Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

Nos. 04-19-00483-CR & 04-19-00486-CR

Vinay **YADAV**,
Appellant

v.

The **STATE** of Texas,
Appellee

From County Court at Law No. 15, Bexar County, Texas
Trial Court Nos. 601415 & 601414
Honorable Melissa Vara, Judge Presiding

Opinion by: Beth Watkins, Justice

Sitting: Rebeca C. Martinez, Justice
Irene Rios, Justice
Beth Watkins, Justice

Delivered and Filed: August 12, 2020

AFFIRMED

A jury found appellant Vinay Yadav guilty of criminal trespass and resisting arrest, search, or transportation. Yadav challenges his conviction in sixteen issues. We affirm the trial court's judgment.

BACKGROUND

On November 19, 2018, Bexar County Sheriff's Office Lieutenant Raymond Ortega arrested Yadav in the parking garage of Yadav's then-employer, One Frost. On November 29, 2018, Yadav was charged with the misdemeanor offenses of criminal trespass and resisting arrest,

search, and transportation. At trial, the jury heard testimony that One Frost's assistant vice president of enterprise physical security, Dwight Obey, initially gave Yadav the choice to either report to human resources for a meeting or leave the premises for the day. Multiple witnesses testified that Yadav refused to report to human resources and became disruptive. Those witnesses also testified that Obey then ordered Yadav to leave several times, but Yadav refused even after he was warned he would be arrested if he stayed. The jury also heard testimony that after Ortega told Yadav he was under arrest, Yadav "[threw] his head back," "arch[ed] his back," and "flail[ed]" and "flopp[ed]" his body while Ortega was trying to handcuff him and transport him to a police car.

A Bexar County jury found Yadav guilty of both charges, and the trial court sentenced him to: 180 days in the Bexar County Jail, probated for eighteen months; sixty hours of community service; and anger management classes. The trial court also ordered Yadav to have no contact with the One Frost campus. Yadav filed two motions for new trial, but he did not set those motions for hearing and they were overruled by operation of law. This appeal followed.

ANALYSIS

Yadav raises sixteen issues challenging his conviction. We will consider related issues together.

Sufficiency of the Evidence

In his eleventh issue, Yadav contends the trial court erred by denying his motion for directed verdict on the resisting arrest charge because there is no evidence he prevented or obstructed Ortega from conducting a search, or used force against Ortega. He also contends there is no evidence to support his conviction for criminal trespass because he had One Frost's permission to be on the premises. Because this issue would, if meritorious, potentially require us

to render a judgment of acquittal on one or both charges, we will consider it first. *See Benavidez v. State*, 323 S.W.3d 179, 181 (Tex. Crim. App. 2010).

Standard of Review

A motion for directed verdict attacks the sufficiency of the evidence to sustain a conviction. *McDuff v. State*, 939 S.W.2d 607, 613 (Tex. Crim. App. 1997). As a result, we construe Yadav's complaint about the trial court's ruling on his motion for directed verdict as a legal sufficiency challenge. *See id.* In reviewing a complaint that the evidence presented at trial is legally insufficient to support a jury's guilty verdict, we must determine whether any rational trier of fact could have found the essential elements of the charged offense beyond a reasonable doubt. *Adames v. State*, 353 S.W.3d 854, 860 (Tex. Crim. App. 2011) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *Caballero v. State*, 292 S.W.3d 152, 154 (Tex. App.—San Antonio 2009, pet. ref'd). We view the evidence in the light most favorable to the jury's guilty verdict and resolve all reasonable inferences from the evidence in its favor. *Tate v. State*, 500 S.W.3d 410, 417 (Tex. Crim. App. 2016). "Because the jury is the sole judge of witness credibility and determines the weight to be given to testimony," we must defer to its determinations. *Hines v. State*, 383 S.W.3d 615, 623 (Tex. App.—San Antonio 2012, pet. ref'd). "If any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, we must affirm the trial court's judgment." *Hernandez v. State*, 198 S.W.3d 257, 260 (Tex. App.—San Antonio 2006, pet. ref'd).

Applicable Law

Under section 38.03 of the Texas Penal Code, a person commits the offense of resisting arrest, search, or transportation "if he intentionally prevents or obstructs a person he knows is a peace officer . . . from effecting an arrest, search, or transportation of the actor or another by using force against the peace officer or another." TEX. PENAL CODE ANN. § 38.03(a). For the purposes of section 38.03, "using force against" a peace officer means "'violence or physical aggression, or

an immediate threat thereof, in the direction of and/or into contact with, or in opposition or hostility to, a peace officer.'" *Finley v. State*, 484 S.W.3d 926, 928 (Tex. Crim. App. 2016) (quoting *Dobbs v. State*, 434 S.W.3d 166, 171 (Tex. Crim. App. 2014)). Evidence showing an individual "used force against the officers by pulling against the officers' force" will support a conviction under section 38.03. *Id*.

