Opinion issued August 18, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00434-CR

WADE HARRELL THOMSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 12th District Court
Grimes County, Texas
Trial Court Case No. 18072 CT I - X

O P I N I O N

Wade Harrell Thomson was convicted of possession of child pornography and sentenced to seven years' confinement. Thomson challenges the (1) denial of his pretrial motion to suppress evidence of child pornography found on his cell phone during a traffic stop, (2) sufficiency of the evidence to support the jury's

factual determinations underlying the admissibility of that same evidence, and (3) denial of his motion for new trial that argued there was newly discovered evidence that would probably bring about a different result in another trial.

Because the trial court erred in denying the motion for new trial, we reverse and remand for a new trial.

Background

Deputy M. Payne stopped Thomson for a routine traffic violation at almost midnight on a Monday night. Thomson—who was over 40 years old—had a young, female passenger in his car. Deputy Payne thought the passenger was a minor, but she was a few days past her 18th birthday. Deputy Payne asked Thomson and the passenger questions. Their stories did not match.

A *Terry*[1] frisk revealed a cell phone on Thomson's hip and a marijuana pipe in his pocket. A search of Thomson's vehicle revealed a duffle bag containing three knives, duct tape, bungie cords, two screwdrivers, binoculars, Benadryl, "pills in powder form," a bar of soap, and a second cell phone. The combination of items, considering Thomson's and his passenger's mismatched stories, led Deputy Payne to ask Thomson about the bag's contents.

Deputy Payne's bodycam recorded the conversation about the contents of Thomson's bag. In response to questioning, Thomson said that he used the items

[1] *Terry v. Ohio*, 392 U.S. 1 (1968).

for his work as a chicken farmer and that the cell phone was a storage device for his pictures. He told Deputy Payne that the secondary phone did not have cellular service. As Deputy Payne was handling the bag and its contents, the secondary phone's screen illuminated, and Deputy Payne saw a "3G" on the screen. He asked Thomson about the symbol, noting that it was inconsistent with Thomson's statement that the phone did not have cellular service. Thomson maintained that the phone did not have cellular service: "No, not at all. That is an out-of-service phone. This is my real phone," referring to the phone on his hip. To further prove his point, Thomson said to Deputy Payne, "Uh, try to make a call on it." Deputy Payne responded that he did not know the code to unlock the phone.

Thomson offered to show Deputy Payne how to unlock the phone, commenting, "I don't get why that's important." Thomson walked Deputy Payne through unlocking the phone, assuring him that there was no cellular service. Thomson told Deputy Payne, "Hit the phone thing. Try to make a phone call. . . . Any call. Call Rodney."

The bodycam video does not show Deputy Payne's navigation of the phone screens. The audio does not include any narration of Deputy Payne's activities. But the record indicates that Deputy Payne unlocked the phone using Thomson's instructions. He tried to make a call but was unsuccessful because the phone lacked prepaid minutes.

After failing to make a phone call, Deputy Payne told Thomson he had asked about the bag's contents because they looked like tools to commit a crime. As Deputy Payne was saying this, he walked away from Thomson and toward Thomson's vehicle, where the open duffle bag sat on the trunk. When Deputy Payne reached the vehicle and bag, he stood silent and still for 15 seconds. The bodycam does not show the phone's screen during the 15 seconds.

At the end of the 15 seconds of silence, Deputy Payne turned to Thomson and said, "Dude, I'm trying to shut your phone, and there's pictures of naked little girls and little girls in sexually explicit positions. What's up with that?" Thomson responded, "I have no idea." Deputy Payne walked to his police vehicle, flashed the phone screen to his bodycam, laid Thomson's phone in his passenger seat, and called for additional instructions.

Thomson was arrested on charges related to the marijuana pipe found in his pocket. Later, Deputy Payne obtained a search warrant to access Thomson's phone. More than 1,400 child pornography images were found on the secondary phone. Thomson was charged with possession of child pornography.

Thomson moved to suppress all evidence of the images obtained from the secondary phone.

The suppression hearing

At the suppression hearing, Thomson argued that the images were recovered through an illegal search. The State responded that Thomson had given consent. Thomson replied that his consent was limited to making a phone call and that he had not consented to a search of his phone's contents.

Deputy Payne testified at the suppression hearing. He said that when he first pulled Thomson over, he saw Thomson make furtive movements toward his backseat. Thomson appeared to be extremely anxious. Deputy Payne "could see [Thomson's] heartbeat right above his stomach through his shirt, his shirt was fluttering up and down. He was having a hard time completing a sentence without having to take a breath. His answers weren't making a whole lot of sense." The combination of furtive movements and nervousness led Deputy Payne to conduct the *Terry* frisk, which revealed the marijuana pipe in Thomson's pocket.

According to Deputy Payne, the discovery of the marijuana pipe gave him probable cause to expand his search to Thomson's vehicle. When Deputy Payne found the secondary phone in the duffle bag, Thomson said it stored his photos and did not have service. Thomson told Deputy Payne to try to make a phone call and led him though unlocking the phone. Deputy Payne testified that he had only ever owned Apple iPhones and was not familiar with how to operate Thomson's Android phone. It took several tries to unlock the phone.

At Thomson's urging, Deputy Payne tried to make a phone call, but the phone lacked prepaid minutes. Deputy Payne described his efforts to return the phone to the duffel bag:

> I turned to go put the phone back in the bag. As I did—I have an iPhone and on an iPhone, it clears back to home screen. You hit the—there is a centrally-located button in the middle of the phone. You hit it and it sends it back to the lock screen. . . . As I turned to go back, I hit that—well, he didn't have an iPhone, it was something else. And a screen full of, I guess, JPEGs or thumbnails popped up. It was all very young girls in sexual positions, half-dressed or undressed.

