Affirmed and Memorandum Opinion filed May 18, 2021.

In The

Fourteenth Court of Appeals

NO. 14-19-00405-CR

BRODERICK D. BATISTE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 122nd District Court
Galveston County, Texas
Trial Court Cause No. 13CR3434

MEMORANDUM OPINION

A jury convicted appellant Broderick D. Batiste of capital murder in 2019. Tex. Penal Code Ann. § 19.03(a)(2). Because the State did not seek the death penalty, the trial court assessed punishment at imprisonment for life without parole. Tex. Penal Code Ann. § 12.31(a)(2). Appellant argues the trial court committed reversible error by admitting (1) an improper and impermissibly suggestive pretrial identification of appellant, (2) an improperly-authenticated telephone call from appellant's codefendant to a cell-phone number associated

with appellant, and (3) autopsy reports and notes in violation of the Sixth Amendment. We affirm.

I. BACKGROUND

In the early morning hours of November 21, 2011, two intruders entered the home of Jorge Vargas, Jr., in Texas City. Vargas confronted the intruders and began to fight with one of the intruders alleged to be appellant. Both intruders had covered their faces. Appellant was alleged to have worn a beanie over his face, and his co-conspirator wore a mask. The only surviving witness to the incident was Vargas's son, J.V., then 11 years old. J.V. testified that after his father ripped off the intruder's beanie, J.V. was able to see the majority of the right side of the intruder's face. He identified appellant nearly two years later, in a photo identification lineup, as the man who was fighting with his father. After some fighting, the intruder who had worn the beanie hit Vargas over the head with his gun and then shot the unarmed Vargas in the abdomen. According to J.V., the second intruder also shot Vargas twice.

Vargas's other child, 15-year-old M.V., was also present. J.V. testified that both intruders repeatedly asked where money was kept. M.V. volunteered to show them where the money and valuables were located, and then led the masked intruder into one of the back bedrooms. The masked intruder shot her in the head shortly thereafter and collected valuables from the home in a plastic bag. J.V. testified that as the pair left, the masked intruder shot his father twice more and then shot at him but missed. J.V. waited for a minute and then ran down the street to seek help for his father and sister at a nearby fire station. When the first responders arrived, M.V. was pronounced dead. Vargas was taken to the hospital, but later died of his injuries.

In 2013, appellant was charged with intentionally causing Vargas's death

while in the course of committing a robbery. At trial, the State's case relied heavily upon DNA evidence to establish appellant's identity as one of the intruders, which was collected from scrapings of fingernail clippings from Vargas's body. Compared against a DNA swab provided by appellant while in custody, the State argued that appellant's DNA was found underneath Vargas's fingernails.[1] The State also relied upon other circumstantial evidence to support its case, including J.V.'s pretrial identification of appellant, a recorded jail call from Dominque Stokes to appellant,[2] and cell-phone location records from a cell-phone number associated with appellant through use on the night of the murders.

II. ANALYSIS

A. Admission of testimony regarding the pretrial photo identification of appellant

In issue 1, appellant argues that the trial court erred in overruling his objection to J.V.'s pretrial identification because it was tainted by an improper and impermissible suggestion which caused an irreparable misidentification in violation of his due-process rights. Nearly two years after the incident, J.V. viewed a photo lineup consisting of six photos. J.V. identified appellant as the person who fought with and shot his father. Appellant objected to J.V.'s identification and sought to suppress and exclude the identification on the basis that the procedure

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[1] The clippings from underneath Vargas's nails contained a mixture of DNA. The analyst testified:

> I interpreted this profile to be a mixture of three individuals. Jorge Vargas is an assumed contributor. Obtaining this profile is 143 — 143 quadrillion times more likely if the DNA came from Jorge Vargas, [appellant], and one unknown individual, than if the DNA came from Jorge Vargas and two unrelated, unknown individuals. Based on the likelihood ratio result, Jorge Vargas and [appellant] cannot be excluded as a possible – as possible contributors to the profile.

[2] Dominque Stokes was alleged to be the second intruder. He was tried separately and convicted of capital murder.

was tainted because J.V.'s mother and grandmother had shown him a picture of appellant before the photo lineup. The investigating detective took statements from J.V.'s mother and grandmother confirming they had shown J.V. a mug shot of appellant from the internet. Though he did not dispute that his mother or grandmother showed him a picture of appellant, J.V. testified that he did not recall this incident and made his identification based on his memories from November 2011. He also testified that appellant was in the home for at least ten minutes, and he was able to see appellant's face for most of that time. After a hearing, the trial court denied the motion. Testimony regarding J.V.'s pretrial identification of appellant was then admitted at trial.

