IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. AP-77,033

GEORGE THOMAS CURRY, Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL FROM CAUSE NO. 1223596
IN THE 209TH JUDICIAL DISTRICT COURT
HARRIS COUNTY

NEWELL, J., delivered the opinion of the Court, in which KELLER, P.J., KEASLER, HERVEY, RICHARDSON, YEARY, KEEL and WALKER, JJ., joined. ALCALA, J., filed a dissenting opinion.

O P I N I O N

On February 14, 2014, a jury convicted Appellant of murdering Edward "Ricky" Virappen in the course of committing or attempting to commit robbery. *See* TEX. PENAL CODE § 19.03(a)(2). Pursuant to the jury's answers to the special issues set forth in Texas Code of Criminal Procedure Article 37.071, § 2(b) and (e), the trial court sentenced

Appellant to death. *See* TEX. CODE CRIM. PROC. art. 37.071, § 2(g).[1] Direct appeal to this Court is automatic. Art. 37.071, § 2(h). Appellant raises twenty-two points of error.[2] After reviewing Appellant's points of error, we find them to be without merit. Consequently, we affirm the trial court's judgment and sentence of death.

In his third and fourth points of error, Appellant challenges the legal sufficiency of the evidence to support his conviction and the jury's affirmative answer to the future dangerousness special issue. We will address these claims first. The remaining points of error will be addressed in the order presented in his brief.

STATEMENT OF FACTS

On Friday, May 1, 2009, after the Popeye's restaurant on FM 529 in Harris County closed for the night, restaurant employees Wilber Perez, Rogelio Rojas, and Oscar Reyes and their manager, Edward Virappen, cleaned the restaurant and performed end-of-shift procedures after a busy day.[3] The restaurant doors remained locked while the employees, who were all teenagers, performed their closing duties. When Perez finished his duties, he unlocked the single exterior door on the restaurant's east side and, leaving the door

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[1] Unless otherwise indicated, all future references to Articles refer to the Texas Code of Criminal Procedure.

[2] We granted Appellant leave to file a supplemental brief, in which he raises two points of error.

[3] The director of operations testified that Fridays were the busiest day of the week and the biggest money-making day at Popeye's in 2009. The FM 529 restaurant was the busiest location in its franchise group.

unlocked, began to walk to the restaurant's dumpster area to retrieve his bicycle, which was hidden there. As Perez walked toward the dumpster, he observed a man standing by a small four-door, dark-green car with the hood open. Perez described the man as black, bald, muscular, over six feet tall, and dressed in a black suit.[4] Also, Rojas looked out the drive-through window and noticed a black male wearing a black business suit standing beside a dark-colored car with its trunk open. The car was parked at a neighboring store.

Virappen set the alarm and he, Reyes, and Rojas started to walk out the east door.[5] As they were walking out, they encountered a man entering the restaurant. Reyes tried to tell the man, who was wearing a suit, that the restaurant was already closed and he needed to leave. Rojas recognized the man entering the restaurant as the one he had seen standing by the car in the neighboring parking lot. At this point in their trial testimony, both Rojas and Reyes identified Appellant in the courtroom as the man who entered the Popeye's that night.[6] Rojas said appellant's arms were crossed as he entered the Popeye's, and he was holding an automatic pistol in one of his hands. Appellant told them in a very serious tone to go back inside the restaurant. They complied.

Appellant gestured toward the back of the restaurant and instructed Virappen to

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[4] Perez did not get a good look at the man's face. When the police later showed him a photo array, he was not able to identify the perpetrator.

[5] Popeye's procedures required the employees to all leave the store together at the end of the night.

[6] Reyes testified that the restaurant was well lit. Rojas testified that he had a clear view of Appellant and "couldn't take [his] eyes off of him."

turn off the alarm. The employees began to move in the direction of the alarm. Appellant said, "[t]ake me to the money" or "where is the money" and told Virappen to open the safe. Appellant appeared to already know the safe's location. Only Virappen, as the manager, could deactivate the alarm and open the safe.

Meanwhile, Perez returned with his bike and opened the restaurant's east door. He overheard the man he had seen in the parking lot speaking to Virappen, Rojas, and Reyes. Virappen looked up at Perez and gave him a look that indicated to Perez that he should go get help. Perez then fled on his bike. Because he had no cell phone, he rode through the neighborhood until he spotted a family in their garage. He told them what was happening, and they let him use their phone to call 911.

In response to Appellant's demands, Virappen crouched down, opened the safe, and retrieved the bag of money that was inside. Appellant grabbed the bag of money and also took the money from the cash register trays, which the employees had set out full of cash for the next morning.[7] Appellant, who was pointing the gun at the three employees, told them to empty their pockets. Virappen and Reyes complied. Rojas emptied his pockets, too, but secretly retained his phone. Appellant ordered the employees to enter the restaurant's walk-in cooler. Rojas believed Appellant intended to kill them. All four

[7] Later, Popeye's determined that $2,700 or $2,800 was stolen from the restaurant that night.

men walked into the cooler and Appellant told them again to empty their pockets.[8] Rojas quickly threw his cell phone into the corner.

Appellant, still pointing the pistol at the men, ordered Rojas and Reyes to walk into the cooler's freezer compartment. An interior door separated the freezer compartment from the rest of the cooler. Reyes and Rojas were frightened and told Appellant that they did not want to go into the freezer. Appellant indicated that they could stay outside the freezer with Virappen. Reyes recalled Appellant asking them, "Well, [do] all three of you guys want to die?" Virappen told Reyes and Rojas that they should go into the freezer. Virappen assured them, "I'll take care of this, and in a minute I'll get you out."

Reyes and Rojas tried to hide in the freezer, but the space was too small to provide any hiding places. Through the closed freezer door, they heard a gunshot, Virappen screaming, and then more gunshots. Reyes locked the freezer door from the inside. Appellant then began shaking the freezer door, apparently trying to open it from the outside. Rojas and Reyes were both fearful and crying as they waited in the freezer. However, after three or four minutes of silence, they decided to open the door because they were worried about Virappen. They emerged from the freezer and saw Virappen lying on the floor. Reyes ran to Virappen and grabbed his hand. He saw Virappen exhale what appeared to be his last breath. Rojas told Reyes that Virappen was dead.

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[8] Reyes only remembered Appellant telling them to empty their pockets one time.

Rojas ran to the front of the store but saw no one. He locked the east door and retrieved his cell phone. He did not know what to do, and so he called his mother. She told him not to touch anything and to call the police. He called the police, but as he hung up the phone, he could see that the police were already knocking on the door due to Perez's earlier 911 call. Rojas unlocked the door and let them into the restaurant.

Harris County Sheriff's deputies arrived at the Popeye's at around midnight. Deputy Mark McElvany was the lead crime scene investigator. The restaurant appeared clean and well-lit. Virappen's body was lying just outside the restaurant's walk-in cooler. He had two gunshot wounds in his left arm, one in his right side, one in his lower back, and one in his upper back.[9] The safe was open and contained only coins. Officers found six shell casings, one intact projectile, and six projectile fragments. A firearms examiner found the tool marks on these items to be consistent with the use of a Smith & Wesson 9-millimeter semiautomatic pistol. The placement of the casings and Virappen's body suggested that Appellant shot him from inside the cooler as Virappen was trying to exit the cooler.

In addition, Deputy McElvany found bullet fragments and damage to the floor underneath the body, suggesting that Virappen was shot once in the back after he fell to the ground. Virappen was holding his remote control car key in his left hand. When officers began processing the scene for fingerprints, they discovered a palm print on the

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[9] The medical examiner concluded that the gunshot wounds to Virappen's "left upper extremity and torso" caused his death.

interior side of the restaurant's east door. The door was otherwise clean except for the area of the palm print. Popeye's employees were required to clean the glass doors daily at the end of the evening shift and at other times during the day, if needed. Based on McElvany's training and experience, he believed that the print had been left on the door recently. After the crime scene unit lifted the palm print, McElvany ran it through the Automated Fingerprints Identification System (AFIS), a fingerprint database, but found no matches.[10] McElvany also took palm prints from Perez, Reyes, and Rojas.

Officers took Reyes and Rojas to the police station and interviewed them in the early hours of the morning. Rojas described the perpetrator as a black male, about six feet tall, very muscular, bald, wearing a dark-colored suit, and holding a silver pistol. Rojas had never seen him before the night of the offense. Reyes similarly described the perpetrator to police as about six feet in height, 240 to 250 pounds in weight (stocky), with a medium-black skin tone, a very short hair cut, and no facial hair, wearing a suit jacket and suit pants, a dark shirt, and a black tie, and holding a gray handgun.[11] A few days later, Reyes and Rojas returned to the police station and met with a sketch artist, Lois Gibson. They described the robber's appearance and estimated his age. She showed

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[10] In 2009, palm prints were not required to be entered into AFIS.

[11] Reyes testified that, at the time of trial, he did not remember telling the police that the robber was wearing a black jacket and black tie. Reyes said he remembered the man's face and that he was wearing a dark blue suit. Reyes was a Spanish speaker who testified through an interpreter. Other testimony indicated that the Spanish word for "black" can also mean dark-colored.

them a book of sample eyes, mouths, noses, and ears. When Gibson was done, she showed them the composite sketch. At trial, Reyes and Rojas both identified the composite sketch and a photo of Appellant, whom Rojas described as, "[t]he one who killed [Virappen]."

When Reyes returned to work after the offense, he discovered a deformed piece of metal, that may have been a bullet casing, in the cooler area under a low metal table. He gave the piece of metal to his supervisor, District Manager Manuel Ortiz. Ortiz threw the piece of metal into the ocean at the place where Virappen's family spread his ashes. Ortiz said that he did not think about the fact that the piece of metal might have had evidentiary value.

Ortiz also testified that he had interviewed Appellant at the FM 529 restaurant when Appellant applied for a position with Popeye's. Appellant wore a dark, navy-blue suit to the interview and also wore this suit to work once after he was hired in January of 2009 for a managerial position at a different Popeye's restaurant. As a manager, Appellant received training on the security systems used at the Popeye's restaurants and the end-of-shift procedures for handling money and locking doors. Thus, he would have known where the money was kept and which days were the restaurant's "biggest money day[s]." Popeye's held management meetings at the FM 529 store and Appellant attended two of those meetings. Virappen attended at least one of those two meetings. The Popeye's instructions that were issued to Appellant when he was hired stated in part:

> When leaving after dark, be alert for the following: Unknown, unmanned cars, persons loitering outside the store. If you are not sure of their reasons for being there, contact the police and advise your manager and supervisor. Always leave in a group when possible.

Appellant trained at two different Popeye's locations, and then became the manager of the Crosby location. However, in April, Appellant reported late to work a couple of times. Then, the Crosby store's safe was found to be missing approximately $80. As the manager, Appellant was the only person who could have accessed the safe. By April 13, 2009, Appellant left his job at Popeye's.

