Opinion issued August 11, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00126-CR

CHARLES EDWARD MILLER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Case No. 1529159

MEMORANDUM OPINION

Appellant, Charles Edward Miller, was charged with aggravated sexual assault.[1] He was convicted by a jury and, due to sentencing enhancements, was sentenced to life in prison. In four issues on appeal, appellant contends that: (1) the

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1 TEX. PENAL CODE § 22.021.

trial court abused its discretion by refusing to strike the testimony of a witness who violated the Rule, (2) the trial court erred in admitting pen packets, (3) the trial court erred in admitting the testimony of a fingerprint expert, and (4) the evidence was insufficient to support the sentencing enhancements.

We affirm.

Background

The Assault

The complainant testified at trial that, on January 30, 2016, she and her best friend, Kelesha James, went to another friend's birthday party at a country bar called Neon Boots. James and the complainant arrived at around 10:00 p.m. or 10:30 p.m. and they stayed together for most of their time at the bar. James left at around 1:00 a.m. or 1:30 a.m., and the complainant stayed behind at the bar. James testified that when she left, the complainant was not unconscious or in need of going to the hospital, but she was "drunk."

The complainant testified that she drank "[a] lot" that night. She testified that she did not know the exact time that she left the bar, but thought it was between 1:00 a.m. and 2:00 a.m. because she knew it was before closing time. She left in her own vehicle but realized after a few minutes that she had been drinking too much to drive, so she pulled over near a railroad track and wooded area. She saw no other vehicles or people around, removed the keys from the ignition, which unlocked her doors,

and went to sleep. She did not know the exact time that she pulled over, but thought it was just a few minutes after leaving the bar.

After sleeping for what she thought was "a few hours," the complainant was awakened by appellant trying to take off her pants. She did not know exactly what time she woke up. Although she tried to leave, appellant blocked her and put a small knife in her hand. He pushed the complainant down across the seats, got on top of her, and sexually assaulted her. She kept her eyes closed for most of the assault, but saw his face a couple of times, including when she tried to leave the vehicle and "later on after the assault." She had no idea how long the assault lasted.

When appellant "was done," he got up and "was just this nice person all of a sudden." Among other questions, appellant asked the for her name and phone number. She gave him her real phone number "because that was the only thing that I could think of is how I could get this guy." Eventually, appellant told the complainant he had to go to work and rode off on a bicycle. The complainant testified it was still dark outside when he left. After he left, the complainant drove to her mother's house in Magnolia, Texas without stopping. On the way there, James called the complainant to make sure she made it home safely, and she told James what had happened. James testified that she called the complainant around 7:30 or 8:00 a.m. that morning.

When asked on direct what time she thought the assault occurred, the complainant testified that she thought it was around 5:30 or 6:00 a.m. "[b]ecause I had been sleeping for hours before it happened." However, she admitted that she was not certain of the time but was "pretty sure" the assault did not occur just an hour after she fell asleep.

The next morning, appellant sent the complainant a text message. She posted the sender's phone number on Facebook and one of her friends found a profile which was connected to the phone number. The name on the profile identified appellant, Charles Miller, and the complainant immediately recognized the person in the profile picture as her assailant. The complainant later reported the assault to police and told them how she located the man who assaulted her.

Sergeant C. Garza, the investigator assigned to the case, was the second witness to testify[2] and testified before the complainant. Sergeant Garza testified on cross-examination that there was never a concrete time as to when the assault occurred, just that "it was very early morning hours of January 31." Defense counsel showed Sergeant Garza what appeared to be payroll records for appellant which showed a clock-in time for work at 5:03 a.m. on January 31, 2016, at a location about 14 miles away from where the sexual assault occurred.

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[2] James was the first witness called by the State.

However, Sergeant Garza later testified that she did not know: (1) where appellant was living at the time of the assault; (2) what transportation, other than a bicycle, he had access to; and (3) whether appellant was the person who clocked in for work that day, as she did not know the company's clock-in procedures. Sergeant Garza also agreed it was possible that an intoxicated person may not have the best grasp of time.

The Rule Violation

The trial court recessed for lunch while the complainant was still on direct. After lunch, appellant's counsel conducted cross-examination of the complainant, focusing heavily on the timeline of the assault. The complainant testified again that she thought she left the bar between 1:00 and 2:00 a.m., but that she couldn't "do an exact time line" because "it's been three years." She also testified that although she "felt like" she had slept for a few hours before being woken up, she reiterated that she was intoxicated and did not "know a time line." When pressed on her previous testimony on direct that she slept for a few hours, the complainant testified that "I've said that several times because—but I don't know—but I literally—and I keep repeating myself, I don't know . . . Maybe it was a few hours, maybe it wasn't. But, again, that was three years ago."

The complainant reaffirmed her testimony on direct that it was still dark when appellant left, and that she drove straight to her parent's house in Magnolia, though

she did not recall what time she got home because she did not "know a timeline." When pressed again about how long she had slept before the assault, the following exchange occurred:

DEFENSE: Okay. You testified earlier that you're pretty sure it's not—well, first of all, you said it was not possible that you slept only an hour after 2:00 o'clock, right? And that's per your recollection, right?

