Affirmed as modified; Opinion Filed October 24, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00182-CR
No. 05-16-00183-CR

WALDRICK BROOKS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 282nd Judicial District Court
Dallas County, Texas
Trial Court Cause Nos. F14-70150-S & F15-00333-S

MEMORANDUM OPINION

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

In a single proceeding in the trial court, appellant Waldrick Brooks pleaded not guilty to aggravated sexual assault in trial court cause number F14-70150-S and aggravated robbery in trial court cause number F15-00333-S. A jury found appellant guilty in both cases and assessed punishment at fifty years' imprisonment and a $10,000 fine in trial court cause number F14-70150-S and twenty years' imprisonment in trial court cause number F15-00333-S.

In four issues on appeal, appellant asserts (1) the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by "failing to turn over evidence that could have been used to impeach the complaining witness and/or formulate a new trial strategy"; (2) "it was known to the State that the complaining witness's evidence contained perjured testimony regarding the *Brady* material";

(3) in the alternative, that evidence "should be considered newly discovered"; (4) the trial court erred by admitting evidence of extraneous offenses during the guilt/innocence phase of trial over appellant's objections under Texas Rules of Evidence 403 and 404(b), *see* TEX. R. EVID. 403, 404(b); (5) the trial court erred "by not hearing from actual jurors to determine whether they had received evidence from outside source(s) during punishment deliberation"; and (6) "the appellate court should correct the appellant's judgment to correctly reflect the jury's verdict" in trial court cause number F15-00333-S.

We decide in favor of appellant on his request to modify the judgment in trial court cause number F15-00333-S. Appellant's remaining issues are decided against him. We (1) affirm the trial court's judgment in trial court cause number F14-70150-S and (2) modify the judgment in trial court cause number F15-00333-S as described below and affirm that judgment as modified.

I. FACTUAL AND PROCEDURAL CONTEXT

The indictment in trial court cause number F14-70150-S alleged in part that in approximately September 2013, appellant (1) "cause[d] penetration of the female sexual organ of [E.H.], hereinafter called the complainant, without the consent of the complainant, by means of . . . the sexual organ of said defendant" and (2) by acts and words, placed E.H. in fear that "death, serious bodily injury, and kidnapping" would be imminently inflicted on her and threatened to cause such.[1] The indictment in trial court cause number F15-00333-S alleged in part that during that same time period, appellant, while in the course of committing theft of property, "threaten[ed] and place[d] [E.H.] in fear of imminent bodily injury and death" and "used and exhibited a deadly weapon, to-wit: a firearm."

[1] We refer to the victims of the alleged sexual assaults described in this opinion by their initials. *See Doyal v. State*, Nos. 05-14-00943-CR & 05-14-00944-CR, 2016 WL 447528, at *1 n.1 (Tex. App.—Dallas Feb. 4, 2016, no pet.) (mem. op., not designated for publication).

Prior to trial, appellant filed a "Written Objection to Admissibility of Extraneous Offenses, Request for Procedural Determination by Trial Court with Findings of Fact and Conclusions of Law, and for Limiting Instruction." Therein, appellant objected to the admission of "extraneous offense evidence" under Texas Rules of Evidence 401, 402, 403, and 404(b), and requested that the State be required to "prove such evidence has relevance other than proving the character of the Defendant, or suggesting that he acted in conformance with a criminal propensity." During a pretrial hearing, the trial court stated that "motion" was granted as to requiring a prior "procedural determination" respecting such evidence. Shortly after that pretrial hearing, appellant's trial counsel withdrew and appellant was appointed new counsel.

Several months later, appellant filed a pretrial "Motion to Exclude Evidence" in which he (1) stated he "is charged in six separate indictments with alleged conduct arising from three or more incidents," including two cases of aggravated sexual assault involving two different victims and four cases of aggravated robbery involving the same two victims as the aggravated sexual assault cases as well as two other victims, and (2) argued "evidence relating to any similar incident other than the incident in which [he] is on trial would be extraneous conduct that should not be admitted." Additionally, on that same date, appellant filed a motion in limine respecting several matters. Section "B" of that motion in limine was titled "Extraneous Offenses" and stated in part that appellant "further requests that the [trial court] enter an order instructing the State, its agents, its employees and its witnesses not to mention, allude to or refer to, in any manner, any extraneous offenses by the Defendant in this cause in the presence of the jury."

During a pretrial hearing on those two motions, appellant contended the admission of evidence respecting the other "incidents" described in his motion to exclude evidence would violate rules of evidence 403 and 404(b) because those other incidents are not "similar enough or close enough that all of these incidences should be able to be brought up in the trial on one of the

cases." Then, as to section "B" of appellant's motion in limine, (1) counsel for appellant stated in part "everything else that we've talked about already; that's all we're dealing with," and (2) the trial court stated in part, "All right. . . . Section B is covered in your defendant's motion to exclude evidence." At a subsequent pretrial hearing, the trial court granted a motion by the State to allow evidence respecting the "incidents" described above, denied appellant's motion to exclude evidence, and stated in part, "Section B, the extraneous offenses, I believe my ruling spoke to that." Also, the trial court granted appellant a "running objection" as to "those motions."

During opening statements at trial, counsel for appellant stated in part (1) "the evidence in this case is going to show that the big problem with the State's case, as far as the sexual assault, has to do with consent," and (2) "the evidence is going to show throughout this case . . . that [appellant], online, made a deal with [E.H.] to have sex for money."

E.H. testified that at approximately 11 p.m. on the date of the events in question, she was walking alone from a friend's apartment near the Southwest Center Mall to a nearby hotel where she was staying. She stated that as she walked on a sidewalk along Chesterfield Drive near an entrance to the Canterbury Apartments, she saw appellant walking towards her. He was wearing a gray pullover, dark-colored shorts or pants, and a black or navy-blue backpack. After appellant passed by her, she heard him "say something" to her to get her attention. She kept walking. She testified that "not even a minute after," she heard footsteps behind her. She stated that as she turned around, appellant "was already behind me with an object to my back." According to E.H., the object was "hard" and "felt like metal."

E.H. testified appellant told her not to say anything and made her walk down a nearby trail that led from the sidewalk toward an area with trees and a "dried up creek bed." The area was dark and she saw no other people. When they got to the creek bed area, appellant pushed the hard object to her head and told her to get on her knees. E.H. stated she complied because she

believed appellant was holding a gun to her head and she was scared. She stated she had heard that "Canterbury" had a "reputation for crime" and she did not want to be killed. She testified appellant opened a condom, "put[] protection on," and lifted up her dress. Then, without her consent, he inserted his penis into her vagina from behind. She testified appellant had one hand around the lower part of her jaw and his other hand was holding the object described above against her head. The assault lasted approximately three minutes. E.H. stated appellant was "calm" during the assault, which led her to believe "he had done it before." Afterward, appellant told her to count to 300 before she moved. Then, appellant took her cell phone and approximately $27 that had fallen out of her bra during the assault and "ran off." E.H. testified she was scared and "mostly in shock." She began counting and stopped when she could no longer hear appellant running. At that point, she got up, adjusted her dress, and walked to the hotel where she was staying. She stated she did not call 9-1-1 because she was "still in shock" and "didn't believe anything could be done about it."

During E.H.'s testimony, State's Exhibits 5, 6, 7, and 8 were admitted into evidence. Those exhibits consisted of aerial and ground-level photographs that E.H. testified showed the area where the events described above occurred. State's Exhibit 7 consisted of a full-color, ground-level photograph that depicted a creek bed with a drop of at least several feet, surrounded by sloping ground with grass and trees. E.H. testified that photograph showed the area where appellant told her to get on her knees.

Additionally, E.H. testified that approximately a month later, a police detective called her boyfriend's cell phone and asked to speak to her. The detective asked her if someone had taken her cell phone. After that call, E.H. went to the police station and told police about the events described above. Also, she was shown a photographic lineup and identified appellant as the person who had assaulted her and stolen her personal property.

