NUMBER 13-13-00338-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

LAURA DAY A/K/A LAURA SYRING A/K/A LAURA LEE BUSH A/K/A LAURA LEE MARSDEN A/K/A LAURA LEE FEIST, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 214th District Court of Nueces County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Garza and Longoria
Memorandum Opinion by Chief Justice Valdez

A Nueces County jury found Laura Day a/k/a Laura Syring a/k/a Laura Lee Bush a/k/a Laura Lee Marsden a/k/a Laura Lee Feist guilty of the offenses of capital murder, injury to a child, and endangering a child for the drowning death of her six-year-old stepson, T.S. *See* TEX. PENAL CODE ANN. §§ 19.03, 22.04, 22.014 (West, Westlaw

through 2015 R.S.). The trial court sentenced Day to mandatory life in prison without the possibility of parole for the capital murder.

Day raises ten issues on appeal. By five issues, which we treat as one issue with five sub-issues, Day contends that the evidence is legally insufficient to support her conviction for capital murder because: (a) there is no evidence that she committed a felony murder as defined by Texas Penal Code section 19.02(b)(3); (b) the medical doctor who performed the autopsy on T.S. gave the jury a reason to doubt whether T.S.'s death was a homicide as opposed to an accidental drowning; (c) the State failed to prove that T.S. drowned in Nueces County as opposed to Kleberg County; (d) as a matter of law, the State only proved the lesser-included offense of criminal negligence; and (e) the State failed to prove that she lacked remorse after T.S.'s death. By her third and fourth issues, Day contends that there is legally insufficient evidence to prove that she committed the offenses of injury to a child and endangering a child. By her eighth and ninth issues, Day contends that the attorneys representing the State committed prosecutorial misconduct during trial and that her trial counsel was ineffective for failing to object to such misconduct. By her tenth issue, Day contends that the trial court erred in admitting her jail telephone conversations under Texas Rule of Evidence 403.[1] We dismiss for want of

[1] On July 14, 2014, Day's court-appointed appellate counsel filed a brief, raising two issues challenging the trial court's judgment. Day then filed a pro se motion with this Court asking us to discharge her court-appointed counsel and allow her to represent herself in prosecuting this appeal. On July 30, 2014, we abated this appeal and remanded the case to the trial court for a determination as to whether Day desired to proceed pro-se on appeal. *See Hubbard v. State*, 739 S.W.2d 341 (Tex. Crim. App. 1987). After admonishing Day regarding the dangers and disadvantages of self-representation, the trial court determined that Day knowingly and intelligently waived her right to appellate counsel and that she desired to proceed pro-se on appeal. On December 19, 2014, Day filed her pro-se appellate brief raising ten issues challenging the trial court's judgment. Accordingly, we strike the appellate brief previously filed by Day's court-appointed counsel and address only the issues Day raised in her pro-se brief, which are set out above. We will broadly construe Day's issues in the interest of justice, but we have no duty to make an independent review of the record and applicable law to determine whether the complained-of errors occurred. *See Cavender v. State*, 42 S.W.3d 294, 296 (Tex. App.—Waco 2001, no pet.); *see also Comeaux v. State*, No. 13-11-00440-CR, 2013 WL 3203143, at *3 (Tex. App.—Corpus Christi June 30, 2013, pet. struck) (mem. op., not designated for publication). We will not make Day's arguments for her, nor will we address any

jurisdiction Day's appeal concerning her legal sufficiency challenge to injury to a child and endangering a child, and affirm the trial court's judgment.

I. Background

The evidence at trial showed that Day and D.S., T.S.'s biological father, met in the summer of 2011 and began a relationship. They divorced their respective spouses by the spring of 2012 and married each other later that year, in August 2012. The evidence showed that Day was concerned that D.S. might resume a relationship with his former spouse and T.S.'s biological mother, K.S. Nonetheless, after getting married, Day and D.S. made plans to move away from Texas together with T.S., whom D.S. affectionately described to others as his "everything." During this time, Day sent her biological son from a previous marriage away to live with her ex-husband, and D.S. hired an attorney to obtain primary custody of T.S. from K.S. However, by early October 2012, it became apparent to them that obtaining custody of T.S. was not likely to happen.

Against this evidentiary backdrop, the State presented evidence that during the afternoon hours of October 5, 2012, Day picked T.S. up from school and drove him to a stretch of beach along the coast of the Gulf of Mexico. The evidence showed that Day was aware that T.S. started to learn how to swim not more than three months before she drove him to the beach. The evidence also showed that Day did not tell D.S. about the beach plan, despite the fact that she spoke to D.S. on the telephone after she picked T.S. up from school that day. It was the third time that Day had ever picked T.S. up from

issues that are inadequately briefed. *See* TEX. R. APP. P. 38.1(i) (providing that appellant's brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record); *Roberts v. State*, 273 S.W.3d 322, 326 (Tex. Crim. App. 2008) (applying the adequate-briefing rule to a capital murder appellant proceeding pro se on appeal); *see also Kindley v. State*, 879 S.W.2d 261, 264 (Tex. App.—Houston [14th Dist.] 1994, no pet.) (holding that a pro se appellant is not entitled to special treatment, is held to the same standards as licensed attorneys, and must comply with all briefing rules).

school. D.S., who described T.S. as not a "really strong swimmer," testified that he would have advised against the trip to the beach had Day told him about it beforehand.

