# TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

**NO. 03-15-00383-CR**

**Rocky Orosco, Appellant**

**v.**

**The State of Texas, Appellee**

**FROM THE DISTRICT COURT OF COMAL COUNTY, 207TH JUDICIAL DISTRICT**
**NO. CR2014-294, HONORABLE DIB WALDRIP, JUDGE PRESIDING**

## MEMORANDUM OPINION

Rocky Orosco was arrested and charged with aggravated sexual assault and aggravated kidnapping. *See* Tex. Penal Code §§ 20.03, .04 (setting out elements of offenses of kidnapping and aggravated kidnapping), 22.011, .021 (governing offenses of sexual assault and aggravated sexual assault). The victim in all three offenses was A.V., and the offenses allegedly occurred in A.V.'s home after she and Orosco had become romantically involved. Following his arrest, Orosco filed a motion to suppress evidence obtained from his cell phone, and the district court convened a hearing on the motion. After considering the arguments made by the parties, the district court denied the suppression motion. At the end of the guilt-or-innocence phase, the jury found Orosco guilty of both offenses.[1] Orosco elected to have his punishment assessed by the district court,

[1] The indictment also charged Orosco with sexual assault. *See* Tex. Penal Code § 22.011. After the jury found Orosco guilty of both sexual assault and aggravated sexual assault, the State chose to proceed to punishment on the aggravated-sexual-assault count.

and the district court determined that Orosco should be sentenced to life imprisonment for the aggravated-sexual-assault offense and to eighty-four years' imprisonment for the aggravated-kidnapping offense with both sentences to run concurrently. *See id.* §§ 20.04(c) (stating that aggravated kidnapping is, with one exception, first-degree felony), 22.021(e) (providing that aggravated sexual assault is first-degree felony); *see also id.* § 12.32 (setting out permissible punishment range for first-degree felony). In three issues on appeal, Orosco challenges the district court's ruling on the motion to suppress, argues that statements made by the district court in front of the jury were improper, and asserts that the district court improperly limited testimony regarding A.V.'s alleged drug use and regarding lies that A.V. allegedly told Orosco before the alleged offenses occurred. We will affirm the district court's judgments of conviction.

## BACKGROUND

As set out above, Orosco was charged with and ultimately convicted of aggravated kidnapping and aggravated sexual assault and filed a motion to suppress evidence obtained from his phone. During the suppression hearing, only one witness was called to the stand, Officer Clint Penniman. In his testimony, Officer Penniman explained that he was directed to respond to the scene of an alleged sexual assault on the Friday after Thanksgiving, that he talked with A.V. to obtain a statement regarding the alleged offense, that A.V. stated that Orosco sexually assaulted her and filmed it with his phone, that A.V. related that she took Orosco's phone when she left her apartment, that A.V. gave the phone to the police, that Officer Penniman asked Orosco if he would come to the police station and give a statement, that Orosco agreed, and that Orosco drove himself to the police station.

When discussing the interview with Orosco, Officer Penniman stated that although Orosco refused to sign a release allowing the police to search his cell phone and refused to provide the pass code, Orosco repeatedly told Officer Penniman that the police should be able to get into the phone and that the officers should do whatever they needed to do for their investigation. In addition, Officer Penniman also testified that Orosco asked on multiple occasions when his phone would be returned to him, and Officer Penniman stated that he told Orosco that his phone would not be returned until the following Monday at the earliest.

In his testimony, Officer Penniman explained that based on his conversations with Orosco and A.V., he decided to apply for a search warrant in order to search the contents of Orosco's phone. Further, Officer Penniman recalled that he did not draft the affidavit until the Tuesday following the incident because he was not scheduled to work over the weekend or on the following Monday, but Officer Penniman related that he presented the request for a search warrant to the magistrate on Tuesday morning and that the magistrate signed the search warrant that day. In addition, Officer Penniman testified that because it was a holiday weekend, there was a reduced number of "criminal investigation detectives" on duty and that there were no detectives available to fill out a request for a search warrant in his place. Moreover, Officer Penniman explained that it was not customary to turn over an investigation to another officer and that because he had been the only person to interview A.V. and Orosco, no one else could have prepared the search-warrant affidavit. Similarly, Officer Penniman related that the only officer "qualified to use the Cellebrite system to download a cell phone" was not on duty for the long holiday weekend and would not return to work until the following Monday or Tuesday.

During Officer Penniman's testimony, two exhibits were admitted into evidence. One of the exhibits was the affidavit for a search warrant prepared by Officer Penniman. The affidavit is consistent with Officer Penniman's testimony regarding the day that the affidavit was prepared and presented. The other exhibit was an audio and video recording of Officer Penniman's interview with Orosco, and a portion of the lengthy recording was played for the district court. In that portion of the recording, Orosco repeatedly stated "no comment" when asked if he would give the police the pass code to his phone and also told the police "to go in and get" the information on the phone and to "do what you need to do." In addition, Officer Penniman stated on the recording that Orosco was under no obligation to disclose the pass code but that if Orosco did not provide the pass code, then the police would not be able to access the contents of the phone until after the holiday weekend because the analyst would not return to work until after the weekend was over. Following the recording being played, the State and Orosco told the district court that in prior portions of the recording, Orosco stated that he needed the phone for work and asked if Officer Penniman had any idea if, how, and when the phone would be returned.

At the end of the suppression hearing, the district court denied the motion and explained that it found "that there is not anything tantamount to an unequivocal contemporaneous demand for the immediate return of the phone" and that "under the circumstances, being the holiday weekend . . . and that the officer was off on Monday and that he did get the warrant signed at 8:55 a.m. after having returned to work Tuesday morning at 7:00 a.m., that it's not an unreasonable continued seizure of the phone under those circumstances."