Jaclyn Watkins testified that at the time of the events in question she was the property manager at Brandon Mill Apartments, which are located near the Southwest Center Mall. Watkins testified her job included communicating regularly with several Dallas police officers who patrolled the area, including Detective Eric Lightle. In late September 2013, Watkins was "walking the property" to collect unpaid rent. She saw appellant in a second-floor breezeway and "said something to him." According to Watkins, at that point, appellant "ducked down and hid from me as if he didn't want me to see him." Watkins asked appellant what he was doing and whether he lived in the complex. She stated he told her he did not live on the property, but he knew someone who lived in apartment 512 and he was "waiting on a ride."

Watkins testified that about three weeks later, she again saw appellant at the apartment complex near the leasing office. She immediately called Lightle, who was on the property, and asked him to "do a criminal trespass" on appellant so he "could not be out on my property walking around." As Lightle approached appellant and stated that he wanted to talk to him, appellant "just took off running." Watkins testified Lightle chased appellant through the complex. She stated appellant fell in a muddy area near the pool, but quickly got up and continued running. Watkins thought appellant might be heading to apartment 512, so she cut through one of the buildings and went directly to building five. She reached it before Lightle and saw appellant walk up the back set of stairs "very slow and quiet" and enter apartment 512. Lightle and several other officers knocked on the door to that apartment and waited outside, but did not enter. Watkins stated that a short time later, appellant answered the door wearing different clothing.

Lightle testified that on the date of the chase described above, he was working an off-duty security job at Brandon Mill Apartments. He stated he spoke with Watkins that morning prior to her call to him. At that time, Watkins told him there had been two sexual assaults at the

complex days before and gave him a description of the person believed to have been involved. A short time later, Watkins called him and told him she had seen a person matching that description near the leasing office. Lightle went to the leasing office and the chase described above ensued. Lightle stated that when he knocked on the door to apartment 512, appellant called through the door, "I'll be there in a second." About twenty seconds later, appellant opened the door wearing different clothing. Appellant asked why the police were there and stated he had been playing video games. Appellant was arrested for "evading" and taken into police custody.

Detective Brandi Kramer of the Dallas Police Department testified she secured a search warrant for apartment 512 of the Brandon Mill Apartments following the chase described above. Kramer stated that inside the apartment, there were "fresh clumps" of mud on the floor and muddy clothing in the washer. A black backpack found inside the apartment contained a clutch purse, which contained several cell phones. Additionally, (1) in other areas of the apartment, police found several more cell phones and shoe boxes containing unopened condoms and torn pieces of condom wrappers, and (2) in the closet in a child's bedroom, police found a pair of muddy, adult-sized shoes.

Randy Penn testified that at the time of the events in question, he was a detective with the Dallas Police Department. He stated he performed an analysis of the data on seven cell phones found in the search described above. He determined that one of those phones belonged to E.H. and another belonged to another witness in this case, B.W.

Detective Todd Haecker of the Dallas Police Department testified he interviewed appellant after he was taken into police custody as described above. A video recording of that interview was admitted into evidence. Further, Haecker stated he contacted E.H. through her boyfriend based on data from her cell phone and investigated the offense in question. He stated he found no criminal history or indications of involvement in prostitution respecting E.H. and

"felt she was true and she was genuine." Also, he testified (1) it is not uncommon "for someone not to report being raped" and (2) the distance between where E.H. was assaulted and where appellant lived is approximately 1.3 miles.

B.W. testified that in late 2013, she had recently been released from jail for "failure to ID" and was living in Dallas. She stated she advertised on a website called "Backpage" to arrange "dates" at which men sometimes paid her money for sex. On October 14, 2013, she arranged a "date" at Brandon Mill Apartments with a man she had never seen or met. When she arrived at the apartment complex at approximately 11 a.m., she saw no one at the location where they had arranged to meet. As B.W. walked toward a covered area to get out the rain, appellant passed by her. She stated he was wearing sunglasses, a hoodie, and a backpack. B.W. testified that immediately after appellant passed her, he approached her from behind with a gun in his hand. He told her to walk with him and to not scream or try to run. B.W. stated she was scared. She did not think this was the person she had arranged to meet. Appellant led her to the back of the property and up some stairs to a breezeway. No other people were around. B.W. testified appellant held the gun to the back of her head and pulled her tights and underwear down to "have sex" with her. She stated appellant rubbed his penis against her leg from behind her and it felt to her as though he was wearing a condom. She stated she told him "no" and that she was on her period, and he stopped trying to have sex with her. Then, he took her purse, which contained her cell phone and identification, and put it in his backpack. She stated he told her to count to "300 or 400 or something like that" before going down the stairs. After waiting a short time, B.W. ran to the leasing office in the complex and called 9-1-1. She testified that in her statement to police, she told police she saw a condom wrapper on the ground at the site of the incident. Also, she was shown a photographic lineup in which she identified appellant as the person who assaulted and

robbed her. A video recording and documents pertaining to that lineup were admitted into evidence.

D.L. testified that on February 13, 2013, she arranged to meet in person with a man she had met through an online "chat site" called "MocoSpace." The man asked her to meet him in the late afternoon at the Regal Crossing Apartments near Southwest Center Mall. When D.L. arrived at the arranged meeting place, she was met by appellant. After they talked "for a second," she got into his car and they drove a short distance to the back of the Canterbury Apartments. Appellant led her to an apartment that he said was his. D.L. entered first and appellant followed behind her. D.L. stated she saw "broken glass all over the floor" and asked appellant "what's going on." Appellant told her to go "around to the other side of the wall." She saw he had "something in his hand" and she assumed it was gun, so she "just did what he said." D.L. testified appellant made her lie down on the ground on her stomach and pull her pants down. She heard him "fumbling" with what she assumed was the wrapper of a condom. Then, without her consent, he inserted his penis into her vagina from behind. After the sexual assault ended, appellant told her not to turn around, but she did so anyway. She stated appellant was "holding a gun in my face." Appellant forced her into a closet. She stated she begged him not to take her purse, but he grabbed her purse off the ground while she was in the closet, told her to count to 300, and ran off. She stated she counted to approximately fifteen, then ran after appellant. She chased his car, but he drove away. D.L. testified she was "in shock" and "crying hysterically." Because her cell phone was in the purse taken by appellant, she had no way to call police. A short time later, she used a friend's cell phone to call 9-1-1. An audio recording of D.L.'s 9-1-1 call was admitted into evidence and published for the jury. Additionally, D.L. testified that several months later, she identified appellant in a photographic lineup as the individual who had assaulted and robbed her. On cross-examination, D.L. testified that at the time of her encounter

with appellant, she had an advertisement posted on "Backpage," which she stated is a "prostitution" website.

C.B. testified that in 2012, she posted advertisements on "Backpage" offering sex for money. On June 15, 2012, she received a phone call from appellant, whom she had not previously seen or met. He told her he "wanted an hour" and texted her an address. C.B. drove to that address, which was a deserted, dilapidated house in the Pleasant Grove area of Dallas. Appellant told her he had just bought the house and was planning to remodel it. Also, he told her he did not have condoms and needed to go to the store. C.B. drove him to a nearby store to purchase condoms and they returned to the house. They entered the house through the back door and went to an upstairs bedroom. C.B. testified appellant gave her a hundred dollars and she had consensual sexual intercourse with him. Afterward, they both started putting on their clothes. According to C.B., at that point appellant reached into a black backpack he had with him and "pulled a gun" on her. She stated she "panicked." Appellant ordered her to lie on her stomach. C.B. stated he took her money and her cell phone and told her to count to "around a hundred and something" before moving. Then, appellant ran from the house. C.B. stated she counted to about twenty and then ran after him, but could not catch him. She ran to her cousin's house nearby and called 9-1-1. About a year or two later, she was contacted by Dallas police and was asked to view a photographic lineup. She stated she identified appellant as the individual who had robbed her.

