TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00531-CR

Drexell Davon Washington, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 427TH JUDICIAL DISTRICT
NO. D-1-DC-13-300855, HONORABLE JIM CORONADO, JUDGE PRESIDING

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

A jury convicted appellant Drexell Davon Washington of the offense of murder and assessed punishment at life imprisonment.[1] The district court rendered judgment on the verdict. In two points of error on appeal, Washington asserts that the district court abused its discretion in (1) admitting evidence of a piece of fingernail the State claimed to have recovered from the crime scene and (2) admitting expert testimony tending to show that Washington could not be excluded as a contributor of DNA that was found on the fingernail piece. We will affirm the judgment of conviction.

[1] *See* Tex. Penal Code § 19.02.

BACKGROUND

The jury heard evidence that on the night of April 9, 2013, Reynaldo Ortega was shot and killed outside his apartment in Austin. The shooting was recorded by a security camera in the apartment parking lot, and a copy of the recording was admitted into evidence and played for the jury. The recording showed a black Honda Accord pulling into the apartment complex. After the vehicle parked, an unidentified man wearing a dark-colored hoodie and dark pants approached the vehicle and got into an altercation with the driver, later identified as Ortega. Ortega then ran from the vehicle toward an apartment building, with the other man in pursuit, until they were both out of view of the camera. Several moments later, the other man came back into view and could be seen approaching and entering the vehicle. Approximately twenty seconds later, Ortega also came back into view and could be seen running toward the vehicle, whereupon the other man exited the vehicle and ran toward Ortega. As the two men were running toward each other, the unidentified man pulled what appeared to be a gun from his waistband, at which point Ortega backed off, put his arms up, and ran back toward the apartment building. The other man followed Ortega, pointed the gun at him, and appeared to shoot him in the back.

The shooting was personally witnessed by Martin Lopez, a resident at the apartment complex. Lopez testified that he was outside talking to his wife on the phone when he "heard some shots" and "saw somebody shooting somebody else in the back." Then, Lopez recalled, "the guy that was shooting, he came after me and he asked me for my wallet." Lopez testified that he ran toward his apartment, while the other man ran after him, firing the gun twice at Lopez but missing. Lopez continued that when he reached his apartment and went inside, the other man followed him to the

entrance and pointed the gun at Lopez and his roommate, Simon Diaz, demanding that Lopez give him his cell phone. Then, Lopez recounted, he grabbed a sledge hammer in an attempt to defend himself, whereupon the man shot him in the midsection and then continued firing his gun at both him and Diaz. However, upon realizing that the gun had run out of bullets, Diaz grabbed a bat and chased the man out of the apartment. Neither Lopez nor Diaz was able to identify the shooter, although they both testified that he was a black male wearing a sweatshirt and pants.

The majority of the State's evidence presented at trial focused on establishing Washington's identity as the shooter. This evidence included the testimony of Washington's girlfriend, Jayonna Reed, who lived in the apartment complex where the shooting had occurred and testified that Washington was at her apartment that night when she returned home from work, and Washington's friend, Jermaine Owens, who testified that Washington had confessed to him that he had committed the shooting. Other evidence considered by the jury included cell-phone records tending to show that Washington had made phone calls on the night in question from the general vicinity of where the shooting had occurred; additional video evidence showing the shooter, shortly after the shooting had occurred, walking toward the apartment building where Washington's girlfriend lived, and then, approximately an hour later, walking away from that building; and DNA evidence recovered from Ortega's car and body. Based on this and other evidence, which we discuss in more detail below, the jury found Washington guilty of murder and assessed punishment at life imprisonment as noted above. The district court rendered judgment on the verdict. This appeal followed.

