 S.W.2d 179, 182 (Tex. 1963). "Prejudice" means "prejudgment." *Id.* "Bias, by itself, is not sufficient for a challenge for cause. Instead,

an appellant must show that the juror was biased to the extent that he or she was incapable of being fair." *Henson v. State*, 173 S.W.3d 92, 99 (Tex. App.—Tyler 2005, pet. ref'd), citing *Anderson*, 633 S.W.2d at 853

A bias or prejudice that substantially impairs a potential juror's ability to carry out his oath and court instructions in accordance with the law disqualifies him from jury service. *Gardner v. State,* 306 S.W.3d 274, 295 (Tex. Crim. App. 2009). It is well settled that, if prospective jurors have a predisposition to believe police officers such that it would prevent those persons from impartially judging the credibility of such witnesses, they have demonstrated a bias against the defendant and are subject to a challenge for cause pursuant to Article 35.16(a) of the Code of Criminal Procedure. *Berkley v. State*, No. AP-74,336, 2005 WL 8154117, at *4 (Tex. Crim. App. Apr. 6, 2005) (not designated for publication) citing *Hernandez v. State*, 563 S.W.2d 947, 950 (Tex. Crim. App. 1978).

C. Analysis

Deficient performance

"Counsel's performance is deficient when his representation falls below an objective standard of reasonableness." *Cueva v. State*, 339 S.W.3d 839, 857-858 (Tex. App.—Corpus Christi-Edinburg 2011, pet. ref'd), citing *Ex parte Briggs*, 187 S.W.3d 458, 466 (Tex. Crim. App. 2005) and *Strickland*, 466 U.S. at 687-688. "In determining whether there is a deficiency, we afford great deference to trial counsel's ability, indulging 'a strong presumption that counsel's conduct falls within the wide range of

reasonable professional assistance,' and that counsel's actions were the result of sound and reasonable trial strategy." *Id.* at 858, citing *Strickland*, 466 U.S. at 689 and *Jaynes v. State*, 216 S.W.3d 839, 851 (Tex. App.—Corpus Christi-Edinburg 2006, no pet.). "[U]nless there is a record sufficient to demonstrate that counsel's conduct was not the product of a strategic or tactical decision, a reviewing court should presume that trial counsel's performance was constitutionally adequate 'unless the challenged conduct was so outrageous that no competent attorney would have engaged in it.'" *State v. Morales*, 253 S.W.3d 686, 697-698 (Tex. Crim. App. 2008).

Appellant acknowledges that the Court of Criminal Appeals and other appellate courts have rejected ineffective assistance of counsel claims for the failure to move to challenge for a cause a venire person when confronted with a silent record. *See Delrio v. State*, 840 S.W.2d 443, 446 (Tex. Crim. App. 1992) ("Although we would certainly expect the occasion to be rare, we cannot say, as the court of appeals did, that under no circumstances could defense counsel justifiably fail to exercise a challenge for cause or peremptory strike against a venireman who deemed himself incapable of serving on the jury in a fair and impartial manner."); *State v. Morales*, 253 S.W.3d 686, 697-698 (Tex. Crim. App. 2008) (trial counsel permitted to make a strategic or tactical decision to retain a juror who is only *presumably* biased by virtue of her status as an assistant district attorney."); *Notias v. State*, 491 S.W.3d 371 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd) (while record silent as to counsel's motivation, venire member's bias concerned the Fifth Amendment and Notias testified at trial); and *Jackson v. State*, 617 S.W.3d 916

(Tex. App.—Houston [14th Dist.] 2021, pet. ref'd) (counsel specifically stated on record he did not want to challenge prospective jurors).

Having said that, Appellant contends that trial counsel's failure to challenge Juror Number 7 for cause constituted deficient performance. Juror 7 was biased against the law. Trial counsel's question was clear and unambiguous.

