Affirmed and Memorandum Opinion filed August 29, 2023

In The

Fourteenth Court of Appeals

NO. 14-22-00423-CR

ELIAS MONTES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 300th District Court
Brazoria County, Texas
Trial Court Cause No. 91914-CR

MEMORANDUM OPINION

Appellant Elias Montes appeals his murder conviction, arguing that (1) there is insufficient evidence to support his conviction, (2) the trial court erred by denying his motion to suppress oral statements made before *Miranda* warnings were administered, (3) the trial court erred by allowing evidence of an extraneous offense, and (4) the trial court erred by admitting license plate photographs that were hearsay and unauthenticated. We affirm.

Background

At approximately 8:00 a.m. on October 18, 2020, Jose Rivera was driving with his son on Wickwillow Lane in Alvin, Texas. When he approached County Road 185, he saw a woman's body in the ditch alongside the road. He called 911 and remained at the scene until police arrived. Several other witnesses also reported seeing a body in a ditch near the intersection of Wickwillow Lane and County Road 185. The woman's body was later identified as Donna Wilson.

Law enforcement officers from the Brazoria County Sherriff's Office and the Alvin Police Department arrived at the scene where Wilson's body was located. Investigators secured the crime scene and observed that Wilson's body had visible gunshot wounds. Investigators located one 9-millimeter casing about three feet east of Wilson's body and another at the edge of the roadway. In addition to the casings, investigators located a LG cellular phone near Wilson's body. A search warrant was obtained to download the digital information off the cellular phone. One of the contacts was saved in the phone as "Mom." The number associated with this contact corresponded with Angelina Carrera, appellant's mother. The image files downloaded from the cellular phone contained a selfie photograph that appeared to match appellant. With this information, investigators were able to identify appellant's name.

Dr. Erin Barnhart, chief medical examiner for Galveston County, performed Wilson's autopsy on October 19. She testified to three gunshot wounds involving the neck, head, torso, and right arm. The fatal gunshot wound entered Wilson's chest and struck her right lung, diaphragm, and liver before exiting. Wilson's cause of death was confirmed as multiple gunshot wounds. Sergeant Clinton Lobpries with the Brazoria County Sherriff's Office attended the autopsy. He testified that he saw powder burns, which indicated close contact. Toxicology tests performed during the

autopsy indicated that methamphetamines were present in Wilson's system.

Sergeant Dominick Sanders with the Brazoria County Sherriff's Office located Wilson's next of kin. He spoke with Wilson's sister, Jamie Corder, and Wilson's boyfriend, Michael Thom. Thom turned over two cellular phones belonging to Wilson to investigators that were at his residence. Corder provided Sanders with a description of Wilson's vehicle and the VIN number. With this information, Sanders was able to search and locate the actual license plate number of Wilson's vehicle. Both Corder and Thom identified appellant as a last known contact for Wilson. Because appellant's cellular phone was found near Wilson's body and appellant's name was implicated by two different individuals as a last known contact, investigators identified appellant as a possible suspect in the murder investigation. At this point in the investigation, Wilson's vehicle and appellant's location were unknown.

During the investigation, investigators learned that Wilson left home driving her vehicle on the day of the murder. Investigators discovered that Wilson did not let other people drive her vehicle, and her vehicle was unaccounted for and presumed stolen. Before Wilson's vehicle was listed as stolen, it was first spotted on October 19 by Officer Phillip Alexander with the Sugar Land Police Department. Alexander testified that he was patrolling Highway 90 and saw a disabled vehicle. When Alexander approached the vehicle, appellant exited and stated that "he was having problems with his car." Alexander did not remember what kind of vehicle appellant was operating, but the call slip identified the vehicle as a gold Monte Carlo with license plate "KLF1904." Alexander testified that his interaction with appellant lasted about two to three minutes.

