No. 14-24-00934-CR

In the
Court of Appeals
for the
Fourteenth District of Texas
at Houston

No. 1708901
In the 183rd District Court
Harris County, Texas

JARRETT RAY MCCLINTOCK
Appellant
V.
THE STATE OF TEXAS
Appellee

APPELLANT'S BRIEF

JESSICA AKINS
Attorney for Appellant
State Bar No: 24029415
3200 Wilcrest Drive, Suite 170
Houston, Texas 77042
jessica.akins.esq@gmail.com
713.299.0075

ORAL ARGUMENT IS NOT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to TEX. R. APP. P. 9.4(g) and TEX. R. APP. P. 39.1, Appellant does not request oral argument in this case.

IDENTIFICATION OF THE PARTIES

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

Counsel for the State:
Harris County District Attorney's Office
1201 Franklin, Suite 600
Houston, Texas 77002

Sean Teare — District Attorney of Harris County

Jessica Caird — Assistant District Attorney on appeal

Neha Mehtaji, Michele Oncken — Assistant District Attorneys at trial

Appellant or criminal defendant:
Jarret Ray McClintock

Counsel for Appellant at trial:

Ted Doebbler
P.O. Box 55012
Houston, Texas 77055

Counsel for Appellant on appeal:

Jessica Akins
3200 Wilcrest, Suite 170
Houston, Texas 77042

Hon. Sherlene Cruz — Trial Judge (Voir Dire)

Hon. Kristin Guiney — Trial Judge (Trial and Punishment)

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTES

RULES

TO THE HONORABLE COURT OF APPEALS:

STATEMENT OF THE CASE

Appellant was charged by indictment with the offense of murder. (CR 81). Appellant pleaded not guilty to the offense and proceeded to trial. (RR2 71-72). The jury returned a guilty verdict and then sentenced Appellant to 35 years confinement in the Institutional Division of the Texas Department of Criminal Justice. (CR 505, 514). Appellant filed a timely notice of appeal. (CR 520).

STATEMENT OF FACTS

Appellant was charged by indictment with murder for events that transpired on January 28, 2021. (CR 81). The victim in this case, Ellis Williams, was from Beaumont and traveled to Houston to visit his cousin and some friends, including Appellant. (RR3 250-53; RR4 164-65; State's Exhibit No. 80). Several people gathered to eat, drink and get tattoos on the evening of January 27, 2021, at the Redwood Apartments. (RR3 78, 252-56; State's Exhibit No. 2). At some point in the evening, Appellant and Williams got into a verbal altercation. (RR3 252-53, 256-57). Appellant was under the impression that Williams was being inappropriate with Appellant's girlfriend. (RR3 253; State's Exhibit No. 2). Bystanders believed Appellant and Williams worked it out and then the party broke up. (RR3 256-57).

Early the next morning, several people awoke to a disturbance outside the apartments. (RR3 258-59). Appellant returned to the scene and was yelling at Williams,

insinuating Williams did something to harm his girlfriend, when he noticed her pants were down. (RR3 258-59; RR4 126-27; State's Exhibit No. 2). Appellant admitted he then fired several shots at Williams' vehicle, a blue Buick. (RR3 259-60; State's Exhibit No. 2). Video surveillance at the apartment, which scans license plates as they pass, showed a tan Buick, license plate ZZY 896, arrive right before the murder. (RR3 276-280; State's Exhibit Nos. 6, 115-18). Williams can be seen walking down the street in front of the apartments. (RR4 291; State's Exhibit No. 6). The tan Buick stops, an individual jumps out the car, while the car keeps rolling, and shoots Williams. (State's Exhibit No. 6). The individual runs back to the car and drives away. (State's Exhibit No. 6).

Around 4:18 a.m. the security guard at the apartments heard 3-4 gun shots. (RR3 77-81; State's Exhibit Nos. 3, 4, 9). He drove toward the noise outside the apartment complex and observed Williams crawling on the ground, clearly injured. (RR3 82-83). He called 911 and administered CPR on him until EMS arrived. (RR3 87, 92-93; State's Exhibit Nos. 5, 9). Officer Werking arrived on the scene and located the shell casings. (RR3 101-123; State's Exhibit Nos. 9, 10-19). The crime scene investigator documented the scene and took possession of four .380 caliber shell casings. (RR3 124-150; State's Exhibit Nos. 70-73).

Williams suffered three gunshot wounds and died at the scene. (RR3 226-41; State's Exhibit Nos. 220, 221-36). The medical examiner was able to recover two bullets

from his body. (RR3 242; State's Exhibit Nos. 241, 242). The cause of death was multiple gunshot wounds, and the manner of death was homicide. (RR3 243).

Detective Brown was assigned the investigation of this homicide. (RR3 270-73). Brown reached out to Officer Schrock for assistance with surveillance of Appellant. (RR3 152-56). On January 30, Schrock was watching Appellant's apartment and saw him and his girlfriend. (RR3 156-60; State's Exhibit Nos. 170-74). He became concerned when he saw Appellant carrying two bags to his girlfriend's car. (RR3 163-65). Thinking Appellant might be leaving town, Schrock instructed another unit to make a traffic stop. (RR3 163-68). Appellant's girlfriend ran a stop sign and the marked unit initiated a traffic stop. (RR3 166-68).

