In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-15-00125-CR

CONSTANTINO RIOS MORALES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 249th District Court
Johnson County, Texas
Trial Court No. F48830

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

After stopping a pickup truck driven by Constantino Rios Morales for several traffic violations and determining that Morales had various warrants outstanding for his arrest, Cleburne[1] Police Officer Eric Alexander arrested Morales and, following that arrest, searched the truck with Patrol Lieutenant Shane Wickson. Among the items found in the truck during the search were three tablet computers—one of which was determined to have been stolen—thirty-nine grams of methamphetamine, drug paraphernalia, and $483.00 in cash.

As a result, a Johnson County jury found Morales guilty of possessing over four, but less than 200 grams of methamphetamine with intent to deliver.[2] Morales was sentenced to forty-five years' imprisonment and fined $10,000.00.

On appeal, Morales argues various grounds related to his effort to suppress certain items of evidence, asserts that the evidence is legally insufficient to support his conviction, and claims he was wrongfully denied his right to due process, a fair trial, and a mistrial all springing from the trial court's comments, not in the jury's presence, concerning proof of the chain of custody.

We affirm the judgment of the trial court, because (1) Morales' issues regarding his arrest and the legality of the search were not preserved; (2) Morales' truck spoliation issue, though preserved, is inadequately briefed; (3) the search of the iPad did not violate Morales' Fourth

[1]Originally appealed to the Tenth Court of Appeals in Waco, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. *See* TEX. GOV'T CODE ANN. § 73.001 (West 2013). When different from our own, we will follow the precedent of the Tenth Court of Appeals in deciding this case. *See* TEX. R. APP. P. 41.3.

[2]*See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.102(6), 481.112(a), (d) (West 2010).

Amendment rights; (4) legally sufficient evidence supports the finding that Morales possessed the drugs with intent to deliver; and (5) Morales did not preserve any complaint related to the trial court's comments regarding proof of the chain of custody.

(1) Morales' Issues Regarding His Arrest and the Legality of the Search Were Not Preserved

Morales asserts that, at the suppression hearing, no officer testified that he was under arrest or how the traffic stop resulted in his arrest, that the inventory search was conducted in accordance with Cleburne Police Department policies and procedures, or that they had probable cause to search the pickup. Therefore, he argues, because the State failed to show that the search was legal, the trial court erred in entering findings of fact in support of the legality of the search and in failing to suppress the evidence from the search. The State argues that Morales failed to preserve any error related to the legality of the search of the vehicle.

A motion to suppress evidence is a specialized objection to the admissibility of evidence. *Galitz v. State*, 617 S.W.2d 949, 952 n.10 (Tex. Crim. App. 1981). As such, a motion to suppress is required to meet the requirements of an objection. *Carroll v. State*, 911 S.W.2d 210, 218 (Tex. App.—Austin 1995, no pet.); *Mayfield v. State*, 800 S.W.2d 932, 935 (Tex. App.—San Antonio 1990, no pet.). To preserve an issue involving the admission of evidence for appellate review, the objection is required to inform the trial court why, or on what basis, the evidence should be excluded. *Ford v. State*, 305 S.W.3d 530, 533 (Tex. Crim. App. 2009) (citing *Cohn v. State*, 849 S.W.2d 817, 821 (Tex. Crim. App. 1993) (Campell, J., concurring)).[3] In order to preserve a

[3]*See also* TEX. R. APP. P. 33.1(a)(1)(A) (error preserved only when record shows "complaint was made to the trial court by a timely request, objection, or motion that stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context").

complaint on appeal, "all a party has to do … is to let the trial judge know what he wants, why he thinks himself entitled to it, and to 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." *Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992). However, the objection must be sufficiently clear so that the trial court has an opportunity to address or correct the purported deficiency. *Ford*, 305 S.W.3d at 533. For this reason, "shotgun objections" citing many grounds for the objection without argument will not preserve points on appeal based on authority that is just mentioned in the trial court without argument. *Johnson v. State*, 263 S.W.3d 287, 290 (Tex. App.—Houston [1st Dist.] 2007, pet. dism'd); *Webb v. State*, 899 S.W.2d 814, 818 (Tex. App.—Waco 1995, pet. ref'd). A form motion to suppress asserting multiple grounds that are not subsequently asserted with argument at the suppression hearing will not preserve those grounds on appeal. *See Johnson*, 263 S.W.3d at 289–90. Also, an issue on appeal that does not comport with the objection made at trial presents nothing for appellate review. *Ibarra v. State*, 11 S.W.3d 189, 197 (Tex. Crim. App. 1999); *Wright v. State*, 154 S.W.3d 235, 241 (Tex. App.—Texarkana 2005, pet. ref'd).