Immediately following the district court's ruling, the guilt-or-innocence phase of the trial commenced. During the trial, the State called several witnesses to the stand, including A.V.,

a sexual-assault-nurse examiner, and various law-enforcement officials. In her testimony, A.V. stated that the incident occurred after the couple broke up and after she agreed to temporarily allow Orosco to stay at her home while he looked for a new place. Regarding how the incident occurred, A.V. recalled that Orosco jumped into her bed late at night while she was trying to sleep, held her down, and ripped off her clothing, and she also related that she unsuccessfully tried to hold onto her clothes, that Orosco hurt her, and that she kept "telling him, no. Stop." Further, she recalled that Orosco kept calling her a "whore," that he was yelling at and threatening her, that he mocked how she was saying no and how she was crying, that he laughed at her, that he put his hands over her mouth and throat when he got angry, that she was gasping for air, that he "threatened to call his homeboys and run a train on" her, that she eventually stopped fighting because she was afraid for her daughters in the next room and because she thought she "would end up dead," that he penetrated her vagina and her anus with his penis, that the assault lasted for hours, that he filmed portions of the assault, and that she never consented to the sexual activity or to being filmed. In addition, A.V. stated that Orosco told her that he was filming the incident in order to "hold [it] over [her]" and to force her to allow him to stay at her house and threatened to release the footage online. When describing her injuries, she testified that Orosco ripped out her hair and left a "complete bald spot." During A.V.'s testimony, the State introduced into evidence a recording of the 911 call that she made after the incident. On the recording, A.V. sounds distraught and states that she had been sexually assaulted.

After A.V. finished her testimony, the State called Katrina Thomasson to the stand. Thomasson was the sexual-assault-nurse examiner who examined A.V. In her testimony, Thomasson recalled that A.V. "described being punched, being hit, being anally assaulted, [and] being vaginally

assaulted" during "a pretty violent physical and sexual assault." When describing the injuries that she observed during the exam, Thomasson described "pretty impressive areas of redness to [A.V.'s] scalp and areas where hair was missing that had been snatched out of her head." Further, Thomasson testified that A.V. was "tender to the touch," that A.V. had red bruises on her breasts and on her arm, that A.V. stated that she had "pain in her abdomen" and in her back, that A.V. had a tear between the labia minora and the labia majora, and that A.V. had multiple "fresh, open, bleeding tear[s]" to her anus that were causing A.V. pain to such a degree that A.V. "was unable to sit and [was] having a lot of difficulty tolerating that portion of the exam." In her testimony, Thomasson stated that A.V.'s injuries were consistent with sexual assault, and Thomasson also recalled that she took multiple samples from the affected areas for DNA testing. During Thomasson's testimony, photographs of the injuries to A.V.'s breasts were admitted into evidence.

Following Thomasson's testimony, the State called Officer Richard Groff to the stand to testify regarding his investigation in the case. In his testimony, Officer Groff recalled that he collected a DNA sample from Orosco for testing purposes and that the results of the testing identified Orosco as the perpetrator. In addition, Officer Groff explained that six recordings pertaining to the incident were extracted from Orosco's phone. During Officer Groff's testimony, the video clips were played for the jury and show Orosco repeatedly penetrating A.V.'s vagina with his fingers and with his penis, document A.V. crying during the incident, chronicle A.V. repeatedly pleading with Orosco to stop, capture Orosco roughly grabbing A.V. by the hair, show that portions of A.V.'s hair were missing, chronicle Orosco demanding that A.V. spread her legs and say that she loves him and that she wants to have sex with him, and capture Orosco repeating those demands and asking that she make the statements without crying.

Once the State rested its case, Orosco elected to testify as part of his defense, and the district court questioned Orosco about whether he wanted to testify and whether he understood the consequences of testifying. After Orosco stated that he understood and that he wanted to testify, the district court convened a lengthy hearing outside the presence of the jury in which the court instructed Orosco that he could not discuss A.V.'s alleged drug use during his testimony, allowed Orosco to vent his frustrations regarding the trial, warned Orosco repeatedly that the court would have to intervene if he did not limit his answers to the questions asked, provided guidance regarding what types of answers were permissible, allowed Orosco to extensively consult with his attorney regarding questions that he wanted asked, and cautioned Orosco that he could be held in contempt of court if he did not comply with the rules governing the proceeding. When the trial resumed after the jury was brought back to the courtroom, the court repeatedly instructed Orosco to only answer the questions asked, and the court made comments in front of the jury that Orosco urges on appeal were improper.

The first comment occurred after the district court had instructed Orosco multiple times to limit his answers to the questions asked and after Orosco's attorney asked Orosco if A.V. gave her consent on the night in question, and Orosco answered, "[y]eah, definitely. We talked about everything before we did it." After the State objected, the court asked, "[h]ow difficult is it . . . to understand when you have answered the question to shut up?" The second comment was made after the court again instructed Orosco to only answer the question asked and after the court asked if Orosco understood the instruction. In response, Orosco stated, "[y]es, sir. I'm just trying to answer it the best I can without [the State] saying false statements and trying to use reverse

psychology," and the court responded, "Shhh. I just asked if you understood . . . and then you go off on a diatribe." The third comment happened after Orosco suggested in his testimony that he and A.V. had agreed to role play a sexual fantasy and to record it. When the State asked Orosco whether it was A.V. or him who could be heard on the video begging the other to stop, Orosco answered, "[a]ll of that was part of the role." After the State told Orosco to just answer the question that he was asked, the court stated that Orosco's answer was nonresponsive and said, "I'm trying to be patient with you." The fourth comment took place after the State questioned Orosco about whether he told the police officers that they should be able to get access to the contents of his phone and about whether he said that he was going to leave the interrogation room and after Orosco answered, "I just wanted to make sure that I wasn't going to get hurt or arrested . . . if I got up and walked out." In response, the court stated, "[w]e don't want . . . the reason why. We don't want your motivation, just do you recall telling the officer that? It's either a yes or a no. . . . It's not a five-minute diatribe, okay?" The fifth comment occurred after the State asked Orosco if the police told him that he would be "without [his] phone for a couple of days until [the officer] could get that search warrant." When responding to the question, Orosco stated, "[i]t sounds like a trick question . . . and a setup," and the court replied, "you know, you can really just answer the question . . . or say, I don't believe so or I don't recall. That would be a perfectly permissible answer." The sixth comment was made after the State asked Orosco about whether he told the police officers that if someone who he is having sex with tells him "to stop," he is "going to stop right there," and Orosco answered, "[y]es, ma'am, but [A.V.] didn't say the words . . . I don't want to have sex anymore." At that point, the State objected to Orosco's testimony and argued that it was nonresponsive, and the court again asked Orosco to