A fisherman on his way to a fishing spot on the beach testified that as he drove past Day's car, which was parked on the beach, he observed Day back peddling into the ocean while motioning for T.S. to leave the shore and join her. The fisherman testified that when he arrived at his fishing spot further down the beach, he lost sight of both Day and T.S and that, sometime later, he noticed that Day had relocated closer to his fishing spot within his line of sight. The fisherman testified that Day stayed there for approximately twenty to thirty minutes and that he never saw T.S. with her after she relocated. According to the fisherman, when Day drove away, she waved at him with an "ear-to-ear" grin. The fisherman testified that the next time he saw Day's face was on the television screen when the local news reported that T.S. drowned at the beach. The fisherman called the police to report what he saw at the beach.

Before her arrest, Day told authorities that it was T.S.'s idea to go to the beach and that she stopped by her house to pick up some beach wear before heading out to the beach. Day also told authorities that she allowed T.S. to swim in the ocean without a life jacket while she stayed at the shore. An expert in drowning investigations determined that the depth of the water reached approximately T.S.'s shoulders based on his height. Day told authorities that T.S. suddenly disappeared from the water's surface and then resurfaced floating approximately 150 feet to the right of where she last saw him. Day recounted that she ran to T.S.'s floating body, gave him mouth-to-mouth breath resuscitation without doing chest compressions, loaded him in the back of her car, and drove to an emergency hospital without calling 911. Day admitted to authorities that she was certified in CPR.

At trial, the State presented evidence demonstrating that certain aspects of Day's explanation regarding the circumstances of T.S.'s death were implausible. For example, the State's expert in drowning investigations testified that individuals who drown at T.S.'s age do not float—they sink—and that, in any event, tidal currents reported that day would have carried T.S.'s body in the opposite direction than where Day claimed she found him floating. The State also presented evidence that people certified in CPR, such as Day, would know that the proper CPR procedure calls for the use of chest compressions—not just mouth-to-mouth—and that a rescuer usually only has a four-to-six-minute window of time to resuscitate a person who has drowned before he or she dies. Investigators calculated that it took approximately nineteen minutes for Day to drive from the area where T.S. drowned to the emergency hospital even though another emergency facility was closer to the beach and open all day and all night.[2]

T.S. was pronounced dead after emergency personnel at the hospital were unable to resuscitate him. The doctor who performed the autopsy on T.S. testified that, although it was clear to him that T.S. died from complications related to drowning, he could not determine whether T.S. drowned by accident or by the hand of another person (i.e., homicide). The doctor further testified that although he ultimately could not determine the manner of T.S.'s death, it was "suspicious for homicide" based on what he read in a police report about Day.[3]

On the night T.S. died, investigators interviewed Day at the police station to learn more about what happened at the beach. Over Day's objection, the trial court admitted

[2] The State presented evidence that Day was not new to the area where T.S. drowned and that a fire station on the way to the emergency hospital was equipped with 24-hour emergency services.

[3] Although the jury never heard what the doctor read in the police report, a hearing taken outside the presence of the jury showed that the police report referenced Day's prior conviction for murder in California in 1982.

into evidence a video recording of Day's interview. During the entire interview, Day can be seen speaking to investigators with her hair covering her face, and she almost never made eye contact with them. Regarding Day's behavior during the interview, one interviewing investigator testified that "[Day] was making noises like she was crying, but I never saw any tears[.]" Several witnesses who observed Day after T.S.'s death testified that she did not appear to show any kind of remorse for what happened to T.S. under her care.

Investigators did not arrest Day after her interview at the police station. However, four days later, the police arrested and charged Day with, among other things, capital murder. The State's indictment for capital murder alleged the following:

> [Day] intentionally and knowingly by act or omission cause[d] the death of an individual, [T.S.], a child, by; [1] failing to properly supervise [T.S.] while [T.S.] was in the water without a lifejacket, or [2] failing to seek adequate or timely medical care for [T.S.] and [Day] had assumed care, custody, or control of said child, and [T.S.] was then and there an individual younger than ten years of age.

The State's theory of the case was that Day delivered T.S. to the ocean in water deep enough for him to drown and that she did this with the specific intent to expose him to an environment that was reasonably certain to bring about his death without a life jacket—given her knowledge that T.S. was a six-year-old novice swimmer. The State further theorized that after T.S. drowned at the beach, Day specifically intended to stall resuscitative efforts that could have revived T.S.—by not performing CPR in accordance with her certification and training, by not calling 911, and by choosing to drive to a hospital that was more than six minutes away from the location where T.S. drowned.

Regarding Day's motive to commit the crime, the State alleged that she wanted D.S.'s "everything" to die because T.S. posed a threat to her new marriage and to her plan to move out of Texas with D.S. Specifically, the State alleged that Day was

concerned that D.S. might resume a relationship with K.S. for the sake of T.S. or might refuse to leave Texas without T.S. after he failed to obtain primary custody of T.S. To support its theory concerning Day's motive, the State introduced several statements that she made during recorded jail conversations with D.S. after her arrest, which include, but are not limited to, the following:

1. "Do you love me more than you loved [K.S.]?"

2. "I'm so worried that you're going to leave me."

3. "We should build our own dream house together in Florida somewhere. . . . And be happy and live happily ever after like a fairy tale."