The charge of the court in each case for the guilt/innocence phase of trial stated in part,

> You are instructed that if there is any testimony before you in this case regarding the defendant having committed offenses or acts other than the offense alleged against him in the indictment in this case, you cannot consider such testimony for any purpose unless you find and believe beyond a reasonable doubt that the defendant committed such other offenses or acts, if any, were committed. Even then, you may only consider such evidence in aiding you, if it does, in determining the motive, opportunity, intent, plan, identity, knowledge or absence of mistake or accident, of the defendant and for no other purpose.

Further, in trial court cause number F15-00333-S, the application portion of the charge stated in part,

> [I]f you find from the evidence beyond a reasonable doubt that . . . [the defendant], while in the course of committing theft of property and with the intent to obtain or maintain control of the property of [E.H.], did intentionally or knowingly threaten or place [E.H.] in fear of imminent bodily injury or death, and the defendant did use or exhibit a deadly weapon, to wit: a firearm, then you will find the defendant guilty of aggravated robbery as charged in the indictment.
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> If you do not so find, or if you have a reasonable doubt thereof, or if you cannot agree, you will next consider whether the defendant is guilty of the lesser included offense of robbery.
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> . . . [I]f you find from the evidence beyond a reasonable doubt that . . . [the defendant], while in the course of committing theft of property and with the intent to obtain or maintain control of the property of [E.H.], did intentionally or knowingly threaten or place [E.H.] in fear of imminent bodily injury or death, then you will find the defendant guilty of the lesser-included offense of robbery.

During closing argument, the State asserted in part (1) the testimony of E.H., alone, is enough evidence to support a finding of guilt; (2) regardless, "[E.H.] is corroborated by others"; and (3) "You know that [appellant] threatens people at gunpoint because you heard it three different times from not only [E.H.] but three other people." Additionally, on rebuttal during closing argument, the State argued in part that appellant's assault and robbery of E.H. was consistent with his "M.O." as described by B.W., D.L., and C.B.

The jury found appellant guilty of "aggravated sexual assault" in trial court cause number F14-70150-S. Further, on the verdict sheet in trial court cause number F15-00333-S, the jury found appellant guilty of "robbery, as included in the indictment." Following the assessment of punishment as described above, the trial court signed separate judgments in those two cases. The judgment in trial court cause number F15-00333-S (1) stated that the offense for which appellant was convicted was "Aggravated Robbery"; (2) stated that the "Statute for Offense" was "29.03 Penal Code"; and (3) contained a deadly weapon finding that stated in part "YES, A FIREARM." (emphasis original).

Appellant timely filed identical amended motions for new trial in both cases. Therein, appellant contended in part that "[s]ince trial new evidence has been discovered that constitutes material evidence favorable to the Defendant." Specifically, according to appellant, (1) his trial counsel told his appellate counsel that after his February 1, 2016 punishment trial and sentencing, approximately eight of the jurors were in the courtroom and "a prosecutor asked them if they saw the [January 31, 2016] Sunday Morning News front page story with the detective's picture on the front page"; (2) "[a]t least two and possibly three jurors answered affirmatively" and "[o]ne juror stated that she was looking at the article and thought that it might not be proper for her to be reading the article"; (3) the article in question dealt with "serial rapists, the difficulty in prosecuting them, and the trauma to the victims, among other issues that could influence a juror's verdict at sentencing"; and (4) this constituted "receipt of other evidence" in violation of the trial court's admonishments to the jurors and violated appellant's right to a "fair and impartial trial." Additionally, appellant contended (1) subsequent to trial, an investigator hired by the defense "went to the location described by the alleged victim," "found the only creek in the area which surrounds the Bella Vista apartments," and "took additional photos of the area" from "a different angle"; (2) a photograph taken by that investigator "shows the 'creek' . . . has a very treacherous 3 foot drop-off to a dangerous ledge" and it "would not be possible to walk directly down those 3 feet without holding on with both hands"; and (3) "[f]rom the treacherous drop-off ledge is an 8–10 foot drop to a cement area by the creek" that "would be virtually impossible to climb out of."

Attached to appellant's amended motion for new trial were exhibits that included (1) an affidavit of the investigator and photographs taken by him; (2) a January 31, 2016 Dallas Morning News article about serial rapist Joseph Beaty that does not mention or refer to

appellant; and (3) an affidavit of appellant's appellate counsel. Also, appellant subsequently filed an affidavit of his trial counsel in support of his amended motion for new trial.[2]

The State filed a response to appellant's amended motion for new trial in which it asserted in part that appellant is (1) "not entitled to the release of juror information because he has failed to establish good cause" and (2) "not entitled to a new trial" because he "has failed to satisfy his burden of proving that juror misconduct occurred or that jurors received other evidence during deliberations" and "has not established that the alleged evidence regarding the location of the attack on E.H. was unknown or unavailable to him at the time of trial, that his failure to discover or obtain the evidence was not due to his lack of diligence, or that the evidence is probably true and would probably bring about a different result in another trial."

At the hearing on appellant's amended motion for new trial, appellant's trial counsel testified he could not recall the "exact words" said by the jurors after the trial was concluded. He stated a prosecutor asked several jurors "if they had seen a picture of the detective in this case that was evidently in the paper the day before." According to appellant's trial counsel, (1) "two or three . . . affirmatively nodded their heads or spoke, yes, they saw that" and (2) "[o]ne of the jurors actually made a comment of something like, yeah, I was looking at that and then got to thinking, well, maybe I shouldn't be reading this." Further, appellant's trial counsel testified that prior to trial the State produced to him "hundreds of photographs," including "State's Exhibit 7, a picture of a wooded area and what appears to be a drop down."

[2] In that affidavit, appellant's trial counsel stated in part,

> At no time did the State's Attorneys, their pictures or reports refer to a creek that had a cement drop off of 8 to 10 feet or did they mention a treacherous area leading down to a 3 foot drop-off or dangerous ledge. Never did the State tell me that the creek or ditch around the apartment complex contained very steep drop offs. It should be noted that I did see one picture, which was contained in the discovery, in which it appeared that there was water in the ditch, and that the ditch was several feet deep. . . .
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> I could have investigated the area prior to or during the trial, but I had no reason to do so. . . . Even if I had learned during trial that the area where the victim said the act occurred was not accessible, I would not have made a big deal of it at trial. The offense occurred at night, and it would be impossible for the victim to be shown a picture of a particular spot of a wooded area that was hundreds of feet long, and identify that spot as the exact spot the act occurred with any certainty. Again, none of the information about the accessibility of the area would have caused me to vary from my trial strategy.

Subsequent to that hearing, appellant filed a "response" to the State's response to his amended motion for new trial in which he stated in part,

> The State complains that there are no affidavits or statements from the jurors, but as they have raised in their motion, the Defense is not entitled to any contact information of the jurors to obtain such evidence without a hearing before the Trial Court. The information is kept secret preventing the Appellant from presenting a defense on the issue.

The trial court denied appellant's amended motion for new trial and made written findings of fact pertaining to that ruling.[3] This appeal timely followed.