The content of a photo lineup or the manner in which it is administered can be considered impermissibly suggestive and thus potentially inadmissible as violative of a defendant's due-process rights. *See Stovall v. Denno,* 388 U.S. 293, 302 (1967). Appellant, however, does not contend on appeal that the content of the photo lineup conducted by law enforcement was unduly suggestive or that the photo lineup was conducted in a suggestive manner. Rather, appellant argues that the witness was shown a mugshot of appellant by his mother and grandmother before the photo lineup, which was impermissibly suggestive and caused the witness to identify appellant during the photo lineup. The State argues in response that appellant's due-process rights were not implicated because there was no suggestion that law enforcement caused an impermissibly-suggestive identification.

1. Standard of review

We employ a two-step analysis to test the admissibility of an identification: "1) whether the out-of-court identification procedure was impermissibly suggestive; and 2) whether that suggestive procedure gave rise to a very substantial

likelihood of irreparable misidentification." *See Simmons v. United States,* 390 U.S. 377, 384 (1968). "Generally, the Constitution protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting its introduction, but by affording the defendant the means to persuade the jury that the evidence should be discounted as unworthy of credit." *Balderas v. State*, 517 S.W.3d 756, 791 (Tex. Crim. App. 2016) (citing *Perry v. New Hampshire*, 565 U.S. 228, 237 (2012)). The Due Process Clause of the Fifth and Fourteenth Amendments bars the admission of identification evidence only when the introduction of such evidence "is so extremely unfair that its admission violates fundamental conceptions of justice." *Dowling v. United States*, 493 U.S. 342, 352 (1990) (internal quotation marks omitted); *see* U.S. Const. amends. V, XIV, § 1.[3] The defendant has the burden to establish by clear-and-convincing evidence that the pretrial procedure was impermissibly suggestive. *Barley v. State*, 906 S.W.2d 27, 34 (Tex. Crim. App. 1995).

Courts assess reliability by weighing five nonexclusive factors against the corrupting effect of any suggestive-identification procedure: (1) the opportunity of the witness to view the suspect at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972). On appeal, in reviewing the trial court's assessment of reliability, we consider these factors, which are issues of historical fact, deferentially in a light favorable to the trial court's ruling. *See Ibarra v. State*, 11

[3] "The Due Process Clause of the Fifth Amendment prohibits the United States, as the Due Process Clause of the Fourteenth Amendment prohibits the States, from depriving any person of property without 'due process of law.'" *Dusenbery v. United States*, 534 U.S. 161, 167, (2002).

S.W.3d 189, 195 (Tex. Crim. App. 1999). We then weigh them de novo against any "corrupting effect" of the suggestive pretrial-identification procedure. *Loserth v. State*, 963 S.W.2d 770, 773–74 (Tex. Crim. App. 1998). We review the evidence from the admissibility hearing as well as the evidence introduced at trial. *Balderas*, 517 S.W.3d at 792.

2. Pretrial identification of appellant was not impermissibly suggestive

Due-process concerns only arise when law-enforcement officers use an identification procedure "tainted by police arrangement." *Perry*, 565 U.S. at 238. In *Perry*, the Supreme Court rejected an argument made by the defendant that if "reliability is the linchpin of admissibility" under the Due Process Clause, it should make no difference whether law enforcement was responsible for creating the suggestive circumstances that marred the identification. *Id*. at 240–41 (witness spontaneously pointed defendant out to police from her kitchen window without any inducement from police). Looking to its own precedent, the Supreme Court reiterated that a primary aim of excluding identification evidence obtained under suggestive circumstances is to deter law enforcement's use of improper lineups and photo arrays. *Id*. at 241. The court declined to "enlarge the domain of due process" and held that when no improper law-enforcement activity is involved, reliability is sufficiently tested "through the rights and opportunities generally designed for that purpose," specifically, "vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt."[4] *Id*. at 233.

