COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

DANIEL LUCAS BROOKS,	§	No. 08-15-00208-CR
Appellant,	§	Appeal from
v.	§	195th District Court
THE STATE OF TEXAS,	§	of Dallas County, Texas
Appellee.	§	(TC # F-1400263-N)

CORRECTED OPINION

Daniel Brooks pled not guilty to the offense of capital murder. On June 11, 2014, a Dallas County jury deadlocked, resulting in a mistrial. Thereafter, Appellant was re-indicted, pled not guilty, and a second jury found him guilty of capital murder as charged. The trial court assessed an automatic sentence of life imprisonment without the possibility of parole as required by statute. TEX.PEN.CODE ANN. § 12.31(a)(2)(West Supp. 2017). Appellant filed a motion for new trial which was overruled by operation of law. He brings six issues for review complaining of charge error, denial of access to outtakes from *The First 48* episode related to this case, and the failure to suppress evidence.[1] He also challenges the sufficiency of the evidence to support a conviction for capital murder.

[1] *The First 48* is a television show on the A&E Channel which follows police investigations from commission of the offense to solving the case.

FACTUAL SUMMARY

Accomplice David Herron

David Herron and Appellant attended middle and high school together. Herron graduated from the University of North Texas with a degree in creative writing. He went through several stints in treatment centers and rehabilitation facilities for heroin addiction. Herron and Appellant re-connected via Facebook in late 2012. Herron's Facebook page referenced violent rap music lyrics and contained links to his writings entitled *Delusions of Grandeur*, *Calculated Risk*, and *Choked Humanity*. Shortly after re-connecting with Herron, Appellant lost his job as a veterinary assistant and began using heroin. As a result of his heroin use, he lost his apartment and began living with Herron in Herron's gold Volkswagen Jetta. The duo kept all of their possessions in the car. Herron testified at trial that it was possible that he wore Appellant's clothing some times.

On March 7, 2013, Herron and Appellant needed money for heroin. While discussing the possibility of panhandling, Appellant mentioned breaking into some houses, because that was "where the money was." Herron was uncomfortable about it because his mother had been strangled to death during a home invasion burglary. Herron was also concerned that someone might be home because it was mid-to-late afternoon and "something could go wrong."

Nevertheless, Appellant proceeded with his plan. He borrowed the Jetta and told Herron that he was going to make something happen. He left Herron at a nearby Walgreens for about an hour. At the time, Appellant was wearing a light wind breaker, green cap, jeans, and boots. When Appellant returned, Herron noticed items in the car that were not there previously. He also noticed that Appellant was no longer wearing the wind breaker. Appellant said that he talked his way into a woman's home, told her he had lost his dog, "scared her and threatened her

and took the stuff and came back." Appellant appeared "visibly upset and flustered" and began "dry-heaving and like throwing up." When Herron asked him if anything went wrong, Appellant replied that he had just scared the woman and "his adrenaline was jacked up because he didn't normally do stuff like that." He then opened the trunk to change out of his western boots into a pair of white tennis shoes. Herron moved back into the driver's seat and the two men left to try to sell Appellant's loot which he had stored in a white kitchen trash bag.

They first drove to PJ Pawn to sell some of the jewelry, antique coins, a purse, a wallet, and some silverware, but PJ's was closed. They then drove to 24-Hour Pawn in Oak Cliff. After Appellant changed clothes again, he went into 24-Hour Pawn to sell the stolen antique coins. A surveillance video showed him wearing his western boots. He also presented his driver's license. Appellant sold the coins for $40. He and Herron used the $40 along with $30 they found in the wallet to purchase heroin from a dealer Herron knew as "Cassie."

After getting high, Herron and Appellant drove to the intersection of Mockingbird and Greenville around 11:00 p.m. Herron parked across the street while Appellant attempted to use a card from the wallet to obtain cash from an ATM. His attempts were unsuccessful. When he returned to the car, he expressed concern that "the woman had called and reported them stolen or canceled them." The two men drove around for a while trying to decide where to go next. They opted for Wal-Mart on Forest Lane. By now, it was the early morning hours of March 8, 2013. Herron parked across the street at a CVS Pharmacy parking lot because he did not want to be caught on camera. The surveillance video at Wal-Mart showed Appellant purchasing an iPad, which the two men planned to sell. They then drove to another Wal-Mart off Cockrell Hill where Appellant attempted to make another purchase. This time, Herron parked at a nearby

What-A-Burger. Video surveillance from the Cockrill Hill Wal-Mart showed Appellant unsuccessfully attempt to purchase a laptop, some clothes, and an Xbox 360 game console.

Herron and Appellant then decided to sell the iPad at a secondhand electronics store once it opened. They slept in the Jetta for a few hours and then drove to EntertainMart at around 10:30 a.m. Again, Herron waited in the parking lot. Appellant went inside and presented his driver's license to Logan Hayse, an employee. Hayse paid $440 for the iPad. Appellant and Herron contacted Cassie using a cell phone they shared and purchased a large amount of heroin. Herron suggested they drive to a casino in Durant, Oklahoma to make some money playing poker. They paid cash for their hotel room and did not win any money. Herron recorded his thoughts in a journal:

> The well-lit pleasures, the dimwit measures, chaos is the vixen, beauty of the victim. The ultimate trespass. No coming back. In the middle of nowhere Oklahoma, from around the bend the train is coming while my feet rest securely on the tracks. A sinking ship with no captain. This is ultimate sin.

Herron and Appellant returned to Dallas on March 9, 2013, because they ran out of heroin and did not know any drug dealers in Oklahoma.

The Crime Scene

On March 7, 2013, 79-year-old Avanell Cowgill spent the day volunteering at her church. At 3:15 p.m., she said goodbye to the pastor and went home. On March 9, 2013, at approximately 11:00 p.m., Officer Elizabeth Wadas, a field training officer, and her trainee, Officer Courtney Williams, checked Cowgill's east Dallas home at the request of one of her daughters, who had not heard from her in several days. Upon arrival, the two officers noticed multiple newspapers lying on the front porch. There was no response when they knocked on the front door, which was locked. Officer Williams remained by the porch while Wadas went around to the backyard where she noticed that the screen door was closed but the inside door was

"wide open." Wadas retrieved Williams and the two proceeded into the house. The lights and the television were on in the sitting room, where they observed knitting materials next to a chair. Wadas turned off the television and announced their presence. As they proceeded into the kitchen and dining room area, the two officers discovered Cowgill's body "laying face-down on the floor deceased."

Wadas immediately radioed for backup and waited with Williams for the other officers to arrive. Soon after, Sergeant Villareal, Sergeant Stinson, trainee Officer Morgan, and Officers Trigo and Devore arrived to assist. After clearing the house, Trigo and Devore left while the rest of the officers waited for the fire department, homicide detectives, crime scene unit, and the medical examiner. Two individuals from the fire department confirmed that Cowgill was dead. The case was quickly assigned to lead homicide detective Scott Sayers, who responded to the crime scene along with a crime scene analyst, two body handlers, a field agent from the medical examiner's office, and two people from the television program, *The First 48*.