4. "I keep daydreaming about us being together in Florida in our new house. . . . And totally just leaving my past behind, leaving [my ex-husband and son] behind me and that's it."

5. "I'm just so excited about our new life together. . . I feel that everything's falling into place like it should. And everything is happening like it's supposed to."

6. "I'm glad everybody's gone and it's just you and me now."

7. "Did you get my letter about all the stuff that I said to throw away—all the kids' stuff?"

The State further alleged that, contrary to what Day initially told authorities, it was her plan to go to the beach, not T.S.'s, and that she actually packed her car with beach wear before picking T.S. up from school, not after. To support this allegation, the State argued that one would not expect to find T.S.'s backpack and school clothes inside Day's car, as the evidence showed, if she actually returned home for beach wear after picking T.S. up from school. The State's lead investigator testified that if Day returned home with T.S. to pick up beach wear, then any reasonable person in Day's position would have left T.S.'s backpack at the house to avoid getting it sandy at the beach and would have allowed T.S. to change into beach clothes in the privacy of a home instead of inside a

car.[4] As further evidence that it was Day's plan rather than T.S.'s wish to go to the beach, the State pointed to Day's own inconsistent statement during a recorded jail call. In that jail call, Day can be heard telling the person on the other end of the call that she and T.S. never went home on the day T.S. drowned. Thus, according to the State, Day lied when she told authorities that it was T.S.'s idea to go to the beach and that she returned to her house for beach wear after picking T.S. up from school. The State also introduced another jail call, wherein Day expresses satisfaction with the fact that no cameras were recording in a location where she and T.S. could have been seen on the day T.S. drowned.

At the conclusion of all the evidence, the trial court instructed the jury to consider not only the charged crime of capital murder but also the lesser-included offense of criminally negligent homicide. The trial court also instructed the jury to consider the other counts on which the State sought a conviction, including injury to a child and endangering a child. The jury found Day guilty as charged on all three counts and rejected the lesser-included offense of criminally negligent homicide. The State elected to proceed to punishment only as to capital murder, and the trial court sentenced Day to life in prison without the possibility of parole. This appeal followed.

II. Legal Sufficiency—Capital Murder

By five issues, Day contends that the evidence is legally insufficient to support her conviction for capital murder.

[4] The investigator testified that T.S.'s underwear was found inside his pants on the floorboard of Day's car, which indicated to the investigator that T.S. probably changed in the car by stepping out of his school clothes.

A. Standard of Review

We conduct our legal sufficiency review by applying the *Jackson v. Virginia* standard of review. *See Brooks v. State*, 323 S.W.3d 893, 906 (Tex. Crim. App. 2010). Under this standard, the relevant question is whether, after viewing all of the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of capital murder beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Brooks*, 323 S.W.3d at 902 n.19. As applied to this case, a person commits capital murder if she, by act or omission, intentionally or knowingly causes the death of an individual who is under ten years of age. *See* TEX. PENAL CODE ANN. § 19.03(a)(8); *see also Harrington v. State*, 547 S.W.2d 616, 619 (Tex. Crim. App. 1977); *De Leon v. State*, 684 S.W.2d 774, 776 (Tex. App.—Corpus Christi 1984, no pet.).

In a legal sufficiency review, the jury is the "exclusive judge of the credibility of witnesses and of the weight to be given testimony, and it is also the exclusive province of the jury to reconcile conflicts in the evidence." *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). The standard for reviewing the sufficiency of the evidence is the same for both direct and circumstantial evidence. *Kutzner v. State*, 994 S.W.2d 180, 184 (Tex. Crim. App. 1999). Our review of all of the evidence includes evidence that was properly and improperly admitted. *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

Sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). A hypothetically correct jury charge is one that "sets out the law, is authorized by the indictment, does not unnecessarily increase the state's burden of proof or

unnecessarily restrict the state's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Id*.

B. Analysis

1. Felony Murder

As we understand her first issue, Day contends that the jury could not rationally convict her of capital murder based on her failure to properly supervise T.S. because the evidence was legally insufficient to show that she committed felony murder under penal code section 19.02(b)(3). *See* TEX. PENAL CODE ANN. § 19.02(b)(3) (West, Westlaw through 2015 R.S.). Section 19.02(b)(3) states:

> A person commits [felony murder] if [s]he. . . commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, [s]he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

Id. Day asserts that, even assuming that she committed the predicate felony offense of injury to a child, the jury could not rationally find her guilty of felony murder because failing to properly supervise a child does not constitute an "act clearly dangerous to human life." *Id*. Had the State actually charged and convicted Day of felony murder, we might be persuaded by her argument. *See Rodriguez v. State*, 454 S.W.3d 503, 508 (Tex. Crim. App. 2014) (holding that a felony murder conviction predicated on a defendant's failure to act is legally insufficient because section 19.02(b)(3) expressly limits the proscribed conduct to "acts"—not omissions, such as the defendant's failure to provide necessary food and nutrition to her child). However, the State did not charge Day with felony murder; accordingly, the jury was never called upon to determine whether her failure to properly supervise T.S. constituted an act clearly dangerous to T.S.'s life. Instead, the State charged and ultimately convicted Day of capital murder under section 19.03(a)(8) of the

penal code. *See* TEX. PENAL CODE ANN. § 19.03(a)(8) (elevating the murder of an individual under ten years of age to capital murder).

