Affirmed as Modified and Memorandum Opinion filed November 30, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00030-CR

WESLEY JOEL SMITH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court
Jefferson County, Texas
Trial Court Cause No. 97384

M E M O R A N D U M O P I N I O N

Appellant Wesley Joel Smith appeals after a jury convicted him of murder for the death of Tonia Porras. *See* Tex. Penal Code Ann. § 19.02(b)(1) (Vernon 2003). Appellant was sentenced to imprisonment for 55 years and assessed a $10,000 fine. We modify the judgment and affirm the judgment of conviction as modified.[1]

[1] Appellant's case was originally filed with the Ninth Court of Appeals and was transferred to this court.

BACKGROUND

Porras's body was discovered on the floor of her garage apartment in Beaumont, Texas, on November 5, 2005. According to the coroner, Porras was rendered unconscious by blunt-force trauma to her head. Her head and wrists were bound with duct tape; an extension cord was wrapped tightly around her neck; and she had been stabbed with a knife at least 26 times.

Police immediately identified Corey Schuff, Porras's ex-boyfriend, as a suspect in the investigation of Porras's murder. Schuff was identified because of his threats to strangle, rape, and kill Porras. Authorities also traced the suspected getaway car, a green Camaro, to Schuff.

Schuff and appellant were close friends and members of the same gang. When questioned by police about Porras's murder, appellant initially denied any first-hand knowledge. In a written statement dated November 10, 2005, appellant stated that his only knowledge of the crime came from an acquaintance and the local newspaper. He told investigators from the Jefferson County Sherriff's Department that he suspected Schuff "may have been the one that killed Tonia." Appellant stated that Schuff had left the area in a car provided by appellant on the night of Porras's murder.

Appellant gave a second written statement to the Jefferson County Sherriff's Department dated December 2, 2005, in which he described Schuff as his "very best friend in the world" whom he loved "like a blood brother." Appellant stated that he and Schuff both were members of the same gang. Appellant stated that Schuff drove to appellant's home in the green Camaro on November 2 and asked appellant to listen to a voicemail on Schuff's phone. According to appellant, the voicemail captured a conversation in which Porras and an ex-gang member discussed a plan to kill Schuff. After they listened to the voicemail, Schuff told appellant he was leaving to visit a friend in Louisiana; Schuff showed up at appellant's home later that night covered in blood. According to appellant's second statement, Schuff said he "flipped out[,] . . . knocked Tonia out and then . . . went crazy and started stabbing her." Appellant stated that he

gave Schuff the keys to a car and $100 to "get away." Appellant again denied any role in the murder; he stated that when a gang member ordered him to burn the Camaro, appellant had "refused to go anywhere around that car."

Appellant gave a third and final written statement to the Jefferson County Sherriff's Department on December 13, 2005. In it, he elaborated upon and contradicted certain portions of his two prior statements. Appellant stated that he and Schuff had been instructed to find the ex-gang member and "deliver him" to Houston to be disciplined by gang leadership. Appellant then described the events that unfolded on November 2:

> Corey and I then left in the green Camaro. . . . Corey then headed toward Port Acres because he had reason to believe that [the ex-gang member] was sighted in the area . . . . Once at this house, I remember it being a two-story with a long driveway. Corey took out a long silver-colored maglight from the [C]amaro and ran upstairs while I waited outside. I was holding a baseball bat because I was under the impression that [the ex-gang member] would be there. At the time, I was standing near several cars that were in the driveway. I then heard a loud commotion from the upstairs room. I waited about two minutes before I ran up the stairs. When I opened the door I saw Corey stabbing Tonia. I knew it was Tonia because of her long black hair and small body frame. Corey thrust a knife into her midsection at least twice. She was lying on the ground in a fetal position and was motionless. Tonia's face and wrists were bound with duct tape and there was blood everywhere (Tonia's body, floor, and Corey's clothing). I was only inside for a matter of seconds and never left the area of the door before Corey told me to go back downstairs. I distinctly remember that no one else was in the room and it was clearly lighted. Before leaving, I used my shirt to wipe my fingerprints off the outside doorknob. About a minute and a half later, Corey came back. He was now carrying the same maglight and a brown plastic grocery bag. Corey got in the front passenger seat and asked me to drive. . . . Within a mile or so from the house, Corey threw the knife he stabbed Tonia with, his flashlight, and my bat from the [C]amaro. . . .
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> While traveling to my house, Corey called someone, and . . . explained that we went out to find [the ex-gang member], but ran into Tonia instead. Corey then told the person on the other end that he killed Tonia. . . . I agreed to give him my stepson's maroon Chevrolet Beretta. . . . I then gave Corey one hundred dollars. . . .
>
> Before leaving, Corey asked me to take the [C]amaro to [another

> gang member who] was supposed to destroy it. Later this same night I took the [C]amaro to [the other gang member to be destroyed]. . . .
>
> . . . I did not take any part in the assault or murder of Tonia and would be willing to testify against Corey Schuff.

Investigators found no trace of appellant's DNA on a knife that was discovered on the property where Porras's garage apartment was located; they also did not find appellant's DNA on the electrical cord or duct tape wrapped around Porras, or on Porras's body. Investigators found no evidence of Porras's DNA on appellant, in his house, or on the baseball bat he held while standing in Porras's driveway. Although Schuff's fingerprints were discovered inside the apartment, appellant's were not. DNA expert Jane Burgett testified for the State and opined that appellant could not be excluded as a "minor contributor" of DNA left on a roll of duct tape discovered near Porras's feet inside the apartment.

At trial, the jury was charged as follows:

> Now if you believe from the evidence beyond a reasonable doubt that in Jefferson County, Texas, on or about November 2, 2005, the defendant Wesley Joel Smith, either acting alone or as a party, as that term is defined in these Instructions, did then and there intentionally or knowingly cause the death of an individual, namely: TONIA LYNN PORRAS . . . by stabbing and cutting [her] with a deadly weapon, to-wit: a knife, that in the manner of its use and intended use was capable of causing serious bodily injury or death, you shall find the defendant GUILTY of the offense of Murder.