STANDARD OF REVIEW

We review a district court's evidentiary rulings for abuse of discretion.[2] We are to view the record "in the light most favorable to the trial court's determination, and the judgment will be reversed only if it is arbitrary, unreasonable, or 'outside the zone of reasonable disagreement.'"[3] We consider the ruling in light of what was before the district court at the time the ruling was made.[4] "We will sustain the lower court's ruling if it is reasonably supported by the record and is correct on any theory of law applicable to the case."[5]

ANALYSIS

Authentication of fingernail piece

During trial, the district court admitted into evidence a piece of fingernail that, according to the State, had been recovered from Ortega's vehicle following the shooting. In his first point of error, Washington asserts that the district court abused its discretion in admitting this evidence because the fingernail piece had not been properly authenticated.

"To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent

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[2] *State v. Story*, 445 S.W.3d 729, 732 (Tex. Crim. App. 2014) (citing *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006)); *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011).

[3] *Story*, 445 S.W.3d at 732 (quoting *Dixon*, 206 S.W.3d at 590); *see Montgomery v. State*, 810 S.W.2d 372, 391-92 (Tex. Crim. App. 1991) (op. on reh'g).

[4] *Billodeau v. State*, 277 S.W.3d 34, 39 (Tex. Crim. App. 2009).

[5] *Dixon*, 206 S.W.3d at 590 (citing *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990)); *see Valtierra v. State*, 310 S.W.3d 442, 448 (Tex. Crim. App. 2010).

claims it is."[6] "In a jury trial, it is the jury's role ultimately to determine whether an item of evidence is indeed what its proponent claims; the trial court need only make the preliminary determination that the proponent of the item has supplied facts sufficient to support a reasonable jury determination that the proffered evidence is authentic."[7] Moreover, "the trial court itself need not be persuaded that the proffered evidence is authentic."[8] "The preliminary question for the trial court to decide is simply whether the proponent of the evidence has supplied facts that are sufficient to support a reasonable jury determination that the evidence he has proffered is authentic."[9] "Evidence may be authenticated in a number of ways, including by direct testimony from a witness with personal knowledge, by comparison with other authenticated evidence, or by circumstantial evidence."[10] "The trial court's determination of whether the proponent has met this threshold requirement is subject to appellate review for an abuse of discretion and should not be countermanded so long as it is within the zone of reasonable disagreement."[11] "This has been aptly described as a 'liberal standard of admissibility.'"[12]

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[6] Tex. R. Evid. 901(a).

[7] *Butler v. State*, 459 S.W.3d 595, 600 (Tex. Crim. App. 2015) (citing *Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012)).

[8] *Tienda*, 358 S.W.3d at 638.

[9] *Id*. (citing *Druery v. State*, 225 S.W.3d 491, 502 (Tex. Crim. App. 2007)).

[10] *Id*. (citing Tex. R. Evid. 901(b)(1), (3)-(4)).

[11] *Butler*, 459 S.W.3d at 600.

[12] *Id*. (quoting Cathy Cochran, Texas Rules of Evidence Handbook 922 (7th ed. 2007-08)).

There were multiple hearings on the admissibility of the disputed piece of fingernail.[13] At the first hearing, Detective Rogelio Sanchez of the Austin Police Department, the lead investigator in the case, testified that he had reviewed the security-camera footage of the shooting and recounted its contents for the court, noting particularly the sequence in which "you can see that there's some kind of struggle going on [outside] the driver's side of the vehicle." Sanchez explained, "[T]here's some kind of physical altercation that's pretty obvious at one point, when—when both of them are outside the vehicle. You can see, just above the roof of the car, both of them in some kind of physical altercation." Sanchez also testified that, following the altercation but prior to the shooting, after Ortega had run away from the vehicle, the suspect could be seen "go[ing] back to the driver's side of the vehicle" and apparently "enter[ing] the vehicle." Thereafter, Sanchez testified, Ortega ran back toward the vehicle, at which point the suspect emerged from the driver's side of the vehicle, ran toward Ortega, pulled out something from his waistband, and aimed it at Ortega as Ortega attempted to retreat. Sanchez concluded, "Then you can see a couple of flashes in the video, after which [the suspect]—he brings his hand back in and tucks it into his front—front waistband, or front—front waistband and starts running northbound in the parking lot."