"just answer the question" and noted that "[e]very other witness has done a pretty good job of answering the questions." The seventh comment happened after Orosco complained that he was not getting a fair trial and accused the State of prosecutorial misconduct, and the court responded, "[i]t's just an obstinance and a defiance that is being conveyed. . . . We've been as patient with you as possible. . . . [A]t some point, I'm going to cut off this examination if you're not able to abide by the rules." The final comment highlighted by Orosco on appeal took place after the State asked Orosco if he told the investigating officers that he would have stopped the sexual activity had A.V. asked him to and after the State played portions of the recordings of the incident recovered from Orosco's phone and asked Orosco several times if he heard A.V. ask him to stop at various points on the recordings. When Orosco repeatedly responded to the questions by saying that he and A.V. had planned the specific activities before recording them and that A.V. had agreed to act in a certain way before being recorded, the court explained that it was "getting ready to prevent" Orosco's attorney from clarifying Orosco's testimony through further questioning.

After Orosco finished testifying, the State called a few rebuttal witnesses, and then both sides rested and closed. The jury determined that Orosco was guilty of aggravated sexual assault and aggravated kidnapping. Following the punishment hearing, in which several witnesses testified, the district court sentenced Orosco and rendered its judgments of conviction.

## DISCUSSION

In his first issue on appeal, Orosco contends that "the trial court erred by refusing to suppress the evidence of the contents of [his] cell phone." In his second issue, Orosco asserts that the district court's "statements to [him] before the jury cumulatively amounted to impermissible

comments on the weight of the evidence." Finally, in his last issue on appeal, Orosco argues that he "was improperly prohibited from" eliciting testimony regarding lies that A.V. purportedly told and regarding her alleged drug use.

**Motion to Suppress**

As discussed previously, in his first issue, Orosco urges that the district court erred by denying his motion to suppress. When challenging the district court's ruling, Orosco does not challenge the propriety of the police having attained custody of the phone after A.V. took the phone and handed it to the police, and Orosco does not assert that the police did not have the authority to initially seize the phone. *Cf. Riley v. California*, 134 S. Ct. 2473, 2486 (2014) (noting that parties' concession that police "could have seized and secured their cell phones [after their arrest] to prevent destruction of evidence while seeking a warrant" was "a sensible concession"); *State v. Granville*, 423 S.W.3d 399, 412 (Tex. Crim. App. 2014) (explaining that "the police may legitimately 'seize' the property and hold it while they seek a search warrant" after property was discovered incident to defendant's arrest). Instead, Orosco argues that it was unreasonable for the police to retain custody of his phone and wait four days before applying for a warrant to search the phone because "[t]here was no proof of imminent destruction indicated by [him] in this appeal to justify the" continued seizure. *See* U.S. Const. amend. IV (prohibiting "unreasonable searches and seizures").[2] Accordingly,

[2] When urging in his brief that there were no exigent circumstances justifying the continued retention of the phone by the police, Orosco points to cases in which the police performed warrantless searches of homes. *See Kentucky v. King*, 563 U.S. 452, 455 (2011) (explaining that exigent-circumstances rule permits "police officers to conduct an otherwise permissible search without first obtaining a warrant" and concluding that rule applied to circumstances in which "police, by knocking on the door of a residence and announcing their presence, cause the occupants to

Orosco contends that the retention of the phone for several days was unreasonable and that the district court should have granted his motion because the evidence was not admissible under the Texas exclusionary rule. *See* Tex. Code Crim. Proc. art. 38.23 (prohibiting admission of evidence "obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States").[3]

Appellate courts review a trial court's ruling on a motion to suppress for an abuse of discretion. *Arguellez v. State*, 409 S.W.3d 657, 662 (Tex. Crim. App. 2013). Under that standard, the record is "viewed in the light most favorable to the trial court's determination, and the judgment

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attempt to destroy evidence"); *Turrubiate v. State*, 399 S.W.3d 147, 149 (Tex. Crim. App. 2013) (determining "that probable cause to believe that illegal drugs are in a home coupled with an odor of marijuana from the home and a police officer making his presence known to the occupants do not justify a warrantless entry" under exigent-circumstances rule). We believe that Orosco's reliance on these cases is misplaced because this case involves the search of a phone that was not performed until after the police obtained a search warrant. In any event, as will be discussed more thoroughly later in the opinion, we believe that there were exigent circumstances justifying the continuation of the seizure of the phone.

[3] Although most of the cases relied on by Orosco in this portion of his brief are federal cases, *see, e.g.*, *Riley v. California*, 134 S. Ct. 2473 (2014); *King*, 563 U.S. 452, at the end of the analysis section of his first issue, Orosco states that the search at issue "should be evaluated under the Texas Constitution" as well. However, Orosco did not provide a separate analysis regarding the relevant provisions from the Texas Constitution or assert that the protections afforded by the Texas Constitution are greater than those guaranteed by the Fourth Amendment. *Cf. Hankston v. State*, __ S.W.3d __, No. PD-0887-15, 2017 WL 1337659, at *7 (Tex. Crim. App. Apr. 12, 2017) (discussing similarity between federal and Texas constitutional provisions prohibiting unreasonable searches and seizures and determining that Texas Constitution provides no greater protection to cell-phone records than Fourth Amendment does). Accordingly, we will address the arguments presented as a single issue challenging the trial court's ruling. *Cf. Johnson v. State*, 912 S.W.2d 227, 235-36 (Tex. Crim. App. 1995) (noting that requirements for determining when person is seized under section 9 of Article I of Texas Constitution are same as requirements under Fourth Amendment); *Morehead v. State*, 807 S.W.2d 577, 579 n.1 (Tex. Crim. App. 1991) (determining that argument regarding free-speech guarantee in Texas constitution was "inadequately briefed" "because appellant provided no argument or authority as to the protection provided by the Texas Constitution" and instead focused on his claims under federal Constitution).