The jury found appellant guilty of murder "as alleged in the indictment," sentenced him to confinement for 55 years, and assessed a $10,000 fine.[2] The trial court's November 21, 2008 judgment included a deadly weapon finding against appellant. Appellant filed a motion for new trial, which was overruled by operation of law.

[2] Schuff was tried for Porras's murder in a separate proceeding, convicted, and sentenced to life in prison. His judgment of conviction was modified on appeal and affirmed as modified. *See Schuff v. Texas*, No. 13-08-00023-CR, 2009 WL 3321023 (Tex. App.—Corpus Christi, Oct. 15, 2009, pet. dism'd as untimely filed) (mem. op., not designated for publication).

Appellant raises fourteen issues on appeal. In support of these issues, appellant argues that (1) the State's DNA evidence is unreliable and other evidence is insufficient to prove his participation in the murder; (2) the State violated his constitutional rights because the State's prosecution of appellant was inconsistent with its prosecution of Schuff; (3) the trial court erroneously admitted evidence regarding a phone call Porras made to police several days before she was murdered; (4) the jury charge contains errors; and (5) the trial court erred by entering a deadly weapon finding against appellant.

ANALYSIS

I. Sufficiency of the Evidence

Appellant argues in Issues 12 and 13 that the evidence is legally and factually insufficient to support his conviction.

We address appellant's sufficiency challenges under a single standard for evaluating legal sufficiency of the evidence. *See Brooks v. State*, No. PD-0210-09, 2010 WL 3894613, at *8 (Tex. Crim. App. Oct. 6, 2010) (plurality opinion) (appropriate standard of review for sufficiency of the evidence considers "all evidence in the light most favorable to the verdict" to determine whether a jury was "rationally justified in finding guilt beyond a reasonable doubt"); *id.* at *15 (Cochran, J., concurring) (concluding that a separate factual sufficiency standard should no longer apply in reviewing sufficiency of evidence supporting a criminal conviction).

A person commits murder if he "intentionally or knowingly causes the death of an individual." Tex. Penal Code Ann. § 19.02(b)(1). Additionally, "[a] person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both." *Id.* § 7.01(a) (Vernon 2003). Criminal responsibility exists when the defendant, "acting with intent to promote or assist the commission of the offense . . . solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense . . . ." *Id.* § 7.02(a)(2).

The indictment and jury charge allowed the jury to convict appellant as a primary

actor or as a party. When the defendant is not the primary actor, the State must prove (1) conduct constituting an offense; and (2) an act by the defendant done with the intent to promote or assist such conduct. *Beier v. State*, 687 S.W.2d 2, 3 (Tex. Crim. App. 1985).

"Evidence is sufficient to convict the defendant under the law of parties where he is physically present at the commission of the offense, and encourages the commission of the offense either by words or other agreement." *Id*. at 3. "In determining whether the accused participated as a party, the court may look to events occurring before, during and after the commission of the offense, and may rely on actions of the defendant which show an understanding and common design to do the prohibited act." *Id*. at 4. "Circumstantial evidence may be used to prove one is a party to an offense." *Id*. "Since an agreement between parties to act together in a common design can seldom be proved by words, the State often must rely on the actions of the parties, shown by direct or circumstantial evidence, to establish an understanding or a common design to commit the offense." *Miller v. State*, 83 S.W.3d 308, 314 (Tex. App.—Austin 2002, pet. ref'd). "[W]hile mere presence at the scene, or even flight, is not enough to sustain a conviction, such facts may be considered in determining whether an appellant was a party to the offense." *Id*. (citing *Valdez v. State*, 877 S.W.2d 71, 74 (Tex. Crim. App. 1981) (op. on reh'g), and *Guillory v. State*, 877 S.W.2d 71, 74 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd)).

Appellant's sufficiency challenge focuses primarily on the State's use of expert testimony from Burgett linking appellant to the roll of duct tape found next to Porras's body. Although appellant disputed aspects of Burgett's methodology at trial via cross-examination and competing testimony proffered by his own expert, appellant did not object to the admission of Burgett's testimony in the trial court. *See Davis v. State*, 313 S.W.3d 317, 352 (Tex. Crim. App. 2010).[3] In any event, "*all* evidence admitted at trial

[3] Appellant contends that Burgett's conclusions are scientifically unreliable. Appellant claims that (1) the DNA evidence could have been degraded by hypothetical environmental contaminants before and after it was collected; (2) Burgett exaggerated the statistical probability that appellant was a contributor to the DNA left on the duct tape roll; (3) Burgett erroneously referred to the DNA match as

— including improperly admitted evidence — is considered in a legal sufficiency review." *Wilson v. State*, 7 S.W.3d 136, 141 (Tex. Crim. App. 1999) (original emphasis); *see also Brooks*, 2010 WL 3894613, at * 8 (reviewing courts consider "all evidence in the light most favorable to the verdict" when addressing a sufficiency challenge). Therefore, we consider Burgett's expert testimony in determining whether legally sufficient evidence supports appellant's conviction.

A. DNA Expert Testimony

Burgett testified without objection regarding her qualifications and credentials as a DNA expert. Burgett testified that she followed DPS Crime Laboratory protocol in calculating the DNA results, and that the protocol had been tendered to appellant. Burgett testified regarding the Texas DPS Crime Laboratory techniques used in DNA collection and amplification. Burgett explained the DPS Crime Laboratory protocol that governed her order of testing, method of handling, and amplification of DNA samples. Burgett explained the process of DNA analysis, in which experts compare samples to determine whether certain individuals can be excluded as contributors of DNA recovered in investigations.

