COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

JESUS ALBERTO MIRELES,	§	No. 08-19-00221-CR
Appellant,	§	Appeal from the
v.	§	384th District Court
THE STATE OF TEXAS,	§	of El Paso, Texas
Appellee.	§	(TC# 20170D04852)

O P I N I O N

Appellant, Jesus Alberto Mireles, appeals from a jury verdict finding him guilty of felony murder. TEX.PENAL CODE ANN. § 19.02(c). Appellant presents eighteen points of error. We affirm.

BACKGROUND

Factual Background

A. The Party

On the evening of December 5, 2015, Appellant, Daniel Mendoza—the victim—and Israel Chavez Reyes—a friend—attended the tree lighting ceremony in downtown El Paso, Texas. They then went to a bar where each of them had one drink. Afterwards, they all attended a friend's house party where they drank alcohol and played games. Appellant and Mendoza began dating

approximately six months prior to the commission of the offense. Reyes testified that during the party, Mendoza tried to distance himself from Appellant, which upset Appellant. Reyes stated that over the course of the night, Mendoza and Mireles began to argue about their relationship. Reyes specifically recalled hearing Mendoza say he no longer wanted to be with Appellant. The argument escalated to the point Reyes and others had to "break it up" and separate Appellant and Mendoza. After separating the two, Reyes noticed Appellant seemed drunk and was swaying and crying.

Donna Martinez, a friend of Reyes and Mendoza, was also present at the party. To de-escalate the situation between Appellant and Mendoza, Martinez spoke with Appellant and tried to calm him down. During this conversation, Appellant told Martinez he could not be without Mendoza. Martinez saw Mendoza and Appellant eventually leave the house together.

B. The Fatal Collision

At approximately 5:30 a.m., Mendoza called 911 and told the 911 operator, "I'm in a car on Hondo Pass and he won't f****** stop speeding, he won't let me out of the car." Mendoza identified the driver of the vehicle as his "boyfriend" named "Jesus" who was "acting crazy." Mendoza relayed he was trying to open the car door, but Appellant would not let him out. According to Mendoza, Appellant was going "like a hundred miles per hour" and would not stop the car. Moments later, Mendoza can be heard screaming, "Dude let me the f*** out!" and "he's been drinking . . . he's about to run another red light again!" After this last statement, loud, muffled noises can be heard, and Mendoza no longer responds to the 911 operator's questions.

Responders arrived on scene and saw Appellant's vehicle had collided with a food truck. Mendoza was gurgling blood and struggling to breathe. Appellant was identified as the driver and Mendoza as the front passenger. Based on the severity of the wreckage, the Special Traffic Investigations Unit (STI) of the El Paso Police Department was dispatched to the scene. Appellant

and Mendoza were transported to the hospital. En route, firefighter Isaac Licerio asked Appellant whether he had been drinking, and Appellant replied in the affirmative. Officer Morales executed an arrest and blood search warrant, and a blood sample was obtained from Appellant at the hospital. The results showed Appellant's blood-alcohol content (BAC) was above the legal limit.

Mendoza was declared dead at approximately 1:21 p.m. According to the medical examiner's testimony, Mendoza's cause of death was attributed to multiple blunt injuries associated with a motor vehicle accident.

C. The Investigation

When STI was initially assigned to the case, STI investigated the case as an intoxication manslaughter offense. However, the case was subsequently transferred to the Crimes Against Persons Unit (CAP) of the El Paso Police Department because Mendoza's statements in his 911 call led investigators to believe he had been unlawfully restrained and murdered.

Procedural Background

Appellant was indicted in two counts: Count I, felony murder, and Count II, aggravated assault against a person with the use of a deadly weapon. TEX.PENAL CODE ANN. §§ 19.02(c), 22.02(b)(1). Mireles filed numerous pre-trial motions, to include: a motion to exclude evidence pursuant to *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993), a motion to dismiss the indictment based on a double jeopardy claim, a motion to quash the indictment based on the failure to allege an offense, and a motion to order the State to elect which count it was seeking a conviction; the trial court denied these motions. Appellant then filed an interlocutory appeal, which we dismissed for lack of jurisdiction. *See Mireles v. State*, No. 08-18-00139-CR, 2018 WL 4214702 (Tex.App.—El Paso Sept. 5, 2018, no pet.)(not designated for publication).

Following a trial, the State dismissed Count II and the jury found Appellant guilty of felony murder, Count I, and assessed a punishment of twenty-two years' confinement in the Texas Department of Criminal Justice Institutional Division. Appellant filed a motion for new trial, which was overruled by operation of law. This appeal followed.

DISCUSSION

Issues One, Two and Eleven: Count I of the Indictment

In Issue One, Appellant claims the trial court abused its discretion in denying his motion to quash Count I on the ground the indictment did not allege an offense. In Issue Two, Appellant further claims the trial court erred in denying his motion to quash Count I arguing the indictment is insufficient in alleging two acts clearly dangerous to human life because alleging two acts is not authorized by the felony murder statute. *See* TEX.PEN.CODE ANN. § 19.02(b)(3). In Issue Eleven, Appellant reasserts the same argument and argues Count I did not allege an act clearly dangerous to human life, and thus, the evidence is legally insufficient to support his conviction. We disagree.

Standard of Review & Applicable Law

The sufficiency of an indictment is a question of law and a trial court's ruling on a motion to quash an indictment is reviewed *de novo*. *State v. Moff*, 154 S.W.3d 599, 601 (Tex.Crim.App. 2004). A charging instrument must convey sufficient notice to allow the accused to prepare his defense. *State v. Mays*, 967 S.W.2d 404, 406 (Tex.Crim.App. 1998). The legislature has provided guidance for the requirements of indictments and Article 21.03 provides, "Everything should be stated in an indictment which is necessary to be proved." TEX.CODECRIM.PROC. art. 21.03. To determine whether an indictment provided a defendant with sufficient notice, a reviewing court must turn to the charging instrument to determine whether it failed to provide some requisite item of "notice[.]" *Olurebi v. State*, 870 S.W.2d 58, 61 (Tex.Crim.App. 1994). Subject to rare

exceptions, an indictment that tracks the language of the penal statute will be legally sufficient and the State need not allege facts which are merely evidentiary in nature. *Moreno v. State*, 721 S.W.2d 295 (Tex.Crim.App. 1986). We read the indictment as a whole in determining whether it sufficiently charges an offense. *Dennis v. State*, 647 S.W.2d 275, 279 (Tex.Crim.App. 1983). A motion to quash should be granted only where the language concerning the defendant's conduct is so vague or indefinite as to deny the defendant effective notice of the acts he is alleged to have committed. *DeVaughn v. State*, 749 S.W.2d 62, 67 (Tex.Crim.App. 1988).