> But who says, "Look, I back the blue. I don't care what they're going to say. Right out the gate, *I give him more credibility and I can't change that* because that's how I'm conditioned." If you raised your hand – you raise them if that's you. Anybody says, "You know what, if a cop is going to come testify, *I'm going to believe him before he opens his mouth just because he's a cop,* period?" And that's okay. Anybody?[438]

By raising her juror card, Juror No. 7 essentially adopted counsel's statement as her own. This is not a case where she was rehabilitated through later questioning. There is nothing in the record that contradicts the panel member's wholehearted adoption of the statement. *See generally, Gardner v. State*, 306 S.W.3d 274, 295 (Tex. Crim. App. 2009) (when the record reflects that a venire member vacillated or equivocated on his ability to follow the law, the reviewing court must defer to the trial judge.)

Additionally, while it is true that a person is not necessarily challengeable because he "tends to" or is "more inclined to" believe officers or "might give more credibility" to officers, those statements do not indicate a prejudgment of the officer's credibility. *See generally Berkley v. State*, No. AP-74,336, 2005 WL 8154117, at *2 (Tex. Crim. App.

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[438] RR2:198-199 (emphasis added)

Apr. 6, 2005) (not designated for publication); *Gardner v. State,* 730 S.W.2d 675, 692–93 (Tex. Crim. App. 1987). That is not the case here. There are no comments by Juror No. 7 that she would not prejudge credibility of witnesses. Just the opposite.

Furthermore. some courts after reviewing the entirety of a juror's statements in voir dire, have held "tend to believe" type statements are an indication of the juror's reliance on the officer's training as opposed to a prejudgment of credibility. *Id.* This case is distinguishable. Here, the only evidence in the record regarding Juror No. 7's beliefs is her adoption of counsel's statement which indicates she would not follow the law. This demonstrates an actual bias and should have been challenged for cause. *See Tran v. State*, 221 S.W.3d 79, 83 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) ("Under Article 35.16(a)(9), it is not necessary to show a particular bias or prejudice in favor of or against the defendant).

This is not a case where the record is ambiguous regarding defense counsel's thoughts about wanting Juror No. 7 to serve. Counsel tried to have her excused for cause for a different reason, but was ultimately unsuccessful. As such, there is no scenario under which trial counsel's failure to challenge Juror Number 7 for cause could be considered "sound trial strategy." Thus, trial counsel's failure to challenge Juror Number 7 for cause was deficient performance, as there was no reasonable strategy to not challenge Juror Number 7, who demonstrated an actual bias in the case when she indicated that she could not be fair and impartial.

Prejudice

"[T]o show prejudice, the appellant 'must show there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceedings would have been different.'" *Smith v. State*, 286 S.W.3d 333, 340 (Tex. Crim. App. 2009), citing *Strickland*, 466 U.S. at 694. "Reasonable probability is a probability sufficient to undermine confidence in the outcome, meaning counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

"It is fundamental to our system of jurisprudence that an accused is entitled to an impartial jury composed of people who have not prejudged the merits of the case." *Alaniz v. State*, 937 S.W.2d 593, 596 (Tex. App.—San Antonio 1996, no pet.), citing *Shaver v. State*, 162 Tex. Crim. 15, 280 S.W.2d 740, 742 (Tex. Crim. App. 1955) and TEX. CONST. ART. 1, § 10. "The presence of one biased juror destroys the impartiality of the entire jury and renders it partial." *Id. See also Delrio*, 840 S.W.2d at 445).

Juror Number 7 demonstrated an actual bias and should have been challenged for cause when she indicated that she could not be fair and impartial in a case like Appellant's. Instead, she sat on the jury.[439] A juror, who by their own admission will not follow the law, rendered the outcome "unreliable" under *Strickland.* "[A] single partial juror will vitiate a conviction." *Delrio*, 840 S.W.2d at 445. As a result, trial counsel's

[439] RR2:262

deficient performance in failing to challenge Juror Number 7 for cause prejudiced the Appellant and this Court should reverse for a new trial.

PRAYER

For these reasons, Brisbon prays this Court reverse and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I provided a copy of the foregoing brief to the Harris County District Attorney via e-filing service on the 3rd day of July 2025.

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CERTIFICATE OF COMPLIANCE

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

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