Burgett testified without objection regarding the uncompromised chain of evidence for the duct tape from which the DNA samples in this case were taken. Burgett testified that the duct tape bindings taken from Porras's body contained no DNA from Schuff or appellant. Burgett testified that she tested three locations on the duct tape roll

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one of inclusion rather than exclusion; and (4) appellant's rebuttal expert revealed that Burgett's testimony did not meet the standard for admissibility of scientific evidence under *Kelly v. State*, 824 S.W.2d 568, 573–74 (Tex. Crim. App. 1992). "Texas Rule of Evidence 705(c) governs the reliability of expert testimony and states that '[i]f the court determines that the underlying facts or data do not provide a sufficient basis for the expert's opinion under Rule 702 or 703, the opinion is inadmissible.'" *Vela v. State*, 209 S.W.3d 128, 133 (Tex. Crim. App. App. 2006) (quoting Tex. R. Evid. 705(c)). An objection to expert testimony is necessary for the trial court to make a ruling on its admissibility. *See* Tex. R. Evid. 103(a)(1); *see also Davis*, 313 S.W.3d at 352 ("Ordinarily, an objection is required to preserve error for review" when appellant contends that an expert witness employed an unreliable methodology.). Appellant failed to object to Burgett's testimony on any of the grounds he argues on appeal. Therefore, we do not address appellant's contention that Burgett's expert testimony failed to satisfy the governing standards for reliability and admissibility. *See Davis*, 313 S.W.3d at 352.

found next to Porras's body, which she described by holding the roll horizontally so that the sticky "edges" of the roll were parallel to the floor: (1) an apparent blood stain on the gray non-sticky side of the tape; (2) the non-stained surface of the "top" sticky edge of the roll; and (2) the non-stained surface of the "bottom" sticky edge of the roll.

Burgett testified that Porras could not be excluded from the blood stain DNA, which belonged to a female. Burgett testified that the DNA sample from the "top" and "bottom" sticky edges contained a mixture of more than two people. Burgett testified that appellant could not be excluded from 15 genetic markers from the sample taken from the "top" sticky edge of the roll, and appellant could not be excluded from eight markers from the sample taken from the "bottom" sticky edge of the roll. Burgett explained that the probability that an unrelated person selected at random could be a contributor for the DNA on the "top" sticky edge of the roll is 1 in 2,350,000 for Caucasians, and the probability that an unrelated person selected at random could be a contributor for the DNA on the "bottom" sticky edge of the roll was 1 in 4214 for Caucasians.[4] Burgett confirmed that appellant is Caucasian.

On cross-examination, Burgett testified that the "peaks" on an electropherogram chart indicate major and minor contributors of DNA left on the roll of duct tape. Burgett testified that she initially assumed that the major female contributor was Porras, and that there was only one other minor "foreign" contributor. Once Burgett compared the known DNA profiles of Porras, Schuff, and appellant to the samples, Burgett concluded that the "foreign" profile was based on a sample with three contributors instead of two.

Appellant proffered his own DNA expert, Tim Kupferschmid. Kupferschmid testified that he would consider the minor contributor DNA profiles inconclusive because the sample level was low. Kupferschmid testified that he would have done two

[4] Over appellant's objection, Burgett identified a transcription error that had affected the initial calculations in her report regarding the sample taken from the "bottom" sticky edge of the roll. Burgett testified that when the error was corrected, her recalculation reduced the statistical probability that appellant left DNA material on the duct tape found next to Porras's body. Burgett stated that this original error benefitted appellant by increasing the likelihood that an unrelated person could have been a contributor to the DNA material found in the sample.

amplifications of the sample for such a low-level mixture to gauge the reliability of the profile of the minor contributors. Kupferschmid criticized Burgett's use of the known samples of Schuff and appellant to conclude that the "foreign" profile was a mixture of two contributors. Kupferschmid testified that based on only the highest "peaks" on Burgett's electropherogram chart, he calculated the probability that an unrelated person selected at random could be a contributor for the DNA from the "top" sticky edge of the roll is 1 in 47, and 1 in 3 for the DNA from the "bottom" sticky edge of the roll. Kupferschmid testified that these probability calculations were so low that virtually anyone who handled the roll could have been a contributor, including the store employee who originally sold the duct tape.

B. Other Evidence

In addition to discounting the State's DNA evidence, appellant also contends that other evidence in the record limits his role to that of a mere "accessory after the fact."

Appellant contends that the record contains no evidence of appellant's motive and intent to murder Porras, or to assist Schuff in murdering her. *See Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004) ("Motive is a significant circumstance indicating guilt. Intent may also be inferred from circumstantial evidence such as acts, words, and the conduct of the appellant."). Appellant argues that Schuff had a motive to murder his ex-girlfriend Porras out of jealousy based on evidence that Schuff was angry because she had engaged in a sexual relationship with one of Schuff's friends. Appellant also contends that he was present at the garage apartment on November 2 only to help find the ex-gang member and deliver him to Houston — not to kill Porras or to help Schuff kill her. However, a rational trier of fact could conclude that appellant had a motive and an intent to assist Schuff in murdering Porras because appellant overheard a voicemail in which Porras spoke with the ex-gang member about a plot to kill Schuff — appellant's fellow gang member, his "blood brother," and his "very best friend in the world." *See Medina v. State*, 7 S.W.3d 633, 636 n.1 (Tex. Crim. App. 1999) (en banc) ("There was evidence that these murders were committed in revenge for the murder of . . . a fellow

gang member of appellant's and his close friend.").