II. EVIDENCE RESPECTING SITE OF INCIDENT

Appellant's first issue consists of three subparts: (1) "the State violated *Brady* by failing to turn over evidence that could have been used to impeach the complaining witness and/or formulate a new trial strategy," (2) "it was known to the State that the complaining witness's evidence contained perjured testimony regarding the *Brady* material," and (3) "in the alternative, the evidence should be considered newly discovered." Specifically, in the first subpart of his issue, appellant contends the State "failed to disclose" evidence favorable to appellant respecting a "drop off" in the creek bed area where the incident in question occurred and thus violated the requirement set forth in *Brady* that the prosecution in a criminal case must disclose exculpatory

[3] The trial court's findings of fact stated in part,

> The Defendant . . . filed a motion for new trial with the [trial court] alleging juror misconduct occurred during the trial and that newly discovered evidence of innocence exists which supports the granting of a new trial. . . .
>
> With regard to the Defendant's claim that he is entitled to a new trial based on newly discovered evidence of innocence, . . . [t]rial counsel testified that pictures, taken after the trial of the offense occurred, . . . were from a different angle then those of the State's exhibits at trial and showed it was impossible for the Defendant to have used a gun to force the victim down the steep slope. Essentially, counsel claimed that the photographs taken of the offense location from this angle are new evidence proving that the offense could not have occurred as the victim alleged.
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> The [trial court] finds that this is not newly discovered evidence. This evidence was available at the time of the Defendant's trial. Moreover, the [trial court] finds that this evidence is not proof of innocence because the State's pictures at trial did depict the slope of the area where the assault occurred. . . .
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> With regard to the Defendant's claim that juror misconduct occurred, . . . the Defendant presented evidence at the motion for new trial hearing that a discussion occurred between some of the jurors and the prosecutor after the Defendant was sentenced. The discussion was regarding newspaper articles about an ongoing investigation by the police into an unrelated sexual assault case. The newspaper articles related to other offenses and did not name the Defendant. . . . Trial counsel stated during the hearing that he was uncomfortable swearing to an affidavit regarding the conversation, if any, between the State and the jurors because he did not hear the entirety of the conversation. . . . As a result, the testimony from trial counsel at the motion for new trial hearing did not support the allegation that the jurors had even read the newspaper articles [of the unrelated investigations into other sexual offenses]. This evidence fails to show that juror misconduct occurred.

evidence. *See Brady*, 373 U.S. at 87. In the second subpart, appellant contends the State allowed E.H. to give "impossible testimony" that was "false" and "perjured," namely, that she "walked into the creek bed with a metal object to her head." Further, in the third subpart, appellant asserts the trial court abused its discretion by not granting him a new trial because "the 10–12 foot drop off is newly discovered evidence."

The State responds in part that appellant's *Brady* and perjury complaints are not preserved for appellate review because appellant did not raise them in the trial court. Additionally, the State contends appellant did not establish any of the elements necessary to be entitled to a new trial based on newly discovered evidence.

A. Preservation of Appellant's Brady and Perjury Complaints

As a prerequisite to presenting a complaint for appellate review, the record must show (1) the complaint was made to the trial court by a timely request, objection, or motion that 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, and (2) the trial court ruled on the request, objection, or motion, either expressly or implicitly, or refused to rule and the complaining party objected to the refusal. TEX. R. APP. P. 33.1(a). The record before us does not show appellant asserted his *Brady* or perjury complaints in the trial court. Consequently, we conclude those two complaints present nothing for this Court's review. *See Keeter v. State*, 175 S.W.3d 756, 760–61 (Tex. Crim. App. 2005) (concluding appellant did not preserve for appellate review his complaint that trial court erred in failing to grant his motion for new trial on basis of *Brady* violation); *McLemore v. State*, No. 05-16-00378-CR, 2017 WL 1360227, at *2 (Tex. App.—Dallas, Apr. 12, 2017, pet. ref'd) (mem. op., not designated for publication) (concluding perjury complaint not preserved for appellate review where not raised at trial or in motion for new trial); *Ledbetter v. State*, No. 05-09-01313-

CR, 2012 WL 3241654, at *9 (Tex. App.—Dallas Aug. 10, 2012, pet. ref'd) (not designated for publication) (concluding *Brady* complaint not preserved where not raised in motion for new trial or at hearing on that motion).

B. Appellant's Newly Discovered Evidence Complaint

1. Standard of Review

"We review a trial judge's denial of a motion for new trial under an abuse of discretion standard." *Copeland v. State*, Nos. 05-16-00293-CR & 05-16-00295-CR, 2017 WL 3725729, at *2 (Tex. App.—Dallas Aug. 30, 2017, no pet.) (mem. op., not designated for publication) (quoting *Colyer v. State*, 428 S.W.3d 117, 122 (Tex. Crim. App. 2014)). "We do not substitute our judgment for that of the trial court; rather, we decide whether the trial court's decision was arbitrary or unreasonable." *Id*. (quoting *Holden v. State*, 201 S.W.3d 761, 763 (Tex. Crim. App. 2006)). "When no reasonable view of the evidence—viewed in the light most favorable to the trial court's ruling, presuming all reasonable factual findings against the losing party—supports the trial court's ruling, the trial court abused its discretion." *Id*. (citing *Colyer*, 428 S.W.3d at 122).

2. Applicable Law

Article 40.001 of the Texas Code of Criminal Procedure provides, "A new trial shall be granted an accused where material evidence favorable to the accused has been discovered since trial." TEX. CODE CRIM. PROC. ANN. art. 40.001 (West 2006). To obtain relief under this provision, the defendant must satisfy the following four-prong test: (1) the newly discovered evidence was unknown or unavailable to the defendant at the time of trial; (2) the defendant's failure to discover or obtain the new evidence was not due to the defendant's lack of due diligence; (3) the new evidence is admissible and not merely cumulative, corroborative, collateral, or impeaching; and (4) the new evidence is probably true and will probably bring

about a different result in a new trial. *State v. Arizmendi*, 519 S.W.3d 143, 149 (Tex. Crim. App. 2017); *Carsner v. State*, 444 S.W.3d 1, 2–3 (Tex. Crim. App. 2014).

3. Application of Law to Facts

As described above, appellant contends the "10–12 foot drop off" described by the investigator is "newly discovered evidence." Further, as to the four factors above, appellant asserts (1) with respect to the first factor, i.e., that the alleged newly discovered evidence was "unknown" to appellant at the time of trial, his trial counsel "testified that he was not told of the drop off and received no photos of the drop off"; (2) with respect to the second factor, i.e., that appellant's failure to discover or obtain the alleged new evidence was not due to his lack of due diligence, the State introduced into evidence only a "photograph which camouflaged the 10-12 foot drop off" and appellant's trial counsel "believed that evidence as presented by the State"; (3) with respect to the third factor, i.e., that the alleged new evidence is admissible and not merely cumulative, corroborative, collateral, or impeaching, "[n]o evidence of the drop off was presented to the jury"; and (4) with respect to the fourth factor, i.e., that the alleged new evidence would "probably bring about a different result in a new trial," "[k]nowing that the alleged assault could not have happened as [E.H.] alleged would have destroyed her credibility with the jury."

However, the record shows appellant's trial counsel stated in his affidavit,

> It should be noted that I did see one picture, which was contained in the discovery, in which it appeared that there was water in the ditch, and that the ditch was several feet deep. . . .
>
> I could have investigated the area prior to or during the trial, but I had no reason to do so. . . . Even if I had learned during trial that the area where the victim said the act occurred was not accessible, I would not have made a big deal of it at trial. The offense occurred at night, and it would be impossible for the victim to be shown a picture of a particular spot of a wooded area that was hundreds of feet long, and identify that spot as the exact spot the act occurred with any certainty.

Also, at the hearing on appellant's amended motion for new trial, trial counsel testified the State produced to him "State's Exhibit 7, a picture of a wooded area and what appears to be a drop

down." As described above, State's Exhibit 7, which was admitted into evidence at trial, depicted a creek bed with a drop of at least several feet, surrounded by sloping ground with grass and trees. On this record, we disagree with appellant's position that the evidence in question was "unknown or unavailable" to him at the time of trial or that his failure to discover or obtain that evidence was not due to his lack of due diligence. *See Arizmendi*, 519 S.W.3d at 149. Therefore, appellant has not met his burden to obtain relief under article 40.001. *See id*. On this record, we conclude the trial court did not abuse its discretion by denying appellant's motion for new trial based on newly discovered evidence. *See Colyer*, 428 S.W.3d at 122.

We decide appellant's first issue against him.

