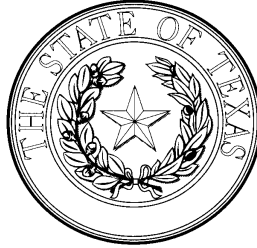


Opinion issued August 31, 2018.



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-16-00977-CR

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**DARREN ANTHONY PAYNE, Appellant**  
V.  
**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 176th District Court  
Harris County, Texas  
Trial Court Case No. 1461121**

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**MEMORANDUM OPINION**

A jury convicted appellant Darren Anthony Payne of murder and the trial court assessed his punishment at twenty-five years' incarceration. On appeal, Payne argues that: (1) the trial court lacked jurisdiction because his indictment was presented by the grand jury of a different district court; (2) the trial court erred by

not admitting evidence that the complainant had previously threatened two other people; and (3) article 102.011(a)(3) and (b) of the Texas Code of Criminal Procedure, which requires defendants convicted of a crime to pay witness summoning and mileage fees, is unconstitutional.

We affirm the trial court's judgment.

### **Background**

Deputy DuPont with the Harris County Sheriff's Office testified that he heard gunshots coming from the Haverstock Hills Apartment Complex on the afternoon of March 14, 2015. When he arrived at the scene of the shooting moments later, Deputy DuPont saw the complainant, Douglas Billings, lying face-down in the threshold of an apartment doorway covered in blood, in the arms of his hysterical wife, Cynthia Moore. Moore told Deputy DuPont that Billings had been shot by Payne. Billings, who had sustained multiple perforating gunshot wounds, died of his injuries later that day. The most lethal shot entered Billings' back and exited his chest.

At trial, Moore testified that she and Billings were living at Haverstock with their two children when the shooting occurred in March 2015. Approximately two months before the shooting, Moore had walked past Payne as he and his friend sat in a parked car in the apartment complex's parking lot. Payne's friend flirted with Moore and asked her if she was romantically involved with anyone. Moore told him that she had a husband and ended the conversation. According to Moore, Payne had

nudged his friend prior to the encounter and encouraged his friend to flirt with her, even though Payne knew that she was married. When Moore told Billings what had happened, Billings was “pretty upset” and asked why Payne would introduce her to someone else when he knew that she was married.

According to Moore, Billings confronted Payne about the incident two days later. When Billings yelled at Payne across an open courtyard, Payne reacted nonchalantly and denied knowing who Moore was. The argument ended when Moore grabbed Billings’ arm and pulled him into the apartment.

Moore testified that Payne avoided making eye contact with them after that incident and that there were no other incidents involving Payne and Billings until the night before the shooting. According to Moore, Billings called her on his cell phone and told her that Payne and some of his friends had walked by Billings while he waited at the bus stop and that the men tried to stare him down, which aggravated Billings. Nothing immediately came from the interaction.

The next afternoon, Moore and Billings heard a commotion outside their apartment and went outside to investigate. Moore saw a fight occurring down the street while several people watched. The couple then heard another commotion. When Moore looked, she saw Payne screaming at Billings from across the road. Payne, who was pacing back and forth and advancing toward the couple, called

Billings derogatory names, and repeatedly demanded that Billings come out into the street because he had “something” for him.

Billings, who was wearing slippers at the time, stepped inside the apartment and put on his work boots. When Billings stepped back outside, he was confronted by one of the two young men with Payne. The third man, who was talking on his cell phone at the time, appeared confused and asked Billings who he was and what was going on. Billings told him that Payne wanted to fight with him.

At that point, Payne, who appeared to be agitated and angry, exchanged words with Billings. Thirty seconds later, Payne pulled out a gun and shot Billings. Moore testified that she heard multiple gunshots, and she heard Billings scream and saw Billings run back into their apartment. Billings stumbled towards their front door and collapsed, face-down on the ground. The police and EMT arrived within minutes. Moore told the police that Payne had just shot her husband.

Payne left the apartment complex almost immediately after the shooting and was arrested in Louisiana four days later.

Payne testified that he barely knew Billings and did not meet him until Billings walked into Payne’s apartment uninvited one afternoon in January 2015. Billings told Payne in a loud and “angry way” that his children’s mother was dating someone else, and then he left.

Payne testified that he had a second brief encounter with Billings at a washeteria a few weeks later. According to Payne, Billings walked angrily towards him and slapped him. Payne described Billings as hyperactive and he testified that Billings “was basically telling me he was going to kill me.” According to Payne, Billings told him, “Don’t be trying to introduce one of your friends to my girl. I’ll kill you, you know. . . . If you want to fight, we can fight.” Payne, who denied introducing Moore to another guy, testified that he tried to diffuse the situation and told Billings that he should talk to Moore.

