

Affirmed and Opinion Filed March 10, 2016.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-14-00179-CR

**MARK ANTHONY SPEERS, Appellant
V.
THE STATE OF TEXAS, Appellee**

**On Appeal from the 194th Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1227999-M**

MEMORANDUM OPINION

Before Justices Lang, Evans, and Whitehill
Opinion by Justice Lang

Mark Anthony Speers¹ appeals the trial court's judgment convicting him of capital murder. The jury found Speers guilty and that he used a deadly weapon during the offense. His punishment was assessed by the trial court at life imprisonment. Speers raises six issues on appeal arguing: (1) the trial court erred when it denied his motion to quash the indictment; (2) the trial court erred when it denied his motion to exclude evidence of party liability at trial; (3) the mandatory sentencing scheme in section 12.31 of the Texas Penal Code and article 37.071 of the Texas Code of Criminal Procedure violate the Constitution of the United States of America (United States Constitution) and the Constitution of the State of Texas 1876 (Texas Constitution); (4) the trial court erred when it denied his motion to suppress the "[historical] cell

¹ In the record, Speers is referred to by some witnesses as "Avalanche."

phone records” from his service provider; (5) the trial court erred when it included an instruction on party liability in the jury charge; and (6) the evidence is insufficient to support his conviction. We decide against Speers on all issues. The trial court’s judgment is affirmed.

I. FACTUAL AND PROCEDURAL BACKGROUND

Speers was indicted for the capital murder of William Allen Easterling. The testimony at trial revealed that Easterling had several health issues, including pancreas and liver problems, diabetes, and alcoholism, and that he required the assistance of a caregiver to cook for him and manage his medications. Speers worked as Easterling’s caregiver. Speers and his girlfriend, Christine Delorme,² lived in Easterling’s home. Also, Easterling owned a champagne-colored 2008 Nissan Sentra.

Years earlier, Easterling’s sister, Billy Jean Easterling, was in an auto accident and became a paraplegic. She died ten years after the accident and, after her death, her three surviving siblings, including Easterling, received a settlement whereby they each received three disbursements in the amounts of \$250,000, \$654,000, and \$8,000.

On February 10, 2012, Joan Beasely, another of Easterling’s sisters, visited him at his home. She observed that Easterling had a large amount of cash that day because he had cashed the last check in the amount of \$8,000. During her visit, Beasely gave Speers a “30-day notice” to move out of her brother’s home. Speers responded, “okay” and did not seem bothered by receiving the notice.

On February 16, 2012, at around 4:00 p.m., Dixie Haynes picked up Anthony Wayne Mangiafico³ at a gas station. They drove to a Wal-Mart and then to Haynes’s “treatment program.” While Haynes attended her “treatment program,” Mangiafico left in her vehicle and

² In the record, Delorme is referred to by some witnesses as “Christi.”

³ In the record, Mangiafico is referred to by some witnesses as “Tony” or “T-bone.”

then returned to wait for her. Then, they left the “treatment facility” and drove to another Wal-Mart. Haynes stated that Mangiafico displayed a lot of anxiety, was very animated, and “full of questions.” Afterward, Haynes dropped Mangiafico off at a gas station, which was later determined to be near Easterling’s house. At the gas station, Mangiafico walked up to a waiting jeep. Speers was in the jeep and handed Mangiafico some money, which Mangiafico gave to Haynes for the purchase of gas. Then, Haynes saw Mangiafico leave in the jeep with Speers. However, before Haynes left the gas station, she saw that the jeep had returned.

Also, on February 16, 2012, Speers and Delorme went to the hotel room of Melynda Frazier, a prostitute, and asked her to go to Easterling’s house with them because they needed an alibi or witness. According to Frazier, she met Speers through a friend, “it was a drug connection.” While driving to Easterling’s house, Speers received a phone call that changed their plans. Frazier stated that Speers said they would need to wait before going to Easterling’s house because Mangiafico was in Easterling’s car in Shreveport and “he wanted to make sure the car was back so that [Mangiafico] didn’t get in trouble.” Frazier testified that Speers was laughing on the phone and told Mangiafico that he better have Speers’s half of the money when he returned. Also, Speers said that there had been a robbery that went wrong because, when Mangiafico went into the house to get the \$10,000 out of the closet, Easterling had fought for his life. Further, according to Frazier, Speers, repeating what he heard on the phone, stated that Mangiafico stabbed Easterling nineteen times, and Mangiafico had taken all the tools and electronics out of the house. So Speers, Delorme, and Frazier drove to Applebee’s instead of going to Easterling’s house. However, Frazier was scared and texted a friend to pick her up at Applebee’s. While at Applebee’s, Frazier stated she had to take a phone call from a client, then walked out of the restaurant and left with the friend she had texted earlier.

On February 17, 2012, at 1:52 a.m., the fire department received a call reporting that neighbors in the area of Easterling's house smelled smoke. The fire department responded, but was not able to determine the source of the smoke.

Also, in the early morning hours of February 17, 2012, Haynes saw Mangiafico at a Wal-Mart. Mangiafico was driving a champagne-colored Nissan. Mangiafico asked Haynes to get him a motel room, but she had plans to go to the house of Mical and Jonathan Scott. Mical Scott told Haynes to just bring Mangiafico to her house. Also, Mangiafico gave Haynes a "wad of bills" and asked her to buy him some "hygiene" items. Haynes stated that Mangiafico could not go into the store because he was disheveled, not wearing a shirt, and there was blood on his knuckles and pant leg. So they each drove their respective cars to a Walgreens on their way to the Scotts' house. Haynes went inside the store and purchased for Mangiafico T-shirts, shoes, socks, shaving equipment, shampoo, and lotion. Then, they proceeded to the Scotts' house. When they arrived, Haynes parked in the driveway and Mangiafico parked the Nissan "down a ways, kind of in a fence[d] area."

When Haynes and Mangiafico arrived at his house, Jonathan Scott saw that Mangiafico was wearing no shoes, limping, and covered in blood. Also, Jonathan Scott saw that when Mangiafico got out of the shower, he did not appear to have any cuts on his face or hands. Mangiafico had locked the keys inside of the Nissan and Jonathan Scott tried to help him open the car. They were not successful in opening the Nissan until Speers arrived with Delorme. After the car was unlocked, Mangiafico moved it to the driveway near the garage. Tools and file boxes were unloaded from the Nissan and put into the Scotts' garage. Jonathan Scott heard Speers tell Mangiafico that some of the tools were his, and "he should go back because, there w[ere] more tools there." He also heard Mangiafico say that "they would be surprised when they found [the pistol underneath the sink]" and there were pills in the file boxes. Jonathan Scott saw

Mangiafico give Speers a “stack of bills” and heard Speers comment on the value of the car. Also, Jonathan Scott saw a stack of credit cards and heard Mangiafico and Speers discussing which credit card they thought might have an amount available that would enable them to make certain purchases. Further, Jonathan Scott saw a gun in the car and told Mangiafico it had better not come out of the car. Later, Mangiafico returned all of the things to the car that he had put in the Scotts’ garage.