III. EVIDENCE OF EXTRANEOUS OFFENSES

A. Standard of Review

We review a trial court's decision to admit or exclude evidence of extraneous offenses under an abuse-of-discretion standard. *See, e.g., Henley v. State*, 493 S.W.3d 77, 82–83 (Tex. Crim. App. 2016); *Devoe v. State*, 354 S.W.3d 457, 469 (Tex. Crim. App. 2011). The trial court does not abuse its discretion unless its decision to admit or exclude the evidence lies outside the zone of reasonable disagreement. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010); *De La Paz v. State*, 279 S.W.3d 336, 343–44 (Tex. Crim. App. 2009). We will uphold the trial court's evidentiary ruling if it was correct on any theory of law applicable to the case. *See De La Paz*, 279 S.W.3d at 344.

It is well-established that the improper admission of extraneous evidence is subject to a harm analysis conducted under rule of appellate procedure 44.2(b). *See* TEX. R. APP. P. 44.2(b); *see also Zacny v. State*, No. 05-15-01125-CR, 2016 WL 4311729, at *2 (Tex. App.—Dallas Aug. 15, 2016, no pet.) (mem. op., not designated for publication). That rule states in part, "Any [non-constitutional] error, defect, irregularity, or variance [in a criminal case] that does not affect

substantial rights must be disregarded." TEX. R. APP. P. 44.2(b). Under a rule 44.2(b) harm analysis, "[a] substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict." *Zacny*, 2016 WL 4311729, at *3 (quoting *Morales v. State*, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000)); *see also* TEX. R. APP. P. 44.2(b). We should not reverse a conviction for non-constitutional error if, after examining the record as a whole, we have "fair assurance that the error did not influence the jury, or had but a slight effect." *Zacny*, 2016 WL 4311729, at *3 (quoting *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998)). In making this decision, we consider the entire record, including any testimony and physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error, and how it might be considered in connection with other evidence in the case. *Zacny*, 2016 WL 4311729, at *3. The weight of evidence of the defendant's guilt is also relevant in conducting the harm analysis under rule 44.2(b). *Id*. Additionally, we may consider the closing statements and voir dire, jury instructions, the State's theory, any defensive theories, and whether the State emphasized the alleged error. *Id.*

B. Applicable Law

Texas Rule of Evidence 404(b)(1) states that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a defendant in order to show he acted in conformity therewith. TEX. R. EVID. 404(b)(1); *see also Segundo v. State*, 270 S.W.3d 79, 87 (Tex. Crim. App. 2008) (explaining that a defendant is generally to be tried only for the offense charged, not for any other crimes). However, extraneous offense evidence may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. TEX. R. EVID. 404(b)(2); *see Casey v. State*, 215 S.W.3d 870, 879 (Tex. Crim. App. 2007). The exceptions listed under Rule 404(b) are neither mutually exclusive nor collectively exhaustive. *See De La Paz*, 279 S.W.3d at 343.

One well-established rationale for admitting evidence of an extraneous offense is "to rebut a defensive issue that negates one of the elements of the offense." *Id*. That is, a "party may introduce evidence of other crimes, wrongs, or acts if such evidence logically serves to make more or less probable an elemental fact, an evidentiary fact that inferentially leads to an elemental fact, or defensive evidence that undermines an elemental fact." *Id*. "[A] defense opening statement may open the door to the admission of extraneous offense evidence to rebut defensive theories presented in that opening statement." *Id*. at 345. When the defensive theory of consent is raised in a sexual assault case, a defendant necessarily disputes his intent to do the act without the consent of the complainant and his intent is thereby placed in issue. *Martin v. State*, 173 S.W.3d 463, 467 n.1 (Tex. Crim. App. 2005).

Further, "evidence of a defendant's particular modus operandi is a recognized exception to the general rule precluding extraneous offense evidence, if the modus operandi evidence tends to prove a material fact at issue, other than propensity." *Casey*, 215 S.W.3d at 880. In the context of extraneous offenses, modus operandi refers to "a defendant's distinctive and idiosyncratic manner of committing criminal acts." *Id*. at 881. Although the modus operandi theory of admissibility under Rule 404(b) usually refers to evidence offered to prove the identity of a specific person, its use is not so limited in the law. *Id*. Modus operandi may also encompass the "doctrine of chances" theory to show lack of consent, motive, and the manner of committing an offense. *Id*. The doctrine of chances is "the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all." *Brown v. State*, 96 S.W.3d 508, 512 (Tex. App.—Austin 2002, no pet.). "For the doctrine to apply, there must be a similarity between the charged and extraneous offenses, since it is the improbability of a like result being repeated by mere chance that gives the extraneous offense probative weight." *Id*. "No rigid rules dictate what

constitutes sufficient similarities." *Garmon v. State*, No. 05-13-00702-CR, 2015 WL 2250379, at *4 (Tex. App.—Dallas May 12, 2015, pet. ref'd) (mem. op., not designated for publication). Common characteristics may include, among other things, (1) proximity in time and place or (2) mode of commission of the crimes. *Id*. "[A]n extremely high degree of similarity is not required where intent, as opposed to identity, is the material issue." *Wiggins v. State*, 778 S.W.2d 877, 886 (Tex. App.—Dallas 1989, pet. ref'd); *accord Brown*, 96 S.W.3d at 513.

"Whether extraneous offense evidence has relevance apart from character conformity, as required by Rule 404(b), is a question for the trial court." *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003). A trial court's ruling admitting evidence pursuant to rule 404(b)(2) is generally within the zone of reasonable disagreement "if there is evidence supporting that an extraneous transaction is relevant to a material, non-propensity issue." *Devoe*, 354 S.W.3d at 469.

Texas Rule of Evidence 403 provides that a trial court may exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence. TEX. R. EVID. 403. When undertaking a rule 403 analysis, a trial court must balance (1) the inherent probative force of the proffered item of evidence along with (2) the proponent's need for that evidence against (3) any tendency of the evidence to suggest decision on an improper basis, (4) any tendency of the evidence to confuse or distract the jury from the main issues, (5) any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted. *McClain v. State*, Nos. 05–16–00972–CR & 05–16–00973–CR, 2017 WL 3275916, *4 n.3 (Tex. App.—Dallas July 31, 2017, no pet.) (mem. op., not designated for publication) (citing

Gigliobianco v. State, 210 S.W.3d 637, 641–42 (Tex. Crim. App. 2006)). "[T]hese factors may well blend together in practice." *Gigliobianco*, 210 S.W.3d at 642. When a trial court "decides not to exclude the evidence, finding that the probative value of the evidence is not outweighed by the danger of unfair prejudice," that decision "shall be given deference." *Moses*, 105 S.W.3d at 627. Further, absent an explicit refusal to conduct the rule 403 balancing test, we presume the trial court conducted the test when it overruled a rule 403 objection. *See Williams v. State*, 958 S.W.2d 186, 195–96 (Tex. Crim. App. 1997).

C. Application of Law to Facts

In his second issue, appellant contends the trial court erred "by admitting extraneous offenses during guilt or innocence over the objection of appellant's first trial counsel and appellant's second trial counsel under 404(b) and 403." Specifically, appellant asserts (1) the extraneous evidence of the other aggravated sexual assault and robbery incidents described above did not show "uniqueness of a signature"; (2) the State was "not entitled to present evidence of a defensive theory not yet urged by Appellant"; (3) the extraneous evidence in question did not "specifically rebut the defensive theory" of consent because "evidence was produced that all the witnesses, but [E.H.] were prostitutes"; and (4) the probative value of that evidence was substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence.[4] Further, appellant contends (1) the extraneous offense evidence admitted by the trial court "allowed for Appellant to be convicted of a continuing course of conduct of being a criminal generally rather than the offenses with which he was charged," and (2) "[h]ad the extraneous offenses not come

[4] To the extent appellant's argument on appeal can be construed to complain of additional extraneous offense evidence other than the aggravated sexual assault and robbery incidents described above, the record does not show such evidence was included in appellant's "running objection" or that appellant objected to that evidence during trial. Therefore, appellant's complaints on appeal respecting other extraneous offense evidence present nothing for this Court's review. *See* TEX. R. APP. P. 33.1(a).

in and Trial Counsel known that [E.H.] could not have walked into the creek bed as she claimed, Appellant likely would have been acquitted."

