IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. AP-77,052

STEVEN ALAN THOMAS, Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL FROM CAUSE NO. 12-1237-K26
IN THE 26TH DISTRICT COURT
WILLIAMSON COUNTY

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

O P I N I O N

In October 2014, a jury convicted appellant of capital murder for the November 1980 murder by strangulation of seventy-three-year-old Mildred McKinney in the course of committing or attempting to commit the burglary, robbery, or aggravated rape of McKinney. *See* TEX. PENAL CODE § 19.03(a)(2).[1] Pursuant to the jury's answers to the special issues set

[1] Unless otherwise noted, all citations to the Texas Penal Code refer to the 1979 version of the code, which was in effect at the time of the instant offense. In 1983, the Penal Code was

forth in Texas Code of Criminal Procedure Article 37.0711, Sections 3(b) and 3(e),[2] the trial judge sentenced appellant to death. *See* TEX. CODE CRIM. PROC. art. 37.0711 § 3(g).[3] Direct appeal to this Court is automatic. Art. 37.0711 § 3(j). Appellant raises seventeen points of error.[4] After reviewing appellant's points of error, we find them to be without merit. Consequently, we affirm the trial court's judgment.

I. STATEMENT OF FACTS

A. Guilt Phase Evidence

1. The immediate investigation following the discovery of McKinney's body

On November 4, 1980, Williamson County Sheriff's Deputy Dennis Jaroszewski responded to a call to investigate an assault and possible rape at a duplex unit in the western

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amended, transforming the former offenses of rape and aggravated rape into the new offenses of sexual assault and aggravated sexual assault. *See Ex parte Austin*, 746 S.W.2d 226, 229 (Tex. Crim. App. 1988) (citing Tex. H.B. 2008, 68th Leg., R.S., ch. 977, § 3, p. 5312-15, eff. Sept. 1, 1983). The amendment was prospective, such that appellant's conduct remains a capital offense under the terms of the statute prior to its amendment. *Id*. § 13, p. 5321. *See Collins v. Youngblood*, 497 U.S. 37, 43 (1990) ("Legislatures may not retroactively alter the definition of crimes[.]").

[2] The trial court also submitted to the jury an "anti-parties" instruction under Texas Code of Criminal Procedure Article 37.071, section 2(b)(2). *See* discussion within point of error 1D, *post*.

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

[4] Appellant did not number his points of error. We have therefore assigned point-of-error numbers to each of the bolded, capitalized headings in appellant's brief, though many of the sections following these headings contain multiple legal arguments. This Court prefers that the parties number their points of error and our Rules of Appellate Procedure require the parties to present distinct legal theories in separate points or sections of the brief. *See Love v. State*, ___ S.W.3d ___, ___ 2016 WL 7131259, at * 1 n.2 (Tex. Crim. App. Dec. 7, 2016) ("Although the Court would prefer the parties to specifically number their points of error, appellant did not."); *Davis v. State*, 329 S.W.3d 798, 803 (Tex. Crim. App. 2010) ("Because appellant bases his single point of error on more than one legal theory, his entire point of error is multifarious."); TEX. R. APP. P. 38.1(I).

part of Williamson County. Jaroszewski encountered an emotionally distraught woman, Patricia Stapleton, and her husband, Robert Stapleton, in the driveway. The Stapletons explained that they had been trying to reach Patricia's mother, Mildred McKinney, and could not reach her on the telephone or by knocking on the door. They said that Patricia had entered McKinney's residence and seen McKinney, and then Patricia had run out of the residence.

When Jaroszewski entered the home, he found McKinney's furniture in disarray, with the drawers pulled out and her possessions strewn about the home. In the bedroom, he found McKinney's naked, deceased body lying face down on the floor under an upside-down chair. He saw "straight-line type blood spray" on the walls and ceiling. When Jaroszewski inspected McKinney's face he saw that she had been "beaten pretty bad[ly]." Investigators found an alarm clock, the base of a telephone, and a lamp—all unplugged—in the middle of McKinney's bed. A crime scene photo depicts bed covers disheveled and stained by what appear to be dark spots of blood. Investigators dusted the bottom of the alarm clock for fingerprints. An open jar of Vaseline was found near McKinney's body and a small sticky ribbon or piece of tape and a cord were tied around her thumb.

Medical Examiner Roberto Bayardo performed McKinney's autopsy. He testified that the only clothing remaining on her body was the left sleeve of a torn and bloody pink nightgown. McKinney's hands were tied behind her back with a white cloth torn from a pillowcase, a yellow telephone cord, and a pair of pantyhose. The pantyhose and telephone

cord had also been tied to her lower leg and opposite ankle. Bayardo additionally discovered two portions of a sticky pink ribbon ("Item 3") tied to McKinney's right thumb. He carefully removed the ribbon and placed it in an envelope. Also, a white string of the type commonly attached to a closet light was tied around both of McKinney's thumbs. Around McKinney's neck, Bayardo found a loose ligature made of a blood-stained strip of pillowcase.

McKinney had suffered extensive bruising and other injuries to her head, face, and neck. She had also suffered bruising from the many ligatures securing her limbs. Her hands were so swollen, bruised, and bloody that Bayardo deduced that her assailant must have stepped on them. McKinney's chest was also bruised, there was extensive bruising of the outside of her sexual organ, and there was a deep tear to the back of her vagina. Bayardo concluded that some object about the size and shape of a baseball bat had caused this vaginal tear. He said that, out of the 15,000 autopsies he had performed over the course of his career, this was the worst injury he had ever seen. Bayardo further found injuries to McKinney's anus and rectum suggesting that an object of similar size had been inserted into her anus. Bayardo also found a lubricant-type material smeared around the opening of McKinney's vagina and anus. He testified that he found "fresh sperms" in McKinney's vagina.

Bayardo stated that bleeding around McKinney's lungs, the fracture of her hyoid bone, and the pattern of bruising on her neck showed that she had been manually strangled. Bruising in the back of McKinney's throat was consistent with an object being pushed into her mouth. Based on the amount of bruising and bleeding he observed, Bayardo surmised

that McKinney was alive when the injuries to her vagina and anus occurred. He concluded that strangulation "associated with" forcible rape caused McKinney's death, which he estimated occurred between 3:00 and 5:00 o'clock in the morning.

After the police completed their investigation of the scene, McKinney's granddaughter inspected McKinney's normally tidy home. She found the china cabinet in disarray, open drawers, and an open jewelry box. Police reports indicated that the items missing from McKinney's house included: a silver tea set; a traditional coffee and tea pot; a cream and sugar bowl; a pewter, dark-wood-handled coffee and tea pot; a sterling silver cream and sugar bowl, tray, and similar pieces monogrammed with "F"; a platinum wedding band with diamonds; a white gold ring with diamond chips; a gold band with settings for five rubies; and a gold wristwatch.

2. Investigators developed other suspects in the first few years after McKinney's murder

In 1983, Williamson County Sheriff Jim Boutwell brought serial killer Henry Lee Lucas to Williamson County to talk to him about the "Interstate 35 bodies" (dead bodies found along the side of the highway between Oklahoma and Laredo). Lucas had traveled throughout the country and committed murders with a known associate named Ottis Toole and Toole's niece and nephew. While Lucas was housed in the Williamson County Jail, a Texas Ranger-led task force arranged meetings with Lucas for law enforcement officers from all over the country. Lucas ultimately confessed to more than 200 murders. A task force officer stated that many of Lucas's confessions were later found to be false because it was

physically impossible for Lucas to have committed the murders.

Boutwell, who had developed a "good working relationship" with Lucas, interviewed him regarding McKinney's murder. Also, Lucas was permitted to speak on the telephone with Toole, who was in custody in Florida, during a conference call with law enforcement officers in November 1983. Lucas asked Toole if he remembered an "old lady in a house with gray hair and she had furniture stacked on top of her body." Toole replied, "I'm puzzled on that one." Lucas responded, "I am, too, 'cause I can't recall it myself, so maybe that's neither one of us. I don't know."

Nevertheless, after law enforcement officers showed Toole crime scene photos in December 1983, he confessed to McKinney's murder. Toole stated in his written confession that he, his niece, his nephew, and Lucas were traveling somewhere close to Austin when Lucas "laid out or spotted" a brick house. An older woman came to the door wearing nightclothes and they forced their way inside the house. Toole said that he beat the woman until she was unconscious, then Toole and Lucas carried her into the bedroom. They tied her hands behind her with pantyhose and telephone wire, then Toole raped her vaginally and anally. Toole said that Lucas raped her, too. Toole thought he might have inserted a vacuum cleaner hose inside her, but he was not certain. He said that he could not remember how he killed her. He stacked furniture on top of her and unsuccessfully searched for gas to start a fire. They stole the woman's money, jewelry (from a drawer in the back room), rings, silverware, silver tray, silver coffee pot, and sugar and cream pitchers.

A few days later, Lucas wrote a letter to law enforcement confessing to his involvement, along with Toole and two other people he refused to name, in the murder of a woman in Round Rock. In January 1984, after Boutwell showed Lucas some crime scene photos, Lucas gave a videotaped statement and a written statement confessing to McKinney's murder. Lucas said Toole and another person entered the house and Toole killed the older woman—who was lying on the floor with her hands tied behind her back. Lucas claimed to have witnessed Toole, who brought Vaseline, having sex with the woman's body. Lucas said he placed a couch in front of the front door and they stole a mirror, a silver platter, a silver tea set with a coffee pot or tea pot, some jewelry from a jewelry box in a dresser drawer, a watch, some rings, hair pins, silverware, and money. They stacked furniture on top of the woman's body but Toole could not find any gas to set a fire.

Investigators transported Toole to Williamson County and then drove with him through McKinney's subdivision. Toole gave another written confession in March 1984 stating that he remembered McKinney's house. He initialed photos of McKinney and the front of her house. Lucas gave another videotaped statement in May 1984. Officers showed Lucas some silverware, which he said appeared to be the same silverware that they stole from the woman's house.

In 1984, a Williamson County grand jury indicted Toole for the capital murder of McKinney and indicted Lucas for the burglary of McKinney's home. The State dismissed Toole's capital murder indictment in 1996 after he died. Prosecutors dismissed Lucas's

burglary indictment during appellant's 2014 trial for the capital murder of McKinney.

3. Developments in the forensic sciences excluded other suspects and led investigators to appellant

In 1980, investigators had collected hairs, clothing, ligatures, bedding, and other evidence from the crime scene, as well as vaginal swabs from the victim's body, and submitted them to the Department of Public Safety Crime Lab (DPS Lab) for forensic testing. Joe Ronald Urbanovski, who was the supervisor of the "Criminalistic Section" of the DPS Lab, testified at the 2014 trial that the forensic sciences have changed drastically over the years. DNA testing did not become available until the early 1990s. In the 1980s, technicians tested blood evidence only for blood type and certain enzymes. Urbanovski could only conclude from the limited forensic testing available in 1980 that "no foreign hairs were recovered," the "[h]uman blood types obtained were all consistent with Mildred McKinney's blood type," and "[n]o seminal stain[s] were detected on any of the items" for which seminal stain examinations were requested.

In 1981, Urbanovski received samples from a suspect named Bryan Charles Pittman.[5] DPS testing revealed that Pittman's blood type did not match the blood evidence in this case.

In 1983 and 1984, DPS received blood, pubic hair, head hair, and saliva samples from Lucas and hair and seminal samples from Toole. Investigators asked DPS to compare the hair samples from Lucas and Toole to the hair found on the pull cord near McKinney's right

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[5] The record does not reveal why Pittman and many others were considered to be suspects in this case.

hand. The DPS Lab found that Lucas's hair shared some of the same general characteristics as the hair in evidence, but there were also significant microscopic differences. Toole's hair was not consistent with the hair in evidence. The DPS Lab also tested Toole's seminal sample for blood group substances and "there was no reaction." indicating that Toole was probably a "non-secretor" unable to produce blood group substances in his bodily fluids.

In 1989, Urbanovski sent a blood sample from McKinney, a bloodstain from her clothing, cuttings from the sticky ribbon removed from her thumb, blood samples from Lucas and Toole, and head hair from Toole to a lab in California that could do rudimentary DNA testing. However, the sample sizes were not large enough to perform any testing using the scientific methods available at the time.

In 1996, Williamson County Sheriff Ed Richards asked Sergeant William "Joey" Briggs to review the McKinney murder case file. Briggs determined that DNA testing should be performed for the purpose of determining whether Lucas and Toole could be excluded. Briggs arranged for the DPS Lab to develop a DNA profile from evidence collected at the crime scene and compare it to the DNA profiles of Lucas and Toole.

Gary John Molina was the CODIS[6] program manager at the DPS Lab. When Molina examined Item 3 (cuttings from the sticky ribbon removed from McKinney's thumb), he found that it contained sperm cells. Molina extracted the biological material from Item 3 and sent the resulting extraction (Item 3A) to a private lab for testing, along with McKinney's

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[6] Testimony established that CODIS is a state, local, and national DNA database administered by the FBI.

bloody nightgown and known DNA samples from Lucas and Toole. Eventually, Molina developed a DNA profile from the sperm cell fraction from Item 3, which he uploaded to CODIS in 1999.

Briggs decided that the evidence collected at the murder scene should be compared to the DNA of McKinney's son-in-law, Robert Stapleton. However, Stapleton refused to provide a sample of his DNA. In 2001, officers seized cigarette butts, napkins, and other items from Stapleton's trash. Officers also collected beverage cans and cigarette butts from the trash at Stapleton's brother's home. Molina tested the cigarette butts supplied by Briggs and found that the DNA extracted from them was not consistent with the DNA profile of the sperm discovered on Item 3. Later in 2001, Molina tested beer cans associated with Stapleton's brother (supplied by Briggs) and again found that they were not consistent with the DNA on Item 3. Finally, in 2002, Molina tested additional cigarette butts and a drinking glass associated with Stapleton and found that the DNA extracted from them was not consistent with the DNA on Item 3.

Williamson County Detective Lee Cooper revisited this case in 2004 after receiving a call from Patricia inquiring about the status of the investigation. After speaking with the Stapletons, he began looking through supplemental reports. He found one cardboard box of evidence containing reports, crime scene photos, and a plastic bag of silverware. He also retrieved vaginal, mouth, throat, and anal swabs from the medical examiner's office and delivered them to DPS.

Cooper focused on three potential suspects: Stapleton, Kirk Fulk, and Randy Boettcher. Fulk had been the maintenance man for McKinney's duplex in 1980. Boettcher, now deceased, had worked construction in the area near McKinney's house in 1980. Boettcher had reportedly stated that he had done "something really bad in Texas." Cooper was working on obtaining a DNA sample from Boettcher's father when a new sheriff was elected and Cooper took a job elsewhere.

Detective John Foster took over this cold case in 2007. Foster began reviewing and organizing the case file and searching for stored evidence. He sought out the law enforcement officers who had worked on the case in the 1980s. Some were dead and others could not remember the investigation. Two large boxes of evidence originally collected at the scene, which included hairs, bindings, and fingernail clippings, had been lost. However, Foster determined that the remaining case file materials retained by law enforcement revealed an unidentified fingerprint and an unknown DNA profile recovered from the crime scene. Foster determined two previously identified suspects merited further investigation: Boettcher and Stapleton. Because Boettcher was deceased, Foster obtained a DNA sample from Boettcher's father. Foster obtained cigarettes butts smoked by Stapleton. Subsequent lab analysis excluded both Boettcher and Stapleton as contributors to DNA evidence from the scene, including Item 3.

DPS Forensic Scientist Kimberly Clement was assigned to this case in 2009. Clement testified that the DNA profile that Molina had uploaded to CODIS in 1999 had only nine loci

or locations, while ten loci were required to upload an unknown profile into the national CODIS database. Therefore, in 2010, Clement extracted a new DNA profile from Item 3 and extracted a known profile from McKinney's bloody nightgown. Item 3 contained both sperm cells and blood or saliva. Clement, who was using STR[7] analysis, reported: "The DNA profile from the sperm cell fraction of Item 3 is consistent with a mixture. Assuming the victim is the source of Item 8 -- 'which would be the nightclothes' -- the victim and an unknown male individual cannot be excluded as contributors to the profile." Clement then uploaded the unknown male profile into the national CODIS database.

In 2012, Clement received a report from the FBI identifying appellant as a potential match to the Item 3 profile. The DNA Lab notified Foster of the possible DNA match. He obtained a search warrant for appellant's DNA and met with appellant in Dallas. Appellant told him that he was from Austin and had lived most of his life in the Austin area until moving to Garland, Texas. Appellant said that, in 1980, he was working construction jobs and working for his brother's pest control company. He identified a photo of his 1980 residence, which was about nine miles from McKinney's house, and he indicated familiarity with McKinney's area of town. Foster showed appellant photos of McKinney and her house. Appellant denied knowing McKinney and denied having any memory of her house. He also denied ever having sex with McKinney.

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[7] The record shows that STR stands for Short Tandem Repeat. This is a type of DNA analysis that allows technicians to "run samples very rapidly" and offers the potential to obtain a full DNA profile from a spot of blood barely visible to the naked eye.

Foster also asked appellant if he had ever ejaculated in homes while performing his pest control duties. Appellant took offense at that question and said he absolutely would not do that. Foster showed appellant photos of the inside of McKinney's home and photos of her dead body. He showed appellant where the seminal material was found on the ribbon tied to her thumb. Foster explained that the DNA profile from the ribbon had registered as a "hit" corresponding to appellant's DNA. Appellant responded that he had had sex with numerous women he met in bars and suggested that he could have met McKinney in a bar. However, appellant "100 percent" denied ever going inside McKinney's house.

Foster asked appellant for a voluntary sample of his DNA. Appellant refused the request, and so Foster executed the search warrant for appellant's saliva and took four "buccal swabs."[8]

Foster also interviewed appellant's parents, his associates, and his brother, William Bruce Thomas (William). William voluntarily provided buccal swab samples and finger and palm prints. William testified at trial that he had owned a pest control business in 1980 and appellant had worked for him during that time period as a technician, providing pest control services. William said that he no longer had access to his business records from 1980. However, William recalled that his mother—who served as his office manager—had remarked about the news stories reporting McKinney's murder, noting that McKinney was one of their customers.