After Speers and Delorme arrived at the Scotts’ house, Haynes saw Speers and Mangiafico separate from the group to have some private conversations. Haynes overheard a couple of these conversations, which were about credit cards and drugs. She also saw Speers give Mangiafico some credit cards with Easterling’s name on them and an I.D.

On February 20, 2012, Speers returned to Frazier’s hotel room. Frazier was curious about Delorme’s absence as she and Speers were always together. Speers asked Frazier to “run” some credit cards with Easterling’s name on them. This was not the first time Frazier had seen Speers use Easterling’s credits cards. Speers told Frazier to go into the store, purchase some items and get \$100 cash from the credit card.

On February 22, 2012, Haynes saw Mangiafico and a man identified only as “Dreamer” at an illegal “game room.” Dreamer told Haynes that Speers wanted to speak with her. Dreamer drove Haynes in a champagne-colored Nissan to a gas station to meet with Speers. Speers wanted Haynes to “run some credits cards” and they went to more than one Wal-Mart to “purchase credit cards and get the cash back, which would have been a hundred dollars.” At one Wal-Mart, Haynes had trouble “running” the credit card at the jewelry counter so she met Speers at the McDonalds located inside the Wal-Mart. Speers was upset with Mangiafico, telling Haynes that Mangiafico had used the credit cards to purchase shoes at Footlocker and it was causing the credit cards to be declined. Then, according to Haynes, Speers called the bank,

identified himself as Easterling, provided the necessary information, and had the credit card reactivated. Afterward, Haynes was able to make the purchase at the jewelry counter.

A few days later, Frazier was helping Speers pack his things at his hotel room. Delorme's purse and dog were there, but she was "missing."⁴ Frazier and Speers drove to a Red Roof Inn where she saw Mangiafico in Easterling's car. Speers told Frazier that Easterling's car was for sale for \$2,500. Frazier asked Speers why he was selling Easterling's car and he responded, "cause it is worth [\$]2,500." Mangiafico got into the car with Speers and Frazier. Once in Speers's car, Mangiafico stated that Easterling had "put up a good fight." Frazier believed that Mangiafico and Speers were trying to intimidate her when Mangiafico commented in Frazier's presence that she did not want "to end up like the old man."

Frazier became afraid of Speers because he was threatening her. Specifically, Speers called Frazier and when she did not answer, he sent threatening text messages. In an attempt to get away from Speers, Frazier moved from Dallas to Addison. As a result of Speers's threats, on February 22, 2012, Frazier called the police and requested that they do a welfare check on Easterling.

Two officers went to Easterling's house to conduct the welfare check. When they arrived, they observed charring marks on the front door, so the officers called dispatch to check if they had responded to a fire at the location and were informed that they had not. The officers rang the doorbell and knocked at the door, but no one responded. Eventually, they had to force the door to gain entry. Once inside the house, they saw a body lying on the living room floor, and found a handgun and knife in the kitchen sink, an empty rifle box, and a "bunch of rags" that had been "stuffed up in the flue."

⁴ Frazier stated she saw Delorme at the trial. However, Delorme did not testify.

Using dental records, the body was identified as Easterling. An autopsy revealed that Easterling had been stabbed multiple times. He also sustained other injuries, but it could not be determined whether those injuries were caused by blunt force or a sharp object. In addition, 70% of the surface area of Easterling's body was charred, although the fire appeared to have occurred after his death because no soot was found in his lungs.

Beasely learned of Easterling's death when she received a telephone call from her brother-in-law telling her that she should turn on the television because her brother had been killed and the house had been burned. Then, she called Speers. When Speers answered his cell phone, Beasely asked him "if he had anything to do with [her] brother's death. And [Speers] said, no, that he loved the old man." Beasely said Speers appeared to know about her brother's death and she asked why he did not tell her something had happened to him. Speers did not answer her question because he said that he had gotten a call from "downtown." However, Speers told Beasely he would call her back after he returned home.

Beasely also testified that as executrix of Easterling's will, she took possession of Easterling's bank statements and bills. After receiving Easterling's bank statements, Beasely became suspicious because she noticed "there were a lot of charges that were made after his death." She was also surprised that Easterling had various retail credit cards because he did not like credits cards. In addition, Beasely claimed that the signature on some checks, which included checks made out to Delorme, did not appear to be Easterling's signature. Further, someone had purchased her brother's car for cash and had their name put on the title, and Beasely had to have that person's name removed.

During the police investigation, the police filed a petition pursuant to article 18.21, section 5 of the Texas Code of Criminal Procedure seeking the subscriber information and seven days of telephone records from Metro PCS pertaining to the cell phone number specified in the

petition. The municipal court signed an order granting that petition. The subscriber information obtained as a result of that order revealed that Speers was the subscriber for that cell phone number.

Speers was indicted for capital murder. During his trial, Speers filed a motion to suppress his historical cell phone records, which the trial court denied. The jury found Speers guilty and the trial court assessed his punishment at life imprisonment.

II. MOTION TO QUASH THE INDICTMENT

In issue one, Speers argues the trial court erred when it denied his motion to quash the indictment. Before us, he contends that, although the State sought to convict him as a party to the offense, the indictment alleged that he acted as a principal and the evidence showed that he was not physically present when Easterling was killed. As a result, Speers claims that his rights to due process and equal protection under the law were violated. However, Speers concedes that:

[He] makes this argument with knowledge of the current law regarding that the law of parties, including the theory of party responsibility set forth in [s]ection 7.02(b)[] which has been deemed applicable to capital murder. [Citations omitted.] [Speers] includes [this] argument for purposes of preserving error for any potential Writ of Certiorari to the United States Supreme Court.

The Texas Court of Criminal Appeals has “continually held that the law of parties announced in [sections] 7.01 and 7.02 [of the Texas Penal Code] is applicable to capital murder cases.” *See Johnson v. State*, 853 S.W.2d 527, 534 (Tex. Crim. App. 1992), *cert. denied*, 510 U.S. 852 (1993); *see also Ex Parte Martinez*, 330 S.W.3d 891, 901 (Tex. Crim. App. 2011).

This Court is bound by the holdings of the Texas Court of Criminal Appeals.

As a result of Speers’s concession, we need not address his first issue.

