Opinion issued July 21, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00368-CR

ARNOLD RAY LAMOTTE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 6
Travis County, Texas
Trial Court Case No. C-1-CR-12-300283

MEMORANDUM OPINION

Appellant Arnold Ray Lamotte, Jr., was charged with theft-by-check in the amount of $20 or more but less than $500, a Class B misdemeanor.[1] A jury found

[1] Effective September 1, 2015, which was after Lamotte's conviction, the Texas Legislature amended the categories of theft. *See* Act of May 31, 2015, 84th Leg.,

Lamotte guilty and assessed his punishment at 180 days in jail and a $2,000 fine. On appeal, Lamotte contends in nine issues that (1) insufficient evidence supports his conviction, (2) the trial court erroneously instructed the jury regarding prima facie evidence of intent to deprive based upon section 31.06 of the Penal Code, and (3) the trial court abused its discretion by improperly admitting various documents in each of the guilt-innocence and the punishment phases of trial.[2] We affirm.

Background

Check #132

On September 15, 2011, HEB store #161 in Travis County received and processed a $200 check, check #132, from Lamotte's bank account at First Convenience Bank. HEB attempted to deposit the check with its bank, Wells Fargo, but Wells Fargo was unable to accept the check because the account upon which it was drawn contained insufficient funds. After Wells Fargo notified HEB that the check had been dishonored, HEB sent the check to the Hot Check Division of the

---

R.S., ch. 1251 (amending TEX. PENAL CODE § 31.03(e)(2)(B), which provided that theft-by-check in an amount between $20 and $500 was a Class B misdemeanor).

[2] The Texas Supreme Court transferred this appeal from the Court of Appeals for the Third District of Texas to this Court pursuant to its docket equalization powers. *See* TEX. GOV'T CODE § 73.001 ("The supreme court may order cases transferred from one court of appeals to another at any time that, in the opinion of the supreme court, there is good cause for the transfer."). We are unaware of any conflict between the precedent of the Third Court of Appeals and that of this Court on any relevant issue. *See* TEX. R. APP. P. 41.3.

Travis County Attorney's Office. When Lamotte failed to make restitution, the State charged Lamotte with theft.

Guilt-innocence phase

Three witnesses testified for the State during the guilt-innocence phase of the trial. Kiara Washington, an HEB cashier, testified that she processed check #132 on September 15, 2011, as evidenced by her employee number printed on the back of the check, her handwritten checkmarks on the front of the check, and the driver's license number of the check-writer written in her handwriting on the right-hand side of the check. Washington testified that the handwritten checkmarks and license number signify that she followed HEB's procedures for verifying the check, which included confirming that the name on the check matched the name on the driver's license presented, that the check-writer was the person pictured on the driver's license, and that the signature on the license matched the signature on the check. Washington testified that she believed the check was good when she processed it. She testified that, in exchange for the $200 check, Lamotte would have received merchandise and up to $50 in cash, per HEB's policy.

Coy Parker, the manager of the store, also testified. Parker told the jury he could tell that check #132 was handled properly under the store's policies based on the markings and information recorded. Parker testified HEB could not retrieve an itemized receipt for the September 15, 2011 transaction because they are destroyed

90 days after they are created in keeping with HEB's document retention policy. However, Parker confirmed Washington's testimony that a customer would receive merchandise and up to $50 in cash in exchange for a $200 check. Parker also testified that his store processed a check in the amount of $304.36 from the same account approximately half an hour before it processed check #132. That earlier check, check #131, bore the same signature as check #132.

The State's third witness, Nicole Benavidez, an employee with the Travis County Attorney's Office's Hot Check Division, testified that when a merchant turns over a check to the Division for collection, the check is logged into the Division's system and the checking account holder is assigned a personal identification number. All checks written from the same account are then associated with that identification number. The Division sends a notice to the account-holder's address on the check notifying him that the check has been dishonored, that restitution must be made, and that he must complete a class on how to avoid writing bad checks. A second, final notice is sent 45 days later, notifying the account-holder that he has 10 days to make restitution and avoid prosecution. Both notices identify all outstanding checks and the balance due.

Benavidez testified that notices were sent to Lamotte in November 2011 and January 2012. On cross-examination, Benavidez acknowledged that the notices

were not sent by registered or certified mail with a return receipt requested. She also admitted that she did not know the address to which the notices were sent.

Benavidez testified that the Division logs in a ledger all information discussed with any person who contacts the Division regarding checks associated with a personal identification number. Benavidez testified that the Division's ledger for Lamotte showed that Lamotte's father, Ray Lamotte, Sr., called the Division in July 2012. The ledger reflects that Lamotte's father was "upset because he wanted info on the checks." He was provided with "balance and class information," and told that if he wanted more information, he should "have the defendant call in with authorization for us to provide that information to him." Benavidez testified that the ledger also showed Lamotte himself called the Division in January 2013 and spoke with her coworker, Ida. The ledger indicates Ida gave Lamotte "balance and class information," and Lamotte "stated that he will let his attorney handle the matter." Benavidez testified that check #132 had not been paid as of the time of trial.

Benavidez also testified that she prepared State's Exhibit 5. Exhibit 5 is a spreadsheet compilation admitted into evidence which summarized the activity in Lamotte's bank account in September 2011. Benavidez testified the account statement for the month of September and her spreadsheet showed there was never $200 or more in the account on any day in September 2011. Benavidez testified the account balance on the day check #132 was written was -$364.96.

The State introduced several other documentary exhibits in its case in chief. Among these was State's Exhibit 1, which was the signature card associated with the bank account. The signature card showed the bank account was held by Arnold Ray Lamotte, Jr., who signed the signature card "Arnold Ray Lamotte." The trial court also admitted State's Exhibit 2, which is a compilation of First Convenience bank account records, including a photograph from the bank's files of the account-holder, Lamotte, statements showing Lamotte's account activity, and copies of the checks written against the account, including check #132.[3] The name in the upper right-hard corner of check #132 is "Ray Lamotte, Jr." and it was signed "Arnold Ray Lamotte." Also admitted was Exhibit 6, a copy of a pro se motion signed and filed by Lamotte in the trial court in January 2013. Further, the State introduced Exhibit 3, which contained a business records affidavit from a representative of HEB followed by four groups of documents that each included a copy of a Travis County Attorney's Office Theft By Check Complaint Form, notices from Wells Fargo to HEB regarding check numbers 128, 130, 131, and 132 drawn on Lamotte's account communicating to HEB that each check was dishonored due to insufficient funds, and an individual check summary complaint form for each check, also prepared by HEB for the Travis County Attorney's Office.

[3] In the guilt-innocence phase, the trial court admitted only the bank statement for the month of September. The portions of Exhibit 2 that were admitted during the guilt-innocence phase are Exhibits 2a, 2b, 2c, 2e, 2f, and 2g.