The fact that Day never stood trial for felony murder is important for purposes of our review here because we measure legal sufficiency against the elements of the offense as defined by a hypothetically correct jury charge. *See Malik*, 953 S.W.2d at 240. A hypothetically correct jury charge for capital murder in this case would instruct the jury to find Day guilty if she intentionally or knowingly, by act or omission, caused the death of an individual under ten years of age. *See* TEX. PENAL CODE ANN. § 19.03(a)(8); *see also Harrington*, 547 S.W.2d at 619; *De Leon*, 684 S.W.2d at 776. In order to entertain Day's sufficiency challenge, we would have to abandon a hypothetically correct jury charge and instead measure legal sufficiency against the elements for felony murder. Such a review is improper because it would require the State to prove an element that is not necessary to prove capital murder—namely, that Day's failure to properly supervise T.S. at the beach constitutes an "act clearly dangerous to human life." *See Malik*, 953 S.W.2d at 240 (observing that a hypothetically correct jury charge is one that does not "unnecessarily increase the State's burden of proof" and "adequately describes the particular offense for which the defendant was tried"). Therefore, we decline Day's invitation to determine whether her actions were clearly dangerous to T.S.'s life because a hypothetically correct jury charge for capital murder would not put that issue before the jury.

After measuring the elements of capital murder against a hypothetically correct jury charge, and after reviewing the evidence in the light most favorable to the jury's verdict, we conclude that the jury could rationally find that Day intentionally or knowingly caused T.S.'s death by failing to properly supervise him in the water without a life jacket

or by failing to seek adequate or timely medical care after he drowned. *See Brooks*, 323 S.W.3d at 906; *see also Ex Parte Weinstein*, 421 S.W.3d 656, 668 (Tex. Crim. App. 2014) (observing that "[a]ttempts to conceal incriminating evidence, inconsistent statements, and implausible explanations to the police are probative of wrongful conduct and are also circumstances of guilt"); *Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004) (observing that intent may be inferred from circumstantial evidence such as acts, words, and the conduct of the defendant). We therefore overrule Day's first issue.

2. Autopsy

By her second issue, Day contends that there was legally insufficient evidence to support her conviction for capital murder because the medical doctor who performed the autopsy on T.S. gave the jury a reason to doubt whether T.S.'s death was a homicide as opposed to an accidental drowning. "Homicide" is generally defined as "the killing of one person by another" or "someone who kills another." BLACK'S LAW DICTIONARY (10th ed. 2014).[5] Specifically, Day points to the doctor's testimony that he initially indicated in his autopsy report that the manner of T.S.'s death "could not be determined" but then subsequently amended his report to include the following note after learning from the police more information about Day: "The death of [T.S.] is inconsistent with accidental manner of death and thus suspicious for homicide." The record taken outside the presence of the jury indicates that the doctor added this note to his autopsy report after learning that Day had been previously convicted of murder. The jury did not hear about Day's previous conviction; instead, the jury only heard that the doctor added the note after reading a police report that raised "red flags."

[5] Aside from the dictionary definition, section 19.01(a) of the Texas Penal Code provides that "criminal homicide" occurs when a person "intentionally, knowingly, recklessly, or with criminal negligence causes the death of an individual." *See* TEX. PENAL CODE ANN. § 19.01 (West, Westlaw through 2015 R.S.).

As we understand her second issue, Day asserts that the doctor's "suspicious of homicide" finding was not scientifically reliable because it was based on what she describes as the "extraneous" matter of her previous murder conviction; therefore, according to Day, the evidence was legally insufficient to support a finding that T.S.'s death was a homicide. Day provides no authority, and we find none, to support her argument that it is categorically unreasonable for a medical doctor to consider the criminal history of the person in whose company the deceased was last seen in determining how the deceased died. Furthermore, we must consider even improperly admitted evidence in a legal sufficiency review. *See Clayton*, 235 S.W.3d at 778. This means that even if we were to agree with Day that the doctor's "suspicious of homicide" finding was improperly admitted, we would not be able to ignore such evidence in addressing her complaint that evidence of a homicide was legally insufficient. In order to sustain Day's second issue, we would have to misapply the rules governing our legal sufficiency review, which we again decline to do.[6] We overrule Day's second issue.

[6] To support her second issue, Day offers for our consideration *Batterbee v. State*—a case in which the court of criminal appeals found insufficient evidence to support the defendant's conviction for the murder of her husband because the doctor who did the husband's autopsy could not determine whether the manner of his death was a suicide or a homicide. 537 S.W.2d 12 (Tex. Crim. App. 1976). However, *Batterbee* is distinguishable on the basis that, among other things, the doctor in this case found the manner of T.S.'s death to be suspicious of homicide, not merely undetermined. Aside from this factual distinction, we also note that *Batterbee*, a 1976 case, analytically relied on negating exculpatory theories raised by the evidence in finding the evidence insufficient. *See Ramsey v. State*, 473 S.W.3d 805, 811 (Tex. Crim. App. 2015). Considering *Batterbee's* place in time, this is not surprising because the court of criminal appeals still applied the reasonable-alternative-hypothesis analytical construct for evaluating sufficiency complaints on appeal. *See id*. This standard once called upon reviewing courts to sustain sufficiency complaints if the State failed to negate every exculpatory theory raised by the evidence—that is, every reasonable alternative to the defendant's guilt. *See Geesa v. State*, 820 S.W.2d 154, 165 (Tex. Crim. App. 1991), *overruled on other grounds by Paulson v. State*, 28 S.W.3d 570, 573 (Tex. Crim. App. 2000). However, because the standard by which we review sufficiency complaints has changed since *Batterbee*, we believe that its ultimate finding of insufficient evidence does not dictate the same result here. *See Ramsey*, 473 S.W.3d at 811 (calling into doubt the holding of a 1977 decision that reversed the defendant's conviction for insufficient evidence, noting that the court at that time had applied the reasonable-alternative-hypothesis analytical construct for reviewing sufficiency complaints, which has since been disavowed).