[4] In *Perry* the Court expressed concern that expanding due-process reviews to identifications made under suggestive circumstances (not by police arrangement) would unnecessarily open the door to review of nearly all eyewitness identifications. *Perry v. New Hampshire*, 565 U.S. 228, 243 (2012) The Court noted that external suggestion is only one of many factors that lead to misidentification, as well as the passage of time between exposure to

Though appellant cites to several cases which conclude that showing an eyewitness a single photo is improper and unduly suggestive, the cases cited by appellant involved law enforcement improperly conducting the photo identification. *See, e.g., Loserth v. State*, 985 S.W.2d 536, 543–44 (Tex. App.—San Antonio 1998, pet ref'd) (concluding identification was impermissibly suggestive when principal eyewitness was shown single photo of defendant by police after providing only vague description of defendant); *see also Simmons*, 390 U.S. at 383 (describing general hazards of initial photo identification). Appellant does not cite to any authority supporting the exclusion of a pretrial photo identification conducted by law enforcement when the identification was tainted by action or suggestion separate and apart from any law-enforcement action or conduct.

J.V. testified that he attended and made an identification at the photo lineup. The officer who conducted the lineup and the lead investigator testified that J.V. identified appellant. No in-court identification was made. It was undisputed that J.V.'s mother and grandmother had shown J.V. a copy of appellant's mug shot approximately a year after the killing of his father and sister, and approximately eight months before he identified appellant in the photo lineup. Though he does not dispute that his mother and grandmother showed him a photo of appellant, J.V. testified he did not remember his mother and grandmother doing so, and he does not recall any conversations with his mother or grandmother about it. He further testified that he made the identification of appellant based on his recollections from 2011. The officer who conducted the photo lineup testified that the procedure

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and identification of the defendant, whether the witness was under stress when the witness first encountered the suspect, how much time the witness had to observe the suspect, how far the witness was from the suspect, whether the suspect carried a weapon, and the race of the suspect and the witness. *Id*. at 243–44.

utilized was a “double-blind” photo lineup—the officer administering the procedure did not know the identity of the suspect or whether his photo was included.

Appellant’s lawyers had the opportunity to (and did) thoroughly cross-examine J.V., as well as the officer who conducted the photo lineup and the lead investigator on the case about the reliability of J.V.’s identification. Appellant was also able to highlight for the jury concerns about the credibility of J.V.’s identification. Appellant’s lawyers were also able to raise concerns about inconsistences between the testimony that J.V. gave at trial and the statements he gave to police on the night of the murders nearly eight years earlier. As the Supreme Court in *Perry* noted, there are safeguards built into the adversarial system that caution juries against placing undue weight on eyewitness testimony of questionable reliability. 565 U.S. at 245–46 (*e.g*., vigorous cross-examination, protective rules of evidence, and jury instructions on both fallibility of eyewitness identification and requirement that guilt be proved beyond reasonable doubt). Here, appellant utilized many of those safeguards. Appellant was able to confront the eyewitness, J.V., and his lawyers effectively exposed concerns about the reliability of J.V.’s testimony. The jury was also cautioned that it must only find appellant guilty if the prosecution proved every element of the offense beyond a reasonable doubt. *See id*. at 248. As the sole judge of witness credibility, the jury alone decided whether to believe J.V.’s testimony and resolved any conflicts in the evidence. *See Mosley v. State*, 983 S.W.2d 249, 254 (Tex. Crim. App. 1998).

Because appellant does not allege any improper law-enforcement conduct, the pretrial identification of appellant was not impermissibly suggestive in violation of appellant’s due-process rights. Therefore, we determine the court did not err in admitting the testimonial evidence of J.V.’s identification of appellant

and need not assess the reliability of the evidence under the *Biggers* factors.[5] *See* Tex. R. App. P. 47.1; *see also Perry*, 565 U.S. at 241 ("The due process check for reliability . . . comes into play only after the defendant establishes improper police conduct.").

We overrule issue 1.

B. Admission of recorded jail telephone call

In issue 2, appellant asserts that the trial court erred in overruling his objection to the admission of a phone call (and transcript of the call) made by Dominque Stokes, appellant's codefendant, from jail to a telephone number associated with appellant because it was not properly authenticated. Because appellant was not identified by name or voice as the second person on the call, appellant argues that the phone call and transcript were not properly authenticated and therefore have no relevance to appellant.

1. Standard of Review

Appellate review of a trial court's ruling on authentication issues is done under an abuse-of-discretion standard. *Fowler v. State*, 544 S.W.3d 844, 848 (Tex. Crim. App. 2018). This standard requires an appellate court to uphold a trial court's admissibility decision when that decision is within the zone of reasonable disagreement. *See Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App.