In the trial court, Morales filed a generic motion to suppress alleging,

> 2. The actions of the Cleburne Police Department violated the constitutional and statutory rights of the Defendant under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I, Section 9 of the Texas Constitution, and Article 38.23 of the Texas Rules [sic] of Criminal Procedure.
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> . . . .
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> 4. Any tangible evidence seized in connection with [the pickup] was seized without probable cause or other lawful authority in violation of the rights of . . . Morales pursuant to the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I, Sections 9, 10 and 19 of the Constitution of the State of Texas.

The motion did not contain any allegation of fact or argument supporting these alleged violations.

At the hearing on Morales' motion to suppress, before any testimony was taken, trial counsel for Morales stated that his motion to suppress covered only two issues, spoliation of evidence resulting from the State's release of the pickup from its custody, and a possible statement or gesture made by Morales during the search.[4] After testimony was taken, Morales also asserted the illegality of the search of one of the tablet computers, an iPad Mini (hereinafter, "the iPad"). At no time during the hearing did Morales argue that he was not under arrest at the time of the search or that there was not probable cause for the search. Further, Morales never contested the validity of the inventory search and never argued that the inventory search was not properly conducted.[5] Therefore, his complaints regarding his arrest and the legality of the search are not preserved for our review.

(2) Morales' Truck Spoliation Issue, Though Preserved, Is Inadequately Briefed

Morales also argues that the State failed to properly preserve the pickup itself as a source of evidence, thereby preventing him from reviewing the pickup for exculpatory evidence and violating his rights under the due course of law provision of the Texas Constitution.[6] The State

[4]This statement or gesture was not introduced by the State and is not an issue on appeal.

[5]To the contrary, before any testimony was taken, counsel for Morales represented to the trial court that

> [Counsel for Morales]: But in any event, Mr. Morales had outstanding warrants. He was arrested, and then the police announced they were doing an inventory search of the vehicle; and at that point they discovered contraband in the vehicle in the form of 39 grams of methamphetamine, digital scales and small plastic baggies that were located in a removable -- in a removable panel in the center console of the vehicle.

[6]*See* TEX. CONST. art. 1, § 19. Morales argues that the due course of law provision provides greater protection than the federal Due Process Clause, citing *Pena v. State*, 226 S.W.3d 634, 651 (Tex. App.—Waco 2007), *rev'd on other*

responds that Morales failed to show that the State's actions in releasing the pickup violated his right to due process.

Although this issue was preserved for appellate review, the inadequate brief on this issue presents nothing for our review. Morales' brief asserts that the trial court erred in denying his motion to suppress since the State failed to preserve the pickup, thereby preventing him from reviewing it for exculpatory evidence. Morales does not point us to any testimony in the record identifying any exculpatory evidence. Rather, he merely refers to possible "finger prints" as an example, without any argument or citing any authority holding that the presence or absence of finger prints in or on the pickup would in any way tend to exculpate him from the charged offense. "To preserve error on appeal an appellant's 'brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record.'" *Johnson v. State*, 263 S.W.3d 405, 416 (Tex. App.—Waco 2008, pet. ref'd) (quoting TEX. R. APP. P. 38.1(g)). Further, "[w]here the 'appellant points us to nothing in the record, makes no argument, and cites no authority to support [ ]his proposition,' '[w]e will not make [the] appellant's arguments for him, and [will] hold the allegation to be inadequately briefed.'" *Id.* (quoting *Wyatt v. State*, 23 S.W.3d 18, 23 n.5 (Tex. Crim. App. 2000)). When an issue is inadequately briefed, it "'presents nothing

grounds, 285 S.W.3d 459 (Tex. 2009). However, Morales never asserted this argument at the trial court and acquiesced when the State argued that the proper standard for reviewing spoliation of evidence claims was that developed in cases considering the requirements under the Due Process Clause. Further, at the suppression hearing, Morales never mentioned the due course of law provision of the Texas Constitution. Since Morales failed to "distinguish the rights and protections afforded under the Texas due course of law provision from those provided under" the Due Process Clause in the trial court, he "has failed to preserve his complaint that the due course of law provides greater protection for appellate review." *Pena v. State*, 285 S.W.3d 459, 464 (Tex. Crim. App. 2009).