3. Venue

By her fifth issue, Day contends that the evidence was legally insufficient to support her conviction for capital murder because the State failed to prove that Nueces County was a proper venue for prosecution. Specifically, Day argues that there was insufficient evidence to support venue in Nueces County because T.S. more than likely drowned on a stretch of beach located in Kleberg County, which borders Nueces County. However, the test for legal sufficiency applies only to the "elements" of capital murder. "[A]n 'element' is a fact that is legally required for a fact finder to convict a person of a substantive offense." *State v. Jarvis*, No. 10-15-00133-CR, ___S.W.3d___, ___, 2016 WL 1389806, at *4 n.4 (Tex. App.—Waco Apr. 7, 2016, no. pet. h.) (quoting *Schmutz v. State*, 440 S.W.3d 29, 34 (Tex. Crim. App. 2014)). The court of criminal appeals has held that venue is not an element of capital murder, and therefore, "the State's failure to prove [it] does not implicate sufficiency of the evidence." *See Schmutz*, 440 S.W.3d at 35 (holding that venue does not implicate a sufficiency review).

In any event, the State proved that venue was proper in Nueces County under article 13.075 of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 13.075 (West, Westlaw through 2015 R.S.). Under article 13.075, a capital murder committed against a victim younger than eighteen years of age may be prosecuted in the county: "(1) in which an element of the [capital murder] was committed; (2) in which the defendant is apprehended; (3) in which the victim resides; or (4) in which the defendant resides." *Id*. Because the statute is worded in the disjunctive, venue is proper in a county in which any one of these four circumstances exists. *See id*. Here, there is no dispute

that Day resided and was apprehended in Nueces County, nor is there any dispute that T.S. resided there prior to his death.[7] We overrule Day's fifth issue.

4. "Negative Finding" Regarding Criminal Negligence

By her sixth issue, Day contends that if she is guilty of homicide, she is only guilty of criminally negligent homicide—not capital murder. The record shows that the trial court submitted the lesser-included charge of criminally negligent homicide to the jury, but the jury ultimately rejected a finding of criminal negligence and instead found that Day intentionally or knowingly caused T.S.'s death.[8]

On appeal, Day argues that the jury's "negative finding" concerning criminal negligence is legally insufficient. Specifically, Day contends that her criminal negligence was conclusively established "simply by the stipulated agreement between the State and defense that evidence adduced at trial clearly gave means to the lesser-included charge of [criminal negligence]." Day continues: "Obviously, the trial judge also conceded that there was conclusive evidence adduced at trial that warranted the charge for the lesser-

[7] In an effort to prove that T.S. probably drowned on a stretch of beach located in Kleberg County, Day filed a motion with this Court on December 16, 2014, asking us to take judicial notice of the beachside county line separating Kleberg County from Nueces County pursuant to Texas Rule of Evidence 201(b). *See* TEX. R. EVID. 201(b) (providing that a court may judicially notice a fact that is "not subject to reasonable dispute because it. . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"); *see also In re J.M.H.*, 414 S.W.3d 860, 863 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (observing that courts have properly taken judicial notice of geographical facts, such as the location of cities, counties, boundaries, dimensions, and distances). We grant Day's motion and take judicial notice of the county line separating Kleberg County from Nueces County. *See In re J.M.H.*, 414 S.W.3d at 863. However, taking notice of this geographical fact does not change our disposition of Day's fifth issue; as noted above, venue was proper in Nueces County pursuant to article 13.075 even if we were to agree with Day for sake of argument that T.S. actually drowned in Kleberg County.

[8] *Compare* TEX. PENAL CODE ANN. § 6.03(a) (West, Westlaw through 2015 R.S.) (providing that a person acts intentionally with respect to the result of her conduct when it is her "conscious objective or desire" to cause the result) *and id*. § 6.03(b) (providing that a person acts knowingly with respect to the result of her conduct when she is "aware that h[er] conduct is reasonably certain" to cause the result), *with id*. § 6.03(d) (providing that a person is criminally negligent with respect to the result of her conduct when she "ought to be aware of a substantial and unjustifiable risk" that the result will occur).

included offense of criminal negligence. Otherwise, the trial court would have rejected such charge to the jury."

Day conflates the evidentiary standard for submission of a lesser-included offense to the jury with the legal sufficiency standard. From a proof standpoint, these standards are quite different. To be entitled to submission of a lesser-included offense, the defendant need only point to "some" evidence in the record indicating that if she is guilty of anything, she is only guilty of the lesser-included offense. *See Hall v. State*, 225 S.W.3d 524, 536 (Tex. Crim. App. 2007) (observing that anything more than a scintilla of evidence may be sufficient to entitle a defendant to a lesser charge). Once the defendant satisfies the some-evidence threshold, the trial court must instruct the jury on the lesser-included offense. *Id*. However, as happened here, it is within the province of the jury to reject the lesser offense and instead convict on the greater offense. *Id*. In contrast, evidence is legally insufficient to support a criminal conviction only when, after viewing the evidence in the light most favorable to the verdict, no rational juror could have found the elements of the offense beyond a reasonable doubt. *See Brooks*, 323 S.W.3d at 906.