III. MOTION TO EXCLUDE EVIDENCE

In issue two, Speers argues the trial court erred when it denied his motion to exclude evidence of party liability at trial. He argues that the trial court should have precluded the State from relying on a theory of party liability at trial because the indictment did not allege party liability. However, Speers “concedes that the Texas Court of Criminal Appeals has held that if the evidence supports a charge on the law of parties, the [trial] court may submit a charge on parties even though there was no such allegation in the indictment.” Speers argues the dissent in *Marable* was correct and that:

allowing the State to conduct voir dire on the law of parties, allowing the State to adduce evidence designed as securing a conviction on party liability, and authorizing the jury to convict on a theory of party liability [when] the indictment is silent as to party liability[], constitutes a constructive amendment of the indictment and a fatal variance by enlarging the indictment and undermining the requirement of jury unanimity.

See Marable v. State, 85 S.W.3d 287, 295–300 (Tex. Crim. App. 2002) (Womack, J., dissenting, joined by Meyers & Johnson, J.J.).

The Texas Court of Criminal Appeals has held that “[r]egardless of whether it is pl[eaded] in the charging instrument, liability as a party is an available legal theory if it is supported by the evidence.” *In re State ex rel. Weeks*, 391 S.W.3d 117, 124 (Tex. Crim. App. 2013). Again, this Court is bound by the holdings of the Texas Court of Criminal Appeals.

Therefore, as a result of Speers’s concession, we need not address his second issue.

IV. MANDATORY SENTENCING SCHEME

In issue three, Speers argues the mandatory sentencing scheme in section 12.31 of the Texas Penal Code and article 37.071 of the Texas Code of Criminal Procedure violates the United States and Texas constitutions. *See* TEX. PENAL CODE ANN. § 12.31 (West Supp. 2015); TEX. CODE CRIM. PROC. ANN. art. 37.071 (West Supp. 2015). Specifically, he contends that these statutory provisions violate: (1) his right to (a) due process under the Fifth and Fourteen

Amendments to the United States Constitution and due course of law under article 1, section 19 of the Texas Constitution and (b) equal protection under the law as guaranteed by the Fourteenth Amendment to the United States Constitution and article 1, sections 3 and 3a of the Texas Constitution; (2) his right under article 2, section 1 of the Texas Constitution, requiring separation of powers; (3) his right to a trial by jury under article 1, section 10 of the Texas Constitution; and (4) the prohibition against cruel and unusual punishment in the Eighth Amendment to the United States Constitution and article 1, section 13 of the Texas Constitution. The State responds only to Speers's argument that the mandatory sentencing scheme violates the constitutional prohibition against cruel and unusual punishment. Nevertheless, Speers concedes that his constitutional arguments have been decided by the Texas Court of Criminal Appeals or our sister courts of appeals, but states he raises these arguments for the purpose of preserving his ability to file a petition for a writ of certiorari.

First, Speers's entire due process and due course of law argument states, "[Speers] would also argue that applying a mandatory life sentence in a case where a [d]efendant is only guilty as a party violates the due process and due course of law provisions of the U[nited] S[tates] and Texas [c]onstitutions."⁵ See U.S. CONST. amend. V, XIV; TEX. CONST. art. 1 § 19. Similarly, Speers's entire equal protection argument states, "the mandatory life sentence for capital murder when [a defendant] is guilty only as a party violates the equal protection clauses of both the U[nited] S[tates] and Texas [c]onstitutions."⁶ See U.S. CONST. amend. XIV; TEX. CONST. art. 1 §§ 3, 3a. Even if Speers's arguments were adequately briefed, it has already been determined by the Court of Appeals for the Fourteenth District at Houston that the mandatory life sentence for capital murder does not violate a defendant's due process rights. See *Laird v. State*, 933 S.W.2d

⁵ See TEX. R. APP. P. 38.1(i) (brief must contain clear and concise argument for contentions made with appropriate citations to authorities and to record).

⁶ *Supra* note 5.

707, 714–15 (Tex. App.—Houston [14th Dist.] 1996, pet. ref’d). We agree with the Court of Appeals for the Fourteenth District.

Second, Speers’s entire separation of powers argument states, “the mandatory life sentence also violates the separation of powers provision of the Texas Constitution.”⁷ *See* TEX. CONST. art. 2 § 1. Again, even if Speers’s argument was adequately briefed on appeal, it has already been determined by the Court of Appeals for the Fourteenth District at Houston that the mandatory life sentence for capital murder does not violate the separation of powers provision in article 2, section 1 of the Texas Constitution. *See Wilkerson v. State*, 347 S.W.3d 720, 723–24 (Tex. App.—Houston [14th Dist.] 2011, pet. ref’d) (concluding prosecutor’s election of mandatory life sentence under section 12.31 does not amount to violation of separation of powers doctrine). Once again, we agree with the Court of Appeals for the Fourteenth District.

Third, Speers makes a vague argument that the mandatory sentencing scheme in section 12.31 of the Texas Penal Code and article 37.071 of the Texas Code of Criminal Procedure violates his right to a trial by jury under article 1, section 10 of the Texas Constitution. *See* U.S. CONST. amend. VI; TEX. CONST. art. 1 § 10. Yet, he concedes that:

“[this] argument has been ruled against by the [Texas] Court of Criminal Appeals (and other [c]ourts), which has addressed whether the Texas Constitution requires ‘that the jury shall assess the punishment.’ [citation omitted.] The court held that ‘the fixing of the penalty by a jury’ is not ‘either implied or guaranteed’ by the Texas Constitution.”

The Texas Court of Criminal Appeals has already determined that the mandatory life sentence for capital murder does not violate the constitutional right to trial by jury because that right does not extend to the assessment of punishment. *See Allen v. State*, 552 S.W.2d 843, 847 (Tex. Crim. App. 1977) (no constitutional right to have jury assess punishment); *Lowery v. State*, 974 S.W.2d 936, 940 n.2 (Tex. App.—Dallas 1998, no pet.) (right to trial by jury at punishment

⁷ *Supra* note 5.

statutory right, not constitutional right); *Sterry v. State*, 959 S.W.2d 249, 257 (Tex. App.—Dallas 1997, no pet.) (no constitutional right to have jury assess punishment); *see also Watt v. State*, No. 03-97-00213-CR, 1999 WL 61207, at *4 (Tex. App.—Austin Feb. 11, 1999, pet. ref’d) (not designated for publication) (does not violate right to trial by jury because predetermining punishment for capital murder when death penalty waived provides maximum benefit defendant convicted of capital murder could receive).