A. Issue One

In his first issue, Appellant claims the trial court abused its discretion in denying his motion to quash Count I because the indictment did not allege an offense. Specifically, he argues the allegation Appellant operated a motor vehicle and caused the vehicle to crash fails to allege an act clearly dangerous to human life.

Appellant asserts the indictment's allegation that he "operat[ed] a motor vehicle in which . . . Mendoza was an occupant and caus[ed] said motor vehicle to crash" did not constitute an act clearly dangerous to human life because "[o]bjectively, one must conclude that operating a motor vehicle is not an 'act clearly dangerous to human life.'" Count I of the indictment alleged that on or about December 6, 2015, Appellant:

> did then and there commit or attempt to commit a felony, to wit: Unlawful Restraint, and in the course and in furtherance of the commission or attempt, committed an act clearly dangerous to human life that caused the death of Daniel Mendoza, to wit: by operating a motor vehicle in which the said Daniel Mendoza was an occupant and causing said motor vehicle to crash.

Count I, in a separate paragraph, also alleges the use of a deadly weapon, to-wit: a motor vehicle, during the commission of and immediate flight from the charged felony offenses.

Appellant contends millions of people engage in the act of operating a motor vehicle daily, and thus, it cannot be considered an act clearly dangerous to human life. Appellant further argues the allegation of "causing said motor vehicle to crash" is also not an act that is clearly dangerous to human life. He maintains under the Texas felony murder statute, the "act" alleged must be the *cause* of the victim's death.

However, Appellant does not point to any case law or other authority supporting his contentions. The State counters, citing case law that states an act clearly dangerous to human life is measured under an objective standard. *See Lugo-Lugo v. State*, 650 S.W.2d 72, 81 (Tex.Crim.App. 1983). Appellant was charged with an affirmative act: "*operating* a motor vehicle in which . . . Daniel Mendoza was an occupant and *causing* said motor vehicle to crash." [Emphasis added]. Operating a motor vehicle and causing it to crash with a passenger in the vehicle is "the type of act which a jury could arguably conclude was clearly dangerous to human life[.]" *Nevarez v. State*, 847 S.W.2d 637, 642 (Tex.App.—El Paso 1993, pet. ref'd). Further, we agree with the State there is no indication in the record, or in Appellant's brief, he was unaware that the State had alleged and intended to prove his conduct caused Mendoza's death by causing his car to crash.

The indictment provided sufficient notice. We find the indictment's language was not so vague or indefinite that it failed to give him adequate notice of the acts alleged against him. The trial court did not err in denying Appellant's motion to quash.

Issue One is overruled.

B. Issue Two

In his second issue, Appellant challenges the language in Count I, which alleges Appellant, "in the course of and in furtherance of the commission or attempt, committed an act clearly

dangerous to human life that caused the death of Daniel Mendoza, to wit: by operating a motor vehicle in which the said Daniel Mendoza was an occupant and causing said motor vehicle to crash." Appellant argues there are two acts clearly dangerous to human life alleged in this indictment: (1) "operating a motor vehicle[,]" and (2) "causing said motor vehicle to crash." According to Appellant, alleging two acts clearly dangerous to human life is not authorized by the felony murder statute because the statute requires a single alleged act clearly dangerous to human life. *See* TEX.PEN.CODE ANN. § 19.02(b)(3).

We find Section 19.02(b)(3) does not state a *single* act is required. *See id*. Appellant cites to a concurring opinion, which states an indictment must allege the defendant committed an act clearly dangerous to human life, which caused the victim's death. *See Lawson v. State*, 64 S.W.3d 396, 399–400 (Tex.Crim.App. 2001). This states nothing more than what Section 19.02(b)(3) already provides. *See* TEX.PEN.CODE ANN. § 19.02(b)(3). Appellant cites to no further authority to support his argument nor are we aware of any.

The State asserts, even if the law prohibited the allegation of multiple dangerous acts in a felony murder count, the indictment did not allege multiple dangerous acts. Moreover, as the State maintains, the indictment alleged one safe act—operating a motor vehicle while Daniel Mendoza was an occupant—that was subsumed into one dangerous act—causing the motor vehicle to crash. The common-sense comprehension of this argument, coupled with there being no case law or statutory prohibitions against alleging multiple dangerous acts to establish a felony murder offense, warrants this argument meritless. *See Strickland v. State*, 193 S.W.3d 662, 664 (Tex.App.—Fort Worth 2006, pet. ref'd)(referring to the indictment in a felony murder prosecution that alleged the defendant committed an act clearly dangerous to human life by "operat[ing] a motor vehicle the wrong way down a public roadway . . . and caus[ing] the motor vehicle . . . to collide with another

motor vehicle occupied by [the victim], which caused the death of [the victim]"); *see also Evans v. State*, No. 01-08-00122-CR, 2008 WL 5102528, at *1 (Tex.App.—Houston [1st Dist.] Nov. 20, 2008, no pet.)(mem. op., not designated for publication)(holding indictment was sufficient where it alleged the defendant "committed an act 'clearly dangerous to human life' by speeding and running a stop sign, colliding with the victim's vehicle, and thereby causing the victim's death").

Issue Two is overruled.

C. Issue Eleven

In his eleventh issue, Appellant recasts his first issue by arguing Count I of the indictment did not allege a felony murder offense because it did not allege an act clearly dangerous to human life, and therefore, the evidence is legally insufficient to support his conviction. Appellant maintains the allegation of "operating a motor vehicle in which the said Mendoza was an occupant and causing said motor vehicle to crash[]" was not an act clearly dangerous to human life.

An issue is multifarious when it generally attacks the trial court's order with numerous arguments. *See Hollifield v. Hollifield*, 925 S.W.2d 153, 155 (Tex.App.—Austin 1996, no writ); *Clancy v. Zale Corp.*, 705 S.W.2d 820, 823 (Tex.App.—Dallas 1986, writ ref'd n.r.e.). We may disregard any assignment of error that is multifarious. *See Hollifield*, 925 S.W.2d at 155; *Clancy*, 705 S.W.2d at 824. Appellant's eleventh issue further argues the evidence is insufficient based on his assertion the felony murder indictment is erroneous. However, because we have overruled Issue One and found the indictment properly alleged an act clearly dangerous to life, Issue Eleven is multifarious. We decline to entertain the issue of legal sufficiency given our finding the indictment is correct.

Issue Eleven is overruled.

