RAYMUNDO NETTLES,		§	No. 08-19-00187-CR
	Appellant,	§	Appeal from the
v.		§	34th Judicial District Court
THE STATE OF TEXAS,		§	of El Paso, Texas
	Appellee.	§	(TC# 20180D02785)

O P I N I O N

Appellant, Raymundo Nettles, appeals his conviction of unlawful possession of a firearm by a felon. TEX.PENAL CODE ANN. § 46.04(a). In four issues, Appellant challenges his conviction. In his first issue, Appellant asserts he was denied a fair trial and due process of law based on the trial court's admission of State's Exhibits 1 and 1A. In Issue Two, Appellant challenges the factual and legal sufficiency of the evidence to support his conviction. In Issue Three, Appellant asserts the trial court abused its discretion when it admitted State's Exhibits 4 and 5. Lastly, Appellant maintains the State's closing argument caused an improper conviction. We affirm.

BACKGROUND

Factual Background

On April 27, 2017, El Paso Police Department (EPPD) officers attempted to execute an arrest warrant for Appellant. Officers arrived at the residence of Appellant's parents and observed Appellant in the front yard cleaning the inside of his vehicle. Upon seeing the officers, Appellant fled and ran inside the house, shutting the front door behind him. Eventually, Appellant's father allowed the officers to enter his residence to apprehend Appellant; Appellant was arrested.

Officers searched the inside of Appellant's vehicle and found several rounds of 9-millimeter ammunition, but did not find a firearm. Appellant denied ownership of the ammunition and told officers he threw a gun in the backyard, but it did not belong to him ~~[8RR97]~~. Officers searched the backyard but failed to find a firearm. As Appellant was transported by officers, he repeatedly asked whether the gun had been located, and asserted it would never be found. Later that same day, Appellant's father contacted EPPD stating he had located the firearm. Appellant's father told EPPD officers he found the firearm inside a tool bag in the backseat of Appellants vehicle. EPPD turned the firearm over to a special agent with ATF.[1]

Procedural Background

Appellant was indicted for unlawful possession of a firearm by a felon. TEX.PENAL CODE ANN. § 46.04(a). Following a trial, the jury returned a guilty verdict and assessed a punishment of thirty years' confinement in the Texas Department of Criminal Justice Institutional Division. This appeal followed.

DISCUSSION

Issues

Appellant appeals from a jury verdict finding him guilty of unlawful possession of a firearm by a felon. TEX.PENAL CODE ANN. § 46.04(a). In four issues, Appellant challenges his conviction on the grounds the trial court erred in admitting certain evidence, asserts the evidence is legally insufficient, and argues the State made a closing jury argument that resulted in an improper conviction.

[1] ATF ("Bureau of Alcohol, Tobacco, Firearms and Explosives") "is a law enforcement agency in the United States' Department of Justice that protects our communities from violent criminals, criminal organizations, the illegal use and trafficking of firearms, the illegal use and storage of explosives, acts of arson and bombings, acts of terrorism, and the illegal diversion of alcohol and tobacco products. We partner with communities, industries, law enforcement, and public safety agencies to safeguard the public we serve through information sharing, training, research, and use of technology." U.S. Dept. of Justice, ATF: Bureau of Alcohol, Tobacco, Firearms and Explosives, https://www.atf.gov/ (last visited Mar. 9, 2022).

EVIDENTIARY RULINGS

In his first issue on appeal, Appellant argues the trial court abused its discretion in admitting evidence of a jailhouse phone call between Appellant and his mother. Exhibit 1 is an unredacted recorded jailhouse call, and Exhibit 1A is a translated version of that call. Appellant asserts the trial court erred in admitting the evidence because it was not timely disclosed, contained hearsay, was improperly translated, and violated the Confrontation Clause. In Issue Three, Appellant challenges the admissibility of Exhibits 4 and 5—photographs admitted at trial of the firearm found in Appellant's vehicle. Appellant asserts the trial court abused its discretion in admitting Exhibits 4 and 5 because of the State's untimely disclosure, late collection of the evidence, and failure to provide Appellant the opportunity to review the evidence.