When the vehicle stopped, Appellant exited the passenger side of the car and dropped his bag on the ground. (RR3 168-69; State's Exhibit No. 170). Officers drew their weapons on Appellant and his girlfriend; Appellant was detained and placed in handcuffs. (RR3 169-70). Schrock asked Appellant whether he would be willing to go down to police headquarters and give a statement. (RR3 171). He testified he told Appellant he was not under arrest, but kept him in handcuffs. (RR3 171). After Appellant agreed, he was transported to the homicide division. (RR3 171-72).

Detective Brown asked Appellant to "come clean" with him regarding the shooting. (State's Exhibit No. 2). Brown referenced the video surveillance evidence, and Appellant asked to view it, and it appears he partially viewed it on Brown's cell

phone. (State's Exhibit No. 2). Brown then advised Appellant he was under arrest for murder and took his cell phone. (State's Exhibit No. 2).

Officer Daignault then took custody of Appellant's phone. (RR3 195-6). He obtained a search warrant for the phone, but didn't extract the data until almost two years later. (RR3 198, 213, 303; RR4 10; State's Exhibit No. 153). The data revealed several text messages between Appellant and others regarding the murder, and also his browser history and GPS location. (RR4 11-12; State's Exhibit Nos. 90-99, 101, 111).

Seven minutes before the murder, Appellant text his girlfriend, "where he at?" (RR4 21-22). At 5:21 a.m., he text her "When u coming home;" then at 5:22 a.m., he followed up with "I was coming to get u laws got it blocked off I think somebody died." (RR4 24). Appellant then told her he needed to figure out where he was going to go. (RR4 25). Two hours later, Appellant searched local crime news on his phone, pulling up the story about William's murder. (RR4 26-28, 31). Soon after, Appellant sent text messages to a family member regarding taking a vacation. (RR4 28-29). He contemplated going to the airport or laying low. (RR4 29-30). He then decided, "I think I'll just get a room far away until I know I'm clear." (RR4 30). Appellant text a family member, "I turned off location and tracking deactivated my Facebook until I clear." (RR4 30). Appellant got upset with his girlfriend indicating he was running for his life, and she didn't seem to care someone lost their life. (RR4 36).

Schrock located Williams' vehicle in the apartment complex and observed a bullet hole. (RR3 173-176; State's Exhibit Nos. 175-81). In February, a vehicle thought

to be associated with Appellant, a tan Buick, was located in League City. (RR3 293-94). Brown obtained a search warrant for the vehicle, and it was transported to be processed. (RR3 293-303; State's Exhibit Nos. 120-48). The vehicle had a Louisiana license plate and the parking permit inside belonged to Appellant's girlfriends' apartment. (RR3 296-97). Paperwork belonging to Appellant was found inside; a North Carolina State Board for a GED for Appellant. (RR3 298-300; State's Exhibit No. 149). DNA evidence taken from the vehicle showed at some point Appellant had been in the car. (RR4 102-06).

On March 19, 2021, Schrock assisted another officer in stopping a vehicle that was reported stolen. (RR3 176-78). Mark Lotts was the driver of the vehicle and was found in possession of a firearm. (RR3 178-80; RR4 8-9; State's Exhibit Nos. 182-85). It was a .380 caliber gun that Appellant possessed at one time. (RR3 182-85; RR4 126; State's Exhibit Nos. 186, 187). Lotts testified he knew Appellant from the apartments, and he bought the gun off the street. (RR4 118-20, 123-24). Lotts further told the jury that Appellant told him he might want to get rid of the firearm, as he had shot someone with it after an altercation involving his girlfriend. (RR4 126-27, 130-31). Lotts was clear in his testimony he did not buy the firearm from Appellant, and Lotts was not a suspect in this murder. (RR4 128-30).

Officer Bassett analyzed the two bullets the medical examiner recovered from Wiliams body; he opined the bullets were from the .380 caliber gun confiscated from Mark Lotts. (RR4 160-61).

SUMMARY OF THE ARGUMENT

First issue presented on appeal: The trial court abused its discretion when it denied a challenge for cause for several prospective jurors who could not consider the five-year minimum sentence.

Second issue presented on appeal: The trial court abused its discretion in denying Appellant's motion to suppress evidence, causing Appellant to suffer harm.

FIRST ISSUE ON APPEAL

THE TRIAL COURT ERRED WHEN IT DENIED A CHALLENGE FOR CAUSE FOR SEVERAL PROSPECTIVE JURORS. THIS ERRONEOUS DENIAL CAUSED APPELLANT TO SUFFER HARM.

Voir Dire Facts

At appellant's trial for murder, the defense attorney posed the following question during voir dire and asked each venire member to respond: "Could you consider the minimum of 5 years on a murder case?" (RR2 156). He further clarified, "if you were selected on the jury and if the Defendant was found guilty beyond a reasonable doubt for murder, in an appropriate case for murder, the punishment range is five to life. Would you consider the minimum range of punishment of five years?" (RR2 160). 26 members of the panel stated that they could not consider the minimum punishment of five years. (RR2 157-68). This represents 40% of the venire that had a total of 65 people.