On July 9, 2009, after publicizing Gibson's composite sketch, lead investigator Russell Gonzales received information about a potential suspect, Appellant. Information he received about Appellant's appearance was consistent with the description given by Reyes and Rojas. Gonzales directed another officer to obtain a photo of Appellant and compile a photo array. The officer obtained all of the photos in the array from a Texas Department of Motor Vehicles database. Gonzales and other officers went to Popeye's to show Rojas and Reyes the photo array. Before showing them the array, officers separated Rojas and Reyes and gave them each instructions on how to review the photo array.[12] The instructions informed the witnesses that they were not obligated to identify anyone in the photos and that they should not conclude or guess that the photos contained a picture of the person who committed the crime. The instructions also told them not to discuss the

[12] The officers instructed Reyes in Spanish.

case with other witnesses.

Rojas immediately identified Appellant in the group of six photos. He circled Appellant's picture, wrote on the photo that this man was the person who murdered Virappen, and dated and signed the note. Rojas said he had no doubt in his mind about his identification of Appellant; he was 100 percent sure. He did not waver in his identification of Appellant. Reyes also instantly picked Appellant's photo out of the array. He appeared visibly shaken upon seeing Appellant's photo, which he circled. He wrote a note in Spanish on the array indicating that this individual was the person who killed Virappen. Reyes was 100 percent sure about his identification at that time, and he was still 100 percent sure at the time of trial.

Also on July 9, 2009, Gonzales obtained a warrant for Appellant's arrest. He determined that there were two addresses associated with Appellant. He went to an apartment located at 790 West Little York and he saw a dark-blue Dodge Neon vehicle parked near the apartment. The Dodge Neon roughly matched Perez's description of the perpetrator's car. Officers ran the license plate number and determined that this vehicle was registered to Appellant. While the officers were watching, Appellant emerged from the apartment and walked towards the Dodge Neon. The officers arrested him. Appellant identified himself and stated that the car belonged to him. Investigator Mario Quintanilla testified that, at the time of Appellant's arrest, Appellant had a very short, "almost shaved," haircut and a very slight growth of facial hair. He was little over six feet tall

with a "pretty stocky" build.

The officers took Appellant's fingerprints and palm prints. Linda Haley, a certified latent print examiner with the International Association for Identification, examined the latent print lifted from the Popeye's east door and found that the print actually contained two "pretty pristine" palm prints – a left palm print and a right palm print. Haley found that the two palm prints from the east door did not match any of the three surviving employees who were present at the Popeye's on the night of the offense. The right palm print did not match a known print. However, the left palm print matched Appellant's left palm print with over one hundred points of comparison. Haley testified that one hundred points is "many, many more" than she normally finds on latent prints. A second fingerprint expert, who had 28 years of experience, compared the latent left palm print from the door to Appellant's left palm print. She agreed with Haley's identification, stating that the match was not a "close call."

The officers obtained a search warrant for the Dodge Neon and the apartment on West Little York. Inside the apartment, they found paperwork and a driver's license with Appellant's name on it. They also found a dark-colored men's dress suit in a size L-48, dress shoes, a partially-full Winchester 9-millimeter ammunition box, and an empty Kel-Tec 9-millimeter pistol box. Officers also examined the Dodge Neon, but they recovered no evidence from the vehicle.

Deputy Jason Brown, a homicide detective, testified that there was no video

surveillance system in the Popeye's restaurant on FM 529. Brown also observed that the vast majority of robbery-murder perpetrators wear some sort of disguise to hide their identities, and yet Appellant made no attempt to cover his face. Brown testified that there were three possible reasons that a robber would not disguise himself: (1) he does not intend to leave any witnesses behind; (2) he does not think the witnesses will be able to identify him; and/or (3) he does not think that there is any video surveillance at the location of the robbery.

The defense team presented alibi testimony from Jason Mouton, Appellant's good friend. Mouton testified that on May 1st and 2nd of 2009, he and Appellant went to a crawfish festival in Breaux Bridge, Louisiana, and spent the night at Mouton's cousin's house. Cross-examination revealed that Appellant and Mouton had discussed their trip to the crawfish festival on the phone while Appellant was in jail for the instant offense. Appellant told Mouton in the telephone conversation that he remembered that they had left for Louisiana on Saturday morning, May 2nd, but Appellant did not recall where he was on Friday night, May 1st. At the end of the conversation, Mouton told Appellant, "I'm going to do what I can on my end, I got your back."

The defense also presented the testimony of Dr. Steven Smith, a psychologist who studies memory. Smith testified about problems with eyewitnesses' memory, particularly the effects of extreme stress and cross-racial identifications. Smith noted that a witness's memory is likely to become less accurate as time passes. Smith also discussed the

potential problems with photo spread identifications. On cross-examination, Smith conceded that when a witness has a clear view and a longer period of time in which to observe the subject, the reliability of the witness's identification could be increased.

At the punishment stage of trial, the State presented several witnesses who testified about Appellant's involvement in the January 1991 fatal shooting of a drug dealer named Ricardo Leudo at a Houston apartment complex. Leudo's girlfriend, Vicky Kennard, testified that Appellant came to her house with another man and a woman. Appellant had arranged to meet with Leudo regarding some drugs. Appellant and the other man went into the kitchen with Leudo, while the woman waited in another room. Kennard's four-year-old son was in the bedroom. Suddenly, Kennard heard gunshots from the kitchen and she heard Appellant say, "Let's go, let's go." Appellant, the other man, and the woman ran out of the apartment. They fired shots as they ran out the back door.

Kennard ran to check on her son, who was hiding in the closet, but the frightened boy refused to open the closet door. She went into the kitchen and saw that Leudo had been shot and was leaning against the wall. He was calling her name. He told her to take his gun and his "dope" out of the apartment. Kennard complied, but she later told the police where she had hidden these items. When she returned to the apartment, the authorities had arrived and Leudo had been taken to the hospital. They later informed her that Leudo had died. Investigators found "high-velocity blood spatter" and other bloodstains throughout the apartment. They recovered four nine-millimeter bullet casings

from the scene. One bullet had traveled through a wall into a neighboring apartment.

Later in January 1991, a few weeks after the shooting of Leudo, Louisiana state troopers were dispatched to the Plantation Motor Inn, which was located 800 yards behind the police station, to try to find Appellant. They knew that Texas authorities were looking for Appellant in the Lafayette area. The troopers spotted an Audi vehicle in the motor inn parking lot with a VIN that indicated it was from Texas. They observed a black male and black female exit a room at the motor inn, unlock the trunk of the Audi, put items in the trunk, lock it with a key, and then return to the motel room.

The troopers then encountered Appellant and a female at the motel room and asked for photo identification. Appellant identified himself as "Jason Mouton" and the woman also gave a false name. Appellant told them that "George Curry" had departed from the motor inn, but left his Audi in the parking lot. They told the troopers that their photo identification cards were locked in the trunk of the car. The couple gave the troopers permission to search their hotel room for identification. The troopers searched the room and found a small amount of cocaine and a 25-caliber Raven pistol located inside a woman's purse, but no identification cards.

Appellant, still posing as "Jason Mouton," told the troopers to call his "brother," Michael Mouton (Michael), to identify him. The troopers called Michael, who agreed to meet them at the Plantation Motor Inn to see the person claiming to be his brother. When he arrived at the motor inn, Michael viewed Appellant and told the officers that this man

was not his brother. Michael stated that his brother was attending school in Texas. Appellant refused to admit his true identity and refused to reveal the location of the key to the Audi until after he was arrested for possession of the cocaine, fingerprinted, and identified by FBI agents.

In the meantime, the troopers called a locksmith to open Appellant's Audi. In the car, they found drug paraphernalia associated with crack cocaine, a scale, a shoe box containing a nine-millimeter Taurus semiautomatic handgun, and a shaving cream can with a false bottom containing 95 grams of cocaine and cash. A firearms expert testified at Appellant's trial that the nine-millimeter Taurus pistol found in Appellant's car was the gun that ejected two of the bullet casings found in Kennard's apartment after Leudo's murder.

The State also introduced evidence showing Appellant was convicted of auto theft in 1987 and placed on probation. In 1989, he was convicted of possession of crack cocaine. As a result, his probation was revoked and he received concurrent four-year prison sentences for these offenses. While on parole following this period of incarceration, Appellant was convicted of possession of marijuana and he participated in the shooting incident that caused Leudo's death. He also received a federal conviction for possession of crack cocaine with intent to distribute in 1992 as a result of the events at the Plantation Motor Inn and was sentenced to 293 months in federal prison. Appellant was released from federal prison in July of 2008, sixty months before his sentence expired, for

good conduct. He murdered Virappen ten months later, while on federal supervised release.

While in federal prison, Appellant on five occasions improperly used other inmates' identification numbers to make phone calls. The content of the calls revealed that Appellant was involved in a prohibited gambling operation. Appellant was also cited on four occasions for possessing alcohol in his cell. Appellant was charged with another disciplinary violation in 2003 after an officer found a nine-inch sharpened shank similar to an ice pick hidden in the wall of his cell. While awaiting trial in the Harris County Jail, he was charged with fighting.

Virappen's mother took the stand and testified about the terrible impact that Appellant's murdering her son had on their family. She stated that she, her husband, and her other sons have suffered from trauma and depression.

The defense called Dr. Richard Lawrence Pollock, a psychologist with expertise in the area of brain injury, who testified that Appellant has a normal IQ, but also has a "major neurocognitive disorder," a "major depressive disorder," and alcohol dependence. During psychological testing, Appellant disclosed that, when he was in federal prison, he distilled alcohol from contraband substances, and he drank on a nearly daily basis. Pollock testified that Appellant's neurocognitive dysfunction was most likely due to some childhood trauma or his chronic alcohol abuse. Pollock stated that this neurocognitive dysfunction made it more likely that Appellant would engage in impulsive behavior,

which could be criminal in nature. On cross-examination, Pollock said that Appellant reported that he had never used any illegal drugs, despite his convictions for drug-related offenses. Appellant also told Pollock that he had completed several semesters of college courses, even though his college transcript indicated that he had failed or dropped all of his courses.

Dr. A. David Axelrad, a neuropsychiatrist, diagnosed Appellant with "unspecified neurocognitive disorder" based on the results of Pollock's testing of Appellant. Axelrad testified that Appellant's cognitive dysfunction caused "some impairment" but was not severe enough to render him legally insane or incompetent to stand trial.

Dr. Michael C. Gottlieb, a psychologist with expertise on the impact of child abuse on development, testified that Appellant was sexually abused by a babysitter when he was eight years old. Appellant was also physically abused by his stepfather and his mother and he witnessed his stepfather verbally abusing his mother. Gottlieb opined that the types of abuse Appellant experienced can lead to mental health issues, including depression, anxiety, post-traumatic stress disorder, "hyper sexuality," drug abuse, and alcoholism. Gottlieb averred that the trauma Appellant experienced impaired his "executive functioning" and impulse control. On cross-examination, Gottlieb agreed that Appellant could possibly be a "continuing threat today."