Appellant's multiple written statements to the police provide significant evidence that a rational trier of fact could rely upon in determining guilt. Although appellant denied any first-hand knowledge of the murder in his November 10 statement, appellant's December 2 statement establishes that appellant knew "Corey was very mad" about the recorded voicemail in which Porras and the ex-gang member were overheard discussing a plot to kill Schuff. Appellant's December 13 statement establishes that appellant (1) accompanied Schuff to Porras's home in the Camaro after they listened to the voicemail; (2) was present at the garage apartment's doorway and watched as Schuff repeatedly stabbed Porras on the apartment floor; (3) did nothing to prevent or stop the stabbing; (4) used his shirt to wipe his own fingerprints off of the outside doorknob of the door leading to the garage apartment, and then left the doorway when Schuff told him to go back downstairs; (5) drove Schuff from the murder scene to appellant's house in the Camaro while Schuff threw the murder weapon and other items out of the car window; and (6) gave Schuff money and another car so Schuff could escape to Houston. A rational jury could have relied upon this evidence to find that appellant was physically present during the offense and encouraged the commission of the offense. *See Adams v. State*, 180 S.W.3d 386, 417–418 (Tex. App.—Corpus Christi 2005, no pet.); *see also Miller*, 83 S.W.3d at 315 ("The evidence supports a finding that Shane knew how Skyler would react in most circumstances. Shane did nothing to discourage Skyler's fatal reaction . . . .").

A rational jury also could have concluded that there was an understanding and a common design to murder Porras based on evidence that appellant lied to police and assisted in concealing evidence. *See Guevara*, 152 S.W.3d at 50 ("Attempts to conceal incriminating evidence, inconsistent statements, and implausible explanations to police are probative of wrongful conduct and are also circumstances of guilt. Lies about an actor's relationship with an accomplice are probative of unlawful acts."); *see also Adams*, 180 S.W.3d at 417.

This evidence would be sufficient to support appellant's conviction even if we did not consider the DNA evidence linking appellant to the roll of duct tape found near Porras's body. *See Guevara*, 152 S.W.3d at 52 ("While each piece of evidence [may lack] sufficiency in isolation, the consistency of the evidence and the reasonable inferences drawn therefrom were sufficient to support the verdict.") Additional evidence shows that the color, size, construction, fibers, and adhesive of the duct tape roll found near Porras's body all were consistent with the duct tape used to bind Porras's hands and wrap her head before she was stabbed. From this evidence and the DNA link to appellant, a rational trier of fact could have concluded that appellant provided equipment used or intended for use in subduing and murdering Porras. Such an action also supports a conviction as a party to murder. *See Adams*, 180 S.W.3d at 416–17 (evidence that appellant gave a ribbon to assailant for use in strangling victim supported appellant's conviction as a party to murder under section 19.02(b)(1) of the Texas Penal Code).

Proof that the DNA was placed on the duct tape roll while Schuff was attacking Porras is not required to support a conviction based on party liability. *See Guevara*, 152 S.W.3d at 51–52. In *Guevara*, the Court of Criminal Appeals addressed an argument that "in order to be convicted as a party to the murder, there must be proof that [the appellant] . . . was assisting in the commission of the offense at the time it was actually committed and that he had knowledge that he was assisting in the commission of the offense." *Id*. at 51. The court rejected this argument because "the Penal Code does not require that the party actually participate in the commission of the offense to be criminally responsible." *Id*. at 51–52.

We conclude that this constellation of evidence, when viewed in the light most favorable to the verdict, would allow a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. Accordingly, we overrule appellant's issues regarding the sufficiency of the evidence.

II. State's Prosecution of Schuff and Appellant

Appellant argues in Issues 5 and 7 that the State violated his Fourteenth Amendment right to due process and his Sixth Amendment right to a fair trial by relying upon theories at his trial that were inconsistent with the theories relied upon at Schuff's trial. Appellant complains in Issue 6 that the State violated his Fourteenth Amendment due process rights by materially misrepresenting facts at his trial.

In support of these issues, appellant cites to the record from Schuff's trial to argue (1) evidence of "torture" was used at appellant's trial but not at Schuff's trial; (2) the State focused more heavily on Schuff's motive and intent to murder Porras in Schuff's trial; and (3) DNA evidence linking appellant to the duct tape at Schuff's trial shows a weaker match than the evidence admitted at appellant's trial.

None of appellant's arguments regarding the State's prosecution of Schuff were raised in appellant's motion for new trial, and appellant did not present the record from Schuff's case to the trial court for review. Appellant was required to present these issues in a motion for new trial so that any evidence necessary to support his arguments could be addressed at a hearing. *See* Tex. R. App. P. 21.2 ("A motion for new trial is a prerequisite to presenting a point of error on appeal . . . when necessary to adduce facts not in the record."); *Dixon v. State*, 64 S.W.3d 469, 474–75 (Tex. App.—Amarillo 2001, pet. ref'd) (citing *Carranza v. State*, 960 S.W.2d 76, 78–79 (Tex. Crim. App. 1998)) (declining to find jury misconduct from facts outside the record because appellant did not present additional evidence of misconduct to the trial court as part of motion for new trial).

To preserve an issue for review on appeal, parties must make a timely complaint to the trial court and obtain a ruling. *See* Tex. R. App. P. 33.1. Without preservation, certain constitutional errors may be waived. *See Briggs v. State*, 789 S.W.2d 918, 924 (Tex. Crim. App. 1990); *Rogers v. State*, 640 S.W.2d 248, 263–64 (Tex. Crim. App. 1981) (op. on second reh'g) (due process argument waived because it was not raised to trial court). Because appellant did not preserve the arguments raised in Issues 5 and 7 for

review, we overrule appellant's issues regarding asserted inconsistencies between the State's prosecution of Schuff and appellant.[5]

III. Admission of Evidence Regarding Request for Special Patrol

Appellant complains in Issues 9 and 10 that the trial court erred in admitting (1) testimony from the police dispatcher who received Porras's request for a special patrol several days before she was murdered; and (2) the log sheet on which the dispatcher recorded the time of the call, the number of the police unit dispatched, and Porras's name and address. The trial court overruled appellant's hearsay objections and admitted the dispatcher's testimony based on hearsay exceptions for present sense impressions and excited utterances under Texas Rules of Evidence 803(1) and (2). The trial court admitted the log sheet as a record of regularly conducted activity under Texas Rule of Evidence 803(6).