Crime Scene Analyst Ryan Woolley processed the scene. He spoke to the first responding officers who informed him they were waiting on a search warrant. Once the officers obtained the warrant, Woolley photographed the outside of the house, the inside of the house, Cowgill's body, any potential blood evidence, and anything that appeared out of place, such as a trash can missing its trash bag liner in the middle of the kitchen and some jewelry boxes in the front bedroom. Woolley also used a sterile fingerprint powder in an attempt to identify any fingerprints that might be on a bloody stool near Cowgill's body.

Woolley then entered the bedroom where he collected jewelry boxes from the dresser and swabbed them for DNA. There was a dresser drawer left slightly ajar and when asked if he swabbed it for DNA, Woolley testified that he did not because he thought he was more likely to

find DNA on the jewelry boxes. He also collected a pair of wire-framed glasses. He photographed some small specks of blood spatter on the top surface of a chair and documented blood found on a doorjamb and what appeared to be blood smeared on the bottom of a door. Woolley swabbed a void in the dust on a table top for DNA and processed the kitchen faucet and trash can for fingerprints and DNA. He then attempted to locate where the bloody stool originated. Finally, along with Sergeant Stinson, Woolley returned some of the items in the house to their original position, including an overturned chair and lamp that had previously been processed for fingerprints. He then swabbed the storm door for DNA.

While officers were processing the scene, Cowgill's telephone rang. Detective Sayers used a Kleenex to answer the phone. Cowgill's daughter was on the line and Detective Sayers relayed the news of her mother's death. He asked to meet with her the next morning. On March 10th, Detective Sayers, along with some other detectives, returned to Cowgill's neighborhood in hopes of locating potential witnesses. After talking to several neighbors, Detective Sayers learned of a pushy door-to-door salesman and called the northeast police substation to determine if there had been any recent burglaries in the area. He also met with Cowgill's family.

Detective Sayers later learned that one of Cowgill's credit card companies had left a message on her answering machine. He contacted the credit card company and spoke to Tony Dillman, a Citibank investigator, to obtain the charges made to the card. Detective Sayers then visited the various locations where the credit card was used and obtained video surveillance footage. Video from the Forest Lane Wal-Mart depicted a suspect wearing a gray jacket while surveillance video from the Cockrell Hill Wal-Mart showed a suspect wearing a brown jacket. That video also led detectives to the What-A-Burger across the street, where a second suspect was spotted. Detective Sayers released these images of the two suspects to the media. He was

also able to track down the iPad purchased using one of Cowgill's credit cards, which led him to EntertainMart, and ultimately to Appellant as the individual who sold the iPad to EntertainMart.

The Arrest

On March 19, 2013, Herron and Appellant checked into a Motel 6 in Dallas. They were arrested the next day after returning from a nearby Wal-Mart. Dallas Police Detective Duggan interviewed Herron. At the beginning of this first interview, Herron "lied and threw up a smoke screen," but later began providing more information after realizing "the seriousness of the situation and the gravity of it." After Duggan showed him the video at the What-A-Burger and relayed what police had recovered from their motel room, Herron told Duggan that Appellant needed to borrow his car to buy from a dope dealer who would not sell to strangers. During this first interview, Herron also claimed that Appellant never told him how he got into Cowgill's house, or that there was even a woman in the house. He also claimed that the car parked at the What-A-Burger was not his.

After Herron was booked into the Dallas County Jail for capital murder, police interviewed him a second time. Accompanied by his attorney, Herron "came clean, filled in the rest of the gaps and came back and told them the truth." He remembered seeing Appellant take off his boots at Walgreens after returning with the Jetta and remembered seeing him wearing the boots when the two men were booked into jail. Detective Sayers attempted to obtain the video footage from Walgreens, but the surveillance footage was lost during a lightning storm. Herron also recalled a conversation in which Appellant professed that Herron's charge would never stick, so Appellant would take the wrap for the offense, and would most likely receive the death penalty for doing so. Finally, Herron testified that he was ultimately charged with burglary of a

habitation, that the State never discussed any type of deal with him, and that his attorney advised him that it was in his best interest to cooperate with the investigation.

Detective Sayers was also able to obtain a search warrant for Appellant's belongings, which were in the custody of the Lew Sterrett County Jail. After he retrieved them, he turned them over to Crime Scene Analyst Justin O'Donnell. O'Donnell then transported Appellant's boots and jeans to the Southwestern Institute of Forensic Sciences (SWIFS) for testing. On March 22, 2013, Detective Michael Yeric retrieved items from the motel room. When he arrived, motel employees had already removed and bagged Cowgill's credit card and driver's license. Yeric brought the items to Detective Sayers. Crime Scene Analyst Christina Hoffman Miranda then took the items from the homicide division to the crime scene lab where she photographed the property, removed each article, separated the items, documented them, and sealed each item with evidence tape. Based on the instructions she was given from the homicide department, she set aside any items suspected to have bloodstains so they could be transferred to SWIFS for further analysis. Meanwhile, other officers photographed and collected evidence from Herron's Jetta.

Evidence at Trial

The State presented evidence from several of the officers involved in the investigation and collection of evidence, telephone records for the cell phone that Appellant and Herron used, and scientific evidence. Medical Examiner Dr. William McClain opined that Cowgill died as a result of blunt force injuries to the head and strangulation. Dr. McClain classified her death as a homicide. SWIFS conducted serology and DNA testing on a large number of items. DNA analyst Angel Fitzwater testified that multiple samples taken from Appellant's boots matched Cowgill's DNA profile.

Sergeant William Flores testified as an expert witness pertaining to bloodstain analysis. He analyzed the bloodstains on the boots and explained that an elliptical stain on the left boot resulted from "a dynamic event where blood was in movement," as opposed to a transfer stain. He observed other similar bloodstains on the boots that he also characterized as being consistent with blood that is in flight.

During the presentation of the defense, Herron was questioned extensively regarding his writings, his Facebook page, and the role he played in Appellant's heroin addiction. The investigating officers were questioned about their procedures, particularly regarding wearing gloves at the crime scene, *The First 48*'s involvement in the case, and any possible contamination of the evidence collected from the motel room and the Jetta. Finally, Lawrence Renner, a forensic analyst, testified as an expert in bloodstain analysis. Renner opined that some of the stains on the boots appeared to be transfer stains but on cross-examination, he admitted that he observed "a couple of medium velocity impact spatter-size" bloodstains.

CHARGE ERROR

Appellant's brings three issues complaining of charge error. First, he contends that the trial court erred in submitting an "intent to promote or assist" parties charge for capital murder. His second and third issues address the trial court's refusal to submit lesser-included offense charges for burglary and robbery.