Payne testified that his third encounter with Billings occurred about one week before the shooting when Billings yelled at him across the courtyard and threatened him. Except for the timing of the encounter, Payne’s account of the incident is similar to Moore’s. According to Payne, Billings was yelling and pointing his finger at Payne, and challenging him to a fight. Payne and his friends laughed at Billings from the other side of the courtyard, but Payne did not say anything to him. Payne also denied seeing Billings at the bus stop the night before the shooting.

On the day of the shooting, Payne testified that he was standing outside with two of his friends watching a large group of people from the apartment complex walk towards the office. He thought there may have been a fight, but he did not see any altercation. While he was outside watching the commotion, Payne spotted Billings sitting outside his apartment without any shoes on and Moore standing next

to Billings. According to Payne, Billings appeared mad and agitated and he yelled at Payne across the street, calling Payne derogatory names and telling him, “You playing with my girl. Don’t go nowhere.” After threatening Payne, Billings walked inside his apartment.

Payne testified that he walked towards his friend’s apartment, which was in the building next to Billings’ apartment, but before he reached his destination, Billings came back outside and walked quickly towards Payne with a silver box cutter or knife in one hand and a black gun in the other. According to Payne, Billings pointed the gun at him and threatened Payne by “basically saying, I’m fixing to show your bitch ass right now. I’m fixing to show you for playing with my girl that you take me for one of these little boy[s] that you be hanging with.” At that point, Payne pulled out a handgun and shot at Billings three times. Billings then turned around and ran back to his apartment.

During trial, Payne offered into evidence transcripts of two Facebook chat messages recovered from Billings’ cell phone. Payne argued that the messages supported his self-defense claim because they indicated that Billings had previously threatened violence against two other people for having inappropriate contact with Moore. According to Payne, these communications were admissible to show Billings’ intent or motive to be the first aggressor when the shooting occurred. The

trial court, however, determined that the transcripts were inadmissible because they were being offered solely for purposes of character conformity.

The jury implicitly rejected Payne’s self-defense claim and convicted Payne of Billings’ murder. This appeal followed.

### **Trial Court’s Jurisdiction**

In his first issue, Payne argues that the district court that tried and convicted him of murder, the 176th District Court, never acquired jurisdiction over him because a grand jury from the 178th District Court presented the indictment to the 176th District Court. Payne further contends that the judgment is void because the 176th District Court did not have jurisdiction over him. Different panels of this Court have recently addressed and rejected identical arguments in other cases. *See Henderson v. State*, 526 S.W.3d 818, 820–21 (Tex. App.—Houston [1st Dist.] 2017, pet. ref’d); *Davis v. State*, 519 S.W.3d 251, 255–56 (Tex. App.—Houston [1st Dist.] 2017, pet. ref’d). Because the relevant facts of this case do not differ materially from the relevant facts in *Henderson* and *Davis*, we overrule Payne’s first issue. *See Henderson*, 526 S.W.3d at 820–21; *Davis*, 519 S.W.3d at 255–56.

### **Admission of Evidence**

In his second issue, Payne argues that the trial court abused its discretion by excluding Facebook chat messages between Billings and third persons because they were admissible under Texas Rule of Evidence 404(b)(2) to show Billings’ specific

intent or motive to attack Payne as the first aggressor. The State responds that the trial court did not abuse its discretion because, not only was the excluded evidence offered solely for purposes of character conformity, it was also irrelevant, and it violated the rule against admitting hearsay evidence.

**A. Standard of Review**

We review a trial court’s evidentiary rulings under an abuse of discretion standard. *Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016). As long as the trial court’s ruling is within the “zone of reasonable disagreement,” there is no abuse of discretion, and the trial court’s ruling will be upheld. *De La Paz v. State*, 279 S.W.3d 336, 343–44 (Tex. Crim. App. 2009). We will affirm the trial court’s evidentiary ruling if it is correct under any applicable theory of law and is reasonably supported by the record. *Winegarner v. State*, 235 S.W.3d 787, 790 (Tex. Crim. App. 2007).

