TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00486-CR

Robert Fabian, Appellant

v.

The State of Texas, Appellee

FROM THE 421ST DISTRICT COURT OF CALDWELL COUNTY
NO. 18020, THE HONORABLE WILLIAM C. KIRKENDALL, JUDGE PRESIDING

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

A jury convicted appellant Robert Fabian of the murder of Zuzu Verk and of tampering with a corpse, sentencing him to respective concurrent sentences of life imprisonment and twenty years' imprisonment, and the trial court entered judgments of conviction consistent with those verdicts. *See* Tex. Penal Code §§ 19.02, 37.09. On appeal, Fabian complains that the trial court erred in allowing the indictment to be amended over his objection; allowing improper character evidence; "improperly validat[ing] the strength of" certain witnesses' testimony by thanking them for "this information"; and allowing testimony by an accomplice witness and a jailhouse informant.[1] He also argues throughout his brief that the evidence was insufficient to

[1] Many of Fabian's issues raise multiple specific complaints and thus are multifarious and "risk[] rejection on that basis alone." *Mays v. State*, 318 S.W.3d 368, 385 (Tex. Crim. App. 2010); *see Wood v. State*, 18 S.W.3d 642, 649 n.6 (Tex. Crim. App. 2000) (refusing to consider multifarious and inadequately briefed point of error); *Davidson v. State*, 249 S.W.3d 709, 717 n.2 (Tex. App.—Austin 2008, pet. ref'd). In the interest of justice, we will consider Fabian's arguments to the degree they are sufficiently briefed. *See Davidson*, 249 S.W.3d at 717 n.2.

support the convictions and that he received ineffective assistance of counsel. As explained below, we affirm the trial court's judgments of conviction.

FACTUAL SUMMARY

Zuzu Verk was a college student at Sul Ross State University in Alpine, Texas, who began dating Fabian in early 2016. The two had a romantic dinner at Fabian's apartment on Tuesday, October 11, 2016, and Zuzu was never heard from or seen again. Fabian reported her missing on Friday, October 14, and in February 2017, her skeletal remains were found in a shallow grave about a six-mile drive from Alpine.[2]

Andreana Doggett, Zuzu's best friend, testified that she and Zuzu communicated several times a week. Doggett met Fabian in April 2016 when he and Zuzu went to Fort Worth to celebrate Zuzu's twenty-first birthday. She said he was "mostly pouting" and "wasn't very inviting as a person." She was annoyed by his insistence on sleeping in Zuzu's room, rather than sleeping on the couch while Zuzu and Doggett shared Zuzu's room as planned, and by his drinking some expensive tequila that she had intended to give to Zuzu. Doggett testified that Zuzu wanted a "friends with benefits," casual relationship with Fabian but that he was "extremely needy" and made Zuzu feel "pressured into dating him." She also said that the two had an on/off relationship and that Zuzu said Fabian "would get angry at very little things" and would "constantly" text her when they broke up. Doggett testified that she told Zuzu "[t]hat she needed to leave and let [the relationship] be done." In August, Zuzu told Doggett that she wanted to transfer to Texas A&M and work in Japan and did not want to take Fabian with her.

[2] Although the events of this case occurred in and around Alpine, Texas, the case was transferred to Caldwell County after Fabian filed a motion to transfer venue asserting he could not receive a fair trial in Brewster County.

On Tuesday, October 11, Zuzu sent Doggett a video of Zuzu "walking upstairs" at what Doggett believed was Fabian's apartment—there were "those little candles, and they're in a heart and it says, I love you, Zuzu, and on the side there's champagne in ice." Doggett said she wrote back that if Zuzu was dating Fabian again, Doggett "was going to kill her, and she needed to text [Doggett] immediately." Zuzu never responded, which was unusual, but Doggett thought Zuzu might be "a little mad" or stressed about midterms. However, Zuzu's mother, Lori Verk, called Doggett a few days later, "frantic" and "really nervous" because she had not heard from Zuzu in several days, which Doggett testified was "extremely" unusual and "very shocking."

Like Doggett, Lori Verk testified that Zuzu's relationship with Fabian was "off and on, they were breaking up, getting back together, breaking up." And like Doggett, when Lori met Fabian in April 2016, she did not care for his "arrogant" and "manipulative" attitude. Lori and her husband had wanted Fabian to sleep on the couch during the visit, but he insisted on sleeping in Zuzu's room, going "against her parents' wishes in her house, in our house." Lori got the impression that Fabian "didn't like to share" Zuzu and testified that he had "wanted to go home early" from Zuzu's party "and not finish celebrating Zuzu's birthday." She said "it was all about [Fabian], and if he wasn't the center of attention he was going to pout." Lori testified that Zuzu had applied to transfer to Texas A&M University the same week she disappeared and that the transfer was both for Zuzu's career but "also a way of a final, you know, breaking it off" with Fabian. On Monday, October 10—during her last phone call with Lori—Zuzu said that she was going to tell Fabian about her transfer plans. Lori tried throughout the week to reach Zuzu through increasingly frantic calls, texts, and social-media messages and testified that it was "[v]ery much" out of character for Zuzu to be so unresponsive, although Lori tried to tell herself that it was due to the stress of midterms that week. Several days into the week, Lori contacted

Fabian, who said that he had not heard from Zuzu and that he "was giving her her space." Fabian did not mention his Tuesday-night dinner with Zuzu until Lori learned of it from Doggett and specifically asked Fabian about it. At that point, Fabian said that he had made Zuzu dinner and that she had left at around 2:00 or 3:00 a.m. Lori testified that on her urging, Fabian called the police on Friday, October 14, to ask them to do a welfare check.

John Franco was Fabian's downstairs neighbor in October 2016. He testified that the apartment building is "very, very old" with "really, really thin" floors, meaning "you can basically hear each other's conversations, like the downstairs to the upstairs, so it was always problems with footsteps or talking or being loud, loud music, like you can hear everything to the—perfect to the T." Franco testified that he could hear when Fabian used the bathroom, was watching television, walked from room to room, fought with Zuzu, or had sex with her.

Between 10:00 and 11:00 p.m. on October 11, Franco and his girlfriend saw Zuzu park her car, a Mazda Miata, where she usually parked and heard her walk upstairs. Franco's girlfriend commented that Fabian was making dinner because they could smell his cooking. Franco testified that he heard Fabian and Zuzu arguing at about midnight and that Fabian said "something like, shut the fuck up," and then started playing a movie "really loud," so loud that Franco's girlfriend could not sleep and Franco and his girlfriend could tell which scene was playing. Franco heard Fabian's bed squeak and shake, and Franco said the noise was different in sound and duration from when Fabian and Zuzu usually had sex. Fabian then started cleaning or "pacing around the house" while Franco fell asleep. Franco's girlfriend woke him in the middle of the night because she was scared by a "loud thump" and thought someone was trying to break in—Franco thought it was at about 4:00 or 5:00 a.m. but said it might have been as early as

2:00 a.m. Franco then heard a car start, so he looked outside and saw Fabian drive away in his vehicle. Zuzu's car was still parked where she had left it.

Franco testified that on Wednesday, October 12, he woke up at about 9:45 a.m. to do laundry and get ready for his job at a restaurant called Guzzi Up. He found clothing in the apartment complex's washing machine and sheets and a mattress pad in the dryer.[3] Franco thought both loads were Fabian's, so he put the clothes in the dryer with the bedding and went to take a shower. When Franco left for work at about 10:15 a.m., Fabian's car was not there, but Zuzu's car was still parked in front of the building. Franco "thought that was weird" because on school mornings, she "never stayed longer than 10:00 in the morning." Franco saw Fabian with Chris Estrada, one of Fabian's long-time friends, at Guzzi Up that night at about 9:30 p.m., and Zuzu's car was gone when Franco got home from work. Franco testified that Fabian did not sleep at his residence from Thursday through the weekend; he did not know if Fabian slept there on Wednesday night.