After voir dire was completed, defense counsel challenged each of these individuals for cause. (RR2 171-90). As the parties were discussing the numerous prospective jurors who couldn't consider a five-year sentence, defense counsel lodged

an objection to three prospective jurors: numbers 16, 18, and 26. (RR2 178). The judge voiced her opinion about the some of the veniremen, that is not supported by the record:

> THE COURT: I'm going to deny those. It came to a point where they were all saying the same thing [cause] it seemed like they figured out what to say to get out of jury selection.
>
> MR. DOEBBLER: Well, Your Honor, they did say it. You know, I don't put words in their mouth. They said it. It's on record.
>
> THE COURT: We can call them back to clarify, but as of this time, 16, 18, and 26 are denied and I will put them on the list, and I will ask them the questions. (RR2 178).

As the challenges for cause discussion continued:

> THE COURT: Does the Defense have any additional challenges for cause on the third row?
>
> MR. DOEBBLER: No. 20, No. 36, and 37, Your Honor, they couldn't consider the minimum range of punishment.
>
> THE COURT: All right. Those do fall under the same category as 16, 18, and 26. So, I will put them on the list. They are denied at this time, but we will call them in for further questioning. (RR2 183-84)…
>
> MR. DOEBBLER: I have 46 for -- I have 46 for the range of punishment, and I believe that's in the State's voir dire, it is.
>
> THE COURT: 46, during the Court's voir dire indicated that he doesn't want to be put in the position. He doesn't believe he's knowledgeable enough to do -- to make an election as to punishment. It was denied as to those reasons when the State requested it, unless the Defense has any additional arguments.
>
> MR. DOEBBLER: No, he did say for sure that he wasn't [gonna] consider the minimum range of punishment, that individual.

> THE COURT: We can put him on the list. We can call him in with the other ones that's on that list. (RR2 185)….
>
> MR. DOEBBLER Additionally, 47 and 48, are they still on?
>
> THE COURT: They are.
>
> MR. DOEBBLER: Both 47 and 48 wouldn't consider the minimum range of punishment.
>
> THE COURT: They're on the same issue as some of the other ones. So, I'll put them on the list. They are denied for now. (RR2 189).

The judge then instructed the bailiff to bring several prospective jurors up one by one—numbers 5, 16, 18, 26, 36, 37, 46, 47, 48, 54. (RR2 192). The judge asked No. 16 whether he could consider the full range of punishment, to which he replied yes. (RR2 193). Defense counsel asked to follow up with No. 16, as he previously stated he couldn't consider the *five-year* minimum – revealed on page 162 of the voir dire record. (RR2 162, 194). The judge denied the challenge for cause. (RR2 194).

Of note—the judge changed defense counsel's question. She stated the range of punishment generally, with no specific years, where defense counsel asked specifically about the *five year* minimum sentence—Would you consider the minimum range of punishment of five years?" (Compare RR2 160 and RR2 193). The judge did this several times to rehabilitate prospective jurors and appeared more concerned with rehabilitating venirepersons to avoid busting the panel than ensuring a fair and impartial jury. (RR2 192-93, 194, 196, 198, 200, 201, 202-03, 204).

With regard to venireperson No. 26:

THE COURT: And my question to the group was can you wait to consider -- can you wait to hear all of the evidence, and then are you able to consider the full range of punishment? And the consideration was, yes, I thought about it, yes, I thought about it, yes or no. What's your response to that?

PROSPECTIVE JUROR: I said, yes, but it kind of ties into my personal bias, like the range that we get to, if I have any personal bias with what I've dealt with in the past. If that will, like, bring any emotions to the case.

THE COURT: And when you talk about personal bias, because I don't believe that we touched on this. What do you mean?

PROSPECTIVE JUROR: It's a witness to an event called in a deceased person. So, it's kind of like the range of, like, if they call for -- like self-defense or like the lower end of the spectrum, I don't know if I could confidently say -- if I would agree with, like, the lower end of punishment for a final verdict.

THE COURT: Okay. And is that -- cause I'm not asking you to agree or disagree. My question is, can you wait? Cause it sounds like you have an example where things happened. It also sounds like you can set that aside and determine this case on what you hear here; is that correct?

PROSPECTIVE JUROR: Uh-huh.

THE COURT: Okay. And so, my question is, can you wait to hear all of the evidence before you make a decision; or are you right now closed to the idea of possibly considering both sides, the full range?

PROSPECTIVE JUROR: I would like to say I would consider all the evidence before I made a decision.

THE COURT: And when you say you would like to say, is that a yes or no?

PROSPECTIVE JUROR: I could wait until all the evidence is presented. (RR2 196-98).

The challenge for cause was denied. (RR2 198).

When the parties got to Nos. 47, 48, and 54, the judge expressed concerns about busting the panel. (RR2 202-03). Upon the State's request to continue questioning, in the case they double-struck potential jurors, the judge continued with voir dire. (RR2 203). She asked No. 47 about the range of punishment, not the minimum of five years, and the prospective juror agreed she could follow it; thus, the court denied the challenge for cause. (RR2 203-04).