Appellant also objected at trial that the dispatcher's testimony and the call log violate the Confrontation Clause because the information Porras gave the dispatcher was testimonial in nature. *See Crawford v. Washington*, 541 U.S. 36, 68 (2004). Appellant argues that under *Crawford*, all evidence regarding the call was inadmissible because Porras was unavailable for cross-examination. *Id.* ("Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.")

[5] The trial court in Schuff's case rendered judgment on November 30, 2007. *See Schuff*, 2009 WL 3321023, at *7. The trial court in appellant's case rendered judgment on November 21, 2008. Appellant filed a motion in this court to supplement the record before this court with the reporter's record from Schuff's trial. Putting aside whether this court properly could take notice of the reporter's record from an entirely separate case, the reporter's record from Schuff's trial does not advance appellant's petition because he did not submit it to the trial court for consideration in conjunction with a motion for new trial. *See* Tex. R. App. P. 21.2. Accordingly, we deny appellant's motion as moot. Even if appellant had preserved these issues, appellant's arguments as briefed would not warrant reversal. The State's decision not to call two witnesses from Schuff's trial, whose testimony implicated Schuff in the murder, did not conflict with the State's prosecution of appellant as a party to Schuff's murder of Porras. The recalculation of the DNA evidence originally admitted in Schuff's trial actually benefitted appellant by reducing the statistical probability that the DNA belonged to appellant.

We review a trial court's decision to admit evidence under an abuse of discretion standard. *Walters v. State*, 247 S.W.3d 204, 217 (Tex. Crim. App. 2007). The trial court abuses its discretion only when the decision lies "outside the zone of reasonable disagreement." *Id*. We first address the trial court's ruling on the dispatcher's testimony.

A. Hearsay Exceptions

Hearsay is an out-of-court statement offered into evidence to prove the truth of the matter asserted. *See* Tex. R. Evid. 801(d). For hearsay to be admissible, it must fit into an exception. *See* Tex. R. Evid. 802. An excited utterance under Texas Rule of Evidence 803(2) constitutes one such exception.

To qualify as an excited utterance, (1) the statement must be the product of a startling occurrence that produces a state of nervous excitement in the declarant and renders the utterance spontaneous; (2) this state of excitement must be so dominant in the declarant's mind that there is no time or opportunity to contrive or misrepresent; and (3) the statement must relate to the circumstances of the occurrence preceding it. *Kesaria v. State*, 148 S.W.3d 634, 642 (Tex. App.—Houston [14th Dist.] 2004), *aff'd*, 189 S.W.3d 279 (Tex. Crim. App. 2006). The pivotal inquiry in deciding whether a statement is an excited utterance is "'whether the declarant was still dominated by the emotions, excitement, fear, or pain of the event.'" *Id*. (quoting *King v. State*, 953 S.W.2d 266, 269 (Tex. Crim. App. 1997)).

The dispatcher testified:

> A: [Porras] told me that she was afraid that [Schuff] was going to kill her. He had beat her up before, she told me; she definitely believed he was going to kill her. She said that.
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> Q: Did she relate to you anything regarding [Schuff's] recent release from custody?
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> A: She told me that she had been told that he had been released from Harris County, and that she knew he was going to be coming over here to kill her.
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> * * *

Q: Did she indicate that the release from custody had been recent?

A: Yeah. She said — yes, sir, she said that it was recent. I don't know if it — I don't remember her saying it was that day. I don't know that, but it was recent.

Q: But she told you that she was afraid of him; is that correct?

A: She told me that more than once.

Q: That — did she ever tell you that he had threatened her in any fashion?

A: I believe he promised her he would do it. She said that he was going to do it.

* * *

Q: Did it appear to you that her emotional state was a result of him having been released from Harris County Jail?

A: Yes. Yes.

Q: And was it in that emotional state that she was making statements and utterances to you while still under the influence of that condition, him having been released from Harris County Jail?

A: Yes, she knew he was free to come over here.

A threat to kill the declarant can constitute an exciting event. *See, e.g.*, *Hayden v. State*, 155 S.W.3d 640, 647 (Tex. App.—Eastland 2005, pet. ref'd) (trial court did not err in admitting excited utterance communicating defendant's threat on declarant's life); *Bondurant v. State*, 956 S.W.2d 762, 764–65 (Tex. App.—Fort Worth 1997, pet. ref'd) (trial court did not err in admitting excited utterance communicating defendant's threat on declarant's life after declarant learned defendant had committed murder previously).

In this case, a prior threat to kill, combined with the knowledge that the threatening party has been released recently from custody, constituted an exciting event. At the time the statements were made, the dispatcher testified that she would characterize the amount of fear in Porras's voice as an "eight" on a scale of one to ten; the dispatcher testified that she would rank callers as a "nine" or "ten" only if they were so distraught that they were unintelligible. The dispatcher testified that Porras's voice was shaking throughout the conversation, and that there was no doubt in the dispatcher's mind that Porras was "scared to death." Porras's statements — that she needed a special patrol

because Schuff had been abusive in the past, had threatened to kill her, and was being released from jail — all related to the exciting event. Based on the record, we conclude that the trial court acted within its discretion to admit the testimony at issue under the exception for excited utterances.