Oumy Ndiaye testified that at about 8:00 a.m. on Wednesday, October 12, she noticed Zuzu's Miata parked in front of Fabian's apartment building. Ndiaye often saw the car parked there and had "no doubt" that the car was Zuzu's because she "used to see [Zuzu] in that car." She noticed the car that morning because it was parked "recklessly," further from the curb than it should have been. After Ndiaye saw reports about Zuzu's disappearance, she contacted the police to report that the car had been in front of Fabian's residence on the morning of October 12. One of Zuzu's neighbors testified that when she went out for a walk at 6:15 a.m. on Wednesday, October 12, she saw Zuzu's dog running loose in the area, with a green leash

[3] Franco testified that Fabian did laundry frequently and often left his laundry in the machines, annoying Franco's girlfriend and "pretty much hogging" the whole laundry room.

attached. The dog was still loose at 8:30 a.m., so the neighbor sent a message to Fabian, who she knew through work and who was "the only person that I knew . . . to get ahold of [Zuzu], to tell her that her dog was loose so that she could get it before the animal control did." The neighbor did not see Zuzu's Miata that morning.

Sergeant Aaron Villanueva of the Alpine Police Department testified that when Fabian reported Zuzu missing, he said that Zuzu had left his house between 2:00 and 3:00 a.m. on Wednesday, October 12, after arguing about his ex-girlfriend. Fabian said he had not spoken to Zuzu since and thought "it was because she was mad at him for the way the conversation ended." He told Villanueva that Zuzu had been wearing "white boots with zippers on the side," black fleece leggings, and "a large, either V-neck sweater or large shirt and underneath that was a black or blue sports bra, and in the back it was woven into each other, like lace type." Fabian said that when Zuzu left, "she must have brought her own shoes because she left carrying the white boots in her hands" and wearing a pair of his boxer shorts and a pair of black underwear with white lace. He further said she put her leggings "in a black Under Armour bag that was one of his old ones, he said the bottom corner had a hole in it." Villanueva agreed at trial that Fabian had given "a lot of detail" about Zuzu's clothes. Fabian reported that after learning that Lori had been unable to reach Zuzu, he and his sister went to her house, where they found the doors locked and the dog in the back yard; Fabian's sister thought she heard the shower running.

Villanueva went to Zuzu's residence to do a welfare check and found Zuzu's friend Dustin Lazenberry there. Lazenberry told Villanueva that he was worried because he "was

supposed to go with Zuzu and her dog on a camping trip" but she had not shown up.[4] Zuzu's doors and windows were closed and locked, all the shades were drawn shut, and no one answered the door. However, Miles Verk, Zuzu's brother and her roommate in Alpine until he moved to Fort Worth just before she disappeared, testified that he and Zuzu did not lock their doors. He thought that Zuzu had misplaced her key "at some point" and testified that even if she had her key, "it was definitely not her habit to lock doors. If anyone locked doors, it was me, and I barely did that, either." Miles and Zuzu usually kept their blinds up, and he did not think they "ever really put them down all that often." Further, Zuzu's dog was in the back yard with a green leash attached to her collar, but both Miles and Lori testified that Zuzu only used a red leash to walk her dog—the green leash was the dog's "puppy leash" and was only used as an extra. Miles also said that Zuzu walked her dog in the evening after class, not in the early morning, and that she would not leash the dog in the fenced backyard, while Lori said that when Zuzu left the house, she would crate her dog inside.

Villanueva searched Zuzu's residence and found the clothing, boots, and black bag Fabian had described. The leggings and underwear were in her washer, "still damp from being washed," and the boots and bag were in her bedroom. Zuzu's Miata was parked at her home with her wallet inside, but her keys and phone were never found. Miles was shown photographs of Zuzu's room as Villanueva found it, and he said it was "[n]ot at all" the way she usually kept her room. There was "way too much stuff on her bed," leaving no "room for her to sleep," and her laptop was sitting open—Miles said "she would always close it. The laptop was almost always on her bed, but it was never left open."

[4] Throughout trial, Fabian's attorney asked questions about Lazenberry and whether he was romantically interested in Zuzu, implying that Lazenberry might have killed her. However, law enforcement witnesses testified that they had investigated and ruled him out as a suspect.

Captain Darrell Losoya of the Alpine Police Department interviewed Fabian on October 14, and he noted that in that interview, which was recorded and introduced into evidence, Fabian used the past tense to talk about Zuzu, such as saying "she was an amazing person." Losoya agreed when he was asked if Fabian's responses "made it sound like she was not just missing" and like "[s]he was dead."[5] Losoya further testified that Fabian did not attend a candlelight vigil held for Zuzu three days after she was reported missing. Miles and Lori both testified that although the "whole town came together" to search for Zuzu, Fabian did not participate. Miles also said that he never saw Fabian do anything to search for her, "[n]ot a single time." Texas Ranger Jeffrey Vajdos testified that he interviewed Fabian on October 15 and that he noted inconsistencies in Fabian's statement, such as whether he left his apartment at about 4:30 a.m., as reported by Franco. Fabian seemed "possessive" of Zuzu and did not "appear to have the type of emotions that you would expect an individual to have when [a loved one] was missing." Vajdos also noted that Fabian used the past tense in speaking about Zuzu, saying that "in and of itself," the use of past tense could just be "a linguistic thing," but that "in the context of the entire interview, . . . it raised a red flag." Another Alpine police officer, however, testified that when he spoke to Fabian on October 14, he "seemed concerned and worried" about Zuzu.

The police searched Fabian's apartment and found his mattress bare, an unopened plastic drop cloth from Dollar General on the dining table, and a load of laundry in the building's dryer containing "a mattress pad and in the mattress pad there was bleach," two towels, a dark

[5] Fabian's recorded interview with Losoya was played for the jury. Fabian and Losoya talked about Zuzu and her relationship with Fabian, and both men often referred to Zuzu in the past tense. At one point, Fabian said he did not "want to talk bad about her if she's not around," and Losoya asked, "What would make you think that she's not around anymore?" Fabian answered, "Well, she's missing," and, "[H]er mom said she went to her house and she was gone . . . [and] she hasn't texted me back in days." He said, "I truly loved this girl, you know?"

sweatshirt, and dark sweatpants, both of which had been stained by bleach. Losoya spoke to the other residents and concluded that the laundry was Fabian's. He also noted various cleaning items in the apartment and said it appeared that Fabian "was doing unnecessary cleaning."

Villanueva testified that after the police got a tip that Fabian had purchased some items at the Dollar General on October 12, they obtained the store's relevant security camera footage and sales records. The security videos were introduced into evidence and show Fabian entering the store at 10:09 p.m., using a credit card to buy several items at 10:13 p.m., and leaving the store immediately after. A copy of the receipt shows that three drop cloths were bought at 10:19 p.m., shortly after Franco saw Fabian and Estrada at Guzzi Up, using Estrada's debit card, and the Dollar General's manager explained that the time stamps on the store's receipts are fairly accurate but often "[a] little bit" off.

Fabian's brother-in-law, James Carrillo, testified that Fabian stayed with him and Fabian's sister on Wednesday, October 12, and that Fabian borrowed Carrillo's truck sometime after 10:00 p.m. that night and used about a quarter tank of gas, which Carrillo said was more than would be needed to get from one end of Alpine to the other. Carrillo testified that he was interviewed twice by Brewster County Sheriff Ronny Dodson and that he was not "totally forthcoming" the first time. He explained that he did not volunteer any information about Fabian using his truck, saying, "I was kind of shocked with what was going on, angry about my truck being taken. Worried about my job, you know. . . . I kind of felt angry at the moment." In the second interview, Dodson specifically asked if Fabian had borrowed the truck, and Carrillo said that he had. Carrillo also told Dodson that he had vacuumed the interior of his truck sometime after Fabian borrowed it. Sheriff Dodson testified that in Carrillo's first interview on October 19, he was "really evasive" and "kind of act[ed] like he didn't know what [Dodson] was

talking about." After Dodson "begg[ed]" Carrillo to "tell us something," he "kind of nodded his head that he had loaned his truck, he had given the keys to his truck to his wife." In the second interview two days later, Dodson said Carrillo was "very forthcoming" and said he "want[ed] to clear up some stuff," reporting that his wife had woken him up on Wednesday, October 12, to ask if Fabian could borrow his truck. Carrillo also told Dodson that he had vacuumed the interior of his truck, so Dodson collected the vacuum so it could be examined for evidence.

