NUMBER 13-14-00157-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

RANDALL BOLIVAR, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 107th District Court
of Cameron County, Texas.

MEMORANDUM OPINION

Before Justices Benavides, Perkes, and Longoria
Memorandum Opinion by Justice Benavides

By sixteen issues, appellant Randall Bolivar appeals his conviction for murder. *See* TEX. PENAL CODE ANN. § 19.02 (West, Westlaw through 2015 R.S.). Bolivar alleges: (1) the initial trial court judge was constitutionally disqualified to render judgment; (2) the court of appeals previously abused its discretion; (3) he was denied counsel at critical

stages of trial; (4) his initial trial counsel was ineffective; (5) the State committed *Brady* violations; (6) the trial court committed error by allowing Bolivar's statement into evidence; (7) there was insufficient evidence to support the conviction; (8) he was denied counsel during the time period to file a motion for new trial; (9) he was denied an evidentiary hearing on his *pro se* motion for new trial; (10) the State violated his Confrontation Clause rights; (11) he was denied the right to testify on his own behalf; (12) the State knowingly used false or misleading testimony; (13) the court reporter failed to record all bench conferences; (14) the law of parties instruction in the jury charge was error; (15) the trial court erred by not giving an accomplice witness instruction *sua sponte*, and (16) the trial judge was constitutionally disqualified from rendering the judgment. We affirm.

I. BACKGROUND[1]

Bolivar was charged by indictment with the murder of Aaron Castillo. *See id*. On February 2, 2009, Bolivar and one of the co-defendants charged in the case, Rolando Garza, ran into Aaron Castillo and his brother, Agustin Castillo, at a local business. Bolivar confronted Agustin regarding some money owed for marijuana Bolivar had sold to him. The confrontation was futile and resulted in a vehicle chase. According to the testimony of both Garza and the other charged co-defendant, Rudy Bolivar (Bolivar's

[1] Bolivar was initially appointed appellate counsel for this appeal, who filed a brief with this Court. Bolivar filed a motion requesting to represent himself *pro se*. This cause was abated to the trial court, who following a hearing, granted Bolivar's motion to represent himself *pro se*. Additionally, Bolivar filed a motion requesting that we strike the previous brief filed by his appellate counsel, which was granted.

This cause was also abated to the trial court regarding Bolivar's motion requesting a complete clerk's record for this matter. Following a hearing, the trial court determined Bolivar was given the entire clerk's record. However, this Court was not provided with initial documents from 2009-2011 by the clerk. We had previously received those documents in a prior appellate filing in cause number 13-11-00397-CR and we *sua sponte* take judicial notice of the previous case file for use in this analysis. The clerk's record in 13-11-00397-CR was also provided to Bolivar by this Court.

brother), Bolivar called Rudy, asked him to pick up a gun, and bring it to where they were. At one point during the chase, Bolivar parked his vehicle blocking the roadway. Aaron, who was driving the vehicle the Castillos were in, rammed Bolivar's vehicle and spun it around. Aaron then drove to his mother's home, where Agustin jumped out of the vehicle and ran inside the house. Bolivar parked down the street, and according to testimony from Garza, approached Aaron's vehicle. Garza testified that Aaron exited his vehicle with his hands raised and Bolivar shot Aaron three times, at least two of the shots in his back, killing him.[2]

Agustin also testified during trial. He said he owed Bolivar money for five pounds of marijuana. He agreed that Aaron had rammed Bolivar's vehicle when it was blocking the road and they drove to their mother's house. Agustin stated he got out of the vehicle and ran inside to get a knife and a telephone. Agustin stated he needed a weapon because he saw Bolivar with a gun. Agustin testified that he saw Bolivar shoot Aaron. However, in his statement to police, Agustin stated he only heard the gunshots. Agustin also testified that Aaron had a crowbar in his vehicle, which was found near his body.