The jury returned a verdict finding Lamotte guilty of theft.

Punishment phase

During punishment, the trial court admitted all of the testimony and evidence admitted in the guilt-innocence phase. It also admitted Exhibit 2d, containing bank records for July through November 2011, which was the entire period that Lamotte's account was open, and Exhibit 4, which was Benavidez's spreadsheet summary of the account activity during that time period.

The State then sought to prove Lamotte's prior convictions by admitting Exhibits 7 through 11. Exhibits 8 and 11 are a judgment of community supervision and a judgment revoking community supervision for felony theft in *The State of Texas v. Arnold Lamotte*, Cause No. 950383. Exhibits 7, 9, and 10, are certified copies of an indictment, judgment of community supervision, and judgment revoking community supervision for felony assault with family violence in *The State of Texas v. Arnold Lamotte*, Cause No. 00-0404. Lamotte objected to the admission of these exhibits on the ground that there was insufficient evidence from which the jury could determine beyond a reasonable doubt that the Arnold Lamotte convicted in those cases was him. The trial court held a hearing on the admission of the exhibits outside the presence of the jury, after which it overruled Lamotte's objection and admitted Exhibits 7 through 11.

The jury sentenced Lamotte to 180 days in jail and a $2,000 fine. The trial court entered judgment on the jury's verdict and Lamotte timely appealed.

Sufficiency of the Evidence

In his first issue, Lamotte contends that insufficient evidence supports his conviction. Specifically, Lamotte maintains there is insufficient evidence from which a rational jury could conclude beyond a reasonable doubt that he intended to deprive HEB of its property at the time that he wrote check #132.

A. Standard of Review

When evaluating the legal sufficiency of the evidence in a criminal case, we view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Whatley v. State*, 445 S.W.3d 159, 166 (Tex. Crim. App. 2014); *Brooks v. State*, 323 S.W.3d 893, 902 (Tex. Crim. App. 2010). The standard is the same for both direct and circumstantial evidence cases. *King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995).

On appeal, we do not resolve any conflict of fact, weigh any evidence, or evaluate the credibility of any witnesses, as this is the function of the trier of fact. *See Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999). We therefore resolve any inconsistencies in the evidence in favor of the verdict, *Matson v. State*,

819 S.W.2d 839, 843 (Tex. Crim. App. 1991), and "defer to the [trier of fact's] credibility and weight determinations." *Marshall v. State*, 210 S.W.3d 618, 625 (Tex. Crim. App. 2006). To the extent that the record contains evidence supporting conflicting inferences, we presume that the jury resolved conflicts in favor of its verdict. *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013) (citing *Jackson*, 443 U.S. at 326).

B. Applicable Law

In order to obtain a conviction for theft-by-check, the State must adduce evidence to show beyond a reasonable doubt that the defendant unlawfully appropriated property by passing a check with intent to deprive the owner of the property. *See* TEX. PENAL CODE § 31.03(a); *Martinez v. State*, 754 S.W.2d 799, 801 (Tex. App.—San Antonio 1988, pet. ref'd) (citing *Wilson v. State*, 663 S.W.2d 834, 836 (Tex. Crim. App. 1984)). Appropriation is unlawful if it is without the owner's effective consent. TEX. PENAL CODE § 31.03(b)(1). Consent is not effective if it is induced by deception, such as by presenting a check that the maker knows will not be honored. *See* TEX. PENAL CODE § 31.01(3)(A).

The State must show that the defendant had the intent to deprive at the time that the check was written. *Martinez*, 754 S.W.2d at 801. The State may establish intent to deprive by direct evidence. *See* TEX. PENAL CODE § 31.06(d); *Sulacia v. State*, 631 S.W.2d 569, 572 (Tex. App.—El Paso 1982, no pet.). Additionally, Penal

Code section 31.06 provides a "[p]resumption for Theft by Check." TEX. PENAL CODE § 31.06. It specifies various ways the State may establish a prima facie case of intent to deprive at the time the check was written. As relevant here, section 31.06(a)(2) provides:

> If the actor obtained property or secured performance of service by issuing or passing a check . . . when the issuer did not have sufficient funds in or on deposit . . . for the payment in full of the check . . . as well as all other checks . . . then outstanding, it is prima facie evidence of the issuer's intent to deprive the owner of property under Section 31.03 (Theft) including a drawee or third-party holder in due course who negotiated the check or order . . . if:
>
> > (2) payment was refused by the bank or other drawee for lack of funds or insufficient funds, on presentation within 30 days after issue, and the issuer failed to pay the holder in full within 10 days after receiving notice of that refusal.

TEX. PENAL CODE § 31.06(a)(2). Notice of refusal under this section "may be actual notice or notice in writing." *Id.* § 31.06(b).

C. Analysis

Lamotte contends that the evidence was insufficient to prove he committed theft-by-check because there is no evidence he intended to deprive HEB of its property. Specifically, he argues there is no evidence he knew he did not have sufficient money in his account to cover check #132 at the time he wrote it. He argues the State did not satisfy the requirements of section 31.06(a)(2) because it failed to establish Lamotte received actual or written notice that check #132 was dishonored and payment was required.

Viewing the evidence and reasonable inferences therefrom in the light most favorable to the verdict, we conclude there was sufficient evidence from which a rational jury could conclude beyond a reasonable doubt that Lamotte committed theft-by-check. To begin, there was sufficient evidence from which a rational jury could conclude that Lamotte was the person who passed check #132 and obtained $200 worth of HEB's property. The evidence at trial included the bank account opening documents, which included a photo of Lamotte and a signature card. The State also introduced a copy of a pro se motion, signed by Lamotte, and a copy of check #132, bearing Lamotte's signature. The jury could have compared the signatures on the signature card, motion, and check #132 and concluded that check #132 was signed by Lamotte. *See* TEX. CODE CRIM. PROC. art. 38.27 (jury may compare handwriting to determine whether made by defendant). Moreover, Washington testified that she followed the verification procedure for accepting check #132, as evidenced by her handwritten notations. She testified that, among other things, she would have confirmed that the picture on the driver's license was of the check writer. Washington and Parker also testified that Lamotte received a combination of merchandise and up to $50 in cash, the total value of which was $200, in exchange for check #132. Hence, there was sufficient evidence from which a rational jury could conclude Lamotte was the person who passed check #132 and obtained $200 worth of HEB's property in exchange.