will be reversed only if it is arbitrary, unreasonable, or 'outside the zone of reasonable disagreement.'" *State v. Story*, 445 S.W.3d 729, 732 (Tex. Crim. App. 2014) (quoting *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006)). Moreover, appellate courts apply "a bifurcated standard, giving almost total deference to the historical facts found by the trial court and analyzing *de novo* the trial court's application of the law." *State v. Cuong Phu Le*, 463 S.W.3d 872, 876 (Tex. Crim. App. 2015); *see Arguellez*, 409 S.W.3d at 662 (explaining that appellate courts afford "almost complete deference . . . to [a trial court's] determination of historical facts, especially if those are based on an assessment of credibility and demeanor"). "The same deference is afforded the trial court with respect to its rulings on application of the law to questions of fact and to mixed questions of law and fact, if resolution of those questions depends on an evaluation of credibility and demeanor." *Crain v. State*, 315 S.W.3d 43, 48 (Tex. Crim. App. 2010). Appellate courts review "*de novo* 'mixed questions of law and fact' not falling within this category." *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997) (quoting *Villarreal v. State*, 935 S.W.2d 134, 139 (Tex. Crim. App. 1996) (McCormick, J., concurring)). In addition, "appellate courts may review *de novo* 'indisputable visual evidence' contained in a videotape" but "must defer to the trial judge's factual findings on whether a witness actually saw what was depicted on a videotape or heard what was said." *State v. Duran*, 396 S.W.3d 563, 570-71 (Tex. Crim. App. 2013) (quoting *Carmouche v. State*, 10 S.W.3d 323, 332 (Tex. Crim. App. 2000)). In general, courts "consider only the evidence adduced at the suppression hearing because the ruling was based on that evidence rather than evidence introduced later" unless "the suppression issue has been consensually relitigated by the parties during trial." *Herrera v. State*, 80 S.W.3d 283, 290-91 (Tex. App.—Texarkana 2002, pet. ref'd) (on reh'g).

At issue in this case is the seizure of Orosco's cell phone. Although searches implicate a person's privacy rights, a seizure only implicates a person's right to possess the particular piece of property, *Segura v. United States*, 468 U.S. 796, 806 (1984), and accordingly, is "far less intrusive than a search," *United States v. Payton*, 573 F.3d 859, 863 (9th Cir. 2009). Accordingly, courts have "frequently approved warrantless seizures of property . . . for the time necessary to secure a warrant, where a warrantless search was either held to be or likely would have been held impermissible." *Segura*, 468 U.S. at 806.

The Fourth Amendment states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated." U.S. Const. amend. IV. Reasonableness is the touchstone of the Fourth Amendment, and the reasonableness of a search or seizure "is measured in objective terms by examining the totality of the circumstances." *Ohio v. Robinette*, 519 U.S. 33, 39 (1996). In addition, a citizen has a "reasonable expectation of privacy in the contents of his cell phone." *Granville*, 423 S.W.3d at 417. Accordingly, police "officers must generally secure a warrant before conducting . . . a search" of a cell phone. *Riley*, 134 S. Ct. at 2485; *see also Robinson v. State*, 368 S.W.3d 588, 598 (Tex. App.—Austin 2012, pet. ref'd) (stating that there is "constitutional preference that searches be conducted pursuant to a warrant").[4]

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[4] On appeal, when arguing that the delay at issue was too long to be reasonable, Orosco suggests that the Supreme Court determined in *Riley* that searches performed within hours of a phone being seized would be reasonable and, according to Orosco, implicitly suggested that seizures that are longer in duration would be unreasonable. In the portion of its analysis discussing the potential that cell phones may be vulnerable to having their content remotely erased, the Supreme Court explained as follows: "Cell phone data would be vulnerable to remote wiping from the time an individual anticipates arrest to the time any eventual search of the phone is completed, which might

"An officer may temporarily seize property without a warrant . . . if she has 'probable cause to believe that'" the property "'holds contraband or evidence of a crime' and 'the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present.'" *United States v. Burgard*, 675 F.3d 1029, 1032 (7th Cir. 2012) (quoting *United States v. Place*, 462 U.S. 696, 701 (1983)); *see also id.* at 1031 (discussing how officer seized defendant's cell phone after officer received tip from defendant's friend that phone contained "sexual images of young girls (possibly aged 14 or younger)" and how search warrant was later obtained to search phone for images). "'[E]xigent circumstances,' includ[e] the need to prevent the destruction of evidence," *King*, 563 U.S. at 455; *see also People v. Thomas*, No. G049862, 2015 WL 778839, at *4 n.2 (Cal. Ct. App. Feb. 24, 2015) (not designated for publication) (observing that police "had every right to seize appellant's computer for the purpose of preserving the images it contained" because police did not create exigency by threatening to or engaging in conduct violating Fourth Amendment). These types of "permissible warrantless seizure[s] . . . must comply with the Fourth Amendment's reasonableness requirement," meaning that "police must obtain a search warrant within a reasonable period of time." *Burgard*, 675 F.3d at 1032. If no search warrant is obtained, "at some point the delay becomes unreasonable . . . under the Fourth Amendment," but there is "no bright line past which a delay becomes unreasonable." *Id.* at 1032, 1033. On the contrary, courts must evaluate the reasonableness of the delay by weighing "the nature and quality of the intrusion on the individual's

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be at the station house hours later." *Riley*, 134 S. Ct. at 2487. We do not read that statement as intending to impose a particular deadline by which a search warrant must be sought in order for the delay between a seizure and the search to be reasonable under the Fourth Amendment.

Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Place*, 462 U.S. at 703.