Additionally, Rudy Bolivar testified against his brother. Rudy stated that Bolivar had called him asking for a black duffle bag. When Rudy retrieved the bag, he looked inside and it had one handgun. Rudy met his brother at a local store, and witnessed Aaron ram Bolivar's vehicle.[3]

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[2] Garza also testified that his testimony was subject to a plea agreement between himself and the State, and in exchange for his testimony, he was allowed to plead guilty to a lesser offense of aggravated assault, and the murder charge against him was dismissed. *See* TEX. PENAL CODE ANN. § 22.02 (West, Westlaw through 2015 R.S.); *id*. §19.02.

[3] Rudy also testified that he was required to testify as part of a plea agreement with the State. Due to his testimony, Rudy's murder charged was dismissed and he pleaded guilty to a subsequent indictment

The State also elicited testimony from Eric Herrera, who was driving Bolivar at the time of his arrest. Herrera testified that Bolivar had told him that he had shot Aaron with a small caliber machine gun for money because Agustin owed Bolivar five hundred dollars. Herrera knew both Bolivar and Aaron and said Bolivar never had any issues with Aaron.

Bolivar also gave a statement to Brownsville Police Department shortly after his arrest, which was admitted into evidence. In that statement, Bolivar states that another person shot Aaron, but that he was there when it happened.

The jury convicted Bolivar of murder and sentenced him to forty-five years in the Texas Department of Criminal Justice–Institutional Division. *See* TEX. PENAL CODE ANN. § 19.02. This appeal followed.

II. EVIDENCE WAS SUFFICIENT TO SUPPORT CONVICTION[4]

By his seventh issue, Bolivar alleges the evidence was insufficient to support his conviction for murder. Specifically, he alleges that the State did not produce evidence other than accomplice–witness evidence that connected him to the offense.

A. Standard of Review and Applicable Law

"A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense." *Castillo v. State*, 221 S.W.3d 689, 691 (Tex. Crim. App. 2007) (quoting TEX.

for unlawful use of a criminal instrument. *See id.* § 16.01 (West, Westlaw through 2015 R.S.).

[4] For clarity, we will address Bolivar's issues out of order throughout this opinion.

CODE CRIM. PROC. ANN. § 38.14 (West, Westlaw through 2015 R.S.)). When reviewing the sufficiency of non-accomplice evidence under article 38.14 of the Texas Code of Criminal Procedure, we must "decide whether the inculpatory evidence tends to connect the accused to the commission of the offense." *Smith v. State*, 332 S.W.3d 425, 442 (Tex. Crim. App. 2011) (citing TEX. CODE CRIM. PROC. ANN. § 38.14)).

"The sufficiency of non-accomplice evidence is judged according to the particular facts and circumstances of each case." *Id*. "Under article 38.14, the reviewing court eliminates all of the accomplice testimony from consideration and then examines the remaining portions of the record to see if there is any evidence that tends to connect the accused with the commission of the crime." *Castillo*, 221 S.W.3d at 691. "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." *Id*. "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." *Smith*, 332 S.W.3d at 442. "So when there are conflicting view of the evidence—one that tends to connect the accused to the offense and one that does not—we will defer to the factfinder's resolution of the evidence." *Id*. "Therefore, it is not appropriate for appellate courts to independently construe the non-accomplice evidence." *Id*.

B. Discussion

Bolivar argues the State's case chiefly rested on the testimony of accomplice-witnesses Garza and Rudy Bolivar. However, if we disregarded Garza and Rudy Bolivar's testimony, we would still be left with Agustin's testimony and Bolivar's own

statement, both of which place him at the scene of the murder.