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[8] A "buccal swab" is a sample of a person's cells taken from the mouth that are routinely used to develop a DNA profile.

Foster gave Clement appellant's and William's buccal swabs. Clement also received the cigarette butts of Shirley Boettcher and Robert Stapleton. Clement stated in a July 20, 2012 report:

> The DNA profile from the sperm cell fraction of the ribbon (Agency Item 3) is consistent with a mixture. Assuming Mildred McKinney is the source of the stain from the night clothes (Agency Item 8), Mildred McKinney cannot be excluded as a contributor to the profile. [Appellant] cannot be excluded as a contributor to the profile. The probability of selecting an unrelated person at random who could be a contributor to this profile is approximately 1 in 96.90 million for Caucasians, 1 in 6.925 billion for Blacks, and 1 in 155.3 million for Hispanics. The approximate world population is 6.8 billion. Assuming that Robert Stapleton is the source of the non-filtered cigarette butt . . ., Robert Stapleton is excluded as a contributor to this profile. Assuming Shirley Boettcher is the source of the cigarette butt . . ., Shirley Boettcher is excluded as a contributor to this profile.

In 2014, Clement sent some materials associated with this case to Cellmark Forensics, a private DNA lab, for testing. Clement also re-analyzed the cutting that Molina had taken from Item 3 and determined that appellant could not be excluded as the contributor of the major component in this mixture at the loci listed. She concluded that the "probability of selecting an unrelated person at random who could be the source of the major component in this profile is approximately 1 in 10.88 trillion for Caucasians, 1 in 204.7 trillion for Blacks, and 1 in 174.2 trillion for Hispanics." Additional testing excluded Lucas, Toole, William, and Boettcher's parents as contributing to the DNA profile developed from Item 3.

The additional testing of the partial DNA profile developed from the sample obtained from McKinney's throat determined that the profile was consistent with a mixture of McKinney's DNA and an unknown person's DNA. The testing excluded appellant, William,

Lucas, Toole, Boettcher's parents, and Stapleton as contributors to the major component of the throat mixture. No comparisons could be made regarding the minor component of the mixture.

Barbara Leal, a DNA analyst at Cellmark Forensics, testified that she analyzed Y-STR profiles of the vaginal, oral, throat, and anal samples from McKinney.[9] Leal could not obtain a Y-STR profile from the vaginal samples. She obtained a partial Y-STR profile from the throat slide, indicating the presence of a male's DNA in McKinney's throat. Appellant, William, Lucas, Toole, Boettcher's father, and Stapleton were all excluded as contributors of that male DNA. Leal found a single male DNA profile for the anal sample, but the result was insufficient to make any further determinations.

Leal processed two sets of cuttings from Item 3 and compared them to the known DNA samples. On the first set, she found a Y-STR profile that was a mixture of two or more males. Leal stated "with a reasonable degree of scientific certainty" that appellant and William could not be excluded as contributors to the major component of that mixture. That major profile was seen, Leal testified, "1 time in 6714, Caucasians; it was also seen 1 time in 5871, African Americans; and it was seen zero times in 3504, Hispanics." Boettcher's father and Toole were excluded, but "due to the mixture profile obtained and the possibility of allelic dropout," Leal could not make a determination regarding Lucas and Stapleton as

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[9] Y-STR testing is STR testing that is specific to the Y-chromosome. This profile is passed down through the paternal lineage in a family and all blood-related males in the same lineage should have the same Y-STR profile.

minor contributors to the mixture. For the second set of cuttings, the Y-STR profile again indicated a mixture of at least two males. Appellant and William could not be excluded from the major component of that mixture.

Latent fingerprint examiner Mark Wild testified that a latent print suitable for comparison was lifted from the alarm clock found on the bed at the crime scene. Wild stated that latent prints are composed primarily of water, which tends to evaporate over time, leaving behind a residue of fats and oils. He said latent prints are "very fragile" and can be wiped off or destroyed if the object containing the latent print is handled. The latent print on the alarm clock matched appellant's right thumb print with sixteen points of comparison, which Wild indicated was a relatively high number of points. Other latent prints found on a Schlitz beer can matched exemplars in a DPS file for a person named John L. Cameron, who had been listed as a suspect in the case file.[10] Appellant and other suspects were excluded as a source of those prints.

Steven Shockey testified that he became acquainted with appellant while they were both incarcerated in the Williamson County Jail in 2013. Appellant was awaiting trial in the

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[10] The prosecutor asserted in closing arguments with regard to the other suspects that the "only physical evidence you hear is about a beer can that's found somewhere on Anderson Mill. You heard from Dennis Jaroszewski, a deputy; he found a beer can." The prosecutor asserted that, though Wild identified prints of another suspect on the beer can, "[n]one of those people were ever legitimately connected to this crime scene." However, Jaroszewski did not testify that he found a beer can near Anderson Mill Road. Testimony at trial established that the beer can in evidence was "submitted immediately after the murder" and the documentation in the file did not specify that the prints from the Schlitz can came from the crime scene. There is no further testimony in the record explaining Cameron's connection with the crime, if any, or why he was identified as a suspect.

instant case. Shockey said that he and appellant did not have "full-fledged conversations." However, while Shockey and appellant were in the day room each afternoon, appellant would occasionally speak in "little outbursts and mumbles that came out about being high on cocaine, approaching a house, burglarizing it or, you know, going into the house, the wee hours of the morning; something about restraining the occupant or the person, having to restrain her before she got out of the bed, [and] taking some money and some jewelry." At one point, appellant told Shockey that, "he was going to put it off on a man named Glen Scongins, and he's dead."

Detective Craig Ferguson of the Williamson County Sheriff's Office Criminal Investigations Division was assigned this case in December of 2013. Ferguson tried unsuccessfully to locate Glen Scongins. However, Ferguson did find a record of a person named Glen Sconci, now deceased, who became acquainted with appellant in 1983 or 1984.

The jury found appellant guilty of capital murder.

B. Punishment Phase Evidence

At the punishment phase of trial, Russell Trimble, appellant's high school friend, testified that appellant had been a typical high school student. However, appellant started using marihuana late in high school. After high school, appellant's drug use extended to cocaine, speed, and prescription pills. One time in 1980, appellant showed up at the apartment of Trimble and his wife, Sharon. Appellant had a full-size kitchen trash bag full of loose prescription pills. He was "very, very high" and he wanted to "stash" the bag of pills

at Trimble's home. Appellant told Trimble that, while exterminating in homes for his brother's pest control company, he would go through customers' medicine cabinets and steal prescription pills. He used a Physician's Desk Reference to determine what drugs he was taking. Also, appellant often sold marihuana and cocaine. Trimble admired appellant's parents and felt that they tried to help appellant with his drug problem. They sent appellant to a treatment program, but it did not cure his drug problem.

Trimble also recalled that, at a party at appellant's parents' house, appellant "got cross-ways" with his girlfriend, Cindy (Sharon Trimble's best friend), and appellant "put his hands on" Cindy. Trimble and his wife brought Cindy back to their apartment to protect her. Appellant then called Trimble and said he was going to burn the apartment down because Trimble had "taken his girlfriend away." Though that was the only occasion on which Trimble personally witnessed appellant abusing Cindy, he knew that this pattern of behavior continued because Cindy would share information with Sharon. Trimble nevertheless continued to be friends with appellant and they would go hunting together, sometimes with appellant's brother. Appellant owned a dozen or more firearms.

In 1978, during a traffic stop, a police officer found several baggies of marihuana in appellant's car. In 1981 or 1982, appellant pulled out a pistol and loudly berated William after William's truck broke down on a hunting trip. Trimble related that, around 1980, appellant was driving his truck and had a heated encounter with an older man riding a bicycle. Appellant claimed the man tried to grab something out of the back of appellant's

truck, and so appellant got out of his truck and beat the old man. Appellant told Trimble that he "put him down."

Trimble testified that appellant continued to use and sell drugs throughout the 1980s. Appellant married Cindy and they had a baby, Blake, in 1986. Trimble was Blake's godfather. Cindy and appellant divorced in the late 1980s or early 1990s. Trimble became concerned because appellant would use drugs while he was taking care of Blake. As Blake got older, he told Trimble that he did not like his father's drug use.

Cindy testified that, when she and appellant started dating in high school, he was good-looking and kind. As time went on, he began to belittle her. She felt frightened of him and never wanted to make him angry. She said she always had bruises on her arms from his fingers. She echoed Trimble's testimony about appellant using drugs in front of Blake and stealing prescription pills from pest control customers' homes. Following the couple's arguments, appellant would leave, saying he was going to the deer lease, and stay away for days at a time. When Blake was two or three years old, while playing with a toy chalkboard, he placed a piece of chalk in his nose, imitating appellant using his "snort straw." Cindy said she left appellant because she "knew [she] had to get her son out of that situation." But appellant would still bring her drugs, which were a "weak spot" for her.

Later, after Cindy began a relationship with her current husband, Kirk Rich, she finally had the strength to break off her relationship with appellant. Appellant "lost it" when he realized that she was seeing Rich. On one occasion, appellant forced his way into her

apartment and "yanked some jewelry off [her] neck, and held [her] against the wall, and threw things in [her] kitchen." Blake was present and witnessed the abuse. Cindy sought help from a battered women's shelter and requested a protective order. While they were in the courthouse for a hearing on the protective order, appellant threatened Rich and kicked Cindy in the leg.

After the protective order took effect, appellant would harass Cindy while she was driving to work or to Blake's school. He would position his truck beside or behind her car and throw things at it. One time, he pulled up next to her and made a throat-slashing motion with his hand. She was frightened of him and kept "looking over [her] shoulder" until he was arrested and jailed. Appellant was also so delinquent in paying his child support that he was incarcerated for the violation. On one occasion, after an encounter with appellant, Rich discovered that his tires had been slashed. He believed appellant was the perpetrator. He went to appellant's house in the early morning to confront him, but appellant did not emerge and Rich went home.

Cindy described appellant's relationship with his family of origin as "[d]ysfunctional." She said that she had seen him beat his parents and his brother. She explained: "He said things and talked down to them the same way he did everybody else if he didn't like what they said that day or that minute. Another day, they were kissy-huggy."

Blake testified that, from an early age, he was aware of his father's drug use, particularly cocaine. During a visit with appellant before Blake was seven, he became

frightened because he could not wake appellant. Rich had to come get him. Appellant went to a rehabilitation center when Blake was seven and then for the next several years he was "clean and really reformed his life." During that time period, appellant was a kind and loving father. However, he relapsed when Blake was in the ninth grade. While Blake was in high school, appellant was living with a man named John Loewenthal. On one occasion when Blake was visiting his father, appellant, Loewenthal, and appellant's girlfriend were all using cocaine. Appellant discovered that his girlfriend had overdosed while in a room taking cocaine with Loewenthal. Appellant held a knife to Loewenthal and told him that, if his girlfriend died, Loewenthal was in trouble. Appellant then took Blake to a friend's house and left him there. One time, while appellant was high, he asked Blake to make a choice: "I'll either kill [Rich], or throw a Molotov cocktail in your mom's car while your sister is in there."

In 1992, Gary Hengst met appellant while they were both attending therapy sessions as part of an addiction treatment program. The two men struck up a friendship. Appellant admitted to a therapy group that he had killed a person. When Hengst noticed that appellant had bullet holes in the side of his truck, appellant explained that he "had been in a shootout with a drug dealer."

Also in 1992, while golfing near Inks Lake, appellant got into an argument with another golfer, Tyrone Claibourne. Appellant then beat Claibourne with a golf club. He caused a serious knee injury and "caved in" Claibourne's skull, necessitating skull

reconstruction surgery.

In 1993, William Rivers was the maintenance man for appellant's duplex unit. Rivers received information from appellant's duplex neighbor concerning appellant's conduct. Rivers felt compelled by law to report that information to the landlord. As a result, appellant was asked to leave. Appellant called Rivers, raised his voice and used profanity, and said he was going to get "even" with Rivers. After that, Rivers's "house was shot up," his "tires were sliced," and his "roommate's tires were sliced." Rivers found birdshot in the window frame of his ten-year-old son's bedroom. Rivers went to confront appellant at the duplex and noticed that his neighbor's tires were also sliced. On another occasion, someone shot buckshot through Rivers's garage door into his truck and into the interior walls of the garage.

An officer pulled appellant over and arrested him for driving while intoxicated in 1993. The officer found assorted varieties of ammunition in appellant's pockets. In appellant's vehicle, the officer found four firearms, two double-edged knives, two carving knives, a metal box containing marihuana, a bag of assorted pills, and assorted ammunition strewn about the vehicle. The officer charged appellant with unlawfully carrying a weapon and possession of marihuana.

Also in 1993, Officer Melissa McGrath pulled appellant over in Austin for a traffic violation. Appellant had a crack pipe clenched in his fist, and he also possessed a bag of marihuana. McGrath spotted a crack rock and pistol magazine clip inside appellant's truck. She asked appellant whether he had any weapons in the vehicle. Appellant stated that he had

a .410 shotgun because he had just come back from hunting. She then searched the vehicle and located a bag containing three pistols, which would have been within appellant's reach when he was inside the truck. They were all loaded and had rounds chambered. She also found a couple of loaded rifles behind the seat with their "butts sticking up" within easy reach of appellant. Various loose ammunition was strewn around the vehicle, and she found some knives—including a prohibited bayonet and a switchblade—and more ammunition, magazines, and clips in a gym bag. As McGrath spoke with appellant, she realized that he was chewing on a crack rock. As a result of this incident, appellant received community supervision for the offenses of unlawfully carrying a weapon and possession of a controlled substance.

In another 1993 incident, appellant's neighbor, Jeff Bingham, woke up in the middle of the night and saw appellant "blast" his truck with a shotgun. The shot created a "big hole" in the door to his truck. Bingham had never spoken to appellant and did not know why appellant shot his truck. Officer Ronald Sommers came to appellant's house and asked him about the shots to Bingham's truck. Appellant said he was asleep at the time with his son and he did not know anything about the shots. Appellant also told Sommers that he did not have any weapons at his home. Sommers believed appellant was lying because he could see a box of .40-caliber ammunition just inside the door, so he searched appellant's residence. Sommers found a .40-caliber pistol in the bedroom and a double-barrel shotgun under the bed. As a result of this incident, appellant pled guilty to the offense of criminal mischief.

Additionally, appellant once told Trimble that he "shot up" his girlfriend's mother's snow cone trailer.

Around 2000, Janet Neururer began dating appellant. At first, Neururer found appellant to be charming, but then she began to fear him. On one occasion, when Neururer and appellant got into an argument, appellant pushed her up against the wall and twisted her arm. When she tried to call the police, appellant jerked the phone out of the wall. She ran to her bedroom and called the police from her cell phone. However, at appellant's urging, she later told the police that she did not want to press charges. Appellant received deferred adjudication for family violence assault in connection with this incident. On another occasion, appellant began pushing down on Neururer's chest while they were having sex. She could not breathe and she felt that he was suffocating her. She began hitting him and saying, "Stop. I can't breathe. I can't breathe." She said appellant finally looked up and said, "What?" She said he "pretended like it was nothing." Also, Neururer believed that appellant had kicked her small dog and she once witnessed him shoot several baby goats.

In 2001, Loewenthal died due to a cocaine overdose, which was ruled a suicide. As part of the police investigation into Loewenthal's death, appellant gave a voluntary statement describing his relationship with Loewenthal. Appellant's statement indicated that Loewenthal was a very wealthy individual with a serious cocaine addiction. Appellant admitted frequently supplying Loewenthal with cocaine and, on at least one occasion, prostitutes.

In 2009 in Garland, Texas, an officer found a shotgun, a .50-caliber rifle, and a felony-level quantity of marihuana, packaged for sale, in appellant's residence. Possession of the firearms was unlawful for appellant at that time.

In 2010, appellant was living with his girlfriend, Joyce Clayton. On one occasion, Joyce's son, Michael Clayton, was locked out of the house all night. The next day, Michael engaged in a verbal altercation with appellant. Appellant shoved Michael, "took him to the ground, and began choking him and banging his head up against the floor." Joyce "was screaming at [appellant] to stop assaulting her son. He stopped, and then eventually grabbed [Michael] by the leg" and tried to "drag him out of the house." Later, Michael became dizzy and "passed out." Michael said that appellant acted like "nothing ever even happened afterwards, like it was no big deal."

In an interview with an investigating officer, appellant admitted to putting his hands around Michael's throat, applying pressure, and choking him. He further admitted to banging Michael's head against the floor and trying to drag Michael out of the house. Appellant said that Michael had lunged at him and tried to bite him and, "it was mutual combat." Appellant also told the investigating officer, with regard to putting his hands around Michael's neck, that he did apply pressure but "it wasn't a lot" because he knew what it was like to choke the wind, breath, or air out of someone.[11]

In January 2010, appellant was arrested crossing the Mexican border with about fifty

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[11] A grand jury "no-billed" criminal charges related to this incident.

kilograms of marihuana hidden in the gas tank of the rental truck he was driving. Appellant made a statement to Task Force Officer Criselda Gracia Pendleton that he had been working for a person named Cory Davis. Pendleton knew Davis to be the leader of a drug trafficking organization that distributed drugs from the Rio Grande City area to the Dallas-Fort Worth area and, from there, into other states. Appellant stated that he had "done multiple loads utilizing rental vehicles" for $4,500 to $5,000 per trip and he "had recruited individuals within the organization to transport marihuana." Appellant revealed that Joyce was accompanying him on these trips and also provided Pendleton with the names of a few other individuals who transported the marihuana. Appellant agreed to cooperate with Pendleton's investigation.

Pendleton described appellant as arrogant; she said that he "seemed to have problems with authority." Eventually, appellant stopped communicating with Pendleton and cooperating with the investigation. The federal prosecutor filed charges against appellant, Davis, and another man for various offenses related to their possession and distribution of large quantities of marihuana. Appellant pled guilty to possession with intent to distribute forty-nine kilograms of marihuana. He was sentenced to sixty months in the federal penitentiary. In connection with this conviction, federal authorities took a buccal swab DNA sample from appellant and entered his DNA profile into the CODIS national database. The entry of this DNA profile led to the 2012 CODIS "hit" from the DNA profile derived from Item 3 from the McKinney murder scene.