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[5] The State also argued that appellant failed to preserve error on this issue because he did not object to J.V.'s testimony after the court denied appellant's motion to suppress. We disagree. Here, the court heard appellant's motion outside the presence of the jury, appellant objected to the testimony and identification, and the trial court admitted the evidence. *See* Tex. R. Evid. 103(a)(1)(b) (preserving claim of error); Tex. R. App. P. 33.1(a)(1)(B). After his motion was denied, appellant was not required to renew his objection. Tex. R. Evid. 103(b) (when court hears party's objections outside jury's presence, party need not renew objection to preserve claim of error for appeal); *see also Livingston v. State*, 739 S.W.2d 311, 334 (Tex. Crim. App. 1987) ("It is settled that when a pre-trial motion to suppress evidence is overruled, the accused need not subsequently object to the admission of the same evidence at trial in order to preserve error.").

1990) (en banc, op. on reh'g). Before we may reverse the trial court's decision admitting evidence, we must find that the trial court's ruling was "so clearly wrong as to lie outside the zone within which reasonable people might disagree." *Henley v. State*, 493 S.W.3d 77, 82–83 (Tex. Crim. App. 2016) (quoting *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008)).

Conclusive proof of authenticity before allowing admission of disputed evidence is not required. *Fowler*, 544 S.W.3d at 848. It is the fact finder's role ultimately to determine whether an item of evidence is indeed what its proponent claims; the trial court need only make the preliminary determination that the proponent of the item has supplied facts sufficient to support a reasonable jury determination that the proffered evidence is authentic. *Butler v. State*, 459 S.W.3d 595, 600 (Tex. Crim. App. 2015) (citing *Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012)).

2. Authentication requirements for the admissibility of evidence

Texas Rule of Evidence 901 governs the general authentication requirements for the admissibility of evidence: "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Tex. R. Evid. 901(a). An example of evidence sufficient to authenticate a voice recording is "[a]n opinion identifying a person's voice—whether heard firsthand or through mechanical or electronic transmission or recording—based on hearing the voice at any time under circumstances that connect it with the alleged speaker." Tex. R. Evid. 901(b)(5). Alternatively, authenticity may be established with evidence of "distinctive characteristics and the like," which include "[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances." Tex. R. Evid. 901(b)(4). As with

evidence in general, authenticating evidence may be direct or circumstantial. *Butler*, 459 S.W.3d at 602.

Appellant relies primarily on two precedential cases which address the proper authentication of cell-phone and social-media evidence.[6] *See Butler*, 459 S.W.3d at 601; *Tienda*, 358 S.W.3d at 641–42. Though we conclude that they do not support appellant's argument that the trial court erred, they are instructive in our analysis. In *Butler*, the defendant complained the trial court improperly admitted text messages into evidence that were not properly authenticated. 459 S.W.3d at 598. The text messages were introduced through the defendant's girlfriend, whom defendant was convicted of kidnapping, based on the girlfriend's testimony that she recognized defendant's number on the text messages and defendant called her from that telephone number during the course of their text messaging. *Id*. at 603. Addressing the authentication of text messages, the court of criminal appeals held that "evidence that merely shows the association of a phone number with a purported sender—alone—might be too tenuous." *Id*. at 601. Recognizing that a cell phone can be used by persons other than the registered or customary user, the court looked to other evidence that might bridge the logical gap and permit a proper inference that the purported author sent the message. *Id*. at 602. Other such evidence might include the message's "appearance, contents, substance, internal patterns, or other distinctive characteristics," which considered

[6] Appellant also cites to a case decided by the Thirteenth Court of Appeals in which the trial court's exclusion of text messages from a "data dump" of a witness's phone was upheld because the proponent of the impeachment evidence did not satisfy his burden to supply facts sufficient to support a determination that the cell phone and its associated messages were authentic. *Mata v. State*, 517 S.W.3d 257, 267 (Tex. App.—Corpus Christi-Edinburg 2017, pet. ref'd). In *Mata*, the only evidence of authenticity was the fact that the text messages were on the witness's phone. There was no evidence tending to show the witness sent or received the messages, and the witness testified she did not recognize the messages. Further, the court concluded there was "no evidence of any distinctive characteristics found in the text messages that would associate [the witness] with the phone and any text message." *Id*. at 266. Therefore, *Mata* is distinguishable from the facts before us.

in conjunction with other circumstances support a conclusion that a message was sent by the purported author. *See* Tex. R. Evid. 901(b)(4). The court in *Butler* upheld the admission of the text messages because the content of the messages supported a finding that the messages were what the State purported them to be—text messages between the defendant and his girlfriend. 459 S.W.3d at 604–05.