When asked what he intended to do as he walked toward the duffle bag with Thomson's unlocked phone, Deputy Payne responded that he only intended to close the phone and return it to the bag. But he added that Thomson had not placed any limitations on his use of the phone.

Deputy Payne reiterated how and why he touched the phone after attempting a call. He was trying to return the phone to its locked screen. An icon in the lower middle portion of the phone's screen reminded him of an iPhone home button. When Deputy Payne pressed that button, the pornographic images appeared. Deputy Payne testified, "I hit one button" and the images appeared.

At the suppression hearing, Thomson argued that Deputy Payne conducted an illegal search of his phone in violation of his Fourth Amendment rights. He argued that the images did not fall within the plain-view exception because Deputy Payne did not have a lawful vantage point to inadvertently see the evidence.

Deputy Payne's vantage point was not lawful because he accessed a portion of Thomson's phone beyond the limited consent Thomson had granted: to make a phone call. Thomson argued that, if an officer is "not lawfully where [they] are supposed to be, how [they] got there shouldn't make a difference." In other words, the fact that Deputy Payne may have wandered beyond his lawful vantage point by accident should not turn the vantage point into a lawful one.

The State focused its arguments against suppression on Thomson's consent to unlock the phone and make the phone call. The State argued that Thomson "never tries to limit the consent. He never tries to revoke the consent. He just consents."

The trial court took the matter under advisement, noting that its focus was "the issue of consent," "how far that consent may go," and "the effect of potentially an accidental opening of that phone."

The trial court denied Thomson's motion to suppress and issued findings of fact and conclusions of law. The court found that Thomson authorized the unlocking of his phone, told Deputy Payne to try to make a phone call, and instructed Deputy Payne to call someone on the saved-contacts list. Thomson consented to Deputy Payne making a phone call, but that consent did not extend to a general search of the phone. The court found that Deputy Payne was familiar with iPhones but not with this type of phone. According to the court's fact

findings, when Deputy Payne "went to return the phone back to the duffle bag," he "hit the button that he believed would return the phone to the locked screen," which is when the images appeared. The court noted Deputy Payne's testimony that he had no intent to search the phone's contents and did not manipulate the phone for that purpose. Instead, he was attempting to close the screen. Finally, the court found Deputy Payne's testimony credible that he inadvertently opened the images as he touched the icon to lock the phone.

The court's conclusions of law included that Thomson voluntarily consented to Deputy Payne's unlocking his phone and attempting to make a call. Deputy Payne made a reasonable, good-faith effort to return the phone to its locked position. The images were discovered inadvertently. Finally, Deputy Payne "did not conduct a warrantless search of" Thomson's phone, and the photos were not subject to suppression.

Trial

The State tried Thomson for possession of child pornography. Deputy Payne testified about the encounter and how the images were discovered. Both Thomson and the State presented experts to explain the phone's operation to the jury. They testified that the icon Deputy Payne described was in the middle of the bottom row of icons on the home screen of Thomson's phone. It is a circle with six dots inside it. Its function is to open all the phone's apps in a grid format. That grid-view icon

would not be visible from the "call" screen Deputy Payne saw when unsuccessfully trying to make a phone call. It would only become visible after exiting the call screen and returning to the home screen. The implication, here, being that Deputy Payne must have done something to return the phone to the home screen before he could have "hit one button" to get to the images.

The experts described a second icon on the phone's home screen. That one is a "gallery" icon that opens images stored on the phone. The gallery icon was one row above and one icon to the left of the grid-view icon Deputy Payne testified he attempted to press to lock the phone.

The experts further testified that Thomson's phone had a cracked screen. The crack ran directly between the grid-view icon and the nearby gallery icon that opens saved images. Screen cracks can affect a phone's responsiveness to touch. Additionally, pressing beyond an icon and near other icons can affect which function the phone initiates.

The jury was shown a video of the State's expert pressing the grid-view icon. The expert intentionally moved the pressure of his touch to a point just outside that icon, toward the gallery icon, but not quite to the gallery icon. In the video, the pressure at that location on the screen—which was on or near the visible crack in the screen—opened a gallery of pornographic images.

Both experts agreed that the images could be opened in that manner from that screen. Thomson's expert highlighted that the grid-view icon Deputy Payne focused on was not visible from the "call" screen and there was no possibility that an inadvertent opening of the gallery occurred from within the "call" functions of the phone. The implication being that Deputy Payne must have exceeded the limited consent to attempt a call if he reached a screen where the gallery icon was visible.

The jury was given an Article 38.23 instruction in the court's charge that it could consider the evidence obtained because of Deputy Payne's search of Thomson's phone only if all jurors agreed that the State had proven beyond a reasonable doubt that Deputy Payne (1) unintentionally activated the phone's screen at the very beginning of the encounter and (2) unintentionally entered the area of the phone that displayed the pornographic images.

Thomson was convicted of possession of child pornography and sentenced to seven years' confinement. Thomson appealed the conviction.

Post-trial events

Two months later, the State supplied Thomson with notice of potential *Brady* material. A letter from the District Attorney's Office stated that a routine audit of a government database was conducted on May 29, 2020—a few days after Thomson's sentencing date. The audit revealed unauthorized database access by

Deputy Payne between December 2018 and May 2020. This unauthorized access violated database-use policies. Deputy Payne resigned from his most recent position as an investigator with the Grimes County District Attorney's Office shortly after being confronted about the database breaches.

We abated Thomson's appeal to allow the trial court to consider Thomson's motion for new trial based on the discovery of new evidence.

At the new-trial hearing, Lieutenant J. Ellis with the Grimes County Sheriff's Office testified that Deputy Payne had accessed a government database four times between 2018 and 2020 to conduct unauthorized searches of a personal nature. Deputy Payne searched for information connected to his wife that would be relevant in his divorce proceeding. Separately, he searched for information about a man his subsequent love interest had become interested in. Deputy Payne used that information to confront his love interest. When Deputy Payne was confronted about the unauthorized accesses of the database, he admitted to conducting the searches and resigned.