Standard of Review

A trial court's decision to admit or exclude evidence is reviewed under an abuse of discretion standard. *Torres v. State*, 71 S.W.3d 758, 760 (Tex.Crim.App. 2002). In admissibility challenges, a trial court's ruling will not be disturbed unless that ruling falls outside the zone of reasonable disagreement. *Id.* We will review Appellant's evidentiary issues under this standard.

We must determine whether the trial court acted without reference to any guiding rules and principles—stated otherwise, whether the act was arbitrary or unreasonable. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985).

Applicable Law

As a threshold inquiry, we must consider whether Appellant preserved error by a proper trial level objection and ruling. TEX.R.APP.P. 33.1; *Geuder v. State*, 115 S.W.3d 11, 13-14 (Tex.Crim.App. 2003). Rule 33.1 of the Texas Rules of Appellate Procedure governs preservation of error and states:

> (a) In General. As a prerequisite to presenting a complaint for appellate review, the record must show that:
>
> (1) the complaint was made to the trial court by a timely request, objection, or motion that:
>
> (A) stated the grounds for the ruling that the complaining party sought from the trial court 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. Error preservation does not require a "hyper-technical or formalistic use of words or phrases[;]" instead, all that is required is a communication that makes clear to the trial judge what the party is requesting and why he thinks he is entitled to it, all while the judge is in the proper position to correct the error. *Pena v. State*, 285 S.W.3d 459, 463-64 (Tex.Crim.App. 2009). Preservation of error requires the complaint on appeal comports with the complaint made at trial. *Id*. at 464. In making this determination, we consider the context of the complaint and the parties' shared understanding at that time it was made. *Id*.

Analysis

Issue One—Exhibits 1 and 1A

Exhibit 1 was conditionally admitted by the trial judge for the sole purpose of having Appellant's father identify the voices on the phone call. The recording was in Spanish, and Lilia Dominguez, a victim advocate of the district attorney's office, translated the recording from Spanish to English for the jury. The jail phone call was made by Appellant to his mother.

Defense counsel did not object to the conditional admission, and specifically stated, "Judge, if I may . . . . We have no problems with moving forward in any such way, Judge." Later at trial, the State moved forward with admitting Exhibit 1A as a business record and called Mario De La Cruz as the records custodian for the jail phone call. Defense counsel then objected to the

admission of Exhibit 1A on the grounds the proper predicate had not been laid; the trial court overruled the objection and Exhibit 1A was admitted and published to the jury.

On appeal, Appellant argues the trial court abused its discretion in admitting Exhibits 1 and 1A because the phone call contained hearsay, was improperly translated, and violated his right to confront witnesses under the Confrontation Clause. Appellant states the alleged error is based on both hearsay and the Confrontation Clause, and concedes trial objections based on hearsay and the Confrontation Clause were not made. The State counters Appellant only objected to the lack of the proper predicate at trial, and accordingly, failed to preserve error for review. We agree.

The admission of inadmissible hearsay is non-constitutional error. *See Moon v. State,* 44 S.W.3d 589, 594 (Tex.App.—Fort Worth 2001, pet. ref'd); *see also* TEX.R.APP.P. 44.2 (b)("*Other Errors.* Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."). Error preservation as to Appellant's hearsay complaint is clear; Appellant has not properly preserved error.

Appellant's remaining complaint regarding a Confrontation Clause violation, may affect substantial rights and warrant the finding of constitutional error. *See* TEX.R.APP.P. 44.2(a) ("*Constitutional Error*. If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment."). However, we need not conduct a full constitutional error analysis. Here, the complained of testimony does not implicate the Confrontation Clause because it is not testimonial hearsay. In *Crawford,* the Supreme Court established three categories of testimonial evidence:

> (1) '*ex parte* in-court testimony or its functional equivalent,' such as affidavits, custodial examinations, prior testimony not subject to cross-examination, or

> ‘similar pretrial statements that declarants would reasonably expect to be used prosecutorially’; (2) ‘extrajudicial statements’ of the same nature ‘contained in formalized testimonial materials’; and (3) ‘statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]’

Ford v. State, No. 08-14-00093-CR, 2016 WL 921385, at *2 (Tex.App.—El Paso Mar. 9, 2016, pet. ref’d)(not designated for publication)(*citing Crawford v. Washington*, 541 U.S. 36, 51-52 (2004)).