In this case, A.V. told the police that Orosco sexually assaulted her and that he recorded the assault on his cell phone, and the police could reasonably have believed that temporarily seizing the phone was necessary because the cell phone contained evidence of a crime, because Orosco was aware that the police had been told that there was a recording of the assault on the phone, and because the delay needed to obtain a search warrant might result in destruction of the evidence if the phone was returned to Orosco. *See Illinois v. McArthur*, 531 U.S. 326, 333 (2001) (observing that "Court has upheld temporary restraints where needed to preserve evidence until police could obtain a warrant"); *see also United States v. Vallimont*, 378 Fed. Appx. 972, 973 (11th Cir. 2010) (concluding that "[t]he warrantless seizure was . . . permissible under the exigent circumstances exception to the warrant requirement because (1) there was probable cause to believe the computer held child pornography, and (2) [Officer] Griffin was understandably concerned that the evidence on the computer might be deleted if Vallimont became aware of the investigation"). Unquestionably, Orosco's right to possess his phone was infringed over the five-day period before the search warrant was issued. Although the district court correctly determined that Orosco did not demand that his phone be returned immediately, the record before this Court indicates that Orosco asserted a possessory interest in his property by making repeated inquiries about when his phone would be returned to him. *Cf. Burgard*, 675 F.3d at 1033 (explaining that asserting claim to property could include "checking on the status of the seizure or looking for assurances that the item would be returned"); *United States v. Stabile*, 633 F.3d 219, 235-36 (3d Cir. 2011) (noting that failure to

seek return of property for months weighed against determination that delay was unreasonable). However, Orosco's privacy interests in the contents of his cell phone were not infringed on during that time because no search was performed until after a search warrant was obtained.

Moreover, the State's interest in seizing the phone was strong because the State had probable cause to believe that the phone contained evidence that Orosco had sexually assaulted A.V. *Cf. Illinois v. Gates*, 462 U.S. 213, 238 (1983) (explaining that probable cause exists under totality of circumstances when "there is a fair probability that contraband or evidence of a crime will be found in a particular place"). Furthermore, although the record establishes that there was a several-day delay between when the phone was seized and when the search warrant issued, the record also demonstrates that Officer Penniman was not scheduled to work for three of those days, that the police department was short-staffed because it was a holiday weekend, that the only officer who could perform the search was not working over the weekend, that Officer Penniman was the only individual with the knowledge of the case needed to prepare a request for a search warrant, that Officer Penniman prepared the request for a search warrant on the morning that he returned to work, and that the search warrant issued that same day. Accordingly, even though the delay is not insignificant, under the circumstances of this case, including the nature of the crime and of the evidence purportedly contained on the phone, we cannot conclude that the district court abused its discretion by determining that the continued seizure of Orosco's cell phone was not unreasonable. *See Burgand*, 675 F.3d at 1034, 1035 (determining that "six-day delay" in filing request for warrant to search seized cell phone "was not so unreasonable as to violate the Constitution" because "police imperfection is not enough to warrant reversal" and because "delay was not the result of complete abdication of [officer's] work"); *United States v. Martin*, 157 F.3d 46, 54 (2d Cir. 1998) (finding

that delay of eleven days between warrantless seizure and search after issuance of search warrant was not unreasonable, in part, because delay "included two weekends and the Christmas holiday"); *Thomas*, 2015 WL 778839, at *5 (concluding that five-day delay between seizure of computer and filing request for search warrant was not unreasonable, in part, because officer was off of work for three of those days).

For these reasons, we overrule Orosco's first issue on appeal.

**Statements by the District Court**

In his second issue on appeal, Orosco asserts that the eight sets of statements discussed earlier that were made by the district court during his testimony in front of the jury amounted to impermissible commentary "on the weight of the evidence that prejudicially deprived [him] of a fair and impartial trial" and urges that "[a]ctions of the Court in participation in the trial can give rise to a violation of [his] rights under the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution." *See* U.S. Const. amends. V, VI, XIV; *see also* Tex. Code Crim. Proc. art. 38.05 (prohibiting trial courts from commenting on weight of evidence or making "any remark calculated to convey to the jury [its] opinion of the case").

During the trial, Orosco did not object to any of the allegedly improper comments made by the district court. *See* Tex. R. App. P. 33.1(a) (stating that to preserve error for appeal, record must show that complaint was made to trial court and that trial court ruled on request or refused to rule and that "complaining party objected to the refusal"); *Peavey v. State*, 248 S.W.3d 455, 470 (Tex. App.—Austin 2008, pet. ref'd) (explaining that, in general, failure to object to "comments on the weight of evidence" by trial court waives issue on appeal and that "contemporaneous

objection requirement encompasses improper comments by the trial court on the weight of the evidence"). In a plurality opinion addressing unobjected-to comments by a trial court, the court of criminal appeals determined that statements to the jury panel that the defendant had attempted to enter into a plea-bargain agreement with the State and that the trial court wished the defendant had pleaded guilty tainted the presumption of innocence and constituted fundamental error that did not need to be objected to in order to be raised on appeal. *See Blue v. State*, 41 S.W.3d 129, 132-33 (Tex. Crim. App. 2000); *see also* Tex. R. Evid. 103(e) (allowing courts to "take notice of a fundamental error affecting a substantial right, even if the claim of error was not properly preserved"). However, the court later explained that because the plurality and concurring opinions were decided on disparate grounds, "the *Blue* decision has no precedential value." *Unkart v. State*, 400 S.W.3d 94, 101 (Tex. Crim. App. 2013).