SUFFICIENCY OF THE EVIDENCE

In point of error three, Appellant contends that the evidence is legally insufficient to support his conviction for capital murder. When reviewing the sufficiency of the

evidence, we consider all of the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). This standard "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id*. at 319. "[A] reviewing court is permitted to consider all evidence in the trial-court record, whether admissible or inadmissible, when making a legal-sufficiency determination." *Powell v. State*, 194 S.W.3d 503, 507 (Tex. Crim. App. 2006) (quoting *Thornton v. State*, 425 S.W.3d 289, 305 n.82 (Tex. Crim. App. 2014)). Each fact need not point directly and independently to the defendant's guilt, as long as the cumulative effect of all the incriminating facts is sufficient to support the conviction. *Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004).

Appellant was charged by indictment with intentionally causing the death of Virappen, "while in the course of committing or attempting to commit" robbery of Virappen, "by shooting [Virappen] with a deadly weapon, namely a firearm." Therefore, to convict Appellant of capital murder, the jury was required to find beyond a reasonable doubt that Appellant intentionally committed murder using a firearm, while in the course of committing or attempting to commit robbery.

Appellant contends that no rational trier of fact could have concluded that he was the person who robbed the Popeye's and shot Virappen. He argues that a rational jury would not have believed Reyes's and Rojas's identifications because they were emotional

teenagers and "stress causes memory to become less accurate." Although Reyes and Rojas identified him, he emphasizes that Perez did not. He complains that neither Reyes nor Rojas specified their assailant's age in the statements they gave to police on the night of the offense. Further, Reyes estimated the assailant's weight at 240 or 250 pounds. Appellant alleges that he weighed only around 200 pounds at the time of the offense.[13]

Appellant points out that his trial expert, Dr. Smith, testified about aspects of the identification process in the instant case that increased the "risk of misidentification," including: Reyes's and Rojas's involvement in creating a composite sketch of the suspect; the fact that Reyes viewed that sketch before viewing the photo array; the process of simultaneously, rather than sequentially, showing the photos to the witnesses; the photo array presenter's knowledge of the suspect's identity; the cross-racial nature of the identification; and the length of time between the event and the in-court identification. Although a fingerprint expert identified the left palm print from the Popeye's door as a match to his own, Appellant emphasizes that the right palm print from the door was never identified. Further, other smeared fingerprints on the door near the palm print were not identifiable. Appellant also notes that police never found the murder weapon and did not find his DNA on the nine-millimeter ammunition box and pistol box found at his apartment.

Nonetheless, viewed in the light most favorable to the jury's verdict, the record

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[13] Other evidence suggested Appellant weighed around 215 pounds.

contains ample evidence that Appellant committed this capital murder. Reyes and Rojas, the only two surviving witnesses who had a clear view of their assailant in a well-lit area, immediately picked Appellant's photo out of a photo array. They both indicated that they were 100 percent sure about their identifications.[14] Upon seeing Appellant's photo, Reyes appeared "visibly shaken, like he was reliving the incident all over again." Both witnesses identified Appellant again at trial and expressed certainty that he was the person who murdered Virappen. Their descriptions of their assailant, given within hours of the offense, were consistent with Appellant's appearance when he was arrested two months later. The third witness, Perez, did not get a good look at the perpetrator's face and was unable to pick a photo out of the array, but he described the assailant's frame, car, and clothing in a manner which roughly matched Appellant, Appellant's Dodge Neon, and Appellant's dark-colored business suit.

Appellant worked as a manager of a Popeye's in the same franchise group as the FM 529 store. He left that job shortly before the instant offense and after money was found to be missing from the safe at the restaurant he managed. The circumstances of the charged offense suggested that the perpetrator had knowledge of the procedures at Popeye's restaurants in general and specific information about the restaurant where the instant offense took place. For example, the FM 529 Popeye's was the top grossing

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[14] Although testimony suggested that the identification procedures used by law enforcement have changed since 2009, there was no testimony supporting the claim that these officers made inappropriately suggestive remarks to the witnesses or failed to comply with the procedures in effect at the time.

restaurant in the franchise group and the robbery occurred after closing time on the busiest day of the week. The perpetrator parked in the parking lot of a neighboring business and wore a business suit, in an apparent attempt to avoid employees calling the police to report a suspicious individual loitering near the Popeye's. The perpetrator wore no mask, perhaps because he was aware that the FM 529 Popeye's location had no video surveillance system. Also, he seemed to have knowledge of the restaurant's alarm system and closing procedures, the location of the safe, and the fact that the on-duty manager would be the only person who could open the safe and turn off the alarm.

The robber also seemed to know which of the employees was the manager, as he focused his attention on Virappen. The record showed that Appellant had attended a manager training meeting at this Popeye's location when Virappen was present. After forcing Virappen to turn off the alarm and open the safe, the robber separated Virappen from the other employees and then shot him five times, which suggested that the robber wanted to make sure that Virappen would not survive to identify him.

Moreover, a nearly "pristine" palm print found on the interior side of the east door of the Popeye's matched Appellant's left palm print with over one hundred points of comparison. Other testimony indicated that the glass door was cleaned at closing and the print appeared to have been left there after the door had been cleaned. The fact that investigators discovered another palm print that did not match Appellant and some unidentifiable fingerprint smears does not diminish the strong evidentiary value of the left palm print match.

In sum, a rational trier of fact could have found beyond a reasonable doubt that Appellant murdered Virappen while in the course of robbing the Popeye's restaurant. The evidence is legally sufficient to support the jury's guilty verdict. We overrule Appellant's third point of error.

In his fourth point of error, Appellant challenges the legal sufficiency of the evidence to support the jury's affirmative answer to the future dangerousness special issue. *See* Art. 37.071, § 2(b)(1). He argues that the evidence was insufficient, emphasizing that the instant offense is Appellant's only criminal conviction involving violence. Appellant notes that he is in his forties and has had "relatively few disciplinary infractions" throughout his many years in prison and jail.

When reviewing the legal sufficiency of the evidence to support the jury's answer to the future dangerousness special issue, we view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have believed beyond a reasonable doubt that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. *Williams v. State*, 273 S.W.3d 200, 213 (Tex. Crim. App. 2008); *Jackson*, 443 U.S. at 319. In its determination of this special issue, the jury is entitled to consider all of the evidence admitted at both the guilt and punishment phases of trial. *Young v. State*, 283 S.W.3d 854, 863 (Tex. Crim. App. 2009). This Court has not mandated that the record contain evidence of prior violent offense convictions in order to sustain a jury's finding of future dangerousness. *See Howard v. State*, 153 S.W.3d 382, 384 (Tex. Crim. App. 2004)

(holding that the evidence was sufficient to support the jury's answer to the future dangerousness special issue, despite the defendant's lack of prior convictions for criminal violence). In fact, the circumstances of the offense and the events surrounding it may alone be sufficient to sustain an affirmative answer to this special issue. *See Devoe v. State*, 354 S.W.3d 457, 462 (Tex. Crim. App. 2011).

Viewed in the light most favorable to the verdict, the record shows that the instant offense was premeditated and brutal. Appellant carefully planned the day, time, and location of his crime to maximize his profit, using knowledge he had gained by working as a Popeye's manager. He wore no mask as he entered the Popeye's restaurant that he had visited previously for manager meetings, making it likely that the manager on duty would recognize him. He brought a loaded semiautomatic pistol and, after he forced Virappen to get the money out of the safe, he shot him five times. Appellant even shot Virappen once in the back after he had fallen to the ground. Appellant then went to the freezer and tried to open the door to get to Reyes and Rojas. He might have succeeded had they not locked the freezer door from the inside.

Further, the jury did not need to rely on this offense alone in answering this special issue. Appellant's criminal history began in 1987 with auto theft and progressed to possession with intent to distribute crack cocaine. On at least three occasions he committed new crimes while on probation, parole, or supervised release, including the instant offense. Although he was not convicted of Leudo's murder, the evidence showed that Appellant actively participated in the 1991 shooting incident that led to Leudo's

death. As part of that incident, Appellant shot nine-millimeter rounds inside an apartment. Appellant then traveled to Louisiana taking cocaine and a gun, and, when confronted by police, he co-opted his friend's identity. Appellant has spent most of his adult life in jail and in federal prison. While in prison, he was repeatedly involved in gambling, hid a nine-inch shank in his cell, and engaged in a hidden alcohol distilling operation so extensive that he developed alcohol dependency during his incarceration. He was cited for fighting while awaiting trial in this case. Further, the record does not indicate that Appellant has become less dangerous as he has matured, given that he committed the instant offense when he was forty-two.

We conclude that the evidence is legally sufficient to support the jury's "yes" answer to the future dangerousness special issue. Appellant's fourth point of error is overruled.

EYEWITNESS IDENTIFICATION

In his first point of error, Appellant argues that the trial court erred in failing to grant his motion to suppress Reyes's and Rojas's in-court identifications of him. He argues their in-court identifications were "tainted by impermissibly suggestive pretrial identification procedures" that violated his right to due process under the Fourteenth Amendment of the United States Constitution.

A pre-trial identification procedure can be so suggestive and conducive to mistaken identification that subsequent use of that identification at trial would deny the accused due process of law. *Barley v. State*, 906 S.W.2d 27, 32-33 (Tex. Crim. App.

1995) (citing *Stovall v. Denno*, 388 U.S. 293 (1967)). The United States Supreme Court has provided a two-step inquiry to address this issue: (1) whether the out-of-court identification procedure was impermissibly suggestive; and (2) whether that suggestive procedure gave rise to a very substantial likelihood of irreparable misidentification. *Simmons v. United States*, 390 U.S. 377, 384 (1968). In performing this inquiry, appellate courts examine the "totality of the circumstances" surrounding the particular case. Reliability is the "linchpin" of this analysis. *Loserth v. State*, 963 S.W.2d 770, 772 (Tex. Crim. App. 1998). A defendant must show by clear and convincing evidence that the in-court identification has been irreparably tainted before we will reverse his conviction. *Barley*, 906 S.W.2d at 34. We review the trial court's decision on this issue *de novo*. *See Gamboa v. State*, 296 S.W.3d 574, 581-82 (Tex. Crim. App. 2009).