When asked if the vehicle belonged to Ortega, Sanchez testified, "Yes, sir. The vehicle was his. And it was registered to his brother Joel Ortega, who he lived with." Sanchez explained that the vehicle was seized on the night of the shooting by the Austin Police Department and taken to a "secured" forensic processing facility, where it was processed the following day,

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[13] The first hearing was before an associate judge, the Hon. Leon Grizzard. The second hearing was before the district court. A third hearing, also before the district court, was held during trial.

April 10, 2013, by Sanchez and the APD Crime Scene Unit. Sanchez testified that photos of both the exterior and interior of the vehicle were taken during processing, but that no fingernail was recovered from the vehicle at that time. According to Sanchez, the vehicle was released to Joel Ortega on April 13, 2013, a Saturday.

Sanchez further testified that on the following Monday, April 15, 2013, he received a call from Joel Ortega and met with him later that day at Sanchez's office. Sanchez recounted that during this meeting, Joel gave him "a piece of a torn fingernail" in an envelope. Sanchez explained that he "packaged [the piece of fingernail] in an evidence envelope," "sealed it with evidence tape," and then "dropped it in the evidence drop box . . . in the basement of the police department," after which it was "picked up by our evidence personnel and taken to the main storage, evidence storage facility." Sanchez subsequently reviewed the photographs that had been taken of the Honda at the processing facility on April 10. According to Sanchez, in one of the photographs, he noticed for the first time what appeared to be a piece of fingernail. This photograph was admitted into evidence at the hearing, as was another photograph—which the State termed a "blowup" of the previous photo—that showed a larger, more detailed image of the item. According to Sanchez, the photographs showed that the item was located on the "floorboard of the driver's side of the vehicle." Sanchez added that the photographs had not been tampered with or altered in any way.

Joel Ortega had died prior to the hearing and was thus unavailable to testify as to how he had come into possession of the fingernail piece. However, Sanchez testified that Joel had brought the nail to him in an envelope and that Joel had told him that he had found the fingernail piece "on the floorboard of the driver's side of the car," while he was cleaning the vehicle. When

asked how he knew that the fingernail piece in the photograph was the same fingernail piece that Joel had provided to him, Sanchez testified, "[I]n my opinion, sir, I believe it's similar to the fingernail that was brought to me by Joel Ortega, just based on the photographs."

At the second hearing, the parties stipulated to the evidence that was presented at the first hearing, including Sanchez's testimony. The district court also admitted into evidence additional photographs of the car's interior, which the State described as "basically a little closer view of this fingernail that was found in the car." Additionally, the district court admitted into evidence what the State claimed was a photograph that Sanchez had taken of the fingernail piece that Joel had brought to Sanchez, prior to Sanchez sealing the piece in an evidence envelope. Following argument, the district court took the matter under advisement and subsequently found the evidence to be admissible. The district court made findings of fact and conclusions of law on the record, including the following:

> [T]his Court does find that there is sufficient circumstantial indicia of authenticity by the nature of the way the evidence was turned over to the police department; the proximity in time in which the car had been delivered to the brother of the decedent; the brother of decedent coming forward a couple days within the vehicle being turned over to him and being—turning the evidence over to the police department. And that there's a corroborating photograph taken by the police department of a fingernail taken on April 10th, three days before the vehicle was turned over to the decedent's brother, Joel Ortega, and five days before the fingernail was turned over to the police department.
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> The chain of custody question, the State has raised an issue that the Defense has not presented in any form of affirmative defense that there was any tampering done to the item or presented any evidence that there may have been some tampering or interference. There is [a] clear . . . chain of custody, once the evidence was placed with the police department, was marked as physical evidence, was properly marked,