Deputy Payne also testified at the new-trial hearing. He testified that he had work-related access to the database as far back as 2013. He admitted to using the database for unauthorized searches on his ex-wife, on the person who his subsequent love interest had become interested in, and on his birth father. Deputy Payne stated that these unauthorized searches were unrelated to the Thomson case

and that the District Attorney's Office was unaware that he was conducting unauthorized searches when it prosecuted Thomson.

The trial court denied Thomson's motion for new trial, specifically finding that "there is no bias, prejudice[,] or motive involved in this particular case."

The subject of the abatement having been resolved, the appeal was docketed for resolution.

Suppression of Evidence Discovered on Thomson's Secondary Phone

In his first two issues, Thomson challenges the denial of his motion to suppress, arguing that Deputy Payne's illegal search of his phone violated the Fourth Amendment.

A. Standard of review

The denial of a motion to suppress is reviewed for an abuse of discretion. *Wells v. State*, 611 S.W.3d 396, 405 (Tex. Crim. App. 2020). We apply a bifurcated standard of review that affords almost complete deference to the trial court's determination of historical facts, including issues of credibility and demeanor. *Id.* We apply a de novo review of mixed questions of law and fact that do not hinge on assessments of credibility or demeanor and on pure questions of law. *Id.* If the trial court's ruling is correct under any applicable theory of law, we will sustain its ruling. *Id.*

B. Analysis

Thomson argues that he gave Deputy Payne limited consent to access his phone. Deputy Payne could unlock it, go directly to the call screen, select someone to try to call, and initiate the call. But Thomson's consent did not extend beyond those screens. As such, Deputy Payne was only authorized to move from the "call" screen to either the locked screen or the off (blackened) screen. Any interaction with the phone that deviated from that progression of screens fell outside of Thomson's consent and was a new search that required some exception to the Fourth Amendment's warrant requirement.

Thomson's argument continues with an evaluation of whether any exception applied for the secondary search. First, he argues that his consent did not extend beyond the specified screens and routes of access he allowed. Second, he argues that the plain-view doctrine cannot apply because, once Deputy Payne moved past the authorized screens, he was in an unauthorized location and did not have a lawful vantage point to view anything. Third, Thomson argues that even if the law allowed Deputy Payne to reach such a vantage point through inadvertence or accident, the law required Deputy Payne to try to avoid reaching that new vantage point by not pressing icons when he did not understand their function.

In our view, the appropriate analysis is not whether a second Fourth Amendment exception applies for a second, discrete search, but whether the scope

of Thomson's consent included inadvertent misnavigation. As we explain below, we conclude that Thomson's consent was broad enough to authorize inadvertent misnavigation and, as such, conclude that the Fourth Amendment was not implicated.

1. Fourth Amendment law allows for observation of items in plain view

The Fourth Amendment protects against unreasonable searches and seizures.[2] U.S. CONST. amend. IV; *Walter v. State*, 28 S.W.3d 538, 540 (Tex. Crim. App. 2000). This protection depends upon a person having a legitimate expectation of privacy in the invaded place. *Walter*, 28 S.W.3d at 541 (citing *Minnesota v. Carter*, 525 U.S. 83, 88 (1998)). When contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy. *Id.* (citing *Texas v. Brown*, 460 U.S. 730, 738–39 (1983)). The observation is not a "search" within the meaning of the Fourth Amendment. *See id.*; *Illinois v. Andreas*, 463 U.S. 765, 771 (1983).

2. Officers have no obligation to avoid seeing all that might be visible from their vantage point

Thomson expresses a restrictive view of consent to access. He argues that his consent allowed only (1) unlocking of phone, (2) pressing the icon that would access the contacts list, (3) selecting a contact, (4) trying to make a call, and no

[2] Thomson does not argue that the Texas Constitution affords any wider protections than the United States Constitution for the issues here.

more. Any deviation from that pathway of access would be outside consent. Any observations outside those screens, viewed in that order, would be tainted no matter if intentional or inadvertent.

But the law has never required officers to avoid seeing what could come within their view as they observe their surroundings from a lawful vantage point. Courts have repeatedly held that, even if an officer must "crane his neck, or bend over, or squat" to bring evidence within his view, that action to expand one's vantage point to all it might encompass "does not render the doctrine inapplicable, so long as what he saw would have been visible to any curious passerby." *Duhig v. State*, 171 S.W.3d 631, 636 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (quoting *Hamilton v. State*, 590 S.W.2d 503, 504–05 (Tex. Crim. App. 1979), and *James v. United States*, 418 F.2d 1150, 1151 n.1 (D.C. Cir. 1969)); *see Brown*, 460 U.S. at 740 (observation by officer bending down at angle to see evidence in car was not search because public could have peered into car from many angles).

3. What is in plain view is not static; objects may fall into view

The expanse of the plain-view doctrine includes evidence that comes into plain view independent of the officer's wishes or efforts. For example, a police dog, without any command or prompt from its handler, nuzzles a bag that falls open to reveal incriminating evidence. *See State v. Miller*, 766 S.E.2d 289, 290

(N.C. 2014). The newly exposed contents of the bag are now in plain view and outside the Fourth Amendment's protections. *Id.* at 296.

But it also includes evidence that comes into view through an officer's own actions, accidentally exposing the item. For example, a motel room door inadvertently swings open when an officer lightly knocks, thus exposing the inside of the room. *See United States v. Sherrill*, No. 11-cr-40027-JAR, 2011 WL 5570841, at *2 (D. Kansas Nov. 16, 2011) (unpublished order). The items visible inside the room are now in the officer's plain view without a search. *Id.* at *7.