Issues Three, Four and Five: Admission of the 911 Call

In Issue Three, Appellant argues the trial court abused its discretion by admitting State's Exhibit 1A into evidence—the 911 call recording made by Mendoza. Appellant asserts the 911 recording should not have been admitted over his hearsay and hearsay-on-hearsay objections. In Issue Four, Appellant argues the trial court abused its discretion by admitting Exhibit 1A because the State failed to prove Elia Elizondo was the custodian of records or possessed personal knowledge of the 911 District's record-keeping policies. In Issue Five, Appellant challenges the admission of the 911 recording on the basis the State failed to prove the necessary predicate to admit the recording through the business records exception.

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). A trial court's ruling will not be reversed unless that ruling falls outside the zone of reasonable disagreement, and a reviewing court should afford great deference to a trial court in its decision to admit evidence. *Id*. at 761; *see also Montgomery v. State*, 810 S.W.2d 372, 378-79 (Tex.Crim.App. 1990)(op. on reh'g). If a trial court's ruling of the admission of evidence is correct on any theory of law applicable to the case, it should be sustained. *Osbourn v. State*, 92 S.W.3d 531, 538 (Tex.Crim.App. 2002)(citations omitted).

Applicable Facts

At trial, Elia Elizondo testified as the custodian of records during the State's admission of Exhibit 1A. Elizondo testified she served as the "911 custodian of records" for the police department and her regular duties included preparing and presenting original copies of 911 call recordings and computer aided dispatch (CAD) printouts. She stated 911 calls are automatically

recorded and although she was not the 911 dispatcher of that call, she listened to all calls made in the early hours of December 6, 2015, and listened to them prior to testifying. Elizondo stated, to her knowledge, all devices used for recording the calls were in working order, had not been tampered with, and were maintained by AT&T and Motorola.

The State offered the 911 recording and CAD as State Exhibit 1 and the defense objected on the grounds: (1) the State did not lay the proper predicate for the admission of the evidence because it was not established that Elizondo was the custodian of records; and (2) the 911 recording contained hearsay and admission of the call violated the Confrontation Clause. The State responded that Elizondo testified: (1) she was a 911 custodian of records; (2) the recording device was working properly and had not been tampered with; and (3) she had listened to the 911 recording in question. As to the Confrontation Clause objection, the State argued the 911 calls were made during an ongoing emergency. The trial court overruled Appellant's objections and allowed the defense to conduct *voir dire* examination of Elizondo.

After Elizondo's *voir dire* testimony, Appellant's counsel re-urged their objection that the State had not laid the proper predicate in that it had failed to show Elizondo was the custodian of records. Further, the defense objected that the State had failed to lay the predicate for the business records exception and Elizondo's testimony contained hearsay-on-hearsay. The trial court overruled Appellant's objections and admitted the 911 call and the CAD.

A. Issues Three and Five

In his third and fifth issue, Appellant argues the State did not overcome his "hearsay on hearsay" objection and failed to establish the proper predicate for the admissibility of the 911 recording. Issues Three and Five will be addressed simultaneously.

However, 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 error 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 communication that makes clear to the 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 that 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 the time it was made. *Id*.

Analysis

Prior to the admission of the 911 recording, Appellant objected to "hearsay on hearsay" and the failure of the State establishing Elizondo as the custodian of records. After *voir dire* of Elizondo, the defense renewed its hearsay-on-hearsay objection, which the trial court overruled. The State argues the defense did not specifically object to the admission of the 911 recording on the basis the State had not established the admissibility of the evidence under the business records exceptions to the hearsay rule until *after* the trial court had admitted the exhibit. We agree.

In addition to the untimely objection, the defense's prior objections, and its *voir dire* examination of Elizondo were not sufficiently specific to inform the trial court it was objecting because the State had failed to lay the proper predicate for the business records exception. As such, Appellant's complaints that the State failed to establish: (1) the call was transmitted by a person with knowledge; and (2) the records were kept in the course of regularly conducted business activity, are not preserved for our review. *See* TEX.R.APP.P. 33.1(a).

Issue Five is overruled.

We now address Appellant's hearsay-on-hearsay objection. In *Garcia v. State*, the Court of Criminal Appeals stated:

> When a business receives information from a person who is outside the business and who has no business duty to report or to report accurately, those statements are not covered by the business records exception. Those statements must independently qualify for admission under their own hearsay exception—such as statements made for medical diagnosis or treatment, statements concerning a present sense impression, an excited utterance, or an admission by a party opponent.

Garcia v. State, 126 S.W.3d 921, 926–27 (Tex.Crim.App. 2004). Accordingly, hearsay statements that fall within the business records exception must also be admissible under an exclusion or exception to the rule against hearsay. *See id*.

The 911 recording was properly admitted under the business records exception; however, the 911 recording did contain Mendoza's out-of-court statements that were offered to prove the truth of the matter asserted—that Appellant was traveling over the speed limit and refused to allow Mendoza to exit Appellant's vehicle. *See* TEX.R.EVID. 801(d). The State argues these hearsay statements qualify as two exceptions to the hearsay rule: present-sense impressions and excited utterances. *See* TEX.R.EVID. 803(1), (2). We agree.

The present-sense impression exception allows a court to admit a declarant's hearsay statement describing or explaining an event or condition made *while* or *immediately after* the

declarant perceived it. TEX.R.EVID. 803(1). [Emphasis added]. During the call, Mendoza's statements revealed: (1) Appellant "won't f****** stop speeding[;]" (2) Appellant was driving the vehicle and "acting crazy[;]" (3) Mendoza was trying to open the car door and get out but Appellant would not let him; (4) Appellant was traveling "at like a hundred miles an hour[;]" (5) Appellant would not stop the vehicle, which was a grey Kia Forte; and (6) Mendoza's final statement, "He's about to run another red light!" Each of these statements were said by Mendoza and were explanations of the events occurring, *as* they occurred, *while* he perceived them. These statements fall within the present-sense impression exception to the hearsay rule. *See* TEX.R.EVID. 803(1). *See, e.g., Reyes v. State*, 314 S.W.3d 74, 78 (Tex.App.—San Antonio 2010, no pet.)(holding the trial court did not abuse its discretion in admitting a 911 call containing hearsay statements because the caller's statements described events as they were happening).

Under the excited utterance exception, hearsay statements are admissible if they relate to an exciting event or condition, and the declarant made the statements while under the stress of excitement that it caused. *See* TEX.R.EVID. 803(2). Here, Mendoza made the 911 call *while* he was a passenger in the vehicle driven by Appellant, *while* Appellant was driving at an excessive speed, and *while* Mendoza pled that Appellant stop the vehicle and let him out. Throughout the recording, Mendoza's voice makes evident he was in a state of distress and was not only pleading for Appellant to stop the vehicle and let him out, but was also urgently requesting assistance from authorities. The State characterizes Mendoza's tone of voice as agitated and frightened.