Before the panel was released and the jury seated, defense counsel made an objection to the formation of the jury and requested additional strikes because of those that were overruled. (RR2 207). Defense counsel stated:

> I wanted to put on [the] record, I had to strike Juror No. 5, 16, 26, and 47 because they said when I did my voir dire, they would not consider the minimum range of punishment. And, therefore, I had to use four of my peremptory challenges just to keep those off the jury. (RR2 209-10)…
>
> I was forced to strike 5, 47, 16, and 26, and before the jury was even sitting -- seated, I would have struck 11, 25, and 51, and also No. 38; but because my peremptory challenges -- my strikes for cause were denied and I had to use them on ones that, in my opinion, wouldn't consider the full range of punishment. Therefore, I'm requesting four additional peremptory challenges to strike those four individuals off the jury. So, I object to the jury. (RR2 11).

The judge denied this request. (RR2 212). Three prospective jurors that defense counsel would have struck, had he not had to use preemptory challenges on them, ended up seated on the jury—Nos. 11, 38, and 51. (RR2 211-12). The jury subsequently found appellant guilty and sentenced him to 35 years in prison. (CR 505, 514).

Law governing Challenges for Cause

A defendant may challenge a potential juror for cause if he or she is biased or prejudiced against the defendant or the law on which the State or defendant is entitled to rely. *Cardenas v. State*, 325 S.W.3d 179, 184–85 (Tex. Crim. App. 2010). A trial judge must excuse the juror if bias or prejudice would impair the juror's ability to carry out their oath and instructions in accordance with the law. *Comeaux v. State*, 445 S.W.3d 745, 749 (Tex. Crim. App. 2014). Before the judge excuses the prospective juror, the law must be explained to them and the challenger must show that the potential juror understood the law and still could not overcome his prejudice. *Gardner v. State*, 306 S.W.3d 274, 295 (Tex. Crim. App. 2009)

To establish harm for an erroneous denial of a challenge for cause, the defendant must show on the record that:

(1) he asserted a clear and specific challenge for cause;
(2) he used a peremptory challenge on the complained-of venire member;
(3) his peremptory challenges were exhausted;
(4) his request for additional strikes was denied; and
(5) an objectionable juror sat on the jury.

Comeaux, 445 S.W.3d at 749; *Davis v. State*, 329 S.W.3d 798, 807 (Tex. Crim. App. 2010). The purpose of the five steps on a challenge for cause is to demonstrate that the defendant suffered a detriment from the loss of a peremptory strike; this error actually harmed the defendant. *Feldman v. State*, 71 S.W.3d 738, 744 (Tex. Crim. App. 2002) (holding that the detriment from an erroneous denial of a challenge for cause is that the defendant was forced to take an identified objectionable juror whom he would have

struck had the trial court granted his challenge for cause or granted him additional peremptory strikes); *see also Gonzales v. State*, 353 S.W.3d 826, 831 (Tex. Crim. App. 2011) (noting that the issue is whether an erroneous ruling on a challenge for cause "effectively deprive[d]" defendant of "statutorily allotted peremptory challenges"); *Johnson v. State*, 43 S.W.3d 1, 11 (Tex. Crim. App. 2001) ("harm is shown by the fact that '[i]t was a peremptory challenge which was wrongfully taken from [the defendant]' ") (Johnson, J., concurring) (quoting *Wolfe v. State*, 178 S.W.2d 274, 280–81 (1944)).

Peremptory strikes are given to each side to use as they see fit. *Comeaux*, 445 S.W.3d at 749. The defendant may strike any member of the venire panel for any reason (except a prohibited reason such as race or sex) or no reason at all. *Id.* When the trial judge denies a valid challenge for cause, forcing the defendant to use a peremptory strike on a panel member who should have been removed, the defendant is harmed if he would have used that peremptory strike on another objectionable juror. *Comeaux*, 445 S.W.3d at 749; *Chambers v. State*, 866 S.W.2d 9, 22 (Tex. Crim. App. 1993).

Appellant can show Harm from the Trial Court's Error

Here, the trial court was faced with a situation where three prospective jurors had previously stated an ability to follow the law, and were being challenged based upon their response to defense counsel's question, "Could you consider the minimum of 5 years on a murder case?"[1] (RR2 156, 160).

[1] Defense counsel originally identified four prospective jurors who couldn't consider the minimum of five years; further review of the record shows there were three; Venireperson No. 5 said they could consider it. (RR2 161).

Appellant has shown all five steps to establish harm from the court's erroneous rulings: he asserted a specific challenge to three prospective jurors—Nos. 16, 26, and 47, he used peremptory challenges to remove them, he exhausted his peremptory challenges, he requested additional strikes from the judge, which was denied, and he identified four prospective jurors that were objectionable, those he would have struck—Nos. 11, 25, 38, and 51. Three of those prospective jurors ended up seated on the jury—Nos. 11, 38, and 51. (RR2 210).

By complying with these steps, Appellant shows that he actually needed the peremptory strikes that he was forced to use on the other three prospective jurors. *Cf. Comeaux,* 445 S.W.3d at 751 (appellant failed to show harm because he could have, but chose not to, strike the objectionable juror); *Hudson v. State*, 620 S.W.3d 726, 734 (Tex. Crim. App. 2021) (because defendant received an additional peremptory challenge, he could not demonstrate harm). And Appellant was not required to explain why any of those four prospective jurors he would have struck were objectionable. *Comeaux,* 445 S.W.3d at 750.