In another example, an officer hands a man his jacket, and an illegal weapon falls from the jacket's pocket. *See United States v. Thornton*, 582 F.2d 993, 994 (5th Cir. 1978) (per curiam). The weapon is in plain view after being jostled from the jacket. *Id.* No warrant is required; the Fourth Amendment is not violated. *Id.*; *see United States v. Lamorte*, 744 F. Supp. 573, 576 (S.D.N.Y. 1990) (summarily concluding that, when an item dislodges from its place of storage, it comes into plain view).[3]

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[3] This same analysis was applied in an unpublished order. *See United States v. Neff*, 61 F.3d 906 (7th Cir. 1995) (unpublished order). There, a man stole a car radio and later consented to his relative giving the radio to the police. *Id.* at *1. A different relative granted access to the room where the thief's belongings were stored. *Id.* The radio was protruding out of a sack and visible to the relative and police. *Id.* When the police reached for the radio, the sack fell over and exposed an illegal weapon. *Id.* The weapon was in plain view to be observed and seized without a warrant. *Id.* at *4.

4. Even pornographic images on a phone may fall into plain view if an officer has authorized access to the phone and stumbles upon them

An officer with access to a person's phone who finds pornographic images on the phone is not a scenario that appears to have been analyzed by any of our Texas courts. But we did not limit our research to Texas cases. Our search of federal case law revealed cases where there was at least some level of authority or consent to handle another's phone preceding the display of child pornography.

a. First, access under some authority but without explicit consent

In one federal case, a jailer saw child pornography on a man's phone as he was being admitted to jail. *United States v. Yockey*, 654 F. Supp. 2d 945, 949 (N.D. Iowa 2009). The jailer stated that he was only trying to turn off the man's phone under standard jail-admission procedures. *Id.* at 949, 953. The officer pressed the button he thought would turn the phone off, but the phone did not power down. *Id.* at 949. He tried another button, but in doing so, "accidentally pressed some of the other buttons, which instead of turning the phone off, accessed pictures stored on the phone," including child pornography. *Id.* at 949–50.

The trial court found that the officer's testimony was credible. *Id.* at 953. Accepting that the images were reached without attempting a search of the phone but, instead, simply trying to turn the phone off, the court held that the officer's "actions in attempting to turn off the cellular telephone do not rise to the level of

[a] search." *Id.* at 958. The images were in the officer's plain view, and the phone owner's Fourth Amendment rights were not violated. *Id.*

b. Next, consent to handle a phone but no more

In *United States v. Coates*, the defendant handed his phone to an officer and consented to the officer viewing his text messages. 462 Fed. Appx. 199, 201 (3d Cir. 2012). Coates walked into a police station and told a police officer that he received a text message from someone threatening to kill his friend. *Id.* He wanted the police to protect his friend. *Id.* When the officer asked whether he should read the text message on Coates's phone, Coates said that he should and slid his phone under a plexiglass screen. *Id.* The officer blindly pressed the phone's buttons with his thumb as he continued to look at and talk to Coates. *Id.* When the officer looked down at the phone's screen, he saw child pornography. *Id.*

The court's analysis provided two bases for holding that the viewing of the pornographic image did not violate Coates's Fourth Amendment rights. *Id.* at 203–04. The first centered on whether Coates had an expectation of privacy in the contents of his phone. *Id.* at 203. The court held that, by passing his phone to the officer, Coates did not exhibit an expectation of privacy. *Id.* ("[A]n individual cannot claim a subjective expectation of privacy in an object voluntarily turned over to third parties[.]").

The precedential value of that holding may be in question given the United States Supreme Court's subsequent opinion in *Riley v. California* that a person has a privacy interest in the contents of his cell phone, considering the quantity and quality of personal information stored on personal phones. 573 U.S. 373, 396 (2014)*; see id.* at 403 (holding police had to obtain warrant to search contents of cell phone seized incident to arrest).

But the *Coates* opinion's second rationale linking the Fourth Amendment analysis to consent is unaffected by *Riley*. *See Coates*, 462 Fed. Appx. at 203. The trial court credited the officer's version of events. *Id.* According to the officer, Coates passed the phone under the plexiglass screen in a closed position. *Id.* at 202. Coates did not retain physical possession of the phone as he asked the officer to view the text messages. *See id.* Nor did he navigate to the text-message screen before handing the phone over. *See id.* He gave the officer his closed phone and consented to the officer accessing the text messages. *Id.* at 203–04.

Scope of consent is measured by what a "typical reasonable person [would] have understood by the exchange between the officer and the subject." *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). The court concluded that a reasonable person "would have understood Coates to have given consent *to navigate* his phone to reach the text message, which is precisely what [the officer] did." *Coates*, 462 Fed. Appx. at 204.

Coates did not maintain navigational control over the phone as he showed the text messages. Yet the phone had to be navigated to get from its closed state to the text-message screen. Coates voluntarily gave his phone to the officer and told the officer to access his text messages. According to the reviewing court, a reasonable person would understand Coates to have consented not just to the reading of the text message, but also to the navigation of his phone to the point that the text message could be read. *Id.* His consent to navigate his phone, the court reasoned, included inadvertent misnavigation. *Id.* Through inadvertent misnavigation, the pornographic images came into plain view and outside the Fourth Amendment's protections. *Id.*

The appellate court's analysis hinged on the factual determination that the images appeared through inadvertent misnavigation, not a purposeful search. *See id.* at 203–04. That determination was made as part of the trial court's factual findings, including credibility findings. *Id.* at 204. The appellate court deferred to those findings, accepting the officer's version of events as the trial court had, and concluded that consent extended to inadvertent misnavigation. *Id.* at 204 (rejecting Coates's argument to "second-guess" trial court's decision to credit officer's testimony as part of its credibility determination).