Standard of Review

Our first duty is to examine whether error exists. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex.Crim.App. 2005); *Middleton v. State*, 125 S.W.3d 450, 453 (Tex.Crim.App. 2003), *citing Hutch v. State*, 922 S.W.2d 166, 170-71 (Tex.Crim.App. 1996). If we find error, then we conduct a harm analysis. *Ngo*, 175 S.W.3d at 743. Preservation of error is not an issue until

harm is assessed. *Id.* The degree of harm necessary for reversal depends on whether Appellant preserved the error by objection. *Id.* Under *Almanza v. State*, 686 S.W.2d 157, 171 (Tex.Crim.App. 1984), charge error requires reversal when the defendant properly objected to the charge and we find "some harm" to his rights. *See also Hutch*, 922 S.W.2d at 171. However, when the defendant fails to object or states that he has no objection to the charge, we will not reverse unless the record shows "egregious harm" to the defendant. *Ngo*, 175 S.W.3d at 743; *Bluitt v. State*, 137 S.W.3d 51, 53 (Tex.Crim.App. 2004); *Almanza*, 686 S.W.2d at 171. In assessing the degree of harm, we do so in light of the entire jury charge, the state of the evidence, the argument of counsel, and any other relevant information in the record as a whole. *Almanza*, 686 S.W.2d at 171.

Law of Parties Charge

A person commits murder if he intentionally or knowingly causes the death of an individual. TEX.PEN.CODE ANN. § 19.02(b)(1)(West 2011). A person commits the offense of capital murder if he intentionally commits murder in the course of committing or attempting to commit robbery or burglary. *Id.* at § 19.03(a)(2)(West Supp. 2017).

A person may be convicted as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or both. TEX.PEN.CODE ANN. § 7.01(a)(West 2011). A person is criminally responsible for the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense. *Id*. at § 7.02(a)(2). Mere presence at the scene of a crime before, during, or after the offense, without more, is insufficient to sustain a conviction as a party; however, combined with other incriminating evidence, it may be sufficient to sustain a conviction. *Thompson v. State*, 697

S.W.2d 413, 417 (Tex.Crim.App. 1985); *see also Ransom v. State*, 920 S.W.2d 288, 302 (Tex.Crim.App. 1996). It is well-established that the law of parties applies to the offense of capital murder. *See Johnson v. State*, 853 S.W.2d 527, 534 (Tex.Crim.App. 1992).

The trial court is required to give the jury a written charge "setting forth the law applicable to the case." TEX.CODE CRIM.PROC.ANN. art. 36.14. (West 2007). In *Grey v. State*, the Court of Criminal Appeals explained that "the State is entitled to pursue the charged offense and, therefore, is entitled to receive a response from the jury on whether the defendant is guilty of the charged offense." 298 S.W.3d 644, 649-50 (Tex.Crim.App. 2009). "It is the State . . . that chooses what offense is to be charged." *Id.* at 650. The State's charging choices, then, become part of the law applicable to the case. *In re State ex rel. Weeks*, 391 S.W.3d 117, 123 (Tex.Crim.App. 2013).

With regard to offenses other than the charged offenses, courts have held that the State's power to choose what offense to pursue means that the State is not required to prove that the defendant was guilty only of a lesser-included offense in order to obtain submission of the lesser-included offense. *Grey*, 298 S.W.3d at 650. The State could pursue the charged offense alone, or the State could also obtain instructions on a lesser-included offense, or the State could abandon the charged offense altogether in favor of prosecuting the lesser-included offense. *Id.*

The same is true with respect to the law of parties. Regardless of whether it is pled in the charging instrument, liability as a party is an available legal theory if it is supported by the evidence. *Marable v. State*, 85 S.W.3d 287, 287-88 & n.3 (Tex.Crim.App. 2002). In the watershed case of *Malik v. State*, the Court of Criminal Appeals' formulation of the standard for sufficiency of the evidence based on the "hypothetically correct jury charge" was motivated in part by the existence of issues such as the law of parties and the doctrine of transferred intent.

953 S.W.2d 234, 239-40 (Tex.Crim.App. 1997). Party liability is as much an element of an offense as the enumerated elements prescribed in a statute that defines a particular crime. *See* TEX.PEN.CODE ANN. § 7.02. If party liability can legally apply to the offense at issue and is supported by the evidence, then the State is entitled to its submission. TEX.CODE CRIM.PROC.ANN. art. 36.14 (trial judge must give jury written charge "setting forth the law applicable to the case"); *Romo v. State*, 568 S.W.2d 298, 302 (Tex.Crim.App. 1978)(opinion on State's motion for rehearing)("In a case where a charge on the law of parties is applicable, it is usually the State that insists on and is entitled to have such a charge, including an application of the law to the facts, submitted to the jury.").

In *Malik*, the Court of Criminal Appeals also explained that the hypothetically correct jury charge is one that "does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability." 953 S.W.2d at 240. This statement is consistent with the fact that it is the State's prosecution, and the State is entitled to pursue any available theories of criminal liability to the broadest extent possible under the charging instrument and the evidence. *Weeks*, 391 S.W.3d at 124. If multiple theories of party liability are supported by the evidence, the trial judge may not arbitrarily limit the State to one of them. *Id.* And the trial judge may not restrict the presentation of a theory of party liability if the restriction is not required by the charging instrument or by the evidence. *Id.*

Appellant objected to the inclusion of the law of parties in the capital murder application paragraph. But he did not object to the inclusion of an instruction on accomplice witnesses or the instruction that Herron was an accomplice as a matter of law.[2] He now argues that there is no

[2] Texas law provides that "[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[.]" TEX.CODE CRIM.PROC.ANN. art. 38.14 (West 2005); *see Druery v. State*, 225 S.W.3d 491, 498 (Tex.Crim.App. 2007)(testimony of an accomplice must be corroborated by "independent evidence tending to connect the accused with the crime"). This rule has been

evidence to support a finding that he and Herron acted together to execute a common design to murder Cowgill. Because the evidence at trial was sufficient for the jury to have found Appellant guilty as the principal actor, any error was harmless. *Bustos v. State*, No. 03-12-00211-CR, 2014 WL 2154093, at *4 n.3 (Tex.App.--Austin May 14, 2014, no pet.)(mem. op., not designated for publication); *Nelson v. State*, 405 S.W.3d 113, 126 (Tex.App.--Houston [1st Dist.] 2013, pet. ref'd); *Black v. State*, 723 S.W.2d 674, 675 (Tex.Crim.App. 1986); *see also Brown v. State*, 716 S.W.2d 939, 946 (Tex.Crim.App. 1986). We overrule Issue One.