for review.'" *Id.* (quoting *Saldano v. State*, 232 S.W.3d 77, 107 (Tex. Crim. App. 2007)). Since this issue is inadequately briefed, Morales has presented nothing for our review.[7]

(3) The Search of the iPad Did Not Violate Morales' Fourth Amendment Rights

Morales asserts also that the officers accessed and searched the iPad without a search warrant in violation of United States Supreme Court precedent. *See Riley v. California*, 134 S.Ct. 2473 (2014). The State argues that, since the iPad is stolen property, Morales lacks standing to challenge the legality of its search.

At the suppression hearing, Alexander and Wickson both testified that the search of the pickup revealed the presence of three tablet computers, one of which was the iPad, which had inside of it a name and telephone number not belonging to Morales. Alexander testified that he and Wickson contacted the owner, who identified the iPad and professed not knowing Morales or the whereabouts of this iPad. Wickson also testified that they confirmed that the iPad was stolen.

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[7]Even if this issue had been preserved, Morales failed to show that the evidence from the pickup should be suppressed.

> The duty to preserve evidence is limited to evidence that possesses an exculpatory value that was apparent before the evidence was destroyed. *California v. Trombetta*, 467 U.S. 479, 489, 104 S.Ct. 2528, 2534, 81 L.Ed.2d 413 (1984); *McDonald v. State*, 863 S.W.2d 541, 543 (Tex. App.—Houston [1st Dist.] 1993, no pet.). Therefore, a defendant must demonstrate the lost evidence was both favorable and material to his case. *U.S. v. Valenzuela–Bernal*, 458 U.S. 858, 873, 102 S.Ct. 3440, 3449, 73 L.Ed.2d 1193 (1982); *Nastu v. State*, 589 S.W.2d 434, 441 (Tex. Crim. App. 1979); *McDonald*, 863 S.W.2d at 543. A showing that the lost evidence *might* have been favorable does not satisfy the materiality requirement. *McDonald*, 863 S.W.2d at 543; *Hebert v. State*, 836 S.W.2d 252, 254 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd). Further, to establish that the failure to preserve [evidence] constitutes a violation of due process or due course of law rights, appellant must demonstrate the police [failed to preserve the evidence] in bad faith. *See Hebert*, 836 S.W.2d at 254.

Mahaffey v. State, 937 S.W.2d 51, 53 (Tex. App.—Houston [1st Dist.] 1996, no pet.). At the suppression hearing, there was no showing that any material evidence favorable to Morales was lost, or that there was any bad faith on the part of the State in not preserving the pickup.

On cross-examination, Wickson described how he activated the iPad, unlocked it, pressed the "Settings" icon, then pressed another icon to obtain the name and telephone number of the purported owner. He also acknowledged that he did not have a search warrant to search the iPad. Morales argued at trial, and in his brief in this Court, only that accessing the owner information on the iPad without a search warrant was an illegal search, citing *Riley*, and that the iPad and all testimony related to it should have been suppressed. Therefore, Morales has preserved only his Fourth Amendment claim for our review.[8] *See id.* at 2482.

In *Riley*, the United States Supreme Court held that law enforcement officers must generally secure a warrant before searching the data on a defendant's cellular telephone. *Id.* at 2485, 2493. Although *Riley* involved the search of data on a "smart" cell phone, we believe the Court's concerns regarding the intrusion on the privacy of the owner represented by a search of data on a cell phone or smart phone[9] apply equally to other electronic devices like the iPad involved

[8]*Riley* involved a claim of an illegal search under the Fourth Amendment. *Riley*, 134 S.Ct. at 2482; *see* U.S. CONST. amend. IV.

[9]For instance, in its discussion the Court noted:

> The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months, as would routinely be kept on a phone.
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> Finally, there is an element of pervasiveness that characterizes cell phones but not physical records. Prior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day. . . . Today, by contrast, it is no exaggeration to say that many of

in this case. *See id.* at 2489–91. *Riley*, however, involved the police accessing information on devices owned by the defendants. *Id.* at 2480–81. Thus, the defendants in *Riley* were asserting their personal Fourth Amendment rights not to have their cell phones, and the personal information pertaining to the defendants contained in those phones, unreasonably searched. In other words, the defendants in *Riley* were asserting their legitimate expectations of privacy in their own cell phones and their own personal information.[10] In this case, however, the undisputed testimony at the suppression hearing showed that the iPad was stolen and was owned by a third party who did not know Morales.