Castillo knew Bolivar and identified him as the shooter of his brother. Castillo testified that Bolivar and he had an altercation at a local business, that a chase ensued through nearby neighborhoods, and that they ended up in front of the Castillo home. Castillo testified that he ran inside the home to get a weapon and call 911 when he heard shots fired as he ran back outside. Castillo saw his brother shot and identified Bolivar as the shooter. Castillo's testimony was similar to Garza and Rodolfo Bolivar's regarding who was at the Castillo home at the time of the shooting. A reasonable juror could have believed the statement of events as Castillo testified to them connected Bolivar to the offense. *See id.*

Additionally, Bolivar himself gave a statement to Brownsville police that was played for the jury. In that statement, Bolivar does not implicate himself as the shooter, but instead implies it was another individual named "Checo." However, Bolivar does place himself at the scene of the murder. Bolivar also gives information that would tend to show that even if the jury believed "Checo" could have been the shooter, Bolivar directed him to where the parties were located. Under the law of parties instruction the trial court properly gave, a reasonable juror could have found Bolivar guilty of the murder. *See id*.

Bolivar also argues there was no physical evidence linking him to the offense. However, jurors are entitled to believe both actual and circumstantial evidence in making their determination of guilt. *See id*.

Therefore, we hold that, even with eliminating the testimony of the accomplice-witnesses Garza and Rodolfo Bolivar, there was sufficient evidence to support the jury's finding of guilt against Bolivar. We overrule Bolivar's seventh issue.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

By his fourth issue, Bolivar argues that he was provided with ineffective assistance of counsel by Alfredo Padilla, his original appointed trial attorney. Bolivar states that due to a conflict of interest, Padilla deprived him of due process and a fair trial.

A. Standard of Review and Applicable Law

To prevail on a claim of ineffective assistance of counsel, the defendant must meet the heavy burden of *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, the defendant must show by preponderance of the evidence that: (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that the result of the proceeding would have been different but for the attorney's deficient performance. *Id*. at 687; *Jaynes v. State*, 216 S.W.3d 839, 851 (Tex. App.—Corpus Christi 2006, no pet).

Allegations of ineffectiveness must be "firmly founded in the record." *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). A "convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690. We look to "the totality of the representation and the particular circumstances of each case in evaluating the effectiveness of counsel." *Thompson*, 9 S.W.3d at 813. If the appellant fails to prove one prong of the test, we need not reach the other prong. *See Strickland*, 466 U.S. at 697; *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001).

Ineffective assistance of counsel may result from an attorney's conflict of interest. *Ex parte Morrow*, 952 S.W.2d 530, 538 (Tex. Crim. App. 1997) (en banc). "An actual

'conflict of interest' exists if counsel is required to make a choice between advancing his client's interest in a fair trial or advancing other interests (perhaps his own) to the detriment of his client's interest." *Id*. The test for ineffective assistance of counsel in these circumstances was established in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), and requires that for a defendant to demonstrate a violation of his right to the reasonably effective assistance of counsel based on a conflict of interest, he must show (1) that defense counsel was actively representing conflicting interests, and (2) that the conflict had an adverse effect of specific instances of counsel's performance. *See id.*

> Where the conflict is one of self-interest, the conflict does not necessarily result in harm to the client. Insofar as the protections to the client are concerned, it does not follow that a client will be denied a fair trial simply because his lawyer has a self-interest at stake. . . A lawyer's personal interest conduct may very well have no effect on whether or not his client receives a fair trial.

Acosta v. State, 233 S.W.3d 349, 353 (Tex. Crim. App. 2007) (quoting *Monreal v. State*, 947 S.W.2d 559, 565 (Tex. Crim. App. 1997)). "A defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. But until a defendant shows that his counsel *actively represented conflicting interests*, he has not established the constitutional predicate for his claim of ineffective assistance." *Id*. at 355 (quoting *Cuyler*, 466 U.S. at 349–50)) (emphasis in original). "In other words, the appellant must show that an actual conflict of interest existed and that trial counsel actually acted on behalf of those other interests during the trial." *Id*. at 355.

