COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

LEONEL HERNANDEZ,	§	No. 08-19-00152-CR
Appellant,	§	Appeal from the
v.	§	168th Judicial District Court
THE STATE OF TEXAS,	§	of El Paso County, Texas
Appellee.	§	(TC#20160D03827)

O P I N I O N

This is a murder case. A jury found Appellant, Leonel Hernandez, guilty of the murder of Richard Madrigal. A few things are clear from the record. Madrigal was killed in his apartment from a gunshot wound to the head. Appellant and his romantic interest—Miranda Palacios—were in the apartment at the time of the murder. Palacios, with varying degrees of certitude in her description, implicated Appellant as the trigger man. Appellant tried to hide the murder weapon after the shooting. But the major contested issue was Appellant's claim, presented through an expert witness, that the physical evidence made it impossible for him to have fired the gun, leaving Palacios as the other possible assailant.

In three issues, Appellant contends that: (1) the trial court erroneously allowed a detective to testify about Appellant's post-interrogation, off-camera, statements about the location of the

murder weapon; (2) the evidence was legally insufficient to support the jury's verdict because expert testimony interpreting the physical evidence precludes him as the shooter; and (3) the trial court improperly allowed the State to impeach Appellant's expert witness with an appellate opinion that concluded the expert had perjured himself when testifying in an out-of-state civil case. Because the heart of Appellant's defense was the expert's opinion that it would have been physically impossible for Appellant to have been the shooter, and the impeachment evidence used by the State against the expert was improperly admitted, we reverse the trial court's judgment of conviction, and remand for a new trial.

I. BACKGROUND

On June 11, 2016, one of Richard Madrigal's neighbors heard a quick succession of "bang bang" sounds coming from Madrigal's apartment but dismissed the noise as fireworks. The next morning, a friend concerned about Madrigal, used a spare key to gain entrance to his apartment. The friend found Madrigal dead with blood on his legs and a puddle of blood by his head. The coroner would later conclude that Madrigal suffered two gunshot wounds. One gunshot had grazed Madrigal's right cheek, leaving a wound with visible gun powder stippling. Based on the stippling, the coroner believed that the gun was fired between two inches and four feet from Madrigal. The second gunshot was fatal. That bullet entered Madrigal's inner left eye in a forward-to-back, left-to-right, and slightly upward track, penetrated his brain, and lodged in his skull.

Physical evidence from the crime scene offered more clues to the crime. The bullet that grazed Madrigal's right cheek left a bullet hole in a window, and then ricocheted off an exterior wall of the apartment building. The location of the mark on the wall, the bullet hole in the window, and location of Madrigal's body lined up to provide the trajectory of the bullet and likely location

of the gun at discharge. The State's blood spatter expert, Officer Ludovico Granillo, interpreted crime scene photographs. From those, he testified that Madrigal was likely standing when he was shot, and then sat down on his buttocks and slumped over on his left side. As he went down, he turned in a sweeping motion. An arc of blood drops can be seen on the carpet near Madrigal's body.

Based on the initial investigation the police quickly focused on Appellant and the trial record develops the following timeline of events.

A. Timeline of Events

Miranda Palacios had separated from her husband but was still living with him. Appellant lived in the same apartment complex as Palacios and was dating her. Palacios had met Richard Madrigal four or five years earlier at school, and she testified that they were friends, but not lovers.

On June 10, 2016, Madrigal was celebrating some occasion and asked Palacios to accompany him to a local bar. That same day, and because she needed a ride, Palacios sent Appellant a text message, asking whether he wanted "to go with Rick [Madrigal]." When Appellant did not respond, Palacios got a ride from Madrigal who took her to the bar that evening. She returned with Madrigal and stayed the night with him in his apartment, but she claims they did not sleep together.

On the morning of June 11th, Alexis Dominguez, who was a close acquaintance of Madrigal, texted and spoke with Madrigal, and learned that Palacios—who Dominguez considered to be bad news—was still at Madrigal's apartment. Also on the morning of June 11, Appellant texted Palacios that he wanted to come over. Palacios and Madrigal swam and then went shopping

that day. They also drank beer, took whiskey shots, and smoked marijuana together.[1] Later that afternoon or early evening, Appellant arrived at Madrigal's apartment. While there, Palacios and Appellant went out to Appellant's truck and ingested cocaine. Palacios did not remember any fight or argument between Appellant and Madrigal.

Sometime that evening while back at Madrigal's apartment, Palacios testified that she heard two shots, saw Madrigal on the floor, and saw Appellant pointing the gun. Palacios testified at trial that she knew that Appellant kept a small gun under the seat of his pickup truck. Palacios testified that she called her husband right after the shooting and left voice messages when he did not answer. Phone records placed these calls at 7:02 and 7:04 p.m. She did not have a car and Appellant was her only means of transportation. Palacios testified that she was afraid that if she called 911, Appellant would find out and she "would be next," so she stayed with him. They left the apartment and checked into a local Hyatt hotel.

The police later obtained Palacios's phone which contained a series of text exchanges the evening of the murder and the next day. At 10:43 p.m., Palacios's daughter, Isis Lozoya, texted Palacios asking "Are you okay mom? Been trying to get ahold of you." She texted again at 11:39 p.m. "Mom are you okay??" Palacios responded at 1:12 a.m. with "Sorry babe!!! My stupid phone died!!! Fml"[2] and then "R u ok???!!!"

Between 2:51 a.m. and 10:12 a.m., Palacios sent a series of 12 text messages to her husband, stating in substance that she was scared, that a person referred to only as "he" killed Rick, that she needed help, but that she could not talk on the phone.

[1] The autopsy later showed that Madrigal's blood alcohol was .221 and his blood tested positive for THC, the active ingredient in marijuana.

[2] Palacios testified that "fml" is an abbreviation for "f*** my life".

Palacios's next texts to her daughter were at 6:45 a.m., stating that "I'm so scared Babe!!!! —I think Leo killed Rick—I'm not joking—I don't know what to do—I'm so scared." When Palacios's daughter sent a message at 6:51 a.m. asking Palacios to go home, Palacios replied, "He's my ride, babe..... I'm so scared. I saw the whole shit." Her daughter then texted, asking her to calm down and go home, but Palacios responded that she could not, she was scared and urged her daughter not to tell anyone. Lozoya and Palacios then spoke by phone, but the background was quiet and Palacios spoke as if she were hiding. Palacios cried, said, "her goodbyes," and also told Lozoya that she had seen Appellant kill Madrigal. Palacios told Lozoya that she did not know what to do and explained that she was too scared to leave her location because she feared that Appellant would do something to her. Palacios declined Lozoya's offer to pick her up. Palacios explained that it was too dangerous and that she only could speak by phone because Appellant had left to wipe down everything at the apartment.

Palacios's husband finally responded by a text at 10:12 a.m. and for an hour, the two exchanged a series of text messages where the husband was trying to find out who the "he" was in her messages, where she was, and what was going on. Palacios continued to respond that she was scared but that she was "trying to keep it cool." She claimed that she could not provide her location because she did not know where she was. Just before 11:00 a.m., her husband, not getting any substantive answers to his questions, texted that he would contact the police, which prompted Palacios to respond: "I asked you to please not do shit." After another fifteen minutes of not getting a response to where she was, her husband said he was going to the police, garnering her response that he was "stupid" and "he can kill me." By 1:13 p.m., the husband was at the police station.

Appellant and Palacios checked out of the hotel and Appellant took her back to their apartment complex. When Palacios arrived, her husband was not home, and she later learned that he was at the police station. That afternoon, Palacios spoke with police at her apartment and informed them that Appellant had shot Madrigal. Palacios allowed police to search and gave them her phone and the clothes that she had been wearing.

