Affirmed and Opinion filed August 29, 2019.

In The

Fourteenth Court of Appeals

NOS. 14-18-00304-CR &
14-18-00305-CR

LEON PHILLIP JACOB, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Cause Nos. 1543812 & 1543813

O P I N I O N

Appellant Leon Phillip Jacob challenges his convictions for solicitation to commit capital murder of two complainants, his ex-girlfriend and his girlfriend's ex-husband. The central issue in the jury trial was whether the evidence established beyond a reasonable doubt that appellant intended for a hitman to murder the complainants. Appellant's sufficiency-of-the-evidence challenge focuses on whether the use of initials to refer to the complainant in each indictment creates a

material variance because the trial evidence proved the full names of each complainant. Appellant also complains that the trial court abused its discretion in excluding enhanced audio recordings that appellant's expert prepared for the stated purpose of assisting the jury in understanding recorded phone conversations. Appellant claims the enhanced audio recordings would have given the jury a more complete picture on the element of intent. In his third issue appellant asserts that a comment the trial court made during voir dire violated his right to an impartial judge. Finding no merit in these challenges, we affirm.

I. Factual and Procedural Background

Appellant met and began dating Meghan Verikas in 2014 in Pittsburgh. She moved with appellant back to his hometown of Houston. While living together in January 2017, appellant and Verikas had a fight, in which appellant allegedly assaulted Verikas. Verikas moved out but had difficulty avoiding appellant, who allegedly harassed her at her workplace. In February 2017, charges were brought against appellant for assault and stalking.

After appellant was arrested on the stalking charge, he sought out Felix Kubosh, whose company had provided the bail bond for the stalking offense. Appellant told Kubosh that he needed "Zack's number." Kubosh had no clue what appellant was talking about. To further clarify for Kubosh, appellant explained to Kubosh that he had paid Zack "a lot of money" to "take care of this matter" and he needed Verikas "to not testify against him on these cases because it would . . . hurt his medical license." Kubosh was concerned and notified the police.

Further details were later uncovered as to the events that occurred before appellant's arrest on the stalking charge. In January 2017, appellant had asked a law-firm employee, Laura Thurlow, to determine the status of any criminal charges pending against him. Thurlow later would testify that appellant also had asked a

series of contingent requests — (1) to approach Verikas to help him get Verikas back, and (2) if she could not help him get Verikas back, he wanted Thurlow to ask Verikas to "please leave town," and (3) if Verikas refused to leave town, he wanted Thurlow to "grab her, put her in a car, and take her to him or have somebody do that" and appellant suggested he had a syringe Thurlow could use and he would "take care of the rest." Thurlow ultimately refused to help appellant, and referred Moataz Azzeh, known as "Zack," to appellant.

Azzeh had served in the military. Appellant wanted Azzeh to kidnap Verikas and convince her to "drop" the criminal case against him, and if that did not happen, he wanted Azzeh to "make her disappear," which Azzeh interpreted as make her "dead." After Kubosh notified the police, the police contacted Azzeh, who became a confidential informant.

Azzeh assisted in arranging for a face-to-face meeting between appellant and an undercover officer, Javier Duran, who was introduced to appellant as a hitman. Valerie McDaniels, with whom appellant had become romantically involved, also took part in the meeting. Information that the police learned at the meeting indicated that appellant and Valerie were seeking to hire someone to murder Verikas and Marion "Mack" McDaniels, Valerie's ex-husband.

In addition to seeking assistance from Azzeh, the police asked Verikas and Mack to assist in the police investigation. Verikas and Mack posed in pictures that the police would use to assist officer Duran in convincing appellant and Valerie that he was carrying out the hitman's end of the bargain. Mack posed for pictures in which it appeared that he had been shot in a carjacking. Verikas posed for pictures in which it appeared that she was bound and held hostage. These pictures assisted the police in building the case against appellant and Valerie.

After appellant and Valerie were charged by indictment with solicitation to

commit capital murder as to each of the complainants, Valerie took her own life. Appellant pled "not guilty" to each indictment and stood trial before a single jury on both charges.