Having reviewed the CAD and listened to the 911 call, we agree. The nature of Mendoza's statements and his tone of voice, the trial court could have reasonably concluded Mendoza was startled by being physically trapped in a speeding vehicle and was driven by emotion when he

made the call. Accordingly, the trial court did not abuse its discretion in admitting the 911 recording because it fell within the excited utterance exception.

Although the 911 recording contained hearsay statements, these statements fall within both the present-sense impression and excited utterance exceptions to the rule against hearsay. *See* TEX.R.EVID. 803(1), (2). The trial court did not abuse its discretion in admitting the 911 recording.

Issue Three is overruled.

A. Issue Four

In his fourth issue, Appellant asserts the trial court abused its discretion for admitting the 911 recording because the State failed to prove Elizondo was the custodian of records or possessed personal knowledge of the 911 District's record-keeping practices. To be properly admitted under Rule 803(6), the business records exception, the proponent must prove the document was made at or near the time of the events recorded, from information transmitted by a person with knowledge of the events, and was made or kept in the regular course of a regularly conducted business activity. *See* TEX.R.EVID. 803(6).

Here, Elizondo testified she was the 911 custodian of records; her regular daily duties included preparing and presenting original copies of 911 call recordings and CAD printouts. The 911 calls are automatically recorded and, although she did not personally take the 911 call made by Mendoza, she listened to it prior to testifying and, to her knowledge, it had not been tampered with.

We find the State sufficiently established Elizondo was the 911 custodian of records given she had knowledge of the preparation of the 911 recording, she testified the 911 recording and CAD reports are kept in the regular course of business, and that the 911 recording was generated at the time the call was made. The custodian of records need not be the record's creator or have

personal knowledge of the contents of the records; all that is required is that the witness have knowledge of the mode of preparation of the records. Elizondo sufficiently testified as to her knowledge of the mode of preparation of the records. *See Brooks v. State*, 901 S.W.2d 742, 746 (Tex.App.—Fort Worth 1995, pet. ref'd). Accordingly, the State laid the proper predicate under the business records exception and the trial court did not abuse its discretion in admitting the 911 recording.

Issue Four is overruled.

Issues Six, Seven, Eight and Nine: Appellant's *Daubert* Challenge

In Issues Six through Nine, Appellant challenges the State's admission of Ron Feder and his testimony, arguing the trial court abused its discretion by denying his *Daubert* motion to exclude Feder's testimony. In his sixth issue, Appellant challenges the validity of the technique used by Feder. In issue seven, Appellant argues the trial court erred by its refusal to reconsider his *Daubert* challenge and allowing Feder to testify as to the speed and Delta-v data obtained from the EDR printout. In Issue Eight, Appellant further challenges Feder's testimony arguing the Event 2 data relating to speed and Delta-v data was not within the four percent margin of error; therefore, the testimony was not reliable or helpful to the jury. In Issue Nine, Appellant asserts the trial court erred by denying his *Daubert* motion to exclude Feder's testimony regarding the EDR printout because it was not based on an "adequate foundation[.]" Due to the intersectionality of these arguments, we address these issues concurrently.

Applicable Facts

Appellant filed a pretrial *Daubert* motion to exclude all evidence and testimony associated with the testing of the Airbag Control Unit (ACU) of Appellant's vehicle.[1] Appellant drove a Kia

[1] *See Daubert*, 509 U.S. at 579.

Forte on the day of the accident. Feder testified as the State's expert witness. Appellant asserted the State should not have been allowed to rely on a "non-approved tool" used by Feder. [Internal quotation omitted]. Appellant's vehicle was titled on November 11, 2011, and according to Appellant, at the time of testing, there was no approved tool prior to September 1, 2012, to accurately download the challenged software of his vehicle.

The trial court held a *Daubert* hearing. Feder testified he had a civil engineering degree, was accredited, and had been employed as an accident reconstructionist for approximately 30 years. Feder stated he was experienced, being involved in over 3,000 cases, and testified as an expert witness in over 70 cases. Feder downloaded Appellant's vehicle information data and testified to his findings. Feder used police documents and a Google Earth image of the crash scene to help form his findings. In sum, Feder testified the data was consistent with the reported details of the accident—Appellant was traveling about 97 miles per hour just prior to hitting the curb and was traveling about 93 miles per hour while possibly airborne before decelerating to 56 miles per hour within .2 seconds upon colliding with a food truck. Feder demonstrated the process for downloading ACU data. During the *Daubert* hearing, Feder downloaded the data from Appellant's vehicle's ACU, which proved to be identical to the information he relied upon in his analysis.

The defense objected to Feder's testimony and argued it should be excluded because: (1) the tool Feder used was only capable of downloading data from Kia vehicles manufactured after September 1, 2012; (2) the SAE paper results were insufficiently supported; (3) the data was not accurate; and (4) the SAE paper was an insufficient source to base his conclusions. The trial court denied Appellant's motion to reconsider his *Daubert* motion.

At trial, Feder testified the data he collected, along with the damage of the vehicle, proved the high level of speed change was consistent with a vehicle traveling approximately 92 miles per hour.

Standard of Review & Applicable Law

A trial court's admission of expert witness testimony is reviewed for abuse of discretion. *Rhomer v. State*, 569 S.W.3d 664, 669 (Tex.Crim.App. 2019). A trial court's ruling must not fall outside the zone of reasonable disagreement, and it must not have acted without reference to any guiding rules or principles. *Id*. Expert testimony is governed by Rule 702 of the Texas Rules of Evidence. *See* TEX.R.EVID. 702. Rule 702 states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

Id. In deciding whether to admit expert testimony, the trial court must consider whether the testimony will assist the trier of fact. *See Morales v. State*, 32 S.W.3d 862, 865 (Tex.Crim.App. 2000). The testimony must be "sufficiently tied to the facts to meet the simple requirement that it be 'helpful' to the jury" and thus, a proper "fit[.]" *Id*. As such, the proponent of scientific evidence must show, by clear and convincing evidence, that the evidence is sufficiently relevant and reliable to assist the jury in accurately understanding other evidence or in determining a fact issue. *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex.Crim.App. 2000).

Three inquiries should be considered in this determination: (1) whether the witness is qualified as an expert by reason of knowledge, skill, experience, training, or education; (2) whether the subject matter of the testimony is an appropriate one for expert testimony; and (3) whether the expert testimony actually assists the fact finder in deciding the case. *Vela v. State*, 209 S.W.3d 128, 131 (Tex.Crim.App. 2006). We address each inquiry in turn.

A. Feder was qualified to testify as an expert

Three factors are considered in determining whether an expert is qualified to offer opinion testimony: (1) whether the field of expertise is complex; (2) whether the expert's opinion is conclusive; and (3) whether the area of expertise is central to the resolution of the lawsuit. *Rhomer*, 569 S.W.3d at 669-70 (*citing Rodgers v. State*, 205 S.W.3d 525, 528 (Tex.Crim.App. 2006)).

