TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-14-00234-CR
NO. 03-14-00235-CR

Joe Derek Carr, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 167TH JUDICIAL DISTRICT
NOS. D-1-DC-11-100059 & D-1-DC-11-902003
HONORABLE CLIFFORD A. BROWN, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

A jury found appellant Joe Derek Carr guilty of tampering with evidence and murder and assessed sentences of twenty and sixty years in prison, set to run concurrently. *See* Tex. Penal Code §§ 19.02(b)(1), 37.09(c). Appellant contends that the evidence was insufficient to show that he committed either offense, that the trial court erred and abused its discretion by admitting and excluding evidence, and that the trial court abused its discretion by denying his motion for new trial. We will affirm the judgment.

BACKGROUND

Veronica Navarro, appellant's 22-year-old fiancée, was last seen alive or heard from by any witness on June 27, 2011. Her decomposing body was found submerged in Lake Travis on July 6, 2011, wrapped in a Coleman tent, bound in rope, and secured to cinder blocks and

paint cans. There was no eyewitness testimony regarding how she died and ended up in the lake near Pace Bend Park.

Navarro's sister, Jacqueline DeLeon, testified that Navarro grew up in Laredo and visited cousins in East Austin for extended periods. During one of those visits, Navarro met her cousins' neighbor, Chris Kashimba. After high school, Navarro moved to Austin, began dating Kashimba, and moved in with him. Navarro's relationship with Kashimba was, by several accounts, long-term but intermittent.

During one of their breakups, Navarro began dating appellant, a firefighter with the Pedernales Fire Department near Pace Bend Park in western Travis County. Appellant was also a tattoo artist, and Navarro soon added his name to her collection of tattoos. When they broke up, Navarro reconnected with Kashimba and moved back in with him. Kashimba testified that Navarro told him she feared appellant because he would scream and throw things, especially when drunk. One night in May 2011, however, Navarro reunited with appellant at a club, and within days left Kashimba again. DeLeon testified that during a phone conversation with her, Navarro cried about breaking up with Kashimba, saying that they had argued about money. Two weeks later, Navarro moved in with appellant and started taking care of his toddler. According to Travis County Sheriff's Office Detective Sylvia Leal, Navarro responded "no way, man" on Facebook to a query on June 9, 2011, regarding whether she and Kashimba were together.

Appellant leased a home near Spicewood, Texas, beginning June 15, 2011, and the couple moved there together. Navarro's cousin AnnaKaren Perez testified that Navarro was excited about getting to paint the home and decorate. On June 19, 2011, Navarro's Facebook posts praised appellant as a loving father and stated that she hated to see him leave for work; she also updated her

"current city" to Spicewood. On June 22, she posted about putting appellant's son down for a nap so that she had time to plant flowers.

Kashimba testified that Navarro nevertheless continued to call and text him during this period. She did so when appellant was at work, Kashimba said, because she feared appellant's reaction. Kashimba testified that Navarro told him that appellant found one of his texts and "threw a big old fit about it," so she told Kashimba not to initiate any contact.

On Friday, June 24, some of Navarro's relatives came from Laredo to celebrate Perez's birthday. Manuela Navarro testified that the decedent Navarro was not able to attend because appellant wanted her to go to a cookout at his friend's house and did not want her to attend the family gathering because it was at Perez's house near Kashimba. Manuela testified that Navarro was unable to see them on Saturday, June 25, because she had to take care of appellant's child. Manuela testified that Navarro was upset at these restrictions, but told her that appellant was nice and had bought her a car. Manuela said she last heard from Navarro via Facebook on June 26.

Juan Darios, Jr., hosted Navarro, appellant, and appellant's child on June 24. Darios testified that appellant was drunk and condescending and not nice to Navarro. Darios testified that Navarro was uncomfortable and spent much time outside with the child. He said he texted with appellant on Monday, June 27, and July 5 or 6 about plans for July 7, but abandoned those plans because appellant never confirmed.

Kashimba testified that Navarro spent Saturday, June 25, with him. Department of Public Safety phone expert Adam Unnasch testified that Navarro's phone was active on a tower near Kashimba's home that day. Kashimba testified that Navarro returned to Spicewood on Sunday, June 26. Kashimba testified that Navarro told him that appellant was angry when he touched the

hood of her car and found it warm because she was not supposed to have gone anywhere, but she told him that she had been to the store. On June 26, her Facebook status changed to show that she was appellant's fiancée.