There was also sufficient evidence from which a rational jury could conclude Lamotte intended to deprive HEB of its property at the time he wrote check #132. *See* TEX. PENAL CODE § 31.06(a)(2). Penal Code section 31.06(a)(2) provides that the State establishes a prima facie case of intent to deprive if it shows: (1) the actor obtained property by passing a check, (2) when the actor did not have sufficient funds on deposit to cover the check and all other checks outstanding, (3) the check was refused by the bank for insufficient funds within 30 days of presentment of the check, and (4) the actor failed to pay the check in full within 10 days of receiving actual notice that the check had been dishonored and full payment was required. *See* TEX. PENAL CODE § 31.06(a)(2).

We have already concluded above that there was sufficient evidence from which a rational jury could conclude that Lamotte obtained property by passing check #132. We conclude that there was sufficient evidence from which a rational jury could find that the remaining three elements of section 31.06(a)(2) were also satisfied. Regarding funds on deposit, the State introduced Lamotte's September 2011 bank records and a summary of the account activity in that month. That evidence showed that on September 15, 2011, the day Lamotte passed check #132, the account balance was -$364.96, and that the account never contained $200 or more on any day in September. The State also introduced evidence that Lamotte wrote a second check to HEB for $304.36 within one hour before writing check

#132. This was sufficient evidence from which a rational jury could conclude beyond a reasonable doubt that Lamotte did not have sufficient funds on deposit with the bank for the payment in full of check #132 and all other checks then outstanding at the time he passed check #132. *See* TEX. PENAL CODE § 31.06(a)(2).

The State also adduced evidence to satisfy the third element of section 31.06(a)(2)— that check #132 was refused by the bank for insufficient funds within 30 days of presentment. Specifically, the State introduced a notice from HEB's bank, Wells Fargo, notifying HEB that check #132 had been dishonored for insufficient funds on October, 7, 2011, less than 30 days after the check was written on September 15, 2011.

Finally, there was sufficient evidence from which a rational jury could find the fourth element of section 31.06(a)(2)—that Lamotte failed to pay the check in full within 10 days of receiving actual notice that the check had been dishonored and full payment was required. TEX. PENAL CODE § 31.06(a)(2). The State presented evidence that Lamotte called the Travis County Attorney's Office's Hot Check Division on January 25, 2013, over two years before trial. Lamotte was told during that phone call the amount that needed to be paid based upon the dishonored check, and he responded that "he would let his attorney handle the matter." Moreover, the trial court admitted Lamotte's January 2013 pro se motion, which constitutes additional evidence that Lamotte was aware by January 2013 that check #132 had

been dishonored and payment was required. *See Leon v. State*, 102 S.W.3d 776, 784 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (evidence that defendant knew checks were outstanding at time of indictment, four years before trial, constituted evidence of actual notice); *Warren v. State*, 91 S.W.3d 890, 896–97 (Tex. App.—Fort Worth, 2002, no pet.) (concluding that because defendant was arrested more than 10 days before trial, defendant would have had actual notice more than 10 days before trial and this established evidence of intent when checks were still not paid at time of trial). The State also presented Benavidez's testimony to the effect that check #132 was still unpaid at the time of trial in 2015. A rational jury could find from this evidence that Lamotte had actual notice of the dishonored check and the need to pay it in full and failed to pay within 10 days of that notice.

Lamotte contends that this evidence is insufficient to permit a jury to conclude that he had actual notice that the check was dishonored because the Hot Check Division's notes that he called the office in January 2013 might be erroneous. In particular, Lamotte notes that Benavidez testified that the Division's notes showed that Lamotte's father had called the office several months earlier. The jury was entitled to believe or disbelieve the testimony regarding the January 2013 phone call to the Division's office. *See Henderson v. State*, 29 S.W.3d 616, 623 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) (jury is entitled to believe or disbelieve testimony). It resolved the issue adversely to Lamotte, and we do not disturb its

credibility determination on appeal. *See Cain v. State*, 958 S.W.2d 404, 408–09 (Tex. Crim. App. 1997) (appellate court does not disturb jury's determination regarding credibility of evidence).

Lamotte also argues that section 31.06 requires actual notice be provided within 10 days of the check's rejection. The 10-day period in the statute defines the window in which Lamotte must have paid after receiving notice of the check's refusal. Nothing in the statute sets forth any deadline within which actual notice of the check's refusal must be given. Thus, we conclude that section 31.06 does not require evidence that actual notice was given within 10 days of the check's refusal or within any particular time period after refusal. *See Ex parte Noyola*, 215 S.W.3d 862, 866 (Tex. Crim. App. 2007) (courts give effect to plain meaning of statutory text unless doing so would lead to absurd results); *cf. Leon*, 102 S.W.3d at 784 (intent was presumed under section 31.06(a)(2) when notice provided four months after check dishonored).

In sum, we hold that there was sufficient evidence from which a rational jury could conclude beyond a reasonable doubt that Lamotte committed theft-by-check. *See, e.g.*, *Leon*, 102 S.W.3d at 785 (sufficient evidence supported theft-by-check conviction where defendant had actual notice check had been dishonored and failed to pay by time of trial).

We overrule Lamotte's first issue.

Confrontation Clause

In his second issue, Lamotte contends that the trial court abused its discretion by admitting State's Exhibit 3 during the guilt-innocence phase in violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution. Exhibit 3 included copies of the Travis County Attorney's Office Theft By Check Complaint Form, individual check summary complaint forms for check numbers 128, 130, 131, and 132, and notices from Wells Fargo informing HEB that each check was dishonored for insufficient funds. The State contends that the trial court properly admitted Exhibit 3 under the business records exception because the statements contained in the exhibit were non-testimonial. In the alternative, the State argues that at least portions of the exhibit are not testimonial and therefore Lamotte waived his Confrontation Clause objection. *See* TEX. R. EVID. 803(6), 902(10).

A. Standard of Review and Applicable Law

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011). We will not reverse the trial court's decision if it falls within the zone of reasonable disagreement. *Id.*

The Confrontation Clause of the Sixth Amendment guarantees an accused the right "to be confronted with the witnesses against him" by having an opportunity to cross-examine the witnesses. U.S. CONST. amends. VI, XIV; *see also Delaware v.*

Van Arsdall, 475 U.S. 673, 678, 106 S. Ct. 1431, 1435 (1986); *Lopez v. State*, 18 S.W.3d 220, 222 (Tex. Crim. App. 2000). The Confrontation Clause bars the admission of testimonial statements of a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine him. *Crawford v. Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354, 1369 (2004); *Russeau v. State*, 171 S.W.3d 871, 880 (Tex. Crim. App. 2005).