The State responds that the trial court properly exercised its discretion in admitting evidence of the extraneous offenses involving B.W. and D.L. because that evidence was admissible under Rule 404(b) to show both "lack of consent" and "modus operandi" and "was also admissible under Rule 403 because the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice." Further, the State asserts any error in the admission of evidence respecting C.B. was harmless.

1. Extraneous Offense Evidence Respecting B.W. and D.L.

The record shows counsel for appellant raised consent as a defensive theory in his opening statement. Therefore, we disagree with appellant's position that the State "present[ed] evidence of a defensive theory not yet urged by Appellant." *See Martin*, 173 S.W.3d at 467 n.1. Also, both B.W. and D.L. testified they did not consent to having sex with appellant. Therefore, we disagree with appellant's position that their testimony did not rebut his defensive theory of consent. Further, with respect to the similarity of the incidents in question, E.H., B.W. and D.L. all testified appellant held them at gunpoint, sexually assaulted them from behind, or attempted to do so, without their consent, used a condom, stole their cell phones and other belongings, told them to count to 300, and fled while they were counting. Additionally, all three incidents took place during 2013 within approximately 1.3 miles of appellant's apartment. On this record, we conclude the trial court did not abuse its discretion in concluding the extraneous offense evidence respecting B.W. and D.L. was admissible pursuant to rule of evidence 404(b)(2) because it rebutted a defensive issue raised by appellant and/or constituted evidence of a "particular modus operandi." *See Martin*, 173 S.W.3d at 468 (extraneous offense testimony demonstrated modus operandi "sufficiently distinctive" to fall within rule 404(b)(2) where evidence showed appellant

falsely claimed to be law enforcement officer as ruse to "pick up" both complainant and extraneous offense witness, both women agreed to meet appellant in residential area in first face-to-face meeting after initial contact, and both women were sexually assaulted by appellant in residence upon meeting with him); *Brown*, 96 S.W.3d at 513 (extraneous offense evidence offered to rebut consent of victim in aggravated sexual assault case was admissible pursuant to rule 404(b)(2) where evidence showed appellant picked up three different women with drug addictions or criminal backgrounds in similar neighborhoods, took them to remote areas, sexually assaulted them, and left them stranded with little or no clothing).

Next, we address whether the trial court abused its discretion by concluding the extraneous offense evidence respecting B.W. and D.L. was admissible under rule 403. Applying the relevant factors, we first consider the inherent probative force of the extraneous offense evidence along with the State's need for that evidence. *See Gigliobianco*, 210 S.W.3d at 641. The record shows E.H. was the sole witness to the charged offense and there was no physical evidence to support her accusation. Therefore, the extraneous offense evidence of two other similar acts had considerable probative force and was needed to corroborate E.H.'s account and rebut appellant's defensive theory of consent. *See Grant v. State*, 475 S.W.3d 409, 420–21 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (evidence of extraneous offense that was similar to charged sexual assault was "highly probative" and necessary, where defendant challenged victim's credibility and lack of consent); *Hill v. State*, No. 05-15-00989-CR, 2017 WL 343593, at *5 (Tex. App.—Dallas Jan. 18, 2017, pet. ref'd) (mem. op., not designated for publication) (extraneous offense evidence of similar sexual assault against different victim had considerable probative force and was needed by State where complainant was sole witness and defense challenged her account of charged offense).

As to the third and fourth factors, we consider any tendency of the evidence to suggest decision on an improper basis or confuse or distract the jury from the main issues. *Gigliobianco*, 210 S.W.3d at 641. The extraneous offenses respecting B.W. and D.L. were of a similar nature to the charged offense and therefore unlikely to elicit any greater inflammatory response by the jury or cause confusion or distraction. Therefore, those factors weigh in favor of admissibility. *See Dilg v. State*, No. 07-13-00160-CR, 2014 WL 458019, at *4 (Tex. App.—Amarillo, Jan. 29, 2014, no pet.) (mem. op., not designated for publication) (extraneous evidence of crime no more heinous than charged offense was not likely to inflame or distract jury). Further, the charge of the court in the guilt/innocence phase of trial contained a limiting instruction to the jury that it was not to consider extraneous offense testimony for any purpose "unless you find and believe beyond a reasonable doubt that the defendant committed such other offenses or acts, if any, were committed" and "[e]ven then, you may only consider such evidence in aiding you, if it does, in determining the motive, opportunity, intent, plan, identity, knowledge or absence of mistake or accident, of the defendant and for no other purpose." *See Lane v. State*, 933 S.W.2d 504, 520 (Tex. Crim. App. 1996) (stating potential "irrational impression on jury" of extraneous offense evidence was minimized through limiting instruction). Appellant contends in part that the trial court "failed to mitigate the overall harm from admitting the extraneous offenses because she did not give a limiting instruction when they were admitted in guilt/innocence setting out the limited purpose for which they were admitted." However, although appellant's original trial counsel filed a pretrial motion requesting a contemporaneous limiting instruction as described above, the record does not show the trial court granted that request or that any objections respecting a contemporaneous limiting instructions were made by appellant. Therefore, that complaint presents nothing for this Court's review. *See* TEX. R. APP. P. 33.1(a); *Martin v. State*, 176 S.W.3d 887, 899 (Tex. App.—Fort Worth 2005, no pet.).

The fifth factor to be considered is a "tendency of an item of evidence to be given undue weight by the jury on other than emotional grounds." *Gigliobianco*, 210 S.W.3d at 641. "For example, 'scientific' evidence might mislead a jury that is not properly equipped to judge the probative force of the evidence." *Casey*, 215 S.W.3d at 880 (citing *Gigliobianco*, 210 S.W.3d at 641). The trial court could have reasonably concluded that the evidence here was not prone to this tendency. *See Hill*, 2017 WL 343593, at *5. It was not scientific or technical and it pertained to matters that could easily be understood by a jury. *Id.*

Finally, the sixth factor we consider is "the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted." *Gigliobianco*, 210 S.W.3d at 641–42. Appellant contends the "number of pages spent on extraneous offenses" during the guilt/innocence phase of trial was approximately 553 pages, out of a total of 893 pages. However, that calculation includes the extraneous offense evidence described above as to which we concluded no complaints were preserved for this Court's review. The record shows the State's presentation of the testimony of B.W. and D.L. covered approximately seventy-five pages of the reporter's record, which is less than ten percent of the entire transcript and approximately twelve percent of the State's case-in-chief. Thus, this factor weighs in favor of admissibility. *See Lane*, 933 S.W.2d at 520 (concluding extraneous offense testimony that amounted to less than one-fifth of State's case-in-chief was not excessive); *Stulce v. State*, No. 05-14-01226-CR, 2016 WL 4218594, at *7 (Tex. App.—Dallas Aug. 9, 2016, no pet.) (mem. op., not designated for publication) (extraneous offense testimony that consumed less than one-tenth of entire trial transcript and less than one-fifth of State's case-in-chief was not excessive).

On this record, we conclude all six factors described above weigh in favor of the admissibility of the extraneous offense evidence respecting B.W. and D.L. Accordingly, we

conclude the trial court did not abuse its discretion by admitting that evidence. *See Gigliobianco*, 210 S.W.3d at 641–42.

2. Extraneous Offense Evidence Respecting C.B.

As described above, C.B. testified she consented to sex with appellant. Therefore, the offense alleged by C.B. was less similar to the offense against E.H. than those involving B.W. and D.L. However, assuming without deciding that the trial court's admission of the extraneous offense evidence respecting C.B. was an abuse of discretion, we cannot agree with appellant's position that he was harmed by that evidence.