Late in the afternoon of Monday, June 27, Navarro interviewed in South Austin for a job. The interviewer described her as bubbly, happy, and excited to be there and said Navarro wore suitable interview attire—dark gray pants, a thin, black blouse and a thin sweater. She said that, of the jobs available, Navarro focused on the front desk of a location on Springdale Road in East Austin.

Kashimba testified that Navarro came to see him after her interview. He said that she wanted the job so that she could be independent of appellant. Kashimba testified that Navarro intended to break up with appellant within two weeks. Her plan was to wait for appellant to get drunk, blow up, and abuse her, then she would tell him she was leaving. Kashimba testified that he called to check on her and that she was fine around 7 p.m.

Navarro's cell phone records then show a progression from the east side of Austin toward her home near Spicewood occurring between 7:37 p.m. and 8:11 p.m.[1] She left a voice mail on Kashimba's phone from near the intersection of Texas Highway 130 and Farm-to-Market Road 973, then spoke with him from near the intersection of Interstate 35 and U.S. Highway 290. She spoke with appellant for about a minute from the intersection of U.S. 290 and Texas Highway

[1] These phone records were introduced through the testimony of DPS's Unnasch. The records do not show who spoke during a voice communication or who sent a text, but absent any evidence of the phone being misappropriated, for convenience we will present the evidence as if the owner of the phone was the person using the phone.

71, and spoke with him again from near the intersection of Texas 71 and Bee Cave Road. Appellant called Navarro briefly at 8:24 p.m. Her phone was never used again and has not been found.

Later that night, appellant called a Lowe's store in Austin at 10:32 p.m., then called a local convenience store at 10:45 p.m. He dialed the Pedernales Fire Department at 11:41 p.m. but terminated the call before anyone picked up. His phone records show that, between June 17 and June 27, appellant and Navarro communicated every day except June 24 ranging from twice on June 22 to 55 times on June 25. They communicated 20 times on June 27, but not after. Kashimba and Navarro communicated even more often during some of this period—June 24: 150 voice calls and texts; June 25: 50, June 26: 30; June 27: 70-75—and that Kashimba sent ten texts to Navarro on June 28 and three texts on June 29.[2] Kashimba testified that, when he did not hear back from Navarro, he assumed that appellant and Navarro had resolved their differences and were back together again.

Appellant went to work on June 28, but coworker Jared Mikeska said appellant was not his usual self. Mikeska testified that appellant was normally "on top of things," but that morning did not respond when Mikeska requested gloves from him four times en route to a call. Mikeska said that appellant did not help at all during the call and, when they returned to the station, went to a recliner, put his cap on his head, and went to sleep during the day—contrary to department policy. PFD battalion chief Bruce Perkins described appellant as quiet and standoffish that day in contrast to his typical energetic, gung-ho approach. Perkins and Mikeska testified that around 7 p.m. appellant said he was not feeling well and left without waiting for his replacement to arrive.

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[2] Unnasch testified that Kashimba might have sent only four messages on June 28 and one on June 29 that were broken up into separate texts by his phone.

In the early hours of June 29, appellant's phone was picked up by different cell phone towers east of his home, according to AT&T engineer Robert Lewis. Appellant did not engage in any text or voice activity, but his cell phone automatically registered with these towers as time passed or his location changed. Lewis testified that appellant's phone moved from near Spicewood, through Briarcliff, and settled in to the southwestern face of a tower in Lago Vista. Though the tower is on the north shore of Lake Travis, Lewis testified that topography causes that tower to serve cell phones that are on the east side of Pace Bend Park. Appellant returned home around 3 a.m. on June 29.

Appellant was next scheduled to work on July 1. Perkins testified that, contrary to department policy requiring two weeks' notice of non-emergency absences, appellant filed a leave form on June 30. Mikeska testified that appellant did not speak to anyone when filing the request. Although his leave request was not approved, appellant did not show up the next day. Perkins said he texted and called appellant but got no response.