Fourth, Speers argues the mandatory sentencing scheme in section 12.31 of the Texas Penal Code and article 37.071 of the Texas Code of Criminal Procedure violates the prohibition against cruel and unusual punishment in the Eighth Amendment to the United States Constitution and article 1, section 13 of the Texas Constitution. *See* U.S. CONST. amend. VIII; TEX. CONST. art. 1 § 13. In support of this contention, Speers argues: (a) the mandatory life sentence constitutes cruel and unusual punishment; (b) application of the mandatory life sentence when a defendant has been convicted under the law of parties constitutes cruel and unusual punishment; and (c) the textual difference between the Texas Constitution and United States Constitution “are not coextensive because of the different meanings of ‘and’ and ‘or.’” At the same time, he concedes that:

Texas courts have consistently held that the mandatory life sentence required under the [Texas] [C]ode of [C]riminal [P]rocedure is not unconstitutional as cruel and unusual punishment under the Eighth Amendment and article 1, section 13 of the Texas Constitution. . . . Nonetheless, in an effort to preserve error for a possible Writ of Certiorari to the United States Supreme Court . . . [he] re-urges the argument.

This Court is bound by the holdings of the Texas Court of Criminal Appeals. *See Smith v. State*, 683 S.W.2d 393, 409 (Tex. Crim. App. 1984) (rejecting Smith’s contention that section 12.31(a) violates the prohibition against cruel and unusual punishment in the United States and Texas constitutions because the United States Supreme Court has declared the death penalty constitutional); *see also Murkledove v. State*, 437 S.W.3d 17, 30 (Tex. App.—Fort Worth 2014,

pet. denied) (“Texas courts have consistently held that the mandatory life sentence required under section 12.31(a) of the penal code and article 37.071, section 1 of the code of criminal procedure is not unconstitutional as cruel and unusual punishment under the Eighth Amendment and article [1], section 13 of the Texas [C]onstitution.”); *Sierra v. State*, 157 S.W.3d 52, 64–65 (Tex. App.—Fort Worth 2004) (rejecting argument that mandatory life sentence for offense of capital murder constitutes cruel and unusual punishment within meaning of Eighth Amendment), *affirmed on other grounds*, 218 S.W.3d 85 (Tex. Crim. App. 2007); *Cienfuegos v. State*, 113 S.W.3d 481, 496 (Tex. App.—Houston [1st Dist.] 2003, pet. ref’d) (life sentence required by section 12.31(a) of penal code and article 37.071, section 1 of the code of criminal procedure does not constitute cruel or unusual punishment under Eighth Amendment or article 1, section 13 of the Texas Constitution); *Buhl v. State*, 960 S.W.2d 927, 935–36 (Tex. App.—Waco 1998) (mandatory life sentence does not constitute cruel and unusual punishment within meaning of Eighth Amendment).

Next Speers contends the mandatory life sentence for capital murder is unconstitutional when the defendant is convicted under the law of parties. However, once again, Speers concedes the Texas courts have consistently held the mandatory life sentence is not unconstitutional “when the defendant has been convicted of capital murder under the theory of party liability set forth in penal code section 7.02(b).” Indeed, our sister courts of appeals have concluded that the mandatory life sentence required under section 12.31(a) of the Texas Penal Code and article 37.071, section 1 of the Texas Code of Criminal Procedure is not unconstitutional as cruel and unusual punishment under the Eighth Amendment and article 1, section 13 of the Texas Constitution even when the defendant has been convicted of capital murder under the theory of party liability set forth in section 7.02 of the Texas Penal Code. *See Murkledove*, 437 S.W.3d at 30; *Cienfuegos*, 113 S.W.3d at 496 (life sentence required under section 12.31(a) does not

constitute cruel or unusual punishment under Eighth Amendment to United States Constitution or article 1, section 13 of Texas Constitution when defendant has been convicted of capital murder under section 7.02(b) of penal code); *see also Ladd v. State*, 3 S.W.3d 547, 573 (Tex. Crim. App. 1999) (death penalty not disproportionate in violation of Eighth Amendment for defendants who participate in crime and anticipate human life will be taken).

Also, Speers argues the mandatory life sentence for capital murder is unconstitutional under the Texas Constitution and “points [to] the textual difference between the Texas Constitution and U[nited] S[tates] Constitution to support his argument that the state and federal constitutional provisions are not coextensive because of the different meanings of ‘and’ and ‘or.’” *Compare* U.S. CONST. amend. VIII (cruel *and* unusual) *with* TEX. CONST. art. 1 § 13 (cruel *or* unusual). However, Speers concedes that he raises this argument:

[I]n an effort to preserve error for a possible Writ of Certiorari to the United States Supreme Court The Court of Criminal Appeals has rejected the argument that this distinction permits the Texas provision to be interpreted more expansively than the Eighth Amendment with respect to the constitutionality of capital punishment.

Again, we reiterate this Court is bound by the holdings of the Texas Court of Criminal Appeals. *See Cantu v. State*, 939 S.W.2d 627, 645 (Tex. Crim. App. 1997) (no significant difference between Eighth Amendment prohibition against cruel and unusual punishment and the Texas Constitution’s prohibition against cruel and unusual punishment).

Accordingly, as a result of his concessions, we need not address Speers’s third issue.

V. MOTION TO SUPPRESS

In issue four, Speers argues the trial court erred when it denied his motion to suppress his historical cell phone records. We note that Speers’s historical cell phone records were acquired by the State pursuant to a court order, not by a search warrant. He argues that: (1) the State

unconstitutionally obtained his records without a search warrant; and (2) the State obtained his historical cell phone records in violation of Texas statutory laws.

A. Standard of Review

An appellate court reviews a trial court's ruling on a motion to suppress evidence under a bifurcated standard. *See Turrubiate v. State*, 399 S.W.3d 147, 150 (Tex. Crim. App. 2013); *State v. Kerwick*, 393 S.W.3d 270, 273 (Tex. Crim. App. 2013); *Lloyd v. State*, 453 S.W.3d 544, 546 (Tex. App.—Dallas 2014, pet. ref'd). An appellate court reviews a trial court's factual findings for an abuse of discretion and the trial court's application of the law to the facts de novo. *See Turrubiate*, 399 S.W.3d at 150; *Lloyd*, 453 S.W.3d at 546. When the trial court does not issue findings of fact, findings that support the trial court's ruling are implied if the evidence, viewed in the light most favorable to the ruling, supports those findings. *See Turrubiate*, 399 S.W.3d at 150; *State v. Kelly*, 204 S.W.3d 808, 818–19 (Tex. Crim. App. 2006). Almost total deference is given to the trial court's implied findings, especially those based on credibility and demeanor. *See Turrubiate*, 399 S.W.3d at 150; *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010).

B. Constitutional Arguments

Speers argues the State unconstitutionally obtained his historical cell phone records from Metro PCS without a warrant. He contends that the State's warrantless acquisition of the records violated his constitutional rights under: (1) the Fourth Amendment's prohibition against unreasonable searches and seizures; and (2) article 1, section 9 of the Texas Constitution.