B. Discussion

Bolivar argues that Padilla was ineffective as his trial counsel because Padilla was

also employed as a special prosecutor with the District Attorney's Office and representing the sitting district attorney at the time in an unrelated matter. While the State concedes that Padilla was appointed as a special prosecutor for the District Attorney's Office, it argues that Padilla was not involved in any of the preparations on Bolivar's case. Additionally, Padilla was appointed to represent Bolivar on March 6, 2009 and was present for arraignment on June 3, 2009. Padilla appeared on behalf of Bolivar in two additional hearings on July 30 and September 24, 2009. During that time, Padilla had filed numerous pre-trial motions with the trial court on behalf of Bolivar, including motions to suppress and motions for discovery. On January 14, 2010, attorney Robert Garza substituted in for Padilla and Garza's motion for substitution was granted, thereby relieving Padilla of his duties.

Here, though Padilla did have a possible stake in conflicting interests, Bolivar has not shown that Padilla actually acted on behalf of those interests during trial. Padilla was the initial appointed attorney on Bolivar's case. There was a series of other attorneys who represented Bolivar through the proceedings and participated in the pre-trial and trial hearings.[5] Padilla's limited involvement in the case, while employed as a special prosecutor on other cases, does not meet the *Cuyler* standards. *See Cuyler*, 466 U.S. at 349–50. Although Padilla was potentially representing conflicting interests, there has been no proof provided that the conflict had an adverse effect on specific instances of counsel's performance. *See id*. We overrule Bolivar's fourth issue.

[5] Bolivar was represented by the following attorneys leading up to his trial on the merits: Rebecca Rubane, Humberto Yzaguirre, Adolfo Cordova, Luis Garcia, Lisa Greenberg, Reynaldo Garza, III, Douglas Pettit, Robert Garza, as well as Alfredo Padilla. Edmund Cyganiewicz initially represented Bolivar on appeal, but withdrew when Bolivar requested to represent himself *pro se*.

III. JURY CHARGE INSTRUCTIONS

By his fourteenth and fifteenth issues, Bolivar alleges the trial court gave improper jury instructions, thereby causing him harm. In issue fourteen, Bolivar alleges the trial court included a law of parties instruction in the abstract paragraph, but not the application paragraph of the jury charge, thereby causing him harm and committing fundamental error. Through his fifteenth issue, Bolivar alleges the trial court erred by not including an accomplice witness instruction, thereby causing him egregious harm.

A. Standard of Review

"In analyzing a jury-charge issue, our first duty is to decide if error exists." *Rodriguez v. State*, 456 S.W.3d 271, 280 (Tex. App.—Houston [1st Dist.] 2014, pet ref'd.) (citing *Almanza v. State*, 686 S.W.2d 157, 174 (Tex. Crim. App. 1985) (op. on reh'g)). Only if error is found do we then consider whether an objection to the charge was made and analyze for harm. *Id*. "The degree of harm necessary for reversal depends upon whether the error was preserved." *Id*. (citing *Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996)).

If "an error is preserved with a timely objection. . . . then the jury-charge error requires reversal if the appellant suffered some harm as a result of the error." *Sanchez v. State*, 376 S.W.3d 767, 774 (Tex. Crim. App. 2012) (citing *Almanza*, 686 S.W.2d at 171). The Court of Criminal Appeals "has interpreted this to mean that any harm, regardless of degree, is sufficient to require reversal." *Rodriguez,* 456 S.W.3d at 280.

But if the "defendant never presents a proposed jury instruction (or fails to object to the lack of one), any potential error in the charge is reviewed only for 'egregious harm' under *Almanza*." *Oursbourn v. State*, 259 S.W.3d 159, 174 (Tex. Crim. App. 2008). As

in this case, when an "appellant d[oes] not object to the charge, the error does not result in reversal 'unless it was so egregious and created such harm that appellant was denied a fair trial.'" *Warner v. State*, 245 S.W.3d 458, 461 (Tex. Crim. App. 2008) (citing *Almanza*, 686 S.W.2d at 171). "Errors that result in egregious harm are those that affect the 'very basis of the case,' 'deprive the defendant of a valuable right,' or 'vitally affect a defensive theory.'" *Warner,* 245 S.W.3d at 461–62 (citing *Hutch*, 922 S.W.2d at 171).