Fabian's friend Josh Cobos testified that Fabian knew Zuzu was thinking about transferring schools and "was very bothered by it," "consumed" by thoughts about her leaving and had even bought a "promise ring" for her about two months before she disappeared. Cobos said that although he and Fabian typically talked or texted almost daily, Fabian was hard to reach the week of October 10 through 15 and "seemed kind of rushed" when he eventually responded to Cobos on Wednesday. Cobos said that when he saw a flyer saying Zuzu was missing on Friday, he "freaked out" and texted Fabian to ask, "[H]ey, what is this, is this a joke, she's missing. Finally his response was, have you seen Zuzu, she's missing." Cobos found that response "odd," saying, "I couldn't believe he didn't message me before, like, hey, Zuzu's missing. So whenever he sent me, have you seen Zuzu, she's missing, I felt kind of thrown off."

Cobos testified that Fabian stayed with him on Friday night and that Fabian made an "unusual comment," saying "if two people know a secret, the only way it's to be kept is if the other is dead. And my response was just a blank face, and he looked at me and he goes, oh, I'm just joking." Fabian also told Cobos that he had made a romantic dinner for Zuzu on Monday night, "that everything went good until towards the end," that things "went sour" after "something got brought up about his ex," and that Zuzu got upset and left. Cobos testified that Fabian's behavior through the weekend was "concerning" and made Cobos and his parents

"uneasy" and "bothered." On Saturday, October 15, Cobos talked to his friend Brittney Gasca, who was also friends with Estrada. Cobos and Gasca discussed "unusual things" that they had observed or heard from Fabian and Estrada, and Cobos testified that Gasca's observations of Estrada made Cobos feel "[v]ery uncomfortable" and suspicious and that Cobos and Gasca decided to speak to the police the next day.

Gasca testified that Estrada came to her house to watch a movie around midnight or 12:30 a.m. on Wednesday, October 12, into Thursday, October 13, and that he went home at about 2:00 or 2:30 a.m. Estrada "looked a little more weird than normal," "like he'd seen a ghost." When Gasca asked what was wrong, he answered, "[J]ust don't ask me questions." Gasca said Estrada's behavior was "just very different that night," different enough that she asked, "Chris, is it newsworthy?" A few days later, Estrada sent Gasca a video of "an open pasture," like the areas outside of Alpine, and although she found it "kind of odd," she did not ask about it. After Zuzu's disappearance was publicized and Gasca and Cobos talked, Gasca decided to tell the police about Estrada's strange behavior.

Estrada testified that he missed two calls from Fabian at about 3:15 a.m. on October 12. They had dinner and drinks that night at Guzzi Up, and after dinner, Fabian said that he needed "to get something at Dollar General" but that he had forgotten his wallet. Estrada testified that he gave Fabian his credit card and stayed in the car while Fabian went into the store. After going to Dollar General, the men went to Fabian's apartment, where they drank and talked, and Estrada testified that Fabian's "demeanor changed to more serious" and that he said he needed to talk to Estrada about "a life and death matter." Fabian then told Estrada that after the romantic dinner, Zuzu and Fabian got into a fight that "escalated to being physical, and that he had his hands around her throat and she started hyperventilating and stopped breathing."

Estrada testified that Fabian said he tried unsuccessfully "to do CPR," and that when Estrada asked why Fabian had not called 911 "if it was an accident," he responded that "he didn't want to, that he was going into survival mode and just didn't want to do any kind of punishment." Estrada said he sat quietly and listened because "[i]t's not what I expected to be in when I got there, so I guess I was slow to react." Estrada was asked at trial if Fabian "used the word choke," and he answered, "I would believe so." He reiterated later that Fabian had said that Zuzu died after he used his hands to "choke" her.

Estrada testified that Fabian then said that Zuzu's body "was still in the bedroom, on the bed, under the covers," and asked Estrada to "help him get her out of the apartment" because "she was too heavy for him to move out himself." Estrada "told him a dozen times it was crazy" and insisted at trial that he had not helped Fabian move Zuzu's body. Fabian "asked if [Estrada] would turn him in," and Estrada testified that he responded, "I would pretend I never heard anything, or pretend he never told me." Estrada dropped Fabian off at his sister's house and then went to Gasca's house. Fabian called about thirty minutes later to ask if Estrada wanted to go to karaoke, and Estrada declined. Estrada said, "I figured he is just trying to be out, seen normally in public." Estrada testified that sometime after 4:00 a.m. on Thursday, October 13, he woke to Fabian knocking on his door, again asking for help moving Zuzu's body, and that he again refused; Estrada did not know what vehicle Fabian was driving. On Friday, Estrada and Fabian had a Snapchat conversation in which Fabian "act[ed] as if he did not know anything" and was "saying he couldn't believe she was missing."

Estrada was indicted for tampering with a corpse and tampering with evidence, and he testified that the State had offered him a reduced sentence on those charges if he would tell the truth. He also testified that he did not receive that offer until he gave a statement for

prosecutors to determine whether it "was worthy of any type of reduced sentence." Estrada pled "no contest" to the charge of tampering with evidence, stipulating in the plea that the State had admissible evidence to prove that between October 12 and 13, he had "concealed evidence with intent to impair its availability as evidence," "knowing that the offense of criminal homicide had been committed." The charge of tampering with a corpse was dismissed, and Estrada had not yet been sentenced. He testified that the State was recommending a forty-two-month prison sentence and that he knew he could receive a sentence between two and ten years or "even probation." Estrada insisted that he had not committed the offense but said he "believed that [the State] had stuff supporting their case" and "chose to go the no contest route versus a trial." Estrada did not think Zuzu's body would have fit in his trunk and said he had used his car to help Fabian move boxes in the past.

Estrada admitted that he had lied "numerous" times to the media, the police, and a December 2016 grand jury, saying it was "me keeping my promise, and I guess sticking up for him." Asked why he did not turn Fabian in, Estrada said, "I couldn't go to the extent of helping him. I guess I did draw a line there, but I hadn't learned yet to draw the line at covering for him." Estrada was also asked why he had a smile on his face throughout the proceeding, and he said, "Well, today I thought I was doing very well with it. You pointed it out. But I do have the habit of smiling, always, and people misread it, but that's just me." Finally, Estrada testified that he had been charged more recently with driving while intoxicated and evading arrest, that those cases were still pending, that the prosecutor in Fabian's case had no control over those charges, and that Estrada did not have any indication that Fabian's prosecutor had communicated with the district attorney handling Estrada's other charges.

Pamela Miller testified that in October 2016, she lived in the Sunny Glen neighborhood, several miles from Alpine. To get into the neighborhood, drivers must pass Miller's house, and the road becomes unpaved about a quarter mile past the house. On Thursday, October 13, she woke up at about 2:15 or 2:30 a.m. and saw the headlights of a vehicle "driving at an incredibly high rate of speed." About five to seven minutes later, "the same car was returning from the same direction, leaving—going incredibly fast this time." The vehicle did not stay down the road for very long, and Miller assumed it had driven to the end of the asphalt and turned around, saying that if it had "come around the loop," its headlights "would have shined right into the bedroom." She tried to get a better look and "saw round headlights" and "round taillights," noting that the vehicle "appeared to be a small SUV" that was "a dark color, possibly black, blue, blue gray, something like that." Miller called the police when she heard that they were looking for information about any sightings of a Miata or a Jeep Liberty. At trial, Miller was shown photographs of Fabian's Jeep Liberty and said it "looks very similar" to the vehicle she saw that night, including its round headlights and taillights.