The jury heard evidence of the events leading to the solicitation-to-commit-capital-murder charges, including recorded phone conversations between appellant and officer Duran, and testimony from Thurlow, Azzeh, and Kubosh about appellant's expressed intentions before the police undercover unit became involved. Azzeh, Verikas, Mack, and various members of the police department testified about their respective involvement in the investigation and undercover operation. Verikas and Mack testified about their respective personal relationships with appellant and Valerie. Jacob's mother, an attorney, testified that she had represented Valerie in her divorce proceeding with Mack and that Valerie had expressed intentions to kill Mack. Undercover police officer Duran, who was named as the solicitee in the indictment, testified that he had handled similar operations before. He explained that only about half the time do such operations result in criminal charges, because the targets of the investigation sometimes choose not to follow through with the plan.

At the close of the evidence, the trial court charged the jury to determine if appellant was guilty of solicitation to commit capital murder of either Verikas or Mack. In the charge, the trial court inquired of appellant's guilt both as a principal and as a party to the offenses, with Valerie acting as the principal.

The jury found appellant guilty as charged as to each offense. As to each offense, the jury assessed appellant's punishment at confinement for life and a $10,000 fine.

II. ISSUES AND ANALYSIS

A. Sufficiency of the Evidence

In his first issue, appellant challenges the sufficiency of the evidence to support his solicitation-to-commit-capital-murder convictions.[1] Appellant asserts that the trial evidence is insufficient to prove the allegations as to the identity of the complainant in each indictment. Appellant does not assert that the evidence is insufficient in any other respect. Appellant claims the proof at trial on the identity of each complainant is insufficient because it shows that appellant solicited the capital murders of "Meghan Verikas" and "Marion 'Mack' McDaniel," as opposed to showing that appellant solicited the capital murders of "M.V." and "M.M.," as alleged in the indictments. Appellant asserts that there is a fatal and material variance between each indictment's allegations as to the identity of each complainant and the proof at trial. On this basis, appellant asks this court to overturn both convictions and render a judgment of acquittal in each case.

Standard of Review

In evaluating a challenge to the sufficiency of the evidence supporting a criminal conviction, we view the evidence in the light most favorable to the verdict. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). The issue on appeal is not whether we, as a court, believe the State's evidence or believe that appellant's evidence outweighs the State's evidence. *Wicker v. State*, 667 S.W.2d 137, 143 (Tex. Crim. App. 1984). The verdict may not be overturned unless it is irrational or unsupported by proof beyond a reasonable doubt. *Matson v. State*, 819 S.W.2d 839, 846 (Tex. Crim. App. 1991). The jury "is the sole judge

[1] Appellant filed a separate appellant's brief as to each conviction but asserts the same issues in each brief, and appellant's arguments in support of each issue are substantially similar. So, for ease of reference, we refer to each issue in singular terms rather than plural terms.

of the credibility of the witnesses and of the strength of the evidence." *Fuentes v. State,* 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). The jury may choose to believe or disbelieve any portion of the witnesses' testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). When faced with conflicting evidence, we presume the jury resolved conflicts in favor of the prevailing party. *Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993). So, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, we must affirm. *McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997).

Elements of Solicitation-to-Commit-Capital-Murder Offense

The indictment in trial court cause number 1543812 alleged that on or about March 8, 2017, appellant "with the intent that the offense of capital murder be committed, request, command and attempt to induce J. DURAN, hereafter called the solicitee, to engage in specific conduct, namely, the MURDER for remuneration of M.V., and that under the circumstances surrounding the conduct of the solicitee as the Defendant believed them to be, would constitute and make the solicitee a party to the offense of capital murder." The indictment in trial court cause number 1543813 contained an identical paragraph except that the initials were "M. M." rather than "M.V."

A person commits murder if the person "intentionally or knowingly causes the death of an individual." Tex. Pen. Code Ann. § 19.02(b)(1). And, a person commits capital murder if the person commits a murder that way and "employs another to commit the murder for remuneration or the promise of remuneration." Tex. Pen. Code Ann. § 19.03(a). A person commits a solicitation-to-commit-capital-murder offense, if with intent that a capital murder be committed, the person "requests, commands, or attempts to induce another to engage in specific conduct that, under the circumstances surrounding [the person's] conduct as the

[person] believes them to be, would constitute [capital murder] or make the other a party to its commission." Tex. Pen. Code Ann. § 15.03(a). The trial court's jury instructions tracked the respective indictments in the disjunctive and were consistent with the statutory elements of the solicitation-to-commit-capital-murder offense under the Penal Code. The jury charges referred to each complainant by initials rather than by name, consistent with the indictments.