Here, although some evidence supporting criminal negligence entitled Day to submission of the lesser-included charge of criminally negligent homicide to the jury, it did not, as she argues, conclusively establish such negligence, nor did it conclusively negate her intent to commit capital murder. Therefore, we cannot agree with Day that there is conclusive evidence supporting a finding of criminal negligence on the basis that she was entitled to and did submit a lesser-included offense to the jury. We overrule Day's sixth issue.

5. Remorse

By her seventh issue, Day contends that the State failed to prove capital murder because there is legally insufficient evidence that she lacked remorse after T.S.'s death. However, as noted above, the test for legal sufficiency applies only to the elements of capital murder. *See Jarvis*, 2016 WL 1389806, at *4 n.4. Day's remorse, or lack thereof, is not a fact that the jury was legally required to find in order to convict her of capital murder. *See id*. Because remorse is not an element of capital murder, we decline Day's invitation to review the legal sufficiency of the evidence to support that fact. We overrule Day's seventh issue.

III. Legal Sufficiency—Injury to a Child and Endangering a Child

By her third and fourth issues, Day contends that the evidence is not legally sufficient to prove that she committed the offenses of injury to a child and endangering a child. *See* TEX. PENAL CODE ANN. § 22.04; *see also id*. § 22.041. However, the record reflects that the State elected to proceed with punishment only as to the capital murder charge. The record further reflects that Day did not object to the State's election or otherwise request that she be sentenced for injury to a child or endangering a child. Because Day was not sentenced with respect to those offenses, there is no appealable "conviction" as to them. *See Thompson v. State*, 108 S.W.3d 287, 293 (Tex. Crim. App. 2003) (observing that without a sentence, there is no "conviction" from which appeal can be taken). In such a situation, the court of criminal appeals instructs that it is appropriate to dismiss Day's appeal from those offenses for want of jurisdiction. *See id*. (affirming in part the defendant's appealable conviction and dismissing in part the non-appealable offense for want of jurisdiction). Accordingly, we dismiss Day's appeal with respect to injury to a child and endangering a child for want of jurisdiction. *See id*. Having dismissed

Day's appeal with respect to those offenses, we overrule her third and fourth issues as moot.

IV. Prosecutorial Misconduct

By her eighth issue, Day contends that she is entitled to a new trial because the prosecuting attorneys engaged in misconduct. Specifically, Day complains that the prosecutors committed misconduct when they allegedly: (1) relied on perjured testimony from an investigator to defeat her pretrial motion to suppress; (2) asked objectionable questions to the State's witnesses throughout the trial that "served no other purpose than to inflame and prejudice the minds of the jury"; and (3) improperly commented on her failure to testify during closing argument by referring to her alleged lack of remorse after T.S.'s death.

We review an allegation of prosecutorial misconduct on a case-by-case basis. *See Stahl v. State*, 749 S.W.2d 826, 830 (Tex. Crim. App. 1988) (en banc). However, to preserve error on a claim of prosecutorial misconduct, a defendant must do the following at trial: (1) make a specific and timely objection to the misconduct, (2) request an instruction to disregard the matter improperly placed before the jury, and (3) move for a mistrial. *See Penry v. State*, 903 S.W.2d 715, 764 (Tex. Crim. App. 1995) (en banc); TEX. R. APP. P. 33.1. Our review of the record indicates that Day failed to object to all three instances of alleged misconduct about which she now complains on appeal. Consequently, Day failed to preserve her eighth issue for our review. *See* TEX. R. APP. P. 33.1. We overrule Day's eighth issue.

V. Assistance of Counsel

Day's ninth issue challenges the effectiveness of her trial counsel for failing to object to the allegations of prosecutorial misconduct referenced in her eighth issue above.

A. Standard of Review

Strickland v. Washington sets forth a two-prong test for reviewing a claim of ineffective assistance of counsel. *See* 466 U.S. 668, 687 (1984). Under *Strickland's* first prong, a defendant must demonstrate that her counsel's performance was deficient in that it fell below an objective standard of reasonableness. *See id*. To make this showing, the defendant must identify the "acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id*. at 690. The reviewing court must then determine "whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id*.

Generally, if the record is silent as to why trial counsel engaged in the action being challenged as ineffective, there is a "strong presumption" that counsel's conduct was the result of sound trial strategy, falling within the wide range of reasonable professional assistance. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999) (citing *Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984)). To overcome this presumption, a claim of ineffective assistance must be firmly demonstrated in the record. *Id*. at 814. Direct appeal is usually an inadequate vehicle for raising an ineffective-assistance claim because the record is frequently undeveloped. *See Menefield v. State*, 363 S.W.3d 591, 592–93 (Tex. Crim. App. 2012). Counsel usually must be afforded an opportunity to explain his challenged actions before a court concludes that his performance was deficient. *Id*. at 593. If trial counsel has not had such an opportunity, we will not find deficient performance unless the conduct "was so outrageous that no competent attorney would have engaged in it." *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005).