In 2012, Trimble received a call from appellant and a call from Detective Foster on the same day. Trimble had not heard from appellant in some time. When appellant called Trimble that day, appellant did not mention anything about talking to Foster, though Foster had just accused appellant of being involved in McKinney's murder. After speaking with appellant, Trimble met with Foster, who told Trimble about appellant's DNA link to McKinney's murder. Trimble called appellant back and asked him if there was something that appellant needed to tell him. Trimble said, "I need to know the truth. Did you do it?" Appellant said, "No, I didn't do it." Trimble asked, "What does your mother think?" Appellant replied, "What do you think?" Trimble said that was the last time he ever talked to appellant.

James Sloan, a Texas Department of Criminal Justice (TDCJ) State Classification Committee Member, testified that a person convicted of capital murder and sentenced to life imprisonment under 1980 law would be placed in "G3" custody for a minimum of ten years. Such an inmate would have a cell mate and wear the same type of jumpsuit as the other prisoners. He could enjoy contact visits with family members and hold a job, if it did not involve travel between buildings or a loading dock. After ten years, such an inmate could become a "G2," a less restrictive classification.

A correctional officer from the Williamson County Jail testified that appellant received a disciplinary action because, during a non-contact visit with his mother, father, and Joyce (where all conversations were recorded), appellant wrote something on a piece of

paper and showed it to his family members. They copied information from the paper he displayed to them. Law enforcement officers considered this action a security threat because appellant was hiding the content of his communication from the surveillance cameras. Officers confiscated a note from appellant's mother after that visit. The note contained a list of about twenty-four firearms.

Foster testified that he had listened to appellant's jail calls and jail conversations that were recorded during appellant's visits with family. He said appellant referred to guns as "golf clubs." At one point, appellant's father made a mistake and said, "guns." Appellant became very angry with his father for this mistake. Foster then contacted appellant's brother. Foster met William at William's home and William voluntarily gave Foster twenty-four guns that belonged to appellant, including shotguns, rifles, and handguns. Foster determined that the guns were not stolen. At the time of trial, he had not performed ballistics testing on the guns.

William testified that appellant "came into the world fighting for his life" because he had pyloric stenosis when he was born. Appellant was small and was picked on in school. William was always a better student than appellant. William said appellant was in the "hospital more times than you want to count," for accidents like running through a sliding door, biting "most of his tongue off," and burning himself on an iron. William said appellant had drug and alcohol problems, but he sought treatment for them and was sober for several years, attending "AA" or "NA" meetings. William explained ways in which appellant was

kind and helpful to family members and friends. He said that his mother was the disciplinarian in their home and his parents did not condone drug use. However, when appellant started using drugs, his parents supported him and tried to give him what he needed to succeed in his recovery. Their mother had a stroke and died while appellant was in jail. William said that appellant had held up the list of guns when his parents were visiting him because he wanted the guns to go to Blake. William said that, if appellant received a life sentence, he would visit him at the penitentiary.

David Dickson, a family friend, testified that appellant's parents hosted many gatherings of family and friends. Appellant was a gracious host at those gatherings and was attentive to Dickson's parents. Appellant was always the first to help Dickson's mother, who had suffered from polio. Later, appellant visited Dickson's father in a memory care facility and took him to visit appellant's parents. Also, appellant notified Dickson when he noticed that Dickson's father's home was dangerously cold.

Ryan Shook testified that he and appellant became very good friends in middle school. Appellant and his family supported Shook after his mother was killed in a murder-suicide in 1973. Shook felt that appellant protected him emotionally after his mother's murder. He said appellant had a strong work ethic and took a job at a young age. They drifted apart after high school.

Appellant's niece, Sarah Thomas, testified that appellant would look after her when her father was out of town. Sarah was always excited to see appellant and described him as

her "second dad." Appellant was the "fun one" who took the kids to Chuck E. Cheese, on roller coaster rides, and to the aquarium. He attended her sports games whenever he could. She felt that she could confide in him and his home was a safe place for her. She said she would visit him in the penitentiary. William's ex-wife testified that appellant was a loving uncle to his other niece, Misty, and she shared stories about appellant's fun sense of humor.

Frank AuBuchon testified that he had worked for over twenty-six years with the Texas Department of Criminal Justice–Institutional Division (TDCJ-ID). AuBuchon said that an inmate convicted of capital murder and sentenced to life imprisonment would start off in TDCJ-ID at G3, but he could come in at a more restrictive level of supervision, such as G4, G5, or administrative segregation. He said that the classification is essentially a risk assessment. The best predictor of an inmate's behavior is how he has previously behaved while incarcerated. After a ten year period, a capital-life inmate's classification could be reduced to a G2. AuBuchon said that life in a maximum security prison is "a hellish experience" because the inmate has no control over his life. He also testified that some correctional officers are women and they can be as young as eighteen years old.

Dr. Steven Yount examined appellant in jail. He found appellant had "out of control" hypertension and diabetes. Appellant appeared to have suffered from these conditions for some time. Yount explained that the hypertension has no cure and can cause damage to the eyes, kidneys, and brain. He said that a study suggested a statistical probability that, just from the diabetes alone, an older diabetic like appellant faced a potential ten-year mortality

rate of fifty-eight percent. Also, appellant's testosterone levels were low and falling, and "lower levels mean less aggression" and a higher "baseline risk" of all causes of mortality, in particular, cardiovascular disease. Yount further testified that the use of illegal drugs can also cause health problems.

McKinney's grandson, Robert (Bob) Stapleton, testified that McKinney's death had a long and lasting effect on his family. The murder had an emotional and physical impact on Bob's parents, who both died before the police solved this crime.

The jury answered the special issues in such a way as to require the trial court to impose a sentence of death.

II. SUFFICIENCY OF THE EVIDENCE

In appellant's first point of error, he argues that the evidence was legally insufficient to support the jury's findings. As we understand his four subpoints, he raises the following arguments:

> (1A) the evidence was legally insufficient to find him guilty under a theory of party liability because there was no proof of his aiding and abetting or causing McKinney's death;
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> (1B) the evidence was legally insufficient to support a finding that he was guilty of an aggravated rape as that offense was defined in 1980;
>
> (1C) the punishment-phase evidence was legally insufficient to find that he acted deliberately in murdering McKinney; and
>
> (1D) the punishment-phase evidence was legally insufficient to show that he caused McKinney's death.

A. The Guilt/Innocence Phase

When reviewing the sufficiency of the evidence, we consider all of the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). This standard "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id*. at 319. The reviewing court's duty is to ensure that the evidence presented supports the jury's verdict and that the State has presented a legally sufficient case of the offense charged. *Queeman v. State*, 520 S.W.3d 616, 622 (Tex. Crim. App. 2017). When the record supports contradicting inferences, the court "must presume that the jury resolved any such conflicts in favor of the verdict, even if not explicitly stated in the record." *Id*. We review "all of the evidence" and consider evidence "both properly and improperly admitted." *Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016).

When the jury returns a general verdict and the evidence supports a guilty finding under any of the allegations submitted, we will uphold the verdict. *Rabbani v. State*, 847 S.W.2d 555, 558 (Tex. Crim. App. 1992). Where a capital murder indictment lists more than one predicate felony, the evidence at trial "need only be sufficient to establish one of the underlying felonies in the indictment." *Matamoros v. State*, 901 S.W.2d 470, 474 (Tex. Crim. App. 1995). Thus, if the evidence is sufficient to establish the elements of one of the

underlying felonies, we need not determine whether the evidence is also sufficient to establish the elements of another underlying felony. *See id*.

In this case, the trial judge determined that the evidence merited a jury instruction on the law of parties. *See* TEX. PENAL CODE §§ 7.01(a), 7.02(a), 7.03. In 1980, as now,[12] the Texas Penal Code provided in relevant part that a person was "criminally responsible" for another's criminal conduct if, acting with the intent to promote or assist in the offense's commission, "he solicit[ed], encourage[d], direct[ed], aid[ed], or attempt[ed] to aid the other person" in committing the offense. TEX. PENAL CODE § 7.02(a)(2). It was no defense that "the person for whose conduct the actor is criminally responsible . . . has not been prosecuted or convicted." TEX. PENAL CODE § 7.03(2).

Evidence can be sufficient to convict under the law of parties where a defendant "is physically present at the commission of the offense and encourages its commission by words or other agreement." *Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1996) (op. on reh'g). "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*. (citing *Cordova v. State*, 698 S.W.2d 107, 111 (Tex. Crim. App. 1985)). Moreover, circumstantial evidence may be used to prove identity and party status. *See id*.;

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[12] We measure sufficiency of the evidence against the version of the offense that was in effect at the time the offense was committed, which made it a capital offense to commit murder in the course of aggravated "rape," as opposed to aggravated "sexual assault," as under the current penal code. *See* note 1, *ante*.

Jenkins, 493 S.W.3d at 599; *Gross v. State*, 380 S.W.3d 181, 186 (Tex. Crim. App. 2012). "Circumstantial evidence is as probative as direct evidence in establishing guilt, and circumstantial evidence alone can be sufficient." *Jenkins*, 493 S.W.3d at 599. However, mere presence at the scene of the crime, or even flight from the scene, without more, is insufficient to support a conviction as a party. *Gross*, 380 S.W.3d at 186.

Appellant contends in point of error 1A that he was convicted under a theory of party liability and yet there was "[n]o evidence" that he caused McKinney's death or did anything to further the offense. Appellant stresses the fact that the evidence showed that more than one person was involved in this offense and the trial court gave the jury a parties charge at the guilt-innocence phase of trial. Appellant complains that, although the State presented evidence that Toole and Lucas confessed to this crime and were charged with the offense, they were never tried for it and the State dismissed their indictments—one of the dismissals occurred during appellant's trial. Appellant further complains that the State had lost "over 18 pieces of critical evidence" by the time of trial. The missing evidence included clippings from McKinney's fingernails, hairs found in her hand and on her body, some of her bindings, and a glove found under her head.

Appellant contends that the State relied at trial on only three pieces of evidence to convict him: (1) appellant worked for the company that provided pest control services to McKinney's home; (2) investigators found a fingerprint matching appellant's right thumb on an alarm clock in McKinney's bedroom; and (3) investigators found appellant's DNA within

a mixture of two-to-three males' DNA on a ribbon (Item 3) found tied around McKinney's thumb. He complains that "there was no evidence presented about where the ribbon came from, or even if was there [sic] more of it in the house."

Appellant contends in point of error 1B that at least one other male's DNA was detected inside McKinney's body and multiple males' DNA profiles were found on Item 3. He argues that the above evidence showed only his "mere presence" and did not show that he committed or aided another in committing the murder or the aggravated rape of McKinney. Appellant also argues that there was no evidence showing his relationship to the others involved in the crime or how he assisted them in the rape. He suggests that he deposited his biological material on Item 3 on some earlier occasion when he was lawfully in the home and not during the instant offense. He asserts that the State merely speculated that, because he was in the house at some point, he must have been involved.[13]

Appellant also argues that the State was required to prove that McKinney's sexual organ was penetrated with a male sexual organ while she was still alive. And he posits that the State was required to prove beyond a reasonable doubt that the intent to sexually assault McKinney was formed "prior to or concurrent with the murder." *See Robertson v. State*, 871

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[13] Appellant also states in a footnote that, by the time of indictment in the instant case, the statute of limitations had run on the lesser-included offense of rape "whose elements are necessary to prove the greater offense." In 1980, Article 12.01(1) provided—and still provides today—that murder and manslaughter have no limitation. We have held that capital murder is a "species of murder" and therefore the limitations period set out in Article 12.01(1) applies to capital murder, not the limitations period for the underlying or lesser-included offense. *See Demouchette v. State*, 731 S.W.2d 75, 80 (Tex. Crim. App. 1986).

S.W.2d 701, 705 (Tex. Crim. App. 1993) ("In order for the murder to qualify as capital murder under section 19.03(a)(2) of the Texas Penal Code, the intent to rob must be formed prior to or concurrent with the murder."). Appellant maintains that, though Medical Examiner Bayardo testified that McKinney was sexually assaulted with an object and he found sperm in her vaginal cavity, Bayardo could not say whether the sperm was deposited while she was alive. Therefore, appellant contends, the State's evidence did not prove that the intent to commit sexual assault was formed before or during the commission of the murder.

In 1980, Texas's capital murder statute provided in relevant part: "A person commits an offense if he commits murder as defined under Section 19.02(a)(1) of this code and: . . . intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson." TEX. PENAL CODE § 19.03(a)(2). Murder was defined as intentionally or knowingly causing the death of an individual. TEX. PENAL CODE § 19.02(a)(1).

The indictment charged appellant with intentionally causing McKinney's death, "by strangling her with one or more of the following: [appellant's] hand or hands, a ligature, and/or an object unknown to the Grand Jury," in the course of committing or attempting to commit the burglary (Paragraph One), robbery (Paragraph Two), or aggravated rape (Paragraph Three) of McKinney. Thus, to establish that appellant committed capital murder, the State had to prove that appellant—as a primary actor or as a party—intentionally

murdered McKinney by strangling her in the course of committing or attempting to commit one of the following underlying offenses: the burglary of McKinney's home, the robbery of McKinney, or the aggravated rape of McKinney.

In 1980, the Texas Penal Code defined "aggravated rape" in relevant part as committing rape, as defined in Section 21.02, and causing "serious bodily injury or attempt[ing] to cause death to the victim . . . in the course of the same criminal episode." TEX. PENAL CODE § 21.03(a)(1). Rape was defined as having sexual intercourse with a female, not the defendant's wife, without the female's consent. TEX. PENAL CODE § 21.02(a). "Sexual intercourse" was defined as "any penetration of the female sex organ by the male sex organ." TEX. PENAL CODE § 21.01(3).

The trial record shows that many evidentiary items collected at the scene were lost in the over three decades that passed before the trial. Investigators focused on several suspects—other than appellant—over the years, employing now-disfavored investigative techniques that resulted in confessions from two of these suspects: Toole and Lucas. Further, DNA testing of the retained biological evidence showed that one, or possibly two, unidentified males in addition to appellant were involved in the rape and murder of McKinney. The identity of these other males remained unknown at the time of trial.

However, the fact that a latent print matching appellant's right thumb was found on the bottom of an alarm clock in McKinney's bedroom supported the jury's conclusion that appellant was physically present at the commission of the offense. Investigators did not find

the alarm clock in a clock's usual place, but rather on McKinney's bed next to an unplugged telephone base (McKinney had been bound with a telephone cord). The bed was disheveled and appeared bloody, and blood spatter was found on the wall behind the bed. McKinney's granddaughter testified that McKinney's home was ordinarily tidy.

This evidence supported a finding that a violent, bloody struggle had occurred on or near the bed and the clock was moved at that time. Fingerprint expert Mark Wild testified that latent prints are "very fragile" and can easily be wiped off if the object containing the latent print is handled. Based on this evidence, a reasonable juror could have inferred that appellant deposited his thumb print on the alarm clock during the violent assault on McKinney that night in her bedroom and not on some earlier occasion.[14]

In addition, the DNA mixture found on Item 3 was identified as containing sperm cells with a DNA profile consistent with appellant's. This was evidence that appellant was present during this offense.[15] Forensic scientist Kimberly Clement testified that the "probability of selecting an unrelated person at random who could be the source of the major component in this profile [was] approximately 1 in 10.88 trillion for Caucasians, 1 in 204.7 trillion for Blacks, and 1 in 174.2 trillion for Hispanics." And DNA testing of the biological evidence

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[14] The fact that appellant was in McKinney's bedroom on that night also supports a finding that the evidence was sufficient to show the underlying offense of burglary.

[15] *Cf. Jenkins*, 493 S.W.3d at 600-01(in a 1975 murder case where the ligatures used to bind the victim had been lost by the time of the defendant's trial in 2013, holding that the jury could have reasonably inferred that the defendant murdered the victim in the course of committing aggravated rape because his DNA profile was identified in semen inside her body and in a hand print on her blouse).

retained by law enforcement excluded the other primary suspects under investigation, including Toole and Lucas.

Moreover, the facts show that appellant helped perpetrate the offense. McKinney's naked body was found under a pile of furniture. She had been beaten, bruised, strangled, and brutally raped in multiple orifices with an object the size of a baseball bat. She had been bound hand-and-foot using several ligatures, including multiple bindings tied around her hands, legs, and thumbs. Bayardo concluded that strangulation associated with forcible rape caused McKinney's death. The DNA mixture from which appellant could not be excluded was contained within a sperm cell fraction taken from a sticky ribbon tied around McKinney's thumb. The fact that appellant's sperm came into contact with one of the ligatures tied to McKinney under these circumstances anchors the jury's finding that appellant intended to promote or assist in the offense's commission and that he was at least a party to this criminal transaction.

Appellant argues that he could have left his fingerprint on the clock and his DNA profile on Item 3 while lawfully present in McKinney's home on a prior occasion to provide pest control services.[16] However, when interviewed by Foster, appellant "100 percent" denied ever having entered McKinney's house. Appellant also denied ever ejaculating in homes while performing his pest control duties and took offense at the suggestion that he

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[16] In oral argument, when discussing the fingerprint on the clock and the DNA evidence on Item 3, appellant's counsel stated, "We know for a fact–it's shown in trial–that Mr. Thomas was in the house for a legal purpose, so that can explain both those items." Counsel specifically argued that appellant might have moved the alarm clock on an earlier occasion as part of his pest control duties.

might do so.

Appellant posits that there may have been other pieces of the ribbon in the home and that other assailants may have affixed the ribbon to McKinney. Such alternative scenarios are speculative, not supported by the record, and not part of a legal sufficiency analysis. To the extent that appellant urges us to consider alternative hypotheses to explain this incriminating evidence, we observe that we abandoned the alternative reasonable hypotheses construct for reviewing the sufficiency of circumstantial evidence cases in 1991. *See Sonnier v. State*, 913 S.W.2d 511, 516 (Tex. Crim. App. 1995) (citing *Geesa v. State*, 820 S.W.2d 154 (Tex. Crim. App. 1991)).