B. Confrontation Clause

The Sixth Amendment right of confrontation applies to the states by virtue of the Fourteenth Amendment. *Pointer v. State*, 380 U.S. 400, 403 (1965); *Langham v. State*, 305 S.W.3d 568, 575 (Tex. Crim. App. 2010). Under *Crawford*, 541 U.S. at 68, the Confrontation Clause requires the State to show that an out-of-court, testimonial statement offered against an accused was made by a declarant who (1) is presently unavailable; and (2) was subject to cross-examination by the accused. *Langham*, 305 S.W.3d at 575–76 (citing *Crawford*, 541 U.S. at 59, 68). Out-of-court statements made to police are not considered testimonial if they are made "'to enable police assistance to meet an ongoing emergency'" rather than "'to establish or prove past events potentially relevant to later criminal prosecution.'" *Vinson v. State*, 252 S.W.3d 336, 338 (Tex. Crim. App. 2008) (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)). We review *de novo* the trial court's ruling on the testimonial nature of a statement. *Langham*, 305 S.W.3d at 576.

To determine whether statements are made during an on-going emergency, we consider whether (1) the situation was still in progress; (2) the questions sought to determine what was presently happening as opposed to what happened in the past; (3) the primary purpose of the questioning was to render aid rather than to memorialize a possible crime; (4) the questioning was conducted in a separate location away from the alleged attacker; and (5) the events were deliberately recounted in a step-by-step fashion. *Vinson*, 252 S.W.3d at 339. These factors are non-exhaustive. *Id*.

Based on these factors, we conclude the trial court did not err in ruling that the information provided by Porras to the police dispatcher was non-testimonial under *Crawford*. Although Porras placed the call on the non-emergency police line, the request

for a special patrol was made to address what the dispatcher deemed "a legitimate threat" then presently faced by Porras. The information provided by Porras involved past events, but these events were relevant to whether Schuff's promise to kill her constituted an on-going emergency at that time. Porras's purpose in conveying this information was apparently for the dispatcher to render aid, not to memorialize the fact that Schuff had been abusive or incarcerated in the past. Although the alleged attacker was not present, the information was given in anticipation of his possible arrival rather than after Porras's safe removal from the emergency. Porras did not give a step-by-step recounting of a crime, but instead offered necessary information for the dispatcher to evaluate the seriousness of the emergency and respond to aid Porras. This non-testimonial evidence does not implicate the Confrontation Clause under these circumstances. The trial court acted within its discretion in admitting the dispatcher's testimony into evidence.

C. Call Log

Having concluded that the information provided to the dispatcher was non-testimonial, we must address whether the trial court properly admitted the call log itself. The call log contained the following relevant information:

> Unit Called: 120
> Time: 0255
> Remarks: Sp. Patrol – 2065 Hillebrandt Acres, Tonia Porras

Even if we presume for the sake of argument that the trial court erred in admitting the call log under the hearsay exception in Texas Rule of Evidence 803(6), any such error was harmless. We reverse for non-constitutional errors only if the substantial rights of appellant are affected. *See* Tex. R. App. P. 44.2(b). Substantial rights are not affected by the erroneous admission of evidence if the error did not influence the jury, or had only a slight effect. *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002). In making this determination, we consider everything in the record, including (1) any testimony or physical evidence admitted for the jury's consideration; (2) the nature of the evidence admitted for the jury's consideration; (3) the nature of the evidence supporting the

verdict; and (4) the character of the alleged error and how it might be considered in connection with other evidence in the case. *Id.*

We have determined that the trial court did not err in admitting the dispatcher's testimony. The call log contained the same information as the dispatcher's testimony, except that the call log also included the number of the police unit dispatched. Thus, the nature of the evidence was almost entirely cumulative. Because the unit number was not relevant to the State's case, it is unlikely that the jury considered it at all in connection with the other evidence of appellant's guilt. We do not believe the admission of the call log had even a slight effect on the jury, and we conclude that any error in admitting the call log was harmless. For the reasons stated above, we overrule Issues 9 and 10.

IV. Jury Instructions

Appellant argues in Issues 8, 11, and 14 that the trial court erred in failing to instruct the jury (1) to unanimously find appellant guilty on a single theory of criminal liability; (2) that extraneous offense evidence must be proven beyond a reasonable doubt; and (3) on the voluntariness of appellant's December 13, 2005 statement.

Our first duty in analyzing a jury-charge issue is to decide whether error exists. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). If we find error, then we analyze that error for harm. *Id.* Preservation of charge error does not become an issue until we assess harm. *Id.* The degree of harm necessary for reversal depends on whether the appellant preserved the error by objection. *Id.*

A. Unanimous Jury Finding on Theory of Criminal Liability

The jury was instructed that it could convict appellant of murder for causing Porras's death "either acting alone or as a party, as that term is defined in these Instructions." Appellant claims the trial court should have instructed the jury to unanimously decide between these two theories of criminal liability.

It is proper for an indictment to allege different means of committing the same offense and for the jury to be charged disjunctively. *See Kitchens v. State*, 823 S.W.2d

256, 258 (Tex. Crim. App. 1991) (charge properly listed two alternative underlying felonies to support capital murder conviction). When a trial court submits alternative theories supporting the accused's commission of the same offense to the jury in the disjunctive, it is appropriate for the jury to return a general verdict if the evidence is sufficient to support a finding under any of the theories submitted. *Id*. Unanimity regarding the specific means by which an accused committed a crime is not necessary. *Id*.; *see also Gamboa v. State*, 296 S.W.3d 574, 583–84 (Tex. Crim. App. 2009) (discussing the "prevailing view" that alternate legal theories supporting conviction for capital murder do not require unanimity because "'the trial court cannot impose multiple convictions and sentences for variations of murder when only one person was killed.'" (quoting *Ex Parte Ervin*, 991 S.W.2d 804, 807 (Tex. Crim. App. 1999))).