1. Fourth Amendment to the United States Constitution

Speers contends "the State's procurement of historical cell [phone] records from Metro PCS[,] without a search warrant[,] violated the Fourth Amendment's prohibition against unlawful searches and seizures." He urges this Court to follow the dissent in the San Antonio

Court of Appeals’s opinion in *Ford*. See *Ford v. State*, 444 S.W.3d 171, 201–03 (Tex. App.—San Antonio 2014) (Chapa, J., dissenting) [hereinafter *Ford I*]. The State concedes that it did not obtain a warrant and responds that this Court should follow the reasoning of the majority in *Ford I*. See *Ford I*, 444 S.W.3d at 187–91.

The record shows that the State filed a petition under article 18.21, section 5(a) with the municipal court, seeking the subscriber information and seven days of incoming and outgoing calls for a specific cell phone number. Speers was the subscriber for that number. The municipal court granted the State’s petition. During the trial, Speers filed a motion to suppress the historical cell phone records and the trial court denied his motion.

After this case was briefed and the appeal was submitted, the Texas Court of Criminal Appeals affirmed the San Antonio Courts of Appeals’s opinion in *Ford I*, holding that a defendant has no legitimate expectation of privacy in the historical cell phone records held by a third-party cell-phone company and the State’s receipt of four days of such information under article 18.21, section 5(a) does not violate the Fourth Amendment. See *Ford v. State*, 477 S.W.3d 321, 330–35 (Tex. Crim. App. 2015) [hereinafter *Ford II*], affirming 444 S.W.3d 171 (Tex. App.—San Antonio 2014). Accordingly, we conclude that the State’s warrantless acquisition of the historical cell phone records did not violate Speers’s constitutional rights under the Fourth Amendment.⁸

2. Article 1, Section 9, of the Texas Constitution

Speers further asserts the State obtained his historical cell phone records in violation of article 1, section 9 of the Texas Constitution. Relying on *Richardson*, he argues the Texas Court

⁸ We note that the Texas Court of Criminal Appeals “acknowledge[d] that Fourth Amendment concerns might be raised if long-term location information were acquired, if real-time location information were used to track the present movements of individuals in private locations, if the data involved came from GPS rather than cell-phone towers, or if the data acquired were content information rather than location data.” See *Ford II*, 477 S.W.3d at 334. However, Speers does not argue that the historical cell phone records in this case falls into any of those categories.

of Criminal Appeals has acknowledged that society has recognized as objectively reasonable the expectation of the customer that telephone numbers dialed will not be published to the rest of the world. *See Richardson v. State*, 865 S.W.2d 944, 951–52 (Tex. Crim. App. 1993). Speers claims that the case before us is distinguishable from the facts in *Ford I*. *See Ford I*, 444 S.W.3d at 191 (Ford failed to preserve issue for appeal because written motion and oral argument made no mention of rights under Texas Constitution), *affirmed on other grounds*, 477 S.W.3d at 321 n.1 (issue that cell-tower data, conveyed from phone involuntarily, is public information under third-party record doctrine was improvidently granted because Ford failed to preserve issue for appeal since written motion and oral argument made no mention of rights under Texas Constitution). In his brief on appeal, Speers does not argue he was harmed by this alleged constitutional error. Although the State addresses the inapplicability of *Richardson* to the Fourth Amendment, the State does not respond to Speers’s argument based on the Texas Constitution. Assuming, without deciding, there was error, we must consider whether it was harmful constitutional error. *See Werner v. State*, 412 S.W.3d 542, 547 (Tex. Crim. App. 2013) (neither defendant nor State bears burden of demonstrating harm); *Schutz v. State*, 63 S.W.3d 442, 444 (Tex. Crim. App. 2001) (neither the State nor appellant must demonstrate harm when an error has occurred; it is appellate court’s duty to assess harm); *Taylor v. State*, 93 S.W.3d 487, 503 (Tex. App.—Texarkana 2002, pet. ref’d) (noting parties may suggest how such harm is shown or not shown).

a. Constitutional Error Harm Analysis

Pursuant to rule 44.2(a), “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 . . . unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction.” TEX. R. APP. P. 44.2(a). A constitutional error within the meaning

of Texas Rule of Appellate Procedure 44.2(a) is an error that directly offends the United States Constitution or the Texas Constitution, without regard to any statute or rule that also might apply. *See Dang v. State*, 202 S.W.3d 278, 280 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

In performing this analysis, an appellate court considers the entire record as well as the following factors: (1) the nature of the error; (2) the extent it was emphasized by the State; (3) the probable implications of the error; and (4) the weight a juror or fact-finder would probably place on the error. *See Snowden v. State*, 353 S.W.3d 815, 821–22 (Tex. Crim. App. 2011). These factors are not exclusive and other considerations may logically inform an appellate court’s constitutional harm analysis. *See Snowden*, 353 S.W.3d at 821–22. “At bottom, an analysis for whether a particular constitutional error is harmless should take into account any and every circumstance apparent in the record that logically informs an appellate determination whether ‘beyond a reasonable doubt [that particular] error did not contribute to the conviction or punishment.’” *Snowden*, 353 S.W.3d at 822 (quoting TEX. R. APP. P. 44.2(a)). Constitutional error does not contribute to the conviction or punishment if the conviction and punishment would have been the same even if the erroneous evidence had not been admitted. *See Clay v. State*, 240 S.W.3d 895, 904–05 (Tex. Crim. App. 2007).

b. Application of the Law to the Facts

Assuming, without deciding, the trial court erred, the nature of the alleged constitutional error was the erroneous admission of evidence, i.e., the historical cell phone records. These records were contained in two exhibits. The first of these exhibits was a call log for a specific cell phone number from February 16, 2012 through February 24, 2012, showing: (1) the date, time, and duration of the calls; (2) the direction—outgoing or incoming—of the calls; (3) the number dialed and destination number; (4) the status of the call—answered or unanswered; (5) any special featured used; (6) the caller ID; and (7) the beginning and ending switch, sector, and

tower. The second exhibit was the Metro PCS subscriber information, identifying Speers as the subscriber for that cell phone number.

Next, we examine the extent to which the State emphasized the alleged constitutional error. During closing argument, the State commented on the historical cell phone records. The State's closing argument noted that the historical cell phone records corroborated the testimony of witnesses, showing that Speers and Mangiafico were both in the area of Easterling's house approximately thirty minutes before his death, and the defense wanted them to "ignore the corroboration." Also, the State asserted that "those phone conversations are very important" for that reason. Specifically, with respect to the historical cell phone records, the State argued:

Remember I told you [that] you can judge a person's credibility once they start talking. The law says you can believe all of what a person says, some of what a person says, or none of what a person says. But guess what, not only did we bring you witnesses, we also brought you other corroborating details about what those witnesses said. We brought you cell phone records that tell you this defendant and his buddy were in the same area around 30 minutes before the murder occur[ed]. Right around the corner from Mr. Easterling's home. Those are items, pieces to the puzzle that helps [sic] you get beyond a beyond a reasonable doubt.