On June 30, appellant's cell phone traveled from his home to southern Texas. Over the next three days, it was active in Port Isabel, South Padre Island, and Brownsville before returning home late on the evening of July 3.

Appellant arrived on time for his July 4 shift. Perkins said that they discussed appellant's improper procedure in requesting time off and reprimanded him for the no-show. Perkins testified that appellant said he stayed home on July 1 because he had broken up with his girlfriend and feared that she would damage his house. Perkins testified that appellant's demeanor was back to normal. Appellant traded shifts with another firefighter and stayed on through July 6 at 9 a.m.

Firefighter Stormy Davis testified that appellant was rambunctious while playing a video game all day on July 5 into July 6. Appellant was scheduled to work beginning at 9 a.m. on July 7.

Around 11 a.m. on July 6, two boat dock builders boating to a job on Lake Travis spotted a tent mostly submerged in the water near the east side of Pace Bend Park. The tent was about ten feet offshore and in about four feet of water nearest to an abandoned campground. One of the workers testified that the tent was wrapped around something that appeared to be shaped like a person. He touched it, then cut a hole in the tent and saw human skin. He called law enforcement. Both the Travis County Sheriff's Office and the Pedernales Fire Department responded.

TCSO crime scene specialist Renee Luna testified that rope was wrapped around the body several times, tied with complex knots, then attached to cinder blocks and paint cans. Inside the tent, there was a black trash bag with a spot that appeared to have shrunk or melted. Luna said that stickers on the paint cans indicated they were bought from Lowe's in Hutto in July 2010. The paint colors were summer lily and chocolate "something" that Luna could not remember. She testified that appellant's previous address was in Hutto.

The victim's body had begun to decompose. She was clothed in a size-nine black skirt, Luna said, though the woman likely wore a size one. The body was also clothed in a gray long-sleeved shirt with a short-sleeved black shirt over it. TCSO Detective Leal testified that the gray shirt was a medium with a religious theme on it. The victim had several tattoos, one of which was the name "Joe Derek Carr."

Also on July 6, appellant withdrew $2,000 from his bank and that evening went to a Blues on the Green concert in Austin. A woman who knew him from her job at a convenience store near appellant's fire station caught his attention. She testified that appellant was drinking

and seemed preoccupied and spacey, not like his normal self. He took her back to his house and would not let her in before he cleaned up the house. She said they then had sex and went to sleep. She woke up around 10 a.m. the next morning, July 7. They exchanged numbers and he took her to her friend's house. She called him the next two days but never reached him. Appellant's phone received a call through a cell tower near the Travis/Hays county line on July 7 at 9:35 a.m. Records show no further activity on that phone.

The Travis County Medical Examiner's office conducted an autopsy and identified the body from the lake as Navarro on July 7. Deputy Chief Medical Examiner Satish Chundru testified that the body's decomposition made the examination difficult. He determined that the cause of death was asphyxia because he ruled out other causes, but he could not determine the means by which she was deprived of oxygen. Her organs were fine and her toxicology test did not reveal any illegal drugs. He testified that her state of decomposition prevented him from checking for signs of strangulation in her eyes or face, finding rope-caused injuries on her skin, meaningfully examining her brain, or gathering useful results from sexual assault tests. Chundru noted that sections of the skin on her back—at least one of which contained a tattoo—were cut out with a sharp implement after her death. Chundru testified that the skin removal, the attempt to dispose of the body, and the lack of other causes for the death of an apparently healthy twenty-two-year-old persuaded him that she was killed by someone.

The Travis County Sheriff's Office executed a search warrant on appellant's home on Saturday, July 9. Sergeant Tom Szimanski testified that, in a closet, he found a plastic container with Navarro's identification card in it. Deputy Jason Krenek testified that he found a cinder block outside the house. He found a can containing pink chocolate paint purchased at Lowe's in Hutto in

July 2010. He found pictures, mostly of Navarro, along with perfumes, lotions, and "female articles" in the kitchen trash can. Lieutenant Bryce Miller testified that he found black plastic trash bags in the house. Department of Public Safety crime lab specialist Kenneth Crawford testified that the trash bags from the house and the one in the tent with Navarro's body had similar manufacturing characteristics, but he could not tell if they were ever connected or were from the same box. Luna testified that officers found intricately knotted rope and many religious-themed t-shirts, sized medium.