> and the chain of custody does begin when the officer seizes or possesses the evidence. Any theoretical breaches, as the Court has pointed out, that the Defense wishes to raise will go to weight and so not to admissibility. . . .
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> Therefore, we conclude that the fingernail cannot be excluded on the bases of tampering or authentication at this point; that there is a proper chain of custody from the time it was seized by the officer and turned over to his custody and being forensically tested. Therefore, the fingernail is being authenticated through circumstance, the circumstance of the photograph taken the 10th, the delivery to the victim's—the decedent's brother on the 13th, and his turning this evidence over on the 15th. And it has the distinctive characteristics of being a fingernail as being evidence, physical evidence.

The district court then denied Washington's motion to exclude the evidence.

The district court held another hearing on the admissibility of the evidence during trial, after additional photos of the car's interior, taken by the medical examiner's office on the night of the shooting, were admitted into evidence. In these photos, the purported fingernail piece was not visible. However, after reviewing the photographs, the district court decided not to reconsider its earlier ruling, noting that the additional photos were "shot at an entirely different angle" and that some portions of the floorboard were "obscured by shadow." The district court added, "The photographs you've shown me at this time, I may not have seen at the hearing, are inconclusive; however, the one which I did see, it's clear from my viewpoint to be what looks like very much to be a fingernail."

On appeal, Washington does not challenge the district court's determinations that the State had established a proper chain of custody for the evidence once it came into the possession of the Austin Police Department, or that Washington had failed to show that anyone had tampered with the evidence. Instead, his contention is that the above evidence is insufficient "to support a finding

that the fragment was connected to the shooting." In other words, according to Washington, there was insufficient evidence to support the district court's preliminary determination that the fingernail piece that Joel had delivered to Detective Sanchez had been left in the vehicle at the time of the shooting.

It would not have been outside the zone of reasonable disagreement for the district court to conclude otherwise. As summarized above, at the time the district court made its ruling, it had before it the following evidence: (1) Detective Sanchez's testimony that the security-camera footage of the shooting showed Ortega and the suspect "struggling" and having a "physical altercation" outside the driver's side of the vehicle and also showed the suspect, following the altercation, entering the vehicle from the driver's side; (2) Sanchez's testimony that the vehicle was seized on the night of the shooting by the Austin Police Department and taken to a "secured" forensic processing facility, where it was processed the following day by Sanchez and the APD Crime Scene Unit; (3) a photograph of the interior of the vehicle, taken by the Crime Scene Unit the day after the shooting, showing what appeared to be a fingernail piece on the floorboard of the driver's side of the vehicle; (4) "blowup" versions of that same photograph, showing "closer" views of the fingernail piece in greater detail; (5) Sanchez's testimony that APD had released the vehicle to Joel Ortega three days after that photo was taken; (6) Sanchez's testimony that two days after that, Joel met with Sanchez at Sanchez's office and delivered to him "a piece of a torn fingernail" that Joel claimed to have found "on the floorboard of the driver's side of the car," while Joel was cleaning the vehicle; and (7) a photograph of the fingernail piece that Joel had delivered to APD, taken by Sanchez, showing an enlarged version of that fingernail in detail. We also note that the

blow-up photographs appear to depict a large portion of the fingernail, approximately one-quarter inch in both length and width, with a jagged edge at one end.

Based on the above evidence, the district court could have reasonably inferred that during the "struggle" or "physical altercation" between Ortega and the suspect, a fingernail piece had been torn loose and then deposited on the floorboard of the driver's side of the vehicle, either during the altercation or upon the suspect's return to the vehicle shortly thereafter. The district court could have further inferred that the item that was photographed on the floorboard of the driver's side of the vehicle was this piece of fingernail, as the State had claimed, particularly when the item is seen in the "blowup" versions of the photo, and that this piece had been in the car when the police had seized the vehicle from the crime scene the preceding night. Moreover, based upon the evidence showing that the vehicle was registered to Joel Ortega, that the vehicle had been released to Joel three days after the photograph was taken, and that Joel had delivered a fingernail to Sanchez two days later that Joel claimed to have found "on the floorboard of the driver's side of the car," the district court could have reasonably inferred that this was the same fingernail piece that had been photographed on the floorboard of the vehicle five days earlier, particularly after observing the similarities between the fingernail piece in the vehicle and the fingernail piece delivered to Sanchez, as shown in the photographs that were admitted into evidence. In sum, the district court would not have abused its discretion in finding that the circumstantial evidence in this case, "taken as a whole with all of the individual, particular details considered in combination," was sufficient to support a finding that the evidence was what the State claimed it to be, namely, a fingernail piece that had been