In *Tienda*, the court of criminal appeals addressed the authenticity of social-media posts that the State asserted were created by the defendant. 358 S.W.3d at 634. The defendant challenged the admission of the social-media evidence arguing anyone could have created the account. *Id*. at 637. The court upheld the admission of the social-media posts because the internal content—including photographs, posts, and messages—was sufficient circumstantial evidence to establish a prima facie case such that reasonable jurors could have found the postings were created and maintained by the defendant. *Id*. at 642.

3. Trial court did not abuse it discretion in admitting the cell-phone call

Here, the State's evidence established that Stokes, the alleged second intruder, called from jail to a cell-phone number which appellant stipulated to using previously on at least three dates: October 11, 2011, December 9, 2011, and December 10, 2011. Stokes made that call from jail on December 21, 2011, one month after the murder, and in the general time frame that appellant stipulated to using the cell-phone number.[7] Though we agree that appellant's association with a

[7] According to account records, the cell phone was activated on November 14, 2011 on an account associated with the daughter of a woman identified as appellant's wife or girlfriend. Both parties believe that the activation date is significant in supporting their respective arguments. The State argues that appellant's stipulation to using the phone before its most recent activation makes his association with the number even stronger. However, appellant argues that the date of the activation further demonstrates a lack of connection between the cell phone and appellant. Regardless, the activation date for the cell phone is immaterial to our analysis of this issue because appellant's association with the cell-phone number alone is too tenuous to support

cell-phone number on several occasions, alone, is too tenuous, the State presented additional circumstantial evidence of authenticity from the context of the call itself. *See Butler*, 459 S.W.3d at 601.

Appellant argues that the content of the conversation has no tendency to show that appellant was the person called by Stokes. We disagree. The content of the call made by Stokes from jail does support its authenticity. The recorded conversation involved a discussion of guns and pawning jewelry matching distinctive facts in the case against appellant. In the call, Stokes said there was something wrong with the history of the guns and that he had two gun cases. The second person told Stokes "I'm up out of here with mine." One of the guns used to commit the murders at the Vargas home was recovered with Stokes when he was arrested, but the second gun was never found. In the call, the second male inquired about "his jewelry." Stokes responded that he got "busted up here" and had to take the jewelry to the "P shop." Evidence at trial revealed that Stokes sold jewelry stolen from the Vargas home to a pawnshop in Austin.

Accordingly, we conclude there was sufficient circumstantial evidence such that reasonable jurors could have found the person called by Stokes from jail was appellant. The trial court did not abuse its discretion when it admitted the recorded cell–phone call at trial. *See Tienda*, 358 S.W.3d at 641 & n.34 (content and/or context of particular exchange of messages may create inference supporting conclusion it was in fact purported author who sent them); *Mosley v. State*, 355 S.W.3d 59, 69 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) ("Alternate grounds to authenticate the identity of a telephone caller include self-identification of the caller coupled with additional evidence such as the context and timing of the telephone call, the contents of the statement challenged, internal patterns, and other

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authenticity whether his association began in November 2011 or before. *See Butler v. State*, 459 S.W.3d 595, 601 (Tex. Crim. App. 2015).

distinctive characteristics and disclosure of knowledge and facts known peculiarly to the caller."). We overrule issue 2.

C. Admission of autopsy reports and medical examiner's notes

Appellant argues in issues 3, 4, and 5 that the trial court's admission of two autopsy reports and handwritten notes related to one of the autopsies violated his Sixth Amendment right to confront the witness. In issue 3, appellant asserts that the trial court erred in improperly admitting the autopsy report of M.V. In issue 4, he asserts that the court erred in improperly admitting the autopsy report of Vargas. And similarly, in issue 5, he asserts the court erred in improperly admitting the medical examiner's enlarged handwritten notes from Vargas's autopsy. It is undisputed that the medical examiner who performed the two autopsies died before trial. We address these three issues together.

