IN THE
TENTH COURT OF APPEALS

No. 10-16-00406-CR

KENNETH ARDEN COBB,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 413th District Court
Johnson County, Texas
Trial Court No. F49423

MEMORANDUM OPINION

In five issues, appellant, Kenneth Arden Cobb, challenges his conviction for manslaughter. *See* TEX. PENAL CODE ANN. § 19.04 (West 2011). Specifically, Cobb argues that: (1) the evidence supporting his conviction is insufficient; (2) the trial court erred by failing to provide a self-defense instruction to the lesser-included offense of manslaughter; (3) the trial court erred by failing to include language in the charge about finding him not guilty to the lesser-included offense of manslaughter; (4) the trial court

erred by excluding evidence of violent acts committed by the deceased prior to being shot by Cobb; and (5) the trial court erred by overruling his oral motion to suppress evidence obtained from his cell phone because the search-warrant affidavit did not establish probable cause. Because we overrule all of Cobb's issues on appeal, we affirm.

I. Background

Here, Cobb was charged by indictment with one count of murder for the shooting of Casey Potts. At trial, Cobb pleaded "not guilty" to the charged offense. At the conclusion of the guilt-innocence phase, the jury found Cobb guilty of the lesser-included offense of manslaughter, a second-degree felony. And at the conclusion of the punishment phase, the jury assessed punishment at twenty years' confinement in the Institutional Division of the Texas Department of Criminal Justice with a $10,000 fine. Thereafter, the trial court certified Cobb's right of appeal. Cobb filed a motion for new trial, which was overruled by operation of law. *See* TEX. R. APP. P. 21.8(a), (c). This appeal followed.

II. Sufficiency of the Evidence

In his first issue, Cobb argues that the evidence supporting his conviction for manslaughter is insufficient. Specifically, Cobb contends that because an instruction on self-defense was included in both the abstract portion of the jury charge and in one of the two application paragraphs on murder, and because the jury found him "not guilty" of murder, the jury must have agreed that he acted in self-defense. And as such, the jury

was precluded from making a finding of recklessness—the culpable mental state for manslaughter.

A. Standard of Review

In reviewing the sufficiency of the evidence to support a conviction, we view all of the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979); *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). This standard enables the fact finder to draw reasonable inferences from the evidence. *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Clayton*, 235 S.W.3d at 778. In performing our sufficiency review, we may not re-evaluate the weight and credibility of the evidence or substitute our judgment for that of the fact finder. *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999); *see Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000) ("We resolve inconsistencies in the testimony in favor of the verdict."). Instead, we determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict. *Hooper v. State*, 214 S.W.3d 9, 16-17 (Tex. Crim. App. 2007).

B. Applicable Law

A person commits manslaughter if he "recklessly causes the death of an individual." TEX. PENAL CODE ANN. § 19.04(a).

> A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Id. § 6.03(c) (West 2011).

C. Discussion

In Paragraph Five of the charge, the trial court provided the following instructions to the jury:

> Now bearing in mind the foregoing instruction, if you believe from the evidence beyond a reasonable doubt that the Defendant, KENNETH ARDEN COBB, on or about March 31, 2015, in the County of Johnson and State of Texas, did then and there intentionally or knowingly cause the death of an individual, namely Casey Potts, by shooting Casey Potts with a firearm or did then and there with intent to cause serious bodily injury to an individual, namely, Casey Potts, commit an act clearly dangerous to human life that caused the death of Casey Potts, by shooting him with a firearm, then you will find the defendant guilty of the offense of Murder as charged in the Indictment and so say by your verdict.

In the next paragraph, the charge instructed that even if the jury found the essential elements of murder proven beyond a reasonable doubt, they must find Cobb "not guilty" if they also determined that Cobb's use of deadly force was justified by self-defense.