In the middle of Deputy McElvany's trial testimony, the trial court held a suppression hearing on the issues raised in Appellant's "Motion to Suppress Any Witnesses' In-Court Identification of the Accused as the Perpetrator of the Offense that is Derived from any Unlawfully Suggestive Circumstances or Show-Up Procedures." At the hearing, Reyes testified that he first saw Appellant when Reyes grabbed the restaurant door to leave for the night and Appellant grabbed the same door to enter the restaurant. Reyes told Appellant that they were closed and Appellant said something back to him in English. Reyes had trouble understanding Appellant, so he peered closely at his face to better discern what he was saying. Reyes estimated that he was in the restaurant with Appellant for a total of seven to ten minutes that night and the lights were on the whole

time. Reyes described the perpetrator to police in the early morning hours after the murder as "a black male about 6 feet in height, weighing about 240 to 250 pounds, very short hair, no beard or mustache, medium black skin color, black suit, black suit pants, and a black tie."[15] At trial, Reyes reviewed the version of his statement in the police report about the robber's appearance. He said that the statements about the man's clothing were not exactly what he remembered saying to police, but the statements about his height, weight, and coloring were accurate.

Rojas testified that he first saw Appellant as he (Rojas) was closing the drive-through window that night. Appellant was facing away from Rojas and appeared to be wearing a "tuxedo" (or suit) as he stood next to the open trunk of a car. Rojas next saw Appellant when the employees were trying to leave and Appellant stopped them at the door. When asked whether he had multiple opportunities that evening to observe the face of the person who committed the instant crime, Rojas answered, "Yes, Sir. I cannot forget that face." Rojas said he was looking carefully at Appellant the "whole time"

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[15] After the mid-trial suppression hearing, Appellant continued to litigate the question of the reliability of the eyewitness identifications. For example, Appellant presented the testimony of Dr. Smith concerning the suggestiveness of police identification procedures, which Appellant asks us to consider in his arguments on this claim of error. Thus, in deciding this point of error, we consider relevant facts adduced at trial that were not offered during the suppression hearing. *See Gutierrez v. State*, 221 S.W.3d 680, 687 (Tex. Crim. App. 2007) ("[W]hen the parties subsequently re-litigate the suppression issue at the trial on the merits, we consider all evidence, from both the pre-trial hearing and the trial, in our review of the trial court's determination."); *Webb v. State*, 760 S.W.2d 263, 272 n.13 (Tex. Crim. App. 1988) (holding appellate review of pretrial identification procedure would not be limited to facts adduced at the pretrial hearing and, "[i]n scrutinizing trial determinations of admissibility of identification testimony, this Court has not so limited its review").

because he feared that Appellant would kill him. Rojas estimated that he was able to observe Appellant in the brightly-lit restaurant for about twenty minutes. Shortly after the offense, he described the assailant to police as a black male, at least six feet tall, very muscular, bald, and wearing a dark-colored suit.

Gonzales testified that he arranged for sketch artist Gibson to meet with Reyes and Rojas on May 5, 2009 – just four days after the murder – to draw a composite sketch of the robber. No suspect had yet been identified and Gonzales did not attempt to influence the content of the sketch. Gibson based her drawing on the witnesses' descriptions of their assailant. Gonzales forwarded the resulting composite sketch to Crime Stoppers, which then disseminated flyers to the public and publicized the composite sketch on television. Reyes saw Gibson's sketch before it was publicized, but he did not see the sketch again before Appellant's trial. Rojas saw the sketch a few times on the news.

On the morning of July 9, 2009, Gonzales received a call from Crime Stoppers. The operator indicated that an anonymous caller had given specific details pertaining to the offense, named Appellant as the perpetrator, and described Appellant's car and where he lived. Officers located a picture of Appellant in a database of driver's license photos and prepared a photo array from this database containing pictures of six African-American men positioned in front of blue backgrounds. The investigators presented the array to Rojas and Reyes at the Popeye's restaurant where the murder occurred, after separating them so they could not hear or see each other while viewing the array.

Before showing the witnesses the array, the officers gave them the following

instructions:

> 1. You will be asked to look at a group of photographs.
>
> 2. The fact that the photographs are being shown to you should not influence your judgment.
>
> 3. You should not conclude or guess that the photographs contain a picture of the person who committed the crime.
>
> 4. You are not obligated to identify anyone.
>
> 5. Remember it is just as important to clear innocent persons from suspicion, as it is to identify the guilty parties.
>
> 6. Do not discuss this case with any other witnesses nor indicate in any way that you have identified someone.[16]

Both witnesses signed the instructions, indicating that they had read them and fully understood them.

Rojas identified Appellant's photo without hesitation as soon as Gonzales "put the paper on the table." Gonzales said Rojas seemed "pretty shaken" upon seeing Appellant's picture. Rojas testified that he recognized Appellant in the courtroom because he remembered him from seeing him at the Popeye's on the night of the offense. Similarly, Reyes identified Appellant without hesitation. Gonzales did not hint at or suggest whom, if anyone, to choose. Reyes circled and initialed the photo of Appellant and wrote a note in Spanish, which Gonzales testified meant, "this is the person I saw kill Edward." Reyes stated that he had never seen Appellant before the offense and that he picked Appellant's photo in the array only because he remembered him from seeing him

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[16] Reyes was given a Spanish translation of these instructions.

during the Popeye's robbery. Reyes also readily identified Appellant in the courtroom. Reyes testified at the hearing and again in front of the jury that he was "100 percent sure" that Appellant was the man who came into the Popeye's and killed Virappen in 2009.

Gonzales testified that, when investigators presented the same photo array to the third employee-witness, Perez, he was unable to positively identify anyone in the array. Officers did not invite Perez to assist Gibson in preparing the composite sketch because Perez had told the police on the night of the offense that he did not have a good view of the suspect. Gonzales acknowledged that their procedures have changed since 2009 and the lead investigator on a case no longer presents photo arrays to witnesses.

The trial court denied Appellant's motion to suppress, ruling that both the in-court identifications and the photo array testimony of Reyes and Rojas would be admitted. A week later, the trial court entered findings of fact and conclusions of law, finding, in part, that Reyes and Rojas identified Appellant in court "based upon their observations of [Appellant] during the commission of the charged offense." The trial court concluded that the "pre-trial identification procedure utilized in this case was not impermissibly suggestive" and did not did give rise to a "substantial likelihood of misidentification."

After the suppression hearing, the defense presented the testimony of Investigator Quintanilla, who stated that Reyes, Rojas, and Perez were all teenagers at the time of the murder. Reyes was emotional throughout the night following the offense. Quintanilla said that he and Investigators James Cassidy and Gonzales knew who the suspect was in the photo array they presented to Reyes and Rojas. Quintanilla stated that they followed

the "proper way" to present the photo array in 2009, but that the process has since changed due to subsequent legislation.[17] Under the new rules, officers have the option of sequentially displaying the photos, rather than showing several photos in a group to witnesses. Also, under the new procedures, the officer presenting a photo array does not know who the suspect is (a "blind" administration) or he cannot see where the suspect's photo is located in the group of photos shown to the witness (a "blinded" administration).

The defense also called Dr. Steven Smith to the stand, who testified that extremely stressful situations, such as being confronted at gunpoint, negatively affect memory at the encoding stage. He also testified that, when observing someone of a different race, a witness tends to encode characteristics more like a stereotype rather than encoding the person's specific features. Smith noted that a witness's memory is likely to be more accurate if the witness is asked to recall the events after "only a matter of hours," as compared to waiting "days or weeks or months." He explained that suggestions a witness receives later in time, such as in conversation with another witness, can influence the accuracy of the memory. Smith stated that, if the suspect looks significantly different from all the other people in a photo spread, that can present a bias. He opined that, in a photo spread identification, the witness's level of certainty is not significantly correlated with accuracy. Smith testified witnesses are more likely to make a false identification in a simultaneous photo spread presentation, like the one used in this case. He also stated that

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[17] *See* Art. 38.20 ("Photograph and Live Lineup Identification Procedures" effective Sept. 1, 2011).

experts prefer blind photo identifications (where the administering officer does not know who the suspect is), in order to avoid the officer inadvertently signaling the suspect's identity to the witness. On cross-examination, Smith conceded that the lengthy duration of a witness's exposure to the person being observed and the witness's clear view of the subject increases the reliability of the witness's identification (but only to sixty or seventy percent). He also explained that taking the witnesses back to the scene of the crime to do the identifications could make the process more reliable.

Appellant argues on appeal that the pretrial identification procedures used here were impermissibly suggestive, setting out the following nine reasons:

> 1. Detective Gonzales obtained a photograph from the DPS database to be placed in a photospread for Reyes and Rojas to view.
>
> 2. Detective Gonzales viewed the composite sketch Reyes and Rojas help[ed] develop before taking the photospread to them for their identification.
>
> 3. Investigator Cassidy and [D]eputy Quintanilla both knew the position of the Appellant[']s photo] in the photospread Reyes and Rojas viewed.
>
> 4. Detective Gonzales knew the position of the Appellant[']s photo] in the photospread that he showed Reyes and Rojas.
>
> 5. [Gonzales] presented the photo array to Reyes and Rojas.
>
> 6. Cassidy and Quintanilla were present when Gonzales presented the photo array to Reyes and Rojas.
>
> 7. The photo array was shown to Reyes and Rojas at the crime scene ten weeks after the incident.
>
> 8. The individuals in the photo array were not sufficiently similar to the Appellant in age, skin color, or facial and head hair.

> 9. Rojas viewed the composite sketch between the time of its completion and viewing the photo array.

Appellant further urges us to consider the "significant body of knowledge" that has developed in recent years that "undermines traditional beliefs in the reliability of eyewitness identification." He emphasizes Smith's testimony criticizing aspects of the identification procedure used in this case, such as non-blind administration and the use of photo arrays instead of sequentially-displayed photos.

The photo array used in this case included images that were obtained from the same driver's license database. All the images have the same blue background and a similar level of exposure. Although their skin tones vary, the six men pictured are all African-American and have very short haircuts and minimal facial hair (Appellant and two others appear to have small mustaches). Four of the six men, including Appellant, are wearing light-colored T-shirts. Although Appellant argues that he was older than all the other men pictured, this is not obvious from the photos (especially when his image is compared to the man to the left of him in the array). Reyes and Rojas were separated when they viewed the photo array and were not allowed to communicate with each other during the process. Although the officer presenting the photo array knew which photo in the array was the suspect (Appellant), there is no evidence that the officer did or said anything to the witnesses to indicate that they should choose a particular photo. Further, the witnesses were instructed that they should *not* assume that the photo array contained a picture of the person who committed the crime.

Appellant does not refer us to legal authority holding that the photo array method used in this case was prohibited or impermissibly suggestive, and the record does not show that the officers violated the procedures in effect at the time. Similarly, Appellant has not provided any legal authority holding that a ten-week delay before identification, or a witness's prior viewing of a composite sketch he helped to create, rendered the process impermissibly suggestive. In sum, Appellant has not demonstrated that the trial court erred in concluding that the procedure used in this case was not impermissibly suggestive. *See Simmons*, 390 U.S. at 384.