As detailed below, that same day the police located Appellant driving in his vehicle. Following a pretextual traffic stop, he was taken to the central station and questioned by detectives. He was then arrested for the murder. While being taken from the central station to the jail, he disclosed the location of the gun to the detectives, which they then retrieved.

B. Procedural Background

A single count, two-paragraph indictment charged Appellant with the offense of murder for the death of Richard Madrigal. Following a series of hearings on a motion to suppress, the trial court suppressed the statements that Appellant gave while being interviewed at the police station. But the trial court declined to suppress Appellant's statement made afterwards while en route to booking where he disclosed the location of the gun. The trial court did not issue any findings of fact germane to the suppression ruling. Following an eight-day trial, a jury found Appellant guilty and assessed a 50-year sentence. Appellant filed a motion for new trial which was overruled by operation of law.

C. Issues on Appeal

Appellant raises three issues. First, he claims that the trial court erred in allowing one of the detectives to testify about Appellant's statement made while en route to his booking about the location of the gun. Second, Appellant challenges the sufficiency of the evidence to support the

jury's verdict. Finally, Appellant challenges the trial court's evidentiary ruling allowing his expert to be impeached with a published Missouri Supreme Court opinion finding that the expert perjured himself when testifying as an expert witness in a civil case. We reorder the issues, and address the sufficiency of the evidence first, the expert evidentiary issue second, and the suppression issue last.

II. SUFFICIENCY OF THE EVIDENCE

In his second issue, Appellant argues that the evidence was legally insufficient to support his conviction. He specifically asserts that the testimony of both the defense and State's experts, alongside the credibility questions over the only eyewitness, establish that the evidence was insufficient to convict him.

A. Standard of Review

The constitutional guarantee of due process requires that every conviction be supported by legally sufficient evidence. *See Jackson v. Virginia*, 443 U.S. 307, 315-16 (1979); *Brooks v. State*, 323 S.W.3d 893, 912 (Tex.Crim.App. 2010). In a legal sufficiency challenge, we focus solely on whether the evidence, when viewed in the light most favorable to the verdict, would permit *any* rational jury to find the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 318-19; *Brooks*, 323 S.W.3d at 912 (establishing legal insufficiency under *Jackson v. Virginia* as the only standard for review of the evidence).

Applying that standard, we recognize that our system designates the jury as the sole arbiter of the credibility and the weight attached to the testimony of each witness. *Metcalf v. State*, 597 S.W.3d 847, 855 (Tex.Crim.App. 2020); *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex.Crim.App. 2014). Only the jury acts "to resolve conflicts in the testimony, to weigh the evidence, and to draw

reasonable inferences from basic facts to ultimate facts." *Clayton v. State*, 235 S.W.3d 772, 778 (Tex.Crim.App. 2007), *quoting Jackson*, 443 U.S. at 319. In doing so, the jury remains at liberty to believe "all, some, or none of a witness's testimony." *Metcalf*, 597 S.W.3d at 855. When the record supports conflicting inferences, we presume that the jury resolved the conflicts in favor of the verdict, and we defer to that determination. *Dobbs*, 434 S.W.3d at 170, *citing Jackson*, 443 U.S. at 319.

In conducting our review, we also keep in mind that circumstantial evidence is just as probative as direct evidence in establishing guilt, and that circumstantial evidence alone may be sufficient to sustain a conviction. *Dobbs*, 434 S.W.3d at 170. Each fact need not point directly and independently to the guilt of the defendant, so long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *Dobbs*, 434 S.W.3d at 170; *Hooper v. State*, 214 S.W.3d 9, 13 (Tex.Crim.App. 2007).

We also remain mindful that "[t]here is no higher burden of proof in any trial, criminal or civil, and there is no higher standard of appellate review than the standard mandated by *Jackson*." *Brooks*, 323 S.W.3d at 917 (Cochran, J., concurring). Yet "[w]e are not to sit as a thirteenth juror reweighing the evidence or deciding whether we believe the evidence established the element in contention beyond a reasonable doubt[.]" *Blankenship v. State*, 780 S.W.2d 198, 207 (Tex.Crim.App. 1988). Instead, our only task under this standard 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).

B. The Hypothetically Correct Jury Charge

We measure the sufficiency of the evidence to support a conviction against a hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex.Crim.App. 1997). In this case, Appellant was charged with the offense of murder. Relevant here, the Penal Code provides that an individual commits the offense of murder by (1) intentionally or knowingly causing the death of an individual or (2) intending to cause serious bodily injury and committing an act clearly dangerous to human life. TEX.PENAL CODE ANN. § 19.02(b)(1), (2). A person acts intentionally with respect to a result of his conduct when it is his conscious objective or desire to cause the result. *Id*. § 6.03(a). A person acts knowingly with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result. *Id.* § 6.03(b). The hypothetically correct jury charge (like the one given here) would ask whether Appellant intentionally or knowingly caused the death of Madrigal by shooting Madrigal with a firearm, or that with the intent to cause serious bodily injury to Madrigal, Appellant committed an act clearly dangerous to human life—shooting at Madrigal with a firearm—that caused Madrigal's death.

C. Analysis

Before addressing Appellant's arguments, we note that the State here presented testimony from Palacios that she was in the apartment at the time of the shooting, she heard the shots, saw Madrigal on the floor, and saw Appellant holding the gun. She also knew that Appellant kept a gun in his truck, and that he had been in the truck that afternoon before the shooting. And subsequent investigation revealed that Appellant had hidden the gun in a relative's vehicle. That same gun was forensically shown to be the murder weapon. And although the State need not prove motive, it presented a host of text message exchanges between Appellant and Palacios in the

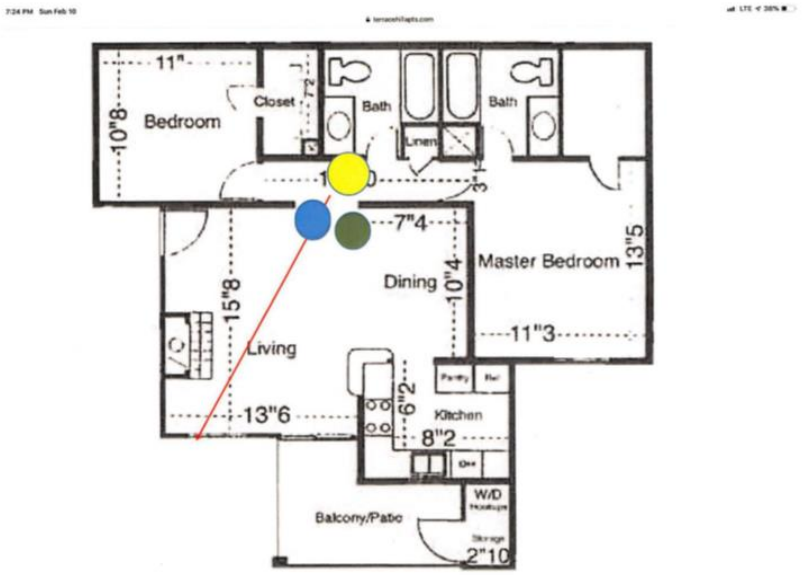
months before the shooting that would suggest that Appellant was jealous and possessive of Palacios's affections. Palacios had spent the night before at Madrigal's apartment. Everyone involved had consumed intoxicants of one kind or another. If the jury believed Palacios's testimony, and discounted the prospect that she was the shooter, this evidence was sufficient to sustain the verdict.