At trial, the State played the recorded phone call. The contested portions of the call are:

> Appellant’s mother: Yes. But what balls do you have for buying a f*****g gun? It’s your fault.
>
> . . .
>
> Appellant’s mother: It’s because you don’t listen, son.”
>
> . . .
>
> Appellant: They didn’t find it. Dad gave it to them. . . . Dad called them back and told them that they found—that he found the gun.

On appeal, Appellant complains these statements are a violation of the Confrontation Clause because at trial Appellant was not afforded the opportunity to confront his mother and challenge the meaning of her statements. However, these statements do not fall within the parameters of testimonial evidence as they are not court testimony or the functional equivalent, they are not extrajudicial statements contained in testimonial nature, and were not made for the purpose of preparation of trial. *See Crawford*, 541 U.S. at 51-52. As a result, the Confrontation Clause is not implicated, and preservation of error for Appellant’s complaint fails.

We find Appellant’s trial objection does not comport with his complaints on appeal. *See Martinez v. State*, No. 08-17-00165-CR, 2019 WL 4127261, at *8 (Tex.App.—El Paso Aug. 30, 2019, no pet.)(not designated for publication)(“Because the content of the objection on appeal must comport with the content of the objection at trial, we find that Martinez’s [] objection at trial

did not preserve his appellate claim . . ."). Consequently, Appellant has not preserved error. *See* TEX.R.APP.P. 33.1. Issue One is overruled in its entirety.

Issue Three— Exhibits 4 and 5

Exhibits 4 and 5 are photographs of the firearm offered by the State at trial. Appellant stated, "Judge, I'm going to object at this time. The defense hasn't been given adequate notice as required by the code in preparation for trial, Judge. It's my understanding this was obtained yesterday. For that, I do object as to untimeliness." The photographs of the firearm were taken on June 10, 2019, the first day of trial. Appellant's father surrendered the firearm to EPPD, who, in turn, referred the Appellant for prosecution to the ATF. However, ATF never filed charges against Appellant. The State eventually indicted Appellant on May 30, 2018—over a year after the firearm was found in Appellant's vehicle.

At trial, Brian Marten Taber was called as a witness to identify the firearm Appellant allegedly possessed. After Exhibits 4 and 5 were shown to Taber, he read the serial number of the firearm and testified the firearm depicted in the photographs belonged to him. He stated the firearm was stolen from him in 2017.

On appeal, Appellant asserts the trial court abused its discretion when it admitted Exhibit 4 and 5 over his objection. Appellant maintains the State did not have evidence of the firearm until the day of jury selection. He contends the trial court permitted "Appellant to stand trial on an indictment they knew to be based, at least partially, on incomplete and misleading evidence and testimony." Appellant relies on and asserts a *Giglio* violation.

In *Giglio*, the United States Supreme Court addressed the issue of newly discovered, post-trial evidence and determined whether a new trial was warranted based on the State's failure to disclose an alleged promise of leniency for the accused's co-conspirator in exchange for testimony.

Giglio v. State, 405 U.S. 150, 150-51 (1972). The Court held the credibility of the co-conspirator witness was "an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility[.]" *Id*. at 154-55. The Court determined the accused's due process rights were violated and ordered a new trial. *Id*.

According to Appellant, the trial court abused its discretion in admitting these photographs when the State allegedly did not take the photos until trial and failed to provide Appellant an opportunity to review the Exhibits 4 and 5 prior to trial. The State counters, asserting as a threshold matter, Appellant failed to preserve this error for review. We disagree. The record amply demonstrates Appellant timely apprised the trial court of his objection.