Further, even if we were to find that the procedure used was impermissibly suggestive, we would not suppress the witnesses' in-court identifications unless the suggestive procedure gave rise to a very substantial likelihood of irreparable misidentification. *See id*. Appellant sets out the following list of reasons to support his contention that the pretrial identification procedures gave rise to a substantial likelihood of irreparable misidentification:

> 1. Reyes and Rojas provided few distinctive identification characteristics at the time of their initial interview [on] the night of the offense.
>
> 2. Reyes and Rojas subsequently looked at the facial features of many individuals in the preparation of a composite sketch.
>
> 3. The Crime Stopper's tip was based on the Appellant's name and not any specific distinctive characteristics.[18]
>
> 4. Viewing the composite sketch between the time of its making and the

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[18] This factor appears to be irrelevant in this inquiry as there is no evidence in the record that either witness was ever informed about the Crime Stopper's tip.

> photo array identification may have affected Rojas' memory for the purpose of his identification.
>
> 5. Approximately ten weeks transpired between the date of the offense and Reyes' and Rojas' photospread identification.
>
> 6. Approximately 4-1/2 years passed between the offense and Reyes' and Rojas' in-court identification.
>
> 7. Although Reyes and Rojas were certain in their identifications, Dr. Steven Smith provided most studies show there is no correlation between the witness' subjective belief in the accuracy of their identification and its actual reliability.

The Supreme Court has defined certain factors to consider in evaluating the likelihood of misidentification, including:

> (1) the opportunity of the witness to view the criminal at the time of the crime;
>
> (2) the witness's degree of attention;
>
> (3) the accuracy of the witness's prior description of the criminal;
>
> (4) the level of certainty demonstrated by the witness at the confrontation; and
>
> (5) the length of time between the crime and the confrontation.

Neil v. Biggers, 409 U.S. 188, 199-200 (1972); *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). The Supreme Court has recently discussed a litigant's citation to research showing that as many as one in three eyewitness identifications are inaccurate, acknowledging that "the annals of criminal law are rife with instances of mistaken identification." *Perry v. New Hampshire*, 565 U.S. 228, 245 (2012) (internal citations

omitted).[19] Nevertheless, the Supreme Court emphasized that the potential unreliability of eyewitness identification evidence does not alone render its introduction at trial fundamentally unfair, noting that "the jury, not the judge, traditionally determines the reliability of evidence." *Id*. The Supreme Court cited *Biggers* in *Perry* and did not revise the *Biggers* factors. *See id*. at 238-39. Accordingly, we continue to adhere to the *Biggers* framework.

In the instant case, Reyes and Rojas both instantly picked Appellant and expressed a high degree of certainty in their identifications. *See Luna v. State*, 268 S.W.3d 594, 608 (Tex. Crim. App. 2008) (finding officer's suggestive conduct did not present a very substantial likelihood of misidentification, noting in part that the witness picked defendant out before the officer could set the array down on the table and was "positive" in his identification). Moreover, Reyes and Rojas benefitted from good lighting at the crime scene, close proximity to Appellant, and an extended period of time in which to observe him. They both indicated that they focused their attention on Appellant during the robbery. Although not extremely detailed, the bulk of their descriptions of the robber, given within hours of the offense, were consistent with Appellant's appearance.

Although over two months had passed before the witnesses were asked to view the photo array and over four and one-half years passed before Reyes's and Rojas's in-court identifications of Appellant, the witnesses did not significantly waver in their descriptions

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[19] *See also Haliym v. Mitchell*, 492 F.3d 680, 705 n.15 (6th Cir. 2007) ("[E]mpirical evidence on eyewitness identification undercuts the hypothesis that there is a strong correlation between certainty and accuracy.").

of their assailant. Both men identified Appellant when asked to identify the perpetrator in the courtroom, again expressing complete certainty. They were able to remember many details of the crime and stated that they recognized Appellant at trial based on seeing him on the night of the offense. Appellant has not presented any authority that persuades us to find that a witness helping a sketch artist draw a composite sketch of an assailant – or seeing that sketch on television – leads to a substantial likelihood of irreparable misidentification.

The totality of the circumstances demonstrate that the trial court did not err in finding the pretrial identification was not impermissibly suggestive and did not give rise to a substantial likelihood of irreparable misidentification. We overrule Appellant's first point of error.

In Appellant's second point of error, he contends that he was denied his Sixth Amendment right to the effective assistance of counsel at the suppression hearing. Appellant complains that his attorney should have presented the statements of Reyes, Rojas, and Perez and the testimony of Smith and Quintanilla during the suppression hearing. In the alternative, he asserts that counsel should have asked the trial court to reserve its ruling on the motion to suppress until after the court heard this evidence when it was presented before the jury. Appellant alleges that Smith and Quintanilla "would have presented persuasive evidence [at the suppression hearing] on the substantial likelihood of misidentification resulting from the impermissibly suggestive pretrial identification procedures." Instead, counsel called them to testify before the jury about

the identification procedures used in his case. Appellant argues that this was pointless because he was not entitled to an Article 38.23 jury instruction on this issue. *See Allen v. State*, 511 S.W.2d 53, 54 (Tex. Crim. App. 1974) (holding that Article 38.23, by its terms, applies only to illegally obtained evidence, not to in-court identifications). Therefore, Appellant contends, his counsel could not "re-litigate the constitutionality of his identification at trial."

We review the adequacy of representation at the guilt-innocence stage of trial using the two-part test the United States Supreme Court articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *Roberson v. State*, 852 S.W.2d 508, 510 (Tex. Crim. App. 1993). First, in light of all the circumstances viewed at the time of trial, an Appellant bears the burden of proving that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *Id*. To establish deficient performance, Appellant must overcome the strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id*. (quoting *Strickland*, 466 U.S. at 690). We have required that the record "affirmatively demonstrate" that a *Strickland* claim is meritorious. *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). Therefore, direct appeal is usually not an adequate vehicle for raising such a claim because the record is "generally undeveloped." *Id*.

If an Appellant demonstrates that his attorney's performance fell below the accepted standard, he then must also demonstrate that there is a reasonable probability

that, but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. We have defined reasonable probability as "a probability sufficient to undermine confidence in the outcome of the proceedings." *Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998). Appellant bears the burden to establish his claim by a preponderance of the evidence. *Id*.

In evaluating Appellant's first point of error, above, we considered Quintanilla's and Smith's trial testimony and trial testimony concerning the eyewitnesses' statements to police. *See Webb*, 760 S.W.2d at 272 n.13. Nevertheless, we rejected Appellant's argument that impermissibly suggestive pretrial identification procedures tainted the eyewitnesses' in-court identifications. Under the circumstances, Appellant has not demonstrated that there is a reasonable probability that, but for counsel's allegedly erroneous failure to introduce this same evidence at the suppression hearing, the trial court would have granted his motion to suppress. Appellant has not satisfied his burden under *Strickland*'s prejudice prong. *See Strickland*, 466 U.S. at 694.

Further, although the record remains silent regarding Appellant's trial attorneys' reasons for not presenting the witness statements and Quintanilla and Smith's testimony at the suppression hearing, they vigorously litigated the reliability of the eyewitness identifications at trial. His attorneys actively cross-examined the young eyewitnesses, presented evidence showing that identification procedures used in 2009 have been replaced with new procedures, and presented expert testimony on the hazards of

eyewitness identification evidence. Counsel reiterated these themes in jury argument.

In *Perry*, the Supreme Court called attention to a "defendant's right to the effective assistance of an attorney, who can expose the flaws in the eyewitness'[s] testimony during cross-examination and focus the jury's attention on the fallibility of such testimony during opening and closing arguments." *Perry*, 565 U.S. at 246-47. Appellant's counsel assailed the reliability of the eyewitness identifications in the very manner the Supreme Court contemplated in *Perry*. We cannot say, based on the record before us, that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Thus, Appellant's claim fails under both prongs of the *Strickland* test. We overrule his second point of error.

MEANING OF "SOCIETY" IN PUNISHMENT CHARGE

In his fifth and sixth points of error, Appellant argues that the trial court, in violation of the Eighth and Fourteenth Amendments, failed to *sua sponte* instruct the jury that the term "society" in the future dangerousness special issue "meant life in prison without the possibility of parole." Appellant acknowledges that the trial court's punishment charge informed the jury that, if they answered "no" to the future dangerousness special issue or "yes" to the mitigation special issue, Appellant would be sentenced to life in prison without the possibility of parole, but he complains that the charge did not "equate" this concept to the term "society" in the special issue.[20]

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[20] We surmise that Appellant means to argue that the trial court should have instructed the (continued...)

Appellant contends that, after the Texas Legislature amended Article 37.071 in 2005, creating life without parole as the only alternative to the death penalty for defendants convicted of capital murder, "'[s]ociety' now means prison for the purpose of the first special issue." Appellant calls our attention to a jury note in which the jurors inquired, "Does the term 'society' include, exclusively the prison system in this case?" (Emphasis in original).[21] He asserts that the jury's note "demonstrates the failings of the court's instruction in spite of both the prosecution and defense arguing 'life' meant life without parole."

Appellant admits that he failed to request such an instruction or object to the court's charge on this ground, and thus that we should assess the alleged error under an "egregious harm" standard. *See Olivas v. State*, 202 S.W.3d 137, 144 (Tex. Crim. App. 2006) ("To be reversible, any unpreserved jury-charge error must result in 'egregious harm' which affects 'the very basis of the case,' deprives the defendant of a 'valuable right,' or 'vitally affect[s] a defensive theory.'"); *Almanza v. State*, 686 S.W.2d 157, 174 (Tex. Crim. App. 1985). Appellant asserts that the alleged charge error egregiously harmed him because the jury found him to be a future danger even though in his "approximately 22 years in prison and 4-1/2 years in jail [he] had only one violent

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[20](...continued)
jury that the term "society" was limited to prison society for the purposes of the future dangerousness special issue.

[21] Appellant challenges the trial court's response to this jury question in his seventh, eighth, and ninth points of error.

infraction."

We have addressed and rejected a claim substantially similar to Appellant's argument about the impact of the 2005 legislative changes:

> We have found nothing to indicate that the Legislature has intended that the future-dangerousness special issue should, contrary to this Court's prior holdings, be construed to ask a jury to determine whether a life-sentenced-without-parole capital defendant would be dangerous only to prison society unless the State could prove beyond a reasonable doubt that the defendant would get out of prison through means of escape or otherwise. We reaffirm this Court's prior holdings that the future-dangerousness special issue asks a jury to determine whether there is a probability that the defendant would constitute a continuing threat to society "whether in or out of prison."

Estrada v. State, 313 S.W.3d 274, 283-84 (Tex. Crim. App. 2010); *see also Lucio v. State*, 351 S.W.3d 878, 903 (Tex. Crim. App. 2011). Further, as Appellant concedes, we have held that a trial court need not define the terms "probability," "criminal acts of violence," and "society" used in the special issues. *Coble v. State*, 330 S.W.3d 253, 297 (Tex. Crim. App. 2010). Therefore, the trial court did not err in failing to *sua sponte* insert a definition limiting the term "society" to prison society in the punishment charge. Because no jury charge error occurred, we need not conduct a harm analysis. *See Tolbert v. State*, 306 S.W.3d 776, 782 (Tex. Crim. App. 2010). We overrule Appellant's fifth and sixth points of error.