Appellant, however, contends that the expert testimony in the case unequivocally showed he could not have been the shooter. Appellant offered the testimony of Louis Akin, a blood spatter expert.[3] Akin reviewed the crime scene photographs and physical evidence in the case. He identified an arc of blood spatter on the carpet just to one side of where Madrigal was standing when he was shot. Akin theorized that the arc resulted from blood spurting out the bullet entrance in Madrigal's eye as he fell in a seated position and as his body rotated to one side. But there was a gap in the arc. And Akin noted that the jeans that Appellant was wearing that day (as recovered by the police) had a spatter of blood on the pants legs. He matched the pants leg up with the gap in the arc, and theorized the gap was explained by the blood hitting Appellant's pants leg and not the rug.

Moreover, Akin showed that if Appellant had been standing in the location where he would have gotten the blood on his pants, he could not have been the shooter. That is, Akin could say definitively from the trajectory of the first bullet that grazed Madrigal, then went out a window and struck an outside wall, the shooter must have been standing in a hallway, and not beside Madrigal where he believes the blood spatter evidence places Appellant. Akin's presentation

[3] Akin's qualifications were not challenged below.

included this schematic, showing Madrigal's location, Akin's location given the spatter, and the only possible location for the shooter:



The red line represents the flight path of the bullet, the blue dot represents Madrigal, the green dot is where Appellant had to be standing to interrupt the arc of blood spatter, and the yellow dot represents where the shooter had to be standing.[4] Moreover, according to Akin, the person who fired the gunshots probably did not have blood on them. He estimated that the gun was 18-24 inches from Madrigal's face when it was discharged. Akin prepared a computer-generated reconstruction of the crime scene that was shown to the jury.

[4] Appellant also contends that the State's spatter expert also placed the shooter in the hallway. The testimony in this regard is less clear because the examination of that witness involved defense counsel pointing to places on a schematic that are unclear from the appellate record.

Appellant pairs the expert's argument with a second thread: Palacios, who testified under immunity and was the only "eyewitness," presented inconsistent and self-controverting testimony.[5] For instance, Palacios had several opportunities to call the police after the shooting but did not. Appellant and Palacios stayed at a Hyatt hotel the evening after the shooting and for some of the next day. While at the hotel, Palacios went to the bar, where she may have been yelling, harassing patrons, and causing a scene. She had gotten mad with Appellant because he at first did not want to go into the bar with her. She testified that she did not recall taking photos with other bar patrons because she had "blacked out." But while in the hotel lobby or bar, she never sought anyone's help or assistance. There was also a time when Appellant left her in a hotel room by herself as he went back to Madrigal's apartment to clean it. She claimed she did not call 911 then, however, because she did not know where Appellant was and thought that he might be watching to see what she would do. Palacios admitted that she had not asked for help at the hotel or used the hotel phone to dial 911.

Appellant also argues that Palacios's text exchange with her husband are odd. She texted him throughout the early morning hours saying that she was afraid and asking for help, but when he responded with basic questions like who was she with, where was she, and what was going on, Palacios provided no substantive answer. When he eventually said he was going to the police, she reacted negatively.

Also, on the afternoon of June 12th, in response to one of her friends who was asking about her, Palacios texted "Some F****** horrible thing happened yesterday. I think *we* Leo killed Rick." (emphasis supplied).

[5] Palacios had been charged with failing to report a felony. The State agreed to dismiss that charge and promised to expunge it from her record.

Appellant also focuses on inconsistencies in the several statements that Palacios gave to authorities. In her recorded police interview, Palacios informed the detectives that the last thing she remembered was hearing two shots, seeing Madrigal on the floor, and "black[ing] out." She had told the detectives that she did not see the gun and did not see Appellant shoot Madrigal but had seen Madrigal on the floor and heard two gun shots. By contrast, on direct examination at trial, she testified she did see Appellant with the gun. Her initial statement to the police recited that Madrigal was already on the ground when the shots were fired, which would conflict with both expert's construction of the blood spatter patterns.[6] Both experts had testified that Madrigal was standing when he was first shot. She also claimed she saw Madrigal face down which was inconsistent with the crime scene photos showing him on his side.

By the time of trial, Palacios explained away some of these inconsistencies by claiming that she now recalled more with the aid of three years of therapy. She claimed to be hysterical and in shock when she gave her first statement to the detectives. She also acknowledged that she did not remember many things from that day.

Appellant complains that the jury's decision in believing Palacios rather than the testimony of "every single forensic expert" was clearly erroneous and was based on either mere speculation or factually unsupported inferences or presumptions. He argues that there is only one permissible

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[6] Her cross-examination included this exchange where defense counsel confronted her with a portion of her statement to the police:

> Q. "I already told you I saw Richard on the floor and then I heard shots. He's on the floor first and I remember looking at Richard and I didn't know if he was knocked down or what and then I heard him." Is that correct?
>
> A. If that's in my statement, then, yes.

She similarly sent a text to her daughter at 6:49 a.m. the next morning stating, "He shot him on the floor. Please don't tell anyone."

view of the evidence and that the State's evidence failed to prove that he killed Madrigal and instead shows that someone else shot and killed Madrigal.

Juries are of course not permitted to reach conclusions based on "mere speculation or factually unsupported inferences or presumptions." *Braughton v. State*, 569 S.W.3d 592, 608 (Tex.Crim.App. 2018) *quoting Hooper*, 214 S.W.3d at 15-16. Yet while an expert's testimony may facilitate the jury's fact finding in deciding a case, the jury remains the arbiter of the expert's credibility and the weight to be given that testimony. *See Vela v. State*, 209 S.W.3d 128, 131 (Tex.Crim.App. 2006) (explaining that whether an expert's testimony will assist the fact finder in deciding a case is one factor considered in the proper admission of such evidence); *Metcalf*, 597 S.W.3d at 855 (acknowledging that the jury alone determines the witness's credibility and the weight to attach to the witness's testimony).

And Appellant's expert testimony did not go without some challenge. As we explain in detail in the next section, the State introduced evidence that a court in another jurisdiction concluded that Akin perjured himself when testifying as an expert in a civil case. Additionally, when Akin performed an out-of-court demonstration for how Appellant's leg could have created the gap in the arc of the blood trial, Akin got spatter on his shoe. Appellant's shoe, as recovered by the police, did not have blood on it.[7] And one of Akin's demonstrative exhibits depicted Madrigal standing, but with his knees bent when he was shot. The prosecutor challenged Akin's assumption that Madrigal fell on his buttocks, rather than on his knees, if he was shot in that position.

[7] Originally, the police found that a spot on Appellant's shoes tested positive for blood. Christine Ceniceros of the DPS Crime Lab, however, subsequently tested the shoes for blood, with negative results. She explained that the presumptive field tests can produce false positive results when certain substances, like metals, bleach, or vegetable stains, are present.

Although there is conflicting testimony, the jury resolved the conflicts, weighed the evidence, and drew reasonable inferences from basic to ultimate facts. *Clayton*, 235 S.W.3d at 778. Because the record supports conflicting inferences, we presume that the jury resolved them in favor of its verdict, and we defer to the jury's determination. *Dobbs*, 434 S.W.3d at 170; *see also Jackson*, 443 U.S. at 319. Even if Akin's testimony was uncontroverted, the jury was free to believe all, some, or none of his testimony. *Metcalf*, 597 S.W.3d at 855. Based on the evidence and reasonable inferences drawn therefrom, we conclude that a rational juror could have found the essential elements of the crime beyond a reasonable doubt. *Isassi*, 330 S.W.3d at 638.

III. IMPROPER WITNESS IMPEACHMENT

In his third issue, Appellant urges that the trial court erred when it permitted the State to impeach his expert, Akin, with the fact that the Missouri Supreme Court had affirmed a lower court's conclusion that he had willfully and deliberately testified falsely about a material fact at trial. A bit of background is needed here.