**B. Applicable Law**

In general, evidence of a person’s character may not be used to prove that the person “behaved in a particular way at a given time.” *Tate v. State*, 981 S.W.2d 189, 192 (Tex. Crim. App. 1998); TEX. R. EVID. 404(b)(1). However, this limit on character evidence is not absolute. Texas Rule of Evidence Rule 404(b)(2) allows a defendant in a homicide prosecution who raises the issue of self-defense to introduce evidence of the “victim’s prior specific acts of violence when offered for a



non-character purpose—such as his specific intent, motive for an attack on the defendant, or hostility—in the particular case.” *Ex parte Miller*, 330 S.W.3d 610, 620 (Tex. Crim. App. 2009); *see* TEX. R. EVID. 404(b)(2). Such specific acts are admissible only to the extent that they have relevance apart from their tendency to show character conformity. *Torres v. State*, 71 S.W.3d 758, 760 (Tex. Crim. App. 2002). Evidence is relevant if it has any tendency to make a fact of consequence in determining the action more or less probable than it would be without the evidence. TEX. R. EVID. 401. “As long as the proffered violent acts explain the outward aggressive conduct of the deceased at the time of the killing, and in a manner other than demonstrating character conformity only, prior specific acts of violence may be admitted even though those acts were not directed against the defendant.” *Torres*, 71 S.W.3d at 762.<sup>1</sup> Such evidence, however, may still be excluded because of some other provision, such as the constitution, statute, or other evidentiary rule, including

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<sup>1</sup> A defendant who raises the issue of self-defense may also introduce evidence of a victim’s character trait for violence pursuant to Rule 404(a)(2) to show that the victim was, in fact, the first aggressor, but the defendant may do so only through reputation and opinion testimony under Rule 405(a). *See* TEX. R. EVID. 404(a)(2), 405(a); *Ex parte Miller*, 330 S.W.3d 610, 619 (Tex. Crim. App. 2009). Such defendants may also offer reputation or opinion testimony or evidence of specific prior acts of violence by the victim to show the “reasonableness of [the] defendant’s claim of apprehension of danger,” if the defendant “is aware of the victim’s violent tendencies and perceives a danger posed by the victim, regardless of whether the danger is real or not.” *Ex parte Miller*, 330 S.W.3d at 619; TEX. R. EVID. 404(b). Payne is not arguing that the Facebook transcripts are admissible under either of these exceptions.

Rule of Evidence 403. *See* TEX. R. EVID. 403 (providing that relevant evidence may be excluded if its probative value is substantially outweighed by danger of unfair prejudice, confusion of the issues, or misleading jury, or by consideration of undue delay, or needless presentation of cumulative evidence).

### **C. Analysis**

Payne argues that the trial court abused its discretion by excluding transcripts of two Facebook chats between Billings and third persons because these messages demonstrate that Billings threatened to kill people whom he believed were having inappropriate contact with his wife, and admissible to show Billings' specific intent or motive to attack Payne as the first aggressor.

The first chat occurred on January 24, 2015 between Billings' Facebook account and an account belonging to Kenneth Jamerson. Billings, or someone using his Facebook account, sent a message to Jamerson's account stating, "I don't feel play bro u a bum she never fuck with u lol come on it's u nobody from home wouldn't get u time or day[.]" Jamerson, or someone using his Facebook account, responded, "ok dont none of that matter u right we never did non but I still got love for her and u lucky to have her," and he told Billings that he should treat his girl better. Billings responded that he could treat his girl how he wanted, and Jamerson stated he did not care who she was with as long as that person treated her right. After the two men argued about which of them had the most money and property,

Jamerson stated, “ight we a see lets stop talkin” and then he threatened Billings by stating, “ima body u.” Billings responded, “where u at then we can play gun play that is . . .” Jamerson responded “u enternet thuggin . . . i got u[.]” Billings returned, “I’m on my way to green point mall three deep in my girl 20 min bro get yo gun if u got one[.]” Jamerson replied, “i hit u up when I get dressed dont have no police around the corner,” and he called Billings derogatory names. It is not clear what prompted Billings to send the initial message or what, if anything, resulted from the exchange.

In the second chat on March 7, 2015, someone using Billings’ Facebook account told a woman to pass along a message to an unidentified male who the sender believed had been flirting with his girl on Facebook. The sender told the woman to “[t]ell yo nigga he got one more time to try to talk to mines . . . nigga diein every day up there so it won’t be shit to make a trip. . .” The woman seemed confused by the message and she asked what was going on. Billings told her, “The nigga keep hitting my girl on fb cus his homeboy is her God brother” and “That fuck around be for me[.]”

As the State points out, these messages were recovered from Billings’ phone by a digital forensics expert, and no witness with knowledge testified about these conversations, provided any context, or offered a comprehensible explanation of the

content. Having reviewed them, we agree that the transcripts of these Facebook messages are ambiguous, at best.

The March 7, 2015 conversation indicates that Billings, or someone using his Facebook account, threatened to somehow kill someone at some point in the indefinite future, whom he believed had been hitting on his “girl.” According to Payne, Billings was hostile towards him and threatened him on at least two prior occasions because Billings thought that Payne had tried to introduce his friend to Billings’ wife, Moore, and that Payne had encouraged his friend to flirt with her, despite knowing that she was married. Nothing in this conversation identifies Moore as the woman in question, and even if the sender is referring to Moore, it is undisputed that Payne never flirted with Moore.