The failure to preserve jury-charge error is not a bar to appellate review but rather establishes the degree of harm necessary for reversal. *Warner*, 245 S.W.3d at 461. To establish harm, the "appellant must have suffered actual, rather than theoretical, harm." *Id*. Neither the State nor the appellant bears the burden on appeal to prove harm. *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013).

B. Applicable Law and Discussion

1. Law of Parties Instruction

Bolivar argues the trial court erroneously included an instruction on the law of parties in the abstract paragraph of the jury charge but did not properly include the law of parties instruction in the application paragraph. Bolivar additionally claims there was no defensive theory presented that warranted the inclusion of the law of parties instruction. Bolivar also points out that he objected to the inclusion of the law of parties instruction and his objection was overruled by the trial court.

The Texas Penal Code defines parties to an offense as:

> (a) A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is responsible, or by both.
>
> (b) Each party to an offense may be charged with commission of the

offense.

TEX. PENAL CODE ANN. § 7.01(a), (b) (West, Westlaw though 2015 R.S.). Additionally, the penal code also defines criminal responsibility for the conduct of another as:

> (a) A person is criminally responsible for an offense committed by the conduct of another if:
> . . .
>
> (2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense.

Id. at § 7.02(a)(2) (West, Westlaw through 2015 R.S.).

Each criminal case is brought by the State, the State has the burden of proof, and the State is "entitled to pursue any available theories of criminal liability to the broadest extent possible under the charging instrument and the evidence." *In re State ex rel. Weeks*, 391 S.W.3d 117, 124 (Tex. Crim. App. 2013). "If multiple theories of party liability are supported by the evidence, the trial judge may not arbitrarily limit the State to one of the theories." *Id*. The State is entitled to request a jury instruction on law of parties if "party liability can legally apply to the offense at issue and is supported by evidence." *Id*. "Regardless of whether it is pled in the charging instrument, liability as a party is an available legal theory if it supported by the evidence." *Id*.; *see Powell v. State*, 194 S.W.3d 503 (Tex. Crim. App. 2006).

Included in the jury charge was the following instruction:

> 3.
>
> A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.
>
> Each party to an offense may be charged with the commission of the

offense.

A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense.

Mere presence alone will not constitute one a party to an offense.

4.

Now, if you find from the evidence beyond a reasonable doubt that on or about February 2, 2009, in Cameron County, Texas, the defendant, RANDALL BOLIVAR, did then and there, acting alone or *as a party as that term has been previously defined*, intentionally or knowingly caused the death of an individual, namely, AARON CASTILLO, by shooting AARON CASTILLO with a firearm, or with intent to cause seriously bodily injury to an individual, namely, AARON CASTILLO, commit an act clearly dangerous to human life that caused the death of said AARON CASTILLO by shooting AARON CASTILLO with a firearm, then you will find the defendant, RANDALL BOLIVAR, guilty of murder as charged in the indictment.

(Emphasis added).

We hold that the State was entitled to the inclusion of a law of parties instructions based on the introduction of Bolivar's statement. Bolivar gave a statement to the Brownsville Police Department, in which he continually referenced a man he called "Checo." Without specifically stating Checo shot Aaron Castillo, Bolivar stated Checo was at least present at the scene. Regardless whether Bolivar or Checo shot Aaron Castillo, Bolivar facilitated Checo locating Agustin and Aaron Castillo, as he stated Checo was on the scene with Bolivar. Prior to arriving at the Castillo house, Bolivar stated that he had called Checo when he first ran into the Castillo brothers. It can be inferred from this evidence that Bolivar was involved in the commission of the offense, either as the shooter or a party.