A statement is "testimonial" if it constitutes a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51, 124 S. Ct. at 1364; *see Russeau*, 171 S.W.3d at 880. "[C]ourts that have addressed the issue of public records documenting prior convictions or other similar official findings have concluded that such records are non-testimonial and therefore beyond the prohibition of *Crawford*." *Segundo v. State*, 270 S.W.3d 79, 107 (Tex. Crim. App. 2008). These courts have "recognized [a] distinction between official records that set out a sterile and routine recitation of an official finding or unambiguous factual matter such as a judgment of conviction or a bare-bones disciplinary finding and a factual description of specific observations or events that is akin to testimony." *Id.*

Typically, documents filed in compliance with the public-records or business-records exceptions to the hearsay rule are non-testimonial. *See Crawford*, 541 U.S. at 56, 124 S. Ct. at 1367 ("Most of the hearsay exceptions covered statements that

by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy."); *Azeez v. State*, 203 S.W.3d 456, 466 (Tex. App.—Houston [14th Dist.] 2006), *rev'd on other grounds*, 248 S.W.3d 182 (Tex. Crim. App. 2008) ("Generally, business records are non-testimonial."). This is because business and public records were "created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial." *Bullcoming v. New Mexico*, 564 U.S. 647, 664, 131 S. Ct. 2705, 2714 n.6 (2011) (quoting *Melendez–Diaz v. Massachusetts*, 557 U.S. 305, 324, 129 S. Ct. 2527, 2539–40 (2009)).

But business or public records may be testimonial. For example, business records are testimonial if they contain a "factual description of specific observations or events that is akin to testimony," *Segundo*, 270 S.W.3d at 106–07, or if the business entity's "regularly conducted business activity is the production of evidence for use at trial," *Melendez–Diaz*, 557 U.S. at 321, 129 S. Ct. at 2538. "A document created solely for an 'evidentiary purpose,' . . . made in aid of a police investigation, ranks as testimonial." *Bullcoming*, 564 U.S. at 664 (citing *Melendez-Diaz*, 557 U.S. at 321, 129 S. Ct. at 2538).

If only a portion of the exhibit sought to be admitted is objectionable under the Confrontation Clause, the party must specifically request that only the objectionable portions be omitted, or the objection is properly overruled. *Blackman*

v. State, Nos. 01-12-00525-CR, 01-12-00526-CR, 2014 WL 50804, at *4 (Tex. App.—Houston [1st Dist.] Jan. 7, 2014, pet. ref'd) (mem. op.) (not designated for publication) (appellant's objection to admission of community-supervision records on Confrontation Clause grounds was properly overruled where portions of records did not violate Confrontation Clause and appellant objected only to admission of records as a whole) (quoting *Wintters v. State*, 616 S.W.2d 197, 202 (Tex. Crim. App. 1981) ("a general objection to an item of evidence, a part of which is admissible, is not sufficient to preserve an alleged error for review")). "A party may claim error in a ruling to admit evidence . . . admissible against [that] party . . . only if the party requests the court to restrict the evidence to its proper scope and instruct the jury accordingly." TEX. R. EVID. 105(b); *see Sonnier v. State*, 913 S.W.2d 511, 518 (Tex. Crim. App. 1995).

B. Analysis

Lamotte contends that each of the pages in Exhibit 3 included testimonial statements and therefore its admission violated the Confrontation Clause. Exhibit 3 contains 12 pages behind a business records affidavit.[4] Four of those pages are copies of the Complaint Form (replicated four times) prepared by HEB for

[4] There is a suggestion in Lamotte's brief that HEB's business records affidavit was also inadmissible under the Confrontation Clause, but Lamotte does not identify any statement in the business records affidavit that was testimonial. *See* TEX. R. EVID. 803(6); 902(10).

submission to the Travis County Attorney's Office and signed and notarized by a representative of HEB. Each copy of the Complaint Form is followed by a notice from Wells Fargo identifying check numbers 128, 130, 131, or 132 and notifying HEB that each check has been dishonored because of insufficient funds. Following each of the notices from Wells Fargo is an individual check summary complaint form for each check prepared by HEB for the Travis County Attorney's Office, which identifies the check number, date, and amount, the check writer's name, address, date of birth, and driver's license information, the name of the person who received the check, the location the check was passed, and the fact that the check was dishonored for insufficient funds.

Even if some portions of Exhibit 3 were testimonial, the four notices that HEB received from Wells Fargo identifying each check and notifying HEB that the check has been dishonored because of insufficient funds are non-testimonial. These documents were "created for the administration of an entity's affairs," namely, the relationship between HEB and its bank, Wells Fargo. *See Bullcoming*, 564 U.S. at 670, 131 S. Ct. at 2721 (quoting *Melendez-Diaz*, 557 U.S. at 324, 129 S. Ct. at 2539–40). Although they were used to establish a fact at trial—namely, that the checks were dishonored for insufficient funds—they were not created "for the purpose of establishing or proving some fact at trial," and would exist as part of HEB's business records even if no charges had ever been filed. *See id.* (quoting *Melendez-Diaz*, 557

U.S. at 324, 129 S. Ct. at 2539–40). Thus, they are not testimonial and do not violate the Confrontation Clause. *See id.* (quoting *Melendez-Diaz*, 557 U.S. at 324, 129 S. Ct. at 2539–40).

Portions of Exhibit 3 were therefore not inadmissible under the Confrontation Clause. Accordingly, we hold that Lamotte's Confrontation Clause objection to the entirety of Exhibit 3 did not preserve his objection for review. *See* TEX. R. EVID. 105(b); *Wintters*, 616 S.W.2d at 202 ("We conclude that since portions of the report were admissible, appellant's [Confrontation Clause] objection directed toward the report as a whole was properly overruled."); *Blackman*, 2014 WL 50804, at *4 (appellant failed to preserve Confrontation Clause objection to admission of exhibit where portions of records were not inadmissible under Confrontation Clause); *Pinkney v. State*, 848 S.W.2d 363, 367 (Tex. App.—Houston [1st Dist.] 1993, no pet.) (appellant waived error regarding Confrontation Clause objection to admissibility of document where appellant objected to admission of entire document and only certain statements in document were inadmissible); *see also Sonnier*, 913 S.W.2d at 518.

We overrule Lamotte's second issue.

Jury Charge

In his third issue, Lamotte argues that the trial court erred by submitting an instruction to the jury regarding prima facie evidence of intent to deprive based upon

section 31.06 of the Penal Code. Specifically, Lamotte argues there is no evidence from which the jury could conclude that he received actual or written notice as required by section 31.06.

A. Standard of Review

In analyzing a jury-charge issue, our first duty is to decide if error exists. *See Almanza v. State*, 686 S.W.2d 157, 174 (Tex. Crim. App. 1985) (op. on reh'g); *Tottenham v. State*, 285 S.W.3d 19, 30 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). Only if we find error do we then consider whether an objection to the charge was made and analyze for harm. *Tottenham*, 285 S.W.3d at 30; *see also Warner v. State*, 245 S.W.3d 458, 461 (Tex. Crim. App. 2008) ("The failure to preserve jury-charge error is not a bar to appellate review, but rather it establishes the degree of harm necessary for reversal.").