The trial court also instructed the jury on the law of parties under Penal Code section 7.02(a)(2). *See* Tex. Penal Code § 7.02. Under section 7.02, "[a] person is criminally responsible for an offense committed by the conduct of another if: . . . (2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense." *Id.* Thus, even if the jury failed to find appellant guilty as a principal, the jury could have found appellant guilty if it found the evidence showed that Valerie was guilty of the solicitation-of-capital-murder offenses and that appellant, acting with intent to promote or assist the commission of each offense solicited, encouraged, directed, aided, or attempted to aid Valerie to commit each offense.

Law Regarding Material Variances

A "variance" occurs when there is a discrepancy between the allegations in the indictment and the proof at trial. *See Gollihar v. State*, 46 S.W.3d 243, 246 Only a "material" variance, one that prejudices a defendant's substantial rights, will make the evidence insufficient. *Ramjattansingh v. State*, 548 S.W.3d 540, 547 (Tex. Crim. App. 2018). This circumstance occurs when the indictment, as written, 1) fails to inform the defendant of the charge against the defendant sufficiently to allow the defendant to prepare an adequate defense at trial, or 2) subjects the defendant to the risk of being prosecuted later for the same crime. *Id.*

The Court of Criminal Appeals has recognized three different categories of variance:

> (1) a statutory allegation that defines the offense, which is either not subject to a materiality analysis, or, if it is, is always material; the hypothetically correct jury charge always will include the statutory allegations in the indictment;
>
> (2) a non-statutory allegation that is descriptive of an element of the offense that defines or helps define the allowable unit of prosecution, which is sometimes material; the hypothetically correct jury charge sometimes will include the non-statutory allegations in the indictment and sometimes will not;
>
> (3) a non-statutory allegation that has nothing to do with the allowable unit of prosecution, which is never material; the hypothetically correct jury charge will never include the non-statutory allegations in the indictment.

Id. The bottom line is that, in a sufficiency review, courts tolerate variances as long as they are not so great that the proof at trial "shows an entirely different offense" than what was alleged in the charging instrument. *Id*.

Waiver of Defect or Error in Each Indictment

The State asserts that under article 21.07 of the Code of Criminal Procedure, a complainant may be identified in an indictment only by initials, without stating the complainant's given name or surname. *See* Tex. Code Crim. Proc. Ann. art. 21.07 ("In alleging the name of the defendant, or of any other person necessary to be stated in the indictment, it shall be sufficient to state one or more of the initials of the given name and the surname."). To determine if the State is correct, we need to decide whether the complainants are persons "necessary to be stated in the indictment." *See id*.

If a defendant does not object to a defect, error, or irregularity of form or substance in an indictment before the date on which the trial on the merits

commences, the defendant forfeits the right to object to the defect, error, or irregularity and may not raise the objection on appeal or in any other post-conviction proceeding. Tex. Code Crim. Pro. Ann. art. 1.14(b). On or before the date on which the trial started, appellant did not object that (1) either indictment was required to state the given name or the surname of the complainant or (2) it was improper to identify the complainants in the indictments as "M.V." and "M.M." Thus, appellant waived any such objection, and we need not and do not address whether, under article 21.07 of the Code of Criminal Procedure, a complainant may be identified in an indictment only by initials, without stating the complainant's given name or surname. *See* Tex. Code Crim. Pro. Ann. art. 1.14(b); *Grant v. State*, 970 S.W.2d 22, 23 (Tex. Crim. App. 1998); *Martin v. State*, 346 S.W.3d 229, 231–33 (Tex. App.–Houston [14th Dist.] 2011, no pet.). We presume for the purposes of our analysis that the indictments properly identified each complainant.

The State's No-Variance Argument

Appellant argues that there is a material and fatal variance between the allegations in the indictments and the proof at trial because the indictments alleged that appellant solicited the capital murder of "M.V." and "M.M." yet the proof at trial showed that appellant solicited the capital murders of "Meghan Verikas" and "Marion 'Mack' McDaniel."