Additionally, Paragraph Eight of the charge instructed:

> *If you have found the defendant not guilty in Paragraph V, above, then, and only then, in that event you will consider Manslaughter.* Now bearing in mind the foregoing instructions, if you believe from the evidence beyond a reasonable doubt that the Defendant, KENNETH ARDEN COBB, on or about March 31, 2015, in the County of Johnson and State of Texas, did then and there recklessly cause the death of an individual, namely, Casey Potts, by shooting him with a firearm, then you will find the Defendant guilty of the offense of Manslaughter as charged in the Indictment and so say by your verdict.

(Emphasis added).

Cobb argues on appeal that the jury's finding of "not guilty" to the murder charge necessarily means that they also found that he acted in self-defense, which, according to the charge, precluded a finding that he acted recklessly and his ultimate conviction for manslaughter. We are not persuaded by these contentions.

According to the charge in this case, the jury could only consider the lesser-included offense of manslaughter if they found that the State had not proven the essential elements of murder outlined in Paragraph Five of the charge. However, manslaughter was not an option for the jury to consider if they found Cobb "not guilty" of murder due to self-defense. By finding Cobb guilty of the lesser-included offense of manslaughter, the jury did not acquit Cobb of murder based on his self-defense theory.

Therefore, in light of the foregoing, we must now examine the record for evidence that Cobb recklessly caused the death of Potts. Here, the evidence was uncontroverted that Cobb shot and killed Potts. Indeed, Cobb admitted to the killing, though he told

police that he shot Potts in self-defense. In any event, Hailey Fowler, Potts's girlfriend, noted that Cobb picked her up on the night in question after she had gotten into an argument with Potts. Fowler told Cobb that Potts was angry, but that Potts did not have a weapon. Eyewitness Shelly Sullivan observed Potts and Cobb exit their respective vehicles to argue and posture for several minutes. Sullivan testified that, other than his mouth, Potts did not appear to be armed. Sullivan heard Cobb warn Potts, "I have a gun in here and I'll shoot you with it." Potts allegedly responded, "What, are you threatening me?" At this point, Sullivan observed Cobb pull out a semi-automatic Sig Sauer .22-caliber pistol and point the pistol at Potts. Cobb then pulled the trigger and shot Potts eight times at close range, with three of the entry wounds to the back and five entry wounds to Potts's left chest. As a result of being shot, Potts staggered back a couple of steps, collapsed near the driver's side rear wheel of Cobb's pickup truck, and died.

Viewing the evidence in the light most favorable to the verdict, we conclude that a rational factfinder could reasonably conclude that Cobb's act of shooting Potts eight times at close range was reckless such that it created a substantial and unjustifiable risk that Potts would die as a result. *See* TEX. PENAL CODE ANN. §§ 6.03(c), 19.04(a); *see also Bell v. State*, 693 S.W.2d 434, 438 (Tex. Crim. App. 2005) (recognizing that proof of intent or knowledge—i.e., higher culpable mental states—necessarily establishes the lower culpable mental state of recklessness). Accordingly, we conclude that the evidence is sufficient to support Cobb's conviction for manslaughter. *See* TEX. PENAL CODE ANN. §§

6.03(c), 19.04(a); *Bell*, 693 S.W.2d at 438; *see also Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Brooks*, 323 S.W.3d at 895; *Clayton*, 235 S.W.3d at 778. We overrule Cobb's first issue.

III. THE JURY CHARGE

In his second issue, Cobb asserts that the trial court erred by failing to include in the application paragraph for manslaughter an instruction on self-defense. Further, in his third issue, Cobb contends that the trial court erred by failing to authorize the jury to find him "not guilty" of the lesser-included offense of manslaughter in the application paragraph.