A. Underlying Facts

Akin testified as an expert for a defendant in a civil premises liability case pending in Missouri. *See March v. Midwest St. Louis, L.L.C.*, 417 S.W.3d 248, 251 (Mo. 2014). In that civil case, the victim of a stabbing blamed the convenience store where he was stabbed for failing to control its premises. Akin testified that the blood spatter evidence showed the stabbing occurred just off the premises. While qualifying Akin as an expert, he was asked whether he was "currently involved in any major investigation where [he had] been retained by the U.S. Government?" Akin

responded: "I recently just finished reconstructing the Fort Hood shooting by Major Malik Hasan."[8] *Id*. at 252.

The defendant prevailed in the premises-liability trial. But the plaintiff sought a new trial when it was later discovered that Akin had been retained by Hasan, and not the U.S Government that was prosecuting Hasan. *Id*. In response to the motion for new trial, the attorneys that had hired Akin pointed out that Akin had been hired in the Hasan case by a JAG defense lawyer and paid by the United States Government, rendering his answer truthful. *Id.* at 254. But the trial court concluded Akin had perjured himself before the civil jury, thereby justifying the grant of a new trial. *Id.* at 254. An intermediate appellate court reversed, concluding that Akin's answer was not false. *March v. Midwest St. Louis, L.L.C.*, ED96722, 2012 WL 4499046, at *6 (Mo.Ct.App. Oct. 2, 2012). But the Missouri Supreme Court reversed the intermediate appellate court and affirmed the grant of the new trial because under the plain and ordinary meaning of the word "retained" it reasoned that Mr. Akin's response was untruthful, and the trial court *did not abuse its discretion* in finding that he testified falsely. *March*, 417 S.W.3d at 255-56.

Back to our case, the issue is whether the trial court erred in allowing the State to impeach Akin with the ultimate conclusion of the Missouri Supreme Court that he had perjured himself. The State's cross-examination of Akin included this question and answer:

> STATE'S ATTORNEY: So, Mr. Akin, isn't it true that in the Phillip H. March case, the Supreme Court of Missouri, the highest court in that state, it came to the conclusion that Mr. Akin willfully and deliberately testified falsely about a material fact and that an improper verdict was occasioned by the perjured testimony?

[8] This exchange refers to the highly publicized shooting on November 5, 2009, by Major Malik Hasan that killed thirteen soldiers at Fort Hood, Texas and wounded many others. In 2013, a military jury found Hasan guilty of multiple counts of both premeditated murder and attempted premeditated murder, and he later was sentenced to death for his crimes. See https://www.history.com "Army major kills 13 people in Fort Hood shooting spree" (last visited August 20, 2021).

AKIN: Yes.

On redirect, Akin explained the actual question asked of him, and his answer. He added that he had been hired by the Military Judge and paid by the U.S. Government to work for the defense. The trial court sustained the State's relevance objection when Appellant's counsel tried to ask about the Missouri intermediate court of appeals decision.

Appellant had objected to the State's use of the Missouri opinion because it was improper impeachment using a specific instance of conduct. Appellant later added that the mention of the Missouri opinion violated Texas Rule of Evidence 403, as it was more prejudicial than probative. The State responded that the cross-examination "goes to bias." The trial court overruled Appellant's objections, reasoning that: "I view this a lot like if you impeach somebody with a conviction, a prior conviction, you never know what the underlying facts are."

B. Standard of Review

We review the trial court's decision to admit or exclude evidence under an abuse of discretion standard. *Gonzalez v. State*, 544 S.W.3d 363, 370 (Tex.Crim.App. 2018). A trial court abuses its discretion when its decision "falls outside the zone of reasonable disagreement." *Henley v. State*, 493 S.W.3d 77, 83 (Tex.Crim.App. 2016); *Martinez v. State*, 327 S.W.3d 727, 736 (Tex.Crim.App. 2010). Before an appellate court may reverse the trial court's decision, "it must find the trial court's ruling was so clearly wrong as to lie outside the zone within which reasonable people might disagree." *Henley*, 493 S.W.3d at 83, *quoting Taylor v. State*, 268 S.W.3d 571, 579 (Tex.Crim.App. 2008). 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). Moreover, "[i]f the ruling was correct on any theory of law applicable to the case, in light of what was before the trial court at the time the

ruling was made, then we must uphold the judgment." *Page v. State*, 213 S.W.3d 332, 337 (Tex.Crim.App. 2006), *quoting Sauceda v. State*, 129 S.W.3d 116, 120 (Tex.Crim.App. 2004).

C. The Admission of the Evidence was Error

1. Improper impeachment with a specific instance of misconduct

Under evidence rule 608, a witness's credibility can be challenged through testimony about the witness's reputation for truthfulness or untruthfulness. TEX.R.EVID. 608(a). But except for criminal convictions as allowed for in Rule 609, "a party may not inquire into or offer extrinsic evidence to prove specific instances of the witness's conduct in order to attack or support the witness's character for truthfulness." *Id.* at 608(b). So, by example, questioning a witness about a lie on a collateral matter would be excludable under Rule 608(b). *Nix v. H.R. Mgmt. Co.*, 733 S.W.2d 573, 576 (Tex.App.--San Antonio 1987, writ ref'd n.r.e.) (evidence that tenant lied in unrelated matter was inadmissible in tenant's action against apartment complex); *Lape v. State*, 893 S.W.2d 949, 959 (Tex.App.--Houston [14th Dist.] 1994, pet. ref'd) (the general credibility of a witness may be attacked by opinion about the witness's character for truthfulness or untruthfulness, but not by specific instances of conduct). Or as the Texas Court of Criminal Appeals explained:

> But, under Rule 608 the witness's general character for truthfulness may be shown only through reputation or opinion testimony. A witness's general character for truthfulness or credibility may not be attacked by cross-examining him (or offering extrinsic evidence) concerning specific prior instances of untruthfulness. For example, the defense may not ask the witness: Didn't you cheat on your income tax last year? Didn't you lie on Tuesday about having an affair with your boss? Didn't you steal five dollars from the church collection plate last week and then lie to the priest about it? While all of those questions attack the witness's general character for truthfulness, that mode of impeachment is specifically barred by Rule 608(b). Our state evidentiary rules frown on unnecessary character assassination.

Hammer v. State, 296 S.W.3d 555, 563 (Tex.Crim.App. 2009) (footnotes omitted). The Rule rejects the logic proposition that some "specific [dishonest] conduct proves dishonest character [and that therefore] the witness is generally dishonest and should not be believed in this case." *Id*. at 564. Reduced to simpler terms, the Rule rejects the notion that "Once a liar, always a liar". *Id.*

Thus, the evidence that the State used here violates Rule 608. It was a specific instance of claimed misconduct used to attack Akin's candor in this case.

2. The trial court's Rule 609 rationale fares no better

Rule 609 permits a witness to be impeached with evidence of a conviction of a felony crime or crime involving moral turpitude. TEX.R.EVID. 609. The trial court analogized the holding in the Missouri opinion that Akin testified falsely to impeachment with a criminal conviction for perjury (which Rule 608 expressly allows for). Except the two are not analogous, or at least they have significant differences. If a person is convicted of a crime, they are the convicted party and had their day in court. In the Missouri case, Akin was a witness, not a party, and while the attorneys representing the defendant party may have had a reason to defend Akin's interest, they were not Akin's lawyer. Moreover, when a party is convicted of the crime of perjury in Missouri, the standard of proof is beyond a reasonable doubt. *State v. Roberson*, 543 S.W.2d 817, 820 (Mo.Ct.App. 1976). The *March v. Midwest* case was a civil proceeding, where the trial judge in deciding a matter germane to a motion for new trial made a fact finding which was ultimately upheld on an abuse of discretion standard. That is a far cry from a criminal conviction.