"'Fourth Amendment rights are personal rights which . . . may not be vicariously asserted.'" *Rakas v. Illinois*, 439 U.S. 128, 133–34 (1978) (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)). Consequently, "[a] person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." *Id.* at 134 (citing *Alderman*, 394 U.S. at 174). In order to assert his Fourth Amendment claim, "an accused must show that the search violated *his*, rather than a third party's, legitimate expectation of privacy." *Matthews v. State*, 431 S.W.3d 596, 606 (Tex. Crim. App. 2014) (citing *Rakas*, 439 U.S. at 134; *Kothe v. State*, 152 S.W.3d 54, 59 (Tex. Crim. App. 2004)). To show a legitimate expectation of

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> the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate.

Riley, 134 S.Ct. at 2489–90 (citations omitted).

[10]*See State v. Granville*, 423 S.W.3d 399, 405–12 (Tex. Crim. App. 2014) (recognizing that a person has legitimate expectation of privacy in cell phone, even when temporarily stored in jail property room).

privacy, the defendant "must show (1) that he exhibited an actual subjective expectation of privacy in the place invaded . . . and (2) that 'society is prepared to recognize that expectation of privacy as objectively reasonable.'" *Id.* (quoting *State v. Betts*, 397 S.W.3d 198, 203 (Tex. Crim. App. 2013) (citing *Smith v. Maryland*, 442 U.S. 735, 740 (1979))).

The record in this case does not show that Morales exhibited any actual subjective expectation of privacy in the iPad. Further, Morales does not assert that he had any property or possessory interest in the iPad. He neither contests that the iPad was stolen property nor contends that he had any right to lawfully possess it. It is well recognized that society is not prepared to recognize as reasonable any actual expectation of privacy one might have in property stolen from another. *Jackson v. State*, 745 S.W.2d 4, 8 (Tex. Crim. App. 1988); *see also Smith*, 442 U.S. at 740; *Hughes v. State*, 897 S.W.2d 285, 305 (Tex. Crim. App. 1994); *Viduarri v. State*, 626 S.W.2d 749, 750 (Tex. Crim. App. 1981); *Henderson v. State*, 395 S.W.3d 304, 310 (Tex. App.—Eastland 2013, no pet.); *Pennywell v. State*, 84 S.W.3d 841, 844 (Tex. App.—Houston [1st Dist.] 2002, pet. granted). Since Morales failed to show that he had a legitimate expectation of privacy in the iPad, his Fourth Amendment rights were not violated in its search.[11] *See Rakas*, 439 U.S. at 148–50. Therefore, the trial court did not err in denying the motion to suppress. We overrule this point of error.

[11]Morales has not directed us to, nor have we found, any authority applying *Riley* to a defendant who failed to show he had a legitimate expectation of privacy in the property searched. To the contrary, cases considering this question have held that *Riley* only applies when the defendant can show a legitimate expectation of privacy. *See, e.g.*, *United States v. Boyce*, No. 2014–00029, 2015 WL 856943, at *6 n.16 (D. V.I. Feb. 26, 2015); *State v. Purtell*, 851 N.W.2d 417, 427 (Wis. 2014); *State v. Clyburn*, 770 S.E.2d 689, 694–96 (N.C. Ct. App. 2015).

(4) Legally Sufficient Evidence Supports the Finding that Morales Possessed the Drugs with Intent to Deliver

Morales asserts that there is legally insufficient evidence to support the jury's finding that he intentionally or knowingly possessed the methamphetamine with intent to deliver. Morales primarily argues that there is insufficient evidence that links him to the methamphetamine to give rise to a reasonable inference that he knew of its existence and exercised control over it, but also claims that there was insufficient evidence of intent to deliver. In his brief, Morales emphasizes the fact that the methamphetamine was hidden and argues that the fact that he was the only one near the methamphetamine is insufficient to link him to it. However, Morales fails to address the other evidence that supports the inferences that he knowingly possessed the substance and that he intended to deliver the same.