When Appellant challenged Nos. 16, 26, and 47 for cause, the judge denied the challenge, and then offered to question them further. *See Gardner v. State*, 733 S.W.2d 195, 210 (Tex. Crim. App. 1987) (a trial judge has the inherent authority to question prospective jurors regarding their qualifications and ability to serve as fair and impartial jurors). As previously explained in detail, she took the opportunity to question the

prospective jurors in a less specific manner, talking generally about whether they could consider the range of punishment. This changed the scope of the inquiry.

Defense counsel's question included a relevant fact, very specific to the facts of this case—when a defendant does not have any felony convictions he is eligible for the minimum punishment of five years for murder. When defense counsel spoke to the venire about the five years, 40% of them thought it was too lenient of a punishment and couldn't follow the law. This is a proper scope of inquiry. *See* Tex. Code Crim. Proc. art. 35.16; *Cardenas*, 325 S.W.3d at 185 (a juror who states that he cannot consider the minimum punishment for an offense is subject to a challenge for cause; in this case, a minimum sentence of five years for aggravated sexual assault of a child); *Johnson v. State,* 982 S.W.2d 403, 406 (Tex. Crim. App. 1998) (prospective jurors who stated unequivocally during voir dire that they could not consider assessing minimum legal punishment for defendant found guilty of aggravated robbery were challengeable for cause; thus, the trial court erred).

When a trial court's questions or comments are reasonably calculated to benefit the State or prejudice the defendant, it will reversible error occur. *Woodall v. State*, 350 S.W.3d 691, 696 (Tex. App.—Amarillo 2011, no pet.). Certainly, the judge's articulated concerns with busting the panel and then broadening the question posed by defense counsel to keep more of the venire benefitted the State. *See Jacobs v. State*, 560 S.W.3d 205, 224 (Tex. Crim. App. 2018) (Richardson, J., dissenting) (addressing judge's concern about busting a panel—when the right to select a fair and impartial jury clashes with a

judge's concern over being able to obtain a qualified jury…the solution is not to restrict the attorneys from asking legitimate voir dire questions (that may validly eliminate unqualified jurors)).

Although trial judges have discretion to clarify whether a juror's response is the result of confusion, misunderstanding, or mistake, making unfounded assumptions that they are lying, and factoring that into the challenge for cause evaluation is improper. The judge stated that she believed some of the venirepersons were answering defense counsel's question falsely, to try to get out of jury duty. There is simply no support for it in the record. And it favors the State and kept the panel from busting. *Woodall,* 350 S.W.3d at 696; *In Re the Commitment of Barbee*, 192 S.W.3d 835, 848 (Tex. App.—Beaumont 2006, no pet.) (trial judge's comments in voir dire regarding busting the panel and honesty present a difficult issue; it would be wise for trial courts to avoid speculating before the jury panel on the possible motivations or make critical comments).

The intent of voir dire is to convene a competent, fair, impartial, and unprejudiced jury to judge the facts of the case. *Bowser v. State*, 865 S.W.2d 482, 487 (Tex. App.—Corpus Christi-Edinburg 1993, no pet.). The primary purpose of voir dire is to inquire about *specific* views that would prevent or substantially impair jurors from performing their duty in accordance with their instructions and oath. *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 749 (Tex. 2006). The answers the three venirepersons provided were in response to a *specific* question posed by defense counsel regarding the minimum of five years confinement for murder. In an attempt to rehabilitate them, the

judge broadened the question and scope of the inquiry. This was not proper. *Bowser*, 865 S.W.2d at 487 (restricting voir dire questioning on theories of punishment is reversible error).

The trial court abused its discretion by denying appellants' three challenges for cause to prospective jurors who unequivocally stated that they could not consider the minimum punishment of five years. The court's attempt to rehabilitate them by changing the question should not factor into this analysis. *Cardenas*, 325 S.W.3d at 189; *T.K.'s Video, Inc. v. State*, 871 S.W.2d 527, 529 (Tex. App.—Fort Worth 1994, pet. ref'd) (trial judge's improper overruling of challenge for cause to venireperson is normally reversible error).

SECOND ISSUE ON APPEAL

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE AND STATEMENTS

Suppression evidence

Appellant filed a motion to suppress evidence and statements obtained from his warrantless arrest on January 30, 2021, two days after the murder. (CR 51-53; RR3 13, 63-64; MTS Exhibit No. 2). The trial court scheduled a pre-trial hearing to address the issues. (RR3 13-68). After hearing all of the evidence, the trial court denied the motion; there are no findings of facts or conclusions of law. (RR3 68).

The State presented two witnesses at this hearing—Officer Schrock and Detective Brown. (RR3 13, 40). Detective Brown was assigned the investigation of this

homicide and had developed Appellant as a suspect. (RR3 40-43). Brown reached out to Officer Schrock for assistance with the surveillance of Appellant. (RR3 46-47). He conveyed to Schrock he wanted to see if Appellant would give a voluntary statement. (RR3 15-16, 19, 47-48). On January 30, Schrock was watching Appellant's apartment when he saw Appellant and his girlfriend; he observed Appellant get into a white Nissan with her. (RR3 16-17). Schrock became concerned when he saw Appellant carrying two bags to the car, thinking perhaps he was leaving town. (RR3 17-19).