Diane Moore ran the hospital where Fabian worked as a pharmacy tech and testified that he was usually very gregarious and friendly but that on Thursday, October 13, he "was not the same guy"—"he was hunched over. He was very nonresponsive. He was not his friendly self. I was pretty much taken back, I was very surprised by that." She also said that Fabian was usually "[v]ery immaculate, always clean" in his appearance and grooming, but on that Thursday, his clothes and hair were "a little messy, he did not look like himself, like he wasn't feeling well or something like that, but not his normal self." After hearing about Zuzu's disappearance, Moore told Fabian, "I don't know what happened, I'm not your parent . . . but I care for you as a person, you need to step up and you need to go talk to this family and you need

to talk to the police." Fabian responded that he "didn't do anything wrong" but "would not look me right in the eye. He was—you know, he was saying the words but he just—I didn't feel like he was just, you know, giving me a straight shot of a look in the eye." Moore further testified that Fabian's sister also worked at the hospital and that surveillance video showed her getting a personal call on her cell phone at about 3:00 a.m. on October 12 and going "to a back area that we don't have cameras on," resulting in her suspension from work.

Yolanda Jurado also worked at the hospital and said that Fabian was always well-groomed and friendly. On October 13, however, he was not dressed as neatly as usual or wearing the cologne he always wore, and he was quiet, "very withdrawn," and walked by with "his head down, he didn't address any of us, he didn't say hi, didn't . . . give us a hug." Jurado testified that she asked Fabian why he had watched a press conference about Zuzu's disappearance, saying that it "must be so hard for you to watch that," and that he responded that he "want[ed] to see if they've uncovered any body parts. And I looked at him like, what, and he said, like ears or toes." Jurado said that remark "chilled me to the spine" and:

> brought me full circle. Prior to that, with all of this happening I couldn't fathom in my heart that Robert would have ever done anything to cause Zuzu—you know, her disappearance or any of that, I couldn't imagine that. And when he said those words, it made me really sad, and it made me think that he had done something and he knew where she was.

Border Patrol Agent Jarred Maynard testified that in February 2017, he was working in the Sunny Glen area and was walking around in the brush when he saw a "depression dug into the ground, and out of the depression was a white clear plastic sticking up out of the ground. The depression was completely uncovered, and there was clothing items strewn about the area." As he got closer, he saw "more of the plastic" and what he believed to be human

skeletal remains. Sheriff Dodson testified similarly, explaining that he went to the scene, which he described as a "brushy area" and "kind of a blank spot" on a working ranch about a six-mile drive from town, where he saw a shallow grave with "what appeared to be that cheap painter's plastic," blonde hair, and bones. Forensic testing confirmed that the skeletal remains were Zuzu's, and DNA testing of some of the hairs found in Carrillo's vacuum and the trunk of Estrada's car indicated that they were consistent with being from Zuzu or a maternal relative.

Roy Roman testified that he had a criminal record of charges of forgery, theft, and receiving stolen property. In March 2017, he was incarcerated in the Brewster County Jail for probation violations and placed in a cell with Fabian and two other inmates. Roman said he "gathered" that Fabian was bisexual from various comments Fabian made and testified that Fabian had said that he "pretty much snapped" when Zuzu told him she "had found out about Fabian's and [Estrada's] little bisexual relationship they had" and was going to "let everybody know" about it. Roman testified that Fabian explained "[t]hat when she was going to leave the area where they were at, that he grabbed and pulled back, and when she hit the floor he didn't know if she was choked out or had a broken neck," demonstrating what had happened. Roman confirmed that Fabian had used the words "choked her out or she broke her neck" and testified that Fabian regularly cried at night, "saying things like, I'm sorry, I didn't mean to hurt you, I'm sorry, that kind of thing." Fabian also expressed concerns about getting Carrillo in trouble:

> Not only was [Fabian] concerned about his situation, but I guess he kind of involved [Carrillo], apparently. He was telling me something about using his vehicle—he and Chris Estrada used a pickup. His car was in the shop at the time, a 280 or 300Z, and they had no way of transporting the body, so they used [Carrillo's] truck, and [Fabian] was worried about the case because he didn't want it to turn back on [Carrillo], and he was going to face the same charges as him and things like that.

Fabian did not tell Roman what he and Estrada had done with Zuzu's body, only that they had used Carrillo's truck "to transport her from one area to the next."

Roman said that at the time of trial, he was out on bond for probation violations. He testified that he had not been promised anything for his testimony and that the prosecutors in the Fabian case had told him they were "not going to do anything for [him]" in the other case for which he was out on bond. Roman said that he decided to tell the jailers about Fabian's confession because he wanted to be moved after he and a third inmate in the cell began "having issues as far as almost getting into a fight." He also said:

> Because—I mean, don't get me wrong. I'm a lifelong criminal. I've been in trouble. But things happen for a reason. I believe that. And I believe in that case that, you know, I had an opportunity to help somebody or help something, and I will. I didn't do it for my gain or anything like that, it was just because right is right and wrong is wrong, and if I could be part of that, that's what I wanted.

Ranger Vajdos testified about social-media records for Estrada that showed his GPS coordinates on the night of October 12 into the early morning of October 13. Those records match Estrada's testimony and the observations by other witnesses, indicating that Estrada was at his home at about 8:27 p.m. on October 12; at Guzzi Up between 9:18 and 10:12 p.m.; at the Dollar General from 10:15 to 10:21 p.m.; at Fabian's sister's house from 10:27 to 10:34 p.m.; at Fabian's residence from 10:50 p.m. to 12:12 a.m. on October 13; at Fabian's sister's house from 12:20 to 12:21 a.m.; at Gasca's residence from 12:25 to 2:42 a.m.; and back at his residence from 3:20 a.m. to 7:37 a.m. Vajdos also testified that Zuzu's cellphone records indicate that her last outgoing text was sent at 10:12 p.m. on October 11. Fabian's cellphone records show that on October 12, he called Estrada twice at about 3:15 a.m.; texted Zuzu at 11:03 a.m. and 1:45 p.m.; called her twice at about 5:00 p.m.; called Estrada at 5:04 and 6:20 p.m.; texted with Estrada

several times between 6:21 and 6:32 p.m.; called and texted Zuzu several times at 6:54 p.m.; texted with Estrada between 8:25 and 8:50 p.m.; got a call from Estrada at about 9:03 p.m.; and got a call from his sister at 10:39 p.m. On October 13, Fabian called Estrada at 12:46 a.m. and then he and his sister called and texted multiple times between 5:46 a.m. on October 13 and 4:28 a.m. on October 14. Also on October 14, Fabian called Zuzu twice and texted her eight times at about 6:25 a.m.; exchanged several calls with his sister between 7:01 and 10:43 a.m.; called and texted Zuzu between 10:44 a.m. and 12:43 p.m. and again at 5:58 p.m.; and spoke to his sister at 12:58 and 3:01 p.m.

Law enforcement searched the area surrounding Zuzu's shallow grave and never found a bullet or knife or "any type of implement, projectile that might be used as a weapon or anything to inflict injury." They did not find useable prints on the shifter or door handles of Zuzu's car, and cadaver dogs searched Estrada's and Fabian's vehicles and returned negative results. Forensic anthropologist Mark Ingraham examined Zuzu's remains, which were almost entirely skeletal, and did not find any bullet trauma or sharp-force trauma, although he agreed that it would be possible to be shot or stabbed without the weapon striking any bones. He was asked if it was possible to tell from skeletal remains whether a person had been strangled, and he said, "Sometimes there are clues based on fractures of a small bone in the neck called the hyoid,[6] which historically has been associated with pressure on the neck, whether it's manual strangulation, ligature strangulation or hanging." However, strangulation does not always cause "trauma on the hyoid," and in a gravesite with animal scavenging, the hyoid often "becomes disassociated with the rest of the body fairly early" and is never found, as was the case here.

[6] Ingraham explained that the hyoid is "is a small horseshoe-shaped bone, maybe with the legs or ends an eighth inch in diameter," that is located "on the front of the neck," above the Adam's Apple, "essentially, at the level of the mandible."