A. Applicable Law

In reviewing a jury-charge issue, an appellate court's first duty is to determine whether error exists in the jury charge. *Hutch v. State*, 922 S.W.2d 166, 170 (Tex. Crim. App. 1996). If error is found, the appellate court must analyze that error for harm. *Middleton v. State*, 125 S.W.3d 450, 453-54 (Tex. Crim. App. 2003). If an error was properly preserved by objection, reversal will be necessary if the error is not harmless. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). Conversely, if error was not preserved at trial by a proper objection, as was the case here, a reversal will be granted only if the error presents egregious harm, meaning Cobb did not receive a fair and impartial trial. *Id.* To obtain a reversal for jury-charge error, Cobb must have suffered actual harm and not just merely theoretical harm. *Sanchez v. State*, 376 S.W.3d 767, 775 (Tex. Crim. App. 2012); *Arline v. State*, 721 S.W.2d 348, 352 (Tex. Crim. App. 1986).

In determining whether charge error has resulted in egregious harm, we consider: (1) the entire jury charge; (2) the state of the evidence, including the contested issues and the weight of the probative evidence; (3) the final arguments of the parties; and (4) any other relevant information revealed by the trial court as a whole. *Allen v. State*, 253 S.W.3d 260, 264 (Tex. Crim. App. 2008). Jury-charge error is egregiously harmful if it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory. *Stuhler v. State*, 218 S.W.3d 706, 719 (Tex. Crim. App. 2007); *Sanchez v. State*, 209 S.W.3d 117, 121 (Tex. Crim. App. 2006).

Article 36.14 of the Code of Criminal Procedure requires the trial judge to give the jury,

> a written charge distinctly setting forth the law applicable to the case; not expressing any opinion as to the weight of the evidence, not summing up the testimony, discussing the facts or using any judgment in his charge calculated to arouse the sympathy or excite the passions of the jury.

TEX. CODE CRIM. PROC. ANN. art. 36.14 (West 2007). "[T]he judge's duty to instruct the jury on the law applicable to the case exists even when defense counsel fails to object to inclusions or exclusions in the charge; this may require the judge to *sua sponte* provide the jury with the law applicable to the case, under Article 36.14." *Taylor v. State*, 332 S.W.3d 483, 486 (Tex. Crim. App. 2011) (emphasis in original). "But it does not inevitably follow that he has a similar *sua sponte* duty to instruct the jury on all potential defensive issues, lesser-included offenses, or evidentiary issues. These are issues that frequently

depend upon trial strategy and tactics." *Delgado v. State*, 235 S.W.3d 244, 249 (Tex. Crim. App. 2007) (emphasis in original).

However, a trial court must charge the jury on any defensive issue raised by the evidence, "regardless of its substantive character." *Brown v. State*, 955 S.W.2d 276, 279 (Tex. Crim. App. 1997).

> "A defendant is entitled to an affirmative defensive instruction on every issue raised by the evidence regardless of whether it is strong, feeble, unimpeached, or contradicted, and even if the trial court is of the opinion that the testimony is not entitled to belief. The defendant's testimony alone may be sufficient to raise a defensive theory requiring a charge."

Id. (quoting *Williams v. State*, 630 S.W.2d 640, 643 (Tex. Crim. App. 1982)). "This rule is designed to insure that the jury, not the judge, will decide the relative credibility of the evidence." *Id.* (quoting *Woodfox v. State*, 742 S.W.2d 408, 409-10 (Tex. Crim. App. 1987)).

B. Manslaughter and Self-Defense

In the instant case, the justification defense of self-defense was raised by Cobb's statement to Johnson County Sheriff's Office Investigator Kevin Link that Cobb thought Potts had a gun. In light of this evidence, Cobb requested that the following instruction on self-defense be included in the abstract portion of the jury charge for the murder allegation:

> Now, if you find from the evidence beyond a reasonable doubt that on the occasion in question the defendant, Kenneth Arden Cobb, did kill Casey Potts by shooting Casey Potts with a firearm, as alleged in the indictment, but you further find from the evidence, as viewed from the standpoint of the defendant at the time, that from the words or conduct, or both, of Casey Potts it reasonably appeared to the defendant that his life or person was in