Also on July 9, appellant attempted to enter Canada without a passport. Canada Border Services Agency Officer Prosper Kuwonu testified that appellant told them he came to Canada for a four-week vacation. Kuwonu said that appellant had $2,000 in cash, but no debit card or credit card as backup. The condition of appellant's car made Kuwonu believe that appellant was homeless and looking for a job. Kuwonu testified that when he told appellant he wanted to call appellant's employer, appellant told him that the fire department's administrator would not be there to confirm his vacation. The person who answered Kuwonu's call said he would call back to confirm information. Instead, Kuwonu received a call from the Travis County Sheriff's Office explaining that appellant was a suspect in a murder. Kuwonu denied appellant entry into Canada and returned him to United States officials.

United States Customs officer Michael Rude testified that appellant was compliant and very calm during his arrest and asked no questions as he was being handcuffed—which Rude found odd. Appellant was sent to jail in Pembina County, North Dakota.

Pembina County Chief Deputy Sheriff Jeff Osvold testified that his office recorded appellant's phone conversation with appellant's mother. On the recording, which was played for

the jury, appellant does not answer when his mother asks if he killed or hurt Navarro or anyone. Appellant's responses included an uneasy chuckle, a discussion of the jail's address, his desire for his mother to post his bond, wishing his father a happy birthday, and silence. When his mother asked "Did you do anything wrong?" appellant replied, "No," and, after a pause, "Not today."

Detective Leal searched appellant's vehicle in North Dakota. She said it contained clothes shoved into bags and backpacks and piled on the floor. The ice chest had no ice, there were NoDoz and Monster drinks, and personal papers in and out of a folder. She also found a different cell phone registered to appellant that had no numbers in its memory. She testified that appellant had a woman's engagement ring tucked inside his wallet.

Appellant was returned to Travis County, indicted, and convicted of murder and tampering with evidence—namely, Navarro's body.

DISCUSSION

Appellant challenges the sufficiency of the evidence to support his convictions. He also challenges the trial court's admission of hearsay testimony regarding his character and specific instances of conduct, admission of a recorded phone call that was not properly authenticated and violated his right against self-incrimination, exclusion of testimony that would impeach Kashimba, and denial of his motion for new trial based on an investigator's failure to disclose surveillance tapes from a store showing appellant and Navarro shopping together on June 26.

Sufficiency of the evidence

We review all of the evidence introduced in the light most favorable to the jury's verdict and decide whether any rational jury could have found each element of the offense beyond

a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318 (1979); *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). We consider all evidence in the record, whether it was admissible or inadmissible. *Winfrey v. State*, 393 S.W.3d 763, 767 (Tex. Crim. App. 2013). The trier of fact may believe all, some, or none of a witness's testimony and is the sole judge of the weight and credibility of the witnesses. *Brooks*, 323 S.W.3d at 899. We defer to the factfinder's resolution of any conflicting inferences from the evidence and presume that the trier of fact resolved such conflicts in favor of the judgment. *Jackson*, 443 U.S. at 326; *Whatley v. State*, 445 S.W.3d 159, 165 (Tex. Crim. App. 2014).

We consider both direct and circumstantial evidence, as well as any reasonable inferences that may be drawn from the evidence. *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). "Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Each fact need not point directly and independently to guilt, as long as the cumulative force of all incriminating circumstances is sufficient to support the conviction. *Id.* Although motive and opportunity are not elements of murder and are not alone sufficient to prove identity, they are "circumstances" indicative of guilt. *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). We review the sufficiency of the evidence measured by the elements of a hypothetically correct jury charge which sets forth the law as contained in the indictment. *Gollihar v. State*, 46 S.W.3d 243, 253 (Tex. Crim. App. 2001).