Medical examiner Dr. Stephen Lenfest testified that "[s]trangulation is a type of asphyxia," which is "a broad term that just means basically a lack of oxygen" to the brain, and that there are three broad types of strangulation: hanging; manual strangulation by the hands or some other part of the body; and ligature strangulation, such as with a rope. Dr. Lenfest also testified about the process of strangulation, explaining that it is not necessarily the constriction of the airways in the throat¸ which takes "quite a bit of pressure," but the constriction of "the large veins and arteries in the neck, which take all the blood" to and from the brain. Constricting the veins takes about five pounds of pressure, "about what it takes to open a can of soda," and constricting the arteries takes about ten pounds of pressure. Dr. Lenfest agreed that laypeople often interchange "the term choking and really mean strangulation" and explained that "[c]hoking has a very specific meaning. It's something actually blocking the internal air passages . . . impeding the ability of air to enter your lungs." Dr. Lenfest testified about strangulation versus choking and said:

> In a strangulation picture where the blood vessels are constricted you immediately get no blood with oxygen that's delivered to the brain, and you're going to see a person typically is going to lose consciousness in five to 15 seconds, very rapid, it's not going to take very long, whereas if it's something that's prohibiting oxygen from getting to the lungs, the body will be able to use all the oxygen that's still in the body. So someone choking on food can communicate or, you know, show signs to someone that they're having a problem, they're going to be conscious for 30 to 40 seconds, depending on the person, whereas with strangulation, most likely, again, one would lose consciousness within five to 15 seconds.

If a person is strangled into unconsciousness and then the pressure is released, Dr. Lenfest said, the person "should wake up and have no residual effects." However, if the pressure is not released, the brain is not getting oxygen and:

> you're going to start seeing—you can see a variety of different neurological symptoms, things that are happening because the brain is not getting any oxygen. They can include convulsions or seizure-like activity, which usually occurs rapidly after loss of consciousness. It can be—between about 15 to 25 seconds you can see some type of convulsion activity.

Dr. Lenfest testified that one of the first convulsion activities is for the arms and legs to "fully extend so everything is stretched out" and "very rigid." The body next begins "a primal reflex" that "looks like abdominal breathing" and can involve gasping that has the appearance of hyperventilating, and then goes into decorticate posturing, when "the legs remain extended but the upper arms flex so now the person, they gather their arms into their chest like this, with everything else still extended." Decorticate posturing is a sign of damage to the brain and brain stem, and "[w]hen you start seeing brain stem injury, you're looking at near death." Dr. Lenfest walked through the timeframe of strangulation and said that from ten to twenty seconds, a person will likely recover if pressure is removed, and that if pressure continues for longer, the victim will suffer worsening brain damage, even if the pressure stops. He also opined that "to get to the point where a strangulation is fatal, it's unlikely to be an accident," explaining that death does not "occur in that first period of loss of consciousness" and that an assailant has to "continue constricting those blood vessels for a period of time. It's most likely up to a minute, but most likely longer than that."

Dr. Lenfest said that strangulation does not usually lead to trauma that "reveal[s] itself on the skeleton" unless there is "some injury to the hyoid bone or to the thyroid cartilage" but that the hyoid bone is very small and "not attached to any other bones" and "would have been difficult to find." He testified that about fifty to sixty percent of Zuzu's skeletal remains were recovered, that an examination did not show any injuries, and that "the cause of death was

ruled homicidal violence based on the totality of the investigated information and autopsy claims." Dr. Lenfest could not "scientifically tell this jury how" Zuzu died and explained that there was no medical or social history indicating a sudden, unexpected death and toxicology ruled out a potential drug death, concluding from all of those factors and the fact that her "remains were found in a remote area, shallow grave is suggestive of someone else—somebody had to put it there, and suggestive of a homicide occurring prior to that." Dr. Lenfest testified that "it was [his] opinion and the opinion of all the other medical examiners at [his] office that the cause of death of homicidal violence was appropriate and the manner of death should be homicide."[7]

SUFFICIENCY OF THE EVIDENCE & CORROBORATION OF ACCOMPLICE/JAILHOUSE TESTIMONY

Throughout his issues, Fabian insists that the evidence is insufficient to support his conviction, arguing that there was not "a shred of evidence" to support a determination that Zuzu was strangled, that "any number of other kinds of trauma could well have been inflicted if indeed the death was a homicide at all," and that there is no evidence that Fabian was her assailant. He also argues that in viewing the evidence, we must disregard Estrada's testimony because it was not corroborated and disregard Roman's testimony as unreliable.

Standard of Review

Fabian urges that "the evidence was insufficient to convict because it was entirely circumstantial and did not exclude every reasonable hypothesis, warranting flexibility in applying *stare decisis* to accommodate the extraordinary lack of direct evidence." Although he

[7] Dr. Lenfest explained that cause of death "can take on many forms," such as sharp-force trauma (from a stabbing), blunt-force injuries, smoke inhalation, or coronary artery disease; while manner of death is a classification of the circumstances of death, "defined as natural, accident, homicide, suicide and undetermined."

acknowledges that the Texas Court of Criminal Appeals has explicitly rejected the use of the "reasonable-hypothesis-of-innocence analytical construct,"[8] *see Geesa v. State*, 820 S.W.2d 154, 160-61 (Tex. Crim. App. 1991), *overruled on other grounds*, *Paulson v. State*, 28 S.W.3d 570, 573 (Tex. Crim. App. 2000), he argues that we should follow other jurisdictions and "hold the prosecution to a stricter standard to ensure that reasonable doubt is not diluted." We decline the invitation to apply other jurisdictions' standards and instead follow the instructions of our highest criminal court, considering all the evidence in the light most favorable to the verdict and asking whether a rational juror could have found the essential elements of the offense beyond a reasonable doubt. *See Braughton v. State*, 569 S.W.3d 592, 608 (Tex. Crim. App. 2018).

In our review, we bear in mind that "direct and circumstantial evidence are treated equally" and that "[c]ircumstantial evidence is as probative as direct evidence in establishing the guilt of an actor" and "can be sufficient" on its own "to establish guilt." *Kiffe v. State*, 361 S.W.3d 104, 108 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd). We ask "whether the necessary inferences made by the trier of fact are reasonable, based upon the cumulative force of all the evidence," *Adames v. State*, 353 S.W.3d 854, 860 (Tex. Crim. App. 2011), and we will not hold that a jury has erred if it reached one of multiple "permissible views of the evidence" as long as it has not "come to conclusions based on 'mere speculation or factually unsupported inferences or presumptions,'" *Braughton*, 569 S.W.3d at 608 (quoting *Hooper v. State*, 214 S.W.3d 9, 15-16 (Tex. Crim. App. 2007); *Evans v. State*, 202 S.W.3d 158, 163 (Tex. Crim. App. 2006)). We presume that the jury resolved conflicts in the evidence or in the inferences that can

[8] Under the analytical construct, to affirm a conviction in a circumstantial-evidence case, "the appellate court must . . . find that every other reasonable hypothesis raised by the evidence was negated, save and except that establishing the guilt of the defendant." *Geesa v. State*, 820 S.W.2d 154, 158 (Tex. Crim. App. 1991), *overruled on other grounds, Paulson v. State*, 28 S.W.3d 570, 573 (Tex. Crim. App. 2000).

be drawn therefrom in favor of its verdict and defer to that resolution—we may not reevaluate the jury's determinations of the weight and credibility of the evidence or substitute our own judgment for that of the jury. *Id.* The evidence is only legally insufficient if the record contains "no evidence, or merely a 'modicum' of evidence, probative of an element of the offense" or if "the evidence conclusively establishes a reasonable doubt." *Kiffe*, 361 S.W.3d at 107 (quoting *Jackson v. Virginia*, 443 U.S. 307, 320 (1979)).

Accomplice & Jailhouse Testimony

A defendant may not be convicted on an accomplice's testimony or the testimony by another inmate about a statement made by the defendant against his interest while they were incarcerated together unless the testimony is corroborated by other evidence tending to connect the defendant with the offense committed. Tex. Code Crim. Proc. arts. 38.075(a), .14. Evidence does not sufficiently corroborate accomplice or "jailhouse" testimony if it merely shows that the offense was committed. *Id*. arts. 38.075(b), .14. The court of criminal appeals has explained that in determining whether such testimony was sufficiently corroborated, we eliminate the challenged testimony from our consideration and ask whether the remaining portions of the record contain "any evidence that tends to connect the accused with the commission of the crime." *Castillo v. State*, 221 S.W.3d 689, 691 (Tex. Crim. App. 2007).