In Appellant's seventh, eighth, and ninth points of error, he argues that the trial court's response to the jury's question, whether "society" was limited exclusively to the prison system, violated his Eighth and Fourteenth Amendment rights. The trial judge responded to the jury's question as follows: "There is no special definition in the law

regarding the term 'society.' With that understanding, the jury cannot put a legal limitation on the term." Defense counsel objected that the judge's proposed response (which initially did not include the word "legal") was "a comment" that was not authorized and urged the court to instead refer the jury to the court's charge. The trial judge declined to refer the jurors to the charge because he felt that the jurors would spend "forever" looking through the charge for a definition of the term "society," which was not there. The court did add the modifier "legal" to the noun "limitation" in the instruction in response to the arguments raised. Defense counsel objected again on the same grounds.[22]

Appellant argues that the trial judge was required to instruct the jury on the law applicable to the case, and the law applicable to the case provides that he is not eligible for release on parole. *See* Art. 36.14 ("[T]he judge shall, before the argument begins, deliver to the jury . . . a written charge distinctly setting forth the law applicable to the case"); Art. 37.071 § 2(e)(2)(B) (providing that the trial court must charge the jury that a defendant sentenced to life in prison under this article is not eligible for release on parole). Further, citing *Simmons v. South Carolina*, 512 U.S. 154 (1994), Appellant contends that the jury's note shows that the jurors might have believed that he could be released on parole if he were not executed. He argues that the trial judge's response did not provide the jury with any additional guidance and unconstitutionally broadened the

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[22] The court responded, "You only get one objection." The basis of the court's remark is unclear from the record. Under the circumstances, we will interpret this response to effectively overrule Appellant's second objection to the court's response to the jury's question.

jury's concept of "society." He asserts that the judge should have instead referred the jury to the court's original charge, so that the jury would have understood that a life sentence for Appellant "truly meant life." Because Appellant raised a timely objection, he avers that we should assess the trial judge's alleged error under *Almanza*'s "some harm" standard. *See Almanza*, 686 S.W.2d at 171.

After closing arguments begin, a trial court may not give a further jury charge "unless required by the improper argument of counsel or the request of the jury." Art. 36.16. When a trial court chooses to respond substantively to a question the jury asks during deliberations, the response "essentially amounts to a supplemental jury instruction, and the trial court must follow the same rules for impartiality and neutrality that generally govern jury instructions." *Lucio v. State*, 353 S.W.3d 873, 875 (Tex. Crim. App. 2011). Thus, the court must limit its answer to the law applicable to the case without expressing any opinion as to the weight of the evidence, summarizing the testimony, discussing the facts, or using any response "calculated to arouse the sympathy or excite the passions of the jury." *See* Art. 36.14; *Lucio*, 353 S.W.3d at 875.

The Legislature did not define the term "society" in Article 37.071. This Court has repeatedly held that the terms and phrases used in the special issues set out in Article 37.071, including "continuing threat to society," require no special definitions: "Where terms used are words simple in themselves, and are used in their ordinary meaning, jurors are supposed to know such common meaning and terms and under such circumstances such common words are not necessarily to be defined in the charge to the jury." *Druery*

v. State, 225 S.W.3d 491, 509 (Tex. Crim. App. 2007) (quoting *King v. State*, 553 S.W.2d 105, 107 (Tex. Crim. App. 1977)); *see also Hunter v. State*, 243 S.W.3d 664, 672 (Tex. Crim. App. 2007). Thus, the trial court's instruction that there is "no special definition in the law" regarding the term "society" and its admonition to not "put a legal limitation on the term" correctly stated the law. Further, the instruction did not call attention to any facts or give any opinion as to the weight of the evidence. Moreover, the court's written charge informed the jury in three places that, if Appellant were not sentenced to death, he would be imprisoned for life without eligibility for release on parole.

Appellant has not demonstrated that the trial court's response to the jury's question violated his constitutional rights. Thus, no harm analysis is necessary. His seventh, eighth, and ninth points of error are overruled.

EXCLUDED "THIRD-PARTY GUILT" EVIDENCE

In Appellant's tenth and eleventh points of error, he argues that the trial court erred in refusing to admit defense evidence of graffiti and a note found on the Popeye's bathroom wall in which an unknown person or persons claimed responsibility for Virappen's murder. Appellant also complains that the trial court erred in excluding evidence of a robbery that occurred in November of 2013 at a different Popeye's restaurant.[23] Appellant contends that this evidence was admissible under the statement

[23] Although these two points deal with efforts to introduce distinct evidence, Appellant posits that both incidents pertain to his "third-party guilt" defensive theory and he argues the points of error together. Consequently, we will review them together, as well.

against interest hearsay exception[24] because it was "sufficiently trustworthy." He avers that the anonymous graffitist knew certain facts about the offense that were not known to the public and also threatened to "do it again." He argues that the trial court's exclusion of this evidence violated his right to present a complete defense under the Sixth and Fourteenth Amendments to the United States Constitution.

A defendant has a right to prove his innocence by showing that someone else committed the charged offense. *Wiley v. State*, 74 S.W.3d 399, 406 (Tex. Crim. App. 2002). However, to present evidence of an alternative perpetrator, the defendant must show that his proffered evidence is sufficient to establish a "nexus between the crime charged and the alleged 'alternative perpetrator.'" *Id*. The admission of alternative perpetrator evidence is subject to the Rule 403 balancing test, in which the trial court weighs the evidence's probative value against its tendency to confuse the issues or mislead the jury, among other potential harms. *See id*. at 405-06; TEX. R. EVID. 403. Further, like other evidence, alternative perpetrator evidence is subject to the rule against hearsay. *See* TEX. R. EVID. 802 (providing that hearsay is inadmissible except as provided by statute or rule); *Segundo v. State*, 270 S.W.3d 79, 101 (Tex. Crim. App. 2008) (holding that the trial judge did not abuse her discretion in excluding alternative perpetrator evidence, noting that the proffered evidence was "unreliable hearsay").

Because trial courts are in the best position to decide the admissibility of evidence,

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[24] *See* TEX. R. EVID. 803(24).

we review the trial court's decision under an abuse of discretion standard. *Rodriguez v. State*, 203 S.W.3d 837, 841 (Tex. Crim. App. 2006). A trial court does not abuse its discretion in excluding the evidence if its ruling is within the "zone of reasonable disagreement." *Id*.

Here, the records shows that, while cross-examining the Popeye's district manager, Ortiz, defense counsel began to question Ortiz about some writings found on a bathroom wall at the FM 529 Popeye's restaurant. The prosecutor objected based on relevance and hearsay. The trial court sustained the State's objection at that time, but said that defense counsel could "make a bill" and the court might change its ruling later. Ortiz gave the following testimony outside the presence of the jury:

> Q. Mr. Ortiz, do you recall an incident in September, I believe September 14th, 2009, where an employee of the 529 store by the name of Avery Lewis found some graffiti in the men's bathroom and a note? Are you aware of that?
>
> A. Yes. . . .
>
> Q. Did you see the note?
>
> A. I believe so.
>
> Q. Do you recall what the note said?
>
> A. No.
>
> Q. Do you have a vivid recollection of what the note made reference to?
>
> A. I think it said something -- it had something to do with what happened on May 1st. I cannot remember every single word on it.
>
> Q. Do you recall it making reference to Ricky -- Edward Ricky Virappen

being killed?

A. Yes. . . .

Q. And do you recall that there were two notes, one was written on a piece of paper stapled to or taped to either a mirror or a wall, and then something written actually on the wall?

A. I believe so. . . .

Q. Is it your recollection that there was an implied threat to the witnesses about what was going to happen to them, anything in that context?

A. If that happened, if somebody does write that in a restaurant, especially the employees who are working there, it was going to be a threat.

Q. Right. It wasn't just normal graffiti, it was alarming, correct?

A. I don't know if it was normal graffiti. It was not -- when something happens to you, anything happens, then you will start paying attention.

Q. When you saw the message, did you think that it was written by the gunman, the robber?

A. I don't know what had did it [sic].

The State's attorney then questioned Ortiz:

Q. You have no idea [who] wrote that note?

A. No.

Q. You didn't see the person who wrote the note?

A. No.

Q. It could have been anybody?

A. Yes.

Q. And it was months after this had happened, correct?

A. Yes.

Q. The case had been on the news a little bit? I think the defense attorney made that reference.

A. Yes.

Also outside the jury's presence, Officer Yusim Owen testified that he was called to the FM 529 Popeye's on September 14, 2009, to view graffiti above the toilet in the men's restroom.[25] Owen said that the graffiti read, "I shot Ricky six times with my 9. You know I'll do it again. Don't fuck with me." Taped to the mirror in the bathroom, Owen found a piece of paper which read, "I killed Edward Virappen with my 9. Ask Oscar why he lied to the police." The State objected on the basis of a violation of the hearsay rule, arguing that the "statement against interest" hearsay exception was the only one that could possibly apply to these statements and the requirements for that exception had not been met. The State also objected on the basis of a lack of authentication,[26] and cited this Court's opinion in *Wiley*, 74 S.W.3d 399, for the position that the defense's alternative perpetrator theory was too tenuous to present to the jury. The State argued that admitting this type of evidence would allow people to manufacture evidence by writing on bathroom walls. The defense argued that the *Wiley* case was distinguishable.

Both the statements contained in the graffiti and the paper note found in the

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[25] The State stipulated that Appellant was in jail from July 9, 2009, until his trial in 2014.

[26] *See* TEX. R. EVID. 901 ("To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.").

Popeye's bathroom were hearsay. They were statements not made by a declarant while testifying at the trial and were offered in evidence to prove the truth of the matters asserted therein. In this instance, the defense offered the statements to prove that the declarant or declarants (and not Appellant) killed Virappen by shooting him "six times with [his] 9," that he/they intended to commit another crime, and that Oscar Reyes lied in his identification of Appellant. *See* TEX. R. EVID. 801. Thus, this evidence was not admissible unless a hearsay exception applied. *See* TEX. R. EVID. 802. Once the opponent of hearsay evidence makes a proper hearsay objection, the proponent of hearsay evidence must establish the existence of a valid exception to the hearsay rule. *See Taylor v. State*, 268 S.W.3d 571, 578-79 (Tex. Crim. App. 2008).

At trial and on appeal, Appellant has argued that the proffered evidence met the requirements of the hearsay exception for statements against interest. The Texas Rules of Evidence provided at the time of Appellant's trial:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . .
>
> (24) Statement Against Interest. --A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in declarant's position would not have made the statement unless believing it to be true. In criminal cases, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

TEX. R. EVID. 803(24).