In *Grant v. State*, the charging instrument alleged that the complainant was "Officer Lawson," and the proof at trial showed that the complainant was peace officer "Lieutenant Craig Lawson." *See Grant*, 970 S.W.2d at 22. The court of appeals concluded that (1) article 21.07 of the Code of Criminal Procedure required the charging instrument to allege the complainant's given name; (2) the charging instrument alleged that the complainant's given name was "Officer"; (3)

there was no proof at trial that the complainant's given name was "Officer"; and (4) thus, there was a fatal variance between the charging instrument's allegation of the complainant's name and the proof at trial on this point. *See id*. n.1.

The Court of Criminal Appeals determined that the charging instrument did not allege that the complainant's given name was "Officer"; instead, the charging instrument failed to allege the given name of the complainant. *See id*. at 22. The high court concluded that under article 1.14(b), the appellant in that case had waived any complaint as to the charging instrument's failure to allege the complainant's given name by failing to object to the indictment on this basis. *See* Tex. Code Crim. Pro. Ann. art. 1.14(b); *Grant*, 970 S.W.2d at 23. Because the charging instrument in *Grant* only identified the complainant as an officer whose surname was Lawson, the State was not required to prove the complainant's given name, and the State only had to prove that the complainant was an officer whose surname was Lawson. *See Grant*, 970 S.W.2d at 23. The high court did not address whether there was a material variance because the court concluded that there was no variance at all given that the instrument alleged that the complainant was an officer whose surname was Lawson and the proof at trial showed that the complainant was an officer whose surname was Lawson. *See id*. at 22–23.

Appellant asserts that "M.V." and "M.M." are pseudonyms for the complainants rather than initials.[2] Appellant asserts that there was a discrepancy between the allegations in the indictments and the proof at trial because the indictments alleged these two pseudonyms for the complainants and the proof at

[2] Some statutes allow complainants in certain criminal cases to choose a pseudonym to be used in public files and records concerning the offense, but none of these statutes apply to the offenses in today's case. *See* Tex. Code Crim. Pro. Ann. arts. 57.01(4), 57.02, 57A.01(4), 57B.01(4), 57D.01(4), 62.001(5); Tex. Pen. Code Ann. §§ 3.01, 20A.02.

trial did not show that "M.V." was a pseudonym for "Meghan Verikas" or that "M.M." was a pseudonym for "Marion 'Mack' McDaniel."

The State relies on *Grant* and argues that appellant waived any objection to the indictment's use of initials to identify the complainants and that there was no variance at all because there was no discrepancy between the allegations in the indictments and the proof at trial. *See id*. In effect, the State asserts that there was no variance at all because the indictments alleged that the complainants were a person with the initials "M.V." and a person with the initials "M.M." and the proof at trial showed that the complainants were a person with the initials "M.V." and a person with the initials "M.M." If the State is correct that there was no variance, then there could not have been a material variance and appellant's sufficiency point lacks merit. *See id*. But, we do not have to address this issue if appellant's material-variance argument lacks merit, even presuming that there was a variance. Therefore, we presume for the sake of argument that there was a variance between the allegations in the indictments and the proof at trial, and we examine whether this variance would be material.

Material-Variance Analysis

Appellant argues that there is a material variance because the variance in this case involves a statutory allegation that defines the offense, which is either not subject to a materiality analysis, or, if it is, is always material. *See Ramjattansingh*, 548 S.W.3d at 547. The name of the complainant is not part of the definition of the solicitation-to-commit-capital-murder offense. *See* Tex. Pen. Code Ann. §§ 19.02(b)(1), 19.03(a), 15.03(a). To support the notion that the complainant's name is one of the statutory elements of the offenses in this case, appellant asserts that the applicable law requires the indictment to allege the name of the complainant and the evidence to prove beyond a reasonable doubt the