left in the vehicle on the night of the shooting.[14] Nor would the district court have abused its discretion in finding that the additional photos of the interior of the vehicle, in which the piece cannot be seen, were "inconclusive" as proof negating that the piece had been present in the vehicle following the shooting. As the district court observed, the photos appeared to be taken from different angles than those depicting the fingernail piece, with certain portions of the floorboard "obscured by shadow." Thus, it would not have been outside the zone of reasonable disagreement for the district court to have found that an inability to see the piece in these other photos went to the weight of the evidence rather than to its admissibility.[15] On this record, we cannot conclude that the district court, using the "liberal standard of admissibility" required by Rule 901, abused its discretion in admitting the fingernail piece into evidence.[16]

We overrule Washington's first point of error.

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[14] *See Tienda*, 358 S.W.3d at 645; *see also* Tex. R. Evid. 901(b)(4) (to satisfy authentication requirement, "[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances," can be considered).

[15] *See Druery*, 225 S.W.3d at 503-04; *Foster v. State*, 779 S.W.2d 845, 860-61 (Tex. Crim. App. 1989); *Binyon v. State*, 545 S.W.2d 448, 452 (Tex. Crim. App. 1976); *see also Cowan v. State*, No. 03-13-00301-CR, 2015 Tex. App. LEXIS 7024, at *23-24 (Tex. App.—Austin July 9, 2015, no pet.) (mem. op., not designated for publication) (explaining that circumstances tending to show that evidence in question was not what its proponent claimed "does not compel a contrary finding that the evidence was inadmissible" but instead "were matters for the jury to consider when evaluating the weight of the evidence and the strength of the State's claim").

[16] *See* Tex. R. Evid. 901(a); *Butler*, 459 S.W.3d at 600, 606; *see also Garner v. State*, 939 S.W.2d 802, 805 (Tex. App.—Fort Worth 1997, pet. ref'd) ("Rule 901 does not require the State to *prove* anything. It requires only a showing that satisfies the trial court that the matter in question is what the State claims; once that showing is made, the exhibit is admissible." (emphasis in original)).

Expert testimony

During trial, multiple witnesses testified that Washington could not be excluded as a contributor to DNA that was recovered from the fingernail piece and other evidence. One of these witnesses was Dr. Ranajit Chakraborty, a professor of molecular and medical genetics. Dr. Chakraborty testified as an expert in "likelihood ratio computation," which he explained was a "technical concept" that examines "multiple scenarios" that could explain a given DNA test result and then determines, based on statistical analysis, "which scenario explains the observation best." According to Chakraborty, this analysis results in a more accurate determination of how likely a certain individual could be excluded as a contributor of a particular DNA sample. Over Washington's objection that this analysis had not been sufficiently peer-reviewed and was thus unreliable, Chakraborty testified that there was a 1 in "at least" 1,000,000,000,000,000 chance that the DNA profile of the major contributor found in the DNA mixture obtained from the fingernail piece would be someone other than Washington.

Assuming without deciding that this evidence was inadmissible, Washington would not be entitled to the reversal of his conviction unless the record demonstrated that he was harmed by the admission of the evidence. The erroneous admission of evidence is non-constitutional error.[17] We may not reverse a conviction for non-constitutional error unless the error affected the defendant's substantial rights.[18] "A substantial right is affected when the error had a substantial and injurious

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[17] *See Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002).