Lesser-Included Offenses

Appellant next contends the trial court erred by refusing his requested instructions on the lesser-included offenses of burglary and robbery.[3] The State argues Brooks was not entitled to either instruction, but even if he were, any error was harmless. We need not determine whether

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part of Texas law since at least 1925, and reflects "a legislative determination that accomplice testimony implicating another person should be viewed with a measure of caution, because accomplices often have incentives to lie, such as to avoid punishment or shift blame to another person." *Blake v. State*, 971 S.W.2d 451, 454 (Tex.Crim.App. 1998). Because the role requires corroboration of accomplice-witness testimony before a conviction can stand, the jury must be instructed accordingly, and the particular instruction that must be given depends on the circumstances of each case.

We examine the various types of accomplice-witness instructions to explain why all of these types should be similarly treated under *Almanza*. A proper accomplice-witness instruction informs the jury that a witness is either an accomplice as a matter of law or an accomplice as a matter of fact. *Zamora v. State*, 411 S.W.3d 504, 510 (Tex.Crim.App. 2013). The evidence in each case will dictate the type of accomplice-witness instruction that needs to be given, if any. *Cocke v. State*, 201 S.W.3d 744, 747 (Tex.Crim.App. 2006). A witness like Herron is an accomplice as matter of law when the witness has been charged with the same offense as the defendant or a lesser-included offense, or "when the evidence clearly shows that the witness could have been so charged." *Druery*, 225 S.W.3d at 499. For accomplice witnesses as a matter of law, the trial court affirmatively instructs the jury that the witness is an accomplice and that his testimony must be corroborated. *See Druery*, 225 S.W.3d at 498-99. In contrast, when the evidence presented by the parties as to the witness's complicity is conflicting or inconclusive, then the accomplice-witness instruction asks the jury to (1) decide whether the witness is an accomplice as a matter of fact, and (2) apply the corroboration requirement, but only if it has first determined that the witness is an accomplice. *Id.*

[3] A person commits burglary of a habitation if, without the consent of the owner, the person enters a habitation and commits or attempts to commit a felony, theft, or an assault. TEX.PEN.CODE ANN. § 30.02(a)(3)(West 2011). A person commits robbery if, in the course of committing theft and with intent to obtain or maintain control of the property, he intentionally, knowingly, or recklessly causes bodily injury to another or places another in fear of imminent bodily injury or death. *Id.* at § 29.02(a)(1)(2).

the trial court erred in refusing the requested lesser-included offense instructions because we agree with the State that any error in refusing to submit the instructions to the jury was harmless.

A trial court's erroneous refusal to give a requested instruction on a lesser-included offense is subject to the harm analysis of *Almanza v. State*, 686 S.W.2d 157, 171 (Tex.Crim.App. 1984). Because Appellant requested the instruction, under an *Almanza* analysis we are required to reverse only if the refusal to submit the requested instruction resulted in "some harm." *See id.*

In *Saunders v. State*, 913 S.W.2d 564, 571 (Tex.Crim.App. 1995), the Texas Court of Criminal Appeals recognized that it "routinely found 'some' harm, and therefore reversed, whenever the trial court has failed to submit a lesser included offense that was requested and raised by the evidence--at least where that failure left the jury with the sole option either to convict the defendant of the greater offense or to acquit him." The court reasoned the defendant suffered "some harm" because the jury was denied the opportunity to fulfill its role as fact finder, i.e., it was not permitted to resolve the factual dispute as to whether the defendant committed the greater or lesser offense. *Id.* But the court also recognized that a defendant may not suffer any harm at all when a trial court submits one lesser-included offense raised by the evidence, but refuses to submit another that might have also been raised by the evidence:

> The jury's options [are] not limited to conviction of the greater offense or acquittal. Under these circumstances the *Beck* [*v. Alabama*, 447 U.S. 625, 634 (1980)] risk that the jury will convict of the greater offense despite its reasonable doubt is not so apparent. There is an available compromise. It is at least arguable that a jury that believed the defendant committed an uncharged lesser included offense, but unwilling to acquit him of all wrongdoing, and therefore inclined to compromise, would opt for a lesser included offense that was submitted rather than convict him of the greater offense.

913 S.W.2d at 572.[4] Thus, a finding of some harm is not automatic when the jury is charged with regard to one requested lesser-included offense, but not another. *Id.*; *Levan v. State*, 93

[4] In *Masterson v. State*, 155 S.W.3d 167, 171-72 (Tex.Crim.App. 2005), the Court of Criminal Appeals applied its

S.W.3d 581, 586 (Tex.App.--Eastland 2002, pet. ref'd); *Jiminez v. State*, 953 S.W.2d 293, 300 (Tex.App.--Austin 1997, pet. ref'd). In fact, a wholly different situation is presented when the trial court submits one lesser-included offense but not another. As the court explained in *Jiminez*, if the jury had a reasonable doubt as to the defendant's guilt of the charged offense, but at the same time believed him guilty of some offense, it was not forced to choose between conviction and acquittal, but had the option of convicting him of the lesser offense that was submitted. 953 S.W.2d at 300. That a jury chose to find the defendant guilty of the greater offense as opposed to the submitted lesser-included offense is an indication that the trial court's refusal to give the other lesser-included offense instruction was harmless error. *Id.*

Here, Appellant requested instructions on the lesser-included offenses of burglary and robbery. The trial court refused to give these instructions, but gave an instruction on the lesser-included offense of theft. This presented the jury with the option of convicting Appellant for an offense which did not include the requisite intent required for murder. The jury rejected this option by finding him guilty of capital murder. Both burglary and robbery are similar offenses to theft in that they also lack the requisite intent for murder. If the jury had harbored a reasonable doubt that Appellant intentionally or knowingly caused Cowgill's death, it is unlikely it would have convicted him of murder because it was given a compromise -- theft. *See Levan*, 93 S.W.3d at 586-87, *citing Saunders*, 913 S.W.2d at 573-74. It is more likely the jury convicted Appellant of capital murder because it believed, given the evidence admitted at trial, that he intentionally or knowingly caused Cowgill's death while in the "course of committing or

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reasoning in *Saunders* to explain that the jury's failure to find an intervening lesser-included offense (one that is between the requested lesser offense and the offense charged) may, in appropriate circumstances, render a failure to submit the requested lesser offense harmless. This is because the harm from denying a lesser offense instruction stems from the potential to place the jury in the dilemma of convicting for a greater offense in which the jury has reasonable doubt or releasing entire from criminal liability a person the jury is convinced is a wrongdoer. *Id.*

attempting to commit . . . burglary, [or] robbery . . . ." [5] *See id.*; *see also* TEX.PEN.CODE ANN. § 19.03(a)(2). Because any error was harmless, we overrule Issues Two and Three.