complainant's name as alleged in the indictment. But, cases from the Court of Criminal Appeals show that the evidence must prove the complainant's name beyond a reasonable doubt based on the charging instrument's allegation of the complainant's name, not because the complainant's name is part of the statutory definition of the offense. *See Gollihar*, 46 S.W.3d at 254; *Curry v. State*, 30 S.W.3d 394, 404–05 (Tex. Crim. App. 2000). We conclude that the complainant's name is not a statutory allegation that defines the offense of solicitation to commit capital murder. *See* Tex. Pen. Code Ann. §§ 19.02(b)(1), 19.03(a), 15.03(a); *Ramjattansingh*, 548 S.W.3d at 547; *Fuller v. State,* 73 S.W.3d 250, 253 (Tex. Crim. App. 2002); *Gollihar*, 46 S.W.3d at 254; *Curry*, 30 S.W.3d at 404–05; *Steele v. State*, 490 S.W.3d 117, 124 (Tex. App.—Houston [1st Dist.] 2016, no pet.). This case falls in the second category for analyzing material-variance complaints, the category containing non-statutory allegations that describe an element of the offense that defines or helps define the allowable unit of prosecution and that sometimes are material. *See Ramjattansingh*, 548 S.W.3d at 547. Thus, to determine whether the variances are material, we must decide whether each indictment informed appellant of the respective charge against him sufficiently to allow him to prepare an adequate defense at trial, and whether prosecution under the indictments would subject him to the risk of being prosecuted later for the same respective crimes. *See Gollihar,* 46 S.W.3d at 258.

As to the first point, the record does not reflect that the use of initials in the indictments rather than the names of each complainant interfered with appellant's ability to prepare an adequate defense to either charge at trial. Appellant does not argue that either indictment failed to inform him of the respective charge against him sufficiently to allow him to prepare an adequate defense at trial. On appeal, appellant states that "the present case involves protection from double jeopardy

[the second point in this analysis], and not lack of notice [the first point]." We conclude that each indictment informed appellant of the respective charge against him sufficiently to allow him to prepare an adequate defense at trial. *See id*.

As to the second point, appellant argues that even after his convictions under the indictments, he still is subject to the risk of being prosecuted later for soliciting the capital murder of "Meghan Verikas" or for soliciting the capital murder of "Marion 'Mack' McDaniel" because the convictions only bar future prosecution for soliciting the capital murder of a person whose "proper name" is "M.V." or whose "proper name" is "M.M." But, if appellant were prosecuted again, appellant could avail himself of the entire record in each of these cases, not merely the two indictments. *See id*. Verikas testified her name is Meghan Verikas. The first letter of her given name is an "M" and the first letter of her surname is a "V," so her initials are "M.V.". Appellant referred to "Meghan" during his interactions with the solicitee and ample other evidence in the record shows Meghan Verikas was one of the complainants in the two solicitation-to-commit-capital-murder offenses. Likewise, Marion "Mack" McDaniel testified his name is Marion "Mack" McDaniel. The first letter of his given name is an "M" and the first letter of his surname is an "M," making his initials "M.M.". Appellant referred to Mack as Valerie's ex-husband during appellant's interactions with the solicitee and ample other evidence shows that Mack (M.M.), was Valerie's ex-husband and the other complainant.

The clerk's record in each case in the trial court and the reporter's record from trial, as well as this court's opinion on appeal, make it clear that appellant was convicted for soliciting the capital murder of "Meghan Verikas" and for soliciting the capital murder of "Marion 'Mack' McDaniel" and that appellant is not subject to another prosecution for either offense. *See Santana v. State*, 59

S.W.3d 187, 195 (Tex. Crim. App. 2001); *Ramos v. State*, 688 S.W.2d 135, 136–37 (Tex. App.—Corpus Christi 1985, no pet.). We conclude that prosecution under the indictments has not subjected appellant to the risk of being prosecuted later for the same respective crimes. *See Gollihar,* 46 S.W.3d at 258.

On appeal, appellant asserts that the State erred in failing to make sure that the indictments alleged the full names of the complainants and that appellant structured his defense around the allegations in the indictments. Appellant claims that he "had absolutely no obligation to make the State aware of its error and was fully justified in 'laying behind the log' to see if the State could carry its burden [of proving that the complainants were named "M.V." and "M.M."]." Appellant asserts that, "[h]ad the State properly alleged the name[s] of the [complainants], [a]ppellant would have put on a completely different defense case and may have even pleaded guilty and received a lesser punishment." This lay-behind-the-log strategy runs afoul of article 1.14(b), under which a defendant who does not object to a defect, error, or irregularity of form or substance in an indictment before the date on which the trial on the merits commences waives the right to object to the defect, error, or irregularity and may not raise the objection on appeal or in any other post-conviction proceeding. *See* Tex. Code Crim. Pro. Ann. art. 1.14(b); *Grant*, 970 S.W.2d at 23; *Martin*, 346 S.W.3d at 231–33.