The rule sets out a two-step requirement for admissibility. First, the trial court must determine whether the statement, considering all the circumstances, subjects the declarant to criminal liability and whether the declarant realized this when he made that statement. *Walter v. State*, 267 S.W.3d 883, 890-91 (Tex. Crim. App. 2008). Second, if the statement tends to expose the declarant to criminal liability, the court must determine whether there are sufficient corroborating circumstances that clearly indicate the trustworthiness of the statement. *See id*. at 891. The statement against interest exception originates in the commonsense notion that people ordinarily do not say things that are damaging to themselves unless they believe that those statements are true. Thus, a reasonable person would not normally claim that he committed a crime, unless it were true. *Id*. at 890.

Ordinarily, statements admitting to shooting and killing a person will expose a declarant to criminal liability. However, in this case the graffiti and bathroom note were not signed and were not made under circumstances in which their author or authors could be identified. Owen and Ortiz said that they did not know who left these messages. Ortiz testified, "It could have been anybody." Accordingly, the statements found in the Popeye's bathroom did not actually expose their declarant or declarants to any criminal liability. Because we have found that the bathroom-wall statements did not tend to expose the declarant or declarants to criminal liability, we need not reach the second step of determining whether "corroborating circumstances clearly indicate the trustworthiness of the statement." The Appellant did not meet his burden to demonstrate a valid hearsay

exception and the trial court did not err in finding this evidence to be inadmissible hearsay. *See, e.g., Adams v. State*, 217 S.W.2d 26, 27 (Tex. Crim. App. 1949) (holding that an anonymous statement in an unsigned letter sent to Appellant's attorney directing him to go to the "CREK BRIDGE" near Wichita Falls to find "EVIDENSE ABOUT THAT PADUKA BURGLAR CASE," after which counsel subsequently located at the described location a sledge hammer purportedly used in the offense, was "hearsay and not admissible in evidence").

Further, the trial court could also have reasonably surmised that the unsigned bathroom messages would have tended to confuse the issues and could have led the jurors down the "rabbit trail" of trying to identify the statements' author or authors. Under the Rule 403 balancing test, the trial court could have reasonably concluded that such adverse effects would have substantially outweighed the limited probative value of the proffered evidence. *See* TEX. R. EVID. 403. The trial court's exclusion of the bathroom-wall statements was within the "zone of reasonable disagreement."

Appellant also sought to introduce evidence of a robbery that occurred on November 27, 2013,[27] early in the morning at a Popeye's restaurant on Houston's south side.[28] The robber was described as a five-foot-nine, light-complected black male with a

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[27] Initial testimony stated that this robbery occurred on November 27, 2009, and Appellant cited this date in his brief, but, on cross-examination, the witness clarified that the robbery was actually committed on November 27, 2013.

[28] The record reflects that the FM 529 Popeye's, where Virappen was murdered, is located in the northwest Houston area.

Louisiana accent, wearing a hooded jacket and blue uniform pants with a brown scarf concealing his face. He demanded the money from the safe and then closed the employees in the store's cooler. He was speaking to someone named Yolanda on the phone during the robbery. A person named Yolanda had worked at that Popeye's restaurant in the past. At the time of trial, the police had not yet made any arrests in the South Houston case. Appellant urged the trial court to admit the South Houston robbery evidence because, he alleged, there were enough similarities with the offense at bar to show a pattern of someone else robbing Popeye's restaurants. He argued that excluding this evidence violated his right to due process and due course of law and his right to put on a defense. The trial court refused to admit the evidence.

Appellant argues that he established a sufficient nexus between the offense at bar and the South Houston Popeye's robbery. He emphasizes the fact that the person who left the bathroom graffiti claimed to have killed Virappen and threatened to "do it again." However, despite some obvious similarities – the South Houston perpetrator was African-American, robbed a Popeye's restaurant, carried a gun, and closed the employees in the cooler – the second Popeye's robbery was not sufficiently similar to establish the required nexus with the charged offense. The 2013 South Houston robbery occurred over four and one-half years after Virappen was murdered and over four years after the bathroom graffiti was found at the FM 529 Popeye's. The perpetrator of the 2013 offense was substantially shorter than six feet in height, robbed the restaurant in the morning (instead of after closing time, when the safe was full), covered his face, had a Louisiana accent,

did not wear a business suit, and did not shoot any of the employees. During the offense, the robber consulted by phone with an apparent accomplice, who may have been a former employee of the South Houston Popeye's store.

We have discussed the inherent dangers regarding this type of evidence:

> The probative value of this testimony was slight because of its highly speculative nature. The testimony did, however, present a great threat of "confusion of the issues" because it would have forced the State to attempt to disprove the nebulous allegation . . . . This side trial might have led the jury astray. . . It is not sufficient for a defendant merely to offer up unsupported speculation that another person may have done the crime. Such speculative blaming intensifies the grave risk of jury confusion, and it invites the jury to render its findings based on emotion or prejudice.

Wiley, 74 S.W.3d at 407 n.21; *see also* TEX. R. EVID. 403. The 2013 robbery was an unsolved offense with only minor similarities to the facts of the instant case. Unsupported speculation about a connection with the offense on trial would have increased the risk of juror diversion and confusion. The trial court did not abuse its discretion in excluding this evidence because its low probative value was substantially outweighed by the danger of confusing the issues and misleading the jury.

The exclusion of a defendant's evidence can amount to a violation of the right to compel the attendance of witnesses, under certain circumstances. *Potier v. State*, 68 S.W.3d 657, 659 (Tex. Crim. App. 2002). An exclusion of evidence may rise to the level of a constitutional violation if: (1) a state evidentiary rule categorically and arbitrarily prohibits the defendant from offering otherwise relevant, reliable evidence vital to his defense; or (2) a trial court's clearly erroneous ruling results in the exclusion of

admissible evidence that forms the vital core of a defendant's theory of defense and effectively prevents him from presenting that defense. *Walters v. State*, 247 S.W.3d 204, 219 (Tex. Crim. App. 2007). But exclusions of evidence are unconstitutional only if they "significantly undermine fundamental elements of the accused's defense." *Potier*, 68 S.W.3d at 666 (quoting *United States v. Scheffer*, 523 U.S. 303, 315 (1998)).

Appellant argues that the exclusion all of his "third-party guilt" evidence under the Texas Rules of Evidence rose to the level of a constitutional violation because the State's cross-examination of Mouton had eroded his alibi defense. Thus, Appellant argues, the excluded evidence was vitally important to his defensive theory that someone else committed the crime. Appellant compares his case to *Ray v. State*, 178 S.W.3d 833 (Tex. Crim. App. 2005). In *Ray*, the jury convicted the defendant of possession with intent to deliver crack cocaine found in a Tylenol container in a car in which she was a passenger. The trial court excluded an acquaintance's testimony that the car's driver gave him crack cocaine from the Tylenol container right before the police stopped Ray and the driver. *Id*. at 835. This Court held that the trial court's exclusion of the evidence was "not grounded on any evidentiary rule prohibiting the admission of the testimony [Ray] offered." *Id*. We further held that, because Ray's only defense was that the cocaine did not belong to her, and her only other evidence supporting that defense was her own testimony, the erroneous exclusion of the acquaintance's testimony was a "serious," harmful error. *Id*. at 836.

The instant case differs from *Ray* in significant respects. In *Ray*, the trial court's

exclusion of the proffered evidence was not grounded on any evidentiary rule. Here, the trial court did not err in excluding the proffered evidence under the rules of evidence. *See id*. at 835; TEX. R. EVID. 403, 802. Also, in *Ray*, the source of the proffered defense evidence was a named person, who was willing to testify under oath that the driver gave him illegal drugs. This Court emphasized that the jury should have had the opportunity to consider this witness's testimony, which was critical to Ray's defense. *Id*. at 836.

In contrast to the proffered defense witness in *Ray*, the person or persons who wrote the bathroom-wall professions of guilt remained unidentified at the time of Appellant's trial. Therefore, these individuals could not be subjected to cross-examination, nor would the jury have the opportunity to evaluate their credibility by observing their demeanor. Further, Appellant was able to offer other evidence supporting his identity defense through Smith's and Quintanilla's testimony, eyewitnesses' cross-examination testimony, and Mouton's alibi testimony. The fact that the State weakened the Mouton alibi through cross-examination was due to the circumstances weighing against Mouton's credibility and not to the trial court's exclusion of defense evidence.

In sum, Appellant has not demonstrated that an evidentiary rule "categorically and arbitrarily" prohibited him from offering otherwise relevant and reliable evidence vital to his defense. Nor has Appellant shown that the trial court's ruling was "clearly erroneous" and resulted in the exclusion of evidence that effectively prevented him from presenting a defense. *See Walters*, 247 S.W.3d at 219. We overrule his tenth and eleventh points of error.

"10-12 RULE"

In Appellant's twelfth point of error, he argues that the trial court's denial of his pretrial motion contesting the constitutionality of the Texas death penalty statute's so-called "10-12 Rule" denied him his right to have his sentence determined by individual jurors in violation of the Eighth and Fourteenth Amendments of the United States Constitution. *See* Art. 37.071, § 2(d)(2), (f)(2). Appellant acknowledges that the Texas death penalty statute and the "10-12 Rule" have been "found constitutionally acceptable." *See Soliz v. State*, 432 S.W.3d 895, 904 (Tex. Crim. App. 2014); *Russeau v. State*, 171 S.W.3d 871, 886 (Tex. Crim. App. 2005). He urges us to reconsider that precedent in light of "the Texas acceptance of life without parole as an alternative to the death penalty," but he does not explain how this fact would affect our analysis on this issue. We are not persuaded to revisit our precedent. Appellant's twelfth point of error is overruled.

CONSTITUTIONALITY OF THE DEATH PENALTY

In his thirteenth point of error, relying on the dissenting opinion in *Glossip v. Gross*, 135 S. Ct. 2726 (2015) (Breyer, J., dissenting), Appellant argues that, "under evolving standards of capital murder jurisprudence," the imposition of the death penalty violates his Eighth and Fourteenth Amendment rights. However, Justice Breyer's dissent does not reflect the current law that the death penalty is constitutional under the Eighth and Fourteenth Amendments. *See Glossip v. Gross*, 135 S. Ct. 2726, 2739 (2015) ("[W]e have time and again reaffirmed that capital punishment is not *per se* unconstitutional.");

Threadgill v. State, 146 S.W.3d 654, 672 (Tex. Crim. App. 2004). We overrule his thirteenth point of error.

JUROR'S REQUEST TO SPEAK TO THE TRIAL COURT

Appellant argues in his fourteenth and fifteenth points of error that the trial court's refusal to speak with a juror who wished to address the court violated his rights to effective assistance of counsel and due process of law under the Sixth and Fourteenth Amendments to the United States Constitution. During the guilt-innocence phase of trial, the following occurred:

THE COURT: Do you need a break?

JUROR: I have to ask the Judge a question. Could I say something?