Moreover, appellant errs in his assertion that the State was required to prove that McKinney's sexual organ was penetrated with a male sexual organ. Because the State alleged in the indictment that appellant committed the murder in the course of committing or *attempting* to commit aggravated rape, the State did not need to prove that anyone actually penetrated McKinney's sexual organ with a male sexual organ. *See Lincecum v. State*, 736 S.W.2d 673, 680 (Tex. Crim. App. 1987) ("Since the State alleged in the indictment that appellant committed the murder in the course of committing or attempting to commit aggravated sexual assault, it is of no import that actual sexual penetration was not shown."). The State could have demonstrated that appellant or a co-actor committed murder while merely attempting to commit that offense.

However, the record shows that the assailants removed most of McKinney's

nightgown. Bayardo found a lubricant-type material smeared around the openings of McKinney's vagina and anus. He also found "fresh sperms" in McKinney's vagina, though later testing did not develop a DNA profile from the vaginal samples. Although Bayardo could not determine when the sperm was deposited, he deduced from the amount of bruising and bleeding that McKinney was alive when the injuries to her vagina and anus occurred.

Given the nature of this brutal sexual assault and given that McKinney's assailants restrained her with ligatures, a reasonable juror could have concluded that the sperm was deposited during the same transaction in which the assailants inflicted the devastating internal injuries—i.e., while she was restrained before her death. Further, because DNA consistent with appellant's was found in a sperm cell fraction on a binding tied around McKinney's thumb, it would have been logical for a fact finder to surmise that appellant possessed or developed the requisite intent to commit the underlying felony prior to McKinney's death.

In addition, the State only needed to show that appellant or a co-actor murdered McKinney while committing or attempting to commit any one of the three underlying felonies charged in the indictment. *See Matamoros*, 901 S.W.2d at 474 (the evidence "need only be sufficient to establish one of the underlying felonies in the indictment"). Therefore, the State could have demonstrated that appellant or a co-actor murdered McKinney while committing or attempting to commit burglary or robbery, rather than aggravated rape.

The evidence also reasonably supports a jury's finding that appellant committed—or

was a party to the commission of—murder in the course of burglary. The Penal Code provided in 1980 that a person committed "burglary" if,

> without the effective consent of the owner, he:
>
> (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony or theft; or
>
> (2) remains concealed, with intent to commit a felony or theft, in a building or habitation; or
>
> (3) enters a building or habitation and commits or attempts to commit a felony or theft.

TEX. PENAL CODE § 30.02(a).

McKinney's granddaughter testified that she found McKinney's ordinarily tidy house in disarray on the morning after the offense, with the china cabinet, drawers, and a jewelry box ajar. Other testimony demonstrated that, in addition to beating, restraining, sexually violating, and killing McKinney, her assailants rifled through her drawers and stole items of value from her home, including a wedding ring.

Also, Shockey, who encountered appellant in jail in 2013, testified that he heard appellant talking about having burglarized a house in "the wee hours of the morning; something about restraining the occupant or the person, having to restrain her before she got out of the bed." And Shockey said appellant talked about stealing money and jewelry. Shockey indicated that appellant intended to implicate another man, Glen Scongins, now deceased, for the crime. Detective Ferguson determined that appellant had been acquainted with a man named Glen with a similar-sounding last name, and the man was dead.

The pieces of evidence linking appellant to McKinney's murder, including the fingerprint and DNA evidence, possessed sufficient inculpatory value. The record supports the jury's finding that appellant entered McKinney's home without her effective consent and committed a felony or theft or aided others in committing a felony or theft in her home. *See* TEX. PENAL CODE §§ 7.02(a), 30.02(a)(3). Viewed in the light most favorable to the jury's verdict, a reasonable juror could have found that appellant murdered McKinney in the course of committing or attempting to commit burglary, or, acting with the intent to promote or assist in the commission of the offense, he solicited, encouraged, directed, aided, or attempted to aid another or others in doing so. *See* TEX. PENAL CODE §§ 7.02(a), 19.03(a)(2). Appellant's points of error 1A and 1B are overruled.

B. The Punishment Phase Deliberateness Issue

In point of error 1C, appellant argues that the State failed to present any evidence to support the jury's affirmative finding at punishment on the first special issue. In this "deliberateness" issue, the trial court asked the jurors to determine beyond a reasonable doubt whether appellant's conduct "that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased, Mildred McKinney, or another would result." *See* Art. 37.0711 § 3(b)(1). Appellant contends that the State was required to prove beyond a reasonable doubt that he "acted with consideration, aware of the consequences of his actions, and that those acts caused the death of the victim, and that the acts had a reasonable expectation that death would ensue, all beyond a

reasonable doubt." Appellant complains that the State presented an "entirely circumstantial case" and that "[t]he only evidence presented by the State to prove the murder was evidence that placed [him] in the home at some point in time." This evidence, he argues, "does not logically lead to the inference that [he] acted deliberately to cause the victim's death."

In determining the sufficiency of the evidence to support the jury's affirmative finding on the deliberateness issue, we view the evidence in the light most favorable to the jury's verdict to determine whether any rational trier of fact could have found the elements of the deliberateness issue were proven beyond a reasonable doubt. *Livingston v. State*, 739 S.W.2d 311, 338 (Tex. Crim. App. 1987). Because the statute does not define the term "deliberately," the term must be understood according to its normal, everyday usage. *Id*. The State need not prove that the killing was premeditated or that the defendant carefully weighed the situation before killing the victim in order to support a finding that he acted deliberately. *Id*. On the other hand, "deliberately" is not equivalent to the term "intentionally" used in the guilt/innocence jury charge. *Id*. Rather, based on the totality of the circumstances of the individual case, the record must show "the moment of deliberation and the determination on the part of the actor to kill." *Id*. (quoting *Cannon v. State*, 691 S.W.2d 664, 677 (Tex. Crim. App. 1985)).

The State's evidence did not merely place appellant in McKinney's home at some unspecified point in time. Biological evidence, specifically, a sperm cell fraction containing a DNA mixture from which appellant could not be excluded, was found on a sticky ribbon

tied around McKinney's thumb. A rational jury could have concluded that this ribbon was one of several ligatures used to bind McKinney while she was brutally beaten, vaginally and anally raped with an object about the size and shape of a baseball bat, and strangled to death. Further, a latent print matching appellant's thumb was found on the bottom of an alarm clock which appeared to have been moved to the middle of McKinney's bed, next to the unplugged base of a telephone, during McKinney's struggle with her assailants. One of the ligatures used to bind McKinney was a telephone cord, the bed was disheveled and bloodstained, and there was blood spatter on the wall behind the bed.

A reasonable juror could have surmised from the totality of the circumstances that: (1) such an exceptionally violent assault on a seventy-three-year-old woman, including manual strangulation, would likely result in her death; (2) during these events, appellant personally handled the alarm clock, which was found in the middle of the victim's bloodstained bed along with other unplugged electrical devices; and (3) appellant reacted at some point during these events by becoming sexually stimulated to the point of ejaculation, depositing his DNA on the ribbon tied to McKinney's thumb. Viewing the evidence in the light most favorable to the jury's verdict, we conclude that a rational trier of fact could have found that the State proved the deliberateness issue beyond a reasonable doubt. *See Patrick v. State*, 906 S.W.2d 481, 487-88 (Tex. Crim. App. 1995) (considering the severity of the wounds the defendant inflicted on the eighty-year-old victim in deciding that the evidence was sufficient to support the trier of fact's determination that the defendant acted

deliberately). We overrule point of error 1C.

C. The Anti-Parties Issue

In point of error 1D, appellant argues that the State failed to present any evidence to support the jury's affirmative finding at punishment on the second special issue, the so-called "anti-parties" charge. *See* Art. 37.071 § 2(b)(2). Because the instant offense occurred before September 1, 1991, Article 37.0711 applies to this case, not Article 37.071. *See* Art. 37.0711 § 1. Article 37.0711 does not mandate or authorize the submission of an anti-parties charge such as the one given in this case. *See id*. at § 3(b). However, appellant has not complained on appeal about the trial court's insertion of the anti-parties charge. The trial record indicates that the trial judge conducted an informal, off-the-record charge conference. Thereafter, appellant's counsel expressed no objections to the trial court's punishment charge. We will assume without deciding that appellant is entitled to challenge the legal sufficiency of the anti-parties special issue under these circumstances.

In the anti-parties issue, the trial court asked the jurors to determine beyond a reasonable doubt whether appellant "actually caused the death of the deceased or intended to kill the deceased or another or anticipated that a human life would be taken." *See* Art. 37.071 § 2(b)(2).[17] Appellant contends that the State showed only that he was in McKinney's

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[17] Article 37.071 § 2(b)(2) provides:

> On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury: . . .
>
> (2) in cases in which the jury charge at the guilt or innocence stage permitted

house at some point before the murder. He asserts that the State did not offer any evidence showing that he actually caused McKinney's death or intended to kill McKinney.

This Court held in *Valle v. State* that the anti-parties issue is amenable to legal sufficiency review. 109 S.W.3d 500, 504 (Tex. Crim. App. 2003). The anti-parties charge did not require the jurors to determine that appellant actually killed McKinney, if they found that he intended to kill her or another or anticipated that a human life would be taken. *See* Art. 37.071 § 2(b)(2). The assault, rape, and murder of McKinney was exceptionally violent and brutal. For example, Bayardo, a doctor who had performed 15,000 autopsies, testified that the injury to McKinney's vaginal area was the worst injury he had ever seen in his career.

A rational trier of fact could have found from the fingerprint and DNA evidence that appellant was present—and engaged in some type of sexual activity causing him to ejaculate—during this offense. Given these circumstances, a rational juror could have surmised that the evidence showed appellant observed and participated in this offense and intended, or at least anticipated, that McKinney would not survive the assault.

In sum, the evidence, viewed in the light most favorable to the verdict, was sufficient

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> the jury to find the defendant guilty as a party under Sections 7.01 and 7.02, Penal Code, whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.

Thus, the trial court's anti-parties charge omitted the following words contained in the statutorily mandated instruction: "did not actually cause the death of the deceased but." Appellant does not call our attention to this omission or complain of any error regarding it.

to show that appellant intended to kill the deceased or anticipated that a human life would be taken. We overrule appellant's point of error 1D.

II. CONSTITUTIONALITY OF DEATH SENTENCE

Appellant claims in his second point of error that his death sentence violates the Eighth and Fourteenth Amendments because he "was not shown to have taken a life, or intended to take a life, or [] provided major assistance in the commission of the crime." Appellant refers us to *Enmund v. Florida*[18] and its progeny. He argues that, despite the DNA evidence suggesting that other males sexually assaulted McKinney, the State "consistently argued that Appellant was the person who actually killed [her]" and that "he and he alone was in the house, only giving lip service to whether or not there was another, or several others shown to be present and violently active."

In *Enmund*, the United States Supreme Court held that the Eighth and Fourteenth Amendments are violated by the imposition of the death penalty on a person who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, intend to kill, or contemplate that life will be taken. 458 U.S. at 798-99. As this Court explained in *Green v. State*:

> ["]*Enmund* prohibits assessment of the death penalty against any defendant who did not kill, attempt to kill, or intend or contemplate that life would be taken." *Meanes* at 375.[19] We discussed the application of the law of parties to Art. 37.071(b)(1) and stressed that the special issues themselves clearly

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[18] 458 U.S. 782 (1982).

[19] *Meanes v. State*, 668 S.W.2d 366 (Tex. Crim. App. 1983).

> focus the jury's attention on the individual defendant, and indeed must do so in order to give the individualized examination required under *Lockett v. Ohio*, [438 U.S. 586 (1978),] and *Woodson v. North Carolina*, [428 U.S. 280 (1976)]. While the law of parties can apply to *convict* an accused of capital murder, the death penalty may be imposed only by examination of the mitigating and aggravating circumstances concerning the *individual* defendant. *Lockett*, supra; *Woodson*, supra. This examination is performed in Texas through the special issues. *Enmund* clearly requires that the individual defendant be shown to be culpable due to his own actions, intentions, and expectations and not those of his cohorts. . . . We hold that the law of parties may not be applied to the three special issues under Art. 37.071(b).

682 S.W.2d 271, 287 (Tex. Crim. App. 1984) (emphasis in original).

Appellant also cites *Tison v. Arizona*, in which the Supreme Court considered whether the Eighth Amendment prohibits the death penalty in the felony-murder case of a defendant whose participation is major and whose mental state is one of reckless indifference to the value of human life. 481 U.S. 137, 152 (1987). The Court concluded that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement. *Id*. at 158.

Appellant calls our attention to the following prosecutorial arguments at the punishment phase:

> You were given a parties charge in guilt/innocence. You get it again, here at the punishment phase, ladies and gentlemen. You have to believe that he wasn't acting alone in order to really consider this. Did he actually cause the death of Mildred McKinney? Yes. You've got these confessions from Lucas and Toole, both of which scientific evidence has excluded. You've got their confessions. And in them, they talk about the people that were with them when they committed this crime. They don't talk about Steven Alan Thomas, do they? They don't. It's because they weren't there. The reason they know those details is because they're sitting there looking at crime scene photographs, piecing it together, to give you what you now have in evidence

to look at, ladies and gentlemen.

> If you believe, or you have a reason to believe that there was [sic] other people there, then fine. He's got to fall into one of those three categories: Did he actually cause the death; did he intend to kill; or, did he anticipate that a human life would be taken?
>
> * * *
>
> The rest of us look at those pictures and it makes us sick. It makes you want to cry out for Mrs. McKinney. He gets off on it. We know that, ladies and gentlemen, because DNA evidence tells us that's exactly what he was doing. It's brutal and nasty stuff. But think about what Dr. Bayardo told us. The blood that he had to suck out of her stomach, that she was aspirating blood as she was gasping for her last breath, that she is fighting for her life. [Appellant's] back there ejaculating on her. It doesn't get any worse than that, ladies and gentlemen. He is not like the rest of us.

Appellant argues that the record did not support the above statement because the State did not present any witnesses whose testimony established when the sperm was deposited on Item 3 and because the DNA evidence showed that there was a mixture of two or three males' DNA profiles on Item 3. Appellant concludes that his death sentence violated the Eighth and Fourteenth Amendments because the evidence presented by the State did not support a finding that he killed or intended to kill McKinney, nor did it show that he aided and abetted the perpetrators. Appellant's arguments have no merit.

First, the submission of the anti-parties special issue satisfied the constitutional requirements of *Enmund* and *Tison*.

Second, the State's complained-of closing argument was also consistent with *Enmund* and its progeny. The prosecutor admonished the jurors that, if they believed that multiple

parties were involved, they had to determine whether appellant "actually cause[d] the death; did he intend to kill; or, did he anticipate that a human life would be taken." This argument called the jury's attention to the trial court's charge to determine beyond a reasonable doubt whether appellant "actually caused the death of the deceased or intended to kill the deceased or another or anticipated that a human life would be taken." *See* Art. 37.071 § 2(b)(2);[20] *see also Martinez v. State*, 129 S.W.3d 101, 103 (Tex. Crim. App. 2004) ("Jury argument referring to a point of law that is properly contained within the charge is permissible.").

Third, critical facets of the State's case focused the jury's attention on appellant's individual involvement in this offense, including: the latent print matching appellant's thumb found on a clock in the middle of McKinney's bed—an area where the evidence showed a violent struggle had occurred; the brutality of the assault, in which McKinney's assailants bound her using several ligatures tied around her hands, legs, and thumbs, severely beat her, strangled her, and brutally raped her using a large object; a DNA mixture found in a sperm cell fraction deposited on one of the ligatures—a sticky ribbon tied around McKinney's thumb—containing a DNA profile from which appellant could not be excluded; and testimony that appellant talked to an inmate about burglarizing a house in the early hours of the morning, stealing valuables, and restraining the owner before she got out of bed.

In sum, viewed in the light most favorable to the jury's verdict, a rational juror could have found beyond a reasonable doubt that appellant himself killed, or intended to kill,

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[20] *See* discussion within point of error 1D and footnote sixteen, *ante*.

McKinney, or that he at least anticipated that a life would be taken. Appellant has not demonstrated that his death sentence violated the Eighth or Fourteenth Amendments. We overrule his second point of error.

IV. RIGHT TO A UNANIMOUS VERDICT

Appellant argues in his third point of error that the jury charge in his case violated his right to a unanimous verdict and thereby his right to due process of law. Specifically, he complains about the three "manner and means" the court's charge offered as options: murder in the course of burglary or attempted burglary; murder in the course of robbery or attempted robbery; and murder in the course of aggravated rape or attempted aggravated rape. Appellant contends that these were not truly manner and means allegations, but rather separate offenses with separate *mens rea* and *actus reus* elements that must be proved "individually." Relying on this Court's opinion in *Ngo v. State*,[21] he complains that the trial court's charge allowed the jury to convict him of capital murder without requiring it to unanimously agree on whether he committed any one of the underlying offenses. He also complains that the State's closing arguments emphasized that the jurors did not have to be unanimous. He argues that his due process rights were violated and that he was egregiously harmed.

The jury in a capital murder case need not be unanimous about which of the

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[21] 175 S.W.3d 738 (Tex. Crim. App. 2005) (holding that the trial court improperly allowed a non-unanimous general verdict when the court's charge permitted the jury to convict the defendant if he committed one of three distinct types of credit card abuse and the State told the jury that it need not be unanimous in its verdict).

enumerated underlying felonies the defendant was in the course of committing (or attempting to commit). *See Gardner v. State*, 306 S.W.3d 274, 302 (Tex. Crim. App. 2009) (following *Kitchens v. State*, 823 S.W.2d 256, 257 (Tex. Crim. App. 1991)); *Luna v. State*, 268 S.W.3d 594, 601 (Tex. Crim. App. 2008) (upholding, over a jury unanimity challenge, a jury's general verdict that the defendant was guilty as charged in the indictment where the indictment in three paragraphs charged alternate theories that the defendant murdered the victim while committing and attempting to commit burglary, robbery, and arson). We have applied this holding "equally to all alternate theories of capital murder" in Penal Code Section 19.03, "whether they are found in the same or different subsections, so long as the same victim is alleged for the predicate murder." *Saenz v. State*, 451 S.W.3d 388, 390 (Tex. Crim. App. 2014) (quoting *Gamboa v. State*, 296 S.W.3d 574, 584 (Tex. Crim. App. 2009)).