Either there was a material variance between each indictment's allegation as to the identity of each complainant and the proof at trial or there was not. If there was no variance, as the State argues, then there could not be a material variance, and each hypothetically correct charge only requires proof that each complainant has the initials alleged in the indictment. *See Grant*, 970 S.W.2d at 23. The trial evidence would allow a rational trier of fact to find beyond a reasonable doubt that one complainant has the initials "M.V." and that the other complainant has the

initials "M.M." *See id*. If there were variances, then we would determine that each variance was not material and thus did not prejudice appellant's substantial rights. *See Ramjattansingh*, 548 S.W.3d at 547–48; *Santana*, 59 S.W.3d at 195; *Gollihar,* 46 S.W.3d at 258. Under the applicable standards of review, we conclude that there was no material variance, as alleged under the first issue, and we conclude that the trial evidence is sufficient to support each conviction for solicitation to commit capital murder. We overrule appellant's first issue.

B. Exclusion of Expert Evidence

Appellant challenges the trial court's decision to exclude the testimony (and demonstrative aids) of his forensic audio expert, Dr. Al Yonovitz.

Standard of Review

Texas Rule of Evidence 702, entitled "Testimony by Expert Witnesses," provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

To fall under this rule, the offering party must show (1) the expert's knowledge and experience on a relevant issue exceeds that of the average juror and (2) the expert's testimony will help the jury understand the evidence or determine a fact issue. *See Duckett v. State,* 797 S.W.2d 906, 914 (Tex. Crim. App. 1990), *overruled on other grounds, Cohn v. State,* 849 S.W.2d 817, 819 (Tex. Crim. App. 1993). When the jury stands equally competent to form an opinion about an ultimate fact issue, or the expert's testimony falls within the common knowledge of the jury, the trial court should exclude the expert's testimony. *Id.*; *Heidelberg v. State,* 36 S.W.3d 668, 676 (Tex. App.—Houston [14th Dist.] 2001, no pet.). Expert

opinions must aid, not supplant, the jury's decision. *Schutz v. State,* 957 S.W.2d 52, 59 (Tex. Crim. App. 1997). If the proffered testimony does not meet the criteria, the trial court should exclude it.

We use an abuse-of-discretion standard in reviewing both the trial court's determination of a witness's qualifications as an expert and the trial court's decision to exclude expert testimony. *Ellison v. State*, 201 S.W.3d 714, 723 (Tex. Crim. App. 2006). We will not disturb the trial court's decision absent a clear abuse of discretion. *Id.* The trial court abuses its discretion when its ruling is arbitrary, unreasonable, or without reference to any guiding rules or legal principles. *Lyles v. State*, 850 S.W.2d 497, 502 (Tex. Crim. App. 1993). Under this standard, we must uphold the trial court's ruling if it falls within the zone of reasonable disagreement. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g).

Proffered Expert Evidence

During Yonovitz's voir-dire examination, when asked about why the defense had called him to assist the jury, Yonovitz testified that he was asked to take the "voluminous amount of audio information" in this case and "assimilate" and "collate" the material. He explained:

> There are a great number of times through the hours and hours of conversations where [appellant] made commentary about what his intention was with Meghan. And I was asked to take those conversations and to organize; not to linguistically interpret them, but instead to put them in a manner that would allow perhaps a jury to understand the structure of what was said during the time that those indications by [appellant] were made.

With respect to the recordings, Yonovitz explained that the defense team asked him to put the recordings into "topical" areas of what appellant said should happen to Verikas. Yonovitz noted that he occasionally "enhanced the audio on

the recordings," removing background noise, where he thought it was needed, and drew a conclusion on what appellant's "words clearly indicated." In his report Yonovitz listed as conclusions his impressions from the words spoken in the recordings.