A person commits the offense of criminal trespass if he, inter alia, "remains on or in property of another . . . without effective consent and the person . . . received notice to depart but failed to do so." TEX. PENAL CODE ANN. § 30.05(a)(2). "'Notice' means: (A) oral or written communication by the owner or someone with apparent authority to act for the owner." *Id.* § 30.05(b)(2)(A).

It is well-established that where a charging instrument alleges different methods of committing an offense in the conjunctive, "it is proper for the jury to be charged in the disjunctive . . . if the evidence is sufficient to support a finding under any of the theories submitted." *Kitchens v. State*, 823 S.W.2d 256, 258 (Tex. Crim. App. 1991); *see also Pizzo v. State*, 235 S.W.3d 711, 714–15 (Tex. Crim. App. 2007). When a jury returns a general verdict, "the State need only have sufficiently proven one of the paragraph allegations to support the verdict of guilt." *Fuller v. State*, 827 S.W.2d 919, 931 (Tex. Crim. App. 1992); *see also Pizzo*, 235 S.W.3d at 714 ("Jury unanimity is required on the essential elements of the offense but is generally not required on the alternate modes or means of commission.") (internal quotation marks omitted).

Application

1. Resisting arrest, search, or transportation

Yadav notes the information alleged he obstructed his own arrest, search, *and* transportation, while the court's charge allowed the jury to find him guilty based on a conclusion

that he obstructed his own arrest, search, *or* transportation. Because there is no evidence Yadav obstructed a search, he argues this discrepancy entitles him to acquittal on the resisting charge.

The Texas Court of Criminal Appeals has held that where the focus of a statutory offense is the result of the defendant's conduct, rather than the specifically alleged conduct itself, then allegations of different types of conduct do not amount to separate offenses that the State must independently prove. *Huffman v. State*, 267 S.W.3d 902, 907 (Tex. Crim. App. 2008). This court and several sister courts have held that section 38.03 "defines a single offense that a person may commit by obstructing or preventing a peace officer from performing his duty, whether that duty involves the arrest, search, or transportation of the actor." *McIntosh v. State*, 307 S.W.3d 360, 366 (Tex. App.—San Antonio 2009, pet. ref'd); *see also Clement v. State*, 248 S.W.3d 791, 802 (Tex. App.—Fort Worth 2008, no pet.); *Hartis v. State*, 183 S.W.3d 793, 799 (Tex. App.—Houston [14th Dist.] 2005, no pet.); *Finster v. State*, 152 S.W.3d 215, 219 (Tex. App.—Dallas 2004, no pet.). Under this analysis, the "focus" of section 38.03 is the result of the defendant's conduct—the obstruction of a peace officer's duties—not the conduct itself. *See, e.g.*, *McIntosh*, 307 S.W.3d at 366. As a result, the State can satisfy its burden of proof under that statute by presenting legally sufficient evidence of only one theory of conduct, even if the court's charge asks the jury to consider multiple theories in the disjunctive.[1] *See id.*; *see also Huffman*, 267 S.W.3d at 907; *Finster*, 152 S.W.3d at 218–19.

Here, multiple witnesses testified that while Ortega was trying to handcuff Yadav, Yadav "arch[ed] his back back [*sic*] and tr[ied] to wiggle away from [Ortega]"; "was throwing his leg back"; and "started to flail like a fish, flopping, kicking his head back, twirling." Obey testified

[1] Yadav cites *Agnew v. State*, 635 S.W.2d 167 (Tex. App.—El Paso 1982, no writ) to support his contention that because the information alleged he obstructed his own arrest, search, *and* transportation, the State was required to prove all three theories. However, in *Agnew*—unlike in this case—the court's charge asked the jury to consider whether the defendant obstructed both an arrest and a search. *Agnew*, 635 S.W.2d at 168.

that "it was hard for Officer Ortega to restrain [Yadav]" in light of the "continual resistance of Mr. Yadav actually wiggling, flopping backwards, trying to get his arms and so forth out of [his] jacket." Ortega himself testified that when he tried to handcuff Yadav, "he was resisting, squirming his body, you know, squirming away. . . . [H]e was actively resisting, obstructing me and not letting me just willingly handcuff him." He also testified that after Yadav was handcuffed and Ortega was trying to transport him to a police car, "I was trying to isolate him, get control of him. He was flailing his body and then he would fall like he was trying to, you know—causing his entire body to fall to the ground." Based on this testimony that Yadav fought Ortega's attempts to both handcuff Yadav and move him to a police vehicle, a rational factfinder could conclude that Yadav's conduct obstructed Ortega from performing his duties related to Yadav's arrest and transport. *See* TEX. PENAL CODE § 38.03(a); *McIntosh*, 307 S.W.3d at 366.