However, Appellant freely concedes he did not request a discovery order nor did the trial court issue one. Accordingly, the State maintains the alleged late disclosure of the photographs did not, and could not, violate a nonexistent order, and because Appellant did not file a request for discovery, the State's obligations under Article 39.14 of the Texas Code of Criminal Procedure were never triggered.[2] We agree.

Furthermore, in *Brady*, the Supreme Court held "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Here, the State did not actively conceal or suppress evidence, nor did it refuse or delay the disclosure of evidence; the evidence at issue merely came

[2] Article 39.14 requires: "as soon as practicable after receiving a timely request from the defendant the state shall produce and permit the inspection and the electronic duplication, copying, and photographing, by or on behalf of the defendant, of any offense reports, any designated documents, papers, written or recorded statements of the defendant or a witness, including witness statements of law enforcement officers but not including the work product of counsel for the state in the case and their investigators and their notes or report, or any designated books, accounts, letters, photographs, or objects or other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of the state or any person under contract with the state." TEX.CODE CRIM.PROC.ANN. art 39.14.

into existence the day before it was offered and admitted. There is no dispute Exhibits 4 and 5 are photographs that did not exist until the day prior to being offered and admitted. From our review of the record, we fail to see how Appellant's due process rights were violated.

We find the trial court did not abuse its discretion in admitting Exhibit 4 and 5. Issue Three is overruled.

LEGAL SUFFICIENCY

In his second issue for review, Appellant challenges the legal and factual sufficiency of the evidence to support his conviction. Appellant specifically challenges the element of possession and asserts the State failed to prove he possessed the firearm.

Standard of Review

Under the Due Process Clause of the U.S. Constitution, the State is required to prove every element of the crime charged beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). In *Brooks*, the Texas Court of Criminal Appeals held the only standard a reviewing court should apply when examining the sufficiency of the evidence is the legal sufficiency standard articulated in *Jackson*, which requires affording deference to the jury's credibility and weight determinations. *Brooks v. State*, 323 S.W.3d 893, 894-95 (Tex.Crim.App. 2010). The critical inquiry in a legal sufficiency challenge is whether the evidence in the record could reasonably support a conviction of guilt beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Clayton v. State*, 235 S.W.3d 772, 778 (Tex.Crim.App. 2007).

When reviewing the legal sufficiency of the evidence, we must view all the evidence in the light most favorable to the verdict to determine whether any rational juror could have found the defendant guilty of the essential elements of the offense beyond a reasonable doubt. *Salinas v. State*, 163 S.W.3d 734, 737 (Tex.Crim.App. 2005). A lack of direct evidence is not dispositive on

the issue of the defendant's guilt; guilt may be established by circumstantial evidence alone. *Guevara v. State*, 152 S.W.3d 45, 49 (Tex.Crim.App. 2004). We measure the evidence by the elements of the offense as defined by a hypothetically correct jury charge. *Thomas v. State*, 303 S.W.3d 331, 333 (Tex.App.—El Paso 2009, no pet.)(*citing Malik v. State*, 953 S.W.2d 234, 240 (Tex.Crim.App. 1997)). A hypothetically correct charge accurately sets out the law, is authorized by the indictment, does not unnecessarily restrict the State's theories of liability, and adequately describes the offense for which the defendant was tried. *Malik*, 953 S.W.2d at 240.

We bear in mind the trier of fact is the sole judge of the weight and credibility of the evidence, and we must presume the fact finder resolved any conflicting inferences in favor of the verdict and we defer to that resolution. *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex.Crim.App. 2014) (*citing Jackson*, 443 U.S. at 319). A reviewing court may not reevaluate the weight and credibility of the evidence or substitute its judgment for that of the fact finder. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex.Crim.App. 2010). Our only task under this standard is to determine whether, based on the evidence and reasonable inferences drawn therefrom, a rational juror could have found the essential elements of the crime beyond a reasonable doubt. *Id*.