Even considering any persuasive authority that *Blue* might have in this case, we do not believe that *Blue* would support a conclusion that fundamental error occurred in this case. In *Blue*, the comments touched upon the defendant's "presumption of innocence," 41 S.W.3d at 132, and courts considering the applicability of the analysis from *Blue* have determined that fundamental error could be present if a trial court's comments tainted the presumption of innocence or prejudiced the jury, *see Jasper v. State*, 61 S.W.3d 413, 421 (Tex. Crim. App. 2001); *Ganther v. State*, 187 S.W.3d 641, 650-51 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd); *see also Watts v. State*, 140 S.W.3d 860, 863 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd) (explaining that trial court makes impermissible comment that prejudices defendant's rights if it "makes a statement that implies approval of the State's argument, that indicates any disbelief in the defense's position, or

that diminishes the credibility of the defense's approach to its case"). In this case, the district court expressed frustration with Orosco's repeated failures to answer the questions asked and to instead provide unrelated commentary, which the district court described as a "diatribe" on two occasions, and the district court repeatedly warned Orosco that additional failures to answer the questions asked or to behave in the manner required in judicial proceedings could result in the imposition of limitations on his ability to testify. None of those comments touched upon the presumption of innocence or indicated that the district court had a negative view of any defensive theory presented by Orosco. *See Jasper*, 61 S.W.3d at 420, 421 (determining that statements by trial court telling defense counsel to "[k]nock it off" and informing jury that statement from witness had not been reduced to writing after convening hearing in which prosecutor was called to testify on matter did not result in fundamental error because it is proper "for a trial judge to interject in order to correct a misstatement or misrepresentation of previously admitted testimony," because "a trial judge's irritation at the defense attorney does not translate to an indication as to the judge's views about the defendant's guilt or innocence," and because "[a] trial judge has broad discretion in maintaining control and expediting the trial," including clearing up confusion); *Wyatt v. State*, No. 03-10-00012-CR, 2012 WL 512654, at *8 (Tex. App.—Austin Feb. 16, 2012, no pet.) (mem. op., not designated for publication) (concluding that defendant failed to preserve error by failing to object to comments made by trial court that "defense counsel was attempting to broach a subject that the court had previously and repeatedly instructed the parties to avoid" and that "a defense witness's testimony was a 'diatribe'" because those comments did not undermine impartiality of jury and did "not rise to the level of fundamental error" and noting that "even though 'diatribe' is often use[d] pejoratively, the word also has a neutral definition").

Morever, as discussed earlier, the district court did not make any of these comments until after convening a hearing in which the district court allowed Orosco to vent his frustrations with the proceeding and in which the district court repeatedly instructed Orosco to limit his answers to the questions asked. The record for that hearing is almost fifty pages long, and the remainder of his testimony is well in excess of a hundred pages. Further, we note that although the district court admonished Orosco that it might have to impose some limitations on the ability of his attorney to ask him clarifying questions after his cross-examination, the district court did not in fact impose any limitations on his testimony. Accordingly, based on our review of the record, we conclude that the allegedly improper comments by the district court did not rise to the level of fundamental error.[5]

For all of these reasons, we overrule Orosco's second issue on appeal.

**Limitations on Testimony Regarding A.V.**

In his final issue on appeal, Orosco argues that during the trial, he "attempted to testify about" A.V.'s "use of drugs on the evening of the alleged assault" and attempted to cross-examine A.V. about her use of illegal drugs "but was rebuffed by rulings of the" district court. In

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[5] As support for his arguments in this issue, Orosco primarily relies on *Bethany v. State*, 814 S.W.2d 455 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd). In that case, the appellate court determined that the trial court's actions deprived the defendant of the right to a fair trial and to the effective assistance of counsel. *Id.* at 456, 462. The trial court at issue in *Bethany* "abandoned its neutral status and took up the role of an advocate in this case" by, among other ways, bringing to the attention of the State discrepancies between the testimony presented at trial and the medical records introduced into evidence, accusing the defendant of perjury, forcing the defendant's attorneys to disclose confidential information, demanding the defendant's attorneys produce more records "for the benefit of the court and the prosecutors," and ordering the defendant "to retract testimony which had been corroborated by other evidence." *Id.* at 461. We find no similarity between the allegedly improper comments at issue in this case and the actions by the trial court in *Bethany*.

addition, Orosco contends that he attempted to testify that A.V. lied to him about her marital status and about her true name but that the district court sustained an objection to his testimony. When presenting these arguments, Orosco asserts that the district court incorrectly determined that the Rules of Evidence prohibited him from testifying regarding specific instances of A.V. using drugs and of A.V. lying.[6]

Appellate courts review a trial court's decision to disallow evidence under an abuse-of-discretion standard. *See Hernandez v. State*, 390 S.W.3d 310, 324 (Tex. Crim. App. 2012). Under the Rules of Evidence, "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." Tex. R. Evid. 404(a)(1). The general rule barring evidence of a person's character or character trait is subject to the exception allowing for the admission of "[e]vidence of a witness's character" under rule 608. *Id.* R. 404(a)(4). Under rule 608, "[a] witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character," but "a party may not inquire into or offer extrinsic evidence to prove specific instances of the witness's conduct in order to attack or support the witness's character for truthfulness" with the exception of evidence of certain criminal convictions not at issue in this case. *See id.* R. 608; *see also Hammer v. State*, 296 S.W.3d 555, 563 (Tex. Crim. App. 2009) (stating that "[a] witness's general character for truthfulness or credibility

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[6] Although Orosco focuses on the evidentiary rulings in this issue, he also argues on appeal that the district court's rulings violated his "Sixth Amendment right to confrontation" because he was not allowed to impeach A.V.'s testimony. However, Orosco made no argument to the district court regarding the Confrontation Clause and has, therefore, "failed to preserve error on Confrontation Clause grounds." *See Paredes v. State*, 129 S.W.3d 530, 535 (Tex. Crim. App. 2004); *see also* Tex. R. App. P. 33.1(a) (setting out manner for preserving issues for appeal).

may not be attacked by cross-examining him (or offering extrinsic evidence) concerning specific prior instances of untruthfulness").[7]