Under the plain language of section 38.03, the State was required to show not only that Yadav obstructed Ortega's exercise of his duties, but also that he did so by exerting force against Ortega. TEX. PENAL CODE § 38.03(a); *Finley*, 484 S.W.3d at 928. The court's charge instructed the jury to determine whether Yadav used force against Ortega by pushing Ortega with his hand or flinging his body toward Ortega. *See Pizzo*, 235 S.W.3d at 715 (noting "means of commission or nonessential" offense elements "are generally set out in 'adverbial phrases' that describe how the offense was committed"). Yadav contends there is no evidence to support the jury's affirmative finding because "Ortega stated in his testimony that neither of those two things occurred" and because there is no evidence Ortega was endangered by Yadav's actions.

While it is true Ortega testified Yadav did not push Ortega with his hand, the jury heard testimony—including from Ortega—that Yadav repeatedly tried "to wiggle away from" Ortega and that he moved his back, head, and leg in Ortega's direction while doing so. This evidence would allow a rational factfinder to conclude Yadav used force against Ortega, both as that term

is used in section 38.03 and as specified in the court's charge. *See* TEX. PENAL CODE § 38.03(a); *Finley*, 484 S.W.3d at 927, 929 (evidence suspect refused to put his arms behind his back to be handcuffed and "pulled his arms away from the arresting officers" was sufficient to support conviction under 38.03). The State was not required to show Yadav posed a specific danger to Ortega to prove he violated section 38.03. *See* TEX. PENAL CODE § 38.03(a); *Clement*, 248 S.W.3d at 797 ("[W]hen a defendant thrashes his arms and legs and is combative towards an officer, he forcefully resists arrest.").

Based on this evidence, a rational trier of fact could have found all of the essential elements of section 38.03 beyond a reasonable doubt. *See Adames*, 353 S.W.3d at 860. As a result, the evidence is legally sufficient to support the jury's finding of guilt under section 38.03. *See* TEX. PENAL CODE § 38.03(a); *Finley*, 484 S.W.3d at 929; *see also Hernandez*, 198 S.W.3d at 260.

2. Criminal trespass

Yadav contends the trial court should have granted his motion for directed verdict on the criminal trespass charge because he had One Frost's permission to be on the premises. He asserts he tried to leave but was kept on the premises against his will by One Frost employees who wanted to retrieve company property from him. While Obey acknowledged that some of One Frost's employees tried to retrieve company property from Yadav, he testified he "overruled" those attempts and instructed Yadav to leave. *See* TEX. PENAL CODE § 30.05(b)(2)(A) (notice to depart can come from "someone with apparent authority to act for the owner"). Obey also testified that he had authority to order a One Frost employee to leave. *See id.* Another One Frost employee who witnessed the incident, Robert Torres, testified that Yadav "was asked several times" to leave and was told he would be trespassing if he did not. Additionally, Ortega testified that Obey told Yadav to leave "several times" and Yadav refused. Finally, Obey and two other One Frost employees who witnessed the incident, Virginia Gonzales and Michael Landin, all testified that Yadav tried

to go back in the building after he had been directed to leave. Based on this evidence, a rational factfinder could conclude Yadav was given notice to depart but failed to do so. *See id.* As a result, the evidence is legally sufficient to support Yadav's criminal trespass conviction. *See Hernandez*, 198 S.W.3d at 260. Because the evidence is legally sufficient to support Yadav's conviction on both charges, we overrule his eleventh issue.

3. Factual sufficiency

In his sixth issue, Yadav primarily argues the evidence is factually insufficient to support his conviction because the State presented incomplete and/or altered surveillance footage of the incidents leading up to his arrest. Texas appellate courts do not review criminal convictions for factual sufficiency. *See Brooks v. State*, 323 S.W.3d 893, 894–95 (Tex. Crim. App. 2010). Because we have already held the evidence is legally sufficient to support Yadav's conviction on both charges, we overrule Yadav's factual sufficiency claim. *See Hernandez*, 198 S.W.3d at 260.