COMPLAINANT: I don't have a timeline. Yes, I might have said, Yeah, it's not possible, which I really thought it was later, but it might not be.

DEFENSE: Okay.

COMPLAINANT: You said he clocked in at 5:00, or she—someone clocked in at 5:00 o'clock.

DEFENSE: Okay. Who told you about him clocking in somewhere?

COMPLAINANT: No one did.

DEFENSE: Well, you just mentioned it. Who told you that?

COMPLAINANT: No one did.

DEFENSE: Who told it to you?

COMPLAINANT: My friend.

DEFENSE: Your friend sitting there?

COMPLAINANT: Uh-huh.

DEFENSE: So she has been watching the testimony and telling you what people have been saying?

COMPLAINANT: No. She's only been here for a few hours.

DEFENSE: Right. And so when did you talk to her and have her tell you what was being said in here?

COMPLAINANT: Lunch break. And she would not tell me anything except for she told me that.

DEFENSE: Right. And then so that obvious problem with that is that the timeline becomes an issue, right?

COMPLAINANT: No.

After this testimony, appellant asked the trial court to strike the complainant's testimony for violation of the Rule.[3] At a hearing held outside the jury's presence, the complainant testified that she had a conversation with her friend Jessica Smith during the lunch break and that she thought Smith had seen "a piece" of the testimony from the morning. She testified that Smith "did say something about a clocking in," but that Smith did not tell her "the exact time or anything," only that "[h]e clocked in, like, to work." The complainant did not think Smith knew about the Rule. The complainant agreed that the prosecutors told her "about the rule and what those rules are," but she "didn't realize it had to do with someone that was just like my friend sitting there."

Smith testified at the hearing that she saw the portion of Sergeant Garza's testimony regarding appellant's work records and when he clocked into work. Smith told the complainant "there was something about the clock-in time," but she did not

[3] "The Rule" refers to Rule 614 of the Texas Rules of Evidence, which requires the court, at the request of any party, to exclude witnesses so that they cannot hear other witnesses' testimony. TEX. R. EVID. 614.

tell the complainant the time that appellant clocked in, or the 5:00 a.m. time period, and she had no idea where the complainant got that from. Smith did not know that she was not supposed to share information of other testimony with the complainant, but that she "didn't really share that much with her. I just told her there was—something about a timeline and a clock-in receipt or something." She denied telling the complainant that it was at 5:00 a.m.

Appellant moved to strike the complainant's testimony in its entirety. The trial court denied the motion, stating, "[a]s I said when you first came up here, you're certainly permitted to vigorously cross-examine her about it." The trial court admonished everyone in the courtroom that spectators cannot relay information to witnesses about testimony and that future violators would be held in contempt, fined, placed in jail, or both.

When the jury returned, defense counsel cross-examined the complainant about her previous testimony and the Rule violation. The following exchange occurred:

DEFENSE:	All right. So to clarify, someone you know was watching the trial earlier, correct?
COMPLAINANT:	Yes. Not yesterday, but earlier today.
DEFENSE:	Really—
COMPLAINANT:	Yeah, she saw the previous who was my investigator.
DEFENSE:	Right. And over lunch you talked to her?

COMPLAINANT: Yes.

DEFENSE: And during that time she told you about my client and his 5:00 o'clock a.m. check in at work; is that true?

COMPLAINANT: She didn't give the exact time, but, yeah, she did.

DEFENSE: Okay. And you're aware that you're under the rule in this situation, right? Like, to where you're not supposed to be able to talk about those things?

COMPLAINANT: Yes.

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DEFENSE: All right. Now, you testified that the assailant, after he assaulted you, told you that he had to go to work, right?

COMPLAINANT: Yes. And it's actually in paperwork. This didn't just happen, like, now. I said it before earlier when we were talking and I've said it in all my reports.

DEFENSE: Well, I have your reports here and it was never mention[ed] ever in any of your previous statements. That's—

COMPLAINANT: I've always said he had to leave for work.

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DEFENSE: All right. But this—but someone clearly told you that there were work records introduced that he was at work at 5:00 in the morning, correct?

COMPLAINANT: They said that she was—he was at work, yes.

DEFENSE: Okay. And then you testified that after—then you testified today that he said he had to go to work?

COMPLAINANT: Actually, I said it earlier that he got on his bicycle and went to work. That was earlier.

The Forensic Evidence

A sexual assault kit was not completed, but the complainant's vehicle was processed as part of the investigation. Possible semen was found in the vehicle. Through an autosomal DNA analysis, appellant was excluded as a possible contributor to DNA mixtures found in the complainant's vehicle. However, Y-STR analysis—DNA testing specific to the Y-chromosome—was also performed, and appellant could not be excluded as a possible contributor to a male DNA mixture found in the complainant's vehicle. His Y-STR DNA profile was consistent with the profile developed in the complainant's vehicle. The profile was estimated to occur in approximately 1 out of every 2,457 Caucasian individuals. The complainant identified appellant from a photo array with 100 percent certainty. She also identified appellant in court as the man who assaulted her.