> The corroborating evidence need not be sufficient by itself to establish guilt; there simply needs to be "other" evidence "tending to connect" the defendant to the offense. We have noted that "unlike extrajudicial confessions, testimony of an accomplice need be corroborated only as to facts 'tending to connect the defendant with the offense committed' and not as to the corpus delicti itself."

Id. (quoting *Gribble v. State*, 808 S.W.2d 65, 71 n.13 (Tex. Crim. App. 1990)).

To be considered corroborating, the evidence does not have to directly link the defendant to the crime or on its own establish his guilt beyond a reasonable doubt, it must simply tend to connect the defendant to the crime. *Id*. Non-accomplice evidence may be circumstantial or direct, *see Smith v. State*, 332 S.W.3d 425, 442 (Tex. Crim. App. 2011) ("The direct or circumstantial non-accomplice evidence is sufficient corroboration if it shows that rational jurors could have found that it sufficiently tended to connect the accused to the offense."), and "[e]ven insignificant circumstances may satisfy the test," *Cantelon v. State*, 85 S.W.3d 457, 461 (Tex. App.—Austin 2002, no pet.); *see Dowthitt v. State*, 931 S.W.2d 244, 249 (Tex. Crim. App. 1996); *Reed v. State*, 744 S.W.2d 112, 126 (Tex. Crim. App. 1988). The "tends-to-connect standard does not present a high threshold," and we view the connecting evidence in the light most favorable to the verdict and judge each case on its own facts. *Cantelon*, 85 S.W.3d at 461 (quoting *In re C.M.G.*, 905 S.W.2d 56, 58 (Tex. App.—Austin 1995, no writ)).

Franco testified that on Tuesday, October 11, into the early morning of October 12, he and his girlfriend heard Zuzu and Fabian fighting, followed by thirty to sixty seconds of "bed shaking" that did not sound like Fabian and Zuzu having sex. Records from Estrada's social-media account and Fabian's cellphone show that Fabian tried to call Estrada at about 3:00 a.m. on October 12. Franco saw Fabian drive away at about 4:00 a.m. and although Fabian told the police that Zuzu had left at 2:00 or 3:00 a.m., her car was seen by Ndiaye and Franco still parked at Fabian's apartment the next morning. Zuzu's family testified that the following circumstances were unusual—the doors to her house were locked, the blinds were drawn, and her dog was in the backyard wearing a green leash. Estrada was acting so strange when he arrived at Gasca's house after having dinner with Fabian that Gasca asked him if it was "newsworthy." Fabian used Estrada's debit card to buy plastic drop cloths at Dollar General the night of

October 12, and Zuzu's remains were wrapped in thin plastic sheeting. Carrillo testified that Fabian borrowed his truck the night of October 12, using more gas than would have been used simply driving through Alpine. In the early morning of October 13, Miller saw an SUV like Fabian's Jeep Liberty driving past her house—near the location where Zuzu's remains were eventually found—at a high rate of speed. DNA evidence indicated that some of the hairs found in Carrillo's vacuum and in Estrada's trunk belonged to Zuzu. Cobos, Moore, and Jurado all testified that Fabian's appearance and behavior were strange and out of character the week of Zuzu's disappearance. Finally, Fabian made inconsistent statements to the police and referred to Zuzu in the past tense, and the police found his bleached mattress pad in the apartment's dryer and one unopened drop cloth in his apartment. This evidence tends to connect Fabian to Zuzu's murder and burial and sufficiently corroborates the testimony of both Estrada and Roman. *See Castillo*, 221 S.W.3d at 691; *Cantelon*, 85 S.W.3d at 461. We overrule Fabian's third issue.

Because Estrada's and Roman's testimony was sufficiently corroborated, it was for the jury to evaluate their credibility and determine how much weight to give their testimony. *See, e.g.*, *Farris v. State*, 819 S.W.2d 490, 495 (Tex. Crim. App. 1990) (although witness's "credibility was seriously undermined by the fact that he had previously testified under oath before the Grand Jury in a manner inconsistent with his trial testimony," it was for jury to view testimony "with considerable circumspection" and to determine his credibility), *overruled on other grounds by Riley v. State*, 889 S.W.2d 290 (Tex. Crim. App. 1993); *McDuff v. State*, 431 S.W.2d 547, 549 (Tex. Crim. App. 1968) (trial court charged jury on accomplice testimony, and jury "resolved the credibility of the accomplice witness against appellant believing the accomplice's version of the events of the night in question").

Sufficiency of the Evidence

Although Fabian does not assert a discrete issue challenging the sufficiency of the evidence supporting the jury's guilty verdict, we will consider the sufficiency of the evidence to address his assertions throughout his brief that the evidence cannot support his conviction. A person commits the offense of murder if he intentionally or knowingly causes another person's death; causes another's death by committing an act clearly dangerous to human life and with the intent to cause serious bodily injury; or causes another person's death while committing or attempting to commit a felony other than manslaughter. Tex. Penal Code § 19.02(b). A person commits the offense of tampering with evidence if, knowing that an investigation or official proceeding is pending, he alters, destroys, or conceals evidence with the intent to impair its verity, legibility, or availability as evidence in the investigation or proceeding. Id. § 37.09(a)(1).

In addition to the testimony of Estrada and Roman, asserting that Fabian told them he had strangled Zuzu, and the corroborating evidence noted above, the jury heard testimony by Ingraham and Dr. Lenfest explaining why Zuzu's skeletal remains might be incomplete and lack physical evidence of how she was killed. Dr. Lenfest based his conclusion that she was murdered on the fact that her remains were found in a shallow grave, wrapped in plastic sheeting, along with the lack of any indication that she might have died an unexpected but natural death. Fabian notes that Ranger Vajdos was patrolling the area for illegal immigrants and that beer bottles were found in the general area, attempting to raise an inference that Zuzu was killed by someone else. However, Vajdos said the beer bottles found near the grave "were all old" and that there were no labels on most of them and testified that he had put empty bottles in his yard for about two years and that they still had labels at the time of trial. There is evidence from which the jury could have concluded that Fabian strangled Zuzu, causing her death, and that he

concealed her body afterward. *See id*. §§ 19.02(b), 37.09(a). On this record, we can only conclude that the evidence is sufficient to support the jury's guilty verdicts on both charges leveled against Fabian.

AMENDMENT OF THE INDICTMENT AND MOTION IN LIMINE

In his first issue, Fabian argues that the trial court improperly granted the State's motion to amend the indictment nearly a year before trial because the amendment affected his substantial rights. Within the issue, he also complains of the court's failure to rule on his motion in limine, asserts that he received ineffective assistance of counsel, and argues that there was jury-charge error.

The code of criminal procedure provides in relevant part:

> (a) After notice to the defendant, a matter of form or substance in an indictment or information may be amended at any time before the date the trial on the merits commences. On the request of the defendant, the court shall allow the defendant not less than 10 days, or a shorter period if requested by the defendant, to respond to the amended indictment or information.
>
> (c) An indictment or information may not be amended over the defendant's objection as to form or substance if the amended indictment or information charges the defendant with an additional or different offense or if the substantial rights of the defendant are prejudiced.

Tex. Code Crim. Proc. art. 28.10. In determining whether a defendant's substantial rights were prejudiced by an amended indictment, we ask whether the amendment impaired the defendant's ability to prepare his defense, meaning we consider whether the defendant had adequate notice of the allegations and was able to prepare a defense. *See Flowers v. State*, 815 S.W.2d 724, 729 (Tex. Crim. App. 1991); *Hillin v. State*, 808 S.W.2d 486, 488-89 (Tex. Crim. App. 1991); *State*

v. Jarreau, 563 S.W.3d 477, 490 (Tex. App.—San Antonio 2018, pet. ref'd). We review the issue de novo. *See Jarreau*, 563 S.W.3d at 489.