Appellant challenges the sufficiency of the evidence for both the murder and the tampering with the evidence convictions. Murder as charged in this case requires proof beyond a reasonable doubt that appellant intentionally or knowingly caused Navarro's death by asphyxia, or

by a manner and means unknown. *See* Tex. Penal Code § 19.02(b)(1). Tampering with the evidence as charged here requires proof beyond a reasonable doubt of the following elements: (1) Knowing that an investigation or official proceeding is pending or in progress; (2) a person alters, destroys, or conceals any record, document, or thing; (3) with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding. Tex. Penal Code § 37.09(a)(1); *Rabb v. State*, 434 S.W.3d 613, 616 (Tex. Crim. App. 2014).[3]

Appellant contends that no evidence links him to either crime beyond a reasonable doubt. The medical examiner could not establish a cause of death other than the general cause of asphyxia—the absence of oxygen to her brain. There was no sign of struggle or indication of how she was deprived of oxygen. No fibers found in his house or car matched the rope or tent found wrapping her body. The paint found with the body could not be uniquely linked to paint found in appellant's house. He argues that proof of motive and opportunity is not enough to fill gaps in proof of wrongful conduct regarding the means of the victim's death and the defendant's mental state. *Stobaugh v. State*, 421 S.W.3d 787, 862-64 (Tex. App.—Fort Worth 2014, pet. ref'd) (reversing

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[3] Regarding the existence of an investigation in the tampering definition, the First Court of Appeals has held that because the typical meaning of "pending" would make it redundant of "in progress," we must use an alternate definition of "pending" meaning "about to take place; impending." *Lumpkin v. State*, 129 S.W.3d 659, 663 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd); Compact Oxford English Dictionary 1301 (2d ed. 1994). *But see Pannell v. State*, 7 S.W.3d 222, 223-24 (Tex. App.—Dallas 1999, pet. ref'd) (driver who threw marijuana out the car window while being stopped for speeding did not tamper with evidence because, when he did so, the marijuana was not evidence in the speeding stop and there was no ongoing investigation of marijuana possession). The *Lumpkin* court's choice makes sense as the statute might otherwise implement a policy that allows criminals to freely destroy evidence of their wrongdoing before they actually know law enforcement officials are looking for such evidence even if they strongly suspect an investigation will occur. The third element—that the person intend to impair the item's use as evidence in the investigation—shields persons who destroy, alter, or conceal something without any knowledge of or intent to impair a possible investigation into wrongdoing.

conviction for murder despite evidence of motive, opportunity, and lying about having called the victim after her disappearance because, without the victim's body, there was no evidence that wrongful conduct occurred). He argues that healthy adults can die without being killed by others and with no sign of the natural cause.

Appellant ignores the weight of the evidence linking him to Navarro's death and the disposal of her body in addition to his motive, opportunity, and actions indicating consciousness of guilt. There is evidence that his relationship with Navarro was serious, but unstable. Dario testified about the uncomfortable evening he spent with the couple the Friday before she disappeared, and Kashimba—backed by Navarro's phone records—testified that Navarro spent Saturday with him. Navarro's Facebook status changed the next day—the day before she disappeared—to state that she was appellant's fiancée, but appellant had a woman's engagement ring with him when he was arrested in North Dakota. Kashimba testified that Navarro intended to break up with appellant the next time he abused her, and her cell phone records indicate that she returned to appellant's home and disappeared on the evening of Monday, June 27. Appellant never called or texted Navarro after that night, though others including Kashimba continued to try to communicate with her. While appellant's cessation of contact is consistent with the simple ending of appellant's relationship with Navarro, it is also consistent with him having unique knowledge that Navarro was dead. Appellant's coworkers testified that appellant acted out of character on June 28—subdued and distracted—and left early without waiting for his replacement. While that change in behavior might be consistent with illness, a breakup, or the death of a friend through natural or accidental means, it is also consistent with having murdered someone—especially when combined with appellant's subsequent actions.

Late the next night (in the early hours of June 29), appellant's cell phone traveled near the location where Navarro's body was found in the lake near a deserted campground that appellant's coworker testified PFD employees would know about. Navarro was dressed in clothes different from her interview clothes and larger than her size, including a t-shirt that matched appellant's t-shirts in size and theme. The tent wrapping the body was the same model as a tent bag found at appellant's house.[4] The paint in the cans attached to the body was not uniquely linked to the paint found at appellant's house, but undisputed evidence showed that it was purchased from a store in Hutto and that appellant had lived in Hutto. The ropes tying Navarro's body to the weights were knotted with unusual knots, as were ropes found at appellant's home. There was testimony that PFD firefighters learn to tie complex knots though that knowledge was not unique to them.