....

And something has to happen very quickly because this well is about to run dry.

And what do [Speers and Delorme] do, they get with [Mangiafico]. And you can get the phone records and see the conversations back and forth, now we are at the during [sic]. The conversation that happened during that late time in February 16, and the early morning hours to February 17, those phone conversations are very important. . . .

. . . . Those phone records put [] Speers at that gas station, approximately a mile away from [] Easterling's home at about midnight with [Mangiafico]. You can go back and look at [Mangiafico's] cell phone record[s]. They are pinging off the same cell phone tower at that same time. Because they are both getting ready to go rob [] Easterling.

....

The Defense Attorney wants you to ignore the corroboration, the fact that their cell phones are pinging right near the location of this Garland gas station that is so close to Mr. Easterling's home.

Finally, we consider the probable implications of the alleged constitutional error and the probable weight a juror would place on the alleged evidence that was admitted in violation of the Texas Constitution. Speers's historical cell phone records were cumulative of the testimony of Haynes and Frazier, as well as the historical cell phone records of Mangiafico, which were also admitted into evidence. Any error by the trial court in admitting Speers's historical cell phone records would not have adversely affected the integrity of the jury's deliberations or contributed to his conviction.

Based on the record, we conclude beyond a reasonable doubt that the admission of the historical cell phone records did not contribute to Speers's conviction. Accordingly, we conclude that assuming, without deciding, the trial court erred when it denied Speers's motion to suppress because the State's procurement of his historical cell phone records allegedly violated his rights under article 1, section 9 of the Texas Constitution, that alleged constitutional error was harmless.

B. Statutory Arguments

Speers raises two statutory arguments as to the manner in which the State obtained his historical cell phone records from Metro PCS. He argues: (1) the State's petition to the municipal court did not comply with article 18.21 of the Texas Code of Criminal Procedure⁹

⁹ Article 18.21, section 4, of the Texas Code of Criminal Procedure provides, in part:

(b) An authorized peace officer may require a provider of an electronic communications service or a provider of a remote computing service to disclose only electronic consumer data that is information revealing the identity of customers of the applicable service or information about a customer's use of the applicable service, without giving the subscriber or customer notice:

....
(5) by obtaining a court order under Section 5[.]

TEX. CODE CRIM. PROC. ANN. art. 18.21 § 4(b)(5) (West Supp. 2015).

Article 18.21, section 5, of the Texas Code of Criminal Procedure states, in part:

(a) A court shall issue an order authorizing disclosure of contents, records, or other information of a wire or electronic communication held in electronic storage if the court determines that there is reasonable belief that the information sought is relevant to a legitimate law enforcement inquiry.

TEX. CODE CRIM. PROC. ANN. art. 18.21 § 5(a).

because the petition failed to provide specific articulable facts supporting the State’s reason to believe the information sought was relevant to a legitimate law enforcement inquiry; and (2) the evidence should have been excluded under article 38.23(a) of the Texas Code of Criminal Procedure¹⁰ because the State’s petition was “not authorized” by article 18.21, section 5. In his brief on appeal, Speers does not argue he was harmed by this alleged non-constitutional error. The State does not respond to these statutory arguments, focusing instead on Speers’s Fourth Amendment constitutional argument. Even if there was non-constitutional error, we must consider whether it was harmful. *See Werner*, 412 S.W.3d at 547 (neither defendant nor State bears burden of demonstrating harm); *Schutz*, 63 S.W.3d at 444 (neither the State nor appellant must demonstrate harm when an error has occurred; it is appellate court’s duty to assess harm); *Taylor*, 93 S.W.3d at 503 (noting parties may suggest how such harm is shown or not shown).

1. Non-Constitutional Error

Pursuant to rule 44.2(b), “Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.” TEX. R. APP. P. 44.2(b). A substantial right is affected if the error had a substantial and injurious effect or influence in determining the jury’s verdict. *See Barshaw v. State*, 342 S.W.3d 91, 93–94 (Tex. Crim. App. 2011); *Coble v. State*, 330 S.W.3d 253, 280 (Tex. Crim. App. 2010); *Haley v. State*, 173 S.W.3d 510, 518 (Tex. Crim. App. 2005). If the error did not influence the jury or had but a slight effect, the error is harmless. *See Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998). An appellate court should examine the record as a whole when conducting a harm analysis. *See Motilla v. State*, 78 S.W.3d 352, 358 (Tex. Crim. App. 2002). In conducting the harm analysis, an appellate court should

¹⁰ Article 38.23(a) of the Texas Code of Criminal Procedure states:

(a) No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (West 2005).

consider everything in the record, including any testimony or physical evidence admitted for the jury's consideration, the trial court's instructions to the jury, the State's theory, any defensive theories, closing arguments, and even voir dire, if material to the appellant's claim. *See Motilla*, 78 S.W.3d at 355–56; *Morales v. State*, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000). In assessing harm, the factors to be considered are the nature of the evidence supporting the verdict, the character of the alleged error, and how the evidence might be considered in connection with the other evidence in the case. *See Motilla*, 78 S.W.3d 355; *Morales*, 32 S.W.3d at 867. Also, an appellate court should consider overwhelming evidence of guilt, but it is only one factor in the harm analysis. *See Motilla*, 78 S.W.3d 357.

2. Application of the Law to the Facts

Even if the trial court erred when it denied Speers's motion to suppress, we must consider whether that alleged non-constitutional error harmed Speers. We have already concluded that any alleged error in the admission of Speers's historical cell phone records did not amount to constitutional harm. However, we also note the following with respect to the non-constitutional harm analysis.

First, we examine the evidence admitted for the jury's consideration. *See Motilla*, 78 S.W.3d at 355–56; *Morales*, 32 S.W.2d at 867. There was evidence that Speers was Easterling's caregiver and resided with Easterling before Beaseley told Speers he had to move out of Easterling's house shortly before Easterling's death. Also, on or before the day of Easterling's death, Speers and Delorme asked Frazier to go to Easterling's house with them because they needed an alibi or witness. According to Frazier, while on his cell phone, Speers told Mangiafico that he better have Speers's half of the money when he returned and Speers stated that there had been a robbery that went wrong because Easterling had fought for his life, Mangiafico stabbed Easterling nineteen times, and Mangiafico had taken all the tools and

electronics out of the house. After Easterling's death, Jonathan Scott testified he heard Speers tell Mangiafico that some of the tools Speers was unloading from a car, which matched the description of Easterling's car, were his and "[Mangiafico] should go back because, there w[ere] more tools there." In addition, Jonathan Scott testified he saw Mangiafico give Speers a "stack of bills," heard Speers comment on the value of the car, saw a stack of credit cards, and heard Mangiafico and Speers discussing which credit card they thought might have an amount available that would enable them to make certain purchases. At the Scotts' house, Haynes said that she overheard a private conversation about credit cards and drugs between Speers and Mangiafico, and she saw Speers give Mangiafico some credit cards with Easterling's name on them and an I.D. Speers asked Frazier and Haynes to "run" some credit cards with Easterling's name on them. When Haynes had trouble running one of the credit cards, Speers called the bank, identified himself as Easterling, provided the necessary information, and had the credit card reactivated. Further, Frazier saw Mangiafico in Easterling's car and Speers told her that Easterling's car was for sale for \$2,500.