Regarding evidence of drug use, the court of criminal appeals has explained that the passage of the Rules of Evidence "abolished the impeachment of witnesses with evidence of drug addiction," *Lagrone v. State*, 942 S.W.2d 602, 612 (Tex. Crim. App. 1997) (discussing Rule of Evidence 608). In other words, the court explained that "[a]lthough long term alcohol or drug use may produce some minimal effects on . . . perceptual capacity, . . . inchoate alcohol and drug usage [are] specific instances of conduct which are immune from impeachment" and that a party "must demonstrate an actual drug-based mental impairment during the . . . observation of the crime in order to pursue impeachment of a" witness's "perceptual capacity with evidence of drug addiction." *Id.* at 613. Further, the court has determined that a witness's "credibility is only subject to attack" when his "perceptual capacity is physically impaired by the intoxicating effects of alcohol or drugs during [his] observation of pertinent events." *Id.*

As set out above, Orosco argues that the district court erred by sustaining the State's objections to his testimony regarding lies that A.V. allegedly told him. In response to a question regarding how Orosco met A.V., Orosco testified that they "messaged each other" on Facebook and

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[7] When objecting to the testimony sought, the State invoked rule 608. We note that Orosco did not argue in response that the evidence was admissible as "evidence of a victim's pertinent trait" under rule 404(a)(3)(A). *See* Tex. R. Evid. 404(a)(3)(A) (containing exception for victims to general rule that character evidence is not admissible); *see also id.* R. 405 (limiting method of proving character trait "[w]hen evidence of a person's character or character trait is admissible" to "testimony about the person's reputation or by testimony in the form of an opinion" and only allowing inquiry into "relevant specific instances of the person's conduct" during "cross-examination of the character witness").

that after they started sending messages to one another, "she started lying to [him] right off the top. For example, whenever." At that point, the State objected on multiple grounds, including that the testimony called "for impeachment of the character on specific instances of conduct." Although the district court did not rule on the objection at that point, Orosco did not continue his testimony regarding any particular lies allegedly told by A.V., and shortly after the objection was made, a hearing was convened outside the presence of the jury in which, among other things, the district court explained to Orosco that he could provide opinion testimony regarding whether A.V. had a reputation for being truthful but that he could not testify regarding specific instances in which A.V. allegedly lied about something.[8] After the jury was called back to the courtroom, Orosco continued his testimony and stated that A.V. had a "[v]ery bad" reputation for "truthfulness."

As discussed earlier, rule 608 allows a party to question a witness's credibility through opinion testimony but does not allow a party to offer evidence of specific instances of conduct in order to attack the witness's "character for truthfulness." Tex. R. Evid. 608. Orosco was allowed to provide opinion testimony regarding A.V.'s character for truthfulness but was instructed not to provide testimony regarding specific instances in which A.V. was allegedly untruthful. *See id.* Accordingly, we cannot conclude that the district court abused its discretion by limiting Orosco's testimony in the manner described.

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[8] In the hearing, Orosco contended that A.V. lied because she told him that she was single and not married and because she used a different last name when they first met. We note that during her cross-examination by Orosco, A.V. testified that she told Orosco that she was separated from her husband and told Orosco initially that her last name was the last name listed on her Facebook profile, which was the name Orosco referred to in the hearing.

In addition to arguing that the district court erred by limiting his testimony regarding A.V.'s truthfulness, Orosco also asserts that the district court improperly prohibited him from introducing evidence regarding A.V.'s alleged drug use through cross-examination of A.V. and through his own testimony. During A.V.'s testimony, the district court held a hearing outside the presence of the jury. In that hearing, Orosco indicated that he wanted to ask A.V. about her alleged use of illegal drugs because he wanted to see if she was under the influence at the time of the alleged offense, and the State objected on multiple grounds, including that the requested testimony would constitute an impermissible attack on A.V.'s character using "specific instances of conduct." While A.V. remained on the stand, Orosco asked A.V. whether she smoked marijuana or consumed any other illegal drugs on the night in question, whether she had a drawer next to her bed where she "kept marijuana and other paraphernalia," and whether she smoked marijuana during her relationship with Orosco. In response, A.V. stated that she did not consume any illegal drugs on the night in question, denied keeping a stash of marijuana in her bedroom, and admitted that she had smoked marijuana "a couple of times" during her relationship with Orosco.

When deciding whether Orosco should be allowed to ask those questions in front of the jury, the district court asked the parties if there was any evidence contradicting the testimony A.V. gave during the hearing, and neither side indicated that there was any evidence, medical or otherwise, controverting A.V.'s testimony. Further, the district court stated that "there's nothing to show that this is [anything] more than a fishing expedition" and sustained the State's objection, but the district court explained that it would allow Orosco the option of recalling A.V. "or any other witness" if there was "information from any other source" indicating that A.V. had used illegal

drugs prior to the alleged assault. No other evidence was presented indicating that A.V. had used illegal drugs on the night in question,[9] and Orosco did not present any evidence indicating that A.V. was mentally impaired due to the use of drugs at the time of the offense and did not attempt to recall A.V. to question her regarding any potential drug use. *Cf. Pierson v. State*, 426 S.W.3d 763, 772 (Tex. Crim. App. 2014) (explaining that "proponent of the evidence" has burden "to show that the question was anything more than a prelude to impeachment on a collateral matter and an impermissible attempt to attack the complaining witness's general credibility with evidence of specific instances of conduct").

In the absence of any evidentiary support for the proposition that A.V. was mentally impaired by the use of drugs at the time in question and given that A.V. denied during the hearing using marijuana or any illegal drug prior to the incident, that no evidence had been introduced contradicting that testimony when the district court made its ruling, and that the district court agreed to allow Orosco to recall A.V. or any additional witness to testify on the matter if evidence was presented demonstrating that A.V. had used drugs just before the incident, we cannot conclude that the district court abused its discretion by concluding that questions regarding A.V.'s alleged drug use would constitute an impermissible attack on A.V.'s character and by sustaining the State's objection to Orosco's request to question A.V. regarding her prior drug use and regarding whether she had used marijuana right before the incident. *See Brown v. State*, No. 03-10-00515-CR, 2013 WL 857252, at *6 (Tex. App.—Austin Mar. 7, 2013, no pet.) (mem. op., not designated for

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[9] On the contrary, during the trial, Officer Evan Powell testified that he did not find any contraband in A.V.'s home when he was performing his investigation.

publication) (determining that rule 608 prohibited defendant from cross-examining victim "regarding her drug use for the purpose of attacking her credibility"); *cf. Pierson*, 426 S.W.3d at 772 (stating that, in general, "impeachment on a collateral matter is impermissible"); *Delamora v. State*, 128 S.W.3d 344, 363 (Tex. App.—Austin 2004, pet. ref'd) (stating that "[a] collateral matter is one which seeks only to test a witness's general credibility or relates to facts irrelevant to issues at trial").