In this case, the jury charge specified that the jurors must find appellant guilty of capital murder if they found that he intentionally killed McKinney by strangling her while in the course of committing or attempting to commit burglary, robbery, or aggravated rape. *See* TEX. PENAL CODE § 19.03(a)(2). Although the jury's verdict had to be unanimous, the jury need not have been unanimous in its determination of which of the three underlying felonies appellant was in the course of committing or attempting to commit.

Appellant also contends that the United States Supreme Court's decisions in *Hurst v.*

Florida[22] and *Ring v. Arizona*[23] mandate that, because the aggravating felonies increase the punishment for a capital crime, they are elements that must be submitted to the jury and proven beyond a reasonable doubt, and the jury's decision regarding these elements must be unanimous. In *Ring*, the Supreme Court considered Arizona's sentencing scheme in which, following a jury adjudication of a defendant's guilt of first-degree murder, the trial judge, sitting alone, determined the presence or absence of the aggravating factors required to impose the death penalty. 536 U.S. at 588. The Court held that Arizona's scheme violated the Sixth Amendment to the extent that Arizona allowed a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. *Id*. at 609.

In *Hurst*, the Supreme Court considered the constitutionality of Florida's hybrid sentencing scheme used in capital cases, in which a jury rendered an advisory verdict regarding the death penalty, but a judge alone could find the existence of aggravating and mitigating circumstances and impose a death sentence. 136 S. Ct. at 620. The Court held that the Sixth Amendment right to an impartial jury required Florida to base Hurst's death sentence on a jury's verdict, not a judge's factfinding. *Id*. at 624.

Ring and *Hurst* are not applicable to this case. Through its general verdict, the jury—not the judge—determined all the elements of capital murder, including the underlying

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[22] 136 S. Ct. 616 (2016).

[23] 536 U.S. 584 (2002).

felony element. *See* TEX. PENAL CODE § 19.03(a)(2). And the jury need not have been unanimous about which of the enumerated felonies appellant was in the course of committing or attempting to commit when he committed murder. *See Gardner*, 306 S.W.3d at 302.[24]

Appellant has not demonstrated a violation of his constitutional rights. We overrule his third point of error.

V. APPELLANT'S ALLEGED ABSENCE FROM COURTROOM

In his fourth point of error, appellant observes that, in volumes eleven and thirteen of the reporter's record, the court reporter failed to indicate at the start of the proceedings that appellant was present. Appellant contends that he was absent from the courtroom on these days. He argues that he has a right under the Sixth Amendment to be physically present at all phases of the criminal proceedings against him and a right under Texas Code of Criminal Procedure Article 33.03 to remain in the courtroom until the jury has been selected.

Appellant asserts that, although Article 33.03 provides for a waiver process when the defendant voluntarily absents himself after pleading to the indictment, this Court has held that the accused must make this waiver personally, and not via his attorney. Appellant asserts that his absence from the courtroom with no record of a personal waiver violated his Sixth Amendment rights, his rights under Article I, Section 10 of the Texas Constitution, and

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[24] At oral argument, appellant also argued that *Mathis v. United States* supports his claim. 136 S. Ct. 2243 (2016). In *Mathis*, the Supreme Court held that, for enhancements under the federal Armed Career Criminals Act, courts must disregard the means by which the defendant committed his crime, and look only to the offense's elements. *Id*. at 2256. *Mathis* is inapposite to the instant application of the Texas capital murder statute.

Article 33.03. He maintains that this error affected his substantial rights because he was not present to consult with counsel on days when a juror was empaneled and the defense exercised two peremptory challenges. *See* TEX. R. APP. P. 44.2(b).

Article 33.03 requires the personal presence of the defendant "at the trial" in all felony prosecutions unless he voluntarily absents himself after pleading to the indictment or information or after the jury has been selected. Art. 33.03. This Court has recognized that, under the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Texas Constitution, "the scope of the right of confrontation is the absolute requirement that a criminal defendant who is threatened with loss of liberty be physically present at all phases of proceedings against him." *Jasper v. State*, 61 S.W.3d 413, 423 (Tex. Crim. App. 2001) (quoting *Miller v. State*, 692 S.W.2d 88, 90 (Tex. Crim. App. 1985)). However, Article 33.03 provides a presumption when the record shows that the defendant was present at the beginning of the trial: "When the record in the appellate court shows that the defendant was present at the commencement, or any portion of the trial, it shall be presumed in the absence of all evidence in the record to the contrary that he was present during the whole trial." Art. 33.03.

Appellant is correct that, at the beginning of volumes eleven and thirteen, the trial judge and/or the court reporter neglected to state on the record that appellant was present in the courtroom. However, the record also does not indicate that appellant was absent. In fact, the record does not state that any parties, including counsel and the trial judge, were present,

suggesting an overall failure to state who was present on these two days.

In volume eleven, the trial judge stated on the record after a recess that appellant was present and then the judge announced that the parties had reached an agreement to strike a certain venire member. In volume thirteen, one of appellant's attorneys informed the trial judge at the beginning of the day that appellant was suffering from severe allergies and had a headache. Counsel did not state that appellant was not present. The trial judge responded that he, too, was suffering from allergies and had a headache all day the previous day. Later that day, counsel asked a venire member, "As you sit there today, and you see Mr. Thomas sitting here, do you presume him innocent? Can you?" The prospective juror replied, "Yes. Yes, sir." This exchange indicates that appellant was present in the courtroom at that time.

Further, the record reflects that appellant was present at his arraignment and at general voir dire. The record also shows that appellant was present on the first day of individual voir dire, the last day of individual voir dire, and the first day of the trial on the merits. Therefore, we see no evidence to rebut the presumption that appellant was present during the whole trial. *See* Art. 33.03; *Bridge v. State*, 726 S.W.2d 558, 572 (Tex. Crim. App. 1986) ("Here the record shows the appellant was present at arraignment and at trial, and there is no evidence to rebut the presumption that he was present during the whole trial."). Point of error four is overruled.

VI. THE STATE'S CHALLENGES FOR CAUSE

In his fifth point of error, appellant argues that the trial judge erred in excusing three

venire members based on the State's challenges for cause, which, he contends, denied him a fair and impartial jury in violation of *Witherspoon v. Illinois*[25] and *Wainwright v. Witt*.[26] Appellant alleges that the State did not articulate "any specific issues in contention" when it challenged two of these venire members based on comments they made during the State's questioning. Appellant maintains that, after defense counsel explained the law to these two individuals, they indicated that they could follow the law. As to a third venire member, appellant alleges that her responses never rose to the level of an opinion that justified a challenge for cause.

Article 35.16(b) provides in relevant part:

> A challenge for cause may be made by the State for any of the following reasons:
>
> > (1) That the juror has conscientious scruples in regard to the infliction of the punishment of death for crime, in a capital case, where the State is seeking the death penalty; . . . and
> >
> > (3) That he has a bias or prejudice against any phase of the law upon which the State is entitled to rely for conviction or punishment.

With regard to a "bias or prejudice" challenge, the test is whether the bias or prejudice would substantially impair the prospective juror's ability to carry out his oath and instructions in accordance with the law. *Gardner*, 306 S.W.3d at 295. Before a prospective juror may be excused for cause for bias or prejudice, the law must be explained to him, and he must be

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[25] 391 U.S. 510 (1968).

[26] 469 U.S. 412 (1985).

asked whether he can follow that law, despite his personal views. *Id*. A challenge for cause under Article 35.16 should allege facts explaining the basis of the challenge. *Cooks v. State*, 844 S.W.2d 697, 718 (Tex. Crim. App. 1992) (citing *Garcia v. State*, 626 S.W.2d 46, 56 (Tex. Crim. App. 1981)). However, where the reason is "obvious to the court and opposing counsel and there is no indication that the parties were unaware of the grounds for the challenge," the challenging party need not allege facts in making the challenge. *Id*.

When considering a trial court's decision to grant or deny a challenge for cause, we review the entire record to determine whether there is sufficient evidence to support the trial court's ruling. *Feldman v. State*, 71 S.W.3d 738, 744 (Tex. Crim. App. 2002). Under *Witherspoon* and *Witt*, the trial judge may excuse prospective jurors based on their views of the death penalty only if those views would "prevent or substantially impair" the jurors from adhering to their oaths and applying the law. *Segundo v. State*, 270 S.W.3d 79, 93 (Tex. Crim. App. 2008). "[N]either nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty." *Adams v. Texas*, 448 U.S. 38, 50 (1980).

Those prospective jurors who firmly believe that the death penalty is unjust may serve as capital case jurors "so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." *Gray v. Mississippi*, 481 U.S. 648, 658 (1987) (citing *Lockhart v. McCree*, 476 U.S. 162, 176 (1986)). Prospective jurors who

can "set aside their beliefs against capital punishment and honestly answer the special issues" are not challengeable for cause. *Russeau v. State*, 171 S.W.3d 871, 879 (Tex. Crim. App. 2005) (citing *Witherspoon*, 391 U.S. at 22).

However, a prospective juror may be challenged for cause where he is so vacillating in his responses as to create the impression that he would be "unable to faithfully and impartially" answer the special issues. *Cooks*, 844 S.W.2d at 720 (citing *Foster v. State*, 779 S.W.2d 845, 851 (Tex. Crim. App. 1989)). "When a prospective juror's answers are vacillating, unclear, or contradictory, we accord deference to the trial court's decision." *Russeau*, 171 S.W.3d at 879. We grant the trial judge considerable deference because he is in the best position to evaluate the prospective juror's demeanor and tone. *Segundo*, 270 S.W.3d at 93. The trial judge has considerable discretion "concerning how long a prospective juror may be questioned on a particular topic and how many times the juror must repeat herself." *Id*. at 92. We will reverse the trial court's excusal of a juror on a challenge for cause only if a clear abuse of discretion is evident. *Russeau*, 171 S.W.3d at 879.

A. Veniremember Liliana Liu

Appellant argues in point of error 5A that the trial court should not have granted the State's challenge for cause to Liu because she stated that she could follow the law and "was very thoughtful and philosophical in her responses to a confusing set of questions." Further, he asserts, "striking her because she believed being a party without the specific intent to murder is always mitigating is not a proper challenge for cause."

Liu stated in her juror questionnaire that she might not be the most impartial candidate in a death penalty case. During voir dire, she indicated that she hoped that she could follow the law and be "fair-minded," but she feared that her instincts and feelings about the death penalty would prevail. She found it particularly difficult to imagine assessing the death penalty in a case in which thirty-four years had passed since the offense. She said that she thought she could follow the law of parties at the guilt or innocence phase but she was not sure that she understood it. She was troubled by the fact that a defendant's guilt could be determined based upon his inclusion in a group without "treating him as a singular individual." The prosecutor clarified the law regarding parties and Liu said she could follow it.

Regarding the punishment special issues, the prosecutor explained to Liu, "the parties law is what allowed for a jury to find the defendant guilty of capital murder. And you've already gone through all those three questions and you get to question number 4." The prosecutor then asked, "Because he's a party, is that always going to be something you'll always find mitigati[ng], because of that fact?" Liu responded, "If his -- so if his role were more kind of like the lookout, where there wasn't an intent, then I would think that, yes." Defense counsel objected that this was a "contracting question,"[27] and the trial court

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[27] Presumably, defense counsel was objecting to what he considered to be an improper commitment question. *Standefer v. State*, 59 S.W.3d 177 (Tex. Crim. App. 2001). "Commitment questions are those that commit a prospective juror to resolve, or to refrain from resolving, an issue a certain way after learning a particular fact." *Id*. at 179. "When the law requires a certain type of commitment from jurors, the attorneys may ask the prospective jurors whether they can follow the law in that regard." *Id*. at 181. "However, where the law does not require a commitment, a

overruled the objection.

The prosecutor asked Liu if, having gone through the law of parties at the guilt or innocence phase of trial, "[I]s that something that's always going to be a mitigating factor for you which would allow you to, essentially, avoid the death penalty and go for life?" Liu explained:

> I mean, if you're asking me if the circumstance such as the lookout, basically, as a person who didn't go in with intent to commit murder, and they are found guilty because of the steps that were taken, then in this particular question, yes, I do believe that's a mitigating circumstance because they didn't go in with an intent to kill.

The prosecutor clarified that, in the hypothetical scenario presented, the jury would have answered the first three special issues before answering the mitigation question. Therefore, the jury would have already unanimously determined that: the crime was a deliberate act; the defendant actually caused the death, intended to kill the deceased, or anticipated that a human life could be taken; and there was a probability that the defendant would commit criminal acts of violence in the future. The prosecutor followed up: "So under the law of parties, if the defendant's found guilty under the law of parties, is that always -- is that an always, always be [sic] mitigating in that circumstance, because of the manner in which the defendant was found guilty under that parties scenario?" Liu answered:

> Yeah. If the defendant was found guilty because he's included in the party, not because he was the primary perpetrator then, yeah, because I -- my -- the way that I believe the law is, I don't believe that that -- I guess you could say that I don't really believe in the law of the parties the way it is, and this is my

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commitment question is invariably improper." *Id.*

way of saying it doesn't make sense to me.

The prosecutor noted that Liu had described herself as a "law-abiding person" who struggled with her "gut instinct." She asked Liu, "Can you follow the law in this case, now that we've kind of developed parties and all of that, or is the fact that the ultimate punishment is in play here, that we -- that there could be a death penalty . . . how your feelings -- have they changed at all?"

This exchange followed:

> [Liu]: So I would say, I guess, given the line of questioning, my biggest problem in answering that "Yes, I can follow it" is the law of the party with -- in accordance with the death penalty.
>
> [Prosecutor]: Okay.
>
> [Liu]: I have a huge issue in saying you can say somebody's guilty of being part of a party [sic] and actually sentenced to the death penalty.
>
> [Prosecutor]: Okay. You can't follow that law?
>
> [Liu]: I don't think so.

Defense counsel then questioned Liu, emphasizing that, before reaching the mitigation special issue, the jury would have already decided that the defendant actually caused the death, intended to kill the deceased, or anticipated that a human life would be taken. Liu indicated that she understood this law. Liu said that, although there were some situations in which the law allowed the death penalty, she could not vote for it. On the other hand, she said that she could support the death penalty as a deterrent to others and for prevention of

further misconduct by the defendant, depending on the circumstances.

At this point, the State challenged Liu for cause and the trial judge granted the challenge. Defense counsel objected, asserting "I don't think she ever set out a scenario where the potential juror said that she could not follow the law." Counsel stated that Liu had been confused about special issue two, but "every time she answered that question, she said she could follow the law and do that." Counsel further objected that the fact that the defendant was convicted as a party could be a mitigating factor, so that was not a proper ground for a challenge for cause.

The trial judge overruled counsel's objection. Though the trial court did not state the grounds for his ruling, the preceding dialogue reveals that both parties and the judge understood that the State's challenge to Liu was based on her inability to follow the law and answer the special issues in a manner that could result in a death sentence for a defendant convicted under the law of parties.

The record shows that Liu expressly stated that she did not think that she could follow the law. Her answers indicated that she did not "believe in the law of the parties." Liu doubted she could ever answer the special issues in such a manner that a defendant convicted under the law of parties would receive the death penalty. Defense counsel clarified the role of the anti-parties special issue for Liu. However, counsel did not then ask Liu whether, after that clarification, she felt that she could follow the law and not automatically opt for a life sentence for a defendant convicted as a party.

Article 35.16 authorizes the State to challenge for cause any prospective juror who "has a bias or prejudice against any phase of the law upon which the State is entitled to rely for conviction or punishment." Art. 35.16(b). We have held that a trial court properly excused a prospective juror who said he could never sentence a non-triggerman to death regardless of the evidence at trial. *Nichols v. State*, 754 S.W.2d 185, 197 (Tex. Crim. App. 1988) (disavowed on other grounds by *Butler v. State*, 830 S.W.2d 125, 130 (Tex. Crim. App. 1992)). Although the juror had vacillated, we noted that the trial court "was in the best position to assess the juror's views" and the court "impliedly found that [the juror's] beliefs concerning non-trigger defendants constitute[d] a bias against the law sufficient to substantially impair his performance." *Id*.

Similarly, the trial court in appellant's case was in the best position to assess Liu's views and impliedly found that her stated beliefs constituted a bias against the law upon which the State was entitled to relay. *See id*.; Art. 35.16(b). The trial court did not err in granting the State's challenge for cause. Point of error 5A is overruled.

B. Veniremember Brent Zunker[28]

Appellant argues in point of error 5B and point of error 6 that the trial court erred in granting the State's challenge for cause to venire member Brent Zunker. Appellant contends Zunker could answer the special issues, take the juror's oath, and follow the law. Appellant

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[28] This venire member's name is spelled two different ways in the reporter's record and in the parties' briefs. Because "Zunker" appears to be used more prevalently in the record, we have used that spelling.

maintains that Zunker indicated he needed more information but "did not disqualify himself by affirmatively stating that he could not or would not follow the law." Appellant maintains Zunker did not vacillate or contradict his answers once the law was sufficiently explained to him. Appellant further contends that the trial court applied the wrong standard in excluding Zunker, who was merely "uncomfortable" with the death penalty. He argues that this excusal constitutes "*Witherspoon* error" which, under *Murphy v. State*, is not subject to a harm analysis under *Jones v. State*.[29]

In general voir dire, the prosecutor explained the second ("anti-parties") special issue to the prospective jurors, emphasizing the "anticipation that a human life would be taken" component. The prosecutor told the venire members that the State would have to prove the anti-parties issue to them beyond a reasonable doubt. The prosecutor explained that, if "ten or more" of the jurors answered no, then "we're done," and the defendant "gets sentenced to life."