SUFFICIENCY OF THE EVIDENCE

In his fourth issue, Appellant challenges the sufficiency of the evidence supporting his capital murder conviction. In conducting our legal sufficiency review, we must examine all of the evidence in a light most favorable to the verdict, and determine whether, based on that evidence and reasonable inferences therefrom, any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime as alleged in the application paragraph of the jury charge. *Gomez v. State*, No. 08-12-00001-CR, 2014 WL 3408382, at *8-9 (Tex.App.--El Paso Jul. 11, 2014, no pet.); *Hooper v. State*, 214 S.W.3d 9, 16 (Tex.Crim.App. 2007), *citing Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex.Crim.App. 1999).

We do not reexamine the evidence and impose our own judgment as to whether the evidence establishes guilt beyond a reasonable doubt, but determine only if the findings by the trier of fact are rational. *See Lyon v. State*, 885 S.W.2d 506, 516-17 (Tex.App.--El Paso 1994, pet. ref'd). The exclusive judge of the credibility of a witness is the fact finder. *Lancon v. State*, 253 S.W.3d 699, 707 (Tex.Crim.App. 2008). The fact finder also determines the weight that is given to each witness's testimony, and may choose to believe some testimony and disbelieve other testimony. *Id.* Therefore, we do not assign credibility to witnesses or resolve any conflicts of fact. *Lancon*, 253 S.W.3d at 707; *Adelman v. State*, 828 S.W.2d 418, 421 (Tex.Crim.App.

[5] The evidence established that Cowgill suffered multiple blunt force injuries to the head and was strangled to death. Appellant relies on the following evidence to support his contention that he was entitled to the lesser-included offense of robbery: he broke into Cowgill's home, took her property, and only scared and threatened her, but did not harm her. Despite this testimony, the physical evidence does not negate that Appellant committed only robbery or burglary alone; forensic DNA testing revealed that the blood stains found on the boots in Appellant's possession matched Cowgill's DNA profile; several forensic experts opined at trial that the type of stain on the boot was a result of "a dynamic event where blood was in movement," which would indicate that the events occurred close in time.

1992); *Matson v. State*, 819 S.W.2d 839, 843 (Tex.Crim.App. 1991); *Belton v. State*, 900 S.W.2d 886, 897 (Tex.App.--El Paso 1995, pet. ref'd). We resolve any inconsistencies in the testimony in favor of the verdict rendered. *Lancon*, 253 S.W.3d at 707.

The standard of review for sufficiency of the evidence applies to both direct and circumstantial evidence cases. *See Powell v. State*, 194 S.W.3d 503, 506 (Tex.Crim.App. 2006); *Garcia v. State*, 871 S.W.2d 279, 280 (Tex.App.--El Paso 1994, no pet.). If we sustain a legal sufficiency challenge, we must render a judgment of acquittal. *Clewis v. State*, 922 S.W.2d 126, 133 (Tex.Crim.App. 1996).

A person commits the offense of capital murder when he intentionally causes the death of an individual during the course of committing or attempting to commit burglary or robbery. TEX.PEN.CODE ANN. § 19.03(a)(2). A person commits burglary of a habitation if, without the consent of the owner, the person enters a habitation and commits or attempts to commit a felony, theft, or assault. *Id.* at § 30.02(a)(3)(West 2011). A person commits robbery if, in the course of committing theft and with intent to obtain or maintain control of the property, he intentionally, knowingly, or recklessly causes bodily injury to another or places another in fear of imminent bodily injury or death. *Id.* at § 29.02(a)(1)(2). Finally, a person commits theft if "he unlawfully appropriates property with intent to deprive the owner of property." *Id.* at § 31.03(a)(West Supp. 2017).

We have already extensively outlined the State's evidence. Through witness testimony and cross-examination, Appellant developed his defense theory. He questioned Herron about his degree in creative writing, his works shared on social media, as well as his contribution to Appellant's heroin habit. The defense also questioned law enforcement about the procedures they employed, such as whether gloves were worn at the crime scene, possible contamination of

evidence collected from the Motel 6 and the Jetta, and *The First 48*'s involvement. While Appellant throughout trial and now on appeal insists on a different interpretation of the evidence -- that Herron murdered Cowgill because he was the more intelligent and creative of the two men with a "well-documented drug addiction, and penchant for control" -- the jury was free to accept or reject this theory. *Lancon v. State*, 253 S.W.3d 699, 707 (Tex.Crim.App. 2008); Aside from Appellant's emphasis on how he and Herron's possessions were "commingled" in the Jetta, he does not point to any other evidence in the record to support his theory. He also raises the possibility that Herron could have worn the bloodstained boots, but video surveillance obtained from several sources showed Appellant wearing the boots at all relevant times. It is not our role to reevaluate the weight and credibility of the evidence. *See Dewberry*, 4 S.W.3d at 740. Because the evidence above is sufficient to uphold the jury's verdict, we overrule Issue Four.

MOTION TO QUASH

In his fifth issue, Appellant argues that the trial court erroneously allowed ITV Studios to hide behind the journalist's privilege in violation of his State and federal constitutional rights. We review a complaint that the trial court improperly quashed a subpoena for an abuse of discretion. *Emenhiser v. State*, 196 S.W.3d 915, 921 (Tex.App.--Fort Worth 2006, pet. ref'd). Similarly, questions regarding limitations on the right to compulsory process are within the trial court's discretion. *Rodriguez v. State*, 90 S.W.3d 340, 358 (Tex.App.--El Paso 2001, pet. ref'd).

Criminal defendants have a right to compulsory process for obtaining witnesses. U.S. CONST. amend. VI; TEX.CONST. art. I, § 10. But the right to compulsory process is not absolute. *Emenhiser*, 196 S.W.3d at 921. Defendants have the right to secure the attendance of witnesses whose testimony would be both material and favorable to the defense. *See Coleman v. State*, 966 S.W.2d 525, 527-28 (Tex.Crim.App. 1998). To exercise this right, the defendant must make a

plausible showing to the trial court, by sworn evidence or agreed facts, that the witness's testimony would be both material and favorable. *Id.* at 528. Counsel's mere belief that a witness would support the defense's case is insufficient to establish materiality. *Castillo v. State*, 901 S.W.2d 550, 553 (Tex.App.--El Paso 1995, pet. ref'd), *citing Hardin v. State*, 471 S.W.2d 60, 62 (Tex.Crim.App. 1971). Moreover, the right to compulsory process is dependent upon an accused's initiative, and the nature of the right requires that its effective use be preceded by "deliberate planning and affirmative conduct" by the defendant. *Rodriguez*, 90 S.W.3d at 358, *citing Taylor v. Illinois*, 484 U.S. 400, 410, 108 S.Ct. 646, 653-54, 98 L.Ed.2d 798 (1988).