A different outcome arises when the credibility finding goes the other way because the trial court rejects the officer's explanation of how he came to view the

contraband. *See United States v. Ruff*, No. 001-62-18, 2018 WL 4268537 (C.G. Ct. Crim. App. Feb. 15, 2018) (unpublished). In *Ruff*, a member of the Coast Guard was arrested for driving under the influence. *Id.* at *1. He called his wife and gave her directions to the police barracks. *Id.* After more than one call, she still could not find the barracks. *Id.* The arrestee handed his phone to the trooper—with his wife already on the line—and asked the trooper to give her directions. *Id.*

At the suppression proceeding, the trooper explained what happened next. He gave the wife directions and, with the husband's phone on speakerphone mode, muted the microphone as he continued with other activities. *Id.* He heard her speak again and reached to unmute the phone without looking at it. *Id.* Apparently unsuccessful in unmuting the phone, the trooper looked down at the and saw an image of child pornography on the phone's screen. *Id.*

The trial court did not find the officer credible. *Id.* at *2 & n.1. The trial court rejected the possibility that the trooper inadvertently manipulated the phone. *Id.* at *2. Instead, the trooper searched the phone. *Id.* The Fourth Amendment protected the accused from that warrantless search. *Id.*

The appellate court deferred to the trial court's factual findings and rejected the Government's argument to second-guess the credibility determination. *Id.* The question whether "the trooper's actions did not constitute a search because the child pornography was in plain view" was dependent upon the trial court's

credibility determination, which the appellate court would not disturb. *Id.* The accused consented to the trooper speaking to his wife who was already on the phone; he did not consent to a search of his phone's contents. *Id.* The trial court's grant of the suppression motion was affirmed. *Id.* at *1.

5. Thomson's consent extended to inadvertent misnavigation of his phone that brought the images into plain view

Thomson argues for a limited view of consent to navigate a phone—allowing the police to touch only those buttons or icons they know will lead to the phone's features the officer has received consent to access. Any misstep takes the officer out of his lawful vantage point and makes any revealed material inadmissible. If the misstep was intentional, then it is a search requiring an independent exception to avoid Fourth Amendment protections. Even if the misstep was unintentional, Thomson would have us require the officer to take steps to avoid evidence accidentally falling into view. But *Yockey*, *Coates*, and *Ruff* show that Thomson's approach does not track existing Fourth Amendment analysis.

Items are permitted to fall into plain view, even if because of police clumsiness. *See Thornton*, 582 F.2d at 994; *see also Neff*, 61 F.3d at 906. For cell phones specifically, under certain facts, a phone owner's consent to navigate to a particular function of a phone can extend to misnavigation if the misnavigation is inadvertent and not a purposeful search. *See Coates*, 462 Fed. Appx. at 201. Which

category of misnavigation is at play depends on the officer's explanation and the trial court's credibility determination. *Compare id.* (trial court found officer credible and evidence admissible), *with Ruff*, 2018 WL 4268537, at *1 (trial court found officer not credible and evidence inadmissible).

Here, the trial court listened to Deputy Payne's testimony as he explained how the images appeared on the screen of Thomson's phone. The trial court observed Deputy Payne during his testimony and watched him react to questioning from the State and the defense. The court determined, as a factual matter, that Deputy Payne was a credible witness and that his version of events was truthful.

We will not invade the province of the trial court to make such credibility determinations. *See State v. Mendoza*, 365 S.W.3d 666, 669 (Tex. Crim. App. 2012) ("In a motion to suppress hearing, the trial judge is the sole trier of fact and judge of the weight and credibility of the evidence. In reviewing the ruling on a motion to suppress, appellate courts must give almost total deference to a trial judge's findings of historical fact and credibility determinations.").

Accepting the trial court's factual findings and credibility determinations, we conclude that the Fourth Amendment is not implicated because no search occurred. Deputy Payne was navigating Thomson's phone with consent. Thomson could have refused access to his locked phone. He did not. He could have held his phone and ensured that only he navigated to the pertinent phone functions. He did

not. By granting consent for Deputy Payne to navigate the phone, Thomson also consented to Deputy Payne's observance of anything that came within his plain view under that consent. That included the contraband images that appeared on the screen through inadvertent misnavigation. We reach this conclusion based on the trial court's credibility determination that inadvertent misnavigation led to the display of the images, not a search.

We overrule Thomson's first and second issues.

Sufficiency of the Evidence

In his third issue, Thomson challenges the sufficiency of the evidence to support the jury's determination that Deputy Payne unintentionally activated Thomson's phone and discovered the images. He argues that the jury's findings are against "the greater weight of the evidence."

The jury made these two factual determinations under the Article 38.23 instruction in the court's charge, which instructed the jury that it could not consider evidence of the images on Thomson's phone unless it first determined, beyond a reasonable doubt, that the evidence was not obtained in violation of the law. *See* TEX. CODE CRIM. PROC. art. 38.23(a). These two factual determinations were required for the jury to consider the evidence in evaluating whether the State proved every element of the charged offense.

A. Standard of review

In criminal cases, challenges to the sufficiency of the evidence on matters for which the State bears the burden of proof are reviewed only for legal sufficiency. *Brooks v. State*, 323 S.W.3d 893, 894–913 (Tex. Crim. App. 2010). Under current law, we do not conduct a separate factual sufficiency review, as Thomson suggests when he argues that the great weight and preponderance of the evidence indicates opposite of the jury's resolution of a factual dispute. *Id.*; *Malbrough v. State*, 612 S.W.3d 537, 559 (Tex. App.—Houston [1st Dist.] 2020, pet. ref'd). Therefore, we will review the evidence only for legal sufficiency.

In assessing the legal sufficiency of the evidence, we consider all the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational juror could have found the essential elements of the crime beyond a reasonable doubt. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007).