Analysis

When a jury stands just as competent as an expert to form an opinion about an ultimate fact issue, or the expert's testimony falls within the jury's common knowledge, the trial court should exclude the expert's testimony. *See Duckett,* 797 S.W.2d at 914; *Heidelberg,* 36 S.W.3d at 676; *see also Davis v. State,* 313 S.W.3d 317, 350 (Tex. Crim. App. 2010) (holding the expertise beyond that of an average person "need not necessarily be monumental"). Expert testimony about a defendant's state of mind or intent at the time of the offense is speculative and improper. *See Jackson v. State,* 548 S.W.2d 685, 692–93 (Tex. Crim. App. 1977); *Winegarner v. State,* 505 S.W.2d 303, 304 (Tex. Crim. App. 1974), *overruled on other grounds by White v. State,* 576 S.W.2d 843, 845 (Tex. Crim. App. 1979). So, it should not be presented to the jury. *See Jackson*, 548 S.W.2d at 692–93; *Winegarner*, 505 S.W.2d at 304.

It does not take an acoustics expert to listen to recordings. An average person can do so. While it might take time and effort to collate statements from recordings into topical areas, the task does not require an audiologist or expert in acoustics. No evidence suggests that it does.

Given that the trial court heard all of the audio recordings through the presentation of other witnesses, the trial court stood in the best position to determine whether Yonovitz's proffered testimony — exclusively devoted to a review of that evidence — would assist the jury. *See Montgomery*, 810 S.W.2d at 391. The trial court's decision to exclude Yonovitz's testimony falls well within

the zone of reasonable disagreement and so does not amount to an abuse of discretion. *See Jackson*, 548 S.W.2d at 692–93; *Winegarner*, 505 S.W.2d at 304. Having concluded that the trial court did not abuse its discretion in excluding the evidence, we overrule appellant's second issue.

C. Did the trial court commit error when it stated that a fine was "meaningless" during voir dire?

In his third issue, appellant complains of a statement the trial court made during voir dire, while explaining the punishment range to the jury. Appellant argues the trial court committed fundamental error when the court stated: "And I forgot to add, by the way, it's five years to life and up to a fine of $10,000, which is meaningless, frankly." Appellant asserts that the trial court, in making this comment, encouraged the jury to ignore the full range of punishment and showed a lack of impartiality. The trial court's comment on the fine is not the first time this trial court has made such a statement or the first time such a statement has drawn an objection. *See Loge v. State*, 550 S.W.3d 366, 378 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (involving a complaint that the same judge told the panel "don't worry about the fine").

As in *Loge*, today we presume, without deciding, that appellant need not have objected in the trial court to preserve this complaint for appellate review. *Loge*, 550 S.W.3d at 382. The trial judge informed the venire members "the State's got the full and complete burden to prove [appellant] guilty beyond a reasonable doubt," "the range of punishment … is a minimum of 5 years to life in the penitentiary, or any in between" (with examples of "10 years, 6 years, 20 years, 30 years to life"), and its "[s]trictly up to you to make a decision on punishment in the case." The remark at issue was made during the trial court's discussion with the venire panel about their ability to consider the full range of punishment,

throughout which, the panel was frequently prompted to ask the court (and did ask the court) questions. After this remark, no one asked questions, made comments, expressed concerns, or otherwise exhibited an inability to consider the full range of punishment.

The jury, rather than the trial court, assessed punishment. In both cases the jury assessed punishment at confinement for life and a $10,000 fine. Considering the trial court's statements in proper context, the comment about the fine being meaningless, though better left unsaid, does not show the trial court was biased, that the trial court failed to act impartially, or that the trial court instructed the jury to ignore the full range of punishment. *See id*. So, the comment did not constitute error, and we overrule appellant's third issue. *See id*.

III. CONCLUSION

There is no material variance between each indictment's allegations as to the identity of each complainant and the proof at trial. Under the applicable standards of review, we conclude the trial evidence is legally sufficient to support each solicitation-to-commit-capital-murder conviction. We also conclude that the trial court did not err in excluding appellant's audio expert and the expert's demonstrative exhibits, and that the trial court's voir-dire comment challenged in the third issue does not constitute error. Having overruled all of appellant's issues, we affirm both of the trial court's judgments.

/s/ Kem Thompson Frost
Chief Justice

Panel consists of Chief Justice Frost and Justices Jewell and Bourliot.

Publish — TEX. R. APP. P. 47.2(b).