In individual voir dire, Zunker initially stated that there was a lot of pressure and stress associated with a death sentence. He stated that he did not want to serve on the jury in this case. Later, the prosecutor addressed the anti-parties issue with Zunker, using the example of the getaway driver in a convenience-store robbery capital murder, where a

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[29] In *Murphy v. State*, 112 S.W.3d 592 (Tex. Crim. App. 2003), we stated that *Witherspoon* error is not subject to a harm analysis under *Jones v. State*, 982 S.W.2d 386 (Tex. Crim. App. 1998). *Murphy*, 112 S.W.3d at 598. We held in *Jones* that "the erroneous excusing of a veniremember will call for reversal only if the record shows that the error deprived the defendant of a lawfully constituted jury." 982 S.W.2d at 394.

gunman and a lookout go into the store and the driver stays outside. In the hypothetical example, the getaway driver participated in the robbery with the knowledge that the gunman would kill the clerk if anything went wrong. The prosecutor asked Zunker:

> [Prosecutor]: Okay. Does that -- how does that make you feel when you think about if you were in that position?
>
> [Zunker]: Again, kind of makes -- I believe in the justice system. I believe that the death penalty, for certain crimes, is a fitting punishment. Being -- that being put into my hands, so to speak -- I don't know if that's critical, but it's a little bit worrisome to feel that I would have to make that judgment on somebody. . . .
>
> [Prosecutor]: All right. So assuming that you answered Special Issue number 1 "Yes," you would then move on to Special Issue number 2. Okay. Now, this is where we get into the parties issue, which you remember I said it's a little bit of a different analysis when you get to punishment. This Special Issue works the same way, in that the State has to prove this Special Issue to you "Yes," beyond a reasonable doubt. Okay? And the question is: "Whether the defendant actually caused the death of the deceased or, if he didn't actually cause the death, did he intend to kill the deceased or someone else, or anticipate that a human life would be taken." So you can see there's three ways that the State can meet our burden on this Special Issue. And let's talk about them in order.
>
> Using our 7-Eleven hypothetical, it's pretty easy or simple, that first way, if the defendant actually caused the death. In our 7-Eleven hypothetical, that would be our gunman, obviously. And if the jury believed that evidence beyond a reasonable doubt, unanimously, you would
> answer this "Yes," move on to Special Issue number 3. Any concerns about that?
>
> [Zunker]: No.
>
> [Prosecutor]: Okay. So let's talk about "intend to kill." Let's change our

hypothetical a little bit. Let's say that our lookout, who's also in the 7-Eleven, also has a gun. And at some point, he's standing at the door of that 7-Eleven and he sees -- he thinks he sees the clerk make a move under the counter to get a shotgun or something, and the lookout panics. He takes his gun out, he points it at that clerk, he shoots and fires, but he misses. Okay? And at that same time, once that first shot goes off, the gunman immediately -- who has the clerk at gunpoint, the gunman shoots and kills the clerk. Could you see how a jury could hear that evidence and, if they believed it beyond a reasonable doubt, answer this Special Issue "Yes" as to that lookout, that he intended to kill the clerk?

[Zunker]: Yes.

[Prosecutor]: Okay. Even though he didn't actually hit the clerk with his shot. Do you have any issues with that?

[Zunker]: No.

[Prosecutor]: Okay. Let's talk about the third way, anticipating that a human life would be taken. Let's use our getaway driver. Let's change our hypothetical up a little bit again. Let's say that, in the vehicle before the gunman and the lookout get out, they show their guns to the getaway driver and they tell that getaway driver "You keep the engine running. If anything goes wrong, we're going to blow his head off. And we'll be right back." The getaway driver keeps the engine running. The gunman and lookout go in. Ultimately, the clerk is shot and killed. They come back out, get in the car and drive off. And now we're at the getaway driver's capital murder trial because we know that getaway driver helped so he's guilty of capital murder. The only question is should he continue on and be eligible for the death penalty. Can you see how that could be some evidence that a jury could hear and believe that that gunman -- excuse me -- the getaway driver anticipated that a human life would be taken?

[Zunker]: Yes.

[Prosecutor]: Okay. And it will be up to the jury to decide.

[Zunker]: Correct.

[Prosecutor]: Let me ask you this. You've talked some about how you feel about serving on a death penalty jury and appreciating and understanding those feelings that you have. Sometimes we talk to jurors who say "Look, I understand and I can follow the law about -- if I'm listening to a case about a defendant who actually caused the death of the deceased -- or even if they didn't actually cause the death, if they intended to kill someone --"

[Zunker]: Uh-huh.

[Prosecutor]: "-- but there is no way that I can answer this Special Issue yes and move on in a death penalty analysis if I'm talking about somebody who didn't actually cause the death and didn't even intend to kill anyone." Is that how you feel?

[Zunker]: Yes.

[Prosecutor]: Okay. Okay. And is that because of kind of the feelings you were talking about earlier?

[Zunker]: Correct.

[Prosecutor]: Okay. That's just a law that you would not be able to follow?

[Zunker]: I mean, again, I guess circumstances -- I'd have to know more information to make that final decision, but--

[Prosecutor]: And I know it's hard --

[Zunker]: -- I guess that I feel there's a disconnect between that getaway driver versus who -- the first person or even the second person involved in it, in that type of situation.

[Prosecutor]: Okay. And I hear what you're saying, and I certainly don't want to tie you down to a specific set of circumstances. My real question is sometimes I talk to jurors who say -- and a lot of times they feel like you -- who say "I get category one. That makes sense to me. That's pretty straightforward."

[Zunker]: Uh-huh.

[Prosecutor]: "I even get category two, they intended to kill. I can follow that law. But if I'm talking about somebody who didn't actually cause and didn't intend to kill anybody, I'm sorry, I can't. I can never assess the death penalty. I can never move on in the death penalty analysis if all I hear is that they anticipated that a human life would be taken."

[Zunker]: I --

[Prosecutor]: Do you agree --

[Zunker]: I agree, yes.

Defense counsel then initiated the following exchange:

[Counsel]: . . . So it's not just, you know, "I think maybe something could have happened because they took guns in," but "I am anticipating that somebody's going to die in there, that a human life would be taken." If I'm in that position, then I should be susceptible to the death penalty just like these other two fellows. Is that fair?

[Zunker]: Yes.

[Counsel]: Is that what you believe?

[Zunker]: I guess I have a problem seeing -- how do you prove that? People can say something, but until it actually happens you don't know. You could be talking tough --

[Counsel]: The evidence would have to show it. Yes, sir.

[Zunker]: -- you know. The driver could say "Absolutely, kill him," whatnot. But until it actually happens, itself --

[Counsel]: Uh-huh. What about a murder for hire? "I'll pay you to go in there." I don't shoot them, I don't -- you know, shoot somebody else with the intent to kill, those first two. But that's the reason

> I'm hiring you. "Go in there and kill somebody." That could come under number 3, I anticipated that human life was going to be taken. That's part of the plan, the program. Is that a circumstance --
>
> [Zunker]: Yes.
>
> [Counsel]: -- where you believe that that law would be appropriate and that person could be considered for the death penalty?
>
> [Zunker]: Yes.

The prosecutor objected that this murder-for-hire hypothetical question would involve an "intent to kill." She challenged the juror for cause based on his earlier statements. Defense counsel argued, "I think he's made it clear that there are a set of circumstances, and if the proof were sufficient, he could see a situation where somebody anticipated [sic] could get the death penalty." The trial judge stated, "I think he disqualified himself, but we can go on if you want to." Defense counsel responded, "Well, I mean, if they're making the challenge -- I wouldn't do anything else to rehabilitate him on that, so I'm done." He objected to the State's challenge. The trial court granted the challenge.

Appellant compares the trial court's dismissal of Zunker with a juror excusal we found to be error in *Clark v. State*. 929 S.W.2d 5, 10 (Tex. Crim. App. 1996). In *Clark*, the trial court improperly excused a juror based on her religious scruples against the death penalty, but the State had neither explained the capital punishment procedure to her nor inquired whether her religious scruples would affect her ability to honestly answer the special issues in accordance with the evidence. *Id*. at 9. Appellant argues that the trial court's

exclusion of Zunker constituted *Witherspoon* error of the sort presented in *Clark* and is not amenable to a harm analysis. He contends that, "as in *Clark*, the State failed to question [Zunker] about his ability to honestly answer the special issues and[,] therefore, failed to demonstrate that his views on the death penalty would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'"

The record shows that, despite his discomfort with personally serving as a juror in the punishment phase of a capital case, Zunker believed that the death penalty was a fitting punishment for certain crimes. Unlike in *Clark*, the record here suggests that Zunker was not excluded due to his scruples against—or difficulty imposing—the death penalty. Rather, the trial court granted the State's challenge for cause because Zunker equivocated concerning whether he could apply and give effect to the "anticipated that a human life would be taken" language in the anti-parties special issue. *Cf. Murphy*, 112 S.W.3d at 599 (finding no *Witherspoon* error in excluding a juror whose personal definition of the "criminal acts of violence" language in the future dangerousness special issue required more proof than the legal threshold, but who did not demonstrate any general opposition to the death penalty). Zunker stated that he could never assess the death penalty if the accused did not kill the victim or intend for the victim to die, indicating an inability to consider the third culpable mental state set out in the anti-parties special issue. *See* Art. 37.071 § 2(b)(2) (where a defendant has been convicted under the law of parties, asking the jurors to determine whether the defendant (1) actually caused the death of the deceased, (2) intended to kill the deceased

or another, or (3) anticipated that a human life would be taken); *see also Enmund*, 458 U.S. at 798-99.

Further, even if Zunker's response to counsel's murder-for-hire example supported his rehabilitation, the trial court did not err in granting the State's challenge for cause. Zunker gave differing opinions regarding whether he could follow the law under various hypothetical scenarios. When the record reflects that a venire member vacillates or equivocates on his ability to follow the law, we must defer to the trial court. *See Moore v. State*, 999 S.W.2d 385, 400 (Tex. Crim. App. 1999).[30] We overrule points of error 5B and 6.

C. Veniremember Manuel Ortega

Appellant argues in point of error 5C that the trial court erroneously granted the State's challenge for cause to venire member Manuel Ortega. When questioned by the State, Ortega expressed "feelings" that appellant was "probably guilty," that an accused person who is innocent should testify, and that he would want defense counsel to provide some proof of their client's innocence. Appellant contends that the State had merely asked Ortega about his juror questionnaire responses and had not explained the law to him before he gave the

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[30] Appellant contends that "even if [Zunker's] responses could be characterized as 'vacillating' or 'equivocal,' this alone is not sufficient to support a challenge for cause." In support, he relies in part on *Perillo v. State*. 758 S.W.2d 567, 577 (Tex. Crim. App. 1988). But *Perillo* and our other precedent do not support the stated principle. *See id.* ("[W]e hold that in granting the State's challenge for cause against this 'vacillating' venireman, the trial court committed no error."); *see also Gardner*, 306 S.W.3d at 296 ("When a veniremember's answers are ambiguous, vacillating, unclear, or contradictory, we give particular deference to the trial court's decision."); *Cooks*, 844 S.W.2d at 720.

above answers. Appellant states that, after defense counsel explained the law, Ortega indicated that he could follow the law and the court's charge.

At the beginning of Ortega's individual voir dire on September 30, 2014, the prosecutor asked him about his statement in his questionnaire that he was planning to move to New York City on October 30, 2014 (a weekday within the range of projected dates of appellant's trial) to attend a community college. Ortega confirmed that he planned to move on that date by flying to New York and said he had given notice to his employer. However, Ortega conceded that he had purchased no plane tickets and was not enrolled at the community college he said he planned to attend. Ortega said that he believed that his planning, packing, and flying to New York would interfere with his ability to serve as a juror. The following exchange then transpired:

> [Prosecutor]: Okay. Let's talk about a couple of other things in your questionnaire.
>
> [Ortega]: Sure.
>
> [Prosecutor]: On question number 18, you were asked: "In your opinion, are there some cases in which life in prison is more appropriate for someone convicted of capital murder?" And you checked "Yes." Then you were asked to kind of explain when you thought that might apply, and you said: "I believe every case of convicted capital murder should be sentenced to life in prison unless the victim's family or guardians say otherwise." And then you continued on to say: "In the extremity of the capital murder." Can you explain that a little bit for me?
>
> [Ortega]: Well, I'm guessing, like -- it depends. Like, say if the victim's been brutally murdered, torture-wise and everything, yeah, of course, punishment by death. But if it's something like -- you know, if it's something like a quick death and -- you know, I

think they deserve to suffer a little. Death is too much of an easy way out for -- you know. And I guess it really comes down to the family, what they want to decide on, or guardians or whoever, you know. That's my -- that's what that is.

[Prosecutor]: Okay. So without -- let's say you were to serve as a juror in a capital murder case in which you were asked to determine the answer to [the] Special Issues and asked to determine whether a life or death sentence was to be imposed. If you were not able to hear from the victim's family as to their wishes, is that -- are those questions that you could answer? Could you render a verdict without that information?

[Ortega]: Without that information, I could. The only thing I need to know is, you know, more what happened or, like, how the murder was committed.

[Prosecutor]: Okay. You said you could. Is that right?

[Ortega]: Yes.

[Prosecutor]: All right. You were also asked about the testimony. Let's talk for a second about these constitutional issues. You were asked about -- on 31, you were asked: "If the State charges someone with murder, that person is probably guilty." And you checked that you agreed with that statement. Is that correct?

[Ortega]: Yes.

[Prosecutor]: Okay. Do you still feel that way?

[Ortega]: Yes.

[Prosecutor]: Okay. When you were asked -- in this particular case, on question 113, you were asked: "Which of the following best describes your opinion of whether this defendant is guilty of the crime in which he is charged?" And you answered underneath that: "I believe he may be guilty." Do you still feel that way, sitting here today?

[Ortega]: Yes. Uh-huh.

[Prosecutor]: Okay. And is that a feeling that, if you were to serve as a juror on this case, you would take with you into the jury box?

[Ortega]: Yes.

[Prosecutor]: Okay. You were also asked about, on question number 31, you were asked: "Even though the law says the defendant has the right to remain silent, an innocent murder --" excuse me "-- an innocent person accused of murder should testify." And you checked that you agree strongly with that statement.

[Ortega]: Yes. I mean, if they -- I mean, if they are innocent, they should -- they should say that they're -- they're not the one that committed the murder.

[Prosecutor]: Sure. And that's a totally understandable feeling. And you understand that at this point in time is when you tell us how you really feel about something. It's not necessarily what the law says; it's what you feel, and if that feeling would go with you into the jury box, and that's -- that's a feeling that you would take with you if you served as a juror, that's what we need to know.

[Ortega]: Uh-huh.

[Prosecutor]: So let's say that the law -- [if] you were to serve as a juror in this case and you knew that the law said that a defendant doesn't have to testify in a criminal case, and that the law says that you can't hold that against him. It sounds like what you're saying to me is that "Nope. You know what? I need to hear from the defendant in order to render a verdict in the case." Is that a fair statement?

[Ortega]: Yes.

[Prosecutor]: Okay. I'll ask you about one more question here that you filled out on your questionnaire --

[Ortega]: Sure.

[Prosecutor]: -- where you were asked about: "The law in the State of Texas says a person can be convicted of a crime based solely on circumstantial evidence." And you were asked if you agreed with that law, and you said "Yes, I do agree with it." And then you said: "Evidence is enough to prove that a person convicted --" I think you meant, maybe "-- committed the crime until proven innocent."

[Ortega]: Uh-huh.

[Prosecutor]: And it sounds like that kind of goes hand-in-hand with what you were saying about you wanted to hear from the defendant in the case. Is it fair to say -- and also your statement that, sitting here today, you believe the defendant probably is guilty of this crime.

[Ortega]: (Nodded head.)

[Prosecutor]: Is it fair to say that that is still your answer to this case, that you would want the Defense to put on some proof to slow [sic] that their client is, in fact, innocent before you could ever render a verdict?

[Ortega]: Yes.

Defense Counsel then questioned Ortega:

[Counsel]: As I understand it, the prosecutor has basically gone in a couple of areas that you may have some opinion that our client started out maybe guilty.

[Ortega]: Uh-huh.

[Counsel]: And then the questioning sort of moved to probably guilty. I want to know what, if any, feeling you have as you sit there today, about the guilt or innocence of [appellant]. Can you tell me?

[Ortega]: Well, what I believe is that if someone's here being -- about to

be tried, they must be guilty about something. That's why I put -- specifically put "may be guilty," because I don't know what happened or what circumstances have occurred.

[Counsel]: All right. And as I mentioned on voir dire, that's a pretty normal reaction. "Why is he here if he didn't do something wrong?" You know, he's sitting in the courtroom in that chair. The question is can you set that aside, this idea "Well, I think he must have done something. He must be guilty of something," set that aside and presume him not guilty or innocent until the State proves otherwise? Could you do that?

[Ortega]: Umm, I'm not sure if I --

[Counsel]: If the Court, in its Charge, Jury Charge -- you know, you get the law from the Judge. If it says that you are to presume -- and every defendant is presumed innocent until proven guilty beyond a reasonable doubt. Okay?

[Ortega]: Uh-huh.

[Counsel]: Could you follow that Charge?

[Ortega]: Yeah. I could.

[Counsel]: You could? All right. You indicated you maybe want to hear something from the Defense or the defendant.

[Ortega]: (Nodded head.)

[Counsel]: And I think Ms. Rojas talked about that on voir dire. It may be something that you want. It may be something that we'd all like --

[Ortega]: Uh-huh.

[Counsel]: -- in a particular dispute. We'd like to hear from both sides. But in this kind of circumstance, because of our Constitution and other things, an accused does not have to put on any evidence or take the stand. You understand that?

[Ortega]: Yes.

[Counsel]: All right. It's a big part of America.

[Ortega]: Uh-huh.

[Counsel]: In some countries, you have to prove that you're not guilty, but not in this country. Taking it from what you want to hear, would you require the State of Texas to prove the elements of this offense, capital murder, beyond a reasonable doubt? Would you require them to do that?

[Ortega]: Yes.

[Counsel]: All right. And the Court's Charge will tell you that that's what you must do. And the burden of proof is only on the State.