But the underlying credibility determinations the jury had to make under the Article 38.23 instruction were not "essential elements of the crime." They were precursors to determining the body of evidence available to the jury as it later considered the elements of the offense: would the child pornography images viewed on Thomson's phone be evidence of the crime for the jury to consider.

B. Ample evidence supported the jury's challenged factual determination

Assuming Thomson can reach beyond the elemental analysis to challenge the sufficiency of the evidence to support the Article 38.23 findings, we conclude there was sufficient evidence to support those findings.

Deputy Payne testified that he unintentionally activated Thomson's phone and accessed the images. A video was admitted and shown to the jury of an expert accessing the gallery of pornographic images by pressing the grid-view icon Deputy Payne said he intended to press but, in doing so, applied pressure beyond that icon's outer border to an area between it and the gallery icon. The video shows that the expert did not press directly on the gallery icon, yet the gallery images appeared. The video also shows a crack in the phone's screen between the two icons, and an expert testified that the crack could have affected the phone's responsiveness to touch in that area of the screen.

Because there was legally sufficient evidence to support these factual determinations on which the jury relied to find that the elements of the criminal offense were met, we overrule Thomson's third issue.

Motion for New Trial

In his last issue, Thomson challenges the trial court's denial of his post-conviction motion for new trial. He argues that the post-conviction notice of Deputy Payne's use of a government database to conduct unauthorized searches

meets the Article 40.001 standard for a new trial. *See* TEX. CODE CRIM. PROC. art. 40.001 ("A new trial shall be granted an accused where material evidence favorable to the accused has been discovered since trial."). He argues that the new evidence directly impacts the factual determination that the jury was required to resolve in his criminal prosecution, which was whether Deputy Payne intentionally or inadvertently accessed information on his secondary phone. He further asserts that this new evidence would likely lead to a different result if included in the trial.

The State responds that evidence of Deputy Payne's unauthorized searches of the government database are neither relevant nor admissible under the Texas Rules of Evidence and, therefore, cannot support the grant of a new trial.

A. Standard of review and applicable law

We review a trial court's decision to deny a motion for new trial asserted on a new-evidence claim under an abuse-of-discretion standard. *State v. Arizmendi*, 519 S.W.3d 143, 148–49 (Tex. Crim. App. 2017); *Wallace v. State*, 106 S.W.3d 103, 108 (Tex. Crim. App. 2003). A trial court abuses its discretion if its decision to deny a new-trial motion is arbitrary or unreasonable. *Arizmendi*, 519 S.W.3d at 148. We view the evidence in the light most favorable to the trial court's ruling and will not reverse its decision to deny a new-trial motion unless it falls outside the zone of reasonable disagreement. *Id.*; *Henley v. State*, 493 S.W.3d 77, 83 (Tex. Crim. App. 2016). The trial court has broad discretion to make credibility and

weight determinations in deciding whether the new evidence will bring about a different result in a new trial. *Arizmendi*, 519 S.W.3d at 148.

The applicable statute reads: "A new trial shall be granted an accused when material evidence favorable to the accused has been discovered since trial." TEX. CODE CRIM. PROC. art. 40.001. To obtain relief, the defendant must satisfy the following four-prong test:

1. the newly discovered evidence was unknown or unavailable to the defendant at the time of trial;

2. the defendant's failure to discover or obtain the new evidence was not due to the defendant's lack of due diligence;

3. the new evidence is admissible and not merely cumulative, corroborative, collateral, or impeaching; and

4. the new evidence is probably true and will probably bring about a different result in a new trial.

Arizmendi, 519 S.W.3d at 149; *Wallace*, 106 S.W.3d at 108. The State conceded that elements one and two are met. It was silent on element four. The only element it briefed opposition to was element three: whether the evidence is admissible.

B. Analysis of admissibility of new evidence

Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence. TEX. R. EVID. 401. Evidence that is relevant is admissible unless it is otherwise excluded by a rule,

statute, or constitutional provision; irrelevant evidence is not admissible. TEX. R. EVID. 402.

Under the Article 38.23 instruction in the court's charge, the jury was required to determine, as a preliminary matter, whether Deputy Payne unintentionally entered the area of the phone that displayed the photos. Only if the jury resolved that question in the State's favor was the jury permitted to consider the evidence obtained from the phone in Thomson's criminal prosecution for possession of child pornography. Thus, whether access to the gallery of pornographic images was the result of intentional navigation or inadvertent misnavigation was a fact of consequence. Relatedly, evidence that Deputy Payne had a history of accessing files without authorization is relevant because it makes it more probable—at least slightly so—that his navigation of Thomson's phone was intentional. *See Hall v. State*, — S.W.3d —, No. AP-77,062, 2021 WL 5823345, at *8 (Tex. Crim. App. Dec. 8, 2021). The evidence is relevant, but we also must determine whether it is admissible.

Rule 404 of the Texas Rules of Evidence deals with evidence of past bad acts that might indicate a trial participant's character. TEX. R. EVID. 404. Subsection (a) provides that "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." TEX. R. EVID. 404(a)(1). It prohibits evidence offered

to prove a person's character, "from which the trier of fact is then to infer that the person acted in conformity with that character trait on the occasion in question." *Johnston v. State*, 145 S.W.3d 215, 219 (Tex. Crim. App. 2004). But there are exceptions to this prohibition. Some exceptions specifically apply to character evidence of an accused. *See* TEX. R. EVID. 404(a)(2). Others apply to an alleged victim. *See* TEX. R. EVID. 404(a)(3). One exception applies for a "witness." *See* TEX. R. EVID. 404(a)(4). There, "[e]vidence of a witness's character may be admitted under Rules 607, 608, and 609" for impeachment purposes.[4] *Id.*

The State argues that Rule 404(a)(4) concerns admissibility of evidence of bad acts by a "witness." By its own terms, that rule is linked to Rules 607 through 609 on witness impeachment, and thus, the only way to get in evidence of a witness's bad acts is if the evidence would be admissible under Rules 607 through 609, such as to prove bias, self-interest, or a motive to lie. *See* TEX. R. EVID. 404(a), 607–09. In the State's view, this limitation on the use of evidence of a *witness*'s bad acts removes any possibility of relying on Rule 404(b) for a pathway to admissibility independent of admissibility through Rules 607 through 609.