After the conclusion of the evidence, the jury found appellant guilty of aggravated sexual assault. The trial then proceeded to the punishment phase, with the jury to assess punishment.

The Sentence

The indictment included two enhancement paragraphs alleging prior felony convictions, one of which was for aggravated rape in 1981 and the other was for burglary of a habitation in 1992. During the punishment phase, appellant pled "not true" to the enhancement allegations. The State introduced three penitentiary packets

as a way to prove the enhancement allegations: (1) Exhibit 36 included an affidavit from the Chairman of Classification and Records for the Texas Department of Criminal Justice – Correctional Institutions Division, a judgment for defendant Charles Edward Miller, Jr., reflecting a conviction for aggravated rape in 1981, and fingerprint cards for Miller, Charles Edward Jr., which listed his date of birth; (2) Exhibit 37 included an affidavit from the Chairman of Classification and Records for the Texas Department of Criminal Justice – Correctional Institutions Division, a judgment for defendant Charles Edward Miller reflecting a conviction for burglary of a habitation in 1992, fingerprint cards for Miller, Charles Edward Jr., which listed his date of birth, and photographs of appellant; and (3) Exhibit 38 included an affidavit from the Chairman of Classification and Records for the Texas Department of Criminal Justice – Correctional Institutions Division, a judgment for defendant Charles Edward Miller, Jr., reflecting a conviction for burglary of a habitation in 1990, and fingerprint cards for Miller, Charles Edward Jr., which listed his date of birth. A fingerprint expert testified that appellant was the source of the fingerprints contained in the pen packets.

The jury found the aggravated rape enhancement true and appellant received a life sentence. *See* TEX. PENAL CODE § 12.42(c)(2)(A)(i), (c)(2)(B)(ii). This appeal followed.

Violation of the Rule

In his first issue, appellant argues the trial court abused its discretion by failing to strike the complainant's testimony after she violated the Rule. Appellant contends that the complainant altered her testimony after learning appellant was at work at the time of the alleged assault, information that she received from a friend who heard Sergeant Garza's testimony during trial. Appellant argues the trial court's error in not striking the complainant's testimony prejudiced him because the complainant's altered testimony "corroborated her accusation of [appellant] as the perpetrator and bolstered her credibility overall by eliminating the giant inconsistency (impossibility) of [appellant] having been in two places at once."

A. Standard of Review and Applicable Law

The purpose of placing witnesses in a proceeding under the sequestration rule is to prevent the testimony of one witness from influencing the testimony of another. Rule 614 requires a trial judge, at a party's request, to order witnesses excluded from the courtroom during the testimony of other witnesses. TEX. R. EVID. 614; *Bell v. State*, 938 S.W.2d 35, 50 (Tex. Crim. App. 1996). The court's decision to allow testimony from a witness who has violated the Rule is a discretionary matter. *Bell*, 938 S.W.2d at 50. "It has been held that the ruling of the trial court on an objection to a witness testifying when he has remained in the courtroom after having been placed under the '[R]ule' may not be relied upon as a ground for reversal unless an

abuse of discretion is shown; and until the contrary has been shown, it will be presumed on appeal that such discretion was properly exercised." *Valdez v. State*, 776 S.W.2d 162, 170 (Tex. Crim. App. 1989). In reviewing the trial court's decision to allow the testimony, we look at whether the witness's presence during other testimony resulted in injury to the defendant. *Bell*, 938 S.W.2d at 50. We consider two criteria to determine injury or prejudice: (1) whether the witness actually conferred with or heard testimony of other witnesses, and (2) whether the witness's testimony contradicted testimony of a witness from the opposing side or corroborated testimony of a witness he had conferred with or heard. *Id*.

B. Analysis

Here, the record is clear that a Rule violation occurred. The complainant admitted that she spoke with her friend, Jessica Smith, and that Smith was present in the courtroom during Sergeant Garza's testimony. The complainant also admitted that she discussed Sergeant Garza's testimony with Smith, and that Smith told her that Sergeant Garza testified that appellant clocked in at work, though she denied that Smith told her the exact time. The complainant also admitted that the prosecutors spoke to her about the Rule but stated she did not realize it precluded her from speaking with a friend.

But a violation of the Rule does not automatically result in reversible error. *See Bell*, 938 S.W.2d at 50. Instead, the trial court has discretion to allow the

testimony, and that discretion will not be overturned on appeal unless the violation resulted in injury to the appellant. *See id*.