On March 17, 2017, the grand jury indicted Fabian for causing Zuzu's death "by a manner and means unknown," along with tampering with evidence by burying her body. *See* Tex. Penal Code § 19.02(b)(1) (person commits offense of murder if he intentionally or knowingly causes another's death). On May 16, 2018, the State filed its motion for leave to amend the indictment, seeking to amend the count of murder to allege that Fabian caused Zuzu's death "by a manner and means unknown, or by strangulation (choking)." More than six months before filing its motion to amend, the State had disclosed Estrada's and Roman's grand-jury testimony, which included allegations that Fabian had confessed to "choking" Zuzu. The trial court held a hearing on the motion, during which Fabian objected that the proposed allegation of a new manner and means prejudiced his right to have a Grand Jury "determine whether there was probable cause for the offense to proceed forward with a true indictment under those manner and means." He further argued that the amendment alleged "a different occurrence because it goes from an unknown to a known means." The trial court granted the motion over his objection.

On appeal, Fabian does not argue that the amendment alleged a different offense or that his right to indictment by a grand jury was violated. Instead, he contends that he was prejudiced because "of the many ways Ms. Verk may have met her demise, including accident or some other manner other than homicide, the possibility of strangulation was highlighted with no evidence of any kind to support it." He further asserts that the record indicates the trial court did not consider prejudice and that:

> The fact that the Court ruled in favor of the State, having characterized the motion as "the easy part,"[9] and the fact that the Court never considered the last clause of Subsection (c), resulted in an indelible impression on the jury that strangulation was likely the manner of death, without a shred of evidence to support it.

Even if we view Fabian's appellate complaints as sufficiently comporting with his trial-level complaints so that error is preserved, *see Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995) (appellate issue "must correspond to the objection made at trial," and trial objection stating one legal theory may not be used to support different legal theory on appeal), the record does not support a conclusion that Fabian was prejudiced by the amendment, *see Johnson v. State*, 43 S.W.3d 1, 5 (Tex. Crim. App. 2001) (under Tex. R. App. P. 44.2(b), "it is the responsibility of the appellate court to assess harm after reviewing the record"; parties do not have burden to demonstrate harm by trial court error).

The original indictment alleged that Fabian had committed the offense of murder by unknown means. The amended indictment also alleged the offense of murder, based on the same occurrence, and simply added specificity to the factual allegations—providing Fabian with greater notice as to the allegations against him. *See Johnson v. State*, 208 S.W.3d 478, 498 (Tex. App.—Austin 2006, pet. ref'd). Furthermore, the State provided discovery to Fabian starting in April 2017, giving him copies of grand jury testimony in May 2017, October 2017, April 2018, and June 2018, which included allegations of Fabian's admissions of "choking" Zuzu; and disclosing in May and November 2017 Roman's and Estrada's police interviews, which provided similar information. In early June 2018, the State filed its list of witnesses, which included

[9] The trial court stated at the hearing that it had several issues to consider and that it would "do the easy one first. The indictment amendment." The clerk's record does not indicate that Fabian filed a written objection after the State moved to amend, and instead he verbally expressed his objection at the hearing. Thus, the trial court might have believed that deciding the motion to amend would be "easy" because the court did not realize Fabian would object.

Roman, Estrada, and Dr. Lenfest, who was listed as "Expert witness testimony on cause of death and manner of death." One week later, Fabian filed a motion in limine and motion to exclude evidence of strangulation. The jury trial began in late April 2019.

The original indictment was clear and gave Fabian notice of the charged offense of murder, and the amendment—made almost a year before trial—did not charge a new or different offense but instead provided detail about one possible manner of death that the State believed to be most likely. Fabian's argument on appeal is that the amendment somehow created an "indelible impression on the jury that strangulation was likely the manner of death, without a shred of evidence to support it," but the record does not support that assertion.[10] Indeed, as we have discussed at length, there was evidence that Fabian strangled Zuzu, including testimony by both Estrada and Roman that Fabian told them he had "choked" her. Further, the indictment also alleged that Fabian killed Zuzu through unknown means. We fail to see how the evidence of strangulation was somehow improperly bolstered by the amended indictment. We hold that Fabian's substantial rights were not prejudiced by the amendment. *See Flowers*, 815 S.W.2d at 729 (amendment that changes or adds specificity to element of offense changes evidence State must provide to prove offense, and if amendment is still based on same incident "upon which original indictment is based, it will, in most cases, be permissible under the substantial rights provision after a review of the record for prejudice").

Fabian next argues that the trial court erred in not ruling on his motion in limine and motion to exclude evidence of strangulation, filed June 11, 2018. The clerk's record does

[10] Fabian argues that by amending the indictment, the State "lower[ed] its effective burden by producing an expectation" that Zuzu died by strangulation. However, he also asserts that the amendment added a "new *type* or explosive *facet* of the occurrence" and "require[d] the State to justify that alternative allegation with admissible and credible evidence beyond mere speculation, which the defense had to prepare to refute."

not include a signed order on the motion, nor does the reporter's record show that Fabian brought the motion to the trial court's attention or requested and obtained a ruling on the motion.[11] "If no ruling was obtained, no error was preserved for review." *Garcia v. State*, 626 S.W.2d 46, 55 (Tex. Crim. App. 1981). Further, the granting or denial of a motion in limine "is a preliminary ruling only and normally preserves nothing for appellate review." *Geuder v. State*, 115 S.W.3d 11, 14-15 (Tex. Crim. App. 2003); *see Warner v. State*, 969 S.W.2d 1, 2 (Tex. Crim. App. 1998) (ruling on motion in limine "is subject to reconsideration throughout trial," and party who filed motion must still preserve error at trial when evidence is offered or excluded). We overrule Fabian's complaint related to his motion in limine.

Finally, Fabian notes in his sub-issue, titled "Error in the jury charge," that trial counsel objected to the trial court's reading the amended indictment when the jury was charged. He asserts that there was "absolutely no evidence" Zuzu was strangled, or even "forensic evidence of foul play," and insists that the cause of her death is unknown, arguing:

> When the curtain is thrown back on the forensic testimony throughout the trial, the wizard is not even behind the curtain. The upshot is that the testimony as to how strangulation occurs was designed with no basis in fact to get the jury something to hang onto as a story, was more prejudicial than probative, and the amending of the indictment was done over Defendant's objection depriving him of the right of due process guaranteed in Art. 1, Section 10, Texas Constitution because it violated Rule 403, Texas Rules of Evidence.

[11] Fabian acknowledges that trial counsel did not object to various instances of testimony related to strangulation, stating that trial counsel had since informed appellate counsel that he did not object because "of the agreement that the judge would rule on his objection at the time the mention of strangulation was sought," and he argues that the judge "implicitly ruled on the objection by admitting the testimony after having agreed that he would withhold ruling until trial." However, any such "agreement" would not preserve error. *See Warner v. State*, 969 S.W.2d 1, 2 (Tex. Crim. App. 1998). Further, to the extent that Fabian argues that the State agreed to the motion in limine, attaching to his brief as support handwritten notes from trial counsel, this information is not part of the record and may not be considered in this appeal.

Any complaints about the rules of evidence or possible jury-charge error are not sufficiently briefed, and we have held that the trial court did not err in granting the State's motion to amend the indictment. We overrule Fabian's first issue as far as it complains about the jury charge, his motion in limine, and the amended indictment.

IMPROPER CHARACTER TRAIT EVIDENCE

In his second issue, Fabian argues that the State's evidence was "rife with improper character trait evidence." Within the discussion of his second issue, Fabian also asserts that if error was not preserved, we should hold that he received ineffective assistance of counsel. As above, we will reserve our discussion of that issue and will limit our discussion here to whether the trial court allowed the State to present improper character evidence.