As set out above, Orosco also challenges the district court's instruction to him to not testify regarding A.V.'s alleged drug use. In the lengthy hearing held outside the presence of the jury during Orosco's testimony, Orosco personally informed the district court from the stand that he wanted to discuss A.V.'s alleged drug use, and the district court explained that it would not allow Orosco to testify regarding general allegations that A.V. regularly used drugs or that she smoked marijuana after the alleged assault because it did not "matter what happened after" the incident. However, the district court explained that it would allow Orosco to testify regarding whether he saw A.V. smoke marijuana and whether Orosco smelled marijuana when he went to A.V.'s home on the night in question because "it's an intoxicant" and because the question is similar to whether someone smelled like alcohol.

When the district court made the instruction, Orosco personally complained that the instructions were unfair because he felt the information was important, but no argument was made that the information should be admitted under the Rules of Evidence. In any event, for the reasons discussed above, we cannot conclude that the district court abused its discretion by prohibiting Orosco from testifying regarding A.V.'s alleged prior or subsequent drug use on the ground that the testimony would be an improper attack on her credibility. *See* Tex. R. Evid. 608(b); *cf. Brown*,

2013 WL 857252, at *6 (explaining that "testimony regarding her drug use after the assault was not relevant to prove any other material issue in the case related to the convicted offense of aggravated assault with a deadly weapon"). In addition, as summarized above, the district court expressly authorized Orosco to answer questions regarding his observations of A.V.'s allegedly contemporaneous use of illegal drugs on the night of the incident.

Even assuming for the sake of argument that the district court erred by prohibiting Orosco from eliciting testimony regarding A.V.'s drug use and regarding specific instances in which A.V. allegedly lied to Orosco, we would still be unable to conclude that Orosco was harmed by the errors. "Generally, the erroneous admission or exclusion of evidence is nonconstitutional error governed by rule 44.2(b)." *See Mohamed v. State*, No. 05-15-01329-CR, 2016 WL 7163848, at *8 (Tex. App.—Dallas Dec. 6, 2016, no pet.) (mem. op., not designated for publication); *cf. Potier v. State*, 68 S.W.3d 657, 662-63 (Tex. Crim. App. 2002) (stating that "[e]rroneous evidentiary rulings rarely rise to the level of denying the fundamental constitutional rights to present a meaningful defense"). Under that rule, any error "that does not affect substantial rights must be disregarded." Tex. R. App. P. 44.2(b). A substantial right is not affected by an erroneous evidentiary ruling "'if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight effect.'" *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002) (quoting *Solomon v. State*, 49 S.W.3d 356, 365 (Tex. Crim. App. 2001)). In making this determination, appellate courts should consider the entire record, "including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence in the case," and appellate courts may also consider "the jury instructions, the State's theory

and any defensive theories, closing arguments and even voir dire, if applicable," as well as the presence of "overwhelming evidence of guilt." *Id.* at 355-56, 357.

As set out above, the testimony presented at trial and the photographs and recordings admitted into evidence overwhelmingly established Orosco's guilt. A.V.'s testimony, the recording of the 911 call that A.V. made, and the six recordings of the incident in question established that A.V. did not consent to the sexual activity at issue. In fact, on the relatively short clips recovered from Orosco's phone, A.V. could be heard clearly and repeatedly begging Orosco to stop on more than twenty occasions. Moreover, A.V.'s testimony, the testimony from nurse-examiner Thomasson, and the photographs admitted into evidence established that A.V. sustained significant injuries from the assault.

In addition, Orosco's defensive theory presented during the trial was that A.V. was lying and that the sexual activity was a consensual encounter in which he and A.V. agreed before he started recording the encounter that they would role play a sexual fantasy and that A.V.'s activities documented on the recordings were her performing the role. During his closing arguments, Orosco again asserted that the activity was consensual but also argued that the search of his phone was improper, that A.V. came up with a plan to pretend to be assaulted and record it so that she could guarantee a clear breakup with Orosco by sending him to prison and so that she could get back together with her husband, and that the absence of witnesses testifying that they heard the assault undermined the believability of A.V.'s testimony. Consistent with the governing Rules of Evidence, Orosco was permitted to testify that A.V. had a reputation for being untruthful, and testimony establishing that A.V. lied about her last name and marital status when she first met Orosco would seem to have little relationship with the other evidence presented during the trial or with Orosco's

defensive theories. Regarding A.V.'s use of drugs, the district court authorized Orosco to testify, if he wanted, about whether he had observed A.V. smoke marijuana shortly before the assault, and testimony that A.V. had smoked marijuana after the assault or in days before the assault would seem to have little connection with the other evidence presented in this case or with Orosco's defensive theories. Importantly, we also note that although Orosco was instructed not to discuss A.V.'s use of illegal drugs on days before the assault, Orosco made multiple references in front of the jury to her alleged use of illegal drugs throughout his testimony. Accordingly, even assuming for the sake of argument that the evidentiary rulings were erroneous, in light of the preceding, we would be unable to conclude that Orosco's substantial rights were affected because the alleged errors either would not have impacted the jury or would have had but a slight effect.

For all of these reasons, we overrule Orosco's third issue on appeal.

## CONCLUSION

Having overruled Orosco's issues on appeal, we affirm the district court's judgments of conviction.

__________________________________________

Cindy Olson Bourland, Justice

Before Chief Justice Rose, Justices Pemberton and Bourland

Affirmed

Filed: June 29, 2017

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