Applicable Law

Appellant was charged with unlawful possession of a firearm by a felon. TEX.PENAL CODE ANN. § 46.04(a). The relevant statute states:

> (a) A person who has been convicted of a felony commits an offense if he possesses a firearm:
>
> > (1) after conviction and before the fifth anniversary of the person's release from confinement following conviction of the felony or the person's release from supervision under community supervision, parole, or mandatory supervision, whichever date is later; or
> >
> > (2) after the period described by Subdivision (1), at any location other than the premises at which the person lives.

Id. Possession is defined by the Penal Code as "actual care, custody, control, or management." TEX.PENAL CODE ANN. § 1.07(a)(39). However, when the firearm is not found on the accused's person or is not in the exclusive possession of the accused, Texas courts have long utilized what is known as the "affirmative links" rule. *Davis v. State*, 93 S.W.3d 664, 667-68 (Tex.App.—Texarkana 2002, pet. ref'd). Additional evidence must affirmatively link the firearm to the accused, which is typically proven through evidence of the circumstances in which the item was found and "the logical force that evidence has in combination." *Id*. at 668. Relevant factors utilized by Texas courts establishing affirmative links include:

> (1) the contraband was in a place owned by the accused; (2) the contraband was conveniently accessible to the accused; (3) the contraband was in plain view; (4) the contraband was found in an enclosed space; (5) the conduct of the accused indicated a consciousness of guilt; (6) the accused had a special relationship to the contraband; and (7) affirmative statements connect the accused to the contraband.

Id.

Analysis

Appellant concedes he is a convicted felon. However, Appellant contests the legal and factual sufficiency of the evidence supporting the element of possession. When police arrived at Appellant's residence, he was cleaning the inside of his vehicle. Upon seeing the police, Appellant fled, running into the house. Only after Appellant's father allowed law enforcement into the home was Appellant apprehended and taken into custody. Then EPPD officers searched inside of Appellant's vehicle observing several rounds of 9-millimeter ammunition. Appellant made incriminating statements, telling officers he did not have a gun inside of his vehicle, but had thrown a gun in the shed in the backyard. Officers searched the backyard but did not find a firearm. Appellant also repeatedly asked officers if they had found a gun, asserting they would never find it. The firearm was found and surrendered to law enforcement by Appellant's father.

The firearm was found in Appellant's vehicle inside a tool bag and was loaded with 9-millimeter ammunition. Appellant's father found the tool bag under the back seat of Appellant's vehicle. Appellant's father also testified that about a day or two before surrendering the firearm to EPPD, he had seen the firearm in the tool bag. Further, the jury heard testimony Appellant used the tools in the tool bag for his job and kept the tool bag in his vehicle. Appellant's father testified Appellant frequently brought firearms to the residence.

Almost all factors utilized by Texas courts in establishing an affirmative link are present. *See Davis*, 93 S.W.3d at 668. The firearm was found in an enclosed space—Appellant's vehicle—it was inside a tool bag in the backseat of the vehicle, which made it conveniently accessible to Appellant. The testimony demonstrated the vehicle was used by Appellant in which the tool bag was kept. The uncontroverted testimony from Appellant's father was the tool bag belonged to Appellant. While the firearm was not in plain view, 9-millimeter bullets inside Appellant's vehicle were found, which was ultimately found to match the firearm's bullets. Appellant's conduct of evading officers and his incriminating statements establish more affirmative links. The logical force of these factors affirmatively connect Appellant to the firearm to prove possession. The evidence is legally sufficient, and a rational juror could have found the essential elements of unlawful possession of a firearm by a felon, namely, possession of the firearm, beyond a reasonable doubt. Issue Two is overruled.

IMPROPER ARGUMENT

In his final issue for review, Appellant asserts the prosecutor made closing arguments that misstated the record and the law which resulted in any improper conviction.