Appellant does not describe any specific harm from C.B.'s testimony in particular. The record shows (1) the testimony of E.H., B.W., and D.L. established appellant's guilt; (2) appellant's offense respecting C.B. consisted only of robbery and was therefore of a lesser magnitude than those offenses; and (3) the offense against C.B. was not mentioned during the State's opening statement or treated any differently during trial and closing argument than the offenses against B.W. and D.L. Further, as described above, the charge of the court contained a limiting instruction to the jury that it was not to consider extraneous offense testimony for any purpose "unless you find and believe beyond a reasonable doubt that the defendant committed such other offenses or acts, if any, were committed" and "[e]ven then, you may only consider such evidence in aiding you, if it does, in determining the motive, opportunity, intent, plan, identity, knowledge or absence of mistake or accident, of the defendant and for no other purpose." In the absence of evidence to the contrary, it is presumed that the jury followed the trial court's instruction. *See Stulce*, 2016 WL 4218594, at *6 (citing *Resendiz v. State*, 112 S.W.3d 541, 546 (Tex. Crim. App. 2003)). Appellant describes no evidence in the record, and we have found none, to rebut that presumption. Consequently, any error in the admission of the evidence was mitigated by the trial court's limiting instruction. *See Martin*, 176 S.W.3d at 898.

After examining the record as a whole, we conclude there is "fair assurance that the error did not influence the jury, or had but a slight effect." *See Zacny*, 2016 WL 4311729, at *3 (quoting *Johnson*, 967 S.W.2d at 417). Consequently, on this record, we conclude the trial court's error in admitting extraneous offense evidence respecting C.B. did not affect appellant's substantial rights and must be disregarded. *See* TEX. R. APP. P. 44.2(b). *Zacny*, 2016 WL 4311729, at *3.

We decide against appellant on his second issue.

IV. EVIDENCE RESPECTING JURY MISCONDUCT

In his third issue, appellant contends the trial court "erred by not hearing from actual jurors to determine whether they had received evidence from outside source(s) during punishment deliberation." Specifically, appellant asserts in part that the trial court abused its discretion by denying his amended motion for new trial because, prior to the trial court's ruling on that motion, his appellate counsel "moved for Trial Court to provide her with names and addresses or other contact information of the Jurors so that her investigator could interview them, obtain affidavits, and possible testimony [sic]," but appellate counsel and her investigator were "not allowed" to contact the jurors.

The State responds that "[t]his Court is without jurisdiction to consider this claim because there is no statute authorizing an appeal from a trial court's denial of a request for jurors' personal information." Alternatively, the State asserts that if this Court has jurisdiction as to appellant's complaint, the trial court "properly exercised its discretion in denying Appellant's request for jurors' personal information because Appellant failed to establish good cause."

A. Standard of Review and Applicable Law

The right to appeal in a criminal case is a substantive right solely within the province of the legislature. *See, e.g., Ahmad v. State*, 158 S.W.3d 525, 526 (Tex. App.—Fort Worth 2004,

pet. ref'd) (citing *Lyon v. State*, 872 S.W.2d 732, 734 (Tex. Crim. App.)). "The standard for determining jurisdiction is not whether the appeal is precluded by law, but whether the appeal is authorized by law." *Abbott v. State*, 271 S.W.3d 694, 696–97 (Tex. Crim. App. 2008). Pursuant to article 44.02 of the Texas Code of Criminal Procedure, "[a] defendant in any criminal action has the right of appeal under the rules hereinafter prescribed." CRIM. PROC. art. 44.02 (West 2006); *see also* TEX. R. APP. P. 25.2(a)(2) (criminal defendant "has the right of appeal under Code of Criminal Procedure article 44.02 and these rules"). Generally, a criminal defendant may only appeal from a final judgment. *See Ahmad*, 158 S.W.3d at 526.

Article 35.29 of the code of criminal procedure provides in relevant part,

> (a) Except as provided by Subsections (b) and (c), information collected by the court or by a prosecuting attorney during the jury selection process about a person who serves as a juror, including the juror's home address, home telephone number, social security number, driver's license number, and other personal information, is confidential and may not be disclosed by the court, the prosecuting attorney, the defense counsel, or any court personnel.
>
> (b) On application by a party in the trial, or on application by a bona fide member of the news media acting in such capacity, to the court for the disclosure of information described by Subsection (a), the court shall, on a showing of good cause, permit disclosure of the information sought.

CRIM. PROC. art. 35.29 (West Supp. 2016). "What constitutes good cause must be based upon more than a mere possibility that jury misconduct might have occurred; it must have a firm foundation." *Romero v. State*, 396 S.W.3d 136, 151 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd) (quoting *Cyr v. State*, 308 S.W.3d 19, 30 (Tex. App.—San Antonio 2009, no pet.)). "[A] trial court does not abuse its discretion in denying a request for disclosure of the juror information cards where the defendant fails to show good cause." *Id*.

Additionally, Texas Rule of Appellate Procedure 21.3 states in part that a defendant in a criminal case must be granted a new trial, or a new trial on punishment, "when, after retiring to deliberate, the jury has received other evidence," or "when the jury has engaged in such

misconduct that the defendant did not receive a fair and impartial trial." TEX. R. APP. P. 21.3 (f)–(g); *see also Ford v. State*, 129 S.W.3d 541, 548 (Tex. App.—Dallas 2003, pet. ref'd) (to be entitled to new trial under rule 21.3(f), defendant must show other evidence was actually received by jury and that it was detrimental); *Gomez v. State*, 991 S.W.2d 870, 871 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (movant for new trial under 21.3(g) must show jury misconduct occurred and such misconduct resulted in harm to him). In proving rule 21.3 has been satisfied, the defendant is limited by Texas Rule of Evidence 606(b). *See* TEX. R. EVID. 606(b). That rule provides that during an inquiry into the validity of a verdict, a juror may not testify about any statement made or incident that occurred during the jury's deliberations, the effect of anything on that juror's or another juror's vote, or any juror's mental processes concerning the verdict. *Id*. However, an exception permits a juror to testify about whether an outside influence was improperly brought to bear on any juror. *Id*. An outside influence is "something originating from a source outside of the jury room and other than from the jurors themselves." *McQuarrie v. State*, 380 S.W.3d 145, 154 (Tex. Crim. App. 2012).

Further, as described above, we review a trial judge's denial of a motion for new trial under an abuse of discretion standard. *See Colyer*, 428 S.W.3d at 122. "When no reasonable view of the evidence—viewed in the light most favorable to the trial court's ruling, presuming all reasonable factual findings against the losing party—supports the trial court's ruling, the trial court abused its discretion." *Copeland*, 2017 WL 3725729, at *2 (citing *Colyer*, 428 S.W.3d at 122).

B. Application of Law to Facts

1. Jurisdiction

We begin with the State's challenge to this Court's jurisdiction respecting this issue. *See, e.g.*, *Richardson v. State*, Nos. 02-15-00271-CR & 02-15-00272-CR, 2016 WL 6900901, at *4

(Tex. App.—Fort Worth Nov. 23, 2016, pet. ref'd) (mem. op., not designated for publication) (noting that State's challenge to jurisdiction must be resolved before addressing appellant's issue). The State argues in part,

> Although article 35.29 of the Texas Code of Criminal Procedure provides that a trial court may disclose jurors' personal information under certain circumstances, the statute does not expressly authorize an appeal of an adverse ruling on a request for such information. Appellant has not cited, and the State's research has not revealed, any statute, rule, or other provision that would authorize an appeal by a criminal defendant from a trial court's post-judgment denial of his request to release jurors' personal information. Because such an appeal is not expressly authorized by law, this Court lacks jurisdiction to consider the instant claim.