When law enforcement with the Brazoria County Sherriff's Office listed Wilson's vehicle as stolen on October 20, they were immediately notified that the

Houston Police Department was with the vehicle. Officer Sulei Johns with the Houston Police Department testified that he found appellant asleep in Wilson's vehicle. The Monte Carlo had three flat tires and was parked on the wrong side of a residential street. While investigating whether appellant needed assistance, Johns learned that Wilson's vehicle was reported stolen. Before appellant could be taken into custody, Johns received a call that there was an officer-involved shooting and left the scene. Sanders later arrived at the location where the vehicle was reported, but both the vehicle and appellant were gone. Investigators with the Brazoria County Sherriff's Office later learned that appellant had been released at a nearby address, and Wilson's vehicle was secured and impounded. Sanders also testified that on this same day, appellant and another individual were at a pawnshop carrying a speaker box that was taken from Wilson's vehicle. According to Sanders, the speaker box in the pawn shop surveillance video appeared to be the same speaker box seen in John's bodycam video.

Investigators obtained a search warrant and retrieved Wilson's vehicle from the tow lot. The vehicle was then towed to the Brazoria County Sherriff's Office to be searched. In the driver floorboard, investigators located a spent 9-millimeter casing that was consistent with the other two casings found near Wilson's body. Jeffrey Kelly with the Texas Department of Public Safety Crime Lab testified that all three casings recovered by law enforcement were fired from the same unknown firearm. During the processing of the vehicle, investigators also noted that there was a gouge mark in the passenger's side door that may have been caused by a fired bullet. The interior surface of the vehicle was fairly clean, but investigators found presumptive evidence of blood splatters using BLUESTAR, a chemical compound used to detect blood residue on surfaces.

Lobpries testified that the day after getting Wilson's vehicle from the impound

in Houston, investigators drove around the area looking for additional video surveillance to establish a timeline of events. Investigators received information that placed appellant, Wilson, and Wilson's vehicle at a McDonald's drive-through in Alvin, Texas just before 7:00 a.m. the morning of the murder. Lobpries asserted that the McDonald's drive-through was approximately 3.3 miles from where Wilson's body was found, and it took him about four minutes to drive the route from the McDonald's to the location of Wilson's body at the posted speed limit.

Two of Wilson's acquaintances, Crystal Yauger and Cody DeSimone, told investigators that they saw appellant and Wilson at the McDonald's drive-through. Yauger and DeSimone testified about an altercation they witnessed between appellant and Wilson. Wilson exited the driver's side, and appellant exited the passenger side of Wilson's vehicle. They argued, and Wilson hit appellant once or twice. Subsequently, appellant and Wilson returned to the vehicle. Appellant was in the driver's seat, and Wilson was in the passenger's seat when Wilson's vehicle left the McDonald's parking lot. Surveillance video obtained from the McDonald's parking lot showed appellant wearing a black shirt and black pants.

During the investigation, Sanders received a phone call from Michael Maxian, a witness who claimed that his home security video may have captured the murder. Maxian lived near the crime scene at the corner of Wickwillow Lane and County Road 185. Maxian reviewed his home security cameras and took the hard drive to officers at the Brazoria County Sherriff's Office. Sanders testified that he reviewed Maxian's home surveillance video. In the video, Wilson's vehicle pulls up to the intersection of Wickwillow Lane and County Road 185 and stops. Approximately two minutes lapse before the passenger door opens. Wilson falls out the passenger side of her vehicle into the ditch. The driver then exits the vehicle, and there is a muzzle flash. The driver goes back and forth between the vehicle and ditch twice

before leaving the scene in Wilson's vehicle. On cross-examination, Sanders conceded that the male exiting the Monte Carlo appeared to be wearing a light-colored shirt and black pants.

On December 7, investigators interviewed appellant at the Harris County jail where he was being held on unrelated charges. Appellant told investigators that the last time he saw Wilson was in late September or early October when she gave him a ride from Houston to Santa Fe, Texas. Later in the interview, appellant told investigators that he dropped Wilson off at her "man's house," and she let him use her car. Appellant asserted that he did not take anything from the vehicle.

Appellant was later arrested and charged with murder. He pleaded not guilty, and his case proceeded to a trial by jury. Appellant did not testify during the guilt-innocence phase, but his counsel challenged whether the State proved that appellant was the individual in the Maxian home surveillance video that captured the murder. Counsel emphasized the DNA found in Wilson's vehicle that belonged to an unidentified third party. The jury presumably rejected counsel's theory, convicted appellant as charged, and sentenced him to life in prison.

Sufficiency of the Evidence

In his first issue, appellant challenges the sufficiency of the evidence to support his conviction. The legal sufficiency standard of review is the only standard applied to determine whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt. *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013) ("[T]his Court now applies only one standard 'to evaluate whether the evidence is sufficient to support a criminal conviction beyond a reasonable doubt: legal sufficiency.'"). For this review, we consider the combined and cumulative force of all admitted evidence and any reasonable inferences therefrom in the light most favorable to the verdict to

determine whether the jury was rationally justified in its decision. *Johnson v. State*, 509 S.W.3d 320, 322 (Tex. Crim. App. 2017).

Direct evidence and circumstantial evidence are equally probative; circumstantial evidence alone may be sufficient to uphold a conviction so long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *Ramsey v. State*, 473 S.W.3d 805, 809 (Tex. Crim. App. 2015). The jury is the sole judge of credibility and the weight to be attached to witnesses' testimony. *Temple*, 390 S.W.3d at 360. The jury may accept one version of the facts and reject another, and it may reject any part of a witness's testimony. *Kelley v. State*, 429 S.W.3d 865, 872 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd). We may not substitute our judgment for that of the jury and must defer to the jury's responsibility to fairly resolve or reconcile conflicts in the evidence. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010).

The State had to prove beyond a reasonable doubt that appellant intentionally or knowingly caused Wilson's death. *See* Tex. Penal Code § 19.02(b)(1). There is no dispute that a firearm was used intentionally to kill Wilson. The issue here is identity—i.e., whether appellant was the person who caused Wilson's death. Identity may be established by "direct evidence, circumstantial evidence, or reasonable inferences from the evidence." *Ingerson v. State*, 559 S.W.3d 501, 509 (Tex. Crim. App. 2018). We accordingly limit our sufficiency review to just the essential element of identity. *See* Tex. R. App. P. 47.1 (providing that the reviewing court must address "every issue raised and necessary to final disposition of the appeal"). In deciding whether that element was proved, we consider all of the evidence in the light most favorable to the verdict. *See Zuniga v. State*, 551 S.W.3d 729, 732 (Tex. Crim. App. 2018).

In this case, there is no direct evidence in support of identity, but the record

contains an abundance of circumstantial evidence establishing that appellant was the person who murdered Wilson. Two witnesses, Yauger and DeSimone, testified that they saw appellant and Wilson together on the morning Wilson was killed. Yauger testified that between 6:45 and 6:50 a.m., she saw appellant with Wilson at a McDonald's drive-through in Alvin, Texas. According to Yauger, appellant was in a "goldish/tan" vehicle in front of them. This description was consistent with the color of Wilson's Monte Carlo. DeSimone's testimony was mostly consistent with Yauger's. Both Yauger and DeSimone asserted that appellant was yelling something incomprehensible before going to the trunk of Wilson's vehicle and grabbing something. Yauger could not definitively say what the object was but believed it to be a gun. DeSimone described the item that appellant retrieved from the trunk as "something metallic." Though DeSimone did not recognize Wilson at the time he saw her at the McDonald's drive-through, he testified that the female "came running around the back end of the car . . . hit [appellant] . . . and said not to pull a gun on [DeSimone]." Afterwards, they returned to the car, and left the McDonald's parking lot. Appellant was in the driver's seat, and Wilson was in the passenger's seat.

In addition to Yauger and DeSimone's testimony regarding appellant and Wilson's activity prior to the murder, the State presented, and the trial court admitted over defense counsel's objection, Maxian's home security video that captured the murder. Maxian's home was approximately three miles from the McDonald's where Yauger and DeSimone previously saw appellant and Wilson. The time stamp on Maxian's home security video shows Wilson's vehicle stopping at the intersection of Wickwillow Lane and County Road 185 at approximately 6:00 a.m. Wilson's vehicle remained parked for a few minutes before Wilson is ostensibly thrown out of the passenger side into the ditch alongside the road at approximately 6:03 a.m.[1]

[1] This time stamp was about an hour before Yauger and DeSimone saw appellant and

Subsequently, the driver exits and follows Wilson into the ditch where there is a muzzle flash. The driver runs back to the vehicle but returns a few seconds later. The driver appears to search the ground around Wilson before returning to the vehicle and driving away alone. While the identity of the driver is not readily discernable from the video, investigators recovered a cellular phone near Wilson's body. It was later discovered that the cellular phone belonged to appellant.

Appellant's counsel emphasized that surveillance video obtained from the McDonald's parking lot showed appellant wearing a black shirt and black pants, which is not consistent with the "white" or "tan-colored" shirt seen in the Maxian surveillance video. However, the State offered the testimony of Jorge Martinez, appellant's childhood acquaintance. Martinez testified that he saw appellant on his home security video at approximately 11:20 a.m.—a few hours after Wilson's body was found. In the video, appellant is not wearing a shirt but has on black pants. In its closing argument, the State emphasized that appellant could have taken off his shirt at some point between leaving McDonald's and the time that Wilson was murdered. The jury was free to resolve conflicts in the evidence and draw a reasonable inference that appellant may not have been wearing a shirt at the time of the murder. *See Isassi*, 330 S.W.3d at 638.

There was also evidence presented of appellant's activity after Wilson's murder. Johns found appellant asleep alone in Wilson's disabled vehicle two days after Wilson's murder. While investigating whether appellant needed assistance, Johns learned that Wilson's vehicle had been reported stolen. Wilson's vehicle was impounded and towed to the Brazoria County Sheriff's Office to be searched. Inside

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Wilson at the McDonald's drive-through. However, when questioned about the time settings on his home security system, Maxian testified that he may not have accounted for daylight savings time.

the vehicle, investigators noticed marks on the passenger side door consistent with a bullet impact. The investigators also located cleaning supplies and observed that the interior surface appeared to be wiped down. Swabs obtained from the inside of Wilson's vehicle contained the DNA of Wilson, appellant, and an unknown contributor. As additional evidence of appellant's activities after Wilson's murder, Sanders testified that appellant sold a speaker box taken from Wilson's vehicle to a pawn shop for $20.

Additionally, the jury could have inferred guilt from inconsistencies in appellant's interview with investigators from the Brazoria County Sheriff's Office. During his interview, appellant told investigators that he knew Wilson because she bought drugs from him. He alleged that Wilson picked him up in Houston and was driving him to his mother's house in Santa Fe, Texas. According to appellant, Wilson was alone when she picked him up. They got some food at McDonald's but had an altercation with some individuals that appellant believed were trying to kill or rob him. When Wilson and appellant left McDonald's, appellant was driving. He claimed that he dropped Wilson off at her "man's house" in Alvin. From Alvin, appellant alleged that he went straight to Houston and was going to return Wilson's car in a couple of hours. Appellant asserted that he did not learn of Wilson's murder until days later and did not provide any information regarding her manner of death.

However, later in the interview, appellant offered different details that he had not previously shared with investigators. He claimed that Wilson picked him up with a girl named "Ashley." According to appellant, Ashley and Wilson wanted to "have a relationship with him." He told investigators that Ashley would have information regarding Wilson's murder. Further, appellant claimed that he heard that Wilson was shot with a gun from "people in Alvin" even though he previously told investigators that he did not frequently visit Alvin.

Based on the inconsistent statements provided by appellant during the investigation, the jury could have inferred guilt. *See Padilla v. State*, 326 S.W.3d 195, 201 (Tex. Crim. App. 2010) (recognizing that rational fact finder can consider a defendant's untruthful statement as affirmative evidence of guilt); *see also Gear v. State*, 340 S.W.3d 743, 747 (Tex. Crim. App. 2011) (explaining that a jury may consider a defendant's inconsistent statements as affirmative evidence of guilt); *King v. State*, 29 S.W.3d 556, 565 (Tex. Crim. App. 2000) (holding a defendant's conduct in lying to police officers shows a consciousness of guilt and may be considered as circumstantial evidence of guilt).

In sum, the combined and cumulative force of all admitted evidence was sufficient to support the jury's finding that appellant was the person who murdered Wilson. Two witnesses saw appellant with Wilson at the McDonald's drive-through between 6:45 and 6:50 a.m. and witnessed an altercation between the two of them just minutes before the murder. *See, e.g., Orellana v. State*, 381 S.W.3d 645, 653 (Tex. App.—San Antonio 2012, no pet.) (evidence of an altercation between defendant and the victim a short time before the murder supported the jury's finding that the defendant was the person who murdered the victim); *see also Rodriguez v. State*, 667 S.W.3d 484, 494–95 (Tex. App.—Corpus Christi 2023, no pet.) (noting defendant was involved in altercation with victims' father just prior to shooting); *Green v. State*, 831 S.W.2d 89, 94 (Tex. App.—Corpus Christi 1992, no pet.) (holding evidence of prior altercation between defendant and victim was admissible to show motive and intent to commit the subsequent acts of violence against the victim). The jury heard credible evidence that appellant was alone with Wilson prior to the murder and was the last known person to see her alive. *See, e.g., Matthews v. State*, 513 S.W.3d 45, 54 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd) (considering evidence that defendant was alone with the murder victim for over an

hour and was the last person known to see her alive). The jury was free to disbelieve appellant's inconsistent statements provided during the investigation. *See Kelley*, 429 S.W.3d at 872 (providing that the jury may accept one version of the facts and reject another, and it may reject any part of a witness's testimony). Moreover, Wilson's vehicle that appellant admitted to driving and the murder were captured on Maxian's home security video within minutes of appellant and Wilson leaving McDonald's. Notably, only appellant's cellular phone was found near Wilson's body. *See, e.g., Diaz v. State*, 604 S.W.3d 595, 604 (Tex. App.—Houston [14th Dist.] 2020, pet. granted) (noting several cell phone parts were found at the scene, tying at least one cell phone to the offense). Also, appellant was found in unexplained possession of Wilson's vehicle days after the murder and sold Wilson's speaker box to a pawn shop. *See Patrick v. State*, 906 S.W.2d 481, 487 (Tex. Crim. App. 1995) (providing that intent may be inferred from circumstantial evidence such as subsequent conduct of the appellant).

The jury was entitled to consider all of the circumstantial evidence set forth above in determining that appellant was the person who murdered Wilson. We conclude that, after reviewing the evidence in the light most favorable to the verdict, the evidence is sufficient to support the jury's verdict.

Accordingly, we overrule appellant's first issue.

Motion to Suppress

In his second issue, appellant asserts the trial court erred in denying his motion to suppress by allowing his oral statements to investigators about a "blue warrant" for a pending criminal case and his admission to selling drugs to Wilson as *res gestae* statements. Specifically, appellant argues that these statements were made during a custodial interrogation before the investigators gave appellant his *Miranda* warnings.

We review rulings on motions to suppress under a bifurcated standard. *Lerma v. State*, 543 S.W.3d 184, 189–90 (Tex. Crim. App. 2018); *Stocker v. State*, 656 S.W.3d 887, 889 (Tex. App.—Houston [14th Dist.] Dec. 8, 2022, pet. granted). We review the trial court's factual findings for an abuse of discretion but review the trial court's application of the law to the facts de novo. *Lerma*, 543 S.W.3d at 189–90. In a motion to suppress hearing, "the trial judge is the sole trier of fact and judge of credibility of witnesses and the weight to be given to their testimony." *Id.* at 190. We afford almost total deference to the trial court's ruling on the motion when that ruling hinged on its findings of historical facts, especially when they turn on the trial court's decisions concerning credibility and demeanor. *State v. Garcia-Cantu*, 253 S.W.3d 236, 241 (Tex. Crim. App. 2008). When, as here, a trial court has not made a finding on a relevant fact, we imply the finding that supports the trial court's ruling, so long as it finds some support in the record. *Cole v. State*, 490 S.W.3d 918, 922 (Tex. Crim. App. 2016); *State v. Kelly*, 204 S.W.3d 808, 818–19 (Tex. Crim. App. 2006).

"The warnings required by *Miranda* and article 38.22 are intended to safeguard a person's privilege against self-incrimination during custodial interrogation." *Gardner v. State*, 306 S.W.3d 274, 294 (Tex. Crim. App. 2009). "[T]he *Miranda* safeguards do not exist to protect suspects from the compulsion inherent in custody alone, nor do they protect suspects from their own propensity to speak, absent some police conduct which knowingly tries to take advantage of the propensity." *Jones v. State*, 795 S.W.2d 171, 176 n.5 (Tex. Crim. App. 1990). A defendant bears the burden of proving his or her statement was the product of custodial interrogation. *Gardner*, 306 S.W.3d at 294.

An "interrogation" for purposes of *Miranda* means "(1) express questioning and (2) 'any words or actions on the part of the police (other than those normally

attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *Alford v. State*, 358 S.W.3d 647, 653 (Tex. Crim. App. 2012) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)). When, as here, we must determine whether a set of facts amounts to interrogation, we review the issue de novo because it is one of law, requiring the application of legal principles to a specific set of facts. *See id.*

The State introduced the video-recorded interview conducted by Sanders and Lobpries with appellant at the Harris County jail. After reviewing the video, the trial court denied appellant's motion to suppress his oral statements made within the first two minutes, finding that appellant was "eager to speak with the detectives and began speaking before [the detectives] could even finish [the *Miranda* warnings]." The trial court concluded that despite appellant's interruptions, the investigators eventually finished giving appellant his *Miranda* warnings, his statements were *res gestae*, and he "voluntarily gave up his right to remain silent."

A review of the video reflects that appellant spontaneously volunteered incriminating statements that were not coerced and were not in response to interrogation by law enforcement. At approximately 0:11, Sanders confirmed appellant's identity and birthday. At approximately 0:28, appellant volunteered his social security number to the investigators. At approximately 0:50, investigators introduced themselves as law enforcement with the Brazoria County Sheriff's Office. Before Sanders could finish the introduction, appellant told investigators that he had "been waiting to talk to [them] forever" and asked what the investigators had to tell him. At approximately 1:04, Sanders explained that he had been investigating a case involving Wilson, and it was his understanding that appellant and Wilson were together at some point. Before Sanders could finish his statement, appellant volunteered that he was not together with Wilson. Rather, she picked him up in

Houston and drove him to Santa Fe. Appellant added that Wilson was with a girl named Ashley and that "was the last time" he saw Wilson. At approximately 1:36, Sanders repeated appellant's statement that Wilson picked him up in Houston, and appellant offered more details about the precise pick-up location. At approximately 1:47, Sanders asked appellant if he knew what day Wilson picked him up in Houston, and appellant answered "late September or early, beginning of October." At approximately 2:09, appellant asked Sanders what happened to Wilson and wanted to know what was being said "because [he] had facts." At approximately 2:19, Lobpries attempted to read appellant his *Miranda* warnings and explained that it was necessary because appellant was in custody of the Harris County jail. At approximately 3:08, appellant interrupted Lobpries and stated that "I know the law." At approximately 3:29, appellant then volunteered information about a "blue warrant." At approximately 3:33, Lobpries stopped appellant and completed reading appellant's *Miranda* warnings.

Under the totality of these circumstances, we conclude that appellant understood the warnings given to him by the investigators, he was eager to talk to them, and voluntarily waived his right to remain silent. None of the statements made by appellant were the result of interrogation on the part of the investigators. While Sanders asks appellant about the date that Wilson picked him up in Houston, this was a clarification of appellant's volunteered statement. *See Miranda v. Arizona*, 384 U.S. 436, 478 (1966) (providing that volunteered statements "of any kind are not barred by the Fifth Amendment").

Accordingly, we overrule appellant's second issue.

Admission of Evidence

In his third issue, appellant argues that the trial court erred in admitting Martinez's testimony that appellant was trying to burglarize Martinez's home with

a gun because such testimony constituted inadmissible extraneous offense evidence. In his fourth issue, appellant contends that the trial court erred in admitting the license plate reader photographs because the photographs were hearsay and unauthenticated. We begin by discussing the State's contention that appellant waived these issues by failing to adequately brief the issue of harm.

I. Neither Party Has the Burden to Prove Harm

Constitutional errors are reversible unless the appellate court determines the error did not contribute to the conviction or punishment beyond a reasonable doubt. Tex. R. App. P. 44.2(a); *Webb v. State*, 36 S.W.3d 164, 181 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). If the error is not constitutional, we must determine if it affects substantial rights. Tex. R. App. P. 44.2(b); *Webb*, 36 S.W.3d at 181. If the error is neither constitutional nor affects a substantial right, the error is harmless. *See* Tex. R. App. P. 44.2(b); *see also Webb*, 36 S.W.3d at 181.

Appellant does not specify how admitting Martinez's testimony or the license plate reader photographs harmed him. However, the burden to show harm rests on neither the appellant nor the State. *See King v. State*, 666 S.W.3d 581, 587–88 (Tex. Crim. App. 2023); *see also VanNortrick v. State*, 227 S.W.3d 706 (Tex. Crim. App. 2007) (providing that in the context of reviewing whether a non-constitutional error was harmless, there is no burden on either party to prove harm).

To the extent the State asserts appellant waived his complaint on appeal that the trial court erred in admitting into evidence Martinez's testimony or the license plate reader photographs, we disagree. It is the responsibility of the appellate court to assess harm after reviewing the record. *Coble v. State*, 330 S.W.3d 253, 280 (Tex. Crim. App. 2010). We must decide whether that error affected appellant's substantial rights to a fair trial. *See* Tex. R. App. P. 44.2(b).

Accordingly, we examine each of appellant's complaints challenging the admission of evidence in turn.

II. Extraneous Offense Evidence

In his third issue, appellant contends that the trial court erred in admitting evidence of extraneous offenses through Martinez's testimony that he saw appellant with a firearm the night of October 18. Appellant suggests that the "specter of an uncharged firearm allegation is highly prejudicial . . . and was so harmful and influential . . . that it affected a substantial right to a fair trial."

When reviewing a trial court's decision to admit extraneous offense evidence under Rule 404(b), or over a Rule 403 objection, an appellate court applies an abuse of discretion standard. *See De La Paz v. State*, 279 S.W.3d 336, 343 (Tex. Crim. App. 2009); *Henley v. State*, 493 S.W.3d 77, 82–83 (Tex. Crim. App. 2016). A trial court abuses its discretion only when its decision lies outside the "zone of reasonable disagreement." *De La Paz*, 279 S.W.3d at 343–44.

Even if we assume without deciding that the trial court abused its discretion by admitting Martinez's testimony regarding the extraneous offenses, we will not reverse the judgment if the error was harmless. *See* Tex. R. App. P. 44.2; *see also Gonzalez v. State*, 544 S.W.3d 363, 373 (Tex. Crim. App. 2018) (providing that "[i]f we have a fair assurance from an examination of the record as a whole that the error did not influence the jury, or had but a slight effect, we will not overturn the conviction"). Generally, the erroneous admission of evidence is non-constitutional error that requires reversal, i.e., is harmful, only if the error affects the appellant's substantial rights. *Gutierrez v. State*, 585 S.W.3d 599, 615 (Tex. App.—Houston [14th Dist.] 2019, no pet.) (citing *Gonzalez*, 544 S.W.3d at 373). Error affects substantial rights only if the error had a substantial and injurious effect or influence in determining the jury's verdict. *Gonzalez*, 544 S.W.3d at 373.

In assessing the likelihood that the jury's decision was adversely affected by the error, an appellate court considers everything in the record. *Schmutz v. State*, 440 S.W.3d 29, 39 (Tex. Crim. App. 2014) (citing *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002)). This includes testimony, physical evidence, jury instructions, the State's theories, any defensive theories, closing arguments, and voir dire, if applicable. *Id.* (citing *Bagheri v. State*, 119 S.W.3d 755, 763 (Tex. Crim. App. 2003)). Important factors include the nature of the evidence supporting the verdict, the character of the alleged error, and how it might be considered in connection with other evidence in the case and may also include whether the State emphasized the error and whether overwhelming evidence of guilt was present. *Id.*

In this case, the alleged error involved the admission of extraneous offenses. The State anticipated calling Martinez to testify that a week prior to the murder, appellant broke into his home with a firearm. Appellant objected to Martinez's testimony of the extraneous offenses pursuant to Rules 403 and 404(b). The trial court sustained appellant's objections in regards to two extraneous offenses, i.e., burglary of a habitation and aggravated assault, but overruled appellant's objection to Martinez's testimony that Martinez knew appellant possessed a firearm one week prior to the murder.

In its closing argument, the State did not mention the fact that Martinez saw appellant with a firearm prior to the murder. The only extraneous offense evidence referenced by the State in its closing argument was that appellant stole the speaker box out of Wilson's vehicle and sold it to a pawn shop knowing that the speaker did not belong to him. The State also argued that appellant was motivated to sell the speaker box because he knew Wilson was not coming back. This evidence was more impactful than Martinez's testimony because it linked appellant to Wilson's vehicle, established inconsistencies in appellant's statements to investigators, and helped

identify appellant as the person who killed Wilson.

As shown above in the sufficiency of the evidence analysis, the combined and cumulative force of the admitted evidence in the record establishes appellant's guilt, aside from the extraneous offense evidence. After examining the record as a whole, we conclude that the admission of the extraneous offense evidence did not affect appellant's substantial rights because we have a fair assurance that the error did not influence the jury or had but a slight effect. *See Motilla*, 78 S.W.3d at 355. We hold that any error in admitting the extraneous-offense evidence was not harmful error. *See* Tex. R. App. P. 44.2(b).

Accordingly, we overrule appellant's third issue.

III. Hearsay Evidence

In his fourth issue, appellant contends that the trial court erred in admitting the license plate reader photographs because the photographs were hearsay and unauthenticated.

As discussed above, we review a trial court's decision to admit or exclude evidence under an abuse of discretion standard. *Martinez*, 327 S.W.3d at 736. A trial court abuses its discretion if its decision is so clearly wrong as to lie outside the zone within which reasonable people might disagree. *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008). Errors in the admission of hearsay evidence are typically non-constitutional in nature; accordingly, even when such error is established, it will be disregarded unless it affected a defendant's substantial rights. *See* Tex. R. App. P. 44.2(b); *Shaw v. State*, 329 S.W.3d 645, 653 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd).

Hearsay is defined as a statement, other than one made by the declarant while testifying at the current trial or hearing, offered into evidence to prove the truth of

the matter asserted. Tex. R. Evid. 801(d). For there to be hearsay, there must be a "statement." *Id.* at 801(c). A "statement" is defined as "a person's oral or written verbal expression, or nonverbal conduct that a person intended as a substitute for verbal expression." *Id.* at 801(a). A photograph itself is not a statement. *See, e.g.*, *Herrera v. State*, 367 S.W.3d 762, 773 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *accord* Tex. R. Evid. 801(a) (providing that a photograph is not an out-of-court statement for hearsay purposes).

The State offered license plate photographs of Wilson's vehicle. The photographs contain five different images of a vehicle with license plate KLF1904 captured between October 18 and 19. Over appellant's hearsay objection, the trial court admitted the license plate photographs. Even if we assume the trial court erred in admitting the license plate photographs, which we do not hold that it did, such error was harmless. *See* Tex. R. App. P. 44.2(b); *Shaw*, 329 S.W.3d at 653. This same evidence was consistent with Alexander's testimony that while he was on patrol on October 19, he investigated a disabled vehicle. He asserted that appellant was the operator of the vehicle and described the vehicle as a "gold Monte Carlo" with license plate "KLF1904." In addition to the license plate photographs, multiple witnesses testified about appellant's presence in Wilson's vehicle. Yauger and DeSimone testified that they saw appellant and Wilson in Wilson's Monte Carlo at a McDonald's shortly before 7:00 a.m. on October 18. Johns testified that while on patrol on October 20, he found appellant asleep in Wilson's disabled vehicle.

Based on the quality and quantity of the evidence connecting appellant with Wilson's vehicle before and after Wilson was murdered, any error in the admission of the license plate photographs did not influence the jury or had only a slight effect. *See Motilla*, 78 S.W.3d at 355.

Accordingly, we overrule appellant's fourth issue.

Conclusion

We affirm the judgment of the trial court.

/s/ Frances Bourliot
Justice

Panel consists of Justices Bourliot, Hassan, and Poissant.

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