COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

ERIC FLORES,	§	
	§	No. 08-16-00025-CR
Appellant,	§	
	§	Appeal from the
v.	§	
	§	120th Judicial District Court
	§	
THE STATE OF TEXAS,	§	of El Paso County, Texas
	§	
Appellee.	§	(TC# 20110D01621)

O P I N I O N

Eric Flores, *pro se*, appeals his conviction of burglary of a building. Appellant was initially represented by counsel in the trial court, but he waived his right to counsel and exercised his right to self-representation. Appellant represented himself at trial with the assistance of stand-by counsel. A jury found Appellant guilty and the trial court assessed his punishment at imprisonment for six years. We affirm.

FACTUAL SUMMARY

Armida Alvarez owns and operates a store in El Paso called the Holy Spirit Store. The business sells religious items and offers a bill-paying service for utility bills. On December 8, 2010, Ms. Alvarez's husband, Jesus Alvarez, went to the store around 3:00 or 4:00 in the afternoon to collect the bill-payment proceeds to prepare the daily deposit. He carried the money to the office and began working on the deposit. The office is located in a portion of the store which is

not open to the public, and there is a sign on the office door which states, "Employees Only." After he finished counting the money which was about $1,500.00, Mr. Alvarez noticed that he did not have any deposit slips, so he left the money siting on the desk and he went to the area where the registers were located to get a new deposit book. When Mr. Alvarez returned to the office about thirty seconds later, he noticed that the money was gone. He soon realized that the money had been stolen and called the police. The store was equipped with surveillance cameras and a review of the footage showed that a man, later identified as Appellant, went into the small area where the office is located a few seconds after Mr. Alvarez left the office to get the deposit slip book. A few seconds later, Appellant walked out of the area and exited the store. The security footage did not show anyone else entering the small office area during the thirty second period when Mr. Alvarez was gone.

Appellant presented three primary defenses to the burglary charge. First, he introduced evidence that he had filed an internal affairs complaint with the El Paso Police Department, and he argued that the police had falsely charged him with this offense in retaliation. Second, he presented evidence that his brother had been killed by an EPPD officer, and he asserted that the police killed his brother to prevent him from testifying for Appellant in this case. Third, Appellant testified that he was simply looking for a restroom in the store and the surveillance video did not show him actually taking the money. The jury rejected Appellant's defenses and found him guilty. Appellant filed a motion for new trial on the grounds that: (1) he was denied his right to a speedy trial; (2) the store surveillance videos are irrelevant and inadmissible; (3) the witnesses who testified against him lacked personal knowledge; and (4) the trial court failed to excuse two jurors who stated they were biased against Appellant. The motion for new trial was overruled by operation of law.

BIASED JURORS AND JURY MISCONDUCT

In Issue One, Appellant contends that the trial court abused its discretion by failing to exclude those jurors who stated they were biased against him because he has tattoos. This issue has two components because Appellant ostensibly complains about the trial court's failure to exclude potential jurors who stated a bias against him during voir dire. He also complains about jury misconduct in that he claims two jurors communicated with him during trial and expressed bias against him.

Voir Dire

A defendant may challenge a potential juror for cause on the ground that the juror has a bias or prejudice against the defendant. TEX.CODE CRIM.PROC.ANN. art. 35.16(a)(9)(West 2006); *see Cardenas v. State*, 325 S.W.3d 179, 184-85 (Tex.Crim.App. 2010). To preserve error with respect to a trial court's denial of a challenge for cause, an appellant must: (1) assert a clear and specific challenge for cause; (2) use a peremptory strike on the complained-of venire person; (3) exhaust his peremptory strikes; (4) request additional peremptory strikes; (5) identify an objectionable juror; and (6) claim that he would have struck the objectionable juror with a peremptory strike if he had one to use. *Allen v. State*, 108 S.W.3d 281, 282 (Tex.Crim.App. 2003).

During the State's voir dire, Venire Members 17, 18, 21, and 69 each stated that he or she had a bias against Appellant because he has tattoos. Appellant did not challenge these potential jurors for cause on the ground they were biased against him because of his tattoos. The record, however, reflects that the trial court struck each of these potential jurors. Thus, the trial court did not deny a challenge for cause with respect to the jurors who stated a bias based on Appellant's tattoos, and Appellant was not required to use a peremptory strike on these potential jurors. No error is shown.

Jury Misconduct

Appellant additionally argues in Issue One that Jurors 4 and 8 spoke to him outside of the courtroom and said they were going to find him guilty because he has tattoos. Article 36.22 of the Texas Code of Criminal Procedure 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. TEX.CODE CRIM.PROC.ANN. art. 36.22 (West 2006). Once the defendant proves a violation of Article 36.22, a rebuttable presumption of injury is triggered. *Ocon v. State*, 284 S.W.3d 880, 884 (Tex.Crim.App. 2009). The presumption of injury can be rebutted by evidence showing that the case was not discussed or that nothing prejudicial about the accused was said. *Alba v. State*, 905 S.W.2d 581, 587 (Tex.Crim.App. 1995). When evaluating whether the State sufficiently rebutted the presumption of harm, we view the evidence in the light most favorable to the trial court's ruling and defer to the trial court's resolution of historical facts and its determinations concerning credibility and demeanor. *Ocon*, 284 S.W.3d at 884.