Standard of Review & Applicable Law

To fall within the realm of proper jury argument, argument must consist of one of the

following: (1) summation of the evidence, (2) reasonable deductions from the evidence, (3) answer to argument of opposing counsel, or (4) a plea for law enforcement. *Hernandez v. State*, No. 08-98-00016-CR, 2001 WL 9929, at *5 (Tex.App.—El Paso Jan. 4, 2001, pet. ref'd)(not designated for publication). When examining challenges to jury argument, reviewing courts consider the remark in the context in which it appears. *Gaddis v. State*, 753 S.W.2d 396, 398 (Tex.Crim.App. 1988). Counsel is afforded wide latitude without limitation in drawing inferences from the evidence so long as the inferences are reasonable, fair, legitimate, and offered in good faith. *Id*. Jury arguments must be extreme or manifestly improper, or inject new and harmful facts into evidence to constitute reversible error. *Id*.

Upon finding a jury argument improper and that the trial court should have sustained the objection; we then determine whether the error warrants reversal. *Mosley v. State*, 983 S.W.2d 249, 259 (Tex.Crim.App. 1998). Because harmless error does not warrant reversal, we consider three factors in our harm analysis: (1) the severity of the misconduct (the magnitude of the prejudicial effect of the prosecutor's remarks); (2) the measures adopted to cure the misconduct (the efficacy of any cautionary instruction by the judge); and (3) the certainty of conviction absent the misconduct (the strength of the evidence supporting the conviction). *Id*.

Analysis

Appellant argues the State made improper closing arguments by misstating the record and the law. During closing argument, defense counsel argued:

> Now, I want you to remember here that they're finding him -- that they are charging him with felon in possession of a firearm, that being the 9-millimeter Ruger, that gun specifically. Okay? Now, it's that gun specifically that you need to take into account in your deliberations. Okay?

To which the State objected:

> Judge, I'm going to object. That's a misstatement of the law. There's never been

any evidence about the Ruger in there. It's just a gun, a firearm, any firearm.

During the State's closing argument, the following exchange occurred:

> The State: And I just want to start with some of the confusion that I believe was left by the defense counsel's closing argument. We do not have to prove that Mr. Nettles had care, custody, control of that Ruger 9-millimeter.
>
> The Defense: Objection, Your Honor. That's a misstatement of the law. That's how they indicted it, that's what's in the jury charge, and to say that is confusing the jury, Judge.
>
> The Court: Well, the jury will read the charge, read that paragraph, and they can determine and then base it on that.
>
> The State: Let me read that indictment and tell me where it says 'Ruger 9 millimeter.' Let me read it to you. Let me read you the charge. 'Did then and there possess a firearm after being convicted of a felony offense . . . intentionally or knowingly possess a firearm before the fifth anniversary of the defendant's leave from confinement following conviction of that same felony.' I don't see that 'Ruger 9 millimeter' in there.
>
> The indictment that we read to you . . . yesterday, there was no 'Ruger 9 millimeter' in there. This is not a misstatement of the law. I am standing here in front of you. I am not lying to you. That's the indictment. No one -- nowhere here it says 'Ruger 9 millimeter.' Nowhere. It says 'a firearm.' Any firearm. Bought, stolen, found on the street, any firearm. Does not matter.

The State maintains it was permissibly answering defense counsel's argument that it had to prove Appellant possessed a 9-millimeter Ruger firearm. We agree. The State did not misstate the record or the law, it merely explained it was not required to prove that the firearm was any specific firearm; all that was required was proof that Appellant possessed *a firearm*. We also agree the Sate's argument was a correct statement of the law, as the applicable statute states: "A person who has been convicted of a felony commits an offense if he possesses *a firearm*[.]" [Emphasis added]. TEX.PENAL CODE ANN. § 46.04(a).

The State's jury arguments were neither extreme nor manifestly improper and did not inject new and harmful facts into evidence to constitute reversible error. *See Gaddis,* 753 S.W.2d at 398. The arguments fell within the realm of proper jury argument as they amounted to an answer to the defense's counsel closing argument. *Id*. Issue Four is overruled.

CONCLUSION

For these reasons, we affirm.

March 18, 2022 YVONNE T. RODRIGUEZ, Chief Justice

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

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