Affirmed and Memorandum Opinion filed September 26, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00409-CR

LONZO BERRYMAN RAND, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 1502841

M E M O R A N D U M O P I N I O N

Appellant Lonzo Berryman Rand was convicted of possession with intent to deliver between four and 200 grams of methamphetamine and sentenced to thirty-seven years in prison. *See* Tex. Health & Safety Code Ann. § 481.112(d) (West 2017); Tex. Penal Code Ann. § 12.42(d) (West 2011). Appellant appeals his

conviction and contends: (1) the evidence is insufficient to support his conviction because he was not in possession of the drugs, nor did he know the drugs were methamphetamine; and (2) the trial court erred in admitting information from appellant's cell phone and expert testimony regarding that information into evidence over his objections.

We hold that the evidence of affirmative links is legally sufficient to support the jury's finding beyond a reasonable doubt that appellant committed the offense of possession of methamphetamine with intent to deliver. We also hold that the trial court did not abuse its discretion in admitting the cell phone information and expert testimony because the information was properly authenticated, the admission of any hearsay was harmless, the expert's testimony was reliable, and the information was not unfairly prejudicial under Rule 403 and was admissible for a purpose other than showing appellant's bad character under Rule 404 of the Texas Rules of Evidence. We therefore affirm the trial court's judgment.

BACKGROUND

In the early morning hours of February 14, 2015, appellant Alonzo Rand was arrested for possession with intent to deliver between four and 200 grams of methamphetamine. Deputy Sheriff Christopher Moore was on patrol in Spring, Texas when he pulled into the parking lot of Cue Sticks, a local all-night pool hall, that Moore knew to be a place where drug transactions often occurred. Upon pulling into the parking lot, Moore noticed a man leaning into the window of a blue Taurus that had pulled into a parking spot backwards. Moore parked his vehicle and approached the parked car, where he detected the odor of marijuana and noticed that the three men inside the car were making furtive movements.

Appellant was sitting in the driver's seat when Moore asked him to get out of the car. Appellant was holding a cell phone and a plastic baggie when he exited the

car. The plastic baggie was later determined to contain marijuana. Moore detained appellant. While Moore was attempting to detain the man who had been leaning into the car, the two other occupants of the car fled the scene.

Moore called for additional units to assist him. Once those units arrived, Moore used his drug-sniffing dog to investigate whether there were any narcotics in the vehicle other than the marijuana found on appellant's person. The dog alerted on the center console of the car. Inside the console was a clear plastic bag containing marijuana and pills of many different colors. The marijuana and pills were separated, and each had been divided into several smaller plastic bags. The colored pills were later tested and found to contain 4.192 grams of methamphetamine. Moore testified that he had initially assumed the pills to be ecstasy or MDMA, but that it was not uncommon for pills marketed as ecstasy to actually contain methamphetamine mixed with caffeine.

Because the man who was leaning into the car window did not have drugs or a large amount of money, Moore and his fellow officers did not arrest him. Appellant did not have any drugs on his person other than the marijuana he was holding in his hand, nor did he have weapons, drug paraphernalia, or a large amount of money. Moore testified that appellant did not appear intoxicated or under the influence of drugs at the time of his arrest.

A search warrant was later obtained for the cell phone that appellant had been holding in his hand when he got out of the car. A digital forensic investigator for the Harris County District Attorney's office downloaded the contents of appellant's cell phone to a flash drive. This "cell phone dump" included information such as text messages, information from appellant's Facebook page, and photos. The information included text messages detailing conversations relating to drugs and the selling of drugs.

Appellant sought to have the evidence from his cell phone suppressed at

various points throughout the trial.[1] Appellant objected on various grounds, including improper authentication, hearsay, unfairly prejudicial, irrelevant extraneous offenses, and unreliable expert testimony regarding the cell phone evidence.[2] The trial court overruled these objections and admitted the expert testimony and the entire contents of the phone into evidence.

At the conclusion of the evidence, the jury found appellant guilty of possession with intent to deliver between four and 200 grams of methamphetamine and sentenced him to thirty-seven years in prison. This appeal followed.