During the charge conference, the following exchange occurred:

Defense: We would object to the entirety of Section 3 of the jury charge which is the first section on page 2 under the law of parties. What we're arguing is the state's evidence and the state's case almost in its entirety is geared towards Mr. Randall Bolivar, who is the defendant in this case, actually being the shooter, actually physically responsible for shooting the deceased, Mr. Aaron Castillo.

The only possible way is if under the defendant's, Mr. Bolivar's statement to police the day he was arrested, which had some questions under – you know, involve the motion to suppress because we have some legal questions on that, that they're arguing that it's possible because he's the only one that testified to the fact that maybe, maybe someone else shot him.

When he was asked if he shot Aaron Castillo, he said, "I cannot answer that." And when he was asked if Checo, this other person that my client is the only one who mentions, shot Aaron Castillo, he says, "I cannot answer that."

And so what the state is trying to argue is that my client either shot him or he had – he was criminally responsible for Checo shooting him.

. . . .

And so we would object to that inclusion of the law of parties.

. . . .

State: Judge, the state's position is that he set up the – the defendant has set up this whole matter and regardless of what his intent was going through this, he certainly brought all the parties together in one way or another.

Court: And the Court would agree. And I think what the state's trying to assert is that the defendant did promote or assist the commission of the offense. So the objection's overruled.

In a jury charge, the "application paragraph is that portion of the jury charge that applies the pertinent penal law, abstract definitions, and general legal principles to the

particular facts and the indictment allegations." *Vasquez v. State*, 389 S.W.3d 361, 366 (Tex. Crim. App. 2012). "Because that paragraph specifies the factual circumstances under which the jury should convict or acquit, it is the 'heart and soul' of the jury charge." *Id*. at 367.

> When a definition or instruction on a theory of law—such as the law of parties—is given in the abstract portion of the charge, the application paragraph must
>
> (1) specify 'all of the conditions to be met before a conviction under such theory is authorized';
>
> (2) authorize 'a conviction under conditions specified by other paragraphs of the jury charge to which the application paragraph necessarily and unambiguously refers'; or
>
> (3) 'contain some logically consistent combination of such paragraphs.'

Id. (citing *Plata v. State*, 926 S.W.2d 300, 304 (Tex. Crim. App. 1996), *overruled on other grounds by Malik v. State*, 953 S.W.2d 234 (Tex. Crim. App. 1997)).

"Thus, if the application paragraph 'necessarily and unambiguously' refers to another paragraph of the jury charge, then a conviction is authorized, and the trial judge need not *sua sponte* 'cut and paste' that definition into the application paragraph." *Vasquez*, 389 S.W.3d at 367 (citing *Plata*, 926 S.W.2d at 304); *see Chatman v. State*, 846 S.W.2d 329, 332 (Tex. Crim. App. 1993).

Here, the State was entitled to an instruction on law of parties, the abstract paragraph properly defined law of parties, and the application paragraph referred the jury back to the abstract paragraph. The instruction was proper and no error was committed. *See Vasquez*, 389 S.W.3d at 367. We overrule Bolivar's fourteenth issue.

2. Accomplice Witness Instruction

By his fifteenth issue, Bolivar argues the trial court erred by not including an accomplice witness instruction in the jury charge. Although Bolivar did not object to the trial court about the absence of the instruction, he argues that he suffered egregious harm as required by *Almanza v. State*. *See* 686 S.W.2d at 171. Bolivar also argues that without the accomplice witness testimony, there is no evidence that corroborates that he was the shooter.