[18] *See* Tex. R. App. P. 44.2(b).

effect or influence in determining the jury's verdict."[19] The erroneous admission of evidence does not affect substantial rights if, after examining the record as a whole, the reviewing court is reasonably assured that the error did not influence the verdict or had but a slight effect.[20] "In making a harm analysis, we examine the entire trial record and calculate, as much as possible, the probable impact of the error upon the rest of the evidence."[21] "We consider overwhelming evidence supporting the particular issue to which the erroneously admitted evidence was directed . . . but that is only one factor in our harm analysis."[22] Other factors include "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."[23] "The reviewing court may also consider the jury instructions, the State's theory and any defensive theories, closing arguments, voir dire and whether the State emphasized the error."[24] "It is the responsibility of the appellate court to assess harm after reviewing the record, and the burden to

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[19] *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997) (citing *Kotteakos v. U.S.*, 328 U.S. 750, 776 (1946)).

[20] *See Coble v. State*, 330 S.W.3d 253, 280 (Tex. Crim. App. 2010).

[21] *Id*. (citing *Morales v. State*, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000); *Miles v. State*, 918 S.W.2d 511, 517 (Tex. Crim. App. 1996)).

[22] *Id*. (citing *Motilla*, 78 S.W.3d at 356-58).

[23] *Haley v. State*, 173 S.W.3d 510, 518 (Tex. Crim. App. 2005).

[24] *Id*. at 518-19.

demonstrate whether the appellant was harmed by a trial court error does not rest on either the appellant or the State."[25]

We initially observe that the evidence implicating Washington in the shooting was not limited to DNA evidence. Washington's girlfriend, Jayonna Reed, testified that on the night of the shooting, Washington was at her apartment complex, where the shooting had occurred. Reed recalled that Washington had been wearing a "matching set" of dark clothing that night, specifically "a jacket and pants." Reed further testified that Washington had left her apartment at the same time she had left to go shopping that night, and she did not know where Washington had gone. However, when she returned to the complex later that night, after the shooting had occurred, she found Washington inside her apartment. Reed testified that when she asked Washington why he had returned, Washington told her "that he had gotten into it with someone." Later that night, Reed recounted, after Washington had again left her apartment, she called him "to get answers," and Washington told her, "[H]e just got into it with someone and it had got bad." During her testimony, Reed viewed the security-camera footage from the night of the shooting. Reed confirmed in her testimony that the footage showed her leaving the apartment complex at approximately 8:50 p.m. and returning at approximately 9:28 p.m. The shooting had occurred at approximately 9:15 p.m., and the suspect could be seen running in the direction of Reed's apartment at approximately 9:17 p.m., and walking away from her apartment building at approximately 10:28 p.m. Reed testified that she was "not sure" if the suspect's clothing was the same as the clothing that Washington had been wearing that night, but she was able to recall that Washington had been

[25] *Coble*, 330 S.W.3d at 280.

wearing a shirt with a black Adidas logo on the front of it, and the suspect could also be seen wearing a shirt with a black Adidas logo on the front. In addition to Reed's testimony and the video evidence, there were also cell-phone records admitted into evidence tending to show that between 9:00 p.m. and 10:00 p.m. on the night of the shooting, multiple calls to and from Washington's phone were traced to the cell tower that was located in the area where the shooting had occurred.