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[4] Rules 607 through 609 address impeaching a witness. TEX. R. EVID. 607–09. These rules generally prohibit evidence of specific instances of a witness's conduct to attack that witness's character but allow evidence of bad acts that fit within discrete categories, such as felonies and crimes of moral turpitude. *See* TEX. R. EVID. 608(b).

In effect, the State seeks to require Thomson to show that evidence of Deputy Payne's past unauthorized access of the government database is admissible under Rule 404(a) and Rules 607 through 609 as a prerequisite to relying on Rule 404(b). The problem with this position, though, is that Rule 404(b) is an *exception* to Rule 404(a) and no case on which the State relies supports its interpretation of the interplay of these rules.

Subsection (a) of Rule 404 addresses "character" evidence. TEX. R. EVID. 404(a). It prohibits the admission of character evidence to prove that on a particular occasion the person acted in conformity with his bad character. *Id.* Subsection (b) of the same rule addresses evidence of particular "crimes, wrongs, or other act," sometimes generally referred to as "bad acts." TEX. R. EVID. 404(b). It divides bad acts into two categories: (1) bad acts to prove bad character and (2) bad acts to prove something else. *Id.* Evidence of a bad act "is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." TEX. R. EVID. 404(b)(1). But evidence of a bad act "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." TEX. R. EVID. 404(b)(2).

When evidence is being offered for one of these other purposes, its admission is not defeated by pointing out that the evidence might also be relevant

to character; instead, it is admissible subject to a limiting instruction to prohibit the jury from considering the evidence for an impermissible purpose, like character conformity. *See Dukes v. State*, 486 S.W.3d 170, 181 (Tex. App.—Houston [1st Dist.] 2016, no pet.); *Medellin v. State*, 960 S.W.2d 904, 908 (Tex. App.—Amarillo 1997, no pet.); *see also* TEX. R. EVID. 105 ("If the court admits evidence that admissible . . . for a purpose—but not . . . for another purpose—the court, on request, must restrict the evidence to its proper scope and instruct the jury accordingly.").

Thomson argues that it has since surfaced that Deputy Payne has, on other occasions, been granted limited access to digital data and intentionally exceeded the limits of his authorized use to view material he found helpful to his purposes. Deputy Payne searched the government database for information on his birth father, his divorcing spouse, and the new romantic interest of a woman he later dated. His unauthorized access occurred before Thomson's trial but was not discovered until after trial. Thomson argues this evidence is relevant to whether Deputy Payne intentionally exceeded Thomson's limited consent to use his phone with the similar goal of finding incriminating evidence helpful to his purposes.

Deputy Payne admitted during Thomson's criminal trial that he had a suspicion about what might be on Thomson's phone when he first found it. It was inside a bag, along with duct tape and Benadryl. And there was a surprisingly

young woman with Thomson, late at night, whose story did not match Thomson's. Deputy Payne admitted that he thought—from the beginning—that there would be incriminating images on the phone:

> Q. . . . When you asked him why he had that phone, what was his response?
>
> A. To store his photos.
>
> Q. And when he—whenever he said that to you, at that point did that have any significance to you at that point?
>
> A. With the contents of the bag and what I believed it was, yes, there would—there would have been trophy shots that would have been on the phone.

Thomson argues the evidence that Deputy Payne repeatedly accessed electronically stored information without authorization based on what he thought he might find is admissible under Rule 404(b)(2) to prove absence of mistake or lack of accident in exceeding Thomson's limited consent and accessing his phone's stored information to find what Deputy Payne already had a hunch was on the phone. Whether Deputy Payne's navigation to the gallery of images was intentional or not was a key aspect of the Fourth Amendment analysis to determine if the navigation constituted an unconstitutional search.

The State responds that although Thomson purports to rest his argument on Rule 404(b)'s lack-of-accident exception, what "his brief really urges" is "the admissibility of the evidence based on 'a system or pattern evidence' as discussed

in *Johnston v. State*, 145 S.W.3d 215 (Tex. Crim. App. 2004)," and that pattern evidence is inadmissible character-conformity evidence. In other words, according to the State, evidence is inadmissible under Rule 404(a) and *Johnston* if it shows a pattern of misbehavior, even if that same evidence would show a lack of accident. The very text of *Johnston* explains why the State's argument fails.

In *Johnston*, a man was charged with intentionally or knowingly causing injury to his three-year-old stepson by burning his hand with a lit cigarette. *Id.* at 217. Johnston's position at trial was that the child's mother had burned him accidentally. *Id.* at 218. The State successfully admitted pictures of bruises on Johnston's stepdaughter, over his objection, ostensibly to show that it was Johnston who intentionally burned the stepson. *Id.* Johnson was convicted and appealed.

On appeal, the State argued that the pictures were admissible under Rule 404(b) to show intent. *Id.* The Court of Criminal Appeals held that Rule 404(b) did not apply given Johnston's defensive theory that someone else burned the boy. *Id.* at 222–23. There was no question of fact on Johnson's intent in handling the boy—he denied being involved. *Id.* Thus, the pictures of the bruised girl did not tend to prove or disprove Johnston's intent regarding the alleged offense against the boy. *Id.* at 223. There was no basis for the State to admit pictures of the bruised girl.