Second, we review the trial court's instructions to the jury. *See Motilla*, 78 S.W.3d at 355–56; *Morales*, 32 S.W.2d at 867. The application section of the jury charge instructed the jury as to the offense of capital murder under three theories: (1) Speers acted as a principal; (2) Speers was a party to the murder because he promoted or assisted Mangiofico in the commission of the offense; and (3) Speers was a party to the murder because he conspired with Mangiafico to commit robbery. *See* TEX. PENAL CODE ANN. §§ 19.03(a)(2) (capital murder), 7.02(a)(2) (promote or assist), (b) (conspiracy) (West 2011 & Supp. 2015). In addition, the application section instructed the jury on the lesser included offenses of aggravated robbery and robbery under the theory that Speers promoted or assisted Mangiafico in the offense.

Third, we review the State's theory, Speers's defensive theory, and the closing arguments of counsel. *See Motilla*, 78 S.W.3d at 355–56; *Morales*, 32 S.W.2d at 867. The State's theory at trial was that Speers planned to rob Easterling with Mangiafico and that robbery went wrong resulting in Easterling's death. Speers's defensive theory was that there was no evidence of a plot to rob Easterling or that he used Easterling's credit cards after his death and the only evidence of Speers's involvement came from the prostitutes, drug users, and thieves who used Easterling's credit cards. During closing argument, Speers's defense counsel argued that Speers did not kill Easterling and there was no evidence of a plan or conspiracy to commit a robbery. Defense counsel did not address the historical cell phone records. During the State's closing argument, it focused on Speers's liability as a party, pointing to evidence before, during, and after Easterling's death to show he aided in the offense. The State did discuss the historical cell phone records, arguing they were important because they corroborated the witnesses' testimony.

After reviewing all the evidence admitted for the jury's consideration, the trial court's instructions to the jury, the State's theory, the defense's theory, and the parties' closing arguments, we conclude that even if there was error because the State obtained his historical cell phone records in violation of Texas statutory laws, that alleged non-constitutional error was harmless.

D. Conclusions

We conclude the trial court did not err when it denied Speers's motion to suppress because the State's acquisition of his historical cell phone records did not violate his right under the Fourth Amendment to the United States Constitution. Also, assuming, without deciding, the trial court erred when it denied Speers's motion to suppress because the State's procurement of his historical cell phone records violated his rights under article 1, section 9 of the Texas Constitution, that alleged constitutional error was harmless. Finally, we conclude that, even if

the trial court erred when it denied Speers's motion to suppress because the State obtained Speers's historical cell phone records in violation of article 18.21, section 5 of the Texas Code of Criminal Procedure and the evidence should have been excluded under article 38.23(a), that alleged non-constitutional error was harmless.

Issue four is decided against Speers.

VI. JURY CHARGE

In issue five, Speers argues he suffered egregious harm when the trial court included an instruction in the jury charge on party liability and did not "make clear the jury had to find unanimously on at least one statutory offense." He claims the trial court incorrectly submitted separate offenses in the disjunctive. Although Speers does not expressly acknowledge that he failed to raise an objection on this basis at trial, he does argue that he suffered egregious harm, which is the standard applied when the defendant fails to object or states that he has no objection to the jury charge.¹¹ The State responds that Speers did not object to the jury charge, but argues there is no need to determine whether he suffered egregious harm because there was no error. Assuming, without deciding, there was jury charge error, we review the alleged error for egregious harm.

A. Egregious Harm

Article 36.19 of the Texas Code of Criminal Procedure establishes the standard for reversal on appeal when the requirements of article 36.14, which relates to the charge of the court, have been disregarded: "the judgment shall not be reversed unless the error appearing from the record was calculated to injure the rights of [the] defendant, or unless it appears from

¹¹ The record shows that Speers filed a written pretrial motion objecting to the inclusion of an instruction that the jury may convict him as a conspirator under Texas Penal Code 7.02(b) because it violates his constitutional rights by dispensing with the intent required to commit capital murder. The trial court denied that pretrial motion by written order. During the charge conference, Speers reurged his pretrial motion and made an additional objection to "the language in the transitions between the charged offense and the lesser included offenses where it says that [the jury] must acquit [Speers] of the greater offense before proceeding to the lesser offense." The trial court overruled this additional objection.

the record that the defendant has not had a fair and impartial trial.” TEX. CODE CRIM. PROC. ANN. art. 36.19 (West 2006). Under *Almanza*, jury charge error requires reversal of the judgment when the defendant has properly objected to the charge and the appellate court finds “some harm” to his rights. See *Marshall v. State*, PD-0509-14, 2016 WL 146450, at *2 (Tex. Crim. App. Jan. 13, 2016); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984). When the defendant fails to object or states that he has no objection to the jury charge, an appellate court will not reverse for jury charge error unless the record shows “egregious harm” to the defendant. See *Marshall*, 2016 WL 146450, at *2; *Ngo v. State*, 175 S.W.3d 738, 743–44 (Tex. Crim. App. 2005).

Egregious harm is a difficult standard to prove and such a determination must be done on a case-by-case basis. See *Marshall*, 2016 WL 146450, at *2; *Taylor v. State*, 332 S.W.3d 483, 489 (Tex. Crim. App. 2011). The actual degree of harm must be assayed in light of: (1) the entire jury charge; (2) the state of the evidence; (3) the argument of counsel; and (4) any other relevant information revealed by the record of the trial as a whole. See *Marshall*, 2016 WL 146450, at *2; *Allen v. State*, 253 S.W.3d 260, 264 (Tex. Crim. App. 2008); *Almanza*, 686 S.W.2d at 171. Errors which result in egregious harm are those that affect the very basis of the case, deprive the defendant of a valuable right, vitally affect the defensive theory, or make a case for conviction clearly and significantly more persuasive. See, e.g., *Marshall*, 2016 WL 146450, at *2; *Taylor*, 332 S.W.3d at 490.