> danger and there was created in his mind a reasonable expectation or fear of death or serious bodily injury from the use of unlawful deadly force at the hands of Casey Potts, and that acting under such apprehension and reasonably believing that the use of deadly force on his part was immediately necessary to protect himself against Casey Pott's [sic] use or attempted use of unlawful deadly force, he shot Casey Potts with a firearm, then you should acquit the defendant on the grounds of self-defense, or, if you have a reasonable doubt as to whether or not the defendant was acting in self-defense on said occasion and under the circumstances, then you should give the defendant the benefit of that doubt and say by your verdict not guilty.

The trial court granted Cobb's request and included this instruction in the application portion of the charge pertaining to the murder allegation.

However, Cobb did not request that a self-defense instruction be included in the application portion of the charge as it pertained to manslaughter. Instead, Cobb requested the following instruction on manslaughter:

> Our law provides that a person commits an offense if he recklessly causes the death of an individual.
>
> A person acts with recklessy [sic], or is reckless, with respect to the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed fro [sic] the actor's standpoint.
>
> Now, if you find from the evidence beyond a reasonable doubt that Kenneth Arden Cobb, on or about March 31, 2015, in Johnson County, Texas, did recklessly cause the death of Casey Potts, by shooting Casey Potts with a firearm, then you will find the defendant guilty of manslaughter.

> Unless you do find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will find the defendant not guilty of manslaughter.

The jury charge instruction on manslaughter closely mirrored Cobb's requested manslaughter instruction.

In any event, the State concedes that the trial court erred by failing to include a self-defense instruction in the application paragraph for manslaughter. *See Barrera v. State*, 982 S.W.2d 415, 416 (Tex. Crim. App. 1998). Because he did not assert this objection to the charge in the trial court, Cobb did not preserve error; thus, the egregious-harm standard would normally apply. *See Druery v. State*, 225 S.W.3d 491, 504 (Tex. Crim. App. 2007). But it does not apply here because the error was invited. *See Druery*, 225 S.W.3d at 505-06; *Prystash v. State*, 3 S.W.3d 522, 531 (Tex. Crim. App. 1999).

> The court of criminal appeals has applied invited error when the defendant "invites" the trial court to do something, the trial court does the act, and thereafter the defendant complains of the trial court's action. *Kelley v. State*, 823 S.W.2d 300, 302 (Tex. Crim. App. 1992); *Capistran v. State*, 759 S.W.2d 121, 124 (Tex. Crim. App. 1988) (op. on reh'g). Under the doctrine of invited error, if a party requests or moves the court to make an erroneous ruling, and the court rules in accordance with the request or motion, the party responsible for the court's action cannot take advantage of the error on appeal. *Prystash v. State*, 3 S.W.3d 522, 531 (Tex. Crim. App. 1999), *cert. denied*, 529 U.S. 1102, 146 L. Ed. 2d 782, 120 S. Ct. 1840 (2000); *Capistran*, 759 S.W.2d at 124.
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> . . . .
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> The invited error rule in jury charges is one of long standing. *See Murphy v. State*, 640 S.W.2d 297, 299-300 (Tex. Crim. App. 1982) (appellate court held defendant was estopped from complaining about the legality of a search when he elected to prevent any disputed fact issue from coming before

> jury); *Cadd v. State*, 587 S.W.2d 736, 741 (Tex. Crim. App. 1979) (op. on reh'g) (appellate court held defendant in no position to complain about charge given because the defendant requested the charge); *Holmes v. State*, 140 Tex. Crim. 619, 146 S.W.2d 400, 403 (1940) (defendant objected to the wording of the charge, the wording was taken out, then defendant complained the wording was not in the charge, appellate court held defendant invited error and could not complain).

Willeford v. State, 72 S.W.3d 820, 823 (Tex. App.—Fort Worth 2002, pet. ref'd).