To explain its point, the Court highlighted that Johnson's "defense was not that he *accidentally or mistakenly* burned" the boy. *Id.* (emphasis added). If it had

been, according to the Court, the State could have rebutted the defense of "accident" or "mistake" with "evidence of other conduct by the defendant which tends to show that his actions on those occasions, and on this occasion as well, were not mistaken, inadvertent, or accidental." *Id.* at 222 (explaining Rule 404(b)). That, of course, is what we have here: evidence of other bad acts that might rebut the claim of accidental misnavigation of digital data.

Deputy Payne admitted he accessed the images on Thomson's phone, but he claimed that he did so only by accident. He inadvertently pressed beyond the outer edges of one icon and opened the photo gallery, he said. *Johnston* supports the admission of evidence under Rule 404(b) of other instances of exceeding consent because the issue of whether Payne's actions were intentional or accidental was in dispute and a fact of consequence. *Id.* at 222–23.

It matters not that the previous bad acts are by a witness other than the accused. *See Castaldo v. State*, 78 S.W.3d 345, 348–49 (Tex. Crim. App. 2002) (holding bad acts of third parties can be admissible under Rule 404(b) after rejecting State's contention that rule's plain language limited it to defendant's bad acts). Use of Rule 404(b) is not limited to admitting evidence of a criminal defendant's bad acts; it extends to allow admission of bad acts by third parties. *Id.*; *cf. United States v. McClure*, 546 F.2d 670, 673 (5th Cir. 1977) (bad acts of informant admissible under federal Rule 404(b)); *United States v.*

Aboumoussallem, 726 F.2d 906, 911 (2d Cir. 1984) (bad acts of third party, though admissible under federal Rule 404(b), had to be excluded under Rule 403 under relevant facts of case).

To be clear, this evidence is admissible to prove lack of mistake or accident. TEX. R. EVID. 404(b). It is not admissible to prove character conformity or to impeach credibility. Deputy Payne claimed an accidental opening of the images, and this evidence that arguably supports a theory of lack of accident also implicates Deputy Payne's credibility. That dual relevance does not make Rule 404(b) unavailable. That risk may be addressed through a Rule 105 limiting instruction that tells the jury it may not use the evidence for an improper purpose. *See* TEX. R. EVID. 105.

We conclude that the trial court erred in holding that the evidence of Deputy Payne's unauthorized accesses of the government database was inadmissible. Its admissibility was not foreclosed under the rules on which the State relied.[5]

We turn now to element four, which the State did not brief.

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[5] The State did not assert that the evidence was inadmissible under a Rule 403 analysis. No party presented the matter for balancing by the trial court as part of a Rule 403 analysis. We do not find it appropriate to engage in a Rule 403 evaluation in the first instance on appeal. *See Sunbury v. State*, 88 S.W.3d 228, 235 (Tex. Crim. App. 2002) (refusing to consider State's alternative basis for affirming trial court's ruling under Rule 403 because the "trial judge did not exercise his discretion under Rule 403 and did not weigh probative value against any Rule 403 counterfactors").

C. Analysis of whether the new evidence probably is true and would bring about a different result in a new trial

Deputy Payne admitted he accessed the government database without authorization. The State does not dispute he did so. Thus, the evidence meets the standard of likely being true.

"The purpose of the Article 38.23 instruction is to enable the jury to disregard unlawfully obtained evidence." *See Olsen v. State*, 606 S.W.3d 342, 349 (Tex. App.—Houston [1st Dist.] 2020, no pet.); *Dao v. State*, 337 S.W.3d 927, 940 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd). Under the Article 38.23 instruction in the court's charge, the jury was required to determine whether Deputy Payne unintentionally entered the area of the phone that displayed the contraband images. Only if the jury resolved that question in the State's favor was the jury permitted to consider the evidence obtained from the phone in Thomson's trial for possession of child pornography.

The bodycam video does not show what Deputy Payne pressed on Thomson's phone to access the contraband images. The State relied on his explanation that he reached them inadvertently while trying to return Thomson's phone to the lock screen. He denied searching Thomson's phone for incriminating evidence. Thomson's theory of the case was that Deputy Payne intentionally searched his phone without consent. The version of events accepted by the jury hinged on their determination that Deputy Payne's explanation was credible. *Cf.*

Monse v. State, 990 S.W.2d 315, 318 (Tex. App.—Corpus Christi 1999) (discussing grant of new trial where key witness recants posttrial); *Mata v. State*, No. 04-98-00411-CR, 2000 WL 816767, at *6 (Tex. App.—San Antonio Feb. 9, 2000, no pet.) (mem. op., not designated for publication) (same).

With Deputy Payne's credibility playing such a critical role in the jury's determination of whether the evidence from the phone could be relied on for conviction, we are persuaded that this new evidence of confessed, unauthorized access of technology on multiple occasions would have impacted the jury's credibility determination unfavorably to probably trigger Article 38.23 exclusion. This is more than impeachment evidence that would reduce the weight of a witness's testimony. *See, e.g.*, *Bookman v. State*, No. 01-04-01145-CR, 2007 WL 1018648, at *10 (Tex. App.—Houston [1st Dist.] Apr. 5, 2007, no pet.) (mem. op., not designated for publication) ("Sheryl Bookman's testimony merely attempts to discredit Jonathan Gipson's testimony during trial."). It is evidence that would trigger Article 38.23 exclusion of key incriminating evidence.

We conclude that it is probable that the jury would determine that Deputy Payne's access to the gallery images was not inadvertent. That would make it a search without consent, which would lead to the exclusion of the evidence from Thomson's phone. This, in turn, would probably bring about a different result at trial. Factor four is met.

We conclude that the trial court abused its discretion in denying the motion for new trial. We sustain Thomson's last issue.

Conclusion

We reverse the trial court's judgment and remand for a new trial.

Sarah Beth Landau
Justice

Panel consists of Justices Goodman, Landau, and Countiss.

Publish. TEX. R. APP. P. 47.2(b).