ANALYSIS

I. Sufficient evidence supports appellant's conviction of possession with intent to deliver methamphetamine.

In his first issue, appellant contends that the evidence is insufficient to support his conviction of possession with intent to deliver. At the time of his arrest, appellant was one of three individuals who had access to the center console where the drugs were found. Appellant contends that his mere presence at the location where the drugs were found is insufficient to support a conviction. *See Evans v. State*, 202 S.W.3d. 158, 162 (Tex. Crim. App. 2006) (holding that mere presence at the location where drugs are found is insufficient, by itself, to establish possession of drugs).

A. Standard of review and applicable law

When reviewing the sufficiency of the evidence, we view all of the evidence in the light most favorable to the verdict and determine whether any rational trier of

[1] Appellant objected to admitting into evidence information from his cell phone during a suppression hearing outside the presence of the jury, and he objected again in the presence of the jury.

[2] Although appellant asked the trial court to consider allowing the evidence in redacted form, eliminating every "from" message, trial court did not rule on this request and allowed the evidence in its entirety.

fact could have found the elements of the offense beyond a reasonable doubt. *Gear v. State*, 340 S.W.3d 743, 746 (Tex. Crim. App. 2011) (citing *Jackson v. Virginia*, 433 U.S. 307, 318–319 (1979)). In viewing the evidence in the light most favorable to the verdict, we must "defer to the jury's credibility and weight determinations because the jury is the sole judge of the witnesses' credibility and the weight to be given their testimony." *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010) (citing *Jackson*, 433 U.S. at 319 (1979)).

In analyzing legal sufficiency, we consider all evidence from the record, whether admissible or inadmissible. *Winfrey v. State*, 393 S.W.3d 763, 767 (Tex. Crim. App. 2013) (citing *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999)). Direct and circumstantial evidence are to be treated equally. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007) (quoting *Hooper v. State*, 214 S.W.3d 9, 16–17 (Tex. Crim. App. 2007)). As such, knowledge and intent can be inferred from circumstantial evidence. *Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004). In conducting a sufficiency review, we do not engage in a second evaluation of the weight and credibility of the evidence but only ensure that the jury reached a rational decision. *Young v. State*, 358 S.W.3d 790, 801 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd).

A person commits the offense of possession of a controlled substance with intent to deliver if he knowingly possesses a controlled substance, such as methamphetamine, in an amount between four and 200 grams with intent to deliver. *See* Tex. Health & Safety Code Ann. § 481.112(d). "Possession" is defined as "actual, care, custody, or management." Tex. Penal Code Ann. § 1.07(a)(39). Therefore, to prove unlawful possession of a controlled substance, the State must establish that the accused (1) exercised care, control, or management over the contraband, and (2) knew the substance was contraband. *Poindexter v. State*, 153

S.W.3d 402, 405 (Tex. Crim. App. 2005); *Moreno v. State*, 195 S.W.3d 321, 325 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd). The element of possession may be proven through direct or circumstantial evidence, although the evidence must show that the accused's connection with the substance was more than fortuitous. *Poindexter* 153 S.W.3d at 405–406.

When the accused is not in exclusive possession of the place where the contraband is found, the State must show additional facts and circumstances that affirmatively link the accused to the contraband. *See Olivarez v. State*, 171 S.W.3d 283, 291 (Tex. App.—Houston [14th Dist.] 2005, no pet.). An affirmative link generates a reasonable inference that the accused knew of the contraband's existence and exercised control over it. *Id*.

Courts have identified the following factors that may affirmatively link the accused to a controlled substance: (1) the defendant's presence when a search is conducted; (2) whether the contraband was in plain view; (3) the defendant's proximity to and the accessibility of the narcotic; (4) whether the defendant was under the influence of narcotics when arrested; (5) whether the defendant possessed other contraband or narcotics when arrested; (6) whether the defendant made incriminating statements when arrested; (7) whether the defendant attempted to flee; (8) whether the defendant made furtive gestures; (9) whether there was an odor of contraband; (10) whether other contraband or drug paraphernalia were present; (11) whether the defendant owned or had the right to possess the place where the drugs were found; (12) whether the place where the drugs were found was enclosed; (13) whether the defendant was found with a large amount of cash; and (14) whether the conduct of the defendant indicated a consciousness of guilt. *Evans v. State*, 202 S.W.3d at162 n.12. Additionally, a large quantity of contraband may be a factor affirmatively linking appellant to the contraband. *See Olivarez*, 171 S.W.3d at 292.