Procedural Posture

On March 28, 2013, the trial court ordered A&E Television Networks, LLC (AETN) and *The First 48* "to retain and maintain any and all video- and audio-footage, physical and electronic files, and any other files and items, including specifically the outtakes of any episode of *The First 48*, involving defendant Daniel Brooks and/or codefendant David Herron and/or complainant Avanell Cowgill until this Court specifically orders otherwise." *The First 48* episode in question, "When a Stranger Calls/Sweet 16," originally aired on October 3, 2013 and has since aired repeatedly. Appellant e-mailed a copy of the trial court's order and received confirmation of receipt. On December 18, 2013, the court issued a second order for AETN and *The First 48* to release "certified copies of any and all video and audio footage, physical and electronic files, and any other files and items, including specifically the outtakes of any episode of *The First 48*, involving defendant Daniel Brooks and/or codefendant David Herron and/or complainant Avanell Cowgill."

AETN filed a motion to quash arguing that the network was not in possession of the outtakes, that the court lacked jurisdiction to issue an order to AETN, that no one had invoked

Code of Criminal Procedure Article 24.28 for securing attendance of witnesses from without the state, that Appellant cannot circumvent 39.14 by seeking nonparty discovery thought an ex parte order, and that the Texas privilege, Article 38.11, protects any material relating to the episode. At the hearing, AETN's counsel represented that AETN did not have the outtakes but did turn over a copy of the final, edited episode. She represented to the court that ITV Studios and Jason Guberman, whom she had copied on an email related to the litigation, maintained the outtakes. On June 3, 2014, the case went to trial, and on June 11, 2014, the jury deadlocked and was discharged. The case was twice reset before the May 2015 trial date.

On March 30, 2015, the trial court issued an ex parte order to Jason Guberman and ITV Studios related to the outtakes. It also issued a certificate for an out-of-state witness subpoena to a New York court to be served upon Guberman and ITV at their Manhattan address. ITV filed a motion to quash, and on April 20, 2014, the Supreme Court of New York in the County of New York held a show cause hearing related to the subpoena and ultimately held its issuance in abeyance until the Texas trial court determined whether Texas' reporter shield law applied. *See* TEX.CODE CRIM.PROC.ANN. art. 38.11. The trial court conducted a hearing and determined that the shield did apply. It ultimately found that Appellant did not meet the exception and had not "made a clear and specific showing that the outtakes are relevant and material to the proper administration of the claim or defense of this defendant . . . ." It thereafter quashed its own order and attendant certificate for out-of-state witness subpoena.

The Shield

Appellant insists that the trial court erred in quashing its own order and certificate for an out-of-state subpoena for the outtakes from *The First 48* episode related to this case. Essentially, he takes issue with the applicability of Article 38.11 of the Texas Code of Criminal Procedure.

He maintains it does not apply here because *The First 48* does not disseminate news or information to the public, while the State insists that the trial court properly interpreted and applied the Texas' shield law.

The purpose of Article 38.11 "is to increase the free flow of information and preserve a free and active press and, at the same time, protect the right of the public to effective law enforcement and the fair administration of justice." TEX.CODE CRIM.PROC.ANN. art. 38.11 § 2 (West Supp. 2017). Article 38.11 defines a journalist as "a person, including a parent, subsidiary, division, or affiliate of a person, who for a substantial portion of the person's livelihood or for substantial financial gain, gathers, compiles, prepares, collects, photographs, records, writes, edits, reports, investigates, processes, or publishes news or information that is disseminated by a news medium or communication service provider . . . ." *Id.* at § 1(2). It defines "news medium" as a "radio or television station or network, cable, satellite, or other transmission system or carrier or channel, or a channel or programming service for a station, network, system, or carrier, or an audio or audiovisual production company or Internet company or provider, or the parent, subsidiary, division, or affiliate of that entity, that disseminates news or information to the public by any means" including television. *Id.* at § 1(3).

Article 38.11 protects journalists from compelled production or disclosure of "any confidential or nonconfidential unpublished information, document, or item obtained or prepared while acting as a journalist." *Id.* at § 3(a)(1). "A subpoena or other compulsory process may not compel the parent, subsidiary, division, or affiliate of a communication service provider or news medium to disclose the unpublished information, documents, or items or the source of any information, documents, or items that are privileged from disclosure under Subsection (a)." *Id.* at § 3(b).

Regarding unpublished information, here *The First 48*'s outtakes, the Code provides that after service of subpoena and an opportunity to be heard, a court may compel a journalist to testify or to produce any unpublished information, document, or item if the person seeking the unpublished information makes a clear and specific showing that:

> (1) all reasonable efforts have been exhausted to obtain the information from alternative sources; and
>
> (2) the unpublished information, document, or item:
>
> > (A) is relevant and material to the proper administration of the official proceeding for which the testimony, production, or disclosure is sought and is essential to the maintenance of a claim or defense of the person seeking the testimony, production, or disclosure; or
> >
> > (B) is central to the investigation or prosecution of a criminal case and based on something other than the assertion of the person requesting the subpoena, reasonable grounds exist to believe that a crime has occurred.

Id. at § 5(a). When considering an order to compel testimony or to produce or disclose unpublished information, we examine whether (1) the subpoena is overbroad, unreasonable, or oppressive; (2) reasonable and timely notice was given of the demand for the information, document, or item; (3) the interest of the party subpoenaing the information outweighs the public interest in gathering and dissemination of news, including the concerns of the journalist; and (4) the subpoena or compulsory process is being used to obtain peripheral, nonessential, or speculative information. *Id.* at § 5(b).

In resolving this hurdle, we employ a two pronged analysis. We must first determine whether the journalist's shield applies to AETN. If so, then we must decide whether Appellant met his burden (1) to exhaust all reasonable efforts to obtain the needed information, and (2) to show how the outtakes were relevant and material to the trial and essential to his defense.

Does the Shield Statute Apply?

The heart of Appellant's argument is his claim that *The First 48* does not disseminate news or information to the public. He cites but disregards authority finding *The First 48* was qualified for journalistic privilege in another jurisdiction. *United States v. Capers*, 708 F.3d 1286, 1302-03 (11th Cir. 2013). There, the Eleventh Circuit applied the qualified privilege for journalists A&E and ITV with regard to a similar subpoena for recordings made in connection with the filming of an episode of *The First 48*. *Capers*, 708 F.3d at 1302-03. While not binding, this persuasive authority supports the trial court's conclusion.

Further, Appellant's reliance on *Services Employees International Union Local 5 v. Professional Janitorial Service of Houston*, 415 S.W.3d 387, 397 (Tex.App.--Houston [1st Dist.] pet. ref'd)(*SEIC* herein), is misplaced. *SEIC* dealt with an entirely separate statute referring to the media in a civil case involving denial of a motion for summary judgment. There, the appeal focused on whether a union qualified as a member of the media for purposes of an interlocutory appeal under Section 51.014(a)(6) of the Texas Civil Practice and Remedies Code. *SEIC*, 415 S.W.3d at 391-402. The court acknowledged that the interlocutory appeal statute and the journalist's privilege served difference purposes but noted that both definitions emphasized whether the person or entity reports or disseminates news as part of their business. *See id*. at 397. But the privilege does not apply only to the dissemination of news. Article 38.11 specifically defines "news medium" includes a "television station or network . . . that disseminates news *or information* to the public by any means" including television. [Emphasis added]. TEX.CODE CRIM.PROC.ANN. art. 38.11, § 1(3).