In evaluating legal sufficiency, we review all the evidence in the light most favorable to the trial court's judgment to determine whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt. *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *Hartsfield v. State*, 305 S.W.3d 859, 863 (Tex. App.—Texarkana 2010, pet. ref'd). Our rigorous legal sufficiency review focuses on the quality of the evidence presented. *Brooks*, 323 S.W.3d at 917–18 (Cochran, J., concurring). We examine legal sufficiency under the direction of the *Brooks* opinion, while giving deference to the responsibility of the jury "to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson*, 443 U.S. at 318–19); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

Legal sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). The "hypothetically correct" jury charge is "one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Id*. at 240.

In this case, based on the indictment, the State was required to prove beyond a reasonable doubt that (1) on or about August 31, 2014, (2) Morales (3) knowingly possessed (4) with intent to deliver (5) methamphetamine (6) in the amount of four or more, but less than 200 grams. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.102(6), 481.112(a), (d). "To prove unlawful possession of a controlled substance, the State must prove that: (1) the accused exercised control, management, or care over the substance; and (2) the accused knew the matter possessed was contraband." *Poindexter v. State*, 153 S.W.3d 402, 405 (Tex. Crim. App. 2005) (citing *Joseph v. State*, 897 S.W.2d 374, 376 (Tex. Crim. App. 1995); *Martin v. State*, 753 S.W.2d 384, 387 (Tex. Crim. App. 1988)). Simply being present at a location where drugs are found is insufficient, by itself, to establish actual care, custody, or control of those drugs. *Evans v. State*, 202 S.W.3d 158, 162 (Tex. Crim. App. 2006). Knowing possession may be proven by direct or circumstantial evidence, but in either case, "'it must establish, to the requisite level of confidence, that the accused's connection with the drug was more than just fortuitous.'" *Poindexter*, 153 S.W.3d at 406 (quoting *Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995)).

Some factors that may be legally sufficient, either alone or in combination, to circumstantially establish an accused's knowing possession of a controlled substance include: (1) the defendant's presence during the search; (2) whether the controlled substance was in plain view; (3) the defendant's proximity to and the accessibility of the controlled substance; (4) whether the defendant was under the influence of a controlled substance when arrested; (5) whether the defendant possessed other contraband or controlled substances when arrested; (6) whether the defendant made incriminating statements when arrested; (7) whether the defendant attempted to flee; (8) whether the defendant made furtive gestures; (9) whether there was an odor of controlled substances; (10) whether other contraband or drug paraphernalia were present; (11) whether the defendant owned or had the right to possess the place whether the controlled substance was found; (12) whether the location of the controlled substance was enclosed; (13) whether the defendant was found with a large amount of cash; and (14) whether the conduct of the defendant indicated a consciousness of guilt. *Evans*, 202 S.W.3d at 162 n.12; *see also Hargrove v. State*, 211 S.W.3d 379, 385–86 (Tex. App.—San Antonio 2006, pet. ref'd); *Muckleroy v. State*, 206 S.W.3d 746, 748 n.4 (Tex. App.—Texarkana 2006, pet. ref'd); *Olivarez v. Stat*e, 171 S.W.3d 283, 291 (Tex. App.—Houston [14th Dist.] 2005, no pet.); *Kyte v. State*, 944 S.W.2d 29, 31 (Tex. App.—Texarkana 1997, no pet.). The logical force of the links, not the number of links, is dispositive. *Evans*, 202 S.W.3d at 162; *Smith v. State*, 176 S.W.3d 907, 916 (Tex. App.—Dallas 2005, (3) pets. ref'd). Further, the links need not exclude every other reasonable hypothesis but the defendant's guilt. *Brown v. State*, 911 S.W.2d 744, 748 (Tex. Crim. App. 1995).

In addition, the State had to prove, beyond a reasonable doubt, Morales' intent to deliver. Intent to deliver may be established by testimony of experienced law enforcement officers. *Moreno v. State*, 195 S.W.3d 321, 326 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd). Some factors that may show intent include:

> "(1) the nature of the location where the defendant was arrested; (2) the quantity of drugs the defendant possessed; (3) the manner of packaging of the drugs; (4) the presence or absence of drug paraphernalia (for use or sale); (5) whether the defendant possessed a large amount of cash in addition to the drugs; and (6) the defendant's status as a drug user."