Appellant does not appear to contest Feder's qualification, and our review of the record compels us to find Feder's qualifications were sufficiently demonstrated through his testimony. Feder testified during the *Daubert* hearing that he had a civil engineering degree, was accredited by the Accreditation Commission for Traffic Accident Reconstruction, and had been employed as an accident reconstructionist for approximately 30 years. Feder estimated to have reconstructed accidents for over 3,000 cases and had testified as an expert witness at trial over 70 times. Moreover, as the State argues, Feder's testimony was not conclusive or dispositive to the resolution of the case. *See Brantley v. State*, 606 S.W.3d 328, 340–41 (Tex.App.—Houston [1st Dist.] 2020, no pet.)("[Expert] testified only about the basic functioning of the black box and what its data reported, and he tied the reported data to evidence gathered at the scene of appellant's crash. His testimony was not conclusive.").

We find the trial court did not abuse its discretion in finding Feder qualified to testify as an expert on the issue of accident reconstruction and the ACU data collection of Appellant's vehicle.

B. Feder's testimony was reliable

In addition to proper qualification, the party offering the expert testimony also bears the burden of establishing some foundation for the reliability of the expert's opinion. *See Coble v. State,* 330 S.W.3d 253, 275–76 (Tex.Crim.App. 2010). Appellant's complaints implicate Feder's testimony regarding accident reconstruction and the collection and interpretation of in-vehicle computer data

related to vehicular collisions, specifically, the calculation of the speed of Appellant's vehicle. Because case law is split as to whether accident reconstruction is hard or soft science, the mathematical calculations of the Forte's speed will be addressed under the *Kelly* standard, while the testimony regarding the collection and interpretation of the ACU data will be addressed under the *Nenno* standard.[2]

1. Feder's testimony regarding the speed of Appellant's vehicle under the *Kelly* test for reliability.

Kelly requires that: (1) the underlying scientific theory be valid; (2) the technique applying the theory be valid; and (3) the technique must have been properly applied on the occasion in question. *Kelly v. State*, 824 S.W.2d 568, 573 (Tex.Crim.App. 1992). Factors relevant to this inquiry include: (1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community; (2) the qualifications of the experts testifying; (3) the existence of literature supporting or rejecting the underlying scientific theory and technique; (4) the potential rate of error of the technique; (5) the availability of other experts to test and evaluate the technique; (6) the clarity with which the underlying scientific theory and technique can be explained to the court; and (7) the experience and skill of the person(s) who applied the technique on the occasion in question. *Kelly*, 824 S.W.2d at 573.

At trial, Feder testified he used the same speed calculation utilized by Officer Castaneda to determine the Forte's speed, which the defense did not object to. Feder also calculated the Forte's speed with a calculator at trial, which the defense stated was "correct[.]" Feder's testimony was

[2] Hard sciences are "areas in which precise measurement, calculation, and prediction are generally possible," to "include mathematics, physical science, earth science, and life science[,]" and are reviewed under the standard set forth in *Kelly*, 824 S.W.2d at 573. *See Rhomer*, 569 S.W.3d at 671 (*quoting Weatherred*, 15 S.W.3d at 542 n.5). Soft sciences "are generally thought to include such fields as psychology, economics, political science, anthropology, and sociology" and are reviewed under the less-stringent standard set forth in *Nenno v. State*, 970 S.W.2d 549, 560–61 (Tex.Crim.App. 1998), overruled on other grounds by *State v. Terrazas*, 4 S.W.3d 720, 727 (Tex.Crim.App. 1999). *See Rhomer*, 569 S.W.3d at 671; *Weatherred*, 15 S.W.3d at 542 n.5.

sufficient to establish the validity of the speed calculation method and the validity of the technique applying the theory. *See Brantley*, 606 S.W.3d at 338-40.

Appellant mainly contests the third *Kelly* prong—whether Feder properly applied the scientific theory by accurately calculating the Forte's speed here. At trial, Appellant argued Feder's technique was not properly applied and thus, Feder's ultimate conclusion of the Forte's speed was unreliable. Appellant argued that the conclusion he was traveling approximately 135 to 145 feet from Event 1—where the Forte struck the curb—to Event 2—when the Forte struck the food truck—over a period of 400 milliseconds was an implausible speed of 247 miles per hour, which is obviously impossible. However, Feder explained the reading was based on "the data point in between the two events when we have this increase in speed," and this interval corresponded to: (1) the point where the Forte increased speed after it possibly became airborne; and (2) the point where the Forte impacted the food truck. Feder testified according to his calculations and the ACU data, which yielded that the Forte traveled that distance over a period of one second—an approximate speed of 92 to 99 miles per hour. Feder testified to the way the data was collected, explained the process in technical depth during the *Daubert* hearing, and went so far as to conduct the actual calculations at trial, which gives us no indication that the theory was incorrectly applied in this case. The trial court did not abuse its discretion in admitting Feder's testimony regarding his calculation of the Forte's speed. Accordingly, Appellant's arguments regarding the mathematical calculation of the Forte's speed satisfied the *Kelly* standard for reliability.

2. Feder's testimony regarding the collection and interpretation of Appellant's vehicle's ACU data satisfied the *Nenno* test for reliability.

Under *Nenno*, the inquiry is whether: (1) the field of expertise is a legitimate one; (2) the subject matter of the expert's testimony is within the scope of that field; and (3) the expert's testimony properly relies upon and/or utilizes the principles involved in the field. *Nenno v. State*,

970 S.W.2d 549, 560–61 (Tex.Crim.App. 1998). Feder testified he had a civil engineering degree, was accredited, had been employed as an accident reconstructionist for approximately 30 years, had served as an accident reconstructionist in over 3,000 cases, and testified as an expert witness in that field over 70 times. The first *Nenno* prong is satisfied. *See Rhomer*, 569 S.W.3d at 672.

As to the second *Nenno* prong, Feder explained the general function of the ACU and the procedure by which he retrieved the ACU's data, as well as his interpretation of the data report generated by the tool used to download the data. Feder's testimony was limited to the area of accident reconstruction and the use of the ACU data and was within the scope of his expertise. *See Nenno*, 970 S.W.2d at 561. His testimony satisfied the second *Nenno* prong.

Regarding the third *Nenno* prong, Feder testified the methodology behind the tool was based on the peer reviewed SAE paper by Rick Ruth, a respected engineer in ACU data retrieval. Feder stated the ACU records any changes in speed and confirmed that the data from the Forte's ACU was consistent with the physical evidence of the crash scene. Feder properly relied on and utilized principles involved in accident reconstruction.