Billings began the January 2015 conversation with Jamerson by telling him that he was not interested in “play,” i.e., meaning possibly, he did not want to fight with Jamerson. It was Jamerson—not Billings—who made the first threat of violence, if it is, i.e., “ima body u,” after Jamerson criticized Billings’ treatment of his “girl” and the two men argued about which of them was the most prosperous. Thus, Jamerson appears to have been the aggressor in this situation, not Billings. No one at trial attempted to explain what prompted Billings to send the initial message to Jamerson, or what interaction, if any, Jamerson had with Billings’ “girl,” other than Jamerson stating that he still had “love for her.”

After reviewing the excluded transcripts, the trial court could have reasonably determined that both of these situations were distinguishable from the facts of this case, and that neither conversation explained Billings’ alleged outward aggressive conduct towards Payne at the time of the killing nor had any relevance other than its tendency to show that Billings had acted in conformity with his allegedly violent nature. *See Torres*, 71 S.W.3d at 762. Because the trial court’s ruling that these Facebook chat messages were inadmissible character-conformity evidence under 404(b) was not outside the “zone of reasonable disagreement,” we hold that the trial court did not abuse its discretion by excluding this evidence. *See De La Paz*, 279 S.W.3d at 343–44. We overrule Payne’s second issue.

### **Constitutional Challenge to Charge in Cost Bill**

In his third issue, Payne challenges the constitutionality of article 102.011(a)(3) and (b) of the Texas Code of Criminal Procedure.

Article 102.011 provides, in relevant part, that “[a] defendant convicted of a felony or a misdemeanor shall pay the following fees for services performed in the case by a peace officer,” including “\$5 for summoning a witness” and “. . . 29 cents per mile for mileage required of an officer to perform a service listed in this subsection and to return from performing that service . . . .” TEX. CODE CRIM. PROC. ANN. art. 102.011(a)(3), (b). The bill of costs in Payne’s case includes a \$160 charge for “Summoning Witness/Mileage.”

Payne argues that subsections (a)(3) and (b) of article 102.011 are: (1) facially unconstitutional because they violate the Texas Constitution's Separation of Powers clause; and (2) unconstitutional as applied to him because his constructive notice of the \$5 witness summoning fee and related mileage charge authorized by these subsections hindered his constitutional rights to compulsory process to secure favorable witnesses and to confront adverse witnesses as an indigent defendant. *See* U.S. CONST. amend. VI; TEX. CONST. art. I, § 10 (rights to compulsory process and confrontation), TEX. CONST. art. II, § 1 (separation of powers); *see also* TEX. CODE CRIM. PROC. ANN. art. 1.05 (West 2005). This Court has previously considered, and rejected, both arguments in similar appeals. *See Allen v. State*, No. 01-16-00768-CR, 2018 WL 4138965, slip op. at \*\*12–13, 25–26 (Tex. App.—Houston [1st Dist.] Aug. 30, 2018, no pet. h.) (rejecting argument that article 102.011(a)(3) and (b) are facially unconstitutional because they violate Texas Constitution's separation-of-powers clause and as-applied constitutional challenge); *London v. State*, 526 S.W.3d 596, 602 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd) (rejecting indigent defendant's as-applied constitutional challenge to article 102.011(a)(3) because defendant did not meet his burden of showing that his constructive notice of mandatory court costs had actual effect of denying him compulsory process or opportunity to confront witnesses against him). As in *Allen* and *London*, Payne has not identified any material, favorable witnesses who were

available to testify at his trial, and that he would have called to testify but for his constructive notice of the \$5 per witness summoning fee and related mileage fee. *See Allen*, 2018 WL 4138965, slip op. at \*\*25–26; *London*, 526 S.W.3d at 600. He also has not demonstrated how the witness summoning/mileage fee impaired his right to confront and cross-examine the witnesses who testified against him. *See Allen*, 2018 WL 4138965, slip op. at \*\*25–26; *London*, 526 S.W.3d at 600–01. Accordingly, we reject Payne’s arguments challenging the constitutionality of article 102.011(a)(3) and (b) for the reasons articulated in those opinions. *See Allen*, 2018 WL 4138965, slip op. at \*\*25–26; *London*, 526 S.W.3d at 600–02.

We overrule Payne’s third issue.

### **Conclusion**

We affirm the trial court’s judgment.

Russell Lloyd  
Justice

Panel consists of Justices Higley, Massengale and Lloyd.

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