A jury is not required to choose unanimously between alternative theories of primary or party liability for murder if (1) either theory was proved; and (2) the alternate theories do not constitute multiple criminal acts. *See, e.g.*, *Randall v. State*, 232 S.W.3d 285, 294 (Tex. App.—Beaumont 2007, pet. ref'd) (jury not required to choose unanimously between theories of principal, party, or co-conspirator liability for murder); *Holford v. State*, 177 S.W.3d 454, 461–62 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd) (jury not required to choose unanimously between theories of primary or party liability to convict appellant of capital murder); *Hanson v. State*, 55 S.W.3d 681, 693–95 (Tex. App.—Austin 2001, pet. ref'd) (jury not required to choose unanimously between different theories of party liability for capital murder "so long as either theory was proved" because different theories supporting criminal liability for same murder do not constitute multiple offenses). Because the jury was not required to agree unanimously on the method by which appellant incurred criminal liability for causing Porras's death, the trial court was not required to instruct the jury to find appellant guilty unanimously according to one theory.

We overrule appellant's issue regarding the unanimity of the jury verdict.

B. Voluntariness of December 13, 2005 Statement

Appellant argues the trial court should have instructed the jury on the voluntariness of the statement he gave to police on December 13, 2005. Appellant claims that an FBI agent made promises to release appellant from jail in exchange for the statement, and that this conduct rendered his statement involuntary.

Constitutionally improper conduct of law enforcement in obtaining a statement may render a statement involuntary and excludable. *See* Tex. Crim. Proc. Code Ann. art. 38.23 (Vernon 2005); *Oursbourn v. State*, 259 S.W.3d 159, 181–82 (Tex. Crim. App. 2008). The trial court must instruct the jury on voluntariness if the evidence presented to the jury raises a voluntariness issue. *See* Tex. Crim. Proc. Code Ann. arts. 38.22 § 6, 38.23 (Vernon 2005); *Oursbourn*, 259 S.W.3d at 175, 177 (some evidence on voluntariness must be presented to the jury before either general or constitutional voluntariness instruction should be given). Appellant raised his objections to the voluntariness of his December 13 statement to the trial court in his motion to suppress. The trial court overruled appellant's objections and found that the statement was voluntarily given and thus admissible. Appellant does not identify and we cannot locate any place in the record where he presented evidence to the jury showing that law enforcement promised to release him from jail in exchange for the December 13 statement.[6] Even if we assume without deciding that the alleged promises could constitute improper police conduct, the trial court did not err in denying appellant's request for a jury instruction on voluntariness because appellant failed to introduce evidence of such promises before the jury. *See id.*

We overrule appellant's issue regarding the trial court's denial of his request for a jury instruction on voluntariness.

[6] The only evidence presented to the jury relating to the issues raised in appellant's motion to suppress is (1) testimony by Investigator Bruce Koch that he was aware appellant's wife was given money to relocate, although he had no knowledge of whether it was related to appellant's statement, and (2) testimony by Detective Todd Richards that he knew the FBI had arranged for appellant's wife to relocate. Appellant does not argue on appeal that the relocation assistance affected the voluntariness of his statement.

C. Extraneous Offense Evidence

Appellant argues that (1) evidence regarding his disposal of the Camaro was extraneous offense evidence; and (2) the jury should have been instructed that the extraneous offense had to be proven beyond a reasonable doubt before the jury could consider it in assessing appellant's punishment.

During the guilt-innocence phase of trial, the State may not introduce evidence of extraneous offenses or bad acts to show action in conformity therewith. *See* Tex. R. Evid. 404(b). An extraneous offense is any act of misconduct, whether resulting in prosecution or not, that is not shown in the charging papers. *Sansom v. State*, 292 S.W.3d 112, 125 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd) (citing *Rankin v. State*, 953 S.W.2d 740, 741 (Tex. Crim. App. 1996)). The trial court may admit evidence of extraneous offenses for other purposes. *See* Tex. R. Evid. 404(b).

Evidence of extraneous offenses also may be admitted during the punishment phase if the trial court deems the evidence relevant to sentencing. *See* Tex. Crim. Proc. Code Ann. art. 37.07 § 3(a)(1) (Vernon 2005). When evidence of an extraneous offense is used in the punishment phase of trial for the limited purpose of assessing punishment, the evidence must prove beyond a reasonable doubt that the defendant committed the act alleged. *Id*. If such evidence is introduced, the trial court must give the jury an instruction regarding the reasonable doubt standard of proof. *Id*. § 3(b); *Huizar v. State*, 12 S.W.3d 479, 484 (Tex. Crim. App. 2000) (trial court must give jury instruction on reasonable doubt standard for extraneous offense evidence introduced at punishment phase even if parties do not request it).

The evidence at issue here regarding the appellant's disposal of the Camaro was admitted during the guilt-innocence phase of the trial, and appellant did not object to it at that time. During the punishment phase, the State rested after stating that it relied on the case it presented during the guilt-innocence phase. Appellant re-urged the evidence that was admitted in the guilt-innocence phase and rested. Appellant did not request and the trial court did not give a jury instruction on the reasonable doubt standard of proof for

extraneous offense evidence.

The Second Court of Appeals has held that if extraneous offense evidence is before the jury, section 3(b) of article 37.07 requires that the jurors receive the reasonable doubt instruction at punishment regardless of whether such evidence was introduced at the guilt-innocence phase or the punishment phase. *Allen v. State*, 47 S.W.3d 47, 51–52 (Tex. App.—Fort Worth 2001, pet. ref'd) (State's specific reference to extraneous offense evidence in its punishment phase argument, and language in jury charge authorizing it to "take into consideration all the facts shown by the evidence," necessitated reasonable doubt instruction).

The First Court of Appeals has held that extraneous offense evidence admitted in the guilt-innocence phase does not require an instruction on the reasonable doubt standard of proof unless it is actually used or referenced at the punishment phase. *See Rayme v. State*, 178 S.W.3d 21, 26 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd) ("We decline to follow the holding in *Allen* requiring that a trial court sua sponte give a [37.07] jury instruction any time extraneous offense evidence is admitted in the trial . . . regardless of whether the extraneous offense evidence admitted at the guilt-innocence phase is used or referenced in the punishment phase of the trial.").