Under *Strickland's* second prong, the defendant must demonstrate that counsel's deficient performance actually prejudiced her defense. *See Strickland*, 466 U.S. at 692. To demonstrate prejudice, the defendant must show that but for her trial counsel's deficient performance, there is a "reasonable probability" that the outcome of the trial would have been different. *Id*. at 694. A "reasonable probability" in this context refers to a "probability sufficient to undermine confidence in the outcome." *Id*.

B. Analysis

In view of the forgoing standard, we turn to the specific allegations that Day raises to support her ineffective-assistance claim.

1. Failing to Object to Witness Testimony at Suppression Hearing

Day contends that her trial counsel was ineffective for failing to object to allegedly perjured testimony at a pretrial suppression hearing—testimony which she claims the State relied on to defeat her motion to suppress.

The record shows that Day participated in an interview with investigators at the police station on the night of T.S.'s death. The interview lasted approximately eighty minutes and was recorded on video. Before trial, Day moved to suppress the interview arguing that it was taken against her will. *See Green v. State*, 934 S.W.2d 92, 99 (Tex. Crim. App. 1996) (observing that a defendant's statement is involuntary and therefore inadmissible if the totality of the circumstances demonstrate that the defendant did not make the statement of her own free will). Regarding the voluntariness issue, two investigators who interviewed Day testified that it is standard police procedure to investigate a child's death; that potential witnesses are routinely interviewed as part of this standard procedure; that Day was asked to and did participate in such interview; that Day was transported from the hospital where T.S was pronounced dead to the police

station in an unmarked police unit to be interviewed; that Day could have traveled in her own vehicle from the hospital had she expressed a desire to do so; that Day was not under arrest, handcuffed, or otherwise considered by investigators to be a suspect at the time of the interview; that Day left the police station after the interview on her own accord; and that Day was not arrested until four days after the interview. After hearing all of the evidence, the trial court denied Day's motion to suppress and admitted the interview into evidence at trial.

Day asserts on appeal that the trial court's ruling was tainted by the following allegedly perjured testimony given by one of the investigators, which drew no objection from her trial counsel:

> Q. The interview with [Day] that was conducted on the 5th day of October was recorded; is that correct?
>
> A. Yes, ma'am.
>
> Q. In fact, parts of that interview, can you see [Day] using her phone?
>
> A. Yes.
>
> Q. So once there became a point in the interview where you were asking [Day] about [the call history on her phone], at that point did you bring her phone and her purse and bring it into the [interview] room?
>
> A. *She actually already—I believe she already had it in [the interview room]*.

Day argues that the investigator's answer emphasized above was perjury because it contradicts the video, which shows that investigators did not bring Day's cell phone and purse into the interview room until approximately midway through the interview—when Day was asked about her call history. Day is correct that the investigator's testimony emphasized above is not consistent with the events shown on the video in this regard.

However, we do not find, as Day argues in support of her ineffective-assistance ground, that perjury has been shown on this record. A witness does not commit perjury by testifying falsely because of a reasonable mistake, such as a faulty memory. *See* TEX. PENAL CODE ANN. § 37.02 (West, Westlaw through 2015 R.S.) (requiring an intent to deceive to sustain a perjury conviction); *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009) (explaining that perjury does not occur when a witness honestly but mistakenly believes a statement to be true when made). Here, the record is silent concerning the investigator's intent in giving the answer emphasized above. In other words, there is no evidence that the investigator intended to deceive the trial court when he testified to his "belief" that Day's cell phone and purse were in the interview room before the subject of her call history came up during the interview. As such, we cannot agree with Day that her trial counsel was ineffective in failing to object to the investigator's testimony on the basis that such testimony was perjured. Furthermore, Day's trial counsel has not been afforded an opportunity to explain his reasons for not objecting to the allegedly perjured testimony, and we do not find that trial counsel's conduct in this regard was "so outrageous that no competent attorney would have engaged in it." *See Goodspeed*, 187 S.W.3d at 392. Therefore, we hold that Day has not carried her burden on direct appeal of demonstrating that her trial counsel performed deficiently when he failed to object to the investigator's testimony italicized above.[9] *See Strickland*, 466 U.S. at 688; *Estrada v. State*, 313 S.W.3d 274, 311 (Tex. Crim. App. 2010).

[9] We note that an appellant whose attempt at a direct appeal is unsuccessful because of an undeveloped record is not without a potential remedy. Challenges requiring the development of a record to substantiate a claim, such as ineffective assistance of counsel, may be raised in an application for writ of habeas corpus. *See* TEX. CODE CRIM. PROC. ANN. art. 11.07 (West, Westlaw through 2015 R.S.); *Rylander v. State*, 110 S.W.3d 107, 110 (Tex. Crim. App. 2003); *Cooper v. State*, 45 S.W.3d 77, 82 (Tex. Crim. App. 2001); *Ex parte Torres*, 943 S.W.2d 469, 476 (Tex. Crim. App. 1997).