There was evidence that appellant lied to his coworkers about his whereabouts and intentions when going near the border with Mexico on June 30 and attempting to enter Canada on July 9. He did not follow PFD protocol when requesting leave for July 1 and later explaining his absence. He was described as spacey and "occupied" the evening after Navarro's body was found and the day before he apparently headed north to Canada. He failed to request leave for July 7 and instead apparently turned off his phone, got a new phone, withdrew $2,000 in cash, packed his car and attempted to enter Canada. He told border officials that he was on a four-week vacation from his job at PFD, but had not requested or received such leave.

[4] Although appellant argues that the lab representative testified that the tent and the bag did not match, the witness testified only that "the green strap that was with the victim did not originate from that green tent bag."

No single piece of evidence definitively linked appellant to causing Navarro's death, but evidence shows that her death was not due to natural causes. Evidence shows appellant's motive, opportunity, and consciousness of guilt. Much of the physical evidence—paint cans, knotted rope, the tent—could be viewed in ways that do not link appellant to her body. But the standard of review requires that we view the evidence in the light most favorable to the verdict. With that in mind, we cannot say that a reasonable jury could not have found beyond a reasonable doubt that appellant killed Navarro, then tampered with her body by wrapping her in a tent and submerging her. The jury could infer that appellant put her body in the lake knowing that an investigation into her disappearance would ensue and that he did so intending to impair its use in the investigation of her murder. We overrule appellant's challenges to the sufficiency of the evidence to support his convictions.

Evidence of bad character and other instances of bad conduct

Appellant contends that the trial court abused its discretion by admitting hearsay testimony about his alleged bad character and specific instances of that alleged conduct. He contends that the trial court violated Texas Rules of Evidence 403 (excluding relevant evidence if its probative value is substantially outweighed by the risk of unfair prejudice), 404(b) (prohibiting use of evidence of a crime, wrong or other act to prove a person's character to show action consistent with that character, but permitting use for proving such things as motive, opportunity, or intent), and 802 (excluding hearsay). A trial court abuses its discretion when it acts without reference to guiding rules or principles. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990).

Appellant complains about the admission of several segments of testimony. Manuela Navarro testified that Navarro said that appellant would not let her do anything or go anywhere. Kashimba testified that Navarro said she feared appellant and did not like his attitude, that appellant would scream and throw things, that appellant drank a lot and became more aggressive, that appellant bruised her,[5] and that she planned to get a job and break up with appellant. Perez testified that Navarro said that her relationship with appellant was not what she expected and that she had concerns about moving in with him.

Texas law and rules of procedure provide a variety of ways in which the trial court could properly exercise its discretion to admit these bits of testimony. Kashimba's testimony that he saw bruises on Navarro is testimony about his own observation and is not hearsay. *See* Tex. R. Evid. 801(d). The rules of evidence exclude from hearsay statements by the declarant that she was afraid, uncertain of the relationship, and planning to leave. *See* Tex. R. Evid. 803(3). The code of criminal procedure permits the admission of testimony about 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. art. 38.36(a); *Garcia v. State*, 201 S.W.3d 695, 702 (Tex. Crim. App. 2006). This includes evidence of the relationship status and can include previous acts of violence so long as they are admissible under Texas Rules of Evidence like 403 and 404(b). *Garcia*, 201 S.W.3d at 702-03. The trial court

[5] Kashimba did not testify that Navarro told him that appellant bruised her. He testified that he saw bruises on Navarro, that he asked Navarro about the bruises, that Navarro would never say anything, but that he "knew deep down inside that he had"—at which time the trial court sustained appellant's objection to speculation. Indeed Kashimba agreed that Navarro "would never come right out and tell [him] that [appellant] gave those to her."

did not abuse its discretion by concluding that the objected-to testimony, along with Kashimba's testimony that Navarro said appellant threw things, helped illuminate the nature of appellant's relationship with Navarro. The evidence that appellant threw things is about a specific bad act, but the trial court did not abuse its discretion by finding that it also sheds light on appellant's motive and intent. *See* Tex. R. Evid. 404(b)(2); *see also Garcia*, 201 S.W.3d at 703. Likewise, the trial court did not abuse its discretion by determining that the probative value of this evidence is not substantially outweighed by the risk of unfair prejudice, confusion of the issues, or misleading the jury. *See id.* R. 403.