Yadav also contends in his sixth issue that the trial court refused to allow him to present evidence that One Frost tampered with and/or destroyed video surveillance footage of the events that led to his arrest. However, the record citations upon which he relies for this assertion do not support it, and Yadav's expert witness testified that the videos he reviewed did not show any signs of tampering. We may not consider assertions in a brief that are not supported by the record. *See Salazar v. State*, 5 S.W.3d 814, 816 (Tex. App.—San Antonio 1999, no pet.). Additionally, while Yadav's brief appears to complain of Fourth Amendment violations—specifically, that several items were improperly seized from him during his arrest—Yadav did not assert any Fourth Amendment claims in the trial court. Moreover, nothing in the record supports his contention that the items he identifies in his brief were seized from him during his arrest. *See* TEX. R. APP. P. 33.1; *see also Salazar*, 5 S.W.3d at 816. We overrule Yadav's sixth issue.

Wording of the Court's Charge

In his thirteenth issue, Yadav complains the court's charge on resisting arrest, search, or transportation was improperly worded because it did not conform to the charging instrument. He also argues he was prejudiced by the inclusion of the phrase "criminal episode" in the charge.

As noted above, the information charging Yadav with resisting arrest alleged he used force against Ortega by pushing Ortega with his hand *and* flinging his body toward Ortega, but the court's charge allowed the jury to find him guilty if it concluded he used force by pushing Ortega with his hand *or* flinging his body toward Ortega. Yadav did not complain about this discrepancy during the charge conference. To the contrary, the proposed charge Yadav's attorneys read into the trial court record contained the same "or" construction he complains about on appeal. Because Yadav did not raise this argument in the trial court, he must show the error "was so egregious and created such harm that [he] was denied a fair trial." *Warner v. State*, 245 S.W.3d 458, 461–62 (Tex. Crim. App. 2008).

We hold he has not made that showing. We have already held the evidence is legally sufficient to support a finding that Yadav flung his body toward Ortega while Ortega was trying to arrest and transport him. Because the evidence is legally sufficient to support conviction under at least one of the submitted theories, Yadav has not shown that the discrepancy he identifies between the information and the court's charge affected the very basis of the case, deprived him of a valuable right, or vitally affected a defensive theory. *See id.*; *see also Pizzo*, 235 S.W.3d at 714–15.

Yadav also complains the trial court abused its discretion by overruling his objection to the phrase "criminal episode" in the charge. Yadav has not presented any authority showing the inclusion of that phrase in the court's charge was error under these circumstances. *See* TEX. R. APP. P. 38.1; *McDuff*, 939 S.W.2d at 613. We overrule Yadav's thirteenth issue.

Defensive Instruction

In his first issue, Yadav argues the trial court improperly refused to submit a statutory defensive instruction to the jury. The State responds that Yadav was not entitled to assert that defense under the statute's plain language.

Standard of Review and Applicable Law

We review a trial court's decision to deny a defensive instruction for abuse of discretion. *McCallum v. State*, 311 S.W.3d 9, 13 (Tex. App.—San Antonio 2010, no pet.). "A trial court abuses its discretion when its ruling is outside the zone of reasonable disagreement." *Id.* A criminal defendant is not entitled to the submission of a defensive instruction "unless evidence is admitted supporting the defense." TEX. PENAL CODE ANN. § 2.03(c); *Shaw v. State*, 243 S.W.3d 647, 657 (Tex. Crim. App. 2007). A defense is "supported" if the defendant presents the "minimum quantum of evidence necessary to support a rational inference" that the defense is true. *Shaw*, 243 S.W.3d at 657.

Application

It is a defense to a charge of criminal trespass "that the actor at the time of the offense was . . . a person who was: (A) employed by or acting as agent for an entity that had, or that the person reasonably believed had, effective consent or authorization provided by law to enter the property; and (B) performing a duty within the scope of that employment or agency." TEX. PENAL CODE § 30.05(e)(3). Yadav contends the trial court abused its discretion by denying his request to instruct the jury on this defense because he was still a One Frost employee when he was arrested. The State responds that section 30.05(e)(3) does not apply to employees of the property owner. It also argues Yadav was no longer a One Frost employee when he was arrested and that he did not show "he was performing a duty within the scope of his employment or agency" when he was arrested.