[Ortega]: Uh-huh.

[Counsel]: Okay? Never comes over here.

[Ortega]: (Nodded head.)

[Counsel]: All right? And that means that the defendant is never required to testify. Can't be even talked about if they don't. Could you follow that law?

[Ortega]: Yes.

* * *

[Counsel]: [A]re you telling all of us that you would follow that Court's Charge?

[Ortega]: I would.

[Counsel]: And you would try very hard to do it?

[Ortega]: Yes.

[Counsel]: And you think you could do it?

[Ortega]: I could do it.

The trial judge thereafter excused the juror from the room, granted the State's challenge for cause, and overruled the defense's objection to the State's challenge.

Appellant cites *Gray* in support of his claim of error and in arguing that the error is not subject to harmless error analysis. 481 U.S. at 652-59. In *Gray*, the United States Supreme Court found that the trial court had erred in excusing an eligible prospective juror who could properly follow the law and assess the death penalty. *Id*. at 659. The Supreme Court held that, "[t]o permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members" and "stack[s] the deck against the petitioner." *Id*. at 658 (quoting *Witherspoon*, 391 U.S. at 523). The Court concluded that the error impugned the right to an impartial adjudicator and was not subject to harmless error review. *Id*. at 668.

Gray is distinguishable from the situation presented here. *Gray* dealt with a violation of the prohibition on excluding otherwise-qualified venire members simply because they voiced objections to—or religious scruples against—the death penalty, i.e., erroneous *Witherspoon* dismissals. *See Gray*, 481 U.S. at 657-58; *see also Gamboa*, 296 S.W.3d at 580 ("[T]he Supreme Court has explained that the broad language in *Gray* was too sweeping to be applied literally and should not be extended beyond the context of the 'erroneous *Witherspoon* exclusion' of a qualified juror in a capital case.") (quoting *Ross v. Oklahoma*,

487 U.S. 81, 87 (1988)).

The record shows that Ortega did not profess religious or ethical objections to the death penalty. In fact, he indicated that he felt that the death penalty was appropriate for cases involving brutal murders and torture. The trial judge did not explain his reasons for granting the State's challenge for cause and the State did not specify the basis for its challenge. Yet most of the subject matter of the State's questioning of Ortega—and thus the likely basis of the State's challenge for cause to Ortega—pertained to his views on the presumption of innocence and appellant's Fifth Amendment right not to testify. *Cf. Jones*, 982 S.W.2d at 393 ("[T]he State has the right to challenge disqualified jurors even when their disqualifications might seem to make them favor the State."). Therefore, the record does not demonstrate that an erroneous *Witherspoon* dismissal occurred here.

Appellant asserts that the law had not been explained to Ortega. However, the State arguably informed Ortega of the law during its questioning by using phrases like: "Even though the law says the defendant has the right to remain silent," and "[s]o let's say that the law -- [if] you were to serve as a juror in this case and you knew that the law said that a defendant doesn't have to testify in a criminal case, and that the law says that you can't hold that against him."

Ortega offered contradictory answers to the defense and the prosecution on whether he could follow the law regarding appellant's presumption of innocence and Fifth Amendment rights. When defense counsel's voir dire is considered in isolation, counsel

appears to have rehabilitated Ortega. However, an examination of the totality of the record reveals that Ortega repeatedly expressed firmly held opinions indicating an inability to give effect to the presumption of innocence and an inability to respect the appellant's right not to testify, even after those legal concepts had been explained to him. In such a situation, we defer to the trial court who is in the best position to evaluate the prospective juror's demeanor and tone. *See Segundo*, 270 S.W.3d at 93; *Moore*, 999 S.W.2d at 400. We see no clear abuse of discretion here. *See Russeau*, 171 S.W.3d at 879.

Moreover, even if appellant had demonstrated error in the excusal of this juror, he has not shown that he was harmed by it. This Court has held that, when *Witherspoon* error has not occurred, the erroneous excusal of a venire member will call for reversal "only if the record shows that the error deprived the defendant of a lawfully constituted jury." *Gamboa*, 296 S.W.3d at 580 (citing *Jones*, 982 S.W.2d at 394). In this inquiry, we ask whether or not the jurors who actually sat on appellant's jury were impartial. *Id*. The record does not show that any of appellant's jurors were biased or that he was deprived of a lawfully constituted jury. We overrule his point of error 5C.

VII. TESTIMONY OF THE JAILHOUSE INFORMANT

In his seventh point of error, appellant complains that the trial court erred in admitting the testimony of jailhouse informant Steven Shockey, who had been incarcerated with appellant in the Williamson County Jail in 2012 and 2013. Appellant asserts that the trial court erroneously admitted Shockey's testimony without corroboration in violation of Article

38.075. Trial counsel objected that Shockey's testimony would be extremely prejudicial and had no indicia of reliability. Although trial counsel did not mention Article 38.075, appellant argues that counsel's objection regarding the lack of indicia of reliability constitutes "the very reason for 38.075." He contends counsel's objection put the trial court "on notice of the issue that the defense was objecting to." Thus, he maintains, the trial court should have inquired regarding the corroborating facts that were necessary to render such testimony admissible.

Appellant also concedes that counsel did not request a jury instruction on the jailhouse informant corroboration requirement. He nonetheless asks us to review the jury charge for error in the trial court's failure to *sua sponte* give an Article 38.075 charge, citing *Ngo*. *See Ngo*, 175 S.W.3d at 744 ("Thus, we review alleged charge error by considering two questions: (1) whether error existed in the charge; and (2) whether sufficient harm resulted from the error to compel reversal."). Appellant asserts that the State presented no evidence to corroborate Shockey's testimony, other than evidence showing that appellant was inside McKinney's home at some point. Therefore, appellant contends, the trial court's "error is not harmless."

This section of appellant's brief is multifarious and confuses two legal arguments. *See* footnote 4, *supra*; TEX. R. APP. P. 38.1. As we understand his arguments, appellant essentially raises two legal claims:

> (1) pursuant to Article 38.075, the trial court should not have allowed admission of the uncorroborated testimony of jailhouse informant Shockey,

> and appellant's objection was sufficient to apprise the trial court of his complaint; and
>
> (2) the trial court should have, even in the absence of a request from defense counsel, *sua sponte* instructed the jury that Article 38.075 required corroboration of a jailhouse informant's testimony, and appellant was harmed by the absence of such an instruction.

We address both of appellant's claims in the interest of justice.

Shockey testified on voir dire outside the jury's presence that, in 2013, he was incarcerated in the Williamson County Jail with appellant. Shockey said that, while he and appellant were in the day room, he heard appellant say that he was "going to put this on Glen Scongins" because Scongins was dead. Shockey also said that he heard appellant mumble about "being high on coke one night, [he] broke into a residence in the wee hours of the morning, and had to restrain the occupant before it [sic] got out of bed. Took some jewelry and some money." Shockey further stated that appellant said: "She enjoyed it," and "I had to take care of her."

Appellant's counsel then raised the following objection to Shockey's proposed testimony:

> [Counsel]: Your Honor, clearly this is highly prejudicial. It is in the context of someone in the jail. The Court has heard many, many times cellmates that come in, that he admits two or three, I think -- his purpose, rather than being a good citizen, we suggest is it was [sic] to get that aggravated count taken off. He wanted something. He was trying to give them something in order to accomplish that, and that is in the vein of a Giglio-type

> inquiry,[31] at least. I'm not suggesting that Foster promised anything, or the DA more than what she's proffered. But with that motivation, with the context of no -- absolutely no way to verify the fact of the conversation. This gentleman is convicted -- Was this part of a Norwood package?[32]

[Prosecutor]: No. This is separate from that. But yes.

> [Counsel]: Aggravated -- I mean, Aggravated Assault with a Deadly Weapon, that this -- this does not have the indicia of reliability. It is extremely prejudicial. We'd ask the Court to keep it away from the jury.

THE COURT: Objection is overruled.

Subsequently, in front of the jury, Shockey testified that he became acquainted with appellant when they were both incarcerated on the same "run" in the Williamson County Jail in 2013. He identified appellant in the courtroom. Shockey testified that he was currently serving a fifteen-year sentence for an offense of aggravated assault with a deadly weapon. Shockey said that he and appellant did not have "full-fledged conversations" when they were in jail together, but they would "strike up conversations in the day[]room." He described appellant's statements as "little outbursts and mumbles that came out about being high on cocaine, approaching a house, burglarizing it or, you know, going into the house, the wee hours of the morning; something about restraining the occupant or the person, having to

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[31] This appears to be a reference to *Giglio v. United States*, in which the Supreme Court granted a defendant a new trial on due process grounds where the Government failed to disclose a promise of leniency made to its key witness in return for his testimony. 405 U.S. 150, 150-55 (1972).

[32] The trial record does not explain this reference.

restrain her before she got out of the bed, taking some money and some jewelry." Appellant told Shockey that "he was going to put it off on a man named Glen Scongins, and he's dead."

Later, defense counsel moved for a directed verdict and raised the subject of Shockey's testimony again:

> We renew our objection, Your Honor, with respect to the testimony of Steven Shockey. In terms of -- I don't need to restate it, I suppose; it's in the record -- the prejudicial, inflammatory nature of that testimony relative to any probative value. The Court heard his criminal record, heard that he repeatedly was asking for help, in the Giglio context, "You want something," and that would be clear, I think, to any trier of fact and to the Court, and that was his purpose.[33] He makes comments about the accused trying to put the case off on an individual that in 30 minutes of investigation could be shown Steven Alan Thomas didn't know in 1980, had not met until somewhere between 1982, '83 and '85.

Because Article 38.075 forms the basis of appellant's arguments, we first determine whether this 2009 statute applied to appellant's case. The version of Article 38.075 in effect at the time of appellant's trial provided:

> (a) A defendant may not be convicted of an offense on the testimony of a person to whom the defendant made a statement against the defendant's interest during a time when the person was imprisoned or confined in the same correctional facility as the defendant unless the testimony is corroborated by other evidence tending to connect the defendant with the offense committed. In this subsection, "correctional facility" has the meaning assigned by Section 1.07, Penal Code.
>
> (b) Corroboration is not sufficient for the purposes of this article if the corroboration only shows that the offense was committed.

Art. 38.075 (2013). The enacting legislation provided that the effective date of the Act was

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[33] Despite counsel's repeated references to *Giglio*, he did not at trial—and does not now—argue that the State withheld evidence of a promise of leniency made to Shockey.

September 1, 2009, and the change in law made by the Act applied to "any case in which a judgment has not been entered before the effective date of this Act." Tex. S.B. 1681, 81st Leg., R.S. (2009). Appellant's case falls within the statutory time range because the judgment in appellant's 2014 trial was not "entered before" September 1, 2009.

We have held that the purpose behind Article 38.075 would be best served by giving the phrase "statement against the defendant's interest" the "broadest possible meaning—a statement that is against a defendant's interest is one that is adverse to his position." *Phillips v. State*, 463 S.W.3d 59, 68 (Tex. Crim. App. 2015). A statement made by a defendant to a jailhouse witness can be against the defendant's interest "even if it does not expose him to criminal liability." *Id*. at 67-68. The record reflects that Shockey was confined in the same correctional facility as appellant (the Williamson County Jail), and that he made a statement about remarks appellant made that were adverse to appellant's position. Specifically, Shockey stated that, while they were in the jail's day room together, appellant spoke or mumbled to him about a home-invasion burglary in which the victim was restrained in her bed. Shockey said appellant had indicated an intent to "put it off" on a deceased acquaintance. We conclude that Article 38.075 applied to Shockey's testimony in appellant's case.

The State contends that appellant did not properly preserve his Article 38.075 claims for our review because he failed to object at trial on the basis of Article 38.075 and did not request a jury instruction pursuant to that statute. The State argues that appellant's phrasing

of his trial objection suggested that he was complaining on the basis of Texas Rule of Evidence 403, rather than Article 38.075.

Texas Rule of Appellate Procedure 33.1(a) provides, in relevant part, that for a complaint to be presented on appeal, a timely request, objection, or motion must have been made to the trial court. The request, objection, or motion must have stated the grounds for the ruling that the complaining party sought with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context. TEX. R. APP. P. 33.1(a)(1)(A).

Appellant's trial counsel did not at any point refer to Article 38.075 or the Code of Criminal Procedure in objecting to Shockey's testimony, nor did he mention the lack of corroboration of Shockey's testimony. Appellant's counsel highlighted the prejudicial nature of Shockey's testimony and emphasized that Shockey's testimony was not reliable or probative. Thus, counsel employed language invoking the familiar prejudicial-versus-probative-value balancing test contained in Rule 403. *See* TEX. R. EVID. 403 (2014) ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.").

We conclude that counsel's objection signaled to the trial judge that counsel was objecting on the basis of Rule 403. We further conclude that counsel did not give the judge any reason to think that he was relying on Article 38.075 to bar admission of the evidence,

complaining of the lack of corroborating evidence, or requesting a jury instruction. Therefore, appellant failed to properly preserve his Article 38.075 claims regarding the admissibility of Shockey's testimony.[34] *See* TEX. R. APP. P. 33.1(a).

However, the Code of Criminal Procedure requires that a trial judge "shall, before the argument begins, deliver to the jury . . . a written charge distinctly setting forth the law applicable to the case." Art. 36.14; *see also Phillips*, 463 S.W.3d at 65 (holding the trial court must instruct the jury *sua sponte* on the "law applicable to the case").[35] Article 38.075 requires that, if a jailhouse informant gives testimony about statements made by a defendant against that defendant's interest, such testimony must be corroborated by some other evidence "tending to connect the defendant with the offense committed" to support a conviction. Art. 38.075(a). We have cautioned that the failure to inform the jury of a

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[34] In any event, Article 38.075 does not purport to govern the question of the *admissibility* of testimony from an inmate in a correctional facility; it only addresses the circumstances under which the fact-finder may rely upon such testimony to support a conviction.

[35] In footnote 9 of *Phillips*, we mis-characterized the import of our earlier opinion in *Oursbourn v. State*, 259 S.W.3d 159 (Tex. Crim. App. 2008). There, we described *Oursbourn* as holding that a trial court was "under a duty to instruct the jury *sua sponte*" that the testimony of a correctional facility inmate must be corroborated under Article 38.075. *Phillips*, 463 S.W.3d at 65 n.9 (describing our discussion in *Oursbourn* at 259 S.W.3d at 180). It is true that in *Oursbourn* we noted that a trial court must instruct a jury with respect to the corroboration required by a similarly structured statute governing accomplice witnesses (Article 38.14), because that corroboration requirement is "law applicable to the case" in contemplation of Article 36.14 of the Code of Criminal Procedure. By analogy it may be said that the corroboration requirement of Article 38.075 is also "law applicable to the case" for purposes of Article 36.14, requiring the trial court to instruct the jury accordingly—and we so held in *Phillips*. 463 S.W.3d at 65. But we were mistaken in the footnote in *Phillips* to characterize *Oursbourn* as already having so held. Indeed, Article 38.075 had not yet been enacted at the time we issued our opinion in *Oursbourn*. *See* Acts 2009, 81st Leg., ch. 1422, § 1, p. 4480, eff. Sept. 1, 2009.

corroboration requirement "makes it possible for rational jurors to convict even absent corroboration which they find convincing." *Saunders v. State*, 817 S.W.2d 688, 692 (Tex. Crim. App. 1991) (holding that the absence of a jury instruction on the need for corroboration of an accomplice's testimony denied the defendant a fair trial).

Also, where Article 38.075 applied to the facts of a case, we have held that the trial court erroneously omitted an Article 38.075 jury instruction requiring corroboration. *See Phillips*, 463 S.W.3d at 65-68; *see also Zamora v. State*, 411 S.W.3d 504, 513 (Tex. Crim. App. 2013) ("In light of the plain language that a conviction cannot be had on the testimony of an accomplice unless it is corroborated, an instruction on the accomplice-witness rule is like those instructions that this Court has held to be the law applicable to the case.").

Having found that Shockey testified about a statement appellant made to him that was against appellant's interest during a time when Shockey was confined in the same correctional facility as appellant, we conclude that an Article 38.075 instruction was the law applicable to this case. Therefore, the trial court erred in omitting it from the jury charge. However, because appellant did not object to the jury charge on the basis of Article 38.075 or request an Article 38.075 instruction, he will obtain a reversal only if he suffered "egregious harm." *Almanza v. State*, 686 S.W.2d 157, 174 (Tex. Crim. App. 1985) (op. on reh'g).[36]

> Jury-charge error is egregiously harmful if it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory.

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[36] We assume here, without deciding, that *Almanza* applies to the present circumstance.

> In examining the record to determine whether charge error is egregious, we have traditionally considered: (1) the entirety of the jury charge itself, (2) the state of the evidence, (3) counsel's arguments, and (4) any other relevant information revealed by the entire trial record. Egregious harm is a difficult standard to meet, and such a determination must be made on a case-by-case basis. Neither party bears the burden on appeal to show harm or lack thereof under this standard. Instead, courts are required to examine the relevant portions of the entire record to determine whether appellant suffered actual harm, as opposed to theoretical harm, as a result of the error.

Marshall v. State, 479 S.W.3d 840, 843 (Tex. Crim. App. 2016) (internal citations omitted).

We have noted the similarities between the corroboration requirements contained in Article 38.075(a) and Article 38.14. *Compare* Art. 38.075(a) and Art. 38.14 ("A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense."); *see also Phillips*, 463 S.W.3d at 67 ("Just as Article 38.14 was enacted to address how to handle accomplice-witness testimony, Article 38.075 was enacted to similarly address the unreliability of jailhouse-witness testimony."). Therefore, we look to our Article 38.14 precedent for guidance in applying the *Almanza* harmless error test to Article 38.075 error.