To determine whether the violation resulted in injury to appellant, we consider first whether the complainant actually conferred with or heard testimony of other witnesses. *See Valdez*, 776 S.W.2d at 170. The State seems to argue that this prong is not met because the complainant did not actually hear the testimony of other witnesses, but only spoke to Smith, a spectator who heard the testimony of Sergeant Garza. We disagree. "A violation of the Rule occurs when a nonexempt prospective witness remains in the courtroom during the testimony of another witness, *or when a nonexempt prospective witness learns about another's trial testimony through discussions with persons other than the attorneys in the case* or by reading reports or comments about the testimony." *See State v. Saylor*, 319 S.W.3d 704, 710 (Tex. App.—Dallas 2009, pet. ref'd) (emphasis added). Because the complainant learned about Sergeant Garza's testimony through discussions with Smith, the first prong of the injury test has been met.

Under the second prong, we consider whether the complainant's testimony contradicted testimony of a witness from the opposing side or corroborated testimony of a witness he had conferred with or heard. *See Valdez*, 776 S.W.2d at 170. Here, the complainant's testimony about the assault contradicted the appellant's evidence that appellant clocked in at work at 5:03 a.m. However, the complainant's

testimony post Rule violation did not substantively change from her testimony on direct. As recounted above, the complainant testified on direct that: (1) she thought she left the bar somewhere between 1:00 and 2:00 a.m., but was not sure of the exact time; (2) she pulled over to the side of the road after driving for what she thought was a few minutes; (3) she fell asleep for what she thought was a few hours, although she could not be sure of exactly how long she was asleep; (4) she awoke to someone assaulting her; (5) she did not know what time she woke up or how long the assault occurred; (6) appellant told her he had to go to work and left on his bicycle; (7) she did not know what time it was when appellant left, but it was still dark; and (8) she drove directly to her parent's house in Magnolia after the assault, but did not know what time it was when she arrived. Although the complainant testified that she thought the assault happened around 5:30 or 6:00 a.m., she stated she was not sure of the time.

On cross-examination, her testimony remained substantially the same about the above details. She did waver on how long she slept after pulling over, saying "I've said that several times because—but I don't know—but I literally—and I keep repeating myself, I don't know . . . Maybe it was a few hours, maybe it wasn't. But, again, that was three years ago." However, this testimony is consistent with her previous testimony before the Rule violation, when she admitted that she thought and felt like she slept for a few hours, but she could not be sure. She also stated

numerous times on direct that she could not give exact times because the assault occurred three years ago. Therefore, it does not appear that the information the complainant received from Smith—related to appellant clocking in at work—influenced the complainant's testimony because her testimony remained consistent before and after the Rule violation. *See Barnes v. State*, 165 S.W.3d 75, 86 (Tex. App.—Austin 2005, no pet.) (determining no harm was shown because witness's testimony before Rule violation was consistent with her later post-violation testimony); *Townes v. State*, No. 04-10-00796-CR, 2012 WL 566000, at *3 (Tex. App.—San Antonio Feb. 15, 2012, pet. ref'd) (mem. op., not designated for publication) (finding second prong not met because witnesses' testimonies never changed from prior statements made pre-trial or statements made during trial before Rule was violated).

Moreover, appellant extensively cross-examined the complainant about her violation of the Rule, which the jury could have considered in assessing her credibility. And the trial court admonished everyone in the courtroom that spectators cannot relay information to witnesses about testimony and that future violators would be held in contempt, fined, placed in jail, or both. *See Roper v. State*, No. 05-07-00102-CR, 2008 WL 2548826, at *3 (Tex. App.—Dallas June 26, 2008, pet. ref'd) (not designated for publication) (holding trial court did not abuse its discretion in admitting testimony of witness who violated Rule because appellant extensively

cross-examined witness about her violation of Rule, yet she maintained her testimony that appellant committed charged offenses); *Reed v. State*, No. 14-02-00671-CR, 2003 WL 21782537, at *3 (Tex. App.—Houston [14th Dist.] July 31, 2003, pet. ref'd) (mem. op., not designated for publication) (holding trial court did not abuse its discretion in letting witness testify, in part, because after violation of Rule was exposed, trial court again admonished witness in front of jury and allowed opposing counsel to cross-examine him about violation). Under these circumstances, we hold that the trial court did not abuse its discretion in refusing to strike the complainant's testimony after she violated the Rule.

We overrule appellant's first issue.

Admissibility of Pen Packets

In his second issue, appellant argues that the trial court should have excluded the pen packets, Exhibits 36 through 39, because the State did not serve them on him as required by Rule 902(10) of the Texas Rules of Evidence. In response, the State argues that appellant waived this argument on appeal because his objection at trial does not comport with the argument he raises here.

A. Standard of Review and Applicable Law

Authentication of evidence is a condition precedent to its admissibility. See TEX. R. EVID. 901(a); *Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012). The proponent of the evidence must "make a threshold showing that would be

'sufficient to support a finding that the matter in question is what its proponent claims.'" *Tienda*, 358 S.W.3d at 638 (quoting TEX. R. EVID. 901(a)); *Reed v. State*, 811 S.W.2d 582, 586 (Tex. Crim. App. 1991).