The record reflects that Appellant informed the court during trial that two jurors had communicated with him outside of the courtroom and told him they were going to find him guilty, but he did not state they had expressed a bias because of the tattoos. Appellant did not identify the jurors by number, but the trial court determined that he was referring to Jurors 3 and 8 based on Appellant's description and where the jurors were seated. The trial court subsequently spoke with each of these jurors to determine whether they had communicated with Appellant or anyone else about the case. Juror 3 admitted that she had said hello to two police officers in the hallway, but when the officers said they were there on the same case as the juror, she stopped talking to them and walked away. Juror 3 specifically denied speaking to Appellant at any time, and Juror 8 denied speaking to anyone, including Appellant, about the case. After the trial court spoke with Jurors 3

and 8, Appellant claimed that he had a witness who was present when the jurors spoke with him, but she would not testify truthfully because they had gone through a divorce. The trial court found that both jurors remained qualified and would remain on the jury.

It was the trial judge's responsibility to evaluate the credibility of Appellant and the two jurors. By ruling that the jurors remained qualified, the court impliedly found the jurors credible, and we are required to defer to that credibility determination. The evidence supports a conclusion that neither of the jurors spoke with Appellant and Juror 3 did not speak to the police officers about the case. Based on these facts, the State rebutted the presumption of injury. Issue One is overruled.

LIMITATION OF RETALIATION DEFENSE

In two related issues, Appellant argues that the trial court prevented him from presenting his retaliation defense.

Limitation of Opening Statement

Appellant contends in his second issue that the trial court improperly limited his opening statement. The purpose of an opening statement is to allow the defense to tell the jury the nature of the defenses relied upon and the facts expected to be proved in their support. TEX.CODE CRIM.PROC.ANN. art. 36.01(a)(5)(West 2007). The defense's theory of the case is communicated during the opening statement to aid the jury in its evaluation of the evidence. *See McGowen v. State*, 25 S.W.3d 741, 747 (Tex.App.--Houston [14th Dist.] 2000, pet. ref'd). While the defendant has a statutory right to make an opening statement, the trial court has authority to control the character and extent of the statement. *Norton v. State,* 564 S.W.2d 714, 718 (Tex.Crim.App. [Panel Op.] 1978). We review the trial court's rulings on opening statements for abuse of discretion. *See Donnell v. State,* 191 S.W.3d 864, 867 (Tex.App.--Waco 2006, no pet.).

Appellant's opening statement was extensive and detailed. He informed the jury about what he referred to as an entrapment defense, but he effectively argued that he had been falsely charged with this offense in retaliation for complaints he had made about members of the El Paso Police Department to the Internal Affairs Division. The trial court sustained the State's objections to the following portions of Appellant's opening statement:

> [Appellant]: Okay. Now, as the case stands, I had evidence in my possession. I had given it to the Public Defender's office. And for some reason, the evidence was misplaced. It's hidden. Now they can't find it. Now that trial comes about, they cannot find it. They're now scrambling about trying to find the evidence. It just goes to show you.
>
> [The Prosecutor]: I'm going to object to improper opening statement. It's getting argumentative.
>
> [The Court]: Sustained. Mr. Flores, you need to talk about what you believe the evidence will show, please.
>
> [Appellant]: Yes, Your Honor. This reports disparity. What that means is that, ladies and gentlemen of the jury, you will see the district judge treating me differently from other defendants in that she will not allow me to present certain witnesses. She will not allow me to present certain evidentiary factors.
>
> [The Prosecutor]: Objection, Your Honor. Improper opening statement.
>
> [The Court]: Sustained. Mr. Flores, you need to talk about what you believe the evidence will show.

The trial court properly sustained the State's objections to the first portion of Appellant's opening statement on the ground that it was argumentative. Appellant did not express his comments in terms of what he believed the evidence was going to show. He instead argued that the Public Defender's Office had hidden the evidence. In the second portion of Appellant's opening statement, Appellant commented about the trial court treating him differently than other defendants and preventing him from presenting his evidence. This is an improper opening statement. *See* TEX.CODE CRIM.PROC.ANN. art. 36.01(a)(5).