We conclude that the trial court did not abuse its discretion by admitting this testimony.

Admitting the jailhouse phone call

Appellant contends that the trial court abused its discretion in two ways by admitting the recording of a phone call made by appellant from jail in North Dakota to his mother. He contends that the recording was not properly authenticated and that its admission violated his right against self-incrimination. Appellant argues that the recording was not properly authenticated because the State did not prove that a call was made to the number assigned by the telephone company to a particular person and that the circumstances show the person answering was the person called.

We review admission of evidence over an authentication objection for an abuse of discretion. *Banargent v. State*, 228 S.W.3d 393, 400 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd). The rules of evidence do not dictate a particular means of authentication so long as the

evidence introduced supports a finding "that the item is what the proponent claims it is." Tex. R. Evid. 901(a). Methods can include testimony of a witness with knowledge about the item, an opinion about a voice, evidence that a call was made to a phone number assigned to a particular person if circumstances show that the person answering was the one called, and evidence describing a process or system and showing that it produces an accurate result. *Id*. R. 901(b)(1), (5), (6), (9). These and others listed in the rule "are examples only—not a complete list—of evidence that satisfies the requirement[.]" *Id.* R. 901(b).

Detective Leal testified that, over the course of her investigation, she had become familiar with the voices of appellant and his mother and that the voices on the recording were theirs. Pembina County Deputy Osvold's testimony about the recording system and the voice of appellant's cellmate in the background support that identification. The trial court did not abuse its discretion by concluding that the evidence showed that the recording was what it purported to be—a recording of a phone conversation between appellant and his mother while appellant was in jail in North Dakota.

Appellant contends that the introduction of the recording violates his right not to be a witness against himself because his mother asked whether appellant killed Navarro. *See* U.S. Const. amend. V; Tex. Const. art. I, § 10. Even though appellant never expressly admits guilt, he contends that his silences and changes of subject might be considered testimonial.

But the State did not compel appellant to testify. Appellant called his mother on a jailhouse telephone. There is no evidence that the State prompted him to make the call. His mother—not an agent of the State—asked him questions. She also instructed him not to talk to anyone. In these circumstances, we find that the admission of the recording of appellant's voluntary

phone call to his mother was not an abuse of discretion and did not violate appellant's right to remain silent. *See Autry v. State*, 626 S.W.2d 758, 765 (Tex. Crim. App. 1982).

Excluding evidence impeaching Kashimba

Appellant contends that the trial court abused its discretion by excluding admissible evidence that would have impeached Kashimba. Witnesses may be cross-examined on any relevant matter including credibility. Tex R. Evid. 611. Witness credibility can be attacked, although parties may not inquire into or offer extrinsic evidence to prove specific instances of the witness's conduct in order to attack or support his character for truthfulness. Tex. R. Evid. 608(b). Error in the exclusion of evidence that does not violate the constitution must be disregarded unless it affects substantial rights. Tex. R. App. P. 44.2(b).

Appellant asserts that he wanted to rebut Kashimba's testimony that Kashimba and Navarro never fought, always discussed their disagreements like civil people, and never threw things or blew things out of proportion.[6] The trial court excluded evidence of two instances when conflict between Kashimba and Navarro prompted calls to law enforcement. On October 24, 2008, a deputy was dispatched to Kashimba's house when he and Navarro got into an argument. On February 26, 2010, two deputies responded to a report that Kashimba was chasing Navarro down the street after she broke up with him. There was no physical violence reported and no evidence that charges were filed.

[6] At trial, appellant also sought to introduce evidence that Navarro and Kashimba were fired for taking a laptop from work without approval. Though he mentions it on appeal, he does not appear to complain on appeal about that exclusion.