"The degree of harm necessary for reversal depends upon whether the error was preserved." *Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996). Error properly preserved by a timely objection to the charge will require reversal "as long as the error is not harmless." *Almanza*, 686 S.W.2d at 171. The Court of Criminal Appeals has interpreted this to mean that any harm, regardless of degree, is sufficient to require reversal. *Arline v. State*, 721 S.W.2d 348, 351 (Tex. Crim. App. 1986). However, when the charging error is not preserved "and the accused must claim that the error was 'fundamental,' he will obtain a reversal only if the error is so egregious

and created such harm that he 'has not had a fair and impartial trial'—in short 'egregious harm.'" *Almanza*, 686 S.W.2d at 171; *see Nava v. State*, 415 S.W.3d 289, 298 (Tex. Crim. App. 2013) (egregious harm "is a difficult standard to meet and requires a showing that the defendants were deprived of a fair and impartial trial."). Fundamental errors that result in egregious harm are those which affect "the very basis of the case," deprive the defendant of a "valuable right," or "vitally affect his defensive theory." *Almanza*, 686 S.W.2d at 172 (citations and quotations omitted).

When considering whether a defendant suffered harm, the reviewing court must consider: (1) the entire jury charge; (2) the state of the evidence, including the contested issues and weight of probative evidence; (3) the argument of counsel; and (4) any other relevant information revealed by the record of the trial as a whole. *Id.* at 171. The reviewing court must conduct this examination of the record to "illuminate the actual, not just theoretical, harm to the accused." *Id.* at 174; *see Nava*, 415 S.W.3d at 298 (record must disclose "actual rather than theoretical harm").

B. Applicable Law

As discussed in our analysis of the sufficiency of the evidence regarding intent, section 31.03(a) of the Penal Code provides that a person commits theft if he unlawfully appropriates property with "intent to deprive." As relevant here, section

31.06(a)(2) provides that the State presents a prima facie case of "intent to deprive" if "payment was refused by the bank or other drawee for lack of funds or insufficient funds, on presentation within 30 days after issue, and the issuer failed to pay the holder in full within 10 days after receiving notice of that refusal." TEX. PENAL CODE § 31.06(a)(2). For purposes of section 31.06(a)(2), notice may be actual notice or notice in writing. *See* TEX. PENAL CODE § 31.06(b). However, nothing in section 31.06 "prevents the prosecution from establishing the requisite intent by direct evidence." TEX. PENAL CODE § 31.06(d).

C. Analysis

The complained-of instruction stated:

> (a) If the defendant obtained property by issuing or passing a check or similar sight order for the payment of money, when the issuer did not have sufficient funds in or on deposit with the bank or other drawee for the payment in full of the check or order as well as all other checks or orders then outstanding, his intent to deprive the owner of property is presumed (except in the case of a postdated check or order) if:
>
> (1) he had no account with the bank or other drawee at the time he issued the check or order; or
>
> (2) payment was refused by the bank or other drawee for lack of funds or insufficient funds, on presentation within 30 days after issue, and the issuer failed to pay the holder in full within 10 days after receiving notice of that refusal.
>
> (b) For purposes of (a)(2), notice may be actual notice or notice in writing, sent by registered or certified mail with return receipt requested or by telegram with report of delivery requested, and addressed to the issuer at his address shown on:

(1) the check or order;

(2) the records of the bank or other drawee; or

(3) the records of the person to whom the check or order has been issued or passed.

(c) If written notice is given in accordance with (b), it is presumed that the notice was received no later than five days after it was sent.

(d) Nothing in this section prevents the prosecution from establishing the requisite intent by direct evidence.

The jury is instructed relative to these presumptions, as follows:

(A) that the facts giving rise to the presumption must be proven beyond a reasonable doubt;

(B) that if such facts are proven beyond a reasonable doubt the jury may find that the element of the offense sought to be presumed exists, but it is not bound to so find;

(C) That even though the jury may find the existence of such element, the state must prove beyond a reasonable doubt each of the other elements of the offense charged; and

(D) if the jury has a reasonable doubt as to the existence of a fact or facts giving rise to the presumption, the presumption fails and the jury shall not consider the presumption for any purpose.

Was there error in the charge?

Under *Almanza*, our first duty is to determine whether there was error in the charge. *See Almanza*, 686 S.W.2d at 174. We conclude the charge erroneously instructed the jury with respect to prima facie evidence of intent to deprive based upon written notice, but properly instructed the jury with respect to prima facie evidence of intent to deprive based upon actual notice.

The State conceded in closing argument and concedes in its brief on appeal that there is insufficient evidence from which a jury could find Lamotte received written notice by mail as contemplated by section 31.06. *See* TEX. PENAL CODE § 31.06(b)(1) (notice in writing under section 31.06 must be sent by first class mail, evidenced by affidavit of service, or registered or certified mail with return receipt requested). Accordingly, there is insufficient evidence to support submission of the section 31.06 instruction based upon written notice. *See id.*

However, as detailed in our sufficiency analysis, there is sufficient evidence—evidence of Lamotte's January 2013 phone call to the Division and Lamotte's filing of the pro se motion in the trial court—to support submission of the section 31.06 instruction based upon actual notice. Accordingly, we hold that the charge properly instructed the jury regarding prima facie evidence of intent to deprive under section 31.06 based upon actual notice, but improperly instructed the jury regarding prima facie evidence of intent to deprive under section 31.06 based upon written notice. *See* TEX. PENAL CODE § 31.06(b)(1).

Was Lamotte egregiously harmed?

Having concluded that the charge erroneously instructed the jury about prima facie evidence of intent to deprive under section 31.06 based upon written notice, we now examine the degree, if any, to which this error harmed Lamotte. Lamotte did not preserve his objection to the section 31.06 instruction. At the charge

conference, the parties discussed the inclusion of the section 31.06 instruction. The trial court asked Lamotte's counsel whether he had any basis for an objection to the instruction, and counsel responded: "No. I don't see [any basis]." Accordingly, Lamotte did not preserve error regarding this instruction and must show that it caused him egregious harm. *See Almanza*, 686 S.W.2d at 171 ("[I]f no proper objection was made at trial and the accused must claim that the error was 'fundamental,' he will obtain a reversal only if the error is so egregious and created such harm that he 'has not had a fair and impartial trial'—in short 'egregious harm.'"); *see also Woodard v. State*, 322 S.W.3d 648, 658 (Tex. Crim. App. 2010) (citing *Almanza*, 686 S.W.2d at 171–72 ("[W]hen no proper objection is made to jury-charge error at trial, a defendant may obtain a reversal only in those few situations where the error is 'fundamental' or is 'egregious[ly] harmful.'"). To determine whether the charge error was egregiously harmful, we consider, in turn, the entire jury charge, the state of the evidence, counsel's argument, and any other relevant information revealed by the record of the trial as a whole. *See Almanza*, 686 S.W.2d at 171.