At a later point in his opening statement, Appellant returned to the subject of his retaliation defense. He explained to the jury that he was going to present evidence that the El Paso Police Department retaliated against him by filing this charge. He also stated that an El Paso Police Officer had killed Appellant's brother to prevent him from testifying in Appellant's defense in this case. When Appellant began providing the jury with the elements of a retaliation claim under the Civil Rights Act, the prosecutor objected that the trial court would provide the law to the jury. The court sustained the objection and explained that if Appellant presented evidence raising a retaliation defense, the court would include it in the jury charge. It is the trial court's responsibility to instruct the jury on the law applicable to the case. TEX.CRIM. PROC.CODE ANN. art. 36.14 (West 2007); *Guillory v. State*, 397 S.W.3d 864, 868 (Tex.App.--Houston [14th Dist.] 2013, no pet.). The trial court did not abuse its discretion by sustained the objection to Appellant's attempt to explain to the jury the elements of a retaliation claim under the Civil Rights Act. *See Guillory*, 397 S.W.3d at 868 (trial court did not err by terminating the defense's opening statement where defense counsel was explaining the case law to the jury rather than explaining what he believed the evidence would show). Issue Two is overruled.

Exclusion of Retaliation Evidence

In Issue Five, Appellant asserts that the trial court erred by excluding evidence relevant to his retaliation defense. More specifically, he argues that the trial court did not permit him to question Officer McDowell regarding the reason that he shot Appellant's brother, Javier Flores, Jr. (Flores).

An appellate court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex.Crim.App. 2010). Under this standard, the trial court will be overturned only if its ruling is so clearly wrong as to lie outside the zone of

reasonable disagreement. *Taylor v. State*, 268 S.W.3d 571, 579 (Tex.Crim.App. 2008); *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex.Crim.App. 1990)(op. on reh'g). We may not substitute our own decision for that of the trial court. *Moses v. State*, 105 S.W.3d 622, 627 (Tex.Crim.App. 2003).

Prior to trial, the State filed a motion to quash Appellant's subpoena for Office Paul McDowell on the ground that his testimony was not relevant or material. The trial court denied the State's motion to quash. Prior to the beginning of the defense's case in chief, the trial court heard McDowell's testimony outside of the jury's presence. McDowell testified that he had known Appellant for several years, but he was not involved in the investigation of this case and he had no personal knowledge of it. He also had no knowledge whether Appellant's brother had exculpatory evidence regarding the offense or that he was present at the store. Appellant elicited testimony from McDowell that he shot and killed Flores in 2011, but McDowell insisted that the shooting did not have anything to do with Appellant's case or his complaints made to Internal Affairs. The trial court ruled that Appellant would be permitted to introduce this evidence, but if Appellant went beyond this line of questioning, the court would reconsider the State's objections.

In the presence of the jury, Appellant elicited testimony from McDowell that he shot and killed Flores. Appellant specifically asked McDowell twice whether he shot and killed Flores to prevent him from testifying as a witness in this trial. McDowell denied the accusation both times and stated that the shooting was unrelated to Appellant's trial. McDowell also denied having any knowledge of Appellant's burglary of a building charge at the time of the shooting. The trial court sustained the State's objections when Appellant asked McDowell to testify about what happened on the night of the shooting and when he asked McDowell whether he had planted a knife at the scene.

Evidence is relevant only if it tends to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. TEX.R.EVID. 401. The evidence showed that McDowell had no knowledge of Appellant's case or Flores's purported involvement as a potential witness. McDowell's testimony about the specific details and facts of the shooting is not relevant because it does not tend to show that McDowell shot Flores to prevent him from serving as a witness in this case. Consequently, the trial court did not abuse its discretion by excluding McDowell's testimony about the specific details of the shooting. Issue Five is overruled.

DENIAL OF RIGHT TO A SPEEDY TRIAL

In his third issue, Appellant asserts that his right to a speedy trial was denied. The right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution. *Barker v. Wingo*, 407 U.S. 514, 515, 92 S.Ct. 2182, 2184, 33 L.Ed.2d 101 (1972); *Zamorano v. State*, 84 S.W.3d 643, 648 (Tex.Crim.App. 2002). When analyzing a trial court's decision to grant or deny a speedy trial claim, we must balance four factors: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted his speedy trial rights; and (4) any resulting prejudice to the defendant. *See Barker*, 407 U.S. at 530, 92 S.Ct. at 2192; *Zamorano*, 84 S.W.3d at 648.

The trial court's ruling on the speedy trial claim is reviewed under a bifurcated standard of review. *Cantu v. State*, 253 S.W.3d 273, 282 (Tex.Crim.App. 2008). The factual components are reviewed for an abuse of discretion and the balancing test is reviewed *de novo*. *Cantu*, 253 S.W.3d at 282; *Zamorano*, 84 S.W.3d at 648. Under the abuse of discretion standard, we are required to defer to the trial court's resolution of disputed facts and to its findings of credibility and demeanor. *Cantu*, 253 S.W.3d at 282. Further, we view the evidence in the light most favorable to the trial court's ruling and defer to the inferences which the trial court could have reasonably drawn from

those facts. *Id.*

Length of the Delay

The length of the delay is measured from the time the defendant is arrested or formally accused. *Shaw v. State*, 117 S.W.3d 883, 889 (Tex.Crim.App. 2003). To trigger a speedy trial analysis, the defendant has the burden of first demonstrating a delay of sufficient length to be considered presumptively prejudicial under the circumstances of the case. *Barker*, 407 U.S. at 530, 92 S.Ct. at 2192. In this case, Appellant was arrested on January 13, 2011, and his jury trial began on January 25, 2016. A five-year delay is certainly sufficient to find presumptive prejudice and trigger a speedy trial inquiry. *See Gonzales v. State*, 435 S.W.3d 801, 809 (Tex.Crim.App. 2014)(holding that a six-year delay was more than adequate to find presumptive prejudice and trigger a full *Barker* analysis). Further, this factor weighs heavily against the State. *Id.*