3. The State's witness bias theory also falls flat

The State urged below, and now on appeal, that the perjury finding is admissible because it shows bias. And Rule 613(b) permits a witness to be examined about the witness's bias or

interest. TEX.R.EVID. 613(b). Three facets of our record belie the State's reliance on "bias" as a valid ground for asking the perjury question.

The credibility of a witness may be attacked by evidence that the witness is slanting their testimony against or in favor of a party as a result of personal interest or bias in the cause. *Willingham v. State*, 897 S.W.2d 351, 358 (Tex.Crim.App. 1995). Bias is classically defined as "an inclination of temperament or outlook; *esp.:* a personal and (sometimes) unreasoned judgment". *Bias,* Merriam Webster's Collegiate Dictionary (10th ed. 1993); *see also Bias, Prejudice,* Black's Law Dictionary (10th ed. 2014) (defining bias as "a mental inclination or tendency; prejudice, predilection," and defining prejudice as: A preconceived judgment formed without a factual basis; a strong and unreasonable dislike or distrust"). Thus, it is no surprise that experts testifying in Texas trial courts are routinely asked about the circumstances of their employment, including how often they testify for one side or the other. *See Russell v. Young*, 452 S.W.2d 434, 436 (Tex. 1970) ("It is true that in order to show bias and prejudice an expert medical witness may be cross-examined regarding the number of times he has testified in lawsuits, payments for such testifying and related questions."); *In re Makris*, 217 S.W.3d 521, 525 (Tex.App.--San Antonio 2006, orig. proceeding) (noting same); *Olinger v. Curry*, 926 S.W.2d 832, 834 (Tex.App.--Fort Worth 1996, orig. proceeding) (medical expert admitted in his deposition that 90% of his expert consultation services had been provided for defendants, rather than personal injury plaintiffs). They are also routinely confronted with prior statements to show "bias or interest, on the part of [the] witness" whether or not the statements are inconsistent. *Sparks v. State*, 943 S.W.2d 513, 516 (Tex.App.--Fort Worth 1997, pet. ref'd) *quoting then governing* TEX.R.CRIM.EVID. 612(b).

Yet when cross-examining Akin the prosecutor did not use the statement from the Missouri case to argue any theory of bias. Akin was not asked, for instance, whether he only works for criminal defendants and not the State, to show some implicit bias against criminal prosecutions. The State never asked what the underlying perjury related to, or developed how it would relate to any bias against the State, or favoritism towards a criminal defendant. To borrow from the reasoning of the Missouri Supreme Court, the State's bare claim that a witness who perjures himself in another proceeding is biased, does not fall within the "plain and ordinary meaning" of the word bias. *Cf. March*, 417 S.W.3d at 255 (arguing Akin's employment by the JAG did not fall under plain and ordinary meaning of "retained" by the US. Government).

The State's bias argument is also undermined for a second reason. Under Rule 613, a party must inform the witness about the circumstances or statements that tend to show the witness's bias or interest. TEX.R.EVID. 613(b)(1). The rule then requires that the witness be given an opportunity to explain or deny the circumstances or statements that tend to show the witness's bias or interest, and the witness's proponent may rebut the charge of bias or interest. *Id.* at 613(b)(3). Extrinsic evidence of a witness's bias or interest is not admissible unless the witness is first examined about the bias or interest and fails to unequivocally admit it. *Id.* at 613(b)(4). The usual progression of questions would ask about the bias or interest "before there is an attempt to prove interest or bias otherwise." *Willingham*, 897 S.W.2d at 358. Yet that is not what the State did here. The State never asked Akin to agree or disagree about some theory of bias. The State simply led with the question about the Missouri court's finding with no other foundation. In arguing to the trial court about the admissibility of the question, the prosecutor claimed it would be part of a bias challenge

that also involved some other incident in an Austin, Texas case, but the prosecutor never questioned Akin about that other matter.

Finally, the State did not argue a theory of bias in its closing argument to the jury. The State's prosecutors never used the word "bias" in their closing. Instead, as we set out below, the closing argument focused on the word perjury (to tell a lie) without a whisper of the word bias.

4. Rule 403

Appellant also urged a Rule 403 objection below. Rule 403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or the needless presentation of cumulative evidence. TEX.R.EVID. 403; *Gigliobianco v. State*, 210 S.W.3d 637, 641–42 (Tex.Crim.App. 2006). However, the admission of relevant evidence is favored, and a presumption exists that relevant evidence will be more probative than prejudicial. *Gallo v. State*, 239 S.W.3d 757, 762 (Tex.Crim.App. 2007); *Montgomery v. State*, 810 S.W.2d 372, 389 (Tex.Crim.App. 1990), on reh'g (June 19, 1991). A trial court is entitled to broad discretion in ruling on a Rule 403 objection, and great deference is given to the trial court's decision to admit or exclude evidence under that rule. *See Powell v. State*, 189 S.W.3d 285, 288 (Tex.Crim.App. 2006).

Given our conclusion that the question was inadmissible under Rule 608, and the bias theory advanced by the State, we decline to resolve the question of whether the trial court would have also abused its discretion in failing to exclude the evidence of Akin's prior testimony under Rule 403.

5. Harm

Evidentiary errors generally constitute non-constitutional error which we review under TEX.R.APP.P. 44.2(b). *Gonzalez*, 544 S.W.3d at 373. An appellate court must disregard a non-constitutional error that does not affect a criminal defendant's "substantial rights." TEX.R.APP.P. 44.2(b); *Casey v. State*, 215 S.W.3d 870, 885 (Tex.Crim.App. 2007). Under that rule, an appellate court may not reverse for non-constitutional error if the court, after examining the entire record, has a fair assurance that the error did not have a substantial and injurious effect or influence in determining the jury's verdict. *Casey*, 215 S.W.3d at 885. In doing so, we consider (1) the character of the alleged error and how it might be connected to other evidence; (2) the nature of the evidence supporting the verdict; (3) the existence and degree of additional evidence showing guilt; and (4) whether the State emphasized the complained of error. *Gonzalez*, 544 S.W.3d at 373.

a. Character of the evidence and its connection to other evidence

The moral of Aesop's fable "The Boy Who Cried Wolf" is that "Nobody believes a liar . . . even when he is telling the truth." *Hammer*, 296 S.W.3d at 564. The point of the State's use of the perjury claim was to have the jury disbelieve Akin. And Akin's testimony was at the heart of the defense case. Akin placed Appellant in a position where he could not have been the shooter. That left Palacios as the only other person in the apartment, and by elimination, the shooter. But she was also the State's only eyewitness, and the only person to testify that Appellant committed the crime. So if the jury believed Akin, it would have to disbelieve Palacios.

To be sure, Akin was not the sole avenue that Appellant used to attack Palacios's testimony. Defense counsel developed some inconsistencies in her statements to the police and her testimony

at trial. He also argued that her claim about being so afraid of Appellant after the shooting that she could not contact the police was not believable. She was photographed partying in a bar and was for a time alone in a hotel room. She was also texting her daughter and husband, yet never asked them to contact the police. Appellant proved up a text from Palacios stating that "we" (she and Appellant) killed Madrigal. But neither did the State simply concede these points. It offered Detective Camacho who testified that he developed no information during the investigation that showed that Palacios had shot Madrigal. That the issue was sharply contested, however, only means that any error in the admission of evidence challenging Akin deserves closer scrutiny. Because there was already some reason to doubt Palacios's candor, it may have taken only an additional nudge for the jury to conclude there was a reasonable doubt for guilt.