1. The charge

We note that the section 31.06 instruction was accompanied by an instruction based upon section 2.05(a)(2) of the Penal Code.[5] That instruction told the jury, among other things, that the elements of section 31.06 must be proven beyond a reasonable doubt, and that if the jury had a reasonable doubt as to any element, the

---

[5] Although the text of section 31.06 speaks of "prima facie evidence" and not a presumption, the title of the section is "Presumption for Theft by Check or Similar Sight Order," and the parties and the caselaw refer to section 31.06 as providing a presumption. TEX. PENAL CODE § 31.06; *see, e.g., Thompson v. State*, 89 S.W.3d 843, 849 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd) (evidence created a "presumption" under section 31.06 that defendant intended to deprive complainant). Section 2.05 of the Penal Code provides that if the jury is charged with a presumption instruction, "the court shall charge the jury, in terms of the presumption and the specific element to which it applies, as follows:

> (A) that the facts giving rise to the presumption must be proven beyond a reasonable doubt;
>
> (B) that if such facts are proven beyond a reasonable doubt the jury may find that the element of the offense sought to be presumed exists, but it is not bound to so find;
>
> (C) that even though the jury may find the existence of such element, the state must prove beyond a reasonable doubt each of the other elements of the offense charged; and
>
> (D) if the jury has a reasonable doubt as to the existence of a fact or facts giving rise to the presumption, the presumption fails and the jury shall not consider the presumption for any purpose.

TEX. PENAL CODE § 2.05(a)(2).

jury should not conclude that there was prima facie evidence of intent to deprive. *See* TEX. PENAL CODE § 2.05(a)(2).

2. The evidence

At trial, Lamotte argued that he was not the person who wrote the check and, alternatively, that he did not receive actual or written notice of the dishonored check. Thus, the jury would not reach the issue of whether Lamotte received actual or written notice that the check was dishonored without first rejecting Lamotte's defensive theory that someone else wrote the check. Moreover, we have concluded there is sufficient evidence from which a rational jury could conclude Lamotte received actual notice that check #132 had been dishonored.

3. Counsel's argument

In closing argument, the State reviewed the charge with the jury, including the section 31.06 instruction. The State argued that it proved that Lamotte had actual notice, but it conceded to the jury that there was insufficient evidence to conclude Lamotte received written notice under section 31.06:

> We did not mail that in this manner. Not going to tell you that we did. We do not satisfy notice in writing that meets these specific requirements, because we didn't do it. But we don't need to do it. Because it says below: "Nothing in this section prevents the prosecution from establishing the requisite intent by direct evidence." We had direct evidence, and he responded to it. We discussed it. That is notice. That is actual notice.

Thus, although the charge erroneously instructed the jury that it could find prima facie evidence of intent to deprive if it concluded Lamotte received written notice under section 31.06, the State expressly told the jury that Lamotte did not receive written notice that complied with section 31.06. Instead, the State relied solely on evidence that Lamotte received actual notice that the check was dishonored and needed to be paid. The State called attention to the section 31.06 instruction in closing argument, but did so in order to tell the jury to only find that that it was satisfied if the jury concluded that Lamotte had actual notice.

Lamotte's counsel did not directly address the section 31.06 instruction in closing argument. With respect to actual notice, Lamotte's counsel argued that the only proof that Lamotte received notice was that he was sitting in the courtroom after having been arrested. He argued that it may have been someone other than Lamotte who called the Division in January 2013. He did not address the evidence that Lamotte filed a pro se motion in January 2013.

4. Other information in the record

We do not find any other information in the record that is relevant to the egregious harm analysis.

Whether Lamotte intended to deprive HEB when he wrote check #132 was highly relevant to his defense. However, because the State told the jury that Lamotte did not receive written notice, and instead focused solely on whether Lamotte had

actual notice, we conclude that any harm to Lamotte is no more than theoretical. *See Almanza*, 686 S.W.2d at 174 (court must examine record to "illuminate the actual, not just theoretical, harm to the accused"); *Nava*, 415 S.W.3d at 298 (record must disclose "actual rather than theoretical harm" to warrant reversal based upon charge error). There is no actual likelihood that the inclusion of the section 31.06 instruction regarding written notice affected the basis of the case or Lamotte's rights or his defense; therefore, we hold that the error was not egregiously harmful. *See Almanza*, 686 S.W.2d at 172 (egregious harm if affects the "very basis" of the case or vitally affects defensive theory).

We overrule Lamotte's third issue.

Punishment Phase Evidentiary Rulings

In his fourth through ninth issues, Lamotte complains the trial court abused its discretion by admitting State's Exhibits 2d, 4, 7, 8, 9, 10, and 11 during the punishment phase.

A. Standard of Review

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011). We will not reverse the trial court's decision if it falls within the zone of reasonable disagreement. *Id.* All relevant evidence is admissible, except as otherwise provided by Constitution, by statute, by the rules of evidence, or by other rules prescribed

pursuant to statutory authority. TEX. R. EVID. 402. Evidence is relevant if it tends to make the existence of any consequential fact more or less probable than it is without the evidence. TEX. R. EVID. 401.

Pursuant to article 37.07 of the Code of Criminal Procedure, after a defendant has been found guilty, the State may offer evidence about the defendant "as to any matter the court deems relevant to sentencing." TEX. CODE CRIM. PROC. art. 37.07, § 3(a)(1). Relevant evidence in this context is any evidence that assists the fact-finder in determining the appropriate sentence given the particular defendant in the circumstances presented. *Rogers v. State*, 991 S.W.2d 263, 265 (Tex. Crim. App. 1999). This evidence includes, but is not limited to, evidence regarding:

> the prior criminal record of the defendant, his general reputation, his character, an opinion regarding his character, the circumstances of the offense for which he is being tried, and, notwithstanding Rules 404 and 405, Texas Rules of Evidence, any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act.

TEX. CODE CRIM. PROC. art. 37.07, § 3(a)(1). The statutory language grants wide latitude in the admission of evidence deemed relevant. *Contreras v. State*, 59 S.W.3d 362, 365 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

B. Applicable Law Regarding Extraneous Offense Evidence

During the punishment phase, the State may offer evidence of any extraneous crime or bad act that is shown, beyond a reasonable doubt, either to have been (1) an

act committed by the defendant or (2) an act for which he could be held criminally responsible. *See Fields v. State*, 1 S.W.3d 687, 688 (Tex. Crim. App. 1999); *see also* TEX. CODE CRIM. PROC. art. 37.07 § 3(a)(1). "Prior crimes or bad acts are introduced to provide additional information which the jury may consider in determining what sentence the defendant should receive." *See Arthur v. State*, 11 S.W.3d 386, 392 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd).