B. Application of the Law to the Facts

Initially, we review the entire jury charge. As previously discussed, the application section of the jury charge instructed the jury as to the offense of capital murder under three theories: (1) Speers acted as a principal; (2) Speers was a party to the murder because he promoted or assisted Mangioficio in the commission of the offense; and (3) Speers was a party to

the murder because he conspired with Mangiafico to commit robbery. *See* TEX. PENAL CODE ANN. §§ 19.03(a)(2) (capital murder), 7.02(a)(2) (promote or assist), (b) (conspiracy). In addition, the application section instructed the jury on the lesser included offenses of aggravated robbery and robbery under the theory that Speers promoted or assisted Mangiafico in the offense.

Next, we review the state of the evidence. We have already examined the evidence admitted for the jury's consideration when we assumed, without deciding, the trial court erred when it admitted the historical cell phone records because the State obtained those records in violation of Texas statutory laws and determined that the alleged non-constitutional error was harmless.

Finally, we review the argument of counsel. Again, we have already examined the argument of counsel on two occasions. Initially, when we assumed without deciding the trial court erred when it admitted the historical cell phone records because the State obtained them in violation of the Texas Constitution and determined that the alleged constitutional error was harmless. Then, again when we assumed, without deciding, the trial court erred when it admitted the historical cell phone records because the State obtained those records in violation of Texas statutory laws and determined that the alleged non-constitutional error was harmless.

Having reviewed the entire record, we conclude that assuming, without deciding, there was jury charge error, Speers did not suffer egregious harm. Issue five is decided against Speers.

VII. SUFFICIENCY OF THE EVIDENCE

In issue six, Speers argues the evidence was insufficient to support his conviction. He contends there is no evidence to support the theory that he conspired with Mangiafico to rob or kill Easterling. The State responds that the evidence is sufficient to support Speers's conviction for capital murder.

A. Standard of Review

When reviewing the sufficiency of the evidence, an appellate court considers all of the evidence in the light most favorable to the verdict to determine whether the jury was rationally justified in finding guilt beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979); *Merritt v. State*, 368 S.W.3d 516, 525 (Tex. Crim. App. 2012); *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010) (plurality op.). Appellate courts are required to determine whether any rational juror could have found the essential elements of the offense beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319; *Brooks*, 323 S.W.3d at 902 n.19. An appellate court is required to defer to the jury’s credibility and weight determinations because the jury is the sole judge of the witnesses’ credibility and the weight to be given to their testimony. *See Jackson*, 443 U.S. at 319, 326; *Merritt*, 368 S.W.3d at 525; *Brooks*, 323 S.W.3d at 899. All evidence, whether properly or improperly admitted, will be considered when reviewing the sufficiency of the evidence. *See McDaniel v. Brown*, 558 U.S. 120 (2010) (per curiam); *Lockhart v. Nelson*, 488 U.S. 33, 41–42 (1988); *Jackson*, 443 U.S. at 319.

A verdict of guilt will be upheld if the evidence is sufficient on any one of the theories submitted. *See Sorto v. State*, 173 S.W.3d 469, 472 (Tex. Crim. App. 2005); *Swearingen v. State*, 101 S.W.3d 89, 95 (Tex. Crim. App. 2003). When a defendant fails to challenge the sufficiency of the evidence to support an independent theory of guilt, he presents no error. *See Kitchens v. State*, 823 S.W.2d 256, 259 (Tex. Crim. App. 1981).

B. Applicable Law

Texas Penal Code section 19.03(a)(2) provides that a person commits capital murder if the person commits murder, as defined under section 19.02(b)(1) (intentionally or knowingly causing the death of an individual), and the person intentionally commits the murder in the course of committing or attempting to commit a robbery. TEX. PENAL CODE ANN. § 19.03(a)(2).

Texas Penal Code Chapter 7 sets forth the various ways in which a person can be criminally responsible for the conduct of another. *See* TEX. PENAL CODE ANN. § 7.01–7.03. A person can be criminally responsible if he acts “with intent to promote or assist the commission of the offense” and in doing so “solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense.” TEX. PENAL CODE ANN. § 7.02(a)(2). Alternatively, a person can be criminally responsible if:

[I]n the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators . . . if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.

TEX. PENAL CODE ANN. § 7.02(b).

C. Application of the Law to the Facts

The trial court’s charge authorized the jury to convict Speers of capital murder on any of three theories of capital murder: (1) as a principal; (2) as a party because he promoted or assisted Mangioficio in the commission of the offense; and (3) as a party because he conspired with Mangiaficio to commit robbery. Because the trial court’s charge authorized the jury to convict on alternative grounds, the jury’s verdict of guilt will be upheld if the evidence was sufficient on any one of the theories. As a result, to obtain relief on sufficiency of the evidence grounds, Speers must challenge all alternate theories submitted to the jury. *See Sorto*, 173 S.W.3d at 472; *Swearingen*, 101 S.W.3d at 95. However, Speers does not challenge the sufficiency of the evidence as to the theories that he acted as a principal or that he was as a party because he promoted or assisted Mangioficio in the commission of the offense. As a result, because Speers does not contest the sufficiency of the evidence to prove the two alternate theories charged for capital murder, he presents no error for our review. *See Kitchens*, 823 S.W.2d at 259.

Issue six is decided against Speers.

VIII. CONCLUSION

As a result of Speers's concessions on appeal, we need not address his issues complaining (1) the trial court erred when it denied his motion to quash; (2) the trial court erred when it denied his motion to exclude evidence; and (3) the mandatory sentencing scheme in section 12.31 of the Texas Penal Code and article 37.071 of the Texas Code of Criminal Procedure violate violates the United States and Texas constitutions. We conclude the trial court did not err when it denied Speers's motion to suppress because the State's acquisition of his historical cell phone records did not violate his rights under the Fourth Amendment to the United States Constitution. Also, assuming, without deciding, the trial court erred when it denied Speers's motion to suppress because the State's procurement of his historical cell phone records violated his rights under article 1, section 9 of the Texas Constitution, that alleged constitutional error was harmless. Further, we conclude that, even if the trial court erred when it denied Speers's motion to suppress because the State obtained Speers's historical cell phone records in violation of article 18.21, section 5 of the Texas Code of Criminal Procedure and the evidence should have been excluded under article 38.23(a), that alleged non-constitutional error was harmless. In addition, we conclude that assuming, without deciding, there was jury charge error, Speers did not suffer egregious harm. Finally, we conclude that because Speers does not contest the sufficiency of the evidence to prove the two alternate theories charged for capital murder, he presents no error for our review.

The trial court's judgment is affirmed.

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/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

MARK ANTHONY SPEERS, Appellant

No. 05-14-00179-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 194th Judicial District
Court, Dallas County, Texas

Trial Court Cause No. F-1227999-M.

Opinion delivered by Justice Lang. Justices
Evans and Whitehill participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 10th day of March, 2016.