Akin's testimony also conflicted with the medical examiner's estimate of how close the gun had to be to Madrigal when it was discharged. The medical examiner believed the powder stippling on Madrigal's face placed the gun from 3 to 24 inches from him. Akin, however, testified the distance was 18 to 24 inches. The distance had some relevance, as Akin testified that the shooter would likely not have had blood on their person. And Akin's entire thesis was that Appellant did have blood on his pants leg. But the closer the gun might have been to Madrigal, the easier it would be to explain how the shooter might have been sprayed with blood.

b. Nature of testimony supporting the verdict and additional evidence supporting the verdict

The State's case largely hung on Palacios's eyewitness account buttressed by several pieces of corroborating evidence. That corroborating evidence could support Palacios's account, but could also support no more than Appellant trying to cover up a crime that Palacios may have committed. FBI Special Agent Sean MacManus performed an analysis on Appellant's and

Palacios's phones to determine which cell towers were being used when the phones were active. He concluded that Appellant's phone was near his parents' home—where the gun was found—at 12:25 p.m. on June 11, 2016. At about 8:35 p.m., it was connected to two towers near the Hyatt Place Hotel in El Paso, and was similarly in the same vicinity at 7:41 a.m., and 1:58 p.m. the next day. Palacios's phone was generally in the areas she testified about in the case. His testimony corroborated their location, but not what they were doing.

The jury heard that after the shooting, Appellant disclosed the location of the gun which was found at a relative's address. This evidence would implicate Appellant in covering up the crime, but not necessarily committing it. If the jury believed that Palacios was manipulative, as suggested by the defense, it could have concluded that Appellant was covering for her.

And the State presented DNA testimony that placed Madrigal's DNA, presumably from his blood, on the lower left leg and lower right ankle area of Appellant's pants. Akin, however, used this evidence in support of his theory that the stains represent the break in the blood arc, which puts Appellant in a position where he could not have been the shooter.

We also address the other challenges that the State made to Akin's testimony, because if there are other compelling reasons that the jury might have discounted it, then the perjury charge would be superfluous. The State devoted part of its criticism of Akin on a graphic that he used that showed Madrigal with bent knees when he was shot. Akin also performed an in-court demonstration of how Madrigal may have been standing when he was shot, and Akin's knees were bent. But if Madrigal's knees were bent, the State argued he would have fallen forward on his knees and then slumped forward, which conflicted with Akin's description of the fall. Yet Akin testified that he did not "know exactly what position he was in. There was no way to tell that."

Akin did testify that the trajectory of the bullet required the graze wound to be incurred when Madrigal was not standing at full height. And Akin also testified that Madrigal had to have landed on his buttocks (rather than fall forward) to explain a blood stain in the crotch of Madrigal's pants. Moreover, the State's blood spatter expert had also testified that Madrigal fell on his rear and turned in a sweeping motion.

Akin prepared a video that demonstrated how an arc of blood (he used red dye) could show a gap if a pant leg was in the path of the arc. In the demonstration, Akin had a cover over his shoe as he placed his leg in the path of the spray creating the arc. The State argued that while Akin's shoe would have gotten "blood" on it, there was no blood on Appellant's shoe. But in retort, Akin testified that the demonstration was just to show how a gap in an arc might exist, and not that it was intended as a re-creation of the arc at the scene. So while the State made other challenges to Akin's theory, none were so profound that we can say they independently undermined his credibility.

c. Whether the State emphasized the contested evidence

The State argues in its brief that the prosecutor only "twice referenced the complained-of testimony in its final arguments" with the other mentions coming from Appellant's counsel who was answering the State's attack. State's Brief at p. 75. It also emphasizes that its own reference to the Missouri case was brief—developed through a single question in cross-examination. Those claims are only partially true.

The State's cross-examination of Akin contained two questions about the Missouri court case. The first question came at the end of the prosecutor's cross-examination—a place where skilled advocates often wish to make their strongest point. On recross, the prosecutor attempted

to ask Akin a second time about the Missouri opinion ("Now, you disagree with the Supreme Court of Missouri. Is that correct?") to which the trial court intervened, stating, "Okay. Let's move on from that, please. . . . Everybody's made their point.").

In the opening portion of the State's closing argument, its prosecutor made three attacks on Akin's credibility based on perjury or lying. The prosecutor in referring to the State's expert said:

> In this case we had a report prepared by Sean Macmanus, he's an expert, he's an FBI agent. He's been doing this for a very long time. He's never been disallowed as an expert. *Most importantly he's never been found to commit perjury in a court. And all perjury means is that you have been found to have lied under oath when you swore to tell the truth and nothing but the truth.* (emphasis supplied)

This statement was followed by a direct attack on Akin:

> And as the defense counsel gets up here in a little bit and tries to sell you on this theory that there is a third-party shooter, that someone else, not Mr. Hernandez, must have shot the victim, which of course we all know this theory is concocted by their perjured Mr. Akin who they want to sell as an expert.

The prosecutor pointed to the jury charge instruction which states the jury must "judge the believability of the witnesses and the weight to give their testimony." The prosecutor then reminded the jury that they "can believe all of what someone says, none of what someone says or maybe a little bit or this one thing they said but not the other one because the law allows you to do that." And the prosecutor, quickly followed with another challenge to Akin's credibility:

> In talking about witnesses and their credibility, good old Mr. Akin. Mr. Cox gets up here and asks the question, "The calculations you did with the triangle"--the Pythagoran theory [sic] he was so hell-bent on telling us about--"with the triangle to come back to the area where the shooter had to be." And you know what Mr. Akin says? He says "Yeah, I said those calculations could be done. I didn't actually do them." So all of that that [sic] he got up here to try and sell to you that he did all of these calculations, that he used Pythagoran theory [sic], that based on all of these lasers to tell you where that shooter was standing is a lie. Based on his own testimony that we got from the court reporter, that's a lie.

Appellant's closing argument pursued two themes. First, he contended that based on Akin's testimony, the physical evidence showed Appellant could not have been the shooter. The second theme directly challenged the only eyewitness—Palacios—as "bad news" and as a manipulator:

> If you're asking what happened that night, that is reasonable doubt. If you're thinking it could have happened, that is reasonable doubt. If you're thinking it's possible something happened, that is reasonable doubt." [omitted objection] Ms. Palacios is a manipulator. Manipulated everyone in this case starting with her husband, Leo every other man she's been with, Detective Hernandez, Detective Garcia, Officer Gonzalez, everyone involved in this case. Do not let her manipulate you. Use your common sense.

The lead defense attorney was more direct, in stating: "The State came in and they attacked Mr. Akin. We're going to talk about that some more in a few minutes. But the bottom line is the state of Texas made a deal to give immunity to the person who very likely pulled the trigger and killed Richard Madrigal." But defense counsel was also obliged to defend the attack on Akin, and he spent about a page worth of argument trying to explain the Missouri case.

The State's final rebuttal summation then returned to its same perjury theme to have the jury discount Akin's testimony:

> I'll tell you something else. How do we know about the science? What science do we know? I'll tell you the science we know is from our FBI agent, Sean Macamanus, who's never been accused of perjury in this state, any other state under the laws of the United States. And do you know what else doesn't lie? Cell towers. They don't lie.

She continued:

> And I'll tell you something else. I did not tarnish Mr. Akin. Mr. Akin tarnished himself because he lied in a court of law and got caught. And, yeah, I was aggressive with him. You bet your bottom dollar I was. I used my mom voice. That's exactly what I did. When I walk into that living room after I told my boys "Don't be playing with that ball in the house. You're going to break something." I walk out and I hear something crash. I walk back in, there's a lamp broken and a ball and my kids are like this. Yeah, I used my mom voice because I know they're

> lying to me. I know they're not telling me the truth. Just like that man. Yeah, he didn't like that the Supreme Court of Missouri said that. I get that. It doesn't make it not so.