Rules of Evidence 901 and 902 govern the authentication requirement. Rule of Evidence 901(b) provides an illustrative, though not exhaustive, list of examples of extrinsic evidence that satisfies the requirement of authentication. *See* TEX. R. EVID. 901(b)(1)-(10); *Reed*, 811 S.W.2d at 586. Rule 902 identifies certain evidence as self-authenticating and dispenses with Rule 901's requirement of extrinsic evidence of authenticity for that evidence. *See* TEX. R. EVID. 902(1)-(10). A document may be authenticated under either Texas Rules of Evidence 901 or 902 and need not be authenticated under both. *See Reed*, 811 S.W.2d at 586.

We review a trial court's decision to admit evidence over an authentication objection for an abuse of discretion. *Tienda*, 358 S.W.3d at 638. If the trial court's ruling is at least within the zone of reasonable disagreement, we will not interfere. *Id.*

B. Analysis

To preserve error, a party must timely object and state the grounds for the objection with enough specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context. TEX. R. APP. P. 33.1(a)(1)(A); *see Thomas v. State*, 505 S.W.3d 916, 924 (Tex. Crim. App. 2016).

The objection must be sufficiently clear to give the trial court and opposing counsel an opportunity to address the objection and, if necessary, correct the purported error. *Thomas*, 505 S.W.3d at 924; *see also Smith v. State*, 499 S.W.3d 1, 7–8 (Tex. Crim. App. 2016) ("There are two main purposes behind requiring a timely and specific objection. First, the judge needs to be sufficiently informed of the basis of the objection and at a time when he has the chance to rule on the issue at hand. Second, opposing counsel must have the chance to remove the objection or provide other testimony."). If a trial objection does not comport with arguments on appeal, error has not been preserved. *Thomas*, 505 S.W.3d at 924.

We consider the context of the complaint to determine if the party preserved error. *Edwards v. State*, 497 S.W.3d 147, 162 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd). If the correct ground for exclusion was obvious to the trial court and opposing counsel, waiver will not result from a general or imprecise objection. *Id.* However, if the context shows that a party failed to effectively communicate his argument, then the error is deemed waived on appeal. *Id.*

At trial, appellant's counsel objected to the admission of Exhibits 36 through 39 because "despite making a 39.14[4] request pretrial many months ago, these items,

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[4] Texas Code Criminal Procedure article 39.14 provides that:

> [A]s soon as practicable after receiving a timely request from the defendant the state shall produce and permit the inspection and the electronic duplication, copying, and photographing, by or on behalf of the defendant, of any offense reports, any designated documents,

I believe, were obtained, like, on the eve on [sic] trial and were not actually disclosed to me." The parties continued the discussion about the admissibility of these exhibits and the following exchange occurred:

DEFENSE:	I didn't see them before we started then. I didn't see them.
STATE:	Judge, he's referring to something else that I handed which is not these exhibits. Also, these are self-authenticating document.
COURT:	Has he seen this prior to trial?
STATE:	Yes, he has. Yes, sir.
COURT:	When were they given?
STATE:	Prior.
DEFENSE:	Prior to what?
STATE:	We had them for a while.
DEFENSE:	I don't think I've ever seen them.
STATE:	You saw them for sure.

> papers, written or recorded statements of the defendant or a witness, including witness statements of law enforcement officers but not including the work product of counsel for the state in the case and their investigators and their notes or report, or any designated books, accounts, letters, photographs, or objects or other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of the state or any person under contract with the state.

TEX. CODE CRIM. PROC. art. 39.14(a).

DEFENSE: I never looked at that pen packet. They were never served to me and not in the pretrial.

COURT: Were they provided in discovery?

STATE: Yes, Your Honor. He knew about these and we had them in the file the entire time. He's aware of them. We had this discussion several days ago.

COURT: Were they listed in any type of discovery product that you gave to him, those particular ones?

DEFENSE: There's no copies of them. They might have been in their file the whole time. Honestly, I've never looked at the pen packets in the file.

STATE: That is not a[n] excuse that he didn't open them.

DEFENSE: Open file policy is not an excuse, Your Honor.

STATE: And, Your Honor, I can't take them apart as he's referring because they are certified self-authenticating documents from the State of Texas.

COURT: Overruled. They're admitted unless you have another objection?

DEFENSE: No, sir.

COURT: They are admitted.

Nowhere in this discussion did appellant's counsel reference Rule 901 or 902 governing authentication of evidence, nor did he argue that the exhibits were inadmissible because they were not properly authenticated. Appellant argues that although his objection began as a discovery-violation objection, he later invoked Rule 902(10) by arguing that the exhibits "were never served to me." When viewed in context of the entire conversation, however, it appears that the parties and the trial

court understood appellant's objection to the exhibits to be based on a discovery violation. The trial court's questioning focused on whether appellant's counsel was aware of the exhibits, whether they were listed in any discovery documents, and whether appellant's counsel had seen them prior to trial.