"An accomplice is one who participates in an offense before, during, or after its commission, to the extent that he can be charged with the offense or a less-included offense." *Herron v. State*, 86 S.W.3d 621, 631 (Tex. Crim. App. 2002) (en banc); *see Blake v. State*, 971 S.W.2d 451, 454–55 (Tex. Crim. App. 1998). A "State's witness may be an accomplice as a matter of law or as a matter of fact." *Smith v. State*, 332 S.W.3d 425, 439 (Tex. Crim. App. 2011). A prosecution witness "who is indicted for the same offense or a lesser-included offense as the accused is an accomplice as a matter of law." *Id.*; *see Patterson v. State*, 204 S.W.3d 852, 858 (Tex. App.—Corpus Christi 2006, pet. ref'd). "But if the State dismisses the indictment before the witness testifies, the witness is no longer deemed an accomplice as a matter of law." *Smith*, 332 S.W.3d at 439. "A witness continues to be regarded as an accomplice, however, if the witness agrees to testify against the accused in exchange for dismissal of the charge." *Id*. "If a prosecution witness is an accomplice as a matter of law, the trial court is under a duty to instruct the jury accordingly." *Herron*, 86 S.W.3d at 631. Failure to do so is error. *See id*.

Here, Bolivar argues that the testimony of Rolando Garza and Rudy Bolivar both constituted accomplice witness testimony and an instruction regarding their testimony should have been included in the jury charge. The State concedes that the trial court erred by not including the accomplice witness instruction in the jury charge because both Garza and Rudy Bolivar were at some point charged with the same offense as Bolivar. They should both have been considered accomplice witnesses as a matter of law, or at the very least, as a matter of fact.

In Texas, a factfinder "should exercise caution when considering the testimony of an accomplice; 'accomplices often have incentives to lie, such as to avoid punishment or shift blame to another person.'" *Smith*, 332 S.W.3d at 439 (quoting *Blake*, 971 S.W.2d at 454). Therefore, under article 38.14 of the code of criminal procedure, "a conviction cannot stand on an accomplice witness's testimony unless the testimony is corroborated by other, non-accomplice evidence that tends to connect the accused to the offense." *Id*.

"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." "Once it is determined that such non-accomplice evidence exists, the purpose of the instruction is fulfilled, and the instruction plays no further role in the factfinder's decision-making." *Herron*, 86 S.W.3d at 632. "Therefore, non-accomplice evidence can render harmless a failure to submit an accomplice witness instruction by fulfilling the purpose an accomplice witness is designed to serve." *Id*.

In order to determine if the error from not giving the jury an instruction on accomplice witness testimony existed, we must evaluate it under the egregious harm

standard. The standard states:

> [I]f the omission is not made known to the trial judge in time to correct his error, appellate review must inquire whether the jurors would have found the corroborating evidence so unconvincing in fact as to render the State's overall case for conviction clearly and significantly less persuasive.

Casanova v. State, 383 S.W.3d 530, 533 (Tex. Crim. App. 2012) (quoting *Saunders v. State*, 817 S.W.2d 688, 692 (Tex. Crim. App. 1991)). Whether "error in failing to submit an accomplice-witness instruction will be deemed harmful is, we have said, a function of the strength of the corroborating evidence." *Id*. at 539. "The strength of that evidence is, in turn, a function of (1) its reliability or believability and (2) how compellingly it tends to connect the accused to the charged offense." *Id*.

> Corroborating evidence that is exceedingly weak–that is to say, evidence that, while it is legally sufficient to tend to connect, is nevertheless inherently unreliable, unbelievable, or dependent upon inferences from evidentiary fact to ultimate fact that a jury might readily reject–may call for a conclusion that the failure to give the accomplice-witness instruction resulted in harm regardless of whether the deficiency was objected to. Corroborating evidence this weak may thus result in both egregious harm and some harm. As the strength of the corroborating evidence increases, however, a reviewing court may no longer be able to declare that the lack of an accomplice-witness instruction resulted in egregious harm, but it may still conclude that the deficiency resulted in some harm and reverse the conviction if there was a trial objection. As the corroborating evidence gains in strength to the point that it becomes implausible that a jury would fail to find that it tends to connect the accused to the commission of the charged offense, then a reviewing court may safely conclude that the only resultant harm is purely theoretical and that there is no occasion to reverse the conviction, even in the face of an objection, since the jury would almost certainly have found that the accomplice witness's testimony was corroborated had it been properly instructed that it must do so in order to convict.