Reasons for the Delay

The State bears the initial burden of assigning reasons to justify a lengthy delay. *See Emery v. State*, 881 S.W.2d 702, 708 (Tex.Crim.App. 1994). Different reasons are assigned different weights. *Gonzales*, 435 S.W.3d at 809-10. Evidence that the State deliberately delayed the trial to hamper the defense is weighed heavily against the State, but a more neutral reason, such as an overcrowded docket or a missing witness, is not weighed against the State. *Barker*, 407 U.S. at 531, 92 S.Ct. at 2192; *Emery*, 881 S.W.2d at 708. If the delay is attributable in whole or in part to the defendant, this may constitute a waiver of the speedy trial claim. *State v. Munoz*, 991 S.W.2d 818, 822 (Tex.Crim.App. 1999).

On the day trial began, Appellant filed a motion to dismiss his case for denial of his right to a speedy trial and he brought it to the trial court's attention just before the beginning of voir dire. The trial court considered the motion, but did not conduct an evidentiary hearing or ask the

State to explain the reasons for the delay. Thus, we will look to the record to determine whether it indicates the reasons for the delay.

The record reflects that the case was set for trial in 2011, but it was delayed because Appellant's attorney withdrew and the court ordered a psychiatric examination to determine whether Appellant was competent. The trial court appointed a different attorney to represent Appellant, and on November 28, 2011, Appellant filed a *pro se* notice of appeal challenging the order appointing counsel. The Court dismissed that appeal for lack of jurisdiction on January 25, 2012. *See Eric Flores v. State*, No. 08-11-00362-CR, 2012 WL 225789 (Tex.App.--El Paso January 25, 2012 no pet.)(memo. opinion). Our mandate issued on June 4, 2012.

Following his appointment, Appellant's counsel filed numerous motions, but he did not demand a speedy trial. Appellant also filed several *pro se* motions, including a motion to suppress, but none of his motions included a demand for a speedy trial. The trial court ordered another competency examination on July 5, 2012. At the same time, the State filed an amended witness list. In August 2012, the trial court entered an order finding Appellant competent to stand trial.

The case was delayed for several months because Appellant, on July 9, 2012, filed a *pro se* notice of appeal from the trial court's denial of a motion to suppress and other motions. In the notice, Appellant asserted that the police department had killed his brother and tortured other family members in retaliation against Appellant and the trial judge was threatening to cause his death if he did not plead guilty. On September 12, 2012, we dismissed the appeal for lack of jurisdiction, and the Court of Criminal Appeals denied Appellant's petition for discretionary review on January 16, 2013. *Eric Flores v. State*, No. 08-12-00233-CR, 2012 WL 4005718 (Tex.App.--El Paso September 12, 2012, pet. ref'd), *cert. denied, Flores v. Texas*, 133 S.Ct. 2345,

185 L.Ed.2d 1073 (2013). After the U.S. Supreme Court denied Appellant's petition for writ of certiorari, we issued our mandate on June 7, 2013.

Contemporaneous with the filing of the notice of appeal in cause number 08-12-00233-CR, Appellant filed a petition for writ of mandamus to challenge the trial court's denial of his motion to suppress. *In re Eric Flores*, No. 08-12-00242-CR, 2012 WL 3100844 (Tex.App.--El Paso July 31, 2012, orig. proceeding). The Court denied mandamus relief on July 31, 2012. *Id.* Appellant's second appointed attorney filed a motion to withdraw in July 2014 due to a conflict with Appellant. Counsel asserted that Appellant had created an impermissible hybrid representation relationship because he had insisted on proceeding *pro se*, but at the same time, he was demanding that counsel take actions on his behalf. A different attorney served as Appellant's stand-by counsel at trial.

The case was set for trial in 2014 and 2015, but the settings were canceled by the trial court. The precise reason for the cancellation of the trial settings in not shown in the record, but the trial court observed at the speedy trial hearing that the State had not moved for a continuance at any time during the case. The trial judge also stated on the record that she set the case for trial in 2015 shortly after it was transferred to her court, and Appellant moved for a continuance.