No set formula of facts is required to find an affirmative link that supports an inference of knowing possession; whether such an inference is reasonable is determined by the totality of the circumstance. *Hyett v. State*, 58 S.W.3d 826, 830 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). The number of factors present is not as important as the combined logical force of the factors in proving that the accused knowingly possessed the controlled substance. *Roberson v. State*, 80 S.W.3d 730, 735 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd).

B. The evidence is sufficient to support the jury's finding that appellant possessed and intended to deliver methamphetamine.

Viewing the record in the light most favorable to the verdict, Deputy Moore observed appellant engaging in what appeared to be a hand-to-hand drug transaction. As Moore approached the car, he noticed appellant making furtive movements. Moore also noticed the smell of marijuana. Appellant's location in the driver's seat gave him both access to the drugs in the center console and control over the car that the drugs were found in, despite the car not being registered to him and the presence of other people in the backseat. The Texas Court of Criminal Appeals held in *Poindexter* that "the mere fact that a person other than the accused might have joint possession of the premises does not require the State to prove that the defendant had *sole* possession of the contraband." *Poindexter*, 153 S.W.3d at 412 (citing *United States v. Richardson*, 208 F.3d 626, 632 (7th Cir. 2000)).

As appellant exited the car, he was holding a plastic bag containing marijuana and a cell phone. Other marijuana similarly packaged for distribution was found in the center console with the methamphetamine. Upon being asked to get out of the car, appellant was described as belligerent. Police also took the cell phone appellant had on his person at the time of the arrest. After obtaining a valid search warrant, appellant's cell phone information was compiled and downloaded for review.

Several text messages from the night in question indicate the arrangement of drug buys. One such conversation was as follows:

[Recipient]: I get off at 8:30 can u drop of sum bars then I wrk w chino

[Appellant]: Ok bet

[Appellant]: How many

[Recipient]: i need 8 and my homeboy need sum he wrk w me ill ask but I get off at 7:30 ill have the cash then

[Appellant]: ok

[Recipient]: Whats ticket on bars

[Recipient]: Will u do 5 fo 20

[Appellant]: Naw, 5 a pop

This conversation occurred on February 13, 2015 from 12:42 p.m. to 9:02 p.m. Appellant was arrested in the early hours of February 14, 2015 at 2:50 a.m. Xanax, commonly referred to as "bars," was found in the center console along with the marijuana and methamphetamine.

Other messages from earlier in 2015 and from late 2014 also chronicled similar arrangements to buy and sell drugs. One particular conversation on December 6, 2014, concerned a deal that fell through:

[Recipient]: Who got some narcos or wateva

[Appellant]: How many

[Recipient]: 6 I guess way

[Recipient]: I need em now

[Appellant]: Cum to qstix

[Recipient]: I dnt need em no more she changed her mind

[Appellant]: Well Ima b at eclipse I got wateva

[Recipient]: I'm sorry she didnt wan em

[Recipient]: But what u got

[Appellant]: U kno wat I have

[Recipient]: Ex pills

[Appellant]: Yeah

This conversation referenced Cue Sticks—the location where appellant was arrested in February 2015—and ecstasy, commonly known as "ex." As Deputy Moore testified, pills sold as ecstasy are often actually methamphetamine mixed with caffeine, and such pills were found in the center console.[3]

Overall, factors 1, 3, 5, 8, 9, 10, 11, and 12 link appellant to the methamphetamine in the console, while factors 2, 4, 6, 7, 13, and 14 do not. But the number of factors linking appellant to the drugs in this case is not dispositive. Rather, "the logical force of all of the evidence" is controlling. *Evans*, 202 S.W.3d at 162. Given all the evidence, we conclude a rational trier of fact could have concluded beyond a reasonable doubt that appellant knowingly possessed and intended to distribute methamphetamine. We therefore hold the evidence is sufficient to support

[3]Appellant contended at trial that it was his belief the drugs were ecstasy not methamphetamine, negating the statute's requirement of knowledge. The State correctly pointed out that the statute only requires knowledge of possessing a controlled substance, even if that substance is believed to be another illegal narcotic. Before closing argument, the State made a motion to prevent appellant from arguing to the jury that the State was required to show appellant knew the drugs were methamphetamine to be convicted, as it was a misstatement of the law. *See* Tex. Health & Safety Code Ann. § 481.112. The trial court granted this motion. Nevertheless, appellant attempted to make the argument during closing, only to have the State object again and the court to instruct counsel to "stay within the record." Appellant does not raise any issue on appeal regarding whether he knew the composition of the drugs.

appellant's conviction and overrule appellant's first issue.