Id. at 539–40.

Here, Bolivar gave a statement to police that placed him at the scene of Aaron Castillo's murder. If we consider the evidence presented and remove Rolando Garza

and Rudy Bolivar's testimony, there is still the testimony of Agustin Castillo, who was not an accomplice witness, which places Bolivar at the scene and as the shooter. Although Bolivar argues that Castillo's testimony was inconsistent, the jury is the ultimate determiner of the facts and can choose to believe or disbelieve the testimony of the witness. *See Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986) (en banc). The evidence was sufficiently corroborated by Castillo's testimony and Bolivar's own statement. The trial court committed error by not including the accomplice witness testimony jury instruction; however, the evidence presented tended to connect Bolivar to the offense charged. The harm was purely theoretical based on the evidence presented. *See Warner*, 245 S.W.3d at 461. We overrule Bolivar's fifteenth issue.

VI. STATEMENT NOT ILLEGALLY OBTAINED

By his sixth issue, Bolivar argues the statement given to police was illegally obtained. This statement was challenged during a pre-trial motion to suppress, in which the trial court denied the suppression.

A. Standard of Review

We review a trial court's suppression ruling under a bifurcated standard. *Hubert v. State*, 312 S.W.3d 554, 559 (Tex. Crim. App. 2010). Appellate courts must view all of the evidence in the light most favorable to the ruling. *Vasquez v. State*, 453 S.W.3d 555, 564 (Tex. App.—Houston [14th Dist.] 2014, pet. granted). The trial court is the "'sole and exclusive trier of fact and judge of the credibility of the witnesses and evidence presented at a hearing on a motion to suppress, particularly when the motion is based on the voluntariness of a confession." *Delao v. State*, 235 S.W.3d 235, 238 (Tex. Crim. App. 2007).

Regarding findings of fact, especially when those findings are based on an evaluation of credibility and demeanor, we review the trial court's rulings under an abuse of discretion standard. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997); *see also Xu v. State*, 191 S.W.3d 210, 215 (Tex. App.—San Antonio 2005, no pet.). We afford almost total deference to a trial court's determination of historical facts supported by the record. *See Guzman*, 955 S.W.2d at 89. However, "the trial court's resolution of mixed questions of law and fact, which does not turn on an evaluation of credibility and demeanor, is reviewed *de novo*." *Xu*, 191 S.W.3d at 215. The court of appeals is obligated to "uphold the trial court's ruling on appellant's motion to suppress if that ruling was supported by the record and was correct under any theory of law applicable to the case." *Armendariz v. State*, 123 S.W.3d 401, 404 (Tex. Crim. App. 2003) (en banc).

B. Applicable Law

The statement Bolivar made to the Brownsville Police Department was a videotaped statement. Therefore, the statement must comply with the dictates of article 38.22 of the code of criminal procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22 (West, Westlaw through 2015 R.S.). Oral statements are governed by section 3 of the article. *Id*. at § 3. Section 3 states:

> (a) No oral or sign language statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding unless:
>
> (1) an electronic recording, which may include motion picture, video tape, or other visual recoding is made of the statement;
>
> (2) prior to the statement but during the recording the accused is given the warning in Subsection (a) of Section 2 above and the accused knowingly, intelligently, and voluntarily waives

any rights set out in the warning;

(3) the recording device was capable of making an accurate recording, the operator was competent, and the recording is accurate and has not been altered;

(4) all voices on the recording are identified; and

(5) not later than the 20th day before the date of the proceeding, the attorney representing the defendant is provided with a true, complete, and accurate copy of all recordings of the defendant made under this article.

Id. The State bears