Feder's testimony was based on his training and experience and valid underlying scientific theory. As such, Feder's testimony was sufficiently reliable under that standard, and the trial court did not abuse its discretion in admitting these portions of his testimony under the *Nenno* standard. *See Rhomer*, 569 S.W.3d at 672.

C. Feder's testimony was relevant

Pursuant to the Texas Rules of Evidence, Feder's testimony must have been helpful to the trier of fact to understand the evidence or to determine a fact in issue. *See* TEX.R.EVID. 702. Feder's testimony was relevant to prove Appellant's speed, which was relevant to prove his knowledge or intent to crash the Forte—an act clearly dangerous to human life. Appellant's speed at the time of

the collision was relevant to his *mens rea*—it made it more probable that he acted intentionally or knowingly, which are elements of the charged offense. TEX.PENAL CODE ANN. § 19.02(c). Thus, Feder's testimony was relevant to the case. *See* TEX.R.EVID. 401, 702.

Accordingly, because Feder was qualified and his testimony was based on reliable principles and was relevant to the case, the trial court did not abuse its discretion in admitting his testimony and denying Appellant's *Daubert* motion and motion to reconsider. TEX.R.EVID. 702; *Rhomer*, 569 S.W.3d at 672.

For these reasons, Issues Six, Seven, Eight, and Nine are overruled.

Issue Ten: Feder's Alleged False Testimony

In his tenth issue, Appellant argues the State presented "false testimony and evidence to the jury through [] Feder as to the speed and Delta-v data [that established the speed Appellant's] vehicle was traveling[,]" which resulted in a due process violation. During the *Daubert* hearing, Feder was asked by defense counsel if the Event 2 speed and Delta-v data from the EDR printout he produced relating to Appellant's speed was within the four percent variance margin of error industry standard. Appellant asserts the State presented false material testimony through an inaccurate EDR printout he knew was false and contained false speed and Delta-v data.

However, as a threshold matter, we must consider whether Appellant preserved error by a proper trial level objection and ruling. TEX.R.APP.P. 33.1; *Geuder*, 115 S.W.3d at 13-14.

At trial, Feder testified the Forte was traveling approximately 92 miles per hour when it struck the curb, and the Forte underwent a 56 mile per hour speed change when it struck the food truck. The testimony over the complained-of testimony—whether the Event 2 speed and Delta-v data from the EDR printout he produced relating to Appellant's speed was within the four percent

variance margin of error industry standard—does not contain an objection by defense counsel. In fact, defense counsel states:

> Your Honor, I've introduced, without objection -- and this is the thing from the portal -- the download that was provided by Mr. Feder after testing his box. And the first page of his download states that tools for downloading the EDRs of Kia vehicles have been developed only for vehicles produced after September 1, 2012.

During the defense's case in chief, it presented expert testimony from Roy Davis, who opined that the speed of the Forte was approximately 35 miles per hour at the time it struck the food truck, which the State argues "tends to show that the defense would have been aware of the alleged falsity of Feder's testimony at the time he testified, and that the defense had prepared in advance to present Davis's testimony to rebut Feder's testimony." Nonetheless, because Appellant did not timely object to the complained-of testimony at the time the testimony was given at trial, this issue has not been preserved for our review.

Issue Ten is overruled.

Issue Thirteen: Violation of Due Process in Count I

In his thirteenth issue, Appellant contends he was deprived of due process of law because he was prosecuted based on factual and legal theories not alleged in Count I. Specifically, he contests: (1) the State's final argument he was traveling at an excessive speed which alluded that he intended to kill Mendoza; and (2) the State's use of his BAC. Appellant argues these theories were not alleged in Count I and the State's emphasis on these theories denied him a fair trial.

The trial court submitted the following application paragraph regarding Count I in the jury instructions:

> Now if you find from the evidence beyond a reasonable doubt that . . . Defendant Jesus Alberto Mireles did then and there commit or attempt to commit a felony, to wit: Unlawful Restraint, and in the course of and in furtherance of the commission or attempt, committed an act clearly dangerous to human life that caused the death of Daniel Mendoza, to wit: by operating a motor vehicle in which the said Daniel

> Mendoza was an occupant and causing said motor vehicle to crash. And you further find that said Defendant did use and exhibit a deadly weapon, to-wit: a motor vehicle, that in the manner of its use and intended use was capable of causing death and serious bodily injury, during the commission of and immediate flight from said felony offense, then you will find the Defendant Guilty of Murder as charged in the indictment.

The application paragraph of Count I mirrored the language of Count I as alleged in the indictment.

An indictment must provide proper notice and state the charged offense in plain and intelligible language. TEX.CODECRIM.PROC.ANN. art. 21.02(7). A count in an indictment is facially complete when it alleges all the statutory elements of the charged offense. *See Thomason v. State*, 892 S.W.2d 8, 10 (Tex.Crim.App. 1994). When an indictment facially alleges a complete offense, the State is bound by the theory alleged in the indictment and the jury may not authorize a conviction based on theories not alleged in the indictment. *See Bullard v. State*, No. 12-19-00311-CR, 2020 WL 2078792, at *7 (Tex.App.—Tyler Apr. 30, 2020, no pet.)(mem. op., not designated for publication)(citations omitted).

Appellant challenges the State's theories that prior to causing his vehicle to crash, he operated his vehicle at an excessive speed, ran a red light, and consumed alcohol. The felony murder statute provides a person commits an offense if he:

> commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

TEX.PENAL CODE ANN. § 19.02(b)(3). Count I of the indictment alleged Appellant:

> did then and there commit or attempt to commit a felony, to wit: Unlawful Restraint, and in the course of and in furtherance of the commission or attempt, committed an act clearly dangerous to human life that caused the death of Daniel Mendoza, to wit: by operating a motor vehicle in which the said Daniel Mendoza was an occupant and causing said motor vehicle to crash.

Count I alleged all the elements of the felony murder offense. TEX.PENAL CODE ANN. § 19.02(b)(3). Thus, Count I is facially complete. *See Thomason*, 892 S.W.2d at 10. Furthermore, Appellant was not denied due process or a fair trial because the complained-of theories were relevant to Count II, which will be addressed in Issue Twelve, provided the manner and means allegations. Additionally, the jury charge regarding Count I authorized conviction *only* if the jury believed Appellant committed an act clearly dangerous to human life by operating a motor vehicle in which Mendoza was an occupant and caused his motor vehicle to crash. Thus, the jury charge did not permit the jury to convict Appellant based on his speed, running a red light, or the consumption of alcohol prior to him causing the vehicle to crash. The jury charge and the complained-of theories did not impermissibly enlarge the indictment by authorizing a conviction under Count I based on theories not pled in the indictment. Appellant has not shown he was denied due process or a fair trial.