We need not resolve the question of statutory construction the State has presented, because we agree that Yadav did not present any evidence that he was performing duties within the scope of his employment at the relevant time. *See id.* The evidence shows Yadav was in the parking garage when Obey ordered him to leave for the final time and when Ortega arrested him for refusing to do so. The evidence also shows Yadav was in the parking garage specifically because he had refused his employer's instructions to report to human resources for a meeting. Yadav, who was employed by One Frost as a software developer, did not present any evidence that his job duties included any tasks performed in the parking garage. Because Yadav did not show he was "performing a duty within the scope of [his] employment or agency" when he was ordered to depart the premises or when he was arrested for refusing to do so, the trial court did not abuse its discretion by refusing to instruct the jury on section 30.05(e)(3)'s "employee" defense. *See id.*; *McCallum*, 311 S.W.3d at 13. We overrule Yadav's first issue.

Evidentiary Rulings

Standard of Review and Applicable Law

In his second and fifteenth issues, Yadav challenges the trial court's evidentiary rulings. "Trial court decisions to admit or exclude evidence will not be reversed absent an abuse of discretion." *Beham v. State*, 559 S.W.3d 474, 478 (Tex. Crim. App. 2018). To show an abuse of discretion, the appellant must show the trial court's decision was outside the zone of reasonable disagreement. *Id.*

Application

1. Exclusion of Yadav's bloody jacket

In his second issue, Yadav contends the trial court abused its discretion by refusing to admit the bloody jacket he was wearing at the time of his arrest into evidence. Yadav argues the jacket was relevant evidence because it shows Ortega "battered" Yadav during the arrest and "sent him

to jail after injuring him in bleeding conditions." The State responds Yadav was not harmed by the jacket's exclusion because the trial court admitted photographs of it.

We agree with the State. As Yadav himself notes, multiple witnesses testified that he was injured during his arrest and that his clothes were bloodied as a result. Moreover, the trial court admitted multiple photographs of Yadav wearing the bloody jacket. Because the jury heard testimony that Yadav was injured during his arrest and saw photographs of the bloody jacket, we cannot say the trial court's decision to exclude the jacket itself was outside the zone of reasonable disagreement. *See id*. We overrule Yadav's second issue.

2. Admission of irrelevant hearsay evidence

In his fifteenth issue, Yadav argues the trial court abused its discretion by admitting irrelevant, prejudicial hearsay statements about his character that were contained in his employee file. As the State notes, however, the record shows the trial court consistently sustained Yadav's objections to hearsay "about [his] character as an employee or as a coworker." Although the trial court allowed the State's witnesses to testify that Yadav had received verbal and written warnings from his employer, it limited that testimony to the witnesses' own personal knowledge of performance-related issues that led to those warnings, and it repeatedly refused to allow the State's witnesses to testify about others' perceptions of whether Yadav was a "team player" or "his general demeanor toward other employees." It also did not admit the written warnings into evidence or allow the State's witnesses to read portions of those documents into the record. We conclude Yadav has not identified any hearsay that was erroneously admitted into evidence.

Additionally, even assuming the challenged evidence was irrelevant or unfairly prejudicial, "[t]he erroneous admission of evidence is non-constitutional error. Non-constitutional errors are harmful, and thus require reversal, only if they affect Appellant's substantial rights." *Gonzalez v. State*, 544 S.W.3d 363, 373 (Tex. Crim. App. 2018). Here, the record shows the jury heard ample

evidence to support its finding of guilt on both charges. We therefore conclude, based on our review of the record as a whole, that any error in admitting the evidence Yadav challenges in his fifteenth issue either "did not influence the jury, or had but a slight effect." *Id.* As a result, we overrule Yadav's fifteenth issue. *See id.*; *see also* TEX. R. APP. P. 44.2.

Motion to Reopen

In his third issue, Yadav contends the trial court abused its discretion by refusing to allow him to present testimony from witnesses who had been subpoenaed but did not appear at trial. In his fourth issue, he argues the trial court erred by refusing to allow him to call previous witnesses back to the stand for additional re-cross examination. In his fifth issue, he argues the trial court erred by denying his motion to reopen the evidence for the presentation of the testimony he addresses in his third and fourth issues.

Standard of Review and Applicable Law

The Texas Code of Criminal Procedure provides that a trial court "shall allow testimony to be introduced at any time before the argument of a cause is concluded, if it appears that it is necessary to a due administration of justice." TEX. CODE CRIM. PROC. ANN. art. 36.02. The Texas Court of Criminal Appeals has held that "due administration of justice" means the trial court must reopen the evidence "if the evidence would materially change the case in the proponent's favor." *Peek v. State*, 106 S.W.3d 72, 79 (Tex. Crim. App. 2003). "That the proffered evidence is relevant is not enough; it 'must actually make a difference in the case' and not be cumulative of evidence previously presented.'" *Birkholz v. State*, 278 S.W.3d 463, 464 (Tex. App.—San Antonio 2009, no pet.) (quoting *Peek*, 106 S.W.3d at 79). We review a trial court's decision on whether to reopen the evidence for abuse of discretion. *Id.*