As noted above, Cobb requested a charge on manslaughter that omitted any mentioning of self-defense in the application paragraph; the trial court granted Cobb's requested instruction; and the instruction was incorporated as part of the court's charge to the jury. As such, we hold that the invited-error doctrine applies and that Cobb is estopped from complaining about the absence of a self-defense instruction in the application paragraph for manslaughter.

Moreover, even if the invited-error doctrine does not apply, Cobb has waived any error in the charge as to the absence of a self-defense instruction in the application paragraph for manslaughter. A defensive issue is not "law applicable to the case," for purposes of article 36.14 of the Code of Criminal Procedure, absent a timely request or objection. *Posey v. State*, 966 S.W.2d 57, 62 (Tex. Crim. App. 1998); *see Delgado*, 235 S.W.3d at 249. Furthermore, we do not perform a harmless-error analysis to review the omission of a jury instruction on a defensive issue that was not properly preserved by a request or objection. TEX. R. APP. P. 33.1; *see Posey*, 966 S.W.2d at 61; *see also Willeford*, 72 S.W.3d at 824. "This is because there is generally no 'error' in the charge, for which a harmless error

analysis is required, where the appellant fails to object to claimed errors of omission or commission in the charge." *Willeford*, 72 S.W.3d at 824 (citing *Posey*, 966 S.W.2d at 61). Accordingly, not only is Cobb estopped from making this complaint about the jury charge under the doctrine of invited error, but Cobb has also waived this complaint.

C. The Absence of an Instruction to Find Cobb "Not Guilty" in the Manslaughter Application Paragraph

Next, Cobb complains about the absence of an instruction in the manslaughter application paragraph informing the jury of the conditions required for acquittal. With regard to the application portion of the jury charge, the Court of Criminal Appeals has stated:

> The application paragraph is that portion of the jury charge that applies the pertinent penal law, abstract definitions, and general legal principles to the particular facts and the indictment allegations. Because that paragraph specifies the factual circumstances under which the jury should convict or acquit, it is the 'heart and soul' of the jury charge.
>
> When a definition or instruction on a theory of law . . . is given in the abstract portion of the charge, the application paragraph must
>
> (1) specify all of the conditions to be met before a conviction under such theory is authorized;
>
> (2) authorize a conviction under conditions specified by other paragraphs of the jury charge to which the application paragraph necessarily and unambiguously refers; or
>
> (3) contain some logically consistent combination of such paragraphs.

Vasquez v. State, 389 S.W.3d 361, 367 (Tex. Crim. App. 2012) (internal quotations & citations omitted).

Earlier, we recounted the contents of Paragraph Eight of the jury charge—the paragraph corresponding with the manslaughter allegation. Based on our reading of the charge, we conclude that Paragraph Eight satisfied the requirements outlined in *Vasquez*. *See id.* As such, we cannot say that the charge was erroneous. *See id.* Additionally, it is particularly noteworthy that the following paragraph—Paragraph Nine—specifically mentioned:

> All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that a person has been arrested, confined, or indicted for, or otherwise charged with the offense gives rise to no inference of guilt at his trial. The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the Defendant's guilt after careful and impartial consideration of all the evidence in the case.
>
> The prosecution has the burden of proving the Defendant guilty, and it must do so by proving each and every element of the offense charged beyond a reasonable doubt, and if it fails to do so, you must acquit the Defendant.

Therefore, given the above, we overrule Cobb's complaints in issues two and three.

IV. POTTS'S ACTS PRIOR TO BEING SHOT

In his fourth issue, Cobb argues that the trial court erred by excluding evidence during the guilt-innocence phase of trial of violent acts of misconduct by the deceased prior to being shot by Cobb and evidence impeaching the testimony of a State's witness.