[PROSECUTOR]: She wants to ask you a question.

JUROR: I just -- maybe can I approach you?

THE COURT: No, I'm not really permitted to do that.

JUROR: Okay. Never mind.

THE COURT: Are you having trouble understanding anything?

JUROR: No, I'm not. I am perfectly understanding everything.

THE COURT: Okay.

Appellant's trial counsel made no remark concerning this exchange at the time. When the trial court later took a break, however, counsel requested that the court bring the juror out and speak with her:

[DEFENSE ATTORNEY]: Judge, I would ask the record reflect that juror

who is seated --

THE COURT: That's on the record, isn't it?

THE REPORTER: Yes, it is.

THE COURT: It's already there.

[DEFENSE ATTORNEY]: I would request that the Court bring her out and inquire of her what it is -- outside the presence of the jury what it is she wanted to talk to the Court about.

THE COURT: Overruled.

[OTHER DEFENSE ATTORNEY]: Judge, I would add to that, just for the record, that part of this request is based upon observations that I made of the lady who wanted to speak to the Court immediately after she said she can understand everything that's going on. I saw her, while Mr. Rojas was testifying, Mr. Durham was -- it was his witness, but I looked at that juror and she was having some kind of an animated exchange with a couple of other jurors who were seated near her immediately after she tried to talk to the Court and was unable to do so.

THE COURT: Did they speak back?

[OTHER DEFENSE ATTORNEY]: I don't know if they spoke back, Judge.

THE COURT: Well, You're observing all of this.

[OTHER DEFENSE ATTORNEY]: I think so, but I can't say for sure. They were leaning in and something was exchanged. I don't know what it was. That's why we are asking the Court to bring her out and question her.

THE COURT: I'm not going to do it. I don't want to do that.

Appellant reasons that the juror's statement that she could "understand everything that [was] going on" indicated that she had knowledge of something outside the record. He maintains that the juror's "animated exchange" with other jurors showed that she

"shared her knowledge and thoughts with others who were deciding [Appellant's] fate." Appellant argues that the trial court abused its discretion "by not at least inquiring of the juror's concerns" in order to address the "paramount issue" of whether he received a fair and impartial trial. Appellant concedes that his attorney did not move for a mistrial, request a curative instruction, or file a motion for new trial regarding this issue.

The Texas Rules of Appellate Procedure require that an Appellant must make a complaint to the trial court by "a timely request, objection, or motion" that states the grounds for the ruling that he sought from the trial court "with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context." TEX. R. APP. P. 33.1(a)(1)(A). When the juror initially requested to speak with the judge, Appellant's counsel raised no objection. Subsequently, when Appellant's counsel requested that the juror be questioned, counsel simply stated that he had observed an "animated exchange" among the jurors. He did not hear the content of their conversation, stated no legal grounds justifying his request to question the juror, and, as he concedes, did not file a motion for mistrial or a motion for new trial. *See Camacho v. State*, 864 S.W.2d 524, 530 (Tex. Crim. App. 1993) (stating that the issue of whether jurors ignored the trial court's admonishment to avoid news about the case "would best be addressed in a motion for new trial or, should jury misconduct be exposed during trial, by a motion for mistrial"); *Bell v. State*, 724 S.W.2d 780, 798 (Tex. Crim. App. 1986) (holding that the issue of claimed juror misconduct should have been raised by a motion for new trial). Under the circumstances presented here, we hold that Appellant has not

properly preserved his complaint for our review.

Appellant argues in his fifteenth point of error that we should find that his trial attorney rendered constitutionally ineffective assistance of counsel in the event that we find that his attorney did not properly preserve error. To establish a claim of constitutionally inadequate assistance of counsel, Appellant must meet both prongs of the *Strickland* test. *See Strickland*, 466 U.S. at 694.

"A juror must . . . use the law, the evidence, and the trial court's mandates as his ultimate guides in arriving at decisions as to guilt or innocence and as to punishment." *McQuarrie v. State*, 380 S.W.3d 145, 153 (Tex. Crim. App. 2012) (quoting *Granados v. State*, 85 S.W.3d 217, 235 (Tex. Crim. App. 2002)). Article 36.22 provides that, "No person shall be permitted to converse with a juror about the case on trial except in the presence and by the permission of the court." The primary purpose of Article 36.22 is to insulate jurors from outside influence. *Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009). If proven, a violation of Article 36.22 triggers a rebuttable presumption of injury to the accused, and a mistrial may be warranted. *Id*. We have interpreted the term "outside influence" to mean "something originating from a source outside of the jury room and other than from the jurors themselves." *McQuarrie*, 380 S.W.3d at 154. External events or information, unrelated to the trial, which may cause jurors to feel personal pressure to hasten their deliberations are not "outside influences" because the pressure is caused by the jurors' personal or emotional reaction to information that is irrelevant to the trial issues. *See Colyer v. State*, 428 S.W.3d 117, 125 (Tex. Crim. App.

2014).

Although Appellant argues that the juror in question possessed knowledge of some outside influence and improperly shared it with other jurors, this is not evident on the face of the record. The reason for the juror's request to speak with the judge and the content of the juror's "animated exchange" are unknown to us, absent speculation. The juror could have wished to address a topic completely unrelated to the trial issues. For example, earlier on the same day of the trial, a juror had complained about the courtroom being too cold. The judge stated that he would ask the bailiff to call the building superintendent to adjust the heater. *See id*.

As jurors were selected during voir dire, the trial court admonished them that they were not allowed to discuss anything that happened in the courtroom with others, watch anything about it on television, or read anything about it in the newspaper or other media. Immediately after the jury was sworn, the trial court reminded the jurors of his previous instructions and admonished them to avoid discussion of the evidence in the case with "anybody else outside the court." We generally presume that jurors will follow the trial court's instructions. *Colburn v. State*, 966 S.W.2d 511, 520 (Tex. Crim. App. 1998).

We cannot conclude from this record that any improper juror conduct or outside influence occurred. Thus, even if we were to find that Appellant's counsel performed deficiently under the *Strickland* test, Appellant has not demonstrated a reasonable probability that, but for counsel's failure to preserve this claim, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694. Appellant's

fourteenth and fifteenth points of error are overruled.

CONSTITUTIONALITY OF ARTICLE 37.071

In his sixteenth point of error, Appellant faults the trial court for denying his pretrial challenge contesting the constitutionality of Texas's death penalty statute because the mitigation special issue "shifted the burden of proof to the defendant" and violated the requirement that the State prove the aggravating factors beyond a reasonable doubt. *See* Art. 37.071, § 2(e), (f). He argues that this aspect of the statute violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution. In his seventeenth point of error, Appellant argues that the trial court violated his Eighth and Fourteenth Amendment rights by failing to *sua sponte* define terms and phrases used in the special issues, including "moral culpability," "moral blameworthiness," "acts of criminal violence,"[29] and "society." *See id*. at § 2(b), (e), (f). In his eighteenth point of error, he contends that his trial counsel performed in a constitutionally ineffective manner by failing to challenge the constitutionality of the death penalty statute for using such "vague and indefinite words and phrases." In his nineteenth point of error, he accuses trial counsel of ineffective assistance in violation of his Sixth Amendment rights for failing to object to the trial court's punishment charge on the grounds that it did not define these terms and phrases or suggest definitions for them. Appellant acknowledges

[29] Appellant uses the phrase "acts of criminal violence" in these points of error, but this phrase does not appear in Article 37.071. We presume Appellant is referring to the phrase "criminal acts of violence" used in Article 37.071, § 2(b), i.e., the "future dangerousness" special issue.

that there is adverse authority from this Court on these legal issues. He nevertheless requests that we revisit the issues in light of his jury's question about the meaning of "society" during deliberations and the statutory change regarding life imprisonment without parole.

We have addressed and rejected constitutional challenges substantially similar to the above claims. *See Soliz*, 432 S.W.3d at 904 (rejecting the claim that Article 37.071 is unconstitutional because it fails to place the burden of proof on the State regarding aggravating evidence and improperly shifts the burden to the defendant to produce sufficient mitigating evidence); *Coble*, 330 S.W.3d at 297 (rejecting argument that the statute is unconstitutional due to its failure to define "criminal acts of violence" and "society"); *Blue v. State*, 125 S.W.3d 491, 505 (Tex. Crim. App. 2003) (rejecting claim that statute is unconstitutional because the phrases "personal moral culpability" and "moral blameworthiness" are too vague). Appellant does not persuade us that the jury's question about the term "society" and the legislative change implementing life without parole necessitate abandoning our longstanding precedent. *See Druery*, 225 S.W.3d at 509.

Moreover, Appellant's trial counsel was not deficient in declining to raise futile claims or request jury instructions to which Appellant was not legally entitled. *See Ex parte Chandler*, 182 S.W.3d 350, 356 (Tex. Crim. App. 2005) ("[A] reasonably competent counsel need not perform a useless or futile act, such as requesting a jury instruction to which the defendant is not legally entitled.") Appellant's sixteenth,

seventeenth, eighteenth, and nineteenth points of error are overruled.

In Appellant's twentieth point of error, he asks that we consider the cumulative effect of all the errors he alleges occurred and find that they deprived him of his right to a fair trial. However, Appellant has not demonstrated that the trial court erred or that he received ineffective assistance of counsel. Therefore, there are no errors to cumulate. *See Jenkins v. State*, 493 S.W.3d 583 (Tex. Crim. App. 2016). We overrule his twentieth point of error.

Appellant filed a motion for leave to file a supplemental brief alleging two additional points of error, which we granted on August 9, 2016. In his first supplemental point of error, Appellant argues that the trial court violated his Eighth and Fourteenth Amendment rights under the United States Constitution when it responded to the jury's question about whether the term "society" refers exclusively to the prison system. In his second supplemental point of error, Appellant maintains that he was harmed by the trial court's response to the jurors' question because the court's response "allowed the apparent belief that the Appellant might be released from his life sentence for some reason." Appellant's arguments in his supplemental brief essentially track the arguments he made in his fifth, sixth, seventh, eighth, and ninth points of error, with the addition of a reference to *Lynch v. Arizona*, 136 S. Ct. 1818, 1819 (2016).

In *Lynch*, the United States Supreme Court rejected the Arizona Supreme Court's conclusion that the possibility of executive clemency diminished the defendant's right, described in *Simmons v. South Carolina*, to inform the jury of his parole ineligibility.

Lynch, 136 S. Ct. at 1819. In contrast to the jury charge in *Lynch*, in Appellant's case the trial court's charge informed the jury three times that Appellant could only be sentenced to death or life in prison *without eligibility for parole*. Further, the trial court's supplemental instruction to the jury, refusing to provide a legal definition of the word "society," did not suggest that Appellant would or could become eligible for parole. Appellant has not demonstrated a constitutional violation in his supplemental brief. We overrule his two supplemental points of error.

We affirm the judgment of the trial court.

Filed: March 1, 2017

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