Even a general authentication objection, without more, is not adequate to preserve a complaint on appeal. *Snow v. State*, No. 02-17-00310-CR, 2019 WL 237734, at *3 (Tex. App.—Fort Worth Jan. 17, 2019, no pet.) (mem. op., not designated for publication); *Guaderrama v. State*, No. 02-14-00500-CR, 2016 WL 828325, at *4 (Tex. App.—Fort Worth Mar. 3, 2016, no pet.) (mem. op., not designated for publication) (concluding that general authentication objection was "improper authentication objection" and inadequate to preserve complaint on appeal); *cf. Smith v. State*, 683 S.W.2d 393, 404 (Tex. Crim. App. 1984) (objection that is too general will not preserve issue for appeal). What appellant relies on as an authentication objection falls short of even a general authentication objection. Nothing in the record demonstrates that the trial court and opposing counsel were aware of the specific grounds appellant relies on here, i.e., that the exhibits were inadmissible under Rule 902(10) because they were not served on appellant 14 days before trial. Accordingly, appellant has failed to preserve this issue for appeal.

We overrule appellant's second issue.

Testimony of Fingerprint Expert

In his third issue, appellant argues that the trial court should have excluded the testimony of the State's fingerprint expert, Dimitry Payavla, during the punishment phase because the State failed to properly disclose the name of this expert in accordance with Article 39.14(b) of the Texas Code of Criminal Procedure.

A. Standard of Review and Applicable Law

Generally, notice of the State's witnesses must be given upon request by the defense. *Hamann v. State*, 428 S.W.3d 221, 227 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd). Article 39.14 of the Texas Code of Criminal Procedure requires a party, upon request from the other side, to disclose the name and address of each witness that may testify at trial, including expert witnesses, at least 30 days before trial. TEX. CODE CRIM. PROC. art. 39.14(b). If the trial court allows a witness who was not on the State's list to testify, we review that decision for an abuse of discretion. *Hamann*, 428 S.W.3d at 227 (citing *Martinez v. State*, 867 S.W.2d 30, 39 (Tex. Crim. App. 1993)).

Among the factors a reviewing court considers in determining whether a trial court abused its discretion by allowing a witness who is not on the State's witness list to testify are (1) whether the State's actions in calling a previously undisclosed witness constituted bad faith, and (2) whether the defendant could have reasonably anticipated that the witness would testify. *Id.* at 227–28 (citing *Wood v. State*, 18

S.W.3d 642, 649 (Tex. Crim. App. 2000)). In determining whether the State acted in bad faith, the principal area of inquiry is whether the defense shows that the State intended to deceive the defendant by failing to provide the defense with a witness's name. *Id.* at 228. In examining whether the defense could have reasonably anticipated that the State would call the witness, reviewing courts generally examine (1) the degree of surprise to the defendant; (2) the degree of disadvantage inherent in that surprise (i.e., the defendant was aware of what the witness would say, or the witness testified about cumulative or uncontested issues); and (3) the degree to which the trial court was able to remedy that surprise (i.e., by granting the defense a recess, postponement, or continuance, or by ordering the State to provide the witness's criminal history). *Id.*

B. Analysis

Within this issue, appellant argues this court should apply Texas Rule of Civil Procedure 193.6(a), which provides for the exclusion of undisclosed evidence at trial absent a showing of good cause, instead of the abuse-of-discretion standard applied to evidentiary issues. We decline to do so.

Appellant claims that we should adopt a remedy of exclusion for violations of article 39.14(b), such as that set forth in Texas Rule of Civil Procedure 193.6, because doing so would further the purposes and goals of the legislature in enacting

the Michael Morton Act.[5] However, appellant fails to recognize that the Michael Morton Act, which became effective on January 1, 2014, amended subsection (a) of article 39.14 and added subsections (c) through (n), but made no change to subsection (b), the subsection at issue in this case. *See In re State*, No. 01-19-00688-CR, 2020 WL 1943033, at *3 n.8 (Tex. App.—Houston [1st Dist.] Apr. 23, 2020, orig. proceeding); *see also* Senate Comm. on Criminal Justice, Bill Analysis, Tex. H.B. 510, 84th Leg., R.S. (2015) ("The 83rd Legislature's Michael Morton Act comprehensively overhauled the discovery process for Texas criminal cases. The Act reformed the Texas criminal discovery statute in the Code of Criminal Procedure to ensure more open and transparent discovery in all criminal cases and to improve the reliability of criminal convictions. However, the Act did not change the discovery of expert witnesses, which remains covered by Article 39.14 (b), Code of Criminal Procedure."). Article 39.14(b) was not amended until 2015. *See* Act of June 15, 2015, 84th Leg., R.S., ch. 459, § 1, 2015 Tex. Gen. Laws 1774. Apart from claiming that the penalty of exclusion would further the goals of the Michael Morton Act, appellant has made no argument as to why we should adopt a different standard of review other than the abuse-of-discretion standard. Because appellant has made

[5] Michael Morton Act, 83d Leg., R.S., ch. 49, 2013 Tex. Gen. Laws 106 (codified as an amendment to TEX. CODE CRIM. PROC. art. 39.14).

no other argument as to why we should apply a different standard of review, we decline to engage in such analysis.