II. The trial court did not abuse its discretion in admitting appellant's cell phone information and related expert testimony.

In his second issue, appellant asks this Court to hold that the trial court abused its discretion in admitting the information downloaded from his cell phone and related expert testimony because the information was not properly authenticated, it was hearsay, the expert's testimony was not reliable, the information was unfairly prejudicial under Rule 403 of the Texas Rules of Evidence, and admitting the information violated Rule 404 by attempting to show the appellant was acting in conformity with extraneous offenses. We address each of these issues in turn.

A. The trial court did not abuse its discretion in overruling appellant's authentication objection.

Regarding authentication, appellant contends that modifications were made to his cell phone after his arrest, and that exhibits presented during trial prove that several files had been opened by someone other than him. Under appellant's theory, these modifications compromise the cell phone information's authenticity. Appellant asks this Court to find that the trial court's admission of the cell phone information into evidence, despite the alleged modifications, was outside of the zone of reasonable disagreement.

1. Standard of review and applicable law

Under Texas Rules of Evidence 104(a), the trial court has discretion to determine preliminary questions regarding the admission of evidence. Tex. R. Evid. 104(a). These questions may include whether the evidence is relevant in making the existence of any fact of consequence more probable or less probable. *See* Tex. R. Evid. 401, 402. For evidence to be relevant it must be authentic—that is, what the proponent claims it to be. Tex. R. Evid. 901(a); *Tienda v. State*, 358 S.W.3d 633,

638 (Tex. Crim. App. 2012). In determining whether evidence is authentic, "the trial court itself need not be persuaded that the proffered evidence is authentic," it must simply decide "whether the proponent of the evidence has supplied facts that are sufficient to support a reasonable jury determination that the evidence he has proffered is authentic." *Tienda*, 358 S.W.3d at 633 (citing *Druery v. State*, 225 S.W.3d 491, 502 (Tex. Crim. App. 2007)).

On appeal, we give deference to the trial court's ruling on a preliminary determination to admit evidence. The standard of review is abuse of discretion, and we will only overturn the trial court's decision if it is outside the zone of reasonable disagreement. *See Layton v. State*, 280 S.W.3d 235, 240 (Tex. Crim. App. 2009) (citing *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990)).

Evidence may be authenticated through direct testimony by a witness with personal knowledge, among other things. Tex. R. Evid. 901(b). Electronic evidence presents potential authentication problems. Because of the potential for manipulation, the Texas Court of Criminal Appeals has held that a text message emanating from a cell phone assigned to a purported author, without more, is not enough to prove authenticity. See *Tienda*, 358 S.W.3d at 642. Although courts have looked to various factors in determining electronic evidence's authenticity,[4] "the best or most appropriate method for authenticating electronic evidence will often depend upon the nature of the evidence and the particular circumstances of the case." *Id.* at 639.

2. The State offered sufficient evidence that the information came from appellant's cell phone

In order to show that the information it was offering came from appellant's

[4] *See Tienda*, 358 S.W.3d at 640–641.

cell phone, the State called Tuan Pham, a digital forensic investigator for the district attorney's office, as an expert witness to testify about the information.[5] Pham testified that appellant listed the number associated with this cell phone on his bail bond sheet. He also testified that text messages coming to and from the phone mentioned appellant's name. The email address associated with the phone included appellant's name. The phone had a picture on it of appellant's Texas driver's license. In addition to Pham's testimony as to the contents of the phone, Officer Moore testified appellant was holding the phone at the time of his arrest.

Appellant's claim that the information had been modified is supported by exhibits displaying a "last modified" time stamp after his arrest.[6] These time stamps, according to appellant, prove the information was modified by someone other than him. Pham testified, however, that appellant's characterization of the potential modification of the information was misplaced because the time stamp simply indicates the last time someone accessed the information from the flash drive. Regardless, the "proponent of the evidence is not required to rule out all possibilities inconsistent with authenticity." *Jones v. State*, 466 S.W.3d 252, 262 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd) (citing *Manuel v. State*, 357 S.W.3d 66, 74 (Tex. App.—Tyler 2011, pet. ref'd)). It is sufficient for the State to bridge the logical gap with evidence permitting the inference that the information came from a cell phone belonging to appellant. The trial court reasonably could conclude that the State did so here. For this reason, the trial court did not abuse its discretion in overruling appellant's authentication objection.