A. Applicable Law

A trial court's decision to admit or exclude evidence is reviewed under an abuse-of-discretion standard. *Torres v. State*, 71 S.W.3d 758, 760 (Tex. Crim. App. 2002). We may not reverse a trial court's ruling unless that ruling falls outside the zone of reasonable disagreement. *Id.*

In murder prosecutions, Texas law allows both the State and the defense to offer "testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense." TEX. CODE CRIM. PROC. ANN. art. 38.36 (West 2005); *Garcia v. State*, 201 S.W.3d 695, 702 (Tex. Crim. App. 2006); *Smith v. State*, 5 S.W.3d 673, 678-79 (Tex. Crim. App. 1999) (concluding that evidence admissible under article 38.36(a) may still be excluded under the rules of evidence).

A defendant in a homicide prosecution who raises the issue of self-defense may introduce evidence of the victim's violent character. *See* TEX. R. EVID. 404(a)(2); *Torres v. State*, 117 S.W.3d 891, 894 (Tex. Crim. App. 2003). The evidence may include proof of specific, violent acts of misconduct to show the reasonableness of the defendant's fear of danger, or to show that the victim was the first aggressor. *Id.* at 894.

However, the evidence may not simply show that the victim was acting in accordance with his character. *Id.* at 894-95 ("This Court has held that specific, violent acts are relevant apart from showing character conformity in the context of proving that

the deceased was the first aggressor by demonstrating the deceased's intent, motive, or state of mind."). There must be evidence of aggression by the deceased. *Id.* at 895.

B. Discussion

After the State had rested during the guilt-innocence phase, Cobb informed the trial court that he wished to offer Rule 404(a)(2) evidence as to Potts's character for violence and that Potts was the first aggressor. As a result, Cobb called James Batchelor, his son Rope, and Rope's wife Vivian to testify about the circumstances surrounding Potts's eviction from a pool party on March 31, 2015. The trial court held a hearing outside the presence of the jury to consider Cobb's request.

James testified that his wife Ty, Rope, Vivian, Potts, and Fowler gathered at dusk on March 31, 2015 for a pool party at James's house in the Godley area of the county. James recounted that there was alcohol at the party and that he heard Potts teasing Fowler about not wanting to get into the cold swimming pool. James stated that Potts called Fowler a "chicken" for not wanting to get into the swimming pool, but denied that Potts used any "foul language." In a statement to police, James noted that Fowler and Potts exchanged "a few harsh words" that resulted in Fowler crying and James telling the two "[t]hat was enough, we're not going to have arguing at my house." Rope then told Potts and Fowler to leave, and they did.

The State argued that James's testimony did not address a pertinent character trait for violence. Nor was the evidence of the alleged character trait for violence known to

Cobb at the time the shooting. The trial court agreed and ruled that James's proffered testimony was inadmissible.

Next, Vivian testified that Potts only had two beers at the pool party. Vivian also stated that she had spoken to Fowler about her relationship with Potts and that Fowler had said "no, that they had never been physical. She just . . . she just kind of was venting out of anger and heat towards me and Ty Batchelor about their relationship. And she didn't seem to be very happy with her relationship." Vivian acknowledged telling law enforcement that Fowler told her that Potts had previously gotten physical with her when alcohol was involved. However, at trial, Vivian clarified that she did "not know that for a fact. I just know that from words spoken to me from Hailey. I've never seen them be physical. I just know that that was verbal words Hailey gave to me during their argument." On cross-examination, Vivian testified that she had known Potts his whole life and that she had never seen Potts be physical with anyone. She further testified that she had no knowledge of any specific act of violence perpetrated by Potts.

Once again, the State argued that this testimony failed to demonstrate a specific act of violence and that it was inadmissible hearsay. The trial court sustained the State's objection to the proffered testimony.

And finally, Rope recounted that Fowler was upset that Potts had pushed her into the pool, which resulted in Fowler crying. Rope recalled that Fowler and Potts got into an argument based on Potts pushing her into the pool. However, on cross-examination,

Rope admitted that Potts appeared to be joking with Fowler when he pushed her in the pool and denied that Potts assaulted Fowler because "Casey would never do that." The trial court excluded this testimony as well.