Schock was in plain-clothes that day and asked a marked unit to initiate a traffic stop of the vehicle. (RR3 20-21). Officer Ochoa observed a traffic violation and initiated the traffic stop. (RR3 23, 47; MTS Exhibit No. 3). Ochoa was aware that Appellant was a murder suspect; he and his partner drew their weapons on Appellant and his girlfriend, as did Schrock. (RR3 24, 33-34). Schrock stated when he pulled his gun out and pointed it at the Appellant, Appellant was not free to leave. (RR3 33-34). He acknowledged a reasonable person would not believe they were free to leave. (RR3 34). Appellant was immediately apprehended and placed in handcuffs. (MTS Exhibit Nos. 1, 3).

Schrock asked Appellant whether he would be willing to talk to detectives. (RR3 27-30, 47). According to Schrock, Appellant responded that he had a pretty good idea what it was about. (RR3 30). Schrock told Appellant he was not under arrest, but the handcuffs remained on. (RR3 30; MTS Exhibit No. 1). Schrock acknowledged that when someone is handcuffed, they know they're not free to leave. (RR3 37). Schrock did not read Appellant his rights. (RR3 35). And he admitted he never told Appellant

he was free to leave. (RR3 39). Ochoa and his partner then transported Appellant to the homicide division. (RR3 30-31).

Detective Brown met Appellant when he came into the police station; he did not read him his rights; he characterized the encounter as a "voluntary statement." (RR3 48). They discussed the events of January 28th, 2021, and Appellant admitted he felt Williams had been inappropriate with his girlfriend. (RR3 51-52; MTS Exhibit No. 2). Appellant further admitted he shot at Williams' car. (RR3 52; MTS Exhibit No. 2). Brown never advised Appellant he was free to leave. (RR3 59).

Brown stepped out of the interview room to call the DA's office. (RR3 56; MTS Exhibit No. 2). As there was no existing arrest warrant, he provided the details of the case to them, and they accepted murder charges. (RR3 61). Brown went back into the interview room and placed Appellant under arrest for murder; he seized Appellant's cell phone, later getting a search warrant. (RR3 56, 61-62; MTS Exhibit No. 2).

At trial, Appellant's videotaped interview was admitted into evidence, as well as photographs, text messages, his browser history, and GPS location, all obtained from his cell phone. (RR3 283-84, 303, 306-08; RR4 10-40). Appellant filed a motion to suppress this evidence, complaining he was arrested without being provided his rights, and this evidence was inadmissible as fruits of the poisonous tree. (CR 51-53).

In *Miranda v. Arizona*, the Supreme Court of the United States held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of

procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. 436, 444 (1966). Texas has codified these safeguards in the Texas Code of Criminal Procedure. See Tex. Code Crim. Proc. art. 38.22 § 3(a) (no oral statement of an accused "made as a result of custodial interrogation" shall be admissible against him in a criminal proceeding unless an electronic recording of the statement is made, the accused is given all specified warnings, including the *Miranda* warnings, and he knowingly, intelligently, and voluntarily waives the rights set out in the warnings).

The "fruit of the poisonous tree" doctrine serves to exclude from evidence both direct and indirect products of Fourth Amendment violations. *Wong Sun v. United States*, 371 U.S. 471, 484 (1963); *State v. Iduarte*, 268 S.W.3d 544, 550 (Tex. Crim. App. 2008). Appellant claimed the data seized from his cell phone was logically the product of the unlawful seizure of his phone. (RR3 63). The data from Appellant's phone—text messages, browser history, photographs and location data—should not have been admitted at trial. The trial court erred in this ruling.

Law governing motion to suppress evidence

When reviewing a trial court's ruling on a motion to suppress, this Court applies an abuse-of-discretion standard and shall overturn the trial court's ruling only if it is outside the zone of reasonable disagreement. *Martinez v. State*, 348 S.W.3d 919, 922 (Tex. Crim. App. 2011). The trial judge is the sole factfinder at the hearing and may assess the credibility of witnesses and determine what weight to give that testimony. *Wexler v. State*, 593 S.W.3d 772, 778 (Tex. App.—Houston [14th Dist.] 2019), *aff'd*, 625

S.W.3d 162 (Tex. Crim. App. 2021). This Court shall affirm the trial court's ruling if it is reasonably supported by the record and is correct under any theory of law applicable to the case. *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006).

Miranda warnings and Article 38.22 requirements are mandatory only when there is a custodial interrogation. *Herrera v.* State, 241 S.W.3d 520, 526 (Tex. Crim. App. 2007) (the meaning of custody is the same for purposes of both *Miranda* and Article 38.22). The State has no burden to show compliance with *Miranda* unless and until the record as a whole clearly establishes that the defendant's statement was the product of a custodial interrogation. *Id.* When considering whether a person is in custody for *Miranda* purposes, this Court applies the reasonable person standard. *Wexler*, 593 S.W.3d at 778. This inquiry includes an examination of all the objective circumstances surrounding the questioning, with no consideration given to the subjective belief of police officers, unless that belief was conveyed to the defendant. *Herrera*, 241 S.W.3d at 525-26.

There are four general situations which may constitute custody:

1) when the suspect is physically deprived of his freedom of action in any significant way;

2) when a law enforcement officer tells the suspect that he cannot leave;

3) when law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted; and

4) when there is probable cause to arrest and law enforcement officers do not tell the suspect that he is free to leave.