Issue Thirteen is overruled.

Issue Twelve: Count II

In his twelfth issue, Appellant argues the trial court erred in denying his motion to quash Count II because it "lumped several different manner and means allegations [] into one aggravated assault offense, rather than segregating these different manner and means allegations in separate paragraphs[.]" Appellant also contends the State should have been "precluded from relying upon the manners and means theories alleged in Count II to convict [him] of the felony murder count alleged in Count I."

Multiple offenses may be alleged in an indictment, but must be delineated in counts that allege the manner and means of the commission of each charged offense, separated by paragraphs. *Williams v. State*, 474 S.W.3d 850, 853 n.4 (Tex.App.—Texarkana 2015, no pet.)(*citing Martinez*

v. State, 225 S.W.3d 550, 554 (Tex.Crim.App. 2007). Thus, the term "count" is used to charge the offense itself, and a "paragraph" is a portion of a count, which charges the method of committing the offense. *Renfro v. State*, 827 S.W.2d 532, 535 (Tex.App.—Houston [1st Dist.] 1992, pet. ref'd)(citation omitted). A count may contain as many separate paragraphs charging the same offense as necessary, but no paragraph may charge more than one offense. *See* TEX.CODECRIM.PROC. ANN. art. 21.24(b).

Here, Appellant argues the trial court did not comply with Article 21.24(b) because it combined multiple manner and means allegations in Count II. Count II of the indictment alleged that on or about December 6, 2015, Appellant:

> did then and there intentionally, knowingly, or recklessly cause serious bodily injury or death to Daniel Mendoza while the defendant was operating a motor vehicle in which the said Daniel Mendoza was an occupant by operating said motor vehicle at an excessive rate of speed and/or by failing to control speed and/or by disregarding traffic signal light(s) or sign(s) and/or by having consumed alcohol, and thereby causing said motor vehicle to crash, and the defendant did then and there use or exhibit a deadly weapon, to-wit: a motor vehicle, during the commission of the assault, and the said Daniel Mendoza was a person with whom the defendant has or has had a dating relationship, as described by Section 71.0021(b) of the Texas Family Code.

The State argues that although multiple manners and means were alleged—"operating said motor vehicle at an excessive rate of speed and/or by failing to control speed and/or by disregarding traffic signal light(s) or sign(s) and/or after having consumed alcohol"—it did not improperly charge more than one offense of aggravated assault with a deadly weapon against a person with whom Appellant was in a dating relationship with because it alleged only *one* offense that caused serious bodily injury—causing the motor vehicle to crash. *See Renfro*, 827 S.W.2d at 535 ("An indictment may allege different methods of committing the same offense")(citation omitted). Furthermore, as the State argues, even if the multiple manner and means alleged in Count II constituted a formatting defect, such defect did not affect the jury's consideration of the case,

change the nature of the evidence, or improperly charge more than a single offense in a single paragraph, and formatting defects do not affect the jury's consideration of the case. *Gonzalez v. State*, 610 S.W.3d 22, 26-27 (Tex.Crim.App. 2020)(not yet reported)(*citing Hicks v. State*, 372 S.W.3d 649, 657–58 (Tex.Crim.App. 2012). Appellant has not shown the trial court erred in failing to quash Count II.

Issue Twelve is overruled.

Issue Fourteen: Failure to Quash Count II

In his fourteenth issue, Appellant argues the trial court abused its discretion by denying his motion to quash the portion of Count II that alleged he caused serious bodily injury by operating a motor vehicle "after having consumed alcohol" because according to Appellant, it enabled the State to introduce evidence that he had a BAC over the legal limit. Count II alleged Appellant "intentionally, knowingly or *recklessly* cause[d] serious bodily injury or death to Daniel Mendoza while [Appellant] was operating a motor vehicle in which [Mendoza] was an occupant by operating said motor vehicle . . . after having consumed alcohol, and thereby causing said motor vehicle to crash[.]" [Emphasis added].

The denial of a motion to quash an indictment is reviewed *de novo*. *Lawrence v. State*, 240 S.W.3d 912, 915 (Tex.Crim.App. 2007). We adopt the standard of review and applicable law set forth in Issues One, Two and Eleven of this opinion. One of the statutory elements of the charged offense was that Appellant acted recklessly. TEX.PENAL CODE ANN. § 22.02(a), (b)(1). The State argues the allegation that Appellant consumed alcohol was a circumstance necessary to the essential proof of the recklessness element, irrespective of whether the State proved that Appellant was legally intoxicated at the time of the collision. We agree. Furthermore, because the State was required to prove, from the totality of the circumstances, that Appellant possessed the requisite

mental intent, the consumption of alcohol allegation was not unfairly prejudicial to Appellant. *See* TEX.PENAL CODE ANN. § 22.01(a)(1)(a person commits an offense if the person intentionally, knowingly, or recklessly causes bodily injury to another). For these reasons, the trial court did not abuse its discretion in denying Appellant's motion to quash Count II on this basis.

Issue Fourteen is overruled.

Issue Fifteen: Inadmissible Expert Testimony

In his fifteenth issue, Appellant contends the trial court abused its discretion by overruling defense counsel's objection to the prosecutor's question of a forensic expert.

At trial, the State called John Keinath, a Texas Department of Public Safety forensic scientist in blood alcohol toxicology. Keinath testified in depth as to the process by which he tested Appellant's BAC. The State asked, "What was the result that you received for Mr. Mireles's blood alcohol content?" Keinath responded, "So after testing the blood, the blood alcohol concentration that was detected was a 0.095 grams of alcohol per 100 milliliters of blood." The State then asked whether Appellant was legally intoxicated with a BAC of 0.095 grams, and the defense objected, arguing the question called for a legal conclusion. The trial court overruled the objection and Keinath responded, "Based off of the statute in the law, which is a 0.08, yes."

Standard of Review & Applicable Law

A trial court's admission of expert testimony is reviewed for abuse of discretion. *Rhomer*, 569 S.W.3d at 669. A trial court abuses its discretion when its ruling falls outside the zone of reasonable disagreement and when it acts without reference to any guiding rules or principles. *Id*. An expert witness may offer his opinion as to mixed questions of law and fact so long as that opinion is based on proper legal principles. *Blumenstetter v. State*, 135 S.W.3d 234, 248 (Tex.App.—Texarkana 2004, no pet.)(*citing* TEX.R.EVID. 704). A defendant's alcohol

consumption level in the context of the legal standard of intoxication is a mixed question of law and fact, and it must meet the requirements of expert testimony. *Id*. Thus, in this context, an expert witness must be competent and qualified to testify, and his opinion must be reliable and relevant. *Id*., (*citing* TEX.R.EVID. 702).