Instead, applying the standard long applicable to a trial court's decision to allow a witness not on the State's witness list to testify, we hold that the trial court did not abuse its discretion in allowing Payavla to testify. Here, no evidence shows that the State acted in bad faith or intended to deceive appellant by failing to provide the defense with the specific name of its fingerprint expert. The State timely disclosed a list of witnesses that provided generally that it intended to call a fingerprint identification expert from the Harris County Sheriff's Office at 1301 Franklin, Houston, TX 77002. The State explained at trial that there were only four or five deputies who provide this type of testimony, and the State did not know until the trial date which of those officers would be available to testify. There is also no evidence that appellant inquired further as to the identity of the expert witness or a time as to when the State would know the witness's identity. Under similar circumstances, we have previously concluded that the defendant failed to show the State acted in bad faith or intended to deceive by failing to provide a specific name of an expert. *See Hamann*, 428 S.W.3d at 228 (holding State did not act in bad faith because it generally notified defendant that it intended to call fingerprint expert at trial and defendant made no further inquiry into identity of such expert witness); *see also Young v. State*, 547 S.W.2d 23, 27 (Tex. Crim. App. 1977) (holding trial court

did not abuse its discretion in allowing testimony from undisclosed expert because, at time defense requested that information, State did not know who it would call and defense failed to follow up with State). Thus, we conclude that the State did not act in bad faith or intend to deceive appellant by failing to disclose Payavla as its fingerprint expert.

Furthermore, the record demonstrates that appellant could have reasonably anticipated that the fingerprint expert would testify. While the fact that Payavla was the designated fingerprint expert was a surprise to appellant, the degree of disadvantage inherent in that surprise was minimal because appellant was aware the State would call a fingerprint expert, and the State intended to introduce evidence of his previous conviction. *See Hamann*, 428 S.W.3d at 228 (holding trial court did not abuse its discretion in allowing fingerprint expert whose name was not disclosed to testify, because defendant knew State would call fingerprint expert and State intended to introduce evidence of his prior convictions). Thus, we conclude that the trial court did not abuse its discretion in allowing Payavla to testify during the punishment phase of appellant's trial.

We overrule appellant's third issue.

Legal Sufficiency of Enhancement Paragraph

In his fourth issue, appellant argues that the evidence was insufficient to prove the 1981 conviction for aggravated rape, which was used by the State as a sentencing

enhancement, because he was 16 at the time of the offense and the State produced no evidence that the case was transferred from juvenile court. Accordingly, appellant argues that Exhibit 36, which contains the pen packet for the 1981 conviction, is void on its face and is insufficient to show a prior conviction. The State argues State that the Court of Criminal Appeals has already addressed this issue and held that the State is not required to show a valid transfer order under similar circumstances. In his reply brief, appellant raises an additional argument that the evidence was insufficient to prove both the 1981 conviction (Exhibit 36) and the 1990 conviction (Exhibit 38) because the fingerprint cards contained in those pen packets were not from the respective convictions.

A. Standard of Review and Applicable Law

A trier of fact must consider whether the totality of the evidence establishes beyond a reasonable doubt that the defendant was previously convicted of the enhancement offense. *Wood v. State*, 486 S.W.3d 583, 589 (Tex. Crim. App. 2016). The trier of fact weighs the credibility of each piece of evidence and determines whether the totality of the evidence establishes the existence of the alleged conviction and its link to the defendant beyond a reasonable doubt. *Id.* In reviewing the sufficiency of the evidence to support a finding that an enhancement is "true," we consider all the evidence in the light most favorable to that finding and determine

whether a rational trier of fact could have found the essential elements beyond a reasonable doubt. *Id.*

To enhance a defendant's sentence based on a prior conviction, the State must prove beyond a reasonable doubt that (1) a prior conviction exists, and (2) the defendant is linked to that conviction. *Flowers v. State*, 220 S.W.3d 919, 921 (Tex. Crim. App. 2007). The State may prove both elements in a number of different ways, including through documentary proof (such as a judgment) that contains sufficient information to establish both the existence of a prior conviction and the defendant's identity as the person convicted. *Id.*at 921–22.

B. Analysis

Appellant argues that because the State presented no evidence that the 1981 case was transferred from juvenile court, the evidence supporting that 1981 conviction for aggravated rape is insufficient as a matter of law. We agree with the State, however, that the Court of Criminal Appeals has already addressed this issue and held that the State is not required to show a valid transfer order under similar circumstances. *See Johnson v. State*, 725 S.W.2d 245, 247 (Tex. Crim. App. 1987). In *Johnson*, the defendant objected at trial to the admission of an allegedly void prior conviction, arguing that he was a minor at the time the offense occurred and a proper order transferring the case from juvenile court was not included in the pen packet introduced into evidence by the State. *Id.* at 246. The Court of Criminal Appeals

explained that the State establishes a prima facie showing of a prior conviction by introducing a copy of the judgment and sentence in each case used for enhancement and connecting them with the defendant. *Id.* at 247. Once the State introduces a judgment and sentence and connects the defendant with them, regularity in the judgment is presumed. *Id.* The burden then shifts to the defendant, who must make an affirmative showing of any defect in the judgment, whether that be to show no waiver of indictment or no transfer order. *Id.* The court found that the State made a prima facie showing of a valid prior conviction by introducing evidence of a judgment and sentence and identifying defendant with them. *Id.* The burden then shifted to the defendant to affirmatively show a defect which proved the conviction was void as he alleged. *Id.* Because no such showing was made, the court held that the State proved a valid prior conviction. *Id.*