In defending her own expert, the prosecutor continued to allude to the perjury finding:

> And Officer Granillo, the state's expert who has never committed perjury in a courtroom, who sat in here and listened to their expert, which is permissible by law, and I didn't have to recall him because he testified. He didn't say anybody was in the hall -- the shooter was in the hall.

* * * * * * *

The instances where admission of a single piece of evidence affect the "substantial rights" of a defendant are likely rare. But for many reasons, this is one of those rare cases. A charge of perjury is serious. It is a Class A misdemeanor in Texas, and a third-degree felony if made in connection with an official proceeding. TEX.PENAL CODE ANN. § 37.02 (perjury); *Id*. § 37.03 (aggravated perjury). The perjury attack directly went to the credibility of Akin, who was the sole proponent of the claim that it would be physically impossible for Appellant to have been the shooter. And upon that claim, the credibility of the State's sole eyewitness largely hung. The State had other evidence suggestive of guilt, but if the State's eyewitness becomes the perpetrator as Appellant argued at trial, that other evidence losses its luster. And most significantly, the charge of perjury was not from some gotcha question sprung at trial, but came from the highest court of one of our sister states. It is hardly surprising that Appellant's efforts to rebut the perjury claim might fizzle when put up against the imprimatur of a finding by a state supreme court. And no doubt, the State seized upon the perjury claim, as evidenced by its repeated reference in closing argument.

The admission of the evidence was error and affected Appellant's substantial rights. We sustain Issue Three and remand the case for a new trial.

IV. MOTION TO SUPPRESS LOCATION OF THE GUN

In his first issue, Appellant complains that the trial court improperly denied his motion to suppress Appellant's statement to police about the location of the gun used to kill Madrigal. The core of his argument is that the statement he gave to the police was not voluntarily given and should be excluded (1) under article 38.22 of the Code of Criminal Procedure; (2) as violating *Miranda v. Arizona*, or (3) as violative of due process. For the reason noted below, we cannot resolve this issue.

A. Procedural and Factual Background

Before trial, Appellant moved to suppress all of his custodial statements to police. The motion in general language contended any statements Appellant gave were involuntary, the police failed to inform him of his constitutional and statutory rights, and the statements were tainted by an illegal arrest. The motion also specifically claimed the recorded statements were inaccurate and any oral statement failed to comply with Article 38.22 of the Texas Code of Criminal Procedure. TEX.CODE CRIM.PROC.ANN. art. 38.22, § 3(a)(2) ("No oral . . . statement of an accused made as a result of a custodial interrogation shall be admissible . . . unless . . . the accused . . . knowingly, intelligently, and voluntarily waives any rights set out in the [required statutory warnings].").

The challenged statements resulted from the following sequence of events. The day after the murder, investigating officers located Appellant driving in El Paso. One of the investigating officers, who was driving alongside Appellant, claims he saw Appellant using a cell phone while driving. The detective directed a marked unit to stop Appellant based on that traffic-code violation. Seven other officers assisted in the stop. Appellant was ordered at gun point to get out of his

vehicle and was immediately handcuffed. He was then taken to the El Paso Police Department headquarters. There, Detectives David Camacho and Robert Posada questioned Appellant in a recorded interview. While the detectives read Appellant his *Miranda* rights, and gained his acknowledgment that he understood them, they never had Appellant acknowledge that he waived those rights.

After the interview, the detectives intended to transport Appellant to a magistrate for formal warnings and booking into jail. Detective Camacho testified that as he was leaving with Appellant to book him into jail, Appellant asked, "What happens now?" Camacho then informed Appellant, "Well, you go to jail[,]" and "Somebody [a kid] can get hurt if they find a gun, so we're going to go out there with a bunch of police and start looking for the gun [out in the desert]." The detectives and Appellant also engaged in "basic conversation" about Appellant's business and the work that he had performed on a house. While in transit, Appellant told the detectives that the gun was in his father's truck which was located on another person's property. The detectives then detoured and drove to the property. With the property owner's permission, Detective Camacho searched the vehicle and found the gun where Appellant said it would be. The gun was linked to the death of Madrigal.

In a series of hearings, Appellant challenged the statements made at the police station, and the later statement he made about the location of the gun. He challenged the pretextual traffic stop, contending that the detective had not actually seen the claimed traffic offense—driving while using a cell phone. He also challenged his statement made at the police station because the detectives failed to obtain his waiver of his right to remain silent. And he challenged the later statements made as to the location of the gun for two reasons. The statements were not recorded, as required

by article 38.22, § 3(a), and even if that procedural requirement was not at issue, the statement was not voluntarily given.

During the course of the several suppression hearings, the trial court took expert testimony on the voluntariness of the statements. The court also heard testimony from the several officers involved in the traffic stop, and Detectives Camacho and Posada, who took the statements at the police station, and later in the car. At trial, the court memorialized its several rulings on these issues. The trial court upheld the validity of the original stop, but excluded the recorded statement taken at police headquarters. And relevant to this appeal, the trial court concluded that article 38.22, section (3)(c) permits the unrecorded statement about the gun's location, as an exception to the statutory requirement that any statement be recorded.[9] When announcing its rulings, the trial court noted it made a "conscious decision not to make findings of fact or conclusions of law" and that its ruling was "dynamic" and might change based on the testimony at trial.

At trial, the State offered Detective Camacho to testify about Appellant's statement of where the gun could be found. Appellant objected to that testimony based on his motion to suppress. The trial court overruled that objection, permitting the statement and the testimony about the retrieval of the murder weapon. Following the trial, neither the State nor Appellant requested the trial court to enter finding of fact and conclusions of law.

[9] Article 38.22 contains several technical requirements for the admission of statements, and specifically requires oral statements made in a custodial interrogation be recorded and made after the accused is apprised of their rights and then knowingly, intelligently, and voluntarily waives those rights. TEX.CODE CRIM.PROC.ANN. art. 38.22, § (3)(a)(1), (2). The trial court, however, specifically relied on subsection (c) of that article which provides "Subsection (a) shall not apply to any statement which contains assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused, such as the finding of secreted or stolen property or the instrument with which he states the offense was committed." *Id.* § 3(c).

B. Applicable Law and our Standard of Review

A defendant may claim that his statement was involuntary and therefore inadmissible under three theories: (1) it was made in violation of the Due Process Clause; (2) it does not comply with the dictates of *Miranda*, and (3) it was involuntary under article 38.22. *See Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966); *Oursbourn v. State*, 259 S.W.3d 159, 169 (Tex.Crim.App. 2008); *Wolfe v. State*, 917 S.W.2d 270, 282 (Tex.Crim.App. 1996); TEX. CODE CRIM. PROC. ANN. art. 38.22, §§ 2-3, 6.

When reviewing a ruling on a motion to suppress, we afford almost total deference to the trial court's findings of historical facts that are reasonably supported by the record and to its resolution of mixed questions that turn on credibility or demeanor. *Lopez v. State*, 610 S.W.3d 487, 494 (Tex.Crim.App. 2020), *cert. denied*, 141 S.Ct. 1720 (2021). We perform a de novo review of the trial court's legal conclusions and its resolution of mixed questions that do not turn on credibility or demeanor. *Lopez*, 610 S.W.3d at 494. The trial court is the sole finder of fact and judge of the credibility of witnesses and the weight to be given their testimony. *Wiede v. State*, 214 S.W.3d 17, 24-25 (Tex.Crim.App. 2007). We will sustain the trial court's decision if we conclude that the decision is correct under any applicable theory of law. *Brodnex v. State*, 485 S.W.3d 432, 436 (Tex.Crim.App. 2016).