Appellant claimed at the hearing that the State was responsible for a portion of the delay because the City of El Paso had moved to quash certain subpoenas issued by Appellant. The record reflects that the City moved to quash the subpoena of Officer McDowell on July 17, 2012, and Appellant stated the court denied the motion to quash. Consequently, there is no evidence that the filing of the motion to quash caused the continuance of a jury trial setting. The record also reflects that the State moved to quash the subpoenas of several witnesses at the January 2016 jury trial, but it did not cause a delay because the case proceeded to trial on January 25, 2016. The record shows that the State was ready for trial beginning in 2011 and it did not take any actions which caused or

contributed to the delay. The trial court explained on the record that Appellant's case would not have had as high a priority as other cases because he was not in custody. Consequently, his case was not tried when it was first set in 2015 following transfer to the 120th District Court. Appellant is directly responsible for a considerable part of the delay because his actions resulted in two attorneys withdrawing from representation of him, and after he decided to proceed *pro se*, he pursued two appeals and an original proceeding each of which was groundless. This factor weighs against Appellant's speedy trial claim.

Assertion of Right to Speedy Trial

The third factor requires that we consider Appellant's responsibility to assert his right to a speedy trial. *Barker*, 407 U.S. at 531, 92 S.Ct. at 2192. Assertion of the right is entitled to strong evidentiary weight in determining whether the defendant was deprived of the right. *Id*. at 531-32, 92 S.Ct. at 2192-93; *Gonzales*, 435 S.W.3d at 810-11. This failure weighs more heavily against the defendant as the delay gets longer because a defendant who truly wants a speedy trial would take some action to obtain it. *Dragoo v. State*, 96 S.W.3d 308, 314 (Tex.Crim.App. 2003). A defendant's failure to assert his right in a timely and persistent manner indicates strongly that he did not actually want a speedy trial. *Barker*, 407 U.S. at 529, 532, 92 S.Ct. at 2191, 2193. Seeking a dismissal rather than a trial may attenuate the strength of a speedy trial claim. *Phillips v. State*, 650 S.W.2d 396, 401 (Tex.Crim.App. 1983).

Appellant was arrested on January 13, 2011, and his jury trial began on January 25, 2016. Appellant did not request a speedy trial during this entire five-year-period, and he filed a motion to dismiss for denial of a speedy trial on the first day of trial. An obvious inference can be drawn from this action: Appellant did not actually want a speedy trial. *See McCarty v. State*, 498 S.W.2d

212, 215-16 (Tex.Crim.App. 1973). Given the length of the delay, this factor weighs heavily against finding a speedy trial violation.

Prejudice Resulting from Delay

The final *Barker* factor requires us to examine whether Appellant suffered prejudice as a result of the delay. The defendant bears the burden to make a *prima facie* showing of prejudice. *State v. Munoz*, 991 S.W.2d at 826. If the defendant makes this showing, the State must prove that "the accused suffered no serious prejudice beyond that which ensued from the ordinary and inevitable delay." *Id*. When examining this final factor, we are required to consider it in light of the interests which the speedy trial right was intended to protect: (1) to prevent oppressive pretrial incarceration; (2) to minimize the defendant's anxiety and concern; and (3) to limit the possibility that the defendant's defense will be impaired. *Shaw*, 117 S.W.3d at 890.

We are not concerned with oppressive pretrial incarceration because Appellant was free on bond. There is no evidence that Appellant suffered any anxiety or concern beyond the level normally associated with being charged with a felony. *See Shaw*, 117 S.W.3d at 890. Regarding the third interest, Appellant contends he was prejudiced by the delay because the "police detectives" could not remember their conversations with Mr. and Ms. Alvarez, and therefore, he could not adequately cross-examine the detectives or the Alvarezes about whether the police witnesses coerced them to give biased testimony. We have reviewed the testimony of Detective Annette Reyes, Detective Andrew Duran, Officer Roberto Hernandez, and Mr. and Ms. Alvarez. Appellant cross-examined each of these police witnesses, but he did not question them regarding their conversations with Mr. and Ms. Alvarez or any effort on their part to influence the statements of the witnesses. Appellant's cross-examination of Mr. and Ms. Alvarez focused on the fact that neither of them saw him take the money from the office and the surveillance videos did not show

him taking the money. Further, there is nothing in the testimony of these witnesses to indicate that any of them suffered from poor memory due to the delay.

Weighing the Barker Factors

The first factor weighs heavily in favor of finding a speedy trial violation, but the second, third, and fourth factors weigh against it. Appellant has failed to show that he was seriously prejudiced by the five-year delay between arrest and trial, and the record shows that Appellant caused a substantial part of the delay. Further, Appellant did not assert his right to a speedy trial until the day of trial. Having balanced the weight of the four factors together, we conclude that Appellant's right to a speedy trial was not violated. *See Barker*, 407 U.S. at 534, 92 S.Ct. at 2194 (where defendant was not seriously prejudiced by five-year delay between arrest and trial, and he did not really want a speedy trial, his right to a speedy trial was not violated); *Dragoo*, 96 S.W.3d at 308 (where defendant demonstrated no serious prejudice by three-and-one-half-year delay between arrest and trial, and he waited until just before trial to assert his right to a speedy trial, his right to a speedy trial was not violated). Issue Three is overruled.