The same is true here. At trial, the State introduced Exhibit 36, a pen packet containing a judgment and sentence relating to appellant's 1981 conviction for aggravated rape and a fingerprint card. The State's fingerprint expert testified that he compared the fingerprints on the fingerprint card contained in Exhibit 36, and they matched the defendant's fingerprints taken before trial. Therefore, the State made a prima facie showing of a valid prior conviction by introducing evidence of a judgment and sentence and identified appellant with them. *See Johnson*, 725 S.W.2d at 247. The burden then shifted to appellant to affirmatively show a defect (such as

the absence of an order transferring him from juvenile court to district court) in the prior conviction that would render it void. Appellant failed to show a defect. Because the State made a prima facie showing of appellant's prior conviction, we hold that the evidence is legally sufficient to support the jury's finding of true to the enhancement paragraph.

In his reply brief, appellant raises an additional argument as to why the evidence is insufficient to support the enhancement paragraph. He contends that the fingerprint cards in Exhibits 36 and 38 were insufficient to link appellant to those offenses because the fingerprint cards are not connected to the respective offenses in Exhibits 36 and 38. Citing *Chambers v. State*, 580 S.W.3d 149, 161 (Tex. Crim. App. 2019), appellant argues we should consider this argument because it is "part and parcel" to the arguments raised in his opening brief and because he specifically challenged Exhibit 36 as insufficient evidence. We disagree. Although the Court of Criminal Appeals acknowledged in *Chambers* that courts may consider arguments and authorities in reply briefs that are related to the arguments in the original brief, the court noted that was not a case in which the defendant was raising a completely different sufficiency challenge for the first time in a reply brief. *Id.* But that is exactly what appellant has done here. In his opening brief, appellant argued that the evidence was insufficient to support the enhancement paragraph related to the 1981 conviction because Exhibit 36 contained no transfer order. But in his reply, he raises a

completely different sufficiency challenge based on the fingerprint cards. Therefore, we do not consider this argument raised for the first time in appellant's reply brief.[6] TEX. R. APP. P. 38.3; *Deutsch v. State*, 566 S.W.3d 332, 341 n.9 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

We overrule appellant's fourth issue.

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[6] Even if we were to consider appellant's argument, we would still conclude the evidence is sufficient to support the enhancement paragraphs. Although appellant argues that the fingerprint cards (dated 2015) are not related to the 1981 conviction in Exhibit 36 and the 1990 conviction in Exhibit 38, and therefore are insufficient to support the enhancement findings, numerous courts have rejected this exact argument and found that the fingerprint set maintained by the Texas Department of Criminal Justice refer to the packet as a whole, and a single set of fingerprints may therefore be used to prove up a defendant's identity across multiple convictions. *See Cole v. State*, 484 S.W.2d 779, 784 (Tex. Crim. App. 1972) (holding all five convictions in pen packet admissible even though only one fingerprint card, made in reference to only one conviction, was included in pen packet because "[t]he fingerprints are used as a means of insuring that the person on trial is the same one to whom the packet refers" and "[t]he fingerprints refer to the packet as a whole"); *see also Cantu v. State*, No. 13-16-00205-CR, 2017 WL 2979804, at *3 (Tex. App.—Corpus Christi July 13, 2017, pet. ref'd) (mem. op., not designated for publication) (rejecting defendant's argument that evidence was insufficient to link him to 1989 conviction for enhancement purposes when fingerprint card in pen packet was dated 1972 because fingerprint set maintained by TDC refers to whole packet and can be compared to fingerprints taken from defendant on same day of trial); *Dorton v. State*, No. 14-99-00941-CR, 2001 WL 253700, at *2 (Tex. App.—Houston [14th Dist.] Mar. 15, 2001, no pet.) (not designated for publication) (holding state offered sufficient proof of 1974 conviction to support enhancement paragraph because testimony of fingerprint expert at trial matched fingerprints on fingerprint card to those taken from defendant at trial, even though fingerprint card did not refer to 1974 conviction because fingerprints in pen packet refer to packet as whole). Here, a fingerprint expert testified that the fingerprints contained in Exhibits 36 through 38 (though dated 2015) matched those taken from appellant at trial. Exhibits 36, 37 and 38 also contained judgments and sentences for appellant's 1981 conviction for aggravated rape, 1992 conviction for burglary of habitation, and 1990 conviction for burglary of a habitation, respectively. Therefore, sufficient evidence supported the enhancement paragraphs. *Flowers*, 220 S.W.3d at 921.

Conclusion

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Goodman and Hightower.

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