---

[5] Pham first testified outside the presence of the jury so that the trial court could consider his testimony in ruling on appellant's authentication objection.

[6] The State argues in its brief that appellant's own exhibits were not properly authenticated. Because the State did not make this objection at trial, this issue has not been properly preserved for our review. *See* Tex. R. App. P. 33.1.

B. The trial court did not abuse its discretion in overruling appellant's hearsay objection.

1. Standard of review and applicable law

Appellant raised a hearsay objection to the cell phone information twice—once during a suppression hearing on the information and once during trial. In both instances, the trial court overruled appellant's objection. The standard of review for the trial court's ruling is abuse of discretion. See *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006); *Shuffield v. State*, 189 S.W.3d 782, 793 (Tex. Crim. App. 2006). If the trial's court's decision to admit evidence is correct on any applicable legal theory, that decision must be upheld. *Gomez v. State*, 380 S.W.3d 830, 836 n. 9 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd) (citing *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009)).

Hearsay is defined as an out-of-court statement offered to prove the truth of the matter asserted. Tex. R. Evid. 801(d). A party's own statement offered against that party is not hearsay. Tex. R. Evid. 801(e)(2)(A). A statement also is not hearsay if it is offered against an opposing party and was made by that party's co-conspirator during and in furtherance of the conspiracy. Tex. R. Evid. 801(e)(2)(E).

2. Text messages from appellant's cell phone were not hearsay, and any error in admitting other information from the phone was harmless.

During trial, appellant objected to the admission of information from his cell phone on hearsay grounds, specifically all "to and from" text messages, "especially the 'from' messages."[7]

[7] The State argues appellant did not preserve his objection in the trial court. When an exhibit contains both admissible and inadmissible materials, the objecting party has the duty to point out for the court which specific items are inadmissible. *Sonnier v. State*, 913 S.W.2d 511, 518 (Tex. Crim. App. 1995). We conclude that appellant's objection at trial that "every single 'from' message needs to be redacted" is sufficiently specific and accords with his argument on

The admitted information taken from appellant's cell phone may be grouped into three categories. The first group includes messages coming from appellant himself, which fall under the party-opponent definition of non-hearsay. Tex. R. Evid. 801(e)(2)(A). The second group contains messages coming from other individuals in which drugs are mentioned. These messages fall under the co-conspirator exception. Tex. R. Evid. 801(e)(2)(E). The third group is the remaining information coming from appellant's cell phone, including exhibits 19 and 25 identified by appellant in his brief. The information in this group is hearsay because it was offered for the truth of the matter asserted, but any error in admitting this information was harmless. We explain our conclusion regarding each group of information below.

Rule 801(e)(2) recognizes the long-held belief that "a party should not be allowed to exclude his own statement on the grounds that what he said was untrustworthy." *Davis v. State*, 177 S.W.3d 355, 361 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (quoting *Bell v. State*, 877 S.W.2d 21, 24 (Tex. App.—Dallas 1994, pet. ref'd)). This maxim applies directly in this case. Statements made in text messages originating from a phone that evidence showed belonged to appellant are not hearsay. *See* Tex. R. Evid. 801(e)(2)(E).

In response to appellant's objection at trial, the State also raised Rule 801(e)(2)(E)'s co-conspirator definition of non-hearsay. For a statement made by a non-party opponent to fall under this definition, the State must "show that a conspiracy existed in which the co-conspirator was a member of or later participated in the conspiracy, and that the statements made were the object and purpose of the conspiracy." *Guidry v. State*, 9 S.W.3d 133, 148 (Tex. Crim. App. 1999) (citing

---

appeal that the "admitted messages would all have to consist of offers in furtherance of a conspiracy to buy or sell drugs."

Ward v. State, 657 S.W.2d 133 (Tex. Crim. App. 1983)). Put another way, in order for the co-conspirator definition of non-hearsay to apply, the assertion must be made during and in furtherance of a conspiracy. Tex. R. Evid. 801(e)(2)(E). Because messages show that the drug transactions being arranged had yet to transpire, there is evidence that these statements were made during the course of a conspiracy. Additionally, because the messages were to facilitate and coordinate the exchange of drugs, there is evidence that they were sent in furtherance of the conspiracy.