(citations omitted). In support of that argument, the State cites two criminal cases in which courts concluded a lack of jurisdiction as to a defendant's appeal of a trial court order. *See Ragston v. State*, 424 S.W.3d 49 (Tex. Crim. App. 2014); *Hazlip v. State*, No. 09-14-00477-CR, 2015 WL 184043 (Tex. App.—Beaumont Jan. 14, 2015, no pet.) (mem. op., not designated for publication). However, unlike the case before us, (1) *Ragston* involved an interlocutory appeal of a pretrial motion for bond reduction, *see* 424 S.W.3d at 51, and (2) *Hazlip* involved an appeal of a trial court order denying a motion for juror information filed by a defendant after his conviction was affirmed on appeal, *see* 2015 WL 184043, at *1 ("A trial court may disclose juror information in certain circumstances, but [section 35.29] does not expressly authorize an appeal of an adverse ruling on a request that is made in a closed case."). Therefore, we do not find those cases instructive. Further, the State asserts in its brief in this Court that although "[the amended motion for new trial] did not request or mention jurors' personal information, and the record contains no such request by Appellant," the record of the hearing on Appellant's amended motion for new trial "reflects that both the State and the trial court understood that Appellant was requesting jurors' personal information in connection with the motion." On this record, we conclude appellant's complaint respecting the trial court's denial of his request for juror information is part of his challenge to the trial court's denial of his amended motion for new trial

in his appeal of the trial court's final judgment, which challenge is properly within this Court's jurisdiction. *See* CRIM. PROC. art. 44.02; *Ahmad*, 158 S.W.3d at 526.

2. Good Cause

Appellant argues he met the requirement to obtain juror information under article 35.29(b) because the testimony of his trial counsel at the hearing on his amended motion for new trial was "uncontroverted evidence" of jury misconduct, i.e., the receipt of improper "other evidence," and that testimony was not rebutted by the State. However, as described above, the record shows appellant's trial counsel testified (1) he could not recall the "exact words" of what any juror said after the trial was concluded and (2) when a prosecutor asked several jurors "if they had seen a picture of the detective in this case that was evidently in the paper the day before," "two or three . . . affirmatively nodded their heads or spoke, yes, they saw that" and "[o]ne of the jurors actually made a comment of something like, yeah, I was looking at that and then got to thinking, well, maybe I shouldn't be reading this." The record does not show any juror stated he or she read any news article during the trial. On this record, we conclude appellant did not show "more than a mere possibility" of jury misconduct or the receipt of other evidence by the jury. *See Romero*, 396 S.W.3d at 151 ("What constitutes good cause must be based upon more than a mere possibility that jury misconduct might have occurred; it must have a firm foundation."); *Ford*, 129 S.W.3d at 548 (to be entitled to new trial under rule 21.3(f), defendant must show other evidence was actually received by jury and that it was detrimental). Therefore, we conclude the trial court did not abuse its discretion by denying appellant's request for disclosure of the juror information cards. *See Colyer*, 428 S.W.3d at 122; *Romero*, 396 S.W.3d at 151.

We decide appellant's third issue against him.

V. MODIFICATION OF JUDGMENT

A. Applicable Law

We have the authority to modify an incorrect judgment when we have the necessary data and information to do so. *See* TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27 (Tex. Crim. App. 1993); *McCoy v. State*, 81 S.W.3d 917, 920 (Tex. App.—Dallas 2002, pet. ref'd). Our authority to reform judgments is not limited to mistakes of a clerical nature. *See Bigley*, 865 S.W.2d at 27. Nor is it dependent upon the request of a party. *Asberry v. State*, 813 S.W.2d 526, 529–30 (Tex. App.—Dallas 1991, pet. ref'd). "Appellate courts have the power to reform whatever the trial court could have corrected by a judgment nunc pro tunc where the evidence necessary to correct the judgment appears in the record." *Id*. at 529.

B. Application of Law to Facts

In his fourth issue, appellant contends this Court should "correct the appellant's judgment to correctly reflect the jury's verdict" by modifying the judgment in trial court cause number F15-00333-S to (1) state that the offense for which appellant was convicted is "Robbery," rather than "Aggravated Robbery," and (2) remove the deadly weapon finding. According to appellant, "when the Jury found the Appellant 'not guilty' of 'Aggravated Robbery,' they were finding that he was not guilty of using or exhibiting a deadly weapon."

The State responds that it agrees that "[t]he trial court's judgment in cause number F15-00333-S should be modified to correctly reflect that Appellant was convicted of the offense of robbery." The State does not mention or address the deadly weapon finding.

1. Offense in Judgment

The record shows the judgment in trial court cause number F15-00333-S states that the "Offense for which Defendant Convicted" is "Aggravated Robbery." Also, although not raised by either party, that judgment states the "Statute for Offense" is "29.03 Penal Code." *See* TEX.

PENAL CODE ANN. § 29.03 (West 2011) (titled "Aggravated Robbery"). However, the jury's verdict sheet for the guilt/innocence phase in trial court cause number F15-00333-S states the jury found appellant guilty of the offense of "robbery, as included in the indictment." The penal code section pertaining to robbery is section 29.02. *See id.* § 29.02. On this record, we conclude the judgment in trial court cause number F15-00333-S should be modified to state (1) the offense for which appellant was convicted is "Robbery" and (2) the "Statute for Offense" is "29.02 Penal Code."

2. Deadly Weapon Finding

As described above, the record shows (1) the indictment in trial court cause number F15-00333-S alleged in part that appellant, while in the course of committing theft of property, "threaten[ed] and place[d] [E.H.] in fear of imminent bodily injury and death" and "used and exhibited a deadly weapon, to-wit: a firearm," and (2) the jury's signed verdict sheet for the guilt/innocence phase in trial court cause number F15-00333-S states the jury found appellant guilty of the offense of "robbery, as included in the indictment." However, the application paragraphs of the jury charge respecting aggravated robbery and robbery differed only as to whether "a deadly weapon, to wit: a firearm" was used or exhibited. Accordingly, the record shows "the jury necessarily decided whether a deadly weapon was used or exhibited in light of the application paragraph." *Duran v. State*, 492 S.W.3d 741, 747–48 (Tex. Crim. App. 2016) (describing "scenarios" under which trial court can properly conclude jury made determination as to use of deadly weapon); *see also Lafleur v. State*, 106 S.W.3d 91, 98 (Tex. Crim. App. 2003) (declining to "exalt form over substance to no discernible jurisprudential purpose" when determining whether jury made deadly weapon finding). On this record, we conclude the jury's verdict does not affirmatively support the trial court's judgment that a deadly weapon was used

or exhibited in trial court cause number F15-00333-S. Therefore, we conclude the judgment in that case should be modified to delete the deadly weapon finding therein.

Appellant's fourth issue is decided in his favor.

VI. CONCLUSION

We decide against appellant on his first, second, and third issues. Appellant's fourth issue is decided in his favor.

We affirm the trial court's judgment in trial court cause number F14-70150-S. Additionally, we modify the trial court's judgment in trial court cause number F15-00333-S to (1) state that the offense for which appellant was convicted is "Robbery," (2) state that the "Statute for Offense" is "29.02 Penal Code," and (3) delete the deadly weapon finding. As modified, the trial court's judgment in trial court cause number F15-00333-S is affirmed.

/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

WALDRICK BROOKS, Appellant	On Appeal from the 282nd Judicial District Court, Dallas County, Texas
No. 05-16-00182-CR V.	Trial Court Cause No. F-1470150-S.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Lang, Justices Evans and Schenck participating.

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

Judgment entered this 24th day of October, 2017.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

WALDRICK BROOKS, Appellant

No. 05-16-00183-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 282nd Judicial District Court, Dallas County, Texas
Trial Court Cause No. F-1500333-S.
Opinion delivered by Justice Lang, Justices Evans and Schenck participating.

Based on the Court's opinion of this date, we **MODIFY** the trial court's judgment to (1) state that the offense for which appellant was convicted is "Robbery," (2) state that the "Statute for Offense" is "29.02 Penal Code," and (3) delete the deadly weapon finding. As **MODIFIED**, the judgment is **AFFIRMED**.

Judgment entered this 24th day of October, 2017.