Another court has described *The First 48* as "a non-fiction investigative television series that 'takes viewers behind the scenes of real-life investigations as it follows homicide detectives

in the critical first 48 hours of murder investigations, giving viewers unprecedented access to crime scenes, interrogations and forensic processing.'" *Wilcox v. Florida*, 143 So. 3d 359, 367 n.2 (Fla. 2014)(citation omitted). Appellant cannot legitimately argue that *The First 48* did not provide information to the public about the investigation of this case. Thus, the trial court did not abuse its discretion in concluding that Article 38.11 applied.

Have All Reasonable Efforts Been Exhausted and Are the Outtakes Relevant, Material, and Essential to the Defense?

Assuming without deciding that all reasonable efforts were exhausted, Appellant failed to show the outtakes were relevant and material to the proper administration of the trial and were essential to the maintenance of his defense. *Id*. § 5(a)(2)(A). Examination of the factors in subsection (3)(b) supports the trial court's determination. Although the notice of demand was timely made, the request was overbroad and pertained to speculative information. Appellant's interest in the information could not outweigh the public's interest where he merely speculated as to what the outtakes might depict. Because the trial court properly applied Article 38.11 and acted within its discretion in quashing its order and certificate, we overrule Issue Five.

SUPPRESSION OF THE EVIDENCE

In his sixth and final issue, Appellant maintains that the trial court erred in denying his motion to suppress the boots. He sets forth four arguments: (1) Detective Sayers' affidavit failed to demonstrate probable cause; (2) Detective Sayers' affidavit failed to establish the required nexus between the property and the crime; (3) the search warrant failed to authorize seizure; and (4) Detective Sayers failed to maintain the continuity of condition and chain of custody of the boots.

Appellate courts review a trial court's ruling on a motion to suppress by using a bifurcated standard, giving almost total deference to historical facts found by the trial court and

analyzing *de novo* the trial court's application of the law. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex.Crim.App. 1997). Ordinarily, the preference for searches based upon warrants requires reviewing courts to give "great deference" to a magistrate's determination of probable cause. *Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 1663,134 L.Ed.2d 911 (1996); *Illinois v. Gates*, 462 U.S. 213, 236, 103 S.Ct. 2317, 2331, 76 L.Ed.2d 527 (1983); *see also Swearingen v. State*, 143 S.W.3d 808, 811 (Tex.Crim.App. 2011). "[I]n a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall." *United States v. Ventresca*, 380 U.S. 102, 106, 85 S.Ct. 741, 744, 13 L.Ed.2d 684 (1965); *see also Jones v. State*, 364 S.W.3d 854, 857 (Tex.Crim.App. 2012)("'[T]he magistrate's decision should carry the day in doubtful or marginal cases, even if the reviewing court might reach a different result upon *de novo* review.'"), *quoting Flores v. State*, 319 S.W.3d 697, 702 (Tex.Crim.App. 2010).

But the deference to the magistrate is not required when the question becomes whether an affidavit, stricken of its tainted information, meets the standard of probable cause. *McClintock v. State*, 444 S.W.3d 15, 19 (Tex.Crim.App. 2014). This is, in part, because a "magistrate's judgment would have been based on facts that are no longer on the table," and there is "no way of telling the extent to which the excised portion influenced the magistrate judge's determination." *United States v. Kelley*, 482 F.3d 1047, 1051 (9th Cir. 2007). More importantly, it reinforces the principle that "[a] search warrant may not be procured lawfully by the use of illegally obtained information." *Brown v. State*, 605 S.W.2d 572, 577 (Tex.Crim.App. 1980), *overruled on other grounds by Hedicke v. State*, 779 S.W.2d 837 (Tex.Crim.App. 1989). "When part of a warrant affidavit must be excluded from the calculus, . . . then it is up to the reviewing courts to determine whether 'the independently acquired and lawful information stated in the affidavit nevertheless clearly established probable cause.'" *McClintock*, 444 S.W.3d at 19. A

search warrant based in part on tainted information is nonetheless valid if it clearly could have been issued on the basis of the untainted information in the affidavit. *Brown*, 605 S.W.2d at 577.

Yet, reviewing courts are still required to read the purged affidavit in accordance with *Illinois v. Gates*. *State v. Cuong Phu Le*, 463 S.W.3d 872, 877 (Tex.Crim.App. 2015). Courts should interpret the affidavit in a common sense and realistic manner, drawing reasonable inferences from the information. *Rodriguez v. State*, 232 S.W.3d 55, 61 (Tex.Crim.App. 2007). Indeed, an appellate court should not invalidate a warrant by interpreting the affidavit in a hypertechnical manner. *Bonds v. State*, 403 S.W.3d 867, 873 (Tex.Crim.App. 2013). Probable cause exists if, under the totality of the circumstances, there is fair probability that contraband or evidence of a crime will be found at a specified location. *State v. McLain*, 337 S.W.3d 268, 272 (Tex.Crim.App. 2011). It is a flexible, non-demanding standard. *Id.*

The facts upon which a magistrate bases a probable cause determination must appear within the four corners of the affidavit submitted in support of the request for a warrant. *Cassias v. State*, 719 S.W.2d 585, 587-88 (Tex.Crim.App. 1986). The affidavit must allow the magistrate to independently determine probable cause, and the magistrate's actions "cannot be a mere ratification of the bare conclusions of others." *Rodriguez v. State*, 232 S.W.3d 55, 61 (Tex.Crim.App. 2007), *quoting Illinois v. Gates*, 462 U.S. at 238-39. The affidavit must set forth sufficient facts to establish probable cause of each of the following: (1) that a specific offense has been committed; (2) that the specifically described property or items that are to be searched or seized constitute evidence of that offense or evidence that a particular person committed that offense; and (3) that the property or items constituting evidence to be searched for or seized are located at or on the particular person, place, or thing to be searched. TEX.CODE CRIM.PROC.ANN. art. 18.01(c)(West Supp. 2017).

Appellant first argues that the trial court should have granted his motion to suppress the boots because the affidavit for the warrant failed to demonstrate probable cause on its face. We disagree. Sayers presented the court with an affidavit for a search warrant setting out: (1) a specific offense -- capital murder -- had been committed; (2) the specifically described property to be searched for or seized -- a pair of boots and some clothing along with a cell phone and anything else that might be involved in this investigation -- constituted evidence of the offense or evidence that Appellant committed the offense; and (3) the property or items constituting evidence to be searched for or seized were located at or on the particular person, place, or thing to be searched -- the Lew Sterrett County Jail. These facts are sufficient to establish probable cause.