Application

In his third issue, Yadav argues the trial court abused its discretion by refusing to allow him to present the testimony of several One Frost employees he had subpoenaed. However, Yadav did not attempt to call those witnesses until he moved to reopen the evidence—i.e., after he had already rested his case. As a result, he was required to show that their testimony "would materially change the case" in his favor. *See Peek*, 106 S.W.3d at 79. In the trial court, Yadav identified the subpoenaed witnesses as coworkers "in [his] work area," but he did not explain what their testimony would have been or how their testimony would have helped his case. And other than a statement that the subpoenaed individuals were coworkers who "were sitting around his work-desk" on the day of the incident, his brief is also silent on this issue. Because Yadav has not shown that the subpoenaed witnesses' testimony would "actually make a difference in the case," we overrule his third issue. *Birkholz*, 278 S.W.3d at 464.

In his fourth issue, Yadav argues the trial court erred by refusing to allow him to recall Landin, Gonzales, Obey, Ortega, and Torres to the stand for additional cross examination. He claims those examinations were "of utmost importance to [his] case" because those witnesses "committed multiple perjuries" during their earlier testimony. He also argues he was denied his right to confront them. As was the case with his third issue, however, Yadav did not ask to conduct these re-cross examinations until he moved to reopen the evidence. Additionally, the record shows Yadav cross-examined all of these witnesses at some length before the parties rested. During cross-examination, his attorneys repeatedly questioned the witnesses' recollection of the relevant facts and emphasized alleged discrepancies between the witnesses' statements and the available video evidence. Because the record shows Yadav had an opportunity to impeach those witnesses' credibility in front of the jury, the trial court did not abuse its discretion by concluding that re-

cross examination on their purported perjuries would have been "cumulative of evidence previously presented.'" *See id*. We overrule Yadav's fourth issue.

In his fifth issue, Yadav contends the trial court abused its discretion by refusing to reopen the evidence after the parties rested. Yadav's motion to reopen was based on the evidence addressed by his third and fourth issues on appeal. Because Yadav has not shown that the additional evidence he wished to present would have "materially changed this case in [his] favor," we cannot say the trial court abused its discretion by denying the motion to reopen. *See Peek*, 106 S.W.3d at 79. We overrule Yadav's fifth issue.

Jury Deliberation Question

In his seventh issue, Yadav argues the trial court erred by refusing to give a substantive answer to the following question asked by the jury:

> We would like to get clarification on the transportation aspect of the resisting arrest charge. We want to ensure that this includes the act of the defendant walking under his own power to the police vehicle.

In response, the trial court told the jury:

> Members of the jury, in response to your inquiry, you have heard all the evidence in this case, and you have all the exhibits that were admitted during trial as well as the Charge of the Court. You are instructed to please continue your deliberations.

Although Yadav objected to that answer at trial, his only objection was that "the jury has not heard all the evidence." On appeal, however, he now contends this question shows the jury was "perplexed" and required additional instruction on "the actual law" of the resisting charge. Because the issue presented on appeal does not correspond with the objection Yadav made at trial, he has not preserved it for this court's consideration. *See Lemon v. State*, 298 S.W.3d 705, 708 (Tex. App.—San Antonio 2009, pet. ref'd). We overrule Yadav's seventh issue.

Right to Self-Representation

In his eighth issue, Yadav contends the trial court erred by refusing to allow him to present closing argument. In his ninth issue, he argues the trial court erred by denying his request to represent himself. We construe both of these issues as complaints that the trial court's rulings violated Yadav's right to self-representation. In response to both issues, the State contends Yadav did not timely assert his right to self-representation.

A criminal defendant has a constitutional right to represent himself if he knowingly, intelligently, and voluntarily waives the right to counsel. *See Faretta v. California*, 422 U.S. 806, 807 (1975); *Hatten v. State*, 71 S.W.3d 332, 333 (Tex. Crim. App. 2002). However, "[a]n accused's right to self-representation must be asserted in a timely manner, namely, before the jury is impaneled." *McDuff*, 939 S.W.2d at 619; *see also Ex parte Winton*, 837 S.W.2d 134, 135 (Tex. Crim. App. 1992). We review the denial of a defendant's request to represent himself for abuse of discretion, viewing the evidence in the light most favorable to the trial court's ruling. *Lathem v. State*, 514 S.W.3d 796, 802 (Tex. App.—Fort Worth 2017, no pet.).