Erskine v. State, 191 S.W.3d 374, 380 (Tex. App.—Waco 2006, no pet.) (quoting *Guy v. State*, 160 S.W.3d 606, 613–14 (Tex. App.—Fort Worth 2005, pet. ref'd)).

Alexander testified that he stopped the pickup driven by Morales[12] for several traffic violations on the night of August 31, 2014. After arresting Morales for outstanding warrants, Alexander and Wickson conducted an inventory search of the vehicle. The officers initially found three tablet computers and determined that one, the iPad, was stolen property.[13] The officers testified that people who use drugs often steal items of value to trade for drugs. As they continued their search, Alexander removed the center drink holder on the console. In the compartment beneath the drink holder[14] he found a green bag containing two baggies that held what was later determined by the Texas Department of Public Safety Crime Labortory to be over thirty-nine

[12]Eric Mills testified that he had purchased the pickup driven by Morales from Jeff Dugger Motor Company, but had sold it to Morales in early August.

[13]The owner of the iPad testified that he did not know Morales, that he did not give him permission to take or possess his iPad, and that it was stolen.

[14]Mills also testified that he never used the compartment beneath the drink holder and was not aware of its existence.

grams of methamphetamine. In addition, he found a glass bulb pipe with white residue and a one-inch square Ziploc baggie, which Alexander testified is typically used to transport and distribute small amounts of methamphetamine. In the same compartment, Wickson found digital scales, which the officers testified are carried by drug dealers and used to weigh drugs when buying and selling the drugs. Finally, the officers also recovered over $475.00 as a result of the search.[15] Alexander also testified that someone possessing a large amount of methamphetamine indicates that they may be selling or transporting the drugs. Finally, Alexander testified that the large amount of methamphetamine found in close vicinity to the digital scales, the small baggy, the large amount of cash, and the stolen iPad was indicative of a drug dealer with intent to deliver.

On cross-examination, Alexander stated he had no personal knowledge of how much an average methamphetamine user buys at one time. In his experience, the average user consumes less than a gram at a time. He also testified that he would associate the glass pipe with a user of methamphetamine, but had no personal knowledge that Morales used drugs. He also acknowledged that users of methamphetamine might use digital scales to weigh their drugs and that users might use small baggies to store their drugs. Wickson testified on cross-examination that he did not verify the iPad owner's story and did not know how the three tablet computers got into Morales' pickup. Although he acknowledged that some methamphetamine users may stock up, he testified that the typical user buys it and consumes it immediately.

Martha Cecelia Manzo testified that she is currently in custody in Johnson County and has been indicted on four charges of delivery of methamphetamine, each occurring between July 25,

[15]Alexander did not remember if the cash was found on Morales' person or inside the pickup.

2014, and August 20, 2014. She also testified that Morales was the person who supplied her with the methamphetamine on each of these occasions. Manzo had also seen Morales earlier on August 31, and he told her that he was going to pick up some methamphetamine. She said that, after he was arrested, she talked with him by telephone, and he told her he had gotten pulled over and he had a large amount on him. The State also introduced the recording and transcript of a telephone conversation between Morales and his ex-wife the night he was arrested. In this conversation, Morales told his ex-wife, "They caught me with all the drugs over an ounce, about 40 grams."

Adam King, the commander of the Stop the Offender Special Crimes Unit in Cleburne, testified, based on his training and experience, that possession of an amount of methamphetamine of 3.5 grams or less usually indicates the person is a user and that over that amount begins to look like a dealer. He opined that possessing over thirty-seven grams would definitely indicate either a dealer or a supplier.[16] He also testified that finding scales, baggies, currency, a large amount of drugs, stolen property, and evidence of past dealing all indicate an intent to deliver. He confirmed that stolen property, especially electronics, are often traded for drugs. He also testified that finding $483.00 would not normally indicate a dealer, unless it was found along with drugs, scales, and baggies. On cross-examination, King acknowledged that there was no amount legally that automatically changes possession into possession with intent to deliver. He also acknowledged that sometimes users have scales.

[16]He explained that a dealer deals directly to the users, while a supplier is one who deals with dealers.