In his brief, Appellant referred to Keinath as "Texas DPS forensic expert, John Keinath[.]" Because Keinath's expertise was not contested at trial and is not contested on appeal, we find Keinath was qualified to render an expert opinion as to whether Appellant was legally intoxicated, which is a mixed question of law and fact. *See Blumenstetter*, 135 S.W.3d at 248.

Furthermore, Keinath testified sufficiently at trial as to his expertise, and described his education, training, and experience. Keinath also previously testified as an expert, and he established that his testimony in this case was based on reliable principles through his explanation of the process by which he tested Appellant's blood. Additionally, we agree with the State that Keinath's testimony regarding Appellant's intoxication was relevant to the case because it tended to support both the act clearly dangerous to human life element of Count I, and the allegation in Count II that he recklessly caused serious bodily injury to Mendoza by consuming alcohol and causing his vehicle to crash. Thus, Keinath's testimony was admissible under Rule 702 and the trial court did not abuse its discretion in overruling the objection to the complained-of testimony. *See* TEX.R.EVID. 702.

Issue Fifteen is overruled.

Issues Sixteen and Seventeen: Legal Sufficiency

In his sixteenth issue, Appellant argues the evidence was legally insufficient to prove he was guilty of felony murder because there was no evidence Mendoza's restraint was against his consent based on the "restraint without consent" definition of the Texas Penal Code. In his

seventeenth issue, Appellant argues the evidence was legally insufficient to convict him of felony murder because the underlying unlawful restraint offense merged with the felony murder.

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). 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*.

A. Issue Sixteen

In his sixteenth issue, Appellant argues the evidence was legally insufficient to prove he was guilty of felony murder because there was no evidence Mendoza's restraint was against his consent.

One commits unlawful restraint if he intentionally or knowingly restrains another person. TEX.PENAL CODE ANN. § 20.02(a). Third degree felony restraint is committed when, in addition to satisfying the elements of Section 20.02(a), the person recklessly exposes the victim to a substantial risk of serious bodily injury. TEX.PENAL CODE ANN. § 20.02(c)(2). "Restrain" is defined as "restrict[ing] a person's movements without consent, so as to interfere substantially with the person's liberty, by moving the person from one place to another or by confining the person." TEX.PENAL CODE ANN. § 20.01(1). Restraint is accomplished without consent if the actor uses force, intimidation, or deception. TEX.PENAL CODE ANN. § 20.01(1)(A).

During the call, Mendoza's statements revealed that: (1) Appellant "won't f****** stop speeding[;]" (2) Appellant was driving the vehicle and "acting crazy[;]" (3) Mendoza was trying to open the car door and get out but Appellant would not let him; (4) Appellant was traveling "at like a hundred miles an hour[;]" (5) Appellant would not stop the vehicle; and (6) Mendoza's final statement, "Dude, let me the f*** out," and, "He's about to run another red light!"

Appellant's excessive speed, Mendoza's pleas to be let out of the vehicle, Appellant's refusal to stop the car or let him out, and Mendoza's statement that Appellant was about to run

another red light, sufficiently showed Appellant used force or intimidation to unlawfully restrain him. The State argues because Appellant drove the vehicle at a high rate of speed and used the vehicle's speed to prevent Mendoza from exiting the vehicle, a rational jury could have found beyond a reasonable doubt that Appellant used force or intimidation to restrain Mendoza, and that Appellant recklessly exposed Mendoza to a substantial risk of serious bodily injury in doing so. We agree.

Issue Sixteen is overruled.

B. Issue Seventeen

In his seventeenth issue, Appellant argues the merger doctrine renders the evidence legally insufficient to support his conviction of felony murder. In other words, Appellant maintains the criminal act of the underlying felony of unlawful restraint merged with the act clearly dangerous to human life of the charged felony murder offense, and thus, double jeopardy applies, and his conviction should be set aside.

The Court of Criminal Appeals adopted what is known as the merger doctrine in *Garrett v. State*, 573 S.W.2d 543, 545–46 (Tex.Crim.App. 1978). Under the merger doctrine, the act constituting the underlying felony in a felony murder charge must be a separate act from the act that is clearly dangerous to human life that causes the victim's death. *Id.* at 256. However, in *Johnson v. State*, 4 S.W.3d 254, 255 (Tex.Crim.App. 1999), the Court of Criminal Appeals held that the merger doctrine does not exist in Texas except to the extent the underlying felony offense is manslaughter or a lesser-included offense of manslaughter. As such, *Garrett* and the merger doctrine are inapplicable to cases in which the underlying felony offense is *not* manslaughter or a lesser-included offense of manslaughter. *Id.* [Emphasis added].

Here, Appellant was charged with felony murder and the underlying felony was unlawful restraint. Because the underlying offense is not manslaughter or a lesser-included offense of manslaughter, the merger doctrine is inapplicable. *Johnson*, 4 S.W.3d at 255. Furthermore, the State argues even if this was not so, the *actus reus* for each of the charged offenses differed. The *actus reus* for the charged felony murder offense was "caus[ing] the death of Daniel Mendoza, to wit: by operating a motor vehicle in which the said Daniel Mendoza was an occupant and causing said motor vehicle to crash." Whereas, the *actus reus* for the underlying unlawful restraint offense was Appellant's intentional or knowing restraint of Mendoza and his reckless exposure of Mendoza to a substantial risk of serious bodily injury. The two acts are separate.

Issue Seventeen is overruled.

Issue Eighteen: Facial Constitutionality of the Texas Felony Murder Statute

In his final issue, Appellant argues the Texas felony murder statute is unconstitutional on its face because it violates the Due Process Clause and the Cruel and Unusual Punishment Clause of the United States Constitution. Appellant challenges the constitutionality because: (1) the statute does not require the State to prove a culpable mental state for "the act of murder[;]" and (2) the statute "permits the 'act constituting the underlying felony to merge with and be a constituent element of the 'act clearly dangerous to human life.'"

However, as a threshold inquiry, we must consider whether Appellant preserved error by a proper trial level objection and ruling. *See* TEX.R.APP.P. 33.1. A facial challenge to the constitutionality of a statute may not be raised for the first time on appeal. *Karenev v. State*, 281 S.W.3d 428, 434 (Tex.Crim.App. 2009). Review of the record reveals Appellant did not raise a facial challenge to the constitutionality of Section 19.02(b)(3) at trial. Accordingly, Appellant has not preserved this issue for review.

Issue Eighteen is overruled.

CONCLUSION

For these reasons, we affirm.

August 19, 2022

YVONNE T. RODRIGUEZ, Chief Justice

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

(Do Not Publish)