Here, Yadav first invoked his right of self-representation after both sides had rested, long after the jury was impaneled. As a result, his request to represent himself was untimely. *See McDuff*, 939 S.W.2d at 619; *Ex parte Winton*, 837 S.W.2d at 135. We therefore cannot say the trial court abused its discretion by denying that request. *See Latham*, 514 S.W.3d at 803; *see also Calderon v. State*, No. 10-17-00265-CR, 2019 WL 962310, at *3 (Tex. App.—Waco Feb. 27, 2019, pet. ref'd) (mem. op., not designated for publication) (rejecting a challenge to timeliness requirement).

Although Yadav's brief implies the trial court did not permit any summation to be offered on his behalf, the record shows his attorneys presented closing argument to the jury. To the extent Yadav argues he should have been allowed to present his own closing in addition to that offered

by his attorneys, we overrule that argument. "There is no constitutional right in Texas to hybrid representation partially pro se and partially by counsel." *Landers v. State*, 550 S.W.2d 272, 280 (Tex. Crim. App. 1977); *see also Webb v. State*, 533 S.W.2d 780, 784 (Tex. Crim. App. 1976) (noting Texas courts have "held that an accused does not have the right to be both represented by counsel and also propound his own questions to witnesses and make jury argument in his own behalf"). The Texas Court of Criminal Appeals recently reiterated that hybrid representation "is disallowed in Texas." *See Tracy v. State*, 597 S.W.3d 502, 509 (Tex. Crim. App. 2020). We therefore overrule Yadav's eighth and ninth issues.

Right to Testify

In his tenth issue, Yadav contends he was denied the right to testify on his own behalf. A criminal defendant has a constitutional right to testify in his own defense. *See Rock v. Arkansas*, 483 U.S. 44, 51–52 (1987); *Nelson v. State*, 765 S.W.2d 401, 404 (Tex. Crim. App. 1989). However, "[e]ven constitutional errors may be waived by failure to timely complain in the trial court." *Pabst v. State*, 466 S.W.3d 902, 907 (Tex. App.—Houston [14th Dist.] 2015, no pet.). "Although there are no technical considerations or forms of words required to preserve an error for appeal, a party must be specific enough so as to 'let the trial judge know what he wants, why he thinks himself entitled to it, and do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it.'" *Resendez v. State*, 306 S.W.3d 308, 312–13 (Tex. Crim. App. 2009) (quoting *Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992)).

Here, nothing in the record shows Yadav ever clearly invoked his right to testify, either through his attorneys or during his own discussions with the trial court. In his reply brief, Yadav contends that his statement, "All the evidence that we haven't presented to the jury or to this Court, so I would like to present all those cases—all those evidence myself," was sufficient to put the

trial court on notice that he wanted to testify in his own defense. However, Yadav made that statement in response to the question, "Can you let me know why you'd like to represent yourself?" Under these circumstances, we conclude that this statement, without more, did not clearly and specifically invoke Yadav's right to testify. *See id.* Moreover, while Yadav states in his brief that he objected to jury instructions indicating he had chosen not to testify, the record does not support this assertion. As a result, the record does not allow us to conclude that the trial court was aware Yadav wanted to testify at a time when it was "in a proper position to do something about it" but nevertheless denied him that right. *Id.*

It is true, as Yadav notes, that the trial court "asked the court reporter to go off-the-record for 35 minutes" shortly before he indicated he wanted to dismiss his attorneys and represent himself. Yadav appears to contend that he expressed his wish to testify during those 35 minutes. However, nothing in the record indicates Yadav objected to going off the record or specifically asked for a record to be made during that time. As a result, he waived any complaint he may have had about the trial court's decision to go off the record. *See Valle v. State*, 109 S.W.3d 500, 508–09 (Tex. Crim. App. 2003). Additionally, we cannot consider any factual assertions about what purportedly happened off the record. *Hiatt v. State*, 319 S.W.3d 115, 123 (Tex. App.—San Antonio 2010, pet. ref'd). Because nothing in the record shows Yadav expressed a desire to testify but was denied the right to do so, we conclude he has not preserved this issue for our review. TEX. R. APP. P. 33.1; *see Pabst*, 466 S.W.3d at 907. We overrule Yadav's tenth issue.

Yadav's Twelfth Issue

In his twelfth issue, Yadav appears to argue the State colluded with One Frost and its employees to offer damaging testimony against him. He also appears to contend that the State and/or One Frost improperly refused to disclose evidence to him, such as "all agreements between State and [One Frost]" that he believes would show "collusion" between the State and witnesses

employed by One Frost. Finally, he contends that a number of the State's witnesses offered untruthful testimony about the events leading up to his arrest, implies the State had a duty "to correct the fallacious testimonies of" its witnesses, and argues the trial court erred by not charging the State's witnesses with perjury.