Dowthitt v. State, 931 S.W.2d 244, 255 (Tex. Crim. App. 1996). Arguably, two of these categories are implicated in this case.

Both detention and arrest involve a restraint on one's freedom; the difference is in the degree. *Ortiz v. State*, 421 S.W.3d 887, 890 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd). An arrest places a greater restraint on an individual's freedom of movement than does an investigative detention. *Id.* Persons temporarily detained for purposes of investigation are not in custody for *Miranda* purposes; thus, the right to *Miranda* warnings is not triggered during an investigative detention. *Hauer v. State*, 466 S.W.3d 886, 893 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

There is no bright line rule dividing investigative detentions and custodial arrests. *State v. Sheppard*, 271 S.W.3d 281, 291 (Tex. Crim. App. 2008). When called upon to make that determination, courts examine several factors including:

> "the amount of force displayed, the duration of a detention, the efficiency of the investigative process and whether it is conducted at the original location, or the person is transported to another location, the officer's expressed intent—that is, whether he told the detained person that he was under arrest or was being detained only for a temporary investigation, and any other relevant factors."

Id; Wexler, 593 S.W.3d at 779.

<u>The trial court erred in denying the motion to suppress</u>

The trial court committed reversible error when it overruled Appellant's motion to suppress evidence. (RR3 68). Appellant was in custody when he was placed in handcuffs after a traffic stop. He was physically deprived of his freedom and was never

told he was free to leave. (RR3 33-34). Officer Schrock admitted they created a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted. (RR3 33-34). After Appellant was transported to the police station in handcuffs, Detective Brown never told Appellant he was free to leave. (RR3 59). Appellant should have received warnings required by *Miranda* and Article 38.22 of the Code of Criminal Procedure. Because he did not receive them, (the record is completely void of when, if ever, they were given) the trial court should have sustained his objections to the evidence and excluded it from trial.

This Court evaluates the four situations that constitute custody using factors such as: the amount of force displayed, the efficiency of the investigative process, whether the individual is transported to another location, and the officer's expressed intent, as well as any other pertinent factors. *Sheppard*, 271 S.W.3d at 291; *Wexler*, 593 S.W.3d at 779.

The first situation—that the suspect is physically deprived of his freedom of action in any significant—is clearly shown. From the onset of his contact with police officers that day, Appellant's movements were restrained. His vehicle was stopped, and several officers drew their weapons on him then placed him into handcuffs. This is an incredible amount of force. *Rodriguez v. State*, 975 S.W.2d 667, 676-77 (Tex. App.—Texarkana 1998, pet ref'd) (defendant was under arrest, not detained, when officers stopped defendant's car, drew their weapons, and took him into custody). Appellant was transported to the police station in handcuffs, and they were only taken off once

he was in an interrogation room where he was never told he was free to leave. *Sheppard*, 271 S.W.3d at 290 (arrest involves greater restraint than detention).

It would be illogical to characterize this fact scenario as anything but an individual being deprived of their freedom. *Cf. Ervin v. State*, 333 S.W.3d 187, 209 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (finding that appellant was not in custody when she was not handcuffed or restricted in her movements); *Rathbun v. State*, 96 S.W.3d 563, 566 (Tex. App.—Texarkana 2002, no pet.) (holding that interrogation was not custodial based on, among other factors, the fact that the accused drove his own vehicle to the police station).

The third scenario—that law enforcement officers created a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted—is also present. And the evidence supporting this comes from law enforcement. Officer Schrock stated when he pulled his gun out and pointed it at the Appellant, Appellant was not free to leave. (RR3 33-34). He acknowledged a reasonable person would not believe they were free to leave. (RR3 34). He further explained that when someone is handcuffed, they know they're not free to leave. (RR3 37). By admitting he created a situation that led Appellant, and a reasonable person, to believe their freedom of movement has been restricted; Schrock's testimony demonstrates Appellant was in custody.

In *Charles v. State*, the Dallas Court of Appeals weighed a similar scenario, balancing the use of handcuffs for officer safety and the reasonableness of this action

as it escalates to custody. 2021 WL 4988310, No. 05-20-00458-CR, at *6 (Tex. App.—Dallas Oct. 27, 2021, pet. ref'd) (not designated for publication). The Court was guided by the notion that "common sense and ordinary human experience govern over rigid criteria." *Id;* citing *Balentine v. State*, 71 S.W.3d 763, 771 (Tex. Crim. App. 2002). The Court queried whether a reasonable person who is handcuffed on the side of the road in the presence of two armed police officers would feel free to leave and the answer was emphatically no. *Charles*, 2021 WL 4988310 at *6.

Interestingly, Officer Schrock testified Appellant was not under arrest, which is a factor to consider. *Sheppard*, 271 S.W.3d at 291; *Wexler*, 593 S.W.3d at 779. However, just because that was Schrock's intention, does not make it so. *See Bates v. State*, 494 S.W.3d 256, 271-72 (Tex. App.—Texarkana 2015, pet. ref'd) (defendant was in "custody," thus triggering *Miranda* requirements, when he was handcuffed and placed in police cruiser, despite officer's intent to just detain him). Appellant was deprived of his freedom in a significant way and was clearly not free to leave, as a reasonable person would be led to believe. *Id.*

Schrock stated when he pulled his gun out and pointed it at the Appellant, Appellant was not free to leave. (RR3 33-34). And he admitted he never told Appellant he was free to leave. (RR3 39). Similarly, Brown never advised Appellant he was free to leave. (RR3 59). In this case, the officers did not apprise Appellant of his *Miranda rights* when they began custodial interrogation and failed to apply any curative measures in

order to ameliorate the harm caused by the *Miranda* violation. Appellant's statement at the traffic stop and his videotaped statement should have been suppressed.