LACK OF PERSONAL KNOWLEDGE

In Issue Four, Appellant argues that the trial court erred by admitting the testimony of Jesus Alvarez and Armida Alvarez because neither of them saw him take the missing money. He reasons that the witnesses were prohibited from testifying under Texas Rule of Evidence 602 because they lacked personal knowledge. Similarly, Appellant asserts that the testimony of Detective Annette Reyes, Detective Andrew Duran, and Officer Roberto Hernandez was not based on personal knowledge.

Preservation of Error

In order to preserve a complaint regarding the admission of evidence, a party must make the trial court aware of the complaint by raising a timely and specific objection, motion, or request. *See* TEX.R.APP.P. 33.1(a)(1); TEX.R.EVID. 103(a)(1). The party must also obtain an express or implicit ruling on the objection, motion, or request. TEX.R.APP.P. 33.1(a)(2).

When the State called the complainant, Ms. Alvarez, as a witness, Appellant objected that she should not be permitted to testify because she did not have personal knowledge, and he asked for a hearing outside the presence of the jury to cross-examine her. After the jury was removed from the courtroom, the trial court informed Appellant that the complaining witness had personal knowledge and she would be allowed to take the stand. The court further instructed Appellant that he would be allowed to cross-examine the witness and he was free to object to her testimony as it was given on the ground that she lacked personal knowledge. The prosecutor informed the court that he was going to call Mr. Alvarez as its first witness, rather than Ms. Alvarez, and Appellant objected that Mr. Alvarez also lacked personal knowledge. The court explained to Appellant that he would not be allowed to question Mr. Alvarez outside of the jury's presence, but he could object to the testimony as the witness testified.

The jury returned to the courtroom and Mr. and Ms. Alvarez testified as the State's first and second witnesses, respectively. Appellant did not object to any portion of the testimony of either witness on the ground of a lack of personal knowledge. He also failed to raise a lack of personal knowledge objection to the testimony of the police witnesses. Consequently, Appellant's complaints are waived. *See Best v. State,* 118 S.W.3d 857, 865 (Tex.App.--Fort Worth 2003, no pet.)(failure to raise lack of personal knowledge complaint in the trial court resulted in waiver). Issue Four is overruled.

IRRELEVANT EVIDENCE

In his sixth issue, Appellant contends that the trial court erred by admitting the surveillance video and still photographs taken from the videos because they are irrelevant. When the State offered the surveillance videos into evidence, Appellant objected that the videos were inadmissible because they were insufficient to prove him guilty of the charged offense. He explained that the videos did not show him taking the money, and therefore, the evidence was insufficient. However, when the State offered the still photographs into evidence, Appellant clearly raised a relevancy objection. It appears from the record that the trial court understood Appellant was making a relevance objection to the videos and photographs. *See* TEX.R.APP.P. 33.1.

Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence, and the fact is of consequence in determining the action. TEX.R.EVID. 401. The surveillance videos and photographs are highly relevant to the elements of the offense because they depict who was present in the store at the time the burglary occurred, and they show Appellant in the restricted area where the office was located during the thirty-second window when the money was taken. The trial court did not abuse its discretion by overruling Appellant's relevance objections and admitting the evidence. *See Checo v. State*, 402 S.W.3d 440, 451 (Tex.App.--Houston [14th Dist.] 2013, pet. ref'd).

In this same issue, Appellant additionally argues that the court erred by failing to strike the State's "speculations" based on the surveillance videos. During the prosecutor's opening argument, Appellant objected to the prosecutor's statements regarding what he believed the evidence would show, including his comments about the surveillance videos. The purpose of an opening statement is to allow the prosecution to state to the jury the nature of the accusation and the facts which are expected to be proved in support thereof. TEX.CODE CRIM.PROC.ANN. art. 36.01(a)(3)(West 2007). We review the trial court's rulings on opening statements for abuse of

discretion. *See Donnell*, 191 S.W.3d at 867. The prosecutor utilized the opening statement to explain the nature of the accusation against Appellant and the facts he expected to prove at trial as permitted by the Code of Criminal Procedure. The trial court did not abuse its discretion by overruling Appellant's speculation objections. Issue Six is overruled.

PRIOR INCONSISTENT STATEMENT

In Issue Seven, Appellant complains that the trial court overruled his objections to the testimony of Mr. Alvarez because his testimony was inconsistent with his written statement. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion and will not be reversed if it is within the zone of reasonable disagreement. *Tillman v. State*, 354 S.W.3d 425, 435 (Tex.Crim.App. 2011). Appellant did not attempt to impeach Mr. Alvarez with a prior inconsistent statement at any point during his initial cross-examination of the witness. At the conclusion of Mr. Alvarez's testimony, the trial court asked the State and Appellant whether they had any objection to Mr. Alvarez being excused. Appellant objected that Mr. Alvarez's testimony was inconsistent with his statement. The trial judge explained to Appellant that if he thought he might want to ask the witness additional questions later, he could object to the witness being excused, and she asked Appellant if that was his intention. Appellant agreed, and when he attempted to make a further statement, the court cut him off and said that his objection to the witness being excused was sufficient. Appellant recalled Mr. Alvarez to the stand later and he cross-examined him on the differences between his trial testimony and his written statement. Consequently, the trial court did not make any ruling which prevented Appellant from cross-examining Mr. Alvarez regarding any differences between his written statement and trial testimony. Finding no error, we overrule Issue Seven.