Appellant also claims that the affidavit failed to establish the requisite nexus between his property and the murder. Detective Sayers provided the following details in his affidavit to the magistrate:

> On March 7, 2013 between the hours of 3:30pm and 11:00pm suspect Daniel Lucas Brooks committed capital murder when he entered into the house of complainant Avanell Cowgill . . . , killed complainant Cowgill, took her purse and then used the complainant's credit cards to make a purchase at a local store.
>
> Det. Sayers obtained the complainant's credit card information from the companies and locations of the purchases, Det. Sayers went to the locations and obtained video surveillance footage of a suspect making these purchases and then walking to a suspect car that was being driven by an accomplice waiting for the suspect off the property.
>
> On March 22, 2013 Det. Sayers went to the location that was the subscriber of the IP address that the devise accessed and the store manager was able to find the devise that was purchased with Complainant Cowgirl's [sic] stolen credit card. The manager further stated that on March 8, 2013 at 10:30 am Daniel Lucas Brooks sold the devise for $440.00. Det. Sayers compared arrestee Brooks DL picture with the surveillance of the suspect who was using complainant's stolen card to make the purchase of the devise.

> Suspect Brooks and accomplice Herron were transported to Dallas Homicide and were interviewed. Suspect Brooks admitted to having and using complainant's credit cards and using them to purchase the devise, as well as having the complainant's driver's license. Suspect Brooks stated he would check on the murder periodically on line. Accomplice Herron admitted that he got dropped off by Suspect Brooks at Northwest Hwy and Jupiter and Brooks returned about 45 minutes later with a purse and some jewelry and he said that Brooks was very upset. Both suspect Brooks and Accomplice Herron continued to attempt to use the complainant's credit card. Accomplice Herron told his attorney Toby Shook who then told Det. Sayers that the boots that are in suspect Brooks property at Dallas County Jail are the Boots that suspect Brooks was wearing after he came back with complainant's purse.

Sayers' affidavit asked for a warrant to examine Appellant's property, stating, "The property may contain information that would show the suspect was at the crime scene and may have communicated with other suspects thus establishing that he committed this offense." The facts laid out clearly state that he received information that Appellant was wearing the boots in question when he returned with several of Cowgill's possessions. The affidavit established a sufficient nexus between criminal activity, the things to be seized, and the place to be searched. From the text of the affidavit, the magistrate could find that: (1) Cowgill was found beaten and strangled to death at her residence and her property, including her driver's license and credit cards were stolen; (2) Appellant used Cowgill's credit cards and attempted to make several purchases; (3) Appellant dropped Herron off and returned 45 minutes later with Cowgill's property; and (4) Appellant was wearing the boots when he returned with Cowgill's property and when he was arrested and booked into jail. From the face of Detective Sayers' affidavit, the magistrate had a substantial basis to find probable cause that the boots would be found at the described location, the Lew Sterrett County Jail, and satisfactorily established a nexus between the criminal activity, the things to be seized, and the place to be searched.

The third part of Appellant's argument asserts that Sayers violated the search warrant because it was issued for examination of the boots only and Sayers seized them. Following a

finding of probable cause, the search warrant authorized Detective Sayers to "retrieve the said listed property from the custodian of property at Lew Sterrett for examination." Finally, Appellant maintains that the trial court should have granted his motion to suppress the boots because Detective Sayers failed to maintain the continuity of condition and chain of custody of the boots in his handling of them.

The Texas Rules of Evidence require a party who offers an item into evidence establish that the item is what the party represents it to be. TEX.R.EVID. 901(a); *Avila v. State*, 18 S.W.3d 736, 739 (Tex.App.--San Antonio 2000, no pet.). Distinctive characteristics "taken together with all the circumstances" may be sufficient to establish an item is what a party represents it to be. TEX.R.EVID. 901(b)(4). If the item does not have any unique characteristic, a chain of custody may be required to prove the item presented is the same item involved in the events at issue. *Jackson v. State*, 968 S.W.2d 495, 500 (Tex.App.--Texarkana 1998, pet. ref'd). Absent a clear abuse of discretion, the trial court's ruling on the admission of evidence will not be overturned. *Green v. State*, 934 S.W.2d 92, 101-02 (Tex.Crim.App. 1996); *Ennis v. State*, 71 S.W.3d 804, 808 (Tex.App.--Texarkana 2002, no pet.). A reviewing court should not reverse a trial court's ruling on the admissibility that is within the "zone of reasonable disagreement." *Green*, 934 S.W.2d at 102; *Ennis v. State*, 71 S.W.3d 804, 808 (Tex.App.--Texarkana 2002, no pet.).

Officer Norlock testified about transferring Appellant from the Richardson jail to the Lew Sterrett facility. According to Officer Norlock, the Richardson jail released Appellant's belongings to him, including his boots and clothing worn at the time of his arrest. Appellant, in possession of his property, was then transferred to Lew Sterrett. Detective Yeric testified about the information Herron gave law enforcement to the effect that Appellant was wearing the boots he wore when he came back from Cowgill's residence when he was booked into jail. After

obtaining a search warrant, law enforcement officers went to Lew Sterrett to obtain Appellant's property, which was bagged and transferred to a sack, brought to police headquarters and processed. Crime Scene Analyst Justin O'Donnell retrieved the property from Detective Sayers and the Dallas police department headquarters. O'Donnell brought the items back to his office where he followed procedure by cataloguing and packaging the items. He testified that some of the items were placed in the property room while other items, specifically, the boots and jeans, were sent to SWIFS for testing. O'Donnell testified that Detective Sayers retrieved the boots directly from the Lew Sterrett county jail. Finally, O'Donnell discussed the process he followed in bagging Appellant's property: he put the items into a paper bag, wrote the appropriate item numbers on the bag with a case and tag number and then sealed the top of the bag with evidence tape. He then placed his initials, the date, and his badge number across the seal. O'Donnell personally delivered the sealed bags containing the boots and jeans to SWIFS, where DNA testing was conducted.

We conclude that the trial court did not abuse its discretion in admitting the boots. A reasonable person could conclude the boots were worn by Appellant at the time in question. Any "defects" Brooks raises in his argument, such as the evidence was commingled in the Jetta, is without merit. Questions concerning "care and custody" of evidence do not affect admissibility, but the weight to be given to it. *LaGrone v. State*, 942 S.W.2d 602, 617 (Tex.Crim.App. 1997); *see also Silva v. State*, 989 S.W.2d 64, 68 (Tex.App.--San Antonio 1998, pet. ref'd)(same); *Ennis*, 71 S.W.3d at 808 (proof of chain of custody goes to weight rather than admissibility of evidence). We overrule Issue Six and affirm the judgment of the trial court.

December 13, 2017

ANN CRAWFORD McCLURE, Chief Justice

Before McClure, C.J., Rodriguez, and Hughes, JJ.
Hughes, J., not participating

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