1. The trial court erred in admitting the autopsy report and notes

As discussed above, we review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Henley*, 493 S.W.3d at 82–83. However, if the admission of evidence involves a constitutional or legal ruling, such as whether a statement is testimonial or nontestimonial, the appellate court gives almost total deference to the trial court's determination of historical facts, but reviews de novo the trial court's application of the law to those facts. *Wall v. State*, 184 S.W.3d 730, 742–43 (Tex. Crim. App. 2006) (applying hybrid standard of review to issue of whether statement was testimonial).

The Sixth Amendment provides that in all criminal prosecutions, the accused shall have the right to be confronted by the witnesses against him. U.S. Const. amend. VI. "The Sixth Amendment's Confrontation Clause provides a simple yet unforgiving rule: the State may not introduce a testimonial hearsay statement

unless (1) the declarant is unavailable to testify and (2) the defendant had a prior opportunity to cross-examine the declarant." *Lee v. State*, 418 S.W.3d 892, 895 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd) (citing *Bullcoming v. New Mexico*, 564 U.S. 647, 658 (2011)); *see also Crawford v. Washington*, 541 U.S. 36, 54 (2004) (testimonial statements); *Burch v. State*, 401 S.W.3d 634, 636 (Tex. Crim. App. 2013) (same). The Sixth Amendment right of confrontation applies not only to in-court testimony, but also to out-of-court statements that are testimonial in nature. *Langham v. State*, 305 S.W.3d 568, 575–76 (Tex. Crim. App. 2010). "Testimonial" statements include those statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available later for use at trial. *Crawford*, 541 U.S. at 52

The parties do not dispute that the medical examiner who performed the autopsies died before trial and that appellant had not previously had an opportunity to confront the medical examiner. Both parties agree and this court has previously held that an autopsy report is considered testimonial when an objective medical examiner would reasonably believe that the report would be used in a later prosecution. *Lee*, 418 S.W.3d at 896; *see also* Tex. Code Crim. Proc. Ann. art. 49.25, § 6(a) (medical examiner is statutorily required to conduct inquest when person dies under circumstances warranting suspicion death was caused by unlawful means). In this case, we agree that an objective medical examiner would reasonably believe that the report would be used in a later prosecution. *See Lee*, 418 S.W.3d at 896. Therefore, we conclude the trial court erred in allowing the State to introduce the two autopsy reports and corresponding handwritten notes. *Id.* at 897. We turn next to whether admission of the autopsy reports and notes harmed appellant.

2. The error in admitting the autopsy reports and notes was harmless beyond a reasonable doubt

In assessing the harm arising out of a violation of constitutional rights, we must reverse a judgment of conviction unless we determine beyond a reasonable doubt that the error did not contribute to the conviction. Tex. R. App. P. 44.2(a). "The critical inquiry is not whether the evidence supported the verdict absent the erroneously admitted evidence, but rather 'the likelihood that the constitutional error was actually a contributing factor in the jury's deliberations.'" *Lee*, 418 S.W.3d at 899 (quoting *Scott v. State*, 227 S.W.3d 670, 690 (Tex. Crim. App. 2007)). When reviewing harm for violations of the Confrontation Clause, we consider: (1) how important the out-of-court statement was to the State's case; (2) whether the out-of-court statement was cumulative of other evidence; (3) the presence or absence of evidence corroborating or contradicting the out-of-court statement on material points; and (4) the overall strength of the prosecution's case. *Gutierrez v. State*, 516 S.W.3d 593, 599 (Tex. Crim. App. 2017). Applying the factors relevant to this error, we conclude it did not materially affect the jury's deliberations.

Both the second and third factors weigh against reversal as the autopsy reports and notes were cumulative of other evidence introduced, and they were corroborated by the autopsy photos and testimony of Dr. Erin Barnhart, the current Chief Medical Examiner for Galveston County.[8] The autopsy report of M.V. determined the cause of death was the result of a perforating gunshot wound to the

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[8] The State argues that appellant waived "portions" of his objections to the "degree [appellant] claims Dr. Barnhart's testimony violated his confrontation rights and to the degree [appellant's] confrontation argument includes the autopsy photos." Therefore, the State urges that this court should only consider appellant's complaints to the autopsy reports and diagrams. We agree that appellant did not preserve any Confrontation Clause objections to the autopsy photos or to the testimony of Dr. Barnhart. However, appellant does not challenge the admission of the testimony of Dr. Barnhart or the autopsy photos on appeal. Therefore, we only consider the trial court's admission of the autopsy reports and notes. To the extent that the autopsy photos and the testimony of Dr. Barnhart are cumulative of the autopsy reports themselves, we address this in the harm analysis.