MOTION FOR NEW TRIAL

In Issues Eight through Ten, Appellant asserts that the trial court erred by denying his motion for new trial. His brief does not clearly assign error related to the lack of a hearing, but in his prayer, he requests that we order the court to conduct a hearing on his new trial motion. We have liberally construed his brief as raising an issue related to the lack of a hearing. The record does not show that Appellant presented his motion for new trial to the trial court for a ruling. Consequently, any complaint regarding the court's failure to conduct a hearing is waived. *See Obella v. State*, --- S.W.3d ----, 2017 WL 510568 (Tex.Crim.App. Feb. 8, 2017).

Charge Error

In Issue Eight, Appellant contends that the trial court erred by denying his motion for new trial because the court's failure to instruct the jury on his retaliation defense denied him the right to a fair trial. Appellant did not raise this issue in his motion for new trial.[1] We will review the issue to determine whether there is reversible charge error.

We review alleged jury charge error using a two-step process. *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex.Crim.App. 2012); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex.Crim.App. 1984)(op. on reh'g). First, we must determine whether error occurred. *Wooten v. State*, 400 S.W.3d 601, 606 (Tex.Crim.App. 2013). If there is error in the charge, we must then analyze whether sufficient harm resulted from the error to require reversal. *Id.*

During the charge conference, Appellant requested that the trial court instruct the jury on what he referred to as a retaliation defense, but the instruction he read into the record is based on a civil retaliation claim under Title VII and the Texas Commission on Human Rights Act. *See* 42

[1] Appellant filed a motion for new trial on September 10, 2012, more than three years before trial. He filed what he referred to as a second motion for new trial on February 9, 2016. Our references to Appellant's motion for new trial refer to the one he filed after his trial.

U.S.C.A. § 2000e-3(a); Tex.Lab.Code Ann. § 21.055 (West 2015).[2] The trial court denied the requested instruction because it is not a legal defense in a criminal case. We conclude that the trial court correctly determined that the instruction requested by Appellant pertains to a retaliation claim in a civil case and does not apply to a criminal case. Issue Eight is overruled.

Jury Misconduct

In Issue Nine, Appellant contends that the trial court erred by denying his motion for new trial based on the following jury misconduct: (1) Juror 8 committed jury misconduct because he participated in the shooting and killing of Javier Flores, Jr. to prevent him from testifying as a witness in the trial; (2) Juror 8 was a private investigator who was bribed to convict Appellant; and (3) Juror 8 left the jury during trial and permitted another person who resembled him to take his place on the jury. Appellant raised the first allegation in his motion for new trial, but the second and third allegations are raised for the first time on appeal.

To warrant a new trial based on jury misconduct, the movant must establish not only that jury misconduct occurred, but also that it was material and probably caused injury. *Ryser v. State*, 453 S.W.3d 17, 39 (Tex.App.--Houston [1st Dist.] 2014, pet. ref'd). There is no evidence in the record that Juror 8 participated in the shooting and killing of Appellant's brother. Issue Nine is overruled.

Absence of a Material Witness

In Issue Ten, Appellant argues that the trial court erred by denying his motion for new trial because a material defense witness, Javier Flores, Jr., was prevented from testifying by force

[2] In making his request, Appellant stated: "Your Honor, the requested instructions for the jury charge are: That Title 6 of the Civil Rights Act prohibits retaliation against an individual for complaining against a law enforcement agent; that, as an employee of a governmental law enforcement entity, such as the police department, that is the recipient of governmental financial assistance." Appellant proceeded to request an instruction that included elements of a civil retaliation claim.

resulting in the death of the witness. Generally, to preserve a complaint for appellate review, the complaining party must present the complaint to the trial court by timely request, objection, or motion. TEX.R.APP.P. 33.1. Because Appellant did not raise this issue in his motion for new trial, it is waived. Issue Ten is overruled.

DENIAL OF COMPULSORY PROCESS

In Issue Eleven, Appellant asserts that his right to compulsory process guaranteed by the Sixth Amendment was violated because the trial court did not allow him to call the Honorable Kathleen Cardone, a United States District Court Judge, as a punishment witness. Appellant claims that Judge Cardone would have testified that he had filed a lawsuit in federal court alleging that he had been beaten by detention officers who were attempting to force him to plead guilty to crimes he did not commit.