C. The Absence and Inability to Obtain Findings

These standards presuppose that the reviewing court has findings of fact and conclusions of law to test against the record. And the absence of findings pervades the briefing to this Court. In his brief, Appellant contends that his suppression theory at trial was based on involuntariness under either non-waiver of his rights or improper police influence or both. In support of that claim,

Appellant's opening brief posits that the trial court must have found that statements made at the police station violated *Miranda* or resulted from improper influence, and consequently was "involuntary on at least one theory." He then argues that it is unclear how the later statement made while in the car could meet those same standards and be admissible on its own. The State's brief responds that Appellant's statement in the car was spontaneous and volunteered, the detectives were not interrogating Appellant at that time, nor were their actions coercive under the applicable Due Process totality of the circumstances test. In reply, Appellant contends that the State's "responsive arguments are pure conjecture because the trial court failed to enter findings of fact and conclusions of law." Appellant's argument continues: "The State has attempted to place itself in the role of the trial court by telling this Court why the trial court ruled the way it did on the multi-faceted issue of the suppression of [Appellant's] statements."

On review of the briefing, we concluded that the lack of fact findings erected a hurdle to our review of this issue. Moreover, we recognize that section 6 of article 38.22 requires that:

> In all cases where a question is raised as to the voluntariness of a statement of an accused, the court must make an independent finding in the absence of the jury as to whether the statement was made under voluntary conditions. If the statement has been found to have been voluntarily made and held admissible as a matter of law and fact by the court in a hearing in the absence of the jury, the court must enter an order stating its conclusion as to whether or not the statement was voluntarily made, along with the specific finding of facts upon which the conclusion was based, which order shall be filed among the papers of the cause.

TEX.CODE CRIM.PROC.ANN. art. 38.22, § 6. And while neither party below, nor on appeal, formally requested findings of fact, we concluded that controlling precedent required that findings be issued. The Texas Court of Criminal Appeals has held that an intermediate appellate court has an independent duty to request required findings, even if the parties do not:

> Under article 38.22 of the Texas Code of Criminal Procedure, "[i]n *all cases* where a question is raised as to the voluntariness of a statement of an accused, the [trial]

> court . . . must enter an order stating its conclusion as to whether or not the statement was voluntarily made, along with the specific finding of fact upon which the conclusion was based, which order shall be filed among the papers of this cause." We have held that if a statement is involuntary as a matter of federal constitutional law, it is also involuntary for purposes of article 38.22. This, essentially, means that the requirement for 38.22 findings applies whenever there is a challenge to a statement's voluntariness.
>
> In this case, no findings of fact were filed. This was error. The Court of Appeals further erred by not abating for such findings.
>
> Here, neither party requested written findings at any level of the proceedings, and the issue was not considered by the lower court. Nonetheless, section 6 of article 38.22 clearly requires that the trial court make such findings. We hold that written findings are required in all cases concerning voluntariness. The statute has no exceptions.

Vasquez v. State, 411 S.W.3d 918, 920 (Tex.Crim.App. 2013) (footnotes omitted, emphasis original).

As a result, we abated the appeal and remanded this case to the trial court for findings of fact. We requested that the trial court determine whether any post-interrogation statements about the location of the gun were "voluntary" under the prevailing standards imposed by (1) the Due Process Clause, (2) *Miranda*, and (3) article 38.22. We allowed 60 days to comply with our order. Appellant and the State filed two agreed motions collectively seeking an additional 90 days to comply with our order, which we granted. We then received a motion from the trial judge asking for an abatement (of indeterminate length) based on the fact that the judge had retained Appellant's defense counsel to represent the judge in a pending Texas State Commission on Judicial Conduct charge made against the trial judge arising from an unrelated proceeding. The judge concluded in his motion to abate that "it would be improper to be ruling on matters involving those attorneys during their active representation of me." The judge's motion was not opposed by the State or

Appellant's counsel. The motion provides no definitive time frame for when the judge's legal matter will be concluded.

D. Analysis

The present situation leaves us in a conundrum. We are generally required to resolve "every issue raised and necessary to final disposition of the appeal." TEX.R.APP.P. 47.1. But we are also required to obtain findings of fact on rulings pertaining to the exclusion of evidence where the voluntariness of the statement is challenged. And here, the issue of voluntariness might turn on matters of credibility and demeanor.[10] The five-part hearing on the suppression issues included expert and fact witnesses, and included the testimony taken from the two detectives who heard the contested statement. Courts in prior cases have taken different approaches in dealing with the inability to obtain findings of fact.

In *Nichols v. State*, 810 S.W.2d 829, 833 (Tex.App.--Dallas 1991) *pet. ref'd per curiam,* 815 S.W.2d 732 (Tex.Crim.App.1991), a trial court concluded that a defendant's statement was voluntary, but failed to make specific findings on that issue. The Dallas court of appeals abated the appeal and remanded the case to the trial court to make the findings. *Id*. at 831-32. But the trial court only sent the same conclusions with no specific findings as requested by the court of appeals. *Id.* at 833. Reasoning that the case had been abated once and recognizing that the lack of adequate findings and conclusions hampered the defendant's ability to appeal his conviction,

[10] Appellant's Reply Brief states the problem this way:

> The necessity of such findings and conclusions has never been more important as they are in this case because the trial court suppressed [Appellant's] statements made prior to the statement at issue. The Court and parties, as a result, are left guessing as to what credibility determinations the court made with regard to the witnesses, specifically whether the trial court believed the statement was offered voluntarily. This Court is explicitly left without any conclusions from the trial court below upon which it can rely or evaluate.

the court of appeals reversed the judgment and granted a new trial. *Id*. The 13th Court took a different approach in *Douglas v. State*, 900 S.W.2d 760, 761 (Tex.App.--Corpus Christi 1995, pet. ref'd), where the trial judge who made the original ruling on the voluntariness issue was no longer on the bench. The Corpus Christi court abated the appeal and ordered a second judge to hold another hearing with the witnesses and personally hear their testimony on the voluntariness of the defendant's statement. *Id*. at 762.

But because we reverse the judgment of conviction based on Issue Three—which disposes of the appeal—we decline to decide the suppression issue and decline to follow either the *Nichols* or *Douglas* approach.[11] The remedy that Appellant seeks under this issue is also a new trial, so if we decide the issue in his favor, it would accord him no more relief vis-à-vis the judgment of conviction. We recognize that if we granted his first issue, it might place him in a better position if the State decides to retry the case. We balance that, however, against our obligation under TEX.R.APP.P. 40.2 to "determine a criminal appeal at the earliest possible time, having due regard for the parties' rights and for the proper administration of justice." Lacking a good third alternative, our choice is binary: decide the appeal now on two of the three issues presented or wait until some point in the future when Appellant's counsel will no longer be representing the trial judge and the findings of fact are prepared. Even then, it is unclear if the conflict that prevents the trial court from issuing the findings of fact would be resolved. Nor is it lost on us that Appellant now sits in prison awaiting the resolution of this appeal. And we also recognize that during any

[11] Neither the *Nichols* or *Douglas* approach are entirely satisfactory. If we remanded the matter as the court did in *Douglas* for a different trial judge to consider the matter on a new record, we would then be deciding if this trial judge made the correct ruling, but based on a record that this trial judge did not hear and which could be materially different. Or the new trial judge might arrive at a different conclusion, and effectively decide the appeal. The *Nichols* approach suffers from the prospect of reversing a valid conviction based on an external circumstance, such as the retirement or illness of the original trial judge.

retrial, the suppression issue could well arise again, and be re-urged by Appellant. Thus, we expressly decline to rule on whether the trial court erred in permitting the oral statement about the location of the gun.

V. CONCLUSION

We reinstate the appeal following our prior abatement. We reverse the judgment of conviction based on Issue Three, and remand for a new trial. We overrule Issue Two and decline to rule on Issue One.

JEFF ALLEY, Justice

May 31, 2022

Before Rodriguez, C.J., Palafox, and Alley, JJ.

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