Moreover, even if we assumed that Day's trial counsel performed deficiently in failing to object to the investigator's testimony, Day would need to show a reasonable probability that, had counsel objected, the interview would have been suppressed and excluded from her trial. *See Strickland*, 466 U.S. at 692; *see also Ex parte Fierro*, 934 S.W.2d 370, 374 (Tex. Crim. App. 1996) (observing that the knowing use of perjured testimony at a hearing to suppress a defendant's statement is subject to harmless error analysis). In other words, Day would have to show that the interview was taken against her will because her phone and purse were not in the interview room at the beginning of the interview. Although Day's access to her cell phone and purse during the interview arguably bears on the voluntariness question, Day provides no authority, and we find none, indicating that the legal correctness of the trial court's ruling turns on whether those items were brought into the interview room at the start of the interview as opposed to approximately midway through. After reviewing all of the evidence adduced at the suppression hearing, we are convinced that the trial court's ruling was proper in light of all the circumstances surrounding the interview, which we have detailed above, and did not necessarily depend on a finding that Day had her cell phone and purse in the interview room for the entire interview. *See Armstrong v. State*, 718 S.W.2d 686, 693 (Tex. Crim. App. 1985) (observing that to determine whether the totality of the circumstances renders a defendant's statement involuntary, courts look at whether the defendant's will was overborne by police coercion, including the "length of detention, incommunicado or prolonged detention, denying a family access to a defendant, refusing a defendant's request to telephone a lawyer or family member, and physical brutality"). As such, trial counsel's error, if any, in failing to object to the investigator's allegedly perjured testimony does not undermine our confidence in the correctness of the trial court's suppression

ruling. *See Strickland*, 466 U.S. at 692. Therefore, on this record, we conclude that Day has not carried her burden to show that she was prejudiced by her trial counsel's failure to object to the investigator's testimony at the suppression hearing. *See id*.

2. Failing to Object to Witness Testimony and Argument Concerning Day's Alleged Lack of Remorse

Day also contends that her trial counsel was ineffective in failing to object to witness testimony and closing argument that Day lacked remorse after T.S.'s death; according to Day, such testimony and argument constituted an impermissible comment on her constitutional right not to testify because it required her to take the stand and testify that she was remorseful in order to refute the witness testimony and argument that she was not. However, evidence that a defendant lacks remorse does not amount to a comment on the defendant's failure to testify if it (1) relates to the defendant's lack of remorse at or around the time of the offense and (2) is supported by the record. *See Snowden v. State*, 353 S.W.3d 815, 823 (Tex. Crim. App. 2011) (holding that the portion of the prosecutor's argument referencing the defendant's lack of remorse at or around the time of the offense did not comment on his failure to testify and was supported by the record, but the portion of the prosecutor's argument referencing the defendant's lack of *in-court* remorse was improper). Our review of the record indicates that the witness testimony and argument concerning the subject of remorse related only to Day's lack of remorse immediately after or in the days following T.S.'s death, or during her jail conversations with D.S. There was never any reference to Day's in-court demeanor. Because the witness testimony and closing argument was not objectionable, we cannot conclude that trial counsel was ineffective for failing to object. *See Champenois v. State*, 874 S.W.2d 254, 258 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd) (observing that the

failure to object to admissible evidence does not constitute ineffective assistance of counsel). We overrule Day's ninth issue.

VI. Jail Telephone Calls

By her tenth issue, Day contends that the trial court erred in admitting her jail telephone phone calls with her husband into evidence under Texas Rule of Evidence 403. *See* TEX. R. EVID. 403 (providing that the "court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: [1] unfair prejudice, [2] confusing the issues, [3] misleading the jury, [4] undue delay, or [5] needlessly presenting cumulative evidence").

The record shows that the trial court admitted over twenty-five private telephone conversations, mostly between Day and D.S., while she awaited trial in jail. Each call contains different conversational content occurring on different dates and times leading up to her trial. Without referencing any particular call, Day generally asserts that the calls were inadmissible under rule 403. The relevant appellate briefing provided by Day to support this argument is as follows:

> [The jail calls] were entirely irrelevant, inadmissible on any score, and were highly inflammatory.
>
> Under the Texas Rules of Evidence, these types of prejudicial evidence must be excluded, because, under Rule 403 the probative value is substantially outweighed by the danger of unfair prejudice and confusion of the issues, and of misleading[10] needless presentation of cumulative evidence.

Comparing the actual text of rule 403 with the above-quoted briefing on the issue, it is evident that Day is not relying on rule 403's "undue delay" justification as a reason

[10] We understand Day to be referring to the "misleading the jury" justification for excluding the jail calls under rule 403.

why the trial court erred in admitting the jail calls. Thus, theoretically, each jail call could be deemed inadmissible for at least one of four reasons—i.e., unfair prejudice, confusing the issues, misleading the jury, or needlessly presenting cumulative evidence. *See id*. Because Day provides no argument or analysis other than the above-quoted briefing, we are left to guess which call or calls she claims were inadmissible under rule 403 and the reasons for their inadmissibility. Because the trial court admitted over twenty-five calls and because each call could be deemed inadmissible for at least one of four reasons, we calculate that there are over one-hundred reasons why the trial court could have erred in admitting the calls. With nothing more than the above-quoted briefing on the issue, we may not speculate as to Day's arguments. *See* TEX. R. APP. P. 38.1(i); *see also Roberts*, 273 S.W.3d at 326. Under these circumstances, we must overrule Day's tenth issue as inadequately briefed. *See* TEX. R. APP. P. 38.1(i).

VII. Conclusion

We dismiss for want of jurisdiction Day's appeal concerning her legal sufficiency challenge to injury to a child and endangering a child. We affirm the trial court's judgment.

/s/ Rogelio Valdez
ROGELIO VALDEZ
Chief Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
11th day of August, 2016.