We need not decide whether (1) the evidence at issue was extraneous offense evidence; or (2) the State's reliance during the punishment phase on evidence introduced at the guilt-innocence stage required an instruction on the reasonable doubt standard at the punishment phase. When a defendant does not preserve non-constitutional charge error with a timely trial objection, we do not reverse unless the error was so harmful that the defendant was denied a fair and impartial trial. *Arline v. State*, 721 S.W.2d 348, 351 (Tex. Crim. App. 1986); *see also Huizar*, 12 S.W.3d at 484–85 (failure to give reasonable doubt instruction constitutes non-constitutional error). In other words, we reverse only if appellant suffered egregious harm due to the error. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g). Assuming without deciding that this was extraneous offense evidence and that the trial court should have given such an instruction

in this case, the failure to include such an instruction did not cause appellant egregious harm.

Appellant was convicted of causing Porras's death by acting alone or as a party to her murder. Evidence that appellant attempted to conceal evidence by destroying the Camaro was only part of the evidence the jury had to consider in assessing punishment. The evidence also showed that appellant was involved in violent gang activity; offered conflicting information to police about his own involvement in the crime; and assisted Porras's murderer before, during, and after the crime. At punishment, the State did not emphasize or specifically make reference to the evidence regarding the Camaro at punishment. The jury assessed punishment at imprisonment for 55 years; it could have assessed a maximum of 99 years or life imprisonment. *See* Tex. Penal Code Ann. §§ 19.02, 12.32 (Vernon 2003).

Based on the record, we conclude that even if the trial court erred by failing to instruct the jury regarding the burden of proof for extraneous offenses, any such error did not egregiously harm appellant. *See, e.g.*, *Allen*, 47 S.W.3d at 52–53 (considering the severity of the crime and the range of punishment in assessing egregious harm when jury was not instructed on reasonable doubt standard).

We overrule appellant's issue regarding the burden of proof instruction for extraneous offense evidence.

V. Deadly Weapon Finding

Appellant complains in Issues 1–4 that the jury's verdict cannot support the deadly weapon finding. Appellant was indicted for intentionally and knowingly causing the death of Porras "by stabbing and cutting [her] with a deadly weapon, to-wit: a knife, that in the manner of its use and intended use was capable of causing serious bodily injury and death." The jury convicted appellant for "either acting alone or as a party" to the crime "as alleged in the indictment." The trial court entered a deadly weapon finding against appellant in the judgment.

The trial court must enter an affirmative finding of a deadly weapon when (1) the indictment alleges the use of a deadly weapon and the jury finds the defendant guilty as charged in the indictment; (2) the weapon is deadly per se; or (3) the jury affirmatively answers a special issue on the matter. *Frazier v. State*, 115 S.W.3d 743, 749 (Tex. App.—Beaumont 2003, no pet.) (citing *Lafleur v. State*, 106 S.W.3d 91, 93 (Tex. Crim. App. 2003)). A knife and a baseball bat are not deadly weapons per se. *English v. State*, 171 S.W.3d 625, 628 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (baseball bat); *Hatchett v. State*, 930 S.W.2d 844, 848 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd) (knife). The jury was not asked to answer a special issue on the matter. Thus, we must decide whether this case falls into the first category.

When the State bases its case on party liability, the trial court may enter a deadly weapon finding only if the jury affirmatively finds that (1) the defendant was a party to the offense; and (2) the defendant knew that a deadly weapon would be used or exhibited during the commission of that offense. *See* Tex. Crim. Proc. Code Ann. art. 42.12, § 3g(a)(2) (Vernon 2006). This court has held that, even if the jury convicts a defendant only under the law of parties, if in the indictment the State alleges the use or exhibition of a deadly weapon during the commission of the offense, then the jury's general "guilty" verdict necessarily constitutes a finding that the defendant knew a deadly weapon would be used or exhibited during the commission of the offense. *See Sarmiento v. State*, 93 S.W.3d 566, 568–70 (Tex. App.—Houston [14th Dist.] 2002, pet ref'd) (en banc). The Ninth Court of Appeals has held that when a jury convicts an accused as a party to murder and in the indictment the State alleges the use of a deadly weapon, a verdict of guilty "as alleged in the indictment" is not an affirmative finding that the accused also knew a deadly weapon would be used or exhibited during the offense. *See Frazier*, 115 S.W.3d at 749–50.

Research reveals no precedent from the Court of Criminal Appeals resolving whether the jury's general verdict of "guilty" constitutes a finding that appellant knew a deadly weapon would be used or exhibited during the commission of the offense. *Cf.*

Lafleur, 106 S.W.3d at 98 (trial court may enter a deadly weapon finding against defendant who is convicted according to application paragraph for lesser included offense alleging defendant's use of the same deadly weapon as alleged in the indictment, even though application paragraph does not reference the indictment). The Supreme Court of Texas transferred this appeal from the Ninth Court of Appeals to this court. Unless we apply precedent from the Ninth Court of Appeals, our decision regarding this issue would be inconsistent with the precedent of the transferor court. *Compare Frazier*, 115 S.W.3d at 749–50, *with Sarmiento*, 93 S.W.3d at 568–70. Therefore, we must decide this issue in accordance with precedent from the Ninth Court of Appeals. *See* Tex. R. App. P. 41.3. Applying precedent from the Ninth Court of Appeals, we conclude that the trial court erred in entering a deadly weapon finding in the judgment. *Id.*; *Frazier*, 115 S.W.3d at 749–50.

We therefore grant appellant's request for relief by modifying the trial court's judgment to delete the deadly weapon finding. *See Frazier*, 115 S.W.3d at 750.

CONCLUSION

We grant appellant's request to modify the trial court's judgment by deleting the deadly weapon finding. We affirm the trial court's judgment as modified.

/s/ William J. Boyce
Justice

Panel consists of Justices Yates, Frost, and Boyce.
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