head and identified the manner of death as homicide. The autopsy report of Vargas determined the cause of death was the result of "gunshot wounds of the torso (3) and extremities (2) with blunt force injuries of the head." The manner of Vargas's death was homicide. Autopsy photos depicted the relative placements of the entrance and exit wounds from the gunshots as well as the blunt-force injuries. *See Herrera v. State*, 367 S.W.3d 762, 773 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (autopsy photos are considered nontestimonial and do not implicate Confrontation Clause). Dr. Barnhart reviewed the autopsy report and the photos, testified concerning the injuries, entrance and exit wounds, and used the photos and the appearance of the wounds to explain to the jury how she reached her own independent conclusions to corroborate the causes of death for M.V. and Vargas. *See Paredes v. State*, 462 S.W.3d 510, 517–18 (Tex. Crim. App. 2015) (testifying expert must testify about his or her own opinions and conclusions, though testifying expert can rely on information from nontestifying analyst); *see also* Tex. R. Evid. 703 ("An expert may base an opinion on facts or data in the case that the expert has been made aware of, reviewed, or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.").

The autopsy reports and notes add little beyond the autopsy photos and Dr. Barnhart's testimony, both of which were properly admitted and did not implicate the Confrontation Clause. *See Lee*, 418 S.W.3d at 900 (stating that relevance of autopsy report was that complainant died of multiple gunshot wounds, "which was not only undisputed but readily apparent even to a lay person"). The autopsy reports and notes did not contain any information tending to show that appellant was the person who fought with and shot Vargas, and the information contained

within the reports was largely obvious to the jury, *i.e.*, homicide was the manner of death. The critical issue at trial for appellant was identity, as he contested the evidence tending show that he was one of the two intruders who entered the Vargas home on November 21, 2011. Though appellant repeatedly argues that the admission of the autopsy reports and notes was harmful, he never explains why.

The first factor also weighs against reversal. The autopsy was relatively unimportant in the State's case. The State's key evidence—the DNA evidence from appellant found underneath Vargas's nails—was independent from the autopsy.

The fourth factor also weighs against reversal as the State's case against appellant was strong. In addition to the DNA evidence, J.V. testified that he saw part of appellant's face after his father ripped appellant's beanie during their struggle. He witnessed appellant shoot his father, as well as hit him over the head. Witnesses who examined the ballistics evidence testified there were two different caliber bullets found inside Vargas's body, confirming two different guns were used and supporting J.V.'s testimony that both intruders shot his father. The State also introduced evidence reflecting that the cell-phone number utilized by appellant in October and December 2011 was tracked using location information from cell-phone towers on the night of the murders to an area consistent with the Vargas home at the time that the murders were committed. Though appellant was not the owner of the cell-phone account, he used that cell-phone number on multiple occasions and had a connection to the registered owner, who was the daughter of a woman identified as the appellant's wife or girlfriend. The jury also heard evidence that over 100 calls were placed between the cell-phone number associated with appellant and a cell-phone number associated with Stokes, the second alleged intruder, in the weeks before and after the murder. When Stokes

was in jail, he called appellant's cell–phone number and discussed guns, jewelry, and selling jewelry at a pawnshop with appellant. Further, the investigating detective testified about the recovery of the gun Stokes was carrying when he was arrested (determined to be one of the murder weapons), the jewelry Stokes pawned (identified as belonging to the Vargas family), appellant's shoes (which were of similar size and pattern to bloody prints at the scene), and appellant's medical records from a few hours after the murder (where he complained about injuries to the head, foot and back).

In the harm analysis, all four factors weigh against reversal. *Gutierrez*, 516 S.W.3d at 599. We therefore conclude beyond a reasonable doubt that the erroneous admission of the written autopsy reports and handwritten notes did not contribute to appellant's conviction. *See* Tex. R. App. P. 44.2(a); *Lee*, 418 S.W.3d at 899–901. We overrule issues 3, 4, and 5.

III. CONCLUSION

We affirm the trial court's judgment as challenged on appeal.

/s/ Charles A. Spain
Justice

Panel consists of Justices Wise, Bourliot, and Spain.

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