We have found the unpreserved erroneous omission of an accomplice-witness corroboration instruction to be harmless unless the corroborating evidence is "so unconvincing in fact as to render the State's overall case for conviction clearly and significantly less persuasive." *See, e.g.*, *Herron v. State*, 86 S.W.3d 621, 632 (Tex. Crim. App. 2002) (citing *Saunders*, 817 S.W.2d at 692). To determine whether an appellant

suffered egregious harm from the omission of an accomplice-witness corroboration instruction, we focus on the reliability or believability of the corroborating evidence and the strength of its tendency to connect the appellant to the charged offense. *State v. Ambrose*, 487 S.W.3d 587, 598 (Tex. Crim. App. 2016). We do not require separate corroboration of every element of the offense or every aspect of the witness's testimony. *Id*. However, the corroborating evidence cannot be sufficient if it merely demonstrates the commission of the offense. *See* Art. 38.14; Art. 38.075(b).

Here, the trial record contains strong corroborating evidence tending to connect appellant to the charged offense. A latent print matching appellant's right thumb print with sixteen points of comparison was found on an alarm clock on McKinney's bed, where a struggle had occurred during the offense. A DNA mixture from which appellant could not be excluded was contained in sperm cells found on a sticky ribbon tied around McKinney's thumb–one of many ligatures tied to her body. A forensic scientist testified that the "probability of selecting an unrelated person at random who could be the source of the major component in this profile is approximately 1 in 10.88 trillion for Caucasians, 1 in 204.7 trillion for Blacks, and 1 in 174.2 trillion for Hispanics." This evidence corroborated Shockey's testimony that appellant talked about participating in a home invasion burglary and "restraining the occupant or the person, having to restrain her before she got out of the bed."

Appellant's brother's testimony added another connection to the crime: he stated that

appellant had worked as a technician providing home extermination services for William's pest control company in 1980 and, according to their mother, McKinney was one of their customers at that time.

The prosecutor's closing arguments encompassed fourteen pages of transcribed text with twenty-five lines per page. She devoted a total of only twenty lines of this transcribed argument to Shockey's testimony. Within these twenty lines, she acknowledged Shockey's questionable character: "Now, I am not here to tell you that Steven Shockey is a good person. . . . y'all can do what you will with what Steven Shockey told you. It's just a piece of evidence that connects this defendant." She also focused the jury's attention on some of the corroborating evidence: "Well, lo and behold, back in the 1980s the defendant's friends with somebody name[d] Glen Sconci who's dead." In response, defense counsel called the jury's attention to Shockey's extensive criminal record, including crimes of moral turpitude, and urged that Shockey lacked credibility. Counsel warned the jurors to "[b]e wary when they go to the bowels of the jail to get their testimony."

The totality of the record demonstrates that the State offered credible corroborating evidence from forensic scientists and police investigators which tended to connect appellant to the charged offense. We cannot conclude that the corroborating evidence was "so unconvincing in fact as to render the State's overall case for conviction clearly and significantly less persuasive." Further, counsel from both sides essentially advised the jury to approach Shockey's testimony with caution. Appellant was not egregiously harmed by the

omission of the Article 38.075 corroboration instruction. His seventh point of error is overruled.

VIII. VICTIM-IMPACT EVIDENCE

In his eighth through eleventh points of error, appellant contends that the trial court erred in omitting certain language from the court's punishment charge and thereby violated his rights under the Eighth and Fourteenth Amendments. Appellant complains that the trial court did not instruct the jurors that:

> (1) they should not consider victim-impact evidence in connection with the future dangerousness special issue because it "logically bears no relationship to the issue of whether appellant would commit criminal acts of violence in [the] future" (point of error eight);
>
> (2) their consideration of victim-impact evidence did not relieve the State of its burden to prove the future dangerousness issue beyond a reasonable doubt (point of error nine);
>
> (3) they should disregard victim-impact evidence that was not within the knowledge or reasonable expectation of appellant (point of error ten); and
>
> (4) they should not engage in a comparative worth analysis of the value of the victim to her family and community compared to appellant's value or that of other members of society (point of error eleven).

Appellant asserts that McKinney's grandson, Bob Stapleton, gave victim-character and victim-impact testimony at the punishment phase of trial. Appellant complains that the trial court permitted Bob's testimony without limiting it via the jury instructions set out above and thereby allowed the jury's decision to "turn upon a factor that is entirely arbitrary and random." He argues that the defense did not present any mitigating evidence that "would

have triggered the admission of this evidence." He contends that he had no specific knowledge of the subject matter of Bob's testimony, such as "the impact of the victim's death on her now deceased children and grandchildren."

Our review of the record shows that the defense presented five witnesses at the punishment phase of trial. The jury heard testimony about appellant's struggles with addiction, illnesses, and injuries, his loving relationships with family and friends, and his good deeds. The State offered Bob's brief testimony in rebuttal of appellant's mitigation evidence. Outside the jury's presence, the prosecutor stated that Bob's testimony would be offered for the limited purpose of showing McKinney's relationship with Bob and the harm that the offense caused to the family. She asserted that the State would not elicit any testimony concerning the comparative worth of appellant and McKinney.

Defense counsel objected to the admission of Bob's testimony, arguing that it did not rebut any of the defense's mitigation evidence, was irrelevant to the subject matter of the four punishment special issues, and was inflammatory. However, counsel did not request any of the jury instructions he now complains that the trial court omitted. And counsel made the following remark to the trial judge concerning Bob's proposed testimony:

> It also does not lend itself, as testimony of this type normally would, to some type of limiting instruction. We don't even know what we would request in that regard because it does not. And the reason it doesn't lend itself to a limiting instruction, only to a motion in limine, is that it doesn't -- it doesn't relate to Question 4 [the mitigation special issue].

The trial court overruled appellant's objection, referring to this Court's opinion in *Mosley*

v. State[37] as authority.

Bob's transcribed testimony takes up only six pages compared with the rest of the State's presentation of its punishment case, which spanned two volumes of the reporter's record. Bob testified that he knew McKinney as "Grandma Mimi." When he was very young, she lived in Michigan and his family lived in Indiana. He saw her only on holidays. When he was eight years old, his family moved to Texas. McKinney followed the family to Texas, where Bob was able to see her more often. Bob was twelve years old when McKinney died. Her death had a lasting effect on his family and affected their relationships with each other. At the time his parents passed away, the case remained unsolved. Bob identified a holiday photo of his family that showed McKinney at the head of the table.

We have held: "If a limiting instruction is to be given, it must be when the evidence is admitted to be effective." *Hammock v. State*, 46 S.W.3d 889, 894 (Tex. Crim. App. 2001); *see also* TEX. R. EVID. 105 ("A party may claim error in a ruling to admit evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—only if the party requests the court to restrict the evidence to its proper scope and instruct the jury accordingly."). The party opposing the evidence carries "the burden of objecting and requesting a limiting instruction at the introduction of the evidence." *Hammock*, 46 S.W.3d at 892 (citing *Garcia v. State*, 887 S.W.2d 862, 878 (Tex. Crim. App. 1994)). "Once evidence is received without a limiting instruction, it becomes part of the

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[37] 983 S.W.2d 249 (Tex. Crim. App. 1998).

general evidence and may be used for all purposes." *Id*.

In the instant case, when the State offered Bob's testimony, appellant's counsel made it clear that he was not requesting a limiting instruction. Counsel also did not at any point request that the four above-described instructions be included in the punishment jury charge, nor did he object to their absence. Therefore, we will reverse only if we find that the trial court erred in not *sua sponte* giving the specified instructions and if we find that appellant was egregiously harmed by the omission. *See Almanza*, 686 S.W.2d at 174.

Appellant cites *Payne v. Tennessee*. 501 U.S. 808, 825 (1991). In *Payne*, the United States Supreme Court held that, though the Eighth Amendment does not *per se* bar evidence of the toll that the defendant's crime took on the victim and her family, the due process clause protects against evidence that is so unduly prejudicial that it renders the trial fundamentally unfair. 501 U.S. 808, 825 (1991). Appellant argues that this Court's decisions in *Mosley* and *Jackson v. State*[38] "paid insufficient heed to the limitations place by *Payne* on the admissibility" of victim-impact or victim-character evidence. Nevertheless, he contends, this precedent required the described instructions.

Victim-impact evidence can be relevant to rebut the mitigating evidence the defendant is entitled to introduce. *Scheanette v. State*, 144 S.W.3d 503, 508 (Tex. Crim. App. 2004); *see also Prystash v. State*, 3 S.W.3d 522, 536 (Tex. Crim. App. 1999) ("The thrust of *Payne* is that victim[-]impact evidence is relevant to counteract 'the mitigating evidence which the

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[38] 33 S.W.3d 828 (Tex. Crim. App. 2000).

defendant is entitled to put in.'") (quoting *Payne*, 501 U.S. at 825). In *Mosley*, this Court held that both victim-impact and victim-character evidence are admissible with regard to the mitigation special issue to show the uniqueness of the victim, the harm caused by the defendant, and to rebut the defendant's mitigation evidence. 983 S.W.2d at 262. This Court explained:

> Rule 403 limits the admissibility of such evidence when the evidence predominantly encourages comparisons based upon the greater or lesser worth or morality of the victim. When the focus of the evidence shifts from humanizing the victim and illustrating the harm caused by the defendant to measuring the worth of the victim compared to other members of society then the State exceeds the bounds of permissible testimony. . . . Trial judges should exercise their sound discretion in permitting some evidence about the victim's character and the impact on others' lives while limiting the amount and scope of such testimony. Considerations in determining whether testimony should be excluded under Rule 403 should include the nature of the testimony, the relationship between the witness and the victim, the amount of testimony to be introduced, and the availability of other testimony relating to victim impact and character. And, mitigating evidence introduced by the defendant may also be considered in evaluating whether the State may subsequently offer victim-related testimony.

Id.

In *Mosley,* this Court presumed that the defendant was unaware of the character of his victims and the impact that their deaths would have on others. *Id*. at 261 n.16. We held that, when the defendant did not know his victim, "victim[-]impact and character evidence is relevant only insofar as it relates to the mitigation issue." *Id*. at 263. We further held, "Such evidence is patently irrelevant, for example, to a determination of future dangerousness." *Id*.

However, in cases in which the defendant actually knew his victim at the time of the crime and could reasonably foresee the harmful effect the victim's death would have on others, we have found that the victim evidence was relevant to the defendant's future dangerousness. *See Williams v. State*, 273 S.W.3d 200, 220 (Tex. Crim. App. 2008); *Jackson*, 33 S.W.3d at 833.

Appellant has not presented us with any precedent requiring that the trial court instruct the jury in the manner he proposes. In a recent case, a defendant argued that the trial court had erred in failing to *sua sponte* give four jury instructions nearly identical to those proposed by appellant. *Jenkins*, 493 S.W.3d at 614. We held that the trial judge did not err, noting that the jury charge was consistent with applicable state statutes that met federal constitutional requirements. *Id*. Similarly, we see no reason to conclude that the trial court's failure to submit appellant's requested instructions violated state or federal law.

Appellant also calls our attention to the State's punishment argument, in which the prosecutor told jurors that they should not give credence to any defense arguments that appellant was an old man who should be able to spend his last years with his family, because appellant did not accord McKinney "those same courtesies." However, the prosecutor did not connect this argument to Bob's testimony and appellant's counsel did not object to the argument. To the extent that appellant independently complains about this argument, he has failed to preserve his claim. *See* TEX. R. APP. P. 33.1; *Threadgill v. State*, 146 S.W.3d 654, 667 (Tex. Crim. App. 2004). We overrule appellant's eighth through eleventh points of

error.

IX. THE PUNISHMENT PHASE INSTRUCTIONS

A. Undefined Phrases

In his twelfth and thirteenth points of error, appellant complains that the trial court violated his rights under the Eighth and Fourteenth Amendments when the court failed to define the phrases "criminal acts of violence" and "continuing threat to society" in the punishment charge. He argues that the term "criminal acts of violence" is too broad and could be interpreted to include "the slightest assault" or an offense that merely damages property. Appellant contends that the failure to define "continuing threat to society" left the jury to guess at the meaning of the phrase and thus the meaning of the entire future dangerousness special issue. Appellant's argument lacks merit.

First, appellant has not referred us to any location in the record showing that he requested the definitions that he now faults the trial court for failing to include. The record reflects that appellant's trial counsel stated on the record that he had no requested instructions or objections to the court's punishment charge.

Second, as appellant acknowledges, we have previously rejected these claims. *See Jenkins*, 493 S.W.3d at 615 (rejecting a claim of Eighth and Fourteenth Amendment violations due to the failure to define terms including "criminal acts of violence" and "continuing threat to society"); *Leza v. State*, 351 S.W.3d 344, 362 (Tex. Crim. App. 2011) (rejecting a claim of constitutional error in failing to include in the punishment jury charge

a definition of "criminal acts of violence"); *Gardner*, 306 S.W.3d at 302-03 (rejecting a claim of error in failing to define "criminal acts of violence" and "continuing threat to society" in the punishment charge).

Appellant contends that his case is different from our previous cases because the presumption that the jury will understand the phrase "criminal acts of violence" was undermined in his case and the jury needed clarification. Appellant does not explain what special circumstances in his case necessitated additional clarification. Without more, we are not persuaded to overturn our precedent. We overrule his twelfth and thirteenth points of error.

B. Impact of the Guilty Verdict

Appellant contends in his fourteenth point of error that the trial court violated his Eighth and Fourteenth Amendment rights in failing to instruct the jurors that their verdict of guilt in the first phase of trial did not foreclose their consideration of evidence at the punishment phase of trial that might reduce his blameworthiness. *See Enmund*, 458 U.S. at 798 (holding that the focus must be on the individual defendant's culpability, not on that of his accomplices, "for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence'") (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)). Appellant asserts that the trial court's instructions, as given, did not sufficiently limit the scope of the jury's consideration of the evidence on the first ("deliberateness") special issue.

With regard to the deliberateness issue, the trial court instructed the jurors that they "shall consider all the evidence at the guilt or innocence stage and the punishment stage, including but not limited to evidence of the defendant's background and character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty." The trial court's instruction thus complied with the requirements of Article 37.071 § 2(d)(1).[39] It properly informed the jury that it "shall" consider *all* of the evidence presented, at both phases of trial, as it might bear on the question of deliberateness. Nothing in the jury instructions suggested otherwise, and there is no reason to believe the jury would have been misled with respect to the proper scope of its consideration of the evidence relevant to the deliberateness special issue—either "militat[ing] for or mitigat[ing] against" a finding of deliberateness.

Appellant has not persuaded us to deviate from our precedent. *See Russeau v. State*, 291 S.W.3d 426, 436 (Tex. Crim. App. 2009); *see also Jenkins*, 493 S.W.3d at 616 (facing a similar constitutional challenge, we found no error in the trial court's instructions mandated by Article 37.0711 § 3(e) and (f)). And he has not pointed to any location in the record documenting a request for the jury instruction he now faults the trial court for failing to include. The record does not show that appellant suffered any harm, let alone egregious harm, from the lack of such an instruction. *See Russeau*, 291 S.W.3d at 436; *Almanza*, 686

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[39] Although Article 37.0711 applied to appellant's trial, not Article 37.071, appellant did not object to the trial court's deviation from the requirements of Article 37.0711. *See* discussion within point of error 1D, *ante*.

S.W.2d at 171. We overrule his fourteenth point of error.

C. The Mitigation Special Issue and the Punishment Presumption

In his fifteenth point of error, appellant complains that the trial court failed to instruct the jury that death is not the "presumed" or "default" punishment under Article 37.0711. He also argues that the trial court erred by not instructing the jurors that the mitigation special issue must be decided independently of the other special issues. In his sixteenth point of error, appellant similarly maintains that the jury instructions should have clarified that the jurors had to consider mitigating evidence apart from its relationship to his future dangerousness. He argues that the court's punishment charge may have misled jurors into thinking that the mitigating evidence had to outweigh their finding of future dangerousness. He also maintains that the court's charge did not permit adequate consideration of his personal moral culpability or a "reasoned moral response." He contends that the failure to give these instructions violated the Eighth Amendment's heightened requirement of reliability and guarantee of individualized sentencing in death penalty cases. However, appellant has not referred us to any location in the record showing that he ever requested the jury instructions at issue. *See Rousseau*, 291 S.W.3d at 436; *Almanza*, 686 S.W.2d at 171.

The trial court directed the jurors that, if they affirmatively answered each of the first three special issues in turn, "then and only then" were they to answer the fourth ("mitigation") special issue either "yes" or "no." The trial court instructed the jurors, consistent with Article 37.0711 § 3, that in answering the mitigation special issue, they

should take "into consideration all of the evidence, including the circumstances of the offense, the [d]efendant's character and background, and the personal moral culpability of the defendant." We see nothing in the court's charge that directed the jurors to weigh the mitigating evidence against their finding of future dangerousness. In comparable cases, we have rejected similar claims. *See Jenkins*, 493 S.W.3d at 616-17, 619 (presuming, where the trial court's instructions complied with the applicable statutes, that "the jurors understood and followed the instructions, absent evidence to the contrary," and holding that "nothing in our law required a further instruction that there was 'no presumption in favor of death'"); *see also Rousseau*, 291 S.W.3d at 436. We overrule appellant's fifteenth and sixteenth points of error.

D. Overall Structure of the Jury Instructions

In his seventeenth and final point of error, appellant complains that the punishment-phase jury instructions in his case, "both in their lack of definition and because of their structure, failed to provide a constitutionally satisfactory process for considering and giving effect to mitigating circumstances." He asserts that these "vague and inherently flawed" instructions violated his rights under the Eighth and Fourteenth Amendments.

The defendant in *Jenkins* used similar language to challenge his punishment charge. 493 S.W.3d at 619-20. Due to Jenkins's failure to specify the portion of the court's charge that he contended was "vague and inherently flawed," this Court surmised that he was alleging cumulative error due to defects in the punishment charge. *Id*. at 620. This Court

rejected Jenkins's claim because we found no errors in the punishment charge to cumulate. *Id*. Likewise, in this instance, appellant does not specify what parts of the punishment charge he believes are defective. We have not found that any of his punishment-charge error claims have merit. *See id*. Moreover, this point of error is inadequately briefed. *See* TEX. R. APP. P. 38.1(I); *Jenkins*, 493 S.W.3d at 620. We overrule appellant's seventeenth point of error.

X. CONCLUSION

We affirm the judgment of the trial court.

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