Additionally, Washington's friend, Jermaine Owens, testified that Washington had called him "either the next day or two days" after the shooting and "told me he shot two people last night at Cameron Greens," a reference corresponding to the name of the apartment complex where Ortega had been shot. Owens testified that he hung up on Washington because Owens did not want to "talk[] about shooting people on the phone," but that they discussed the matter in person the following day. According to Owens, Washington "said he was trying to hit a lick at Cameron Greens and when he was trying to hit the lick, somebody bucked.[[26]] So when they bucked, he started shooting. One got out of the car and was running, shot at him. Said he was shooting until the gun started clicking." Owens added that Washington told him that he went to Reed's apartment immediately after the shooting. Owens also testified that he had asked Washington "how it felt to kill somebody," and Washington responded, "[F]uck them Mexicans." Moreover, according to Owens, he had seen Washington with a .22 caliber revolver "probably like a day or two before" the shooting. According to the ballistic and forensic evidence presented at trial, the three bullets that were recovered from Ortega's body had been fired from a .22 caliber revolver.

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[26] Owens explained that a "lick" referred to a robbery and that "bucked" meant that the robbery victim had refused "to give up the cash."

We further observe that Chakraborty's testimony was not the only DNA evidence connecting Washington to the crime scene. Claire McKenna, a DNA analyst with APD, conducted DNA analysis on the fingernail piece. According to McKenna, the DNA profile was consistent with a mixture of at least three individuals and Washington "cannot be excluded as the major contributor to this profile." She added, "The probability of selecting an unrelated person at random who could be a contributor to this profile is approximately 1 in 152,100 for Caucasians, 1 in 25,810 for blacks, and 1 in 156,400 for Hispanics." McKenna also testified that Ortega and his brother Joel could both be excluded as contributors to the DNA recovered from the fingernail piece. McKenna also conducted DNA analysis on a swab taken from the glove box compartment in the vehicle. McKenna testified that the DNA profile was "consistent with a mixture of at least three individuals" and that Washington could not be excluded as a contributor to the profile at some of those regions on the DNA that were looked at." McKenna added, "And at those regions the probability of selecting an unrelated person at random who could be a contributor to the profile is approximately 1 in 36 for Caucasians, 1 in 54 for blacks, and 1 in 41 for Hispanics." McKenna also performed DNA analysis on a swab taken from Ortega's left forearm. According to McKenna, Washington could not be excluded as a contributor to the profile and "the probability of selecting an unrelated person at random who could be a contributor to that profile is approximately 1 in 1,402 for Caucasians, 1 in 178 for African Americans, and 1 in 1,099 for Hispanics."

The State also presented additional DNA evidence from Bode Cellmark Forensics, a DNA-testing company located in Virginia. Jennifer Sampson, a forensic analyst with the company, testified that she had performed DNA testing on the fingernail piece and that Washington could not

be excluded as a contributor of the "major component" of DNA that was found on the piece. According to Sampson, "The probability of randomly selecting an unrelated individual with this major DNA profile is 1 in 830 million in the U.S. Caucasian population, 1 in 76 million in the U.S. African-American population, and 1 in 550 million in the U.S. Hispanic population." Adrienne Borges, another DNA analyst for Bode, testified that she performed "mitochondrial DNA testing" on the fingernail piece and that Washington could not be excluded as a contributor. Borges added that the mitochondrial profile of the piece was "consistent with" Washington's DNA profile but that Washington's "maternal relatives" also could not be excluded as contributors.

It was the above DNA evidence from McKenna, Sampson, and Borges that the State emphasized and repeatedly referenced in its closing arguments. In contrast, the State mentioned Chakraborty's testimony only once and did not discuss his findings in detail. The State also emphasized the testimony of Reed and Owens and the video and cell-phone evidence summarized above, much of which either directly implicated Washington in the shootings or circumstantially connected him to the crime scene. On this record, we cannot conclude that the district court's error, if any, in admitting Chakraborty's testimony had a "substantial and injurious" effect or influence in determining the jury's verdict.[27]

We overrule Washington's second point of error.

CONCLUSION

We affirm the judgment of the district court.

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[27] *See Coble*, 330 S.W.3d at 287; *Motilla*, 78 S.W.3d at 358-59.

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Bob Pemberton, Justice

Before Justices Puryear, Pemberton, and Field

Affirmed

Filed: August 31, 2017

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