Even if the trial court erred by excluding this evidence, we conclude that it did not affect appellant's substantial rights. Appellant argues that impeaching Kashimba was critical because Kashimba's testimony that Navarro was planning to leave appellant is the only evidence supplying motive. But there was other evidence of Kashimba's relationship with Navarro and other evidence of trouble in appellant's relationship with Navarro. There was evidence of repeated break-ups and arguments over money with Kashimba. Regarding appellant, Navarro's relatives described her frustration with appellant not letting her "do anything," and Dario described a tense evening three days before she disappeared. Further, overwhelming circumstantial evidence connects appellant to Navarro's death. After Navarro stopped using her phone, appellant stopped trying to contact her but Kashimba and others continued to try. Appellant was subdued and withdrawn the next day. Late that night, appellant's phone moved from his home and was served by a tower that serves the area where Navarro's body was discovered almost two weeks later. The body was wrapped in a tent that matched the model number of the tent bag found at appellant's house and was weighted down with cans of paint of the same type as cans of paint found at appellant's house. All of the paint was bought in a town where appellant previously lived. Appellant lied to his employer about his whereabouts on an unapproved day off. The evening after Navarro's body was found, appellant again acted "occupied" and spacey. He also in short order withdrew $2,000, deactivated his cell phone and got a replacement, packed his car, and drove approximately 1,400 miles to the Canadian border where he claimed to be taking a four-week vacation he had failed to notify his employer about. Navarro's pictures and belongings were found in the trash at appellant's house, and Navarro's identification was found in a plastic tub in a closet there. We conclude that any error in the

exclusion of evidence that Kashimba's previous arguments with Navarro drew the attention of law enforcement did not affect appellant's substantial rights.

Denying motion for new trial

Appellant argues that the trial court abused its discretion by denying his motion for new trial based on his post-trial discovery[7] of surveillance tapes from a store showing appellant and Navarro shopping together on June 26, the day before her phone was last used. Appellant contends that this evidence contradicts the State's theory of the case by showing that Navarro was not frightened of appellant and planning to leave him, but was instead actively together with appellant. Appellant argues that the trial court should have granted his motion for new trial because of the newly discovered evidence and because the State violated the constitution by failing to disclose the evidence. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963).

These appellate challenges have somewhat different standards of review. To demonstrate a right to a new trial based upon newly discovered evidence, appellant must show that (1) the newly discovered evidence was unknown or unavailable to the defendant at the time of trial; (2) the defendant's failure to discover or obtain the new evidence was not due to the defendant's lack of due diligence; (3) the new evidence is admissible and not merely cumulative, corroborative, collateral, or impeaching; and (4) the new evidence is probably true and will probably bring about a different result in a new trial. *Carsner v. State*, 444 S.W.3d 1, 2-3 (Tex. Crim. App. 2014). We review the trial court's ruling for an abuse of discretion. *Colyer v. State*, 428 S.W.3d 117, 122

[7] Appellant contends and the State concedes that the State knew of this evidence before trial and did not disclose it to appellant.

(Tex. Crim. App. 2014). A trial court abuses its discretion in denying a motion for new trial only when no reasonable view of the record could support the ruling. *Charles v. State*, 146 S.W.3d 204, 208 (Tex. Crim. App. 2004). Whether the prosecutor violated due process under *Brady* is subject to a three-part test to determine whether the prosecutor (1) failed to disclose evidence (2) favorable to the accused, and (3) the evidence is material, meaning there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Little v. State*, 991 S.W.2d 864, 866 (Tex. Crim. App. 1999). This standard of review is distinct from the standard for constitutional error articulated by Texas Rule of Appellate Procedure 44.2(a). *Hampton v. State*, 86 S.W.3d 603, 612 (Tex. Crim. App. 2002).

The State concedes that the videotapes were not turned over until after trial due to no fault of appellant, but argues that the evidence would not bring about a different result at trial. The jury heard testimony from Kashimba that Navarro returned to Spicewood and also evidence that her Facebook status was updated to reflect that she was appellant's fiancée. While the image of them together at a store that day may corroborate evidence that their relationship was intact, it is also consistent with Kashimba's testimony that Navarro intended to stay with appellant until he abused her again. The trial court concluded that "the cumulative and overwhelming circumstantial evidence of the defendant's guilt certainly would indicate to this Court that that photo would have had no impact on the ultimate outcome of the case." Our review of the record leads us to the same conclusion, as well as a conclusion that the State did not violate due process by failing to disclose the recording before trial and that the trial court did not abuse its discretion by denying the motion for new trial.

CONCLUSION

We affirm the judgment.

Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Goodwin and Field

Affirmed

Filed: February 5, 2016

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