Additionally, the evidence retrieved from his cell phone should be excluded as fruit of the poisonous tree. *Iduarte*, 268 S.W.3d at 550 (fruit of the poisonous tree doctrine generally precludes the use of evidence, both direct and indirect, obtained following an illegal arrest). When Appellant met Brown at the police station, he still wasn't read his rights. Appellant admitted to shooting Williams' car; his phone was taken, and he was arrested. The proper procedure would have been to get an arrest warrant, arrest Appellant, and then take the phone, subpoena the phone provider or then get a search warrant for the phone. (RR3 63).

Thus, all evidence from his cell phone—texts, photos, browser history and GPS location—was therefore inadmissible. *Wong Sun*, 371 U.S. at 484; *Iduarte*, 268 S.W.3d at 550. The trial court erred by admitting this evidence.

Appellant was harmed by the trial court's error

The admission of incriminating statements made during a custodial interrogation where no proper *Miranda* warnings were given constitutes constitutional error. *See* Tex. R. App. P. 44.2(a); *Akins v. State*, 202 S.W.3d 879, 891-92 (Tex. App.—Fort Worth 2006, pet. ref'd.). Constitutional error requires reversal "unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment." Tex. R. App. P. 44.2(a). In conducting this analysis in the context of a *Miranda* error, this Cour must judge the magnitude of the error in light of the evidence

as a whole to determine the degree of prejudice to the defendant resulting from that error. *Jones v. State*, 119 S.W.3d 766, 777 (Tex. Crim. App. 2003); *see Wesbrook v. State*, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000). "If there is a reasonable likelihood that the error materially affected the jury's deliberations, then the error is not harmless beyond a reasonable doubt." *McCarthy v. State*, 65 S.W.3d 47, 55 (Tex. Crim. App. 2001).

In determining whether constitutional error in the admission of evidence is harmless, this Court considers several factors, including (1) the importance of the evidence to the State's case, (2) whether the evidence was cumulative of other evidence, (3) the presence or absence of other evidence corroborating or contradicting the evidence on material points, (4) the overall strength of the State's case, and (5) any other factor, as revealed by the record, that may shed light on the probable impact of the error on the average juror. *Clay v. State*, 240 S.W.3d 895, 904 (Tex. Crim. App. 2007).

The State used all of this evidence to establish Appellant committed the murder of Williams. It was not cumulative of other evidence. While one witness believed Appellant shot Williams' car, there was no other evidence corroborating the text messages, including appellant's statements to his girlfriend who did not testify, his browser history, and his location during the murder, from the GPS data. *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) ("a defendant's own confession is probably the most probative and damaging evidence that can be admitted against him ... the admissions of a defendant come from the actor himself, the most knowledgeable and

unimpeachable source of information about his past conduct."). All of this evidence strengthened the State's case.

In *McCarthy*, the Court of Criminal Appeals held that the erroneous admission of the defendant's statement into evidence was harmful, even though the State offered ample evidence of the defendant's guilt from sources independent of his statement. 65 S.W.3d at 55. The Court noted that although the defendant's statement did not place the murder weapon in the defendant's hands, it was "powerful enough to establish her guilt of capital murder either as a party or as a conspirator." *Id.* at 56.

On this record, the judge's error certainly contributed to Appellant's conviction, which requires this Court to reverse the judgement. *Clark v. State*, 365 S.W.3d 333, 338 (Tex. Crim. App. 2012).

CONCLUSION

It is respectfully submitted that there is reversible error to justify appellant's conviction and sentence be overturned.

Respectfully submitted,

/S/ JESSICA AKINS

Attorney for Appellant
State Bar No: 24029415
3200 Wilcrest Drive, Suite 170
Houston, Texas 77042
jessica.akins.esq@gmail.com

CERTIFICATE OF COMPLIANCE

In accordance with the Texas Rules of Appellate Procedure, I hereby certify that appellant's brief, filed on May 7, 2025, has 7,221 words based upon a word count under MS Word.

/S/ JESSICA AKINS
Jessica Akins

CERTIFICATE OF SERVICE

Appellant has transmitted a copy of the foregoing instrument on May 7, 2025 to counsel for the State of Texas via electronic mail at:

Jessica Caird
Chief, Appellate Division
Harris County District Attorney's Office
caird_jessica@dao.hctx.net

/S/ JESSICA AKINS
Jessica Akins

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Jessica Akins on behalf of Jessica Akins
Bar No. 24029415
jessica.akins.esq@gmail.com
Envelope ID: 100537678
Filing Code Description: Brief Not Requesting Oral Argument
Filing Description: Appellant's Brief
Status as of 5/7/2025 10:47 AM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Jessica Caird	24000608	caird_jessica@dao.hctx.net	5/7/2025 10:45:24 AM	SENT