Fabian argues that certain testimony by Roman, Doggett, and Lori Verk was inadmissible character evidence that served only to prejudice the jury against him. However, Fabian did not object to the testimony at trial and thus waived any error. *See Resendez v. State*, 306 S.W.3d 308, 312-13 (Tex. Crim. App. 2009); *Scaggs v. State*, 18 S.W.3d 277, 291 (Tex. App.—Austin 2000, pet. ref'd); *see also* Tex. R. Evid. 103 (party must make timely and specific objection or move to strike or must show that specific grounds were apparent from context). Further, although Fabian insists that the testimony by Verk and Doggett served only to inflame the jury's sympathies for Zuzu and against Fabian,[12] the trial court would not have abused its

[12] Fabian complains of Doggett's and Verk's testimony that they did not like him and found him to be "pouty" and possessive. Fabian also complains of Doggett's testimony that she was annoyed when he drank the tequila that she had intended to give to Zuzu. Fabian does not, however, complain of Miles Verk's testimony that Fabian was jealous and possessive to an "unhealthy degree," that Zuzu knew their relationship "wasn't going to last" and "didn't want it to last," that the two broke up "a lot," and that Zuzu "didn't want to go back to him, but she was just lonely and he was there."

discretion in determining that the testimony described her relationship with Fabian and his behavior toward her and gave the jury context for the State's accusations. *See* Tex. Code Crim. Proc. art. 38.36(a) (in murder prosecution, parties may offer testimony "as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances" showing "condition of the mind of the accused at the time of the offense"); *Garcia v. State*, 201 S.W.3d 695, 702-03 (Tex. Crim. App. 2006) ("For example, in cases in which the prior relationship between the victim and the accused is a material issue, illustrating the nature of the relationship may be the purpose for which evidence of prior bad acts will be admissible."). Similarly, although he asserts that certain testimony by Roman was prejudicial and improper,[13] the trial court would not have erred in determining that the testimony provided information and context about Fabian's relationship with Zuzu and his state of mind around the time she disappeared. *See* Tex. Code Crim. Proc. art. 38.36(a). We overrule Fabian's second issue as far as it complains of improper character evidence.

IMPROPER BOLSTERING OF WITNESS TESTIMONY

In his fourth issue, Fabian argues that the trial court improperly bolstered the testimony of several of the State's witnesses by thanking them "for [their] information" when they were excused. He acknowledges that trial counsel made no objection to those statements but urges us to view this as the category of error discussed in *Proenza v. State*, in which the court

[13] Roman testified that Fabian had told Roman he "looked good without a shirt on," that Fabian was bisexual, and that Fabian told Roman he had had a "little bisexual relationship" with Estrada and that Zuzu and Fabian argued when she found out and threatened to tell people about the relationship. Estrada, however, denied that he and Fabian ever had "any kind of homosexual or gay relationship."

of criminal appeals stated that "when the trial judge's impartiality is the very thing that is brought into question," the alleged error should be considered regardless of whether there was a timely objection, provided the defendant did not expressly waive any error. 541 S.W.3d 786, 799 (Tex. Crim. App. 2017). Article 38.05 provides that a trial court may not "discuss or comment on the weight of" evidence, nor may it "make any remark calculated to convey to the jury [its] opinion of the case." Tex. Code Crim. Proc. art. 38.05. A trial court improperly comments on the weight of evidence "if it makes a statement that implies approval of the State's argument, indicates disbelief in the defense's position, or diminishes the credibility of the defense's approach to the case." *Proenza v. State*, 555 S.W.3d 389, 397 (Tex. App.—Corpus Christi-Edinburg 2018, no pet.) (quoting *Simon v. State*, 203 S.W.3d 581, 590 (Tex. App.—Houston [14th Dist.] 2006, no pet.)).

As observed by the State, the trial court thanked most of the witnesses as they finished testifying throughout the proceeding.[14] It also thanked venire panelists when they answered questions during voir dire, thanked Fabian when he stood to be introduced, thanked counsel during discussions about the admission of exhibits, and thanked the jury at various points in the trial. The court's telling witnesses "thank you for that information" can only be viewed as expressing appreciation for the witnesses' participation in the trial and as indicating that each witness's testimony was over and that they could leave the witness stand. It cannot reasonably be viewed as commenting on the credibility of those particular witnesses as opposed to those who were merely thanked.

[14] The court thanked nineteen of the thirty-four witnesses for "information," including Miller, forensic analysts, two law-enforcement witnesses who provided testimony that did not link Fabian to Zuzu's death, Franco, Cobos, Carrillo, Gasca, Moore, and Jurado. It thanked another nine or ten witnesses without including the word "information."

Even if we were to conclude that thanking some of the witnesses for "information" somehow impermissibly commented on the weight of the testimony, we would hold such error to be harmless. *See Proenza*, 541 S.W.3d at 801-02 (error under article 38.05 is reviewed for harm under Tex. R. App. P. 44.2(b)). Under rule 44.2(b), we must disregard such error unless it affected the defendant's substantial rights. Tex. R. App. P. 44.2(b). "To make this determination, appellate courts must decide whether the error had a substantial or injurious effect on the jury verdict." *Morales v. State*, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000) (quoting *Llamas v. State*, 12 S.W.3d 469, 471 n.2 (Tex. Crim. App. 2000)). When the record gives "fair assurance that the error did not influence the jury, or had but slight effect," we hold that the error was harmless. *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)). We review the entire record, including the testimony, the physical evidence, 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," the jury instructions, closing arguments, voir dire, the theories advanced by the State and the defendant, and whether the State emphasized the error. *Id*.

As noted earlier, the trial court thanked most of the witnesses. It also thanked counsel at various points and thanked the jurors for their service. The court thanked all three of Fabian's witnesses in the punishment phase, thanking two of them "for this information." The State never noted that the trial court had mentioned "information" or otherwise drew attention to it, and when we consider the context in which the statements were made and the evidence as discussed earlier, we have fair assurance that the trial court's including the word "information" when thanking various witnesses did not influence the jury in its decision-making. *See id*. We overrule Fabian's third issue as it complains of the trial court's thanking certain witnesses for

their "information." *See, e.g.*, *In re J.G.*, 195 S.W.3d 161, 177 (Tex. App.—San Antonio 2006, no pet.) (no fundamental error in trial court's thanking six-year-old witness for her testimony as she left witness stand, saying, "All right, [E.M.]. Thank you very much. You answered the questions just right. Thank you. You can go.").

INEFFECTIVE ASSISTANCE OF COUNSEL

Within many of his issues, Fabian urges that if we hold that his asserted errors were waived, we should hold that he received ineffective assistance of counsel.

A defendant asserting that he received ineffective assistance of counsel must show that counsel's performance was deficient, meaning it fell below an objective standard of reasonableness, and that there is a reasonable probability that but for counsel's errors, the proceeding would have turned out differently. *Strickland v. Washington*, 466 U.S. 668, 690-94 (1984); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). Whether a defendant received effective assistance of counsel is a determination made according to the facts of each case, and "the record must affirmatively demonstrate the alleged ineffectiveness." *Thompson*, 9 S.W.3d at 813. "An appellate court looks to the totality of the representation and the particular circumstances of each case in evaluating the effectiveness of counsel." *Id*.

Having reviewed the entire record, we cannot say that trial counsel was ineffective. The record in this case shows that counsel was active and involved throughout trial, attempting to cast doubt on the State's case and to provide an alternative suspect for the jury to consider. Further, the record is silent as to counsel's trial strategy, and Fabian has not shown that he was prejudiced by any alleged errors. *See Ex parte White*, 160 S.W.3d 46, 53 (Tex. Crim. App. 2004) ("To show ineffective assistance of counsel for the failure to object during trial, the

applicant must show that the trial judge would have committed error in overruling the objection."). Given the scant briefing on the issue, in addition to the general rule that the record in a direct appeal is "simply undeveloped and cannot adequately reflect the failings of trial counsel," *Freeman v. State*, 125 S.W.3d 505, 506 (Tex. Crim. App. 2003) (quoting *Thompson*, 9 S.W.3d at 813-14), we decline to hold on this record that trial counsel provided ineffective assistance throughout the underlying proceeding.

CONCLUSION

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

_____

Darlene Byrne, Chief Justice

Before Chief Justice Byrne, Justices Baker and Kelly

Affirmed

Filed: July 29, 2021

Do Not Publish