During the punishment phase, Appellant entered a plea of true to both enhancement allegations, and he stipulated to the judgments from his fourteen prior convictions. After it came to the trial court's attention that Appellant had issued a subpoena for Judge Cardone and he intended to call her as a punishment witness, the trial court asked Appellant what he expected Judge Cardone would testify to if called as a witness. Appellant stated that the federal judge had personal knowledge of a lawsuit involving detention officers who had beaten him to coerce a guilty plea in the cases used to enhance punishment. The trial court gave Appellant an opportunity to show that Judge Cardone had personal knowledge of any facts pertinent to punishment, but he only showed that all of her knowledge was gained by presiding over the case. The trial court excluded Judge Cardone's testimony because it was not based on personal knowledge.

We will review the trial court's decision to exclude this evidence for an abuse of discretion, and we will reverse the trial court's ruling only if it falls outside the zone of reasonable

disagreement. *See Martinez*, 327 S.W.3d at 736; *Taylor*, 268 S.W.3d at 579. The trial court did not abuse its discretion by excluding Judge Cardone's testimony because Appellant failed to show that the witness had personal knowledge that Appellant had been forced to plead guilty as alleged in his federal suit. *See* TEX.R.EVID. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). Issue Eleven is overruled.

SUFFICIENCY OF THE EVIDENCE

Appellant filed a supplemental brief asserting that the evidence is insufficient to support his conviction. Sufficiency of the evidence to support a criminal conviction is governed by the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). Under the *Jackson v. Virginia* standard, a reviewing court must consider all of the evidence in the light most favorable to the verdict and in doing so determine whether a rational justification exists for the jury's finding of guilt beyond a reasonable doubt. *Brooks v. State*, 323 S.W.3d 893, 894-95 (Tex.Crim.App. 2010), *citing Jackson*, 443 U.S. at 319, 99 S.Ct. at 2789. We must presume that the fact finder resolved any conflicting inferences in favor of the verdict and defer to that resolution. *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex.Crim.App. 2014). A reviewing court's task is to determine whether, based on the evidence and reasonable inferences drawn therefrom, a rational juror could have found the essential elements of the crime beyond a reasonable doubt. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex.Crim.App. 2010).

When conducting a sufficiency review, we consider both direct and circumstantial evidence and all reasonable inferences that may be drawn from the evidence. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex.Crim.App. 2007). The standard of review is the same for both direct and circumstantial evidence cases. *Kuciemba v. State*, 310 S.W.3d 460, 462 (Tex.Crim.App. 2010).

Each fact need not point directly and independently to the guilt of the accused, so long as the cumulative force of all the evidence, when coupled with reasonable inferences to be drawn from that evidence, is sufficient to support the conviction. *Hooper*, 214 S.W.3d at 13. Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *Guevara v. State*, 152 S.W.3d 45, 49 (Tex.Crim.App. 2004).

Sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex.Crim.App. 1997). A person commits the offense of burglary of a building if he intentionally or knowingly, without the effective consent of the owner, enters a building or any portion of a building not then open to the public with the intent to commit theft or commits theft. *See* TEX.PENAL CODE ANN. § 30.02 (West 2011). Appellant first contends that the evidence is insufficient to prove his guilt because the surveillance videos did not show him enter a portion of the store not open to the public. Appellant's argument is based upon only one portion of the evidence, namely, the surveillance videos. The surveillance videos show Appellant walking towards the manager's office. Both Mr. and Ms. Alvarez testified that the portion of the store Appellant entered is not open to the public, and it is marked with a sign on the door which states "Employees Only." The evidence includes photographs of the portion of the store not open to the public, and one of the photographs depicts the "Employees Only" sign on the door. When the evidence is considered in the light most favorable to the judgment, it is sufficient to permit a rational juror to find beyond a reasonable doubt that Appellant went into a portion of the store which was not open to the public.

Appellant also argues that the evidence is insufficient to prove that he intended to commit theft or committed theft, but his argument fails to take into account both the direct and

circumstantial evidence. Appellant admitted at trial that he was present at the store and he is the person who appears in the surveillance videos. Mr. Alvarez left the manager's office for about thirty seconds, as shown in the surveillance videos, and the videos show Appellant walking towards the manager's office after Mr. Alvarez left the area. Appellant disappears from view for a few seconds before he reappears in the view of the camera and is seen walking quickly towards the exit. Moments later, Mr. Alvarez returned to the office and discovered that the money was missing. While the video does not depict Appellant taking the money from the manager's desk, the direct and circumstantial evidence is sufficient to permit a rational juror to conclude that Appellant entered the manager's office and took the money from on top of the desk. We conclude that the evidence is legally sufficient to support Appellant's conviction of burglary of a building. The issue raised in Appellant's supplemental brief is overruled. Having overruled each issue presented on appeal, we affirm the judgment of the trial court. Appellant's motion filed on May 12, 2017 is denied.

May 18, 2017

YVONNE T. RODRIGUEZ, Justice

Before McClure, C.J., Rodriguez, and Hughes, JJ.
Hughes, J. (Not Participating)

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