The trial court makes the decision on the threshold issue of admissibility and may not admit extraneous offense evidence unless the evidence is such that a jury could rationally find the defendant criminally responsible for the extraneous offense. *Smith v. State*, 227 S.W.3d 753, 759–60 & n.16 (Tex. Crim. App. 2007). Ultimately, the fact-finder must decide whether the extraneous offense was proven beyond a reasonable doubt. *Id.*; *see also Mitchell v. State*, 931 S.W.2d 950, 953–54 (Tex. Crim. App. 1996) (plurality opinion). Once this threshold is met, the fact-finder may use the evidence however it chooses in assessing punishment. *See Fields*, 1 S.W.3d at 688.

C. Alleged prior convictions

In his fourth, fifth, sixth, seventh, and eighth issues, Lamotte contends that the trial court abused its discretion by admitting during the punishment phase State's Exhibits 7 through 11. Exhibits 8 and 11 are a judgment of community supervision and a judgment revoking community supervision for felony theft in *The State of*

Texas v. Arnold Lamotte, Cause No. 950383. Exhibits 7, 9, and 10, are certified copies of an indictment, judgment of community supervision, and judgment revoking community supervision for felony assault with family violence in *The State of Texas v. Arnold Lamotte*, Cause No. 00-0404. At trial, Lamotte contended that these records should not be admitted because there was insufficient evidence from which the jury could conclude he was the defendant in these cases beyond a reasonable doubt.

At the hearing on Lamotte's objections outside the presence of the jury, the State presented Rachelle Temoney, a Court Probation Officer who works for the Travis County Community Supervision and Corrections Department (Probation Office). Temoney testified that she has worked for seven years for the Probation Office and is familiar with the record keeping of the office. She testified it is the regular business practice of the Probation Office to create probation records, and one of the things routinely entered in the records is the probationer's name, date of birth, and driver's license number. Temoney testified the Probation Office's records showed it supervised the defendant, who was placed on probation in cause number 950383. The records showed the person placed on probation in cause number 950383 was named Arnold Lamotte, and had a birth date of January 23, 1967 and a particular driver's license number. Temoney testified that the entry of the probationer's name, date, and driver's license number is routine in all probation

cases. When asked whether these entries "have been made in the normal business practice of the probation office or by somebody with direct knowledge of that information," Temoney responded, "Yes."

On cross-examination, Temoney admitted that she does not "have personal knowledge" about "what the procedures were in 2001" because she was not physically present when the records were prepared in 2001. However, Temoney testified that in the course of her employment she had become familiar with "how they used to do it back then." She testified that during her employment, she learned that the name, birth date, and driver's license number—the information used to show that Lamotte was the defendant convicted in cause number 950383—would be entered into the system "[w]hen somebody is placed on probation."

The State argued that Temoney's testimony proved that the defendant in cause number 950383 was Lamotte, supporting the admission of Exhibits 8 and 11. The State further argued that the judgment revoking community supervision in cause number 00-0404 was entered on the same day as the judgment in cause number 950383—November 14, 2001—by the same judge, in the same trial court. The defendant's name is the same in both cases—Arnold Lamotte. The two attorneys for the State listed in each judgment are the same, and the attorney for the defendant in each case is the same. The State argued that it was exceedingly unlikely to have two different defendants with the same name, represented by the same lawyer,

opposed by the same two lawyers, in front of the same judge in the same trial court, on the same day, both having their community supervision revoked. The State thus argued that the evidence showed, beyond a reasonable doubt, that Lamotte was also the defendant convicted in cause number 00-0404.

Lamotte argued that Temoney was not qualified to testify about information from the probation records, because Temoney was not employed by the Probation Office at the time that the defendant in cause number 950383 was placed on probation in 2001, and therefore could not have personal knowledge about the creation of that record. Lamotte also argued that, even if sufficient evidence supported admission of the exhibits pertaining to cause number 950383, the similarities between the judgment in that case and the judgment in cause number 00-0404 were not enough to support a finding beyond a reasonable doubt that Lamotte was the defendant convicted in cause number 00-0404. The trial court overruled his objection, Temoney testified to the same facts in front of the jury, and Exhibits 7 through 11 were admitted.

1. Exhibits 8 and 11

Lamotte contends the trial court abused its discretion in admitting Exhibits 8 and 11, pertaining to a felony theft conviction in cause number 950383, because the testimony of Temoney was insufficient to tie him to the conviction.

a. Applicable Law

A conviction alleged as part of a prior criminal record of a defendant under article 37.07 may be established by certified copies of a judgment and a sentence. *See Beck v. State*, 719 S.W.2d 205, 210 (Tex. Crim. App. 1986). However, such documents "are not normally sufficient standing alone to prove the prior convictions," and "this is true even if the name on the judgment and sentence . . . is the same as the defendant in trial." *Id.* The State must show "by independent evidence that the defendant is the person so previously convicted." *Id.* This is frequently established by either the stipulation or judicial admission of the defendant, or testimony of a witness who personally knows the defendant and the fact of his prior conviction and identifies him. *See id.* at 209. However, these are not the exclusive methods for tying a defendant to a prior conviction. *See id.* at 210.

b. Analysis

We conclude that the trial court did not abuse its discretion in admitting State's exhibits 8 and 11 because the State adduced sufficient evidence to permit a rational jury to conclude that Lamotte was the defendant convicted in the cause to which these exhibits pertained, cause number 950383, the felony theft case.

Specifically, the State adduced testimony from Temoney that the defendant convicted in cause number 950383, who was supervised by her office, possessed a driver's license with a number that matched Lamotte's driver's license number.

Lamotte argues that Temoney was not qualified to testify about this information derived from his probation records because Temoney was not employed by the Probation Office in 2001 when the defendant in cause number 950383 was placed on probation. But Temoney testified that in the course of her employment she had become familiar with "how they used to do it back then." She testified that during her employment, she learned that the name, birth date, and driver's license number—the information used to show that Lamotte was the defendant convicted in cause number 950383—would be entered into the system "[w]hen somebody is placed on probation." Thus, Temoney demonstrated that she had sufficient knowledge regarding the procedures of the Probation Office to testify about this information in the records.