Appellant argues in his brief that in order for the co-conspirator definition to apply, "the admitted messages would all have to consist of offers in furtherance of a conspiracy to buy or sell drugs." We disagree. The application of the co-conspirator definition of non-hearsay to some messages does not negate the application of other non-hearsay definitions to other messages.

For all other information coming from appellant's cell phone, including Exhibits 19 and 25 mentioned in appellant's brief, the State argues that it did not offer that information for the truth of the matter asserted but only to authenticate the information as coming from appellant's cell phone. Evidence offered for the purpose of showing something other than the truth of the matter asserted is not hearsay. *Dinkins v. State*, 894 S.W.2d 330, 347 (Tex. Crim. App. 1995). But the question of authentication is for the court to decide, not the jury. *See Tienda*, 358 S.W.3d at 637–638. The State's argument does not explain the purpose for which it offered this information to the jury.

Assuming that the trial court abused its discretion in admitting the remaining information, we conclude such error was harmless. Appellant mentions that the information included his Facebook page and other items, but none of this material tended to establish his guilt except by linking him to the phone—which other evidence discussed above also accomplished. Because any potential error that

occurred in admitting portions of appellant's cell phone information over objection did not have a substantial and injurious effect or influence in determining the jury's verdict, we conclude the trial court's decision to overrule appellant's hearsay objection is not reversible error. *See Garcia v. State*, 126 S.W.3d 921, 927 (Tex. Crim. App. 2004).

C. The trial court did not abuse its discretion in admitting Pham's expert testimony.

1. Standard of review and applicable law

We review the trial court's decision to admit expert testimony for abuse of discretion and will only disturb that decision if it falls outside the zone of reasonable disagreement. *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011). Admission of expert testimony is governed by Rule 702, which allows an expert witness to testify in the form of an opinion if the expert's knowledge will help the jury to understand the evidence presented. Tex. R. Evid. 702. For such testimony to be admissible, it must be shown by clear and convincing evidence that "such testimony is sufficiently reliable and relevant to help the jury in reaching accurate results." *Tilman*, 354 S.W.3d at 435 (quoting *Kelly v. State*, 824 S.W.2d 568, 572 (Tex. Crim. App. 1992)).

2. Pham's testimony was reliable.

Appellant challenges the reliability of the methodology Pham used to copy information from appellant's cell phone. Appellant argues that Pham's unfamiliarity with any scientific theory used in extracting the information and any possible rate of error attributed to the extraction process renders his testimony unreliable.

Because Pham's testimony is more technical than scientific, the proper reliability inquiry is a flexible one, focusing on "whether (1) the field of expertise is a legitimate one, (2) the subject matter of the expert's testimony is within the scope

of the field, and (3) the expert's testimony properly relies upon or utilizes the principles involved in the field." *Coleman v. State*, 440 S.W.3d 218, 226 (Tex. App.—Houston [14th Dist.] 2013, no pet.). In *Krause*, the First Court of Appeals dealt with similar technology and testimony, holding that the expert's testimony was reliable. See *Krause v. State*, 243 S.W.3d 95, 110 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd). The witness in *Krause* was a forensic expert working for the FBI who used computer programs to recreate the defendant's hard drive. The witness in *Krause* did not know exactly how the algorithm used by the program worked, but knew that it had been approved and accepted by the FBI as well as the scientific community. *Id*. at 101. He had hundreds of hours of training, was certified in the process, and could adequately explain how the process worked. *Id*.

The witness in this case, Pham, was a digital forensic investigator for the district attorney's office who downloaded the information from appellant's cell phone. Pham testified that there was no scientific theory behind this process, but that he had used this process to extract information from cell phones "many" times and had testified as to the reliability of this process "many" times. He had hundreds of hours of training through the United States Secret Service, was certified in the process, and had past experience working in the field before coming to the district attorney's office. Pham testified about how the process itself worked without going into technical details, explaining that the process had been verified and accepted by the scientific community.

The only significant difference between the witness's testimony in *Krause* and the testimony presented in this case is Pham's unawareness of the possible rate of error. Given Pham's testimony about the technique's general reliability and simplicity, however, we conclude that the trial court did not abuse its discretion in admitting his testimony. *See Krause*, 243 S.W.3d at 110 (holding trial court could

reasonably have concluded expert's testimony established reliability of program used to reproduce hard-drive information).