Based on our review of the aforementioned testimony, we cannot say that the trial court abused its discretion. *See Torres*, 71 S.W.3d at 760. Specifically, with respect to James's testimony, Potts calling Fowler a "chicken" does not rise to the level of a pertinent character trait for violence that would be relevant to the issue of self-defense. *See Torres*, 117 S.W.3d at 894-95; *see also Hines v. State*, No. 01-09-00629-CR, 2011 Tex. App. LEXIS 950, at *13 (Tex. App.—Houston [1st Dist.] Feb. 10, 2011, no pet.) (mem. op., not designated for publication) (noting that Rule 404(a)(2) evidence "can include the victim's reputation for violence or particular violent actions committed by the victim which would be relevant to the defendant's reasonable belief that he needed to act in self-defense" (citations omitted)). Additionally, there is no indication that Cobb was aware of Potts's name calling prior to the shooting. Regarding Vivian, she did not identify a specific pertinent trait for violence. Further, Vivian's testimony about what Fowler said to her constituted inadmissible hearsay under Texas Rules of Evidence 801 and 802. *See* TEX. R. EVID. 801, 802. Rope's testimony about Potts jokingly pushing Fowler into the pool also failed to identify a specific pertinent trait for violence. We therefore overrule Cobb's fourth issue.

V. COBB'S ORAL MOTION TO SUPPRESS

In his fifth issue, Cobb asserts that the trial court erred by denying his oral motion to suppress and, thus, admitting evidence obtained from his cell phone because the search-warrant affidavit did not establish probable cause. We disagree.

A. Standard of Review

Ordinarily, a trial court's ruling on a motion to suppress is reviewed under a bifurcated standard, giving almost total deference to the trial court's findings of fact but reviewing conclusions of law de novo. *State v. McLain*, 337 S.W.3d 268, 271 (Tex. Crim. App. 2011). However, when ruling on a motion to suppress evidence obtained pursuant to a search warrant, a trial court is limited to the four corners of the affidavit supporting the warrant and thus makes no factual or credibility determinations. *Id.* Our review of a trial court's ruling on a motion to suppress evidence requires us to be highly deferential to a magistrate's decision to issue a search warrant, reflecting the constitutional preference that searches be conducted pursuant to a warrant. *McLain*, 337 S.W.3d at 271; *Rodriguez v. State*, 232 S.W.3d 55, 61 (Tex. Crim. App. 2007).

"'[T]he duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.'" *State v. Jordan*, 342 S.W.3d 565, 569 (Tex. Crim. App. 2011) (quoting *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S. Ct. 2317, 76 L. Ed. 527 (1983)). Probable cause exists when, considering the totality of the circumstances, there is a "fair probability that . . . evidence will be found at the specified

location." *Rodriguez*, 232 S.W.3d at 60 (internal quotations omitted). While our review is limited to the four corners of the affidavit, we interpret the affidavit in a "commonsensical and realistic manner, recognizing that the magistrate may draw reasonable inferences. When in doubt we defer to all reasonable inferences that the magistrate could have made." *Id.* at 61.

B. Discussion

Toward the end of its case-in-chief during the guilt-innocence phase, the State called Captain David Blankenship of the Johnson County Sheriff's Office to testify about information extracted from Cobb's cell phone. Cobb objected to the testimony and sought to suppress the evidence, arguing that it was obtained pursuant to an illegal search because the search-warrant affidavit did not establish probable cause. The trial court conducted a hearing outside the presence of the jury. During the hearing, the trial court heard testimony from several witnesses and reviewed the search warrant and supporting affidavit. At the conclusion of the hearing, the trial court determined that there was sufficient probable cause for the issuance of the search warrant based on the four corners of the supporting affidavit. The trial court subsequently denied Cobb's oral motion to suppress.