The evidence that Lamotte had the same driver's license number as the Lamotte convicted in cause number 950383 was sufficient to permit a rational jury to conclude that Lamotte was the defendant convicted in cause number 950383. Accordingly, we hold that the trial court did not abuse its discretion in admitting Exhibits 8 and 11, the judgment of community supervision and judgment revoking community supervision for felony theft in cause number 950383. *See Smith*, 227 S.W.3d at 759–60 & n.16 (trial court may admit extraneous offense evidence if evidence is such that jury could rationally find defendant criminally responsible for extraneous offense).

2. Exhibits 7, 9, and 10

Lamotte contends that even if Exhibits 8 and 11 were properly admitted, the trial court abused its discretion in admitting Exhibits 7, 9, and 10, records from cause number 00-0404, the assault family violence case. He argues that the only evidence tying him to cause number 00-0404 was the fact that the judgment revoking community supervision in cause number 00-0404 was entered on the same day as the judgment in cause number 950383, by the same judge, in the same trial court, against the same defendant, represented by the same lawyer, opposing the same two State's attorneys.

But even if we assume that the trial court abused its discretion by admitting evidence of the conviction in cause number 00-0404, the erroneous admission of extraneous-offense evidence is not constitutional error. *Casey v. State*, 215 S.W.3d 870, 885 (Tex. Crim. App. 2007). We must disregard a non-constitutional error that does not affect a criminal defendant's "substantial rights." TEX. R. APP. P. 44.2(b). An error affects a substantial right of the defendant when the error has a substantial and injurious effect or influence on the jury's verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). Non-constitutional error is not grounds for reversal if, "'after examining the record as a whole,'" there is "'fair assurance that the error did not influence the jury, or had but a slight effect.'" *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002) (quoting *Johnson v. State*, 967 S.W.2d

410, 417 (Tex. Crim. App. 1998)). In assessing the likelihood that the jury's decision was adversely affected by the error, we

> consider everything in the record, including any testimony or 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. The reviewing court may also consider the jury instructions, the State's theory and any defensive theories, closing arguments, voir dire, and whether the State emphasized the error.

Haley v. State, 173 S.W.3d 510, 518–19 (Tex. Crim. App. 2005) (citations omitted).

Here, considering everything in the record, we conclude that error, if any, in the admission of evidence pertaining to the conviction in cause number 00-0404 did not influence the jury, or at most, had a slight effect. During closing in the punishment phase, the State focused on the conviction in cause number 950383, the felony theft case, arguing to the jury that Lamotte was a thief. The State emphasized the fact that Lamotte had violated the terms of community supervision for the felony theft charge and been revoked. The State pointed out to the jury that Lamotte "[d]idn't pay a dime" of the $10,083 in restitution that had been ordered in that case, and "he's back stealing again." The State also focused on the bank records relevant to the current offense, which showed Lamotte's account was in the red for most of its lifespan, he repeatedly wrote bad checks, and he continued to write checks from the account even after the bank had closed it. The State argued that Lamotte deserved the maximum sentence, 180 days in jail and a $2,000 fine, because he stole

before, did not make things right, and then stole again. While the State did argue that it had proven both convictions beyond a reasonable doubt and mentioned Lamotte had been revoked in the assault family violence case, the State did not mention any details of that offense, and instead focused on its theme that Lamotte was a recidivist thief.

Lamotte's counsel did not mention or discuss either conviction in his punishment closing, and simply argued that because Lamotte had been sent to jail before and it "hasn't improved the behavior or ability by Mr. Lamotte," the jury should give Lamotte the minimum sentence. On appeal, Lamotte's discussion of harm focuses almost entirely on the admission of evidence regarding the felony theft conviction.

Considering that evidence of the felony theft conviction in cause number 950383 was properly admitted and the State's focus in closing was on its argument that Lamotte was a practiced thief, we are assured that any error in the admission of Exhibits 7, 9, and 10 pertaining to cause number 00-0404, the assault family violence case, did not influence the jury's punishment or, at most, had "but a slight effect." *Motilla*, 78 S.W.3d at 355. Accordingly, we conclude that Lamotte has not demonstrated that admission of these exhibits harmed him. *See id.*

We overrule Lamotte's fourth, fifth, sixth, seventh, and eighth issues.

D. Bank records

In his ninth issue, Lamotte contends that the trial court abused its discretion by admitting during the punishment phase State's Exhibits 2d and 4.

During the guilt-innocence phase, the trial court admitted only Lamotte's bank statement for September 2011, the month that check #132 was written. During punishment, the State moved to admit Exhibits 2d and 4. Exhibit 2d contained copies of Lamotte's monthly bank statements for July through November 2011, the entire period that the account was open, as well as copies of all checks that were written against the account during that period. Exhibit 4 was Benavidez's spreadsheet summary of the account activity shown in those records. The records showed numerous overdrafts that resulted in "NSF" penalties, and that the account was in the red for most of the time that it was open. Lamotte argued these records were not admissible because there was insufficient evidence to prove beyond a reasonable doubt that each overdraft in July and August 2011 was made by him, but the trial court overruled the objection and admitted the exhibits.

On appeal, Lamotte asserts the trial court abused its discretion in admitting the exhibits because there was insufficient evidence to support a finding beyond a reasonable doubt that he made each of the overdrafts shown in Exhibit 2d and 4. The State argues that the exhibits were admissible because there was sufficient evidence tying Lamotte to the bank account beyond a reasonable doubt and the jury

was entitled to consider the state and lifespan of the account in evaluating Lamotte's punishment.

We conclude that the trial court did not err in admitting Exhibits 2d and 4. By the punishment phase, the jury had already rejected Lamotte's claim that he had not written check #132 and concluded that check #132 bore his signature. Exhibit 2d included copies of each of the checks written against Lamotte's account while it was open. Moreover, Exhibit 2f, which was admitted during the guilt-innocence phase and about which Lamotte does not complain on appeal, included copies of most of these checks, as well as 14 checks that were written against Lamotte's account after it was closed by the bank. The jury could compare the signatures on those checks to the signatures on check #132 and Lamotte's pro se motion to determine that Lamotte signed those checks. *See* TEX. CODE CRIM. PROC. art. 38.27. There was thus sufficient evidence from which a jury could rationally find Lamotte was responsible for the overdraft activity in his account. *See Smith*, 227 S.W.3d at 759–60 & n.16. The state of the account and Lamotte's use of it were therefore relevant to the jury's consideration of punishment. *See* TEX. CODE CRIM. PROC. art. 37.07, § 3(a)(1) (during punishment, State may offer evidence about the defendant "as to any matter the court deems relevant to sentencing"). Accordingly, we hold that the trial court did not abuse its discretion in admitting State's exhibits 2d and 4.

We overrule Lamotte's ninth issue.

Conclusion

We affirm the trial court's judgment.

Rebeca Huddle
Justice

Panel consists of Justices Keyes, Brown, and Huddle.

Do not publish. TEX. R. APP. P. 47.2(b).