This evidence shows that Morales was the driver and only occupant of the pickup and that he either owned or had the right to possess the pickup. It also shows that over thirty-nine grams of methamphetamine were discovered in a hidden compartment, readily accessible by Morales. Along with the large amount of methamphetamine, other drug paraphernalia, a large amount of cash, the stolen iPad, a baggy, and digital scales, all indicative of an intent to deliver, were found in the hidden compartment. The evidence also demonstrated that Morales had supplied methamphetamine in the recent past to a drug dealer, Manzo. Finally, after his arrest, Morales made incriminating statements to both Manzo and his ex-wife. Based on this evidence, a rational jury could find beyond a reasonable doubt that Morales exercised control, management, or care over the thirty-nine grams of methamphetamine, that he knew it was contraband, and that he possessed it with the intent to deliver it. *See Poindexter*, 153 S.W.3d at 405; *Moreno*, 195 S.W.3d at 326. We overrule this point of error.

(5) Morales Did Not Preserve any Complaint Related to the Trial Court's Comments Regarding Proof of the Chain of Custody

Morales asserts that his constitutional rights to a fair trial and due process were infringed by certain remarks made by the trial court outside the presence of the jury. In a related point of error, Morales incorporates the arguments and authorities under his issue regarding fair trial and asserts that the trial court erred in denying his motion for mistrial in connection with that issue. The State argues that Morales failed to preserve these alleged errors for appellate review. We agree.

To preserve a complaint for appellate review, a defendant must raise the complaint at trial by a timely request, objection, or motion specifically identifying the grounds for the ruling sought. TEX. R. APP. P. 33.1(a)(1)(A). A defendant's appellate contention must comport with the specific objection made at trial. *Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002). An objection based on one legal theory at trial may not be used to support a different legal theory on appeal. *Rezac v. State*, 782 S.W.2d 869, 870 (Tex. Crim. App. 1990); *Lasher v. State*, 202 S.W.3d 292, 296 (Tex. App.—Waco 2006, pet. ref'd). The appellate court will not consider errors, even alleged constitutional errors, not called to the trial court's attention. *Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995); *see Lasher*, 202 S.W.3d 296.

After the trial court heard chain-of-custody testimony, the methamphetamine found in the pickup was admitted into evidence without objection. A short while later, the court dismissed the jury for a short break. During that jury break, at a conference outside the presence of the jury, the trial court expressed questions it had regarding whether additional testimony may be necessary to prove the chain of custody of the methamphetamine. After returning from the break, and before the jury was brought back, Morales objected that the chain of custody had not been established and that the trial court's comments outside the presence of the jury were improper and a comment on the weight of the evidence. He then asked the trial court to declare a mistrial based on the improper comments. The constitutional theories Morales asserts on appeal do not comport with his trial objections. Therefore, he has failed to preserve these complaints for appellate review.[17]

[17]In his brief, Morales cites *Blue v. State*, 41 S.W.3d 129 (Tex. Crim. App. 2000) (plurality op.), which held that when a trial court makes an improper comment *in the presence of the jury*, no trial objection is needed to preserve error. *Id.* at 133. However, as the Waco Court of Appeals has recognized, "'Ordinarily, a complaint regarding an improper

See TEX. R. APP. P. 33.1(a)(1)(A). We overrule these points of error.

We affirm the judgment of the trial court.

Josh R. Morriss III
Chief Justice

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judicial comment must be preserved at trial." *Martinez v. State*, Nos. 10-13-00431-CR & 10-13-00432-CR, 2015 WL 5092672, at *16 (Tex. App.—Waco Aug. 27, 2015, no pet. h.) (mem. op., not designated for publication) (citing *Unkart v. State*, 400 S.W.3d 94, 99 (Tex. Crim. App. 2013)). The Waco Court went on to observe that "[t]he Court of Criminal Appeals . . . has stated that 'the *Blue* decision has no precedential value.'" *Id.* (citing *Unkart*, 400 S.W.3d at 99). We also emphasize that the trial court's comments in this case, unlike those made in *Blue*, were made outside the presence of the jury. In addition, we do not think the trial court's expressing its evidentiary concerns under these circumstances made him an advocate for the State, as argued by Morales. *See Abdygapparova v. State*, 243 S.W.3d 191, 209 (Tex. App.—San Antonio 2007, pet. ref'd). As noted, before the trial court's comments, the evidence had been admitted without objection. Although the State proffered additional chain-of-custody testimony, again without objection, no further ruling on the admissibility of the evidence was requested or given.