D. The trial court did not abuse its discretion in overruling appellant's Rule 403 objection.

1. Standard of review and applicable law

We review a trial court's ruling on a Rule 403 objection for abuse of discretion. *State v. Mechler*, 153 S.W.3d 435, 439 (Tex. Crim. App. 2005). Relevant evidence may be excluded under Rule 403 if the trial court concludes that the evidence's probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or needless presentation of cumulative evidence. Tex. R. Evid. 403. Factors a court may consider include "(1) the probative value of the evidence; (2) the potential to impress the jury in some irrational, yet indelible, way; (3) the time needed to develop the evidence; and (4) the proponent's need for the evidence." *Hernandez v. State*, 390 S.W.3d 310, 324 (Tex. Crim. App. 2012).

2. The cell phone information's probative value was not substantially outweighed by any danger of unfair prejudice.

Appellant objected to the blanket admission of his cell phone information into evidence because it included information that had little to no probative value and could tend to confuse the jury.[8] Appellant contends that the admission of non-drug-related information, messages that are temporally remote from the day he was arrested, and messages mentioning drugs other than methamphetamine "risks confusing the issues, misleading the jury, undue delay or needlessly presenting

[8] The State does not respond to appellant's Rule 403 and Rule 404 arguments on the merits, but instead contends that appellant did not preserve his objection for appeal. We disagree because appellant objected on these bases in the hearing on the motion to suppress and then renewed his objections in the presence of the jury.

cumulative evidence in violation of Rule 403."

We agree that non-drug-related information could cause undue delay or needlessly present cumulative evidence. For example, messages dealing with appellant's personal relationships carry no weight in determining his guilt or innocence of the crime with which he is charged. But, as we concluded with respect to hearsay in Part II.B.2. above, any error in admitting such information was harmless.

The trial court's admission of messages that are temporally remote from the day appellant was arrested did not violate Rule 403. This information is probative because it shows appellant's familiarity with the drugs that were found in his possession, and any danger mentioned by appellant does not substantially outweigh that value. *See Andrade v. State*, 246 S.W.3d 217, 227 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd) (holding that under Rule 403 there is a presumption that relevant evidence is more probative than prejudicial).

Although none of the messages mention methamphetamine, the Texas Penal Code only requires appellant to have knowledge that he possessed a controlled substance, not that he knew the drug he possessed was actually methamphetamine. *See* Tex. Health & Safety Code Ann. § 481.112. For these reasons, we hold that the trial court did not abuse its discretion in holding that the cell phone information's probative value was not substantially outweighed by the danger of unfair prejudice.

E. The trial court did not abuse its discretion in overruling appellant's Rule 404 objection.

We review the trial court's ruling on a Rule 404 objection for an abuse of discretion. See *Lane v. State*, 933 S.W.2d 504, 519 (Tex. Crim. App. 1996) (citing *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990)). Rule 404(b) disallows evidence of another crime, wrong, or other act in an attempt to prove a

person acted in conformity therewith. *See* Tex. R. Evid. 404(b). Such evidence may be admitted, however, for certain other purposes. Two such purposes are knowledge and intent. *See id*.

In *Jones*, similar messages were held admissible to show a course of conduct preceding the arrest that indicated the defendant had knowledge of the drugs contained in a box mailed to him or intended to deliver the drugs to others. *See Jones*, 466 S.W.3d at 266-267. The court in *Jones* held that the purpose of admitting the messages was not to prove that the defendant "had committed any extraneous crimes." *Id*. The same is true in this case. The State offered the text messages from the night in question to show appellant's intent to deliver drugs, not that delivery actually occurred. Similarly, the State offered messages mentioning drugs and drug transactions from the past to show a course of conduct indicating appellant had knowledge of the drugs found in the console on the night of his arrest.

For these reasons, we conclude the trial court did not abuse its discretion by overruling appellant's Rule 404 objection. Having held that there was no harmful error in overruling each of appellant's objections to the admission of the information from his cell phone and the related expert testimony, we overrule appellant's second issue.

CONCLUSION

Having overruled each issue raised by appellant in this appeal, we affirm the trial court's judgment.

/s/ J. Brett Busby
Justice

Panel consists of Justices Christopher, Busby, and Jewell.
Do Not Publish — TEX. R. APP. P. 47.2(b).