Contrary to Cobb's assertions, the supporting affidavit supplied probable cause for the issuance of the search warrant of Cobb's cell phone. The affiant, Detective Michael Gaudet of the Johnson County Sheriff's Office, noted that the information supporting the

search warrant came from the following sources: (1) information obtained from his personal investigation and the investigations of Detectives Emily Wright and Garritt Bennett and Deputy Ryan Gehab, all of the Johnson County Sheriff's Office; and (2) Fowler. Detective Gaudet then explained the basis for probable cause as follows:

- Deputy Gehab was dispatched to the crime scene where he observed Potts's dead body and learned from Cobb that Cobb had shot Potts allegedly in self-defense;

- Deputy Gehab secured a Sig Sauer 1911-22, serial number T163840, pistol on the driver's side front seat of a green, 2014 Ford Ranger pickup truck operated by Cobb;

- Fowler told the detectives the circumstances leading up to the shooting, including the argument at the pool party up to Fowler exiting Cobb's pickup truck;

- Fowler related that, after she exited Cobb's pickup truck, she heard five gunshots and later observed Potts lying in the roadway with no weapon nearby;

- Detective Bennett obtained a written statement from Sullivan describing the argument between Cobb and Potts and Cobb's eventual shooting of Potts;

- Fowler also stated that she, Potts, and Cobb were all familiar with one another; that Cobb had taken over Potts's drug-distribution business; that Potts was acting as a middleman for Cobb; that Potts had called Cobb prior to the shooting and negotiated a purchase of $100 worth of marihuana; and that videos existed on Cobb's cell phone of Cobb and Potts shooting firearms together at a gun range;

- Cobb "was in care, custody, and control of the Samsung telephone, Galaxy III, model SGH-1747, IMEI Number 351873052515587, with serial number R31D313 AYR. The phone also contains a 32 gb micro SD card, which is capable of holding pictures and images"; and

- Law enforcement officers observed Cobb in possession of the cell phone when he was taken into custody; therefore, the cell phone was taken into custody and stored at the Johnson County Sheriff's Office.

Detective Gaudet then stated that it was his belief "that the said cell phone will contain communications between Kenneth COBB and Casey POTTS, as well as communication between Kenneth COBB regarding the crime committed."

A review of the affidavit shows that Detective Gaudet established that a specific offense had been committed—murder—and specifically described the property to be searched—text messages, phone logs, and stored digital videos and images from Cobb's Samsung Galaxy III cell phone. He also explained the substantial basis for his belief that this information constituted relevant corroborated evidence of the offense committed. More specifically, Detective Gaudet believed the information provided by the investigation of various law enforcement officers and by Fowler likely would shed light on the relationship between Potts and Cobb, the circumstances surrounding the shooting, and Cobb's state of mind. Additionally, Detective Gaudet expressed that the information would likely connect Cobb to the Sig Sauer pistol found in his pickup truck, which was believed to be the murder weapon.

Therefore, based on the totality of the circumstances, we conclude that, when viewed as a whole and in a common-sense manner, Detective Gaudet's search-warrant affidavit established a fair probability that evidence of a crime would be found on Cobb's cell phone. *See McLain*, 337 S.W.3d at 271; *see also Jordan*, 342 S.W.3d at 569; *Rodriguez*, 232 S.W.3d at 60-61. As such, we cannot say that the trial court erred in denying Cobb's oral motion to suppress. *See McLain*, 337 S.W.3d at 271. We overrule Cobb's fifth issue.

VI. CONCLUSION

Having overruled all of Cobb's issues on appeal, we affirm the judgment of the trial court.

AL SCOGGINS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
(Chief Justice Gray concurring with a note)*
Affirmed
Opinion delivered and filed June 28, 2017
Do not publish
[CR25]

*(Chief Justice Gray concurs in the judgment of the Court to the extent it affirms the trial court's judgment of guilt and sentence. A separate opinion will not issue.)