Because Yadav's twelfth issue "is based on more than one legal theory and raises more than one specific complaint," it is multifarious. *Prihoda v. State*, 352 S.W.3d 796, 801 (Tex. App.—San Antonio 2011, pet. ref'd). "As an appellate court, we may refuse to review a multifarious issue or we may elect to consider the issue if we are able to determine, with reasonable certainty, the alleged error about which the complaint is made." *Id.* The basis for each complaint appears to be that the State's witnesses gave untruthful testimony. "In the interest of justice, we elect to consider this contention." *Id.*

Yadav points to nothing in the record that conclusively supports his assertions that the State's witnesses lied. Although Yadav disputes the witnesses' recitation of events, as an appellate court, we have no authority to re-weigh the evidence or substitute our own judgment for that of the jury. *See Febus v. State*, 542 S.W.3d 568, 572 (Tex. Crim. App. 2018). While Yadav contends the video evidence offered at trial disproves the testimony of the State's witnesses, the jury viewed those videos and could therefore draw its own conclusions about their impact on the witnesses' credibility. *Cf. Zill v. State*, 355 S.W.3d 778, 788 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *see also Gonzales v. State*, No. 01-15-00914-CR, 2016 WL 5920778, at *4 (Tex. App.—Houston [1st Dist.] Oct. 11, 2016, no pet.) (mem. op., not designated for publication). Moreover, as noted above, Yadav's attorneys repeatedly pointed to perceived discrepancies between the video evidence and the State's witnesses' testimony during cross-examination. *See Trippell v. State*, 535 S.W.2d 178, 181 (Tex. Crim. App. 1976) ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.") (internal quotation marks

omitted). Because we must defer to the jury's determinations on the credibility of the witnesses and the weight to be given to their testimony, we overrule Yadav's twelfth issue. *See Hines*, 383 S.W.3d at 623.

Motion for New Trial

In his fourteenth issue, Yadav argues the trial court erred by not holding a hearing on his motions for new trial and denying those motions by operation of law. The State responds that Yadav was not entitled to a hearing because he did not timely present his motions to the trial court.

"The right to a hearing on a motion for new trial is not absolute." *Aguilar v. State*, 547 S.W.3d 254, 264 (Tex. App.—San Antonio 2017, no pet.). A criminal defendant who seeks a new trial must present his motion to the judge who tried the case within ten days of its filing. TEX. R. APP. P. 21.6; *Aguilar*, 547 S.W.3d at 264. To satisfy this requirement, the record must contain "some documentary evidence or notation that the trial judge personally received a copy of the motion and could therefore decide whether to set a hearing or otherwise rule upon it." *Gardner v. State*, 306 S.W.3d 274, 305 (Tex. Crim. App. 2009). "Without any documentary proof that the trial judge personally saw the motion for new trial, the judge cannot be faulted for failing to hold a hearing on the motion." *Aguilar*, 547 S.W.3d at 265.

Here, Yadav told the trial court at the end of his July 8, 2019 sentencing hearing that he "would like to file" a motion for new trial. The trial court responded that he needed "to do that all through the proper channels . . . . That's not today and that's not done orally." Yadav then filed two written motions for new trial on August 7, 2019. However, he did not file a separate motion requesting a hearing, the motions do not contain any notation indicating the judge saw them, and there is no entry on the docket sheet showing the motions were presented to the judge. *See id.* Because the record does not contain any documentary proof that the trial court judge personally saw either of Yadav's motions within ten days of their filing, we conclude Yadav failed to timely

present his motions for new trial. *See id.* at 265–66. As a result, the trial court did not abuse its discretion by allowing the motions to be overruled by operation of law without a hearing. *See id.* We overrule Yadav's fourteenth issue.

Yadav's Expert Witness

In his sixteenth issue, Yadav argues the trial court erred by "ignoring" the testimony of his expert witness, Russell McWhorter, who testified that Ortega violated certain policies and procedures of the Bexar County Sheriff's Office during Yadav's arrest. However, the jury was the sole judge of both McWhorter's credibility and the weight to give to his testimony. *Williams v. State*, 432 S.W.3d 450, 453 (Tex. App.—San Antonio 2014, pet. ref'd). We "may not sit as a thirteenth juror and substitute our judgment for that of the fact-finder." *Id.* We therefore overrule Yadav's sixteenth issue.

CONCLUSION

We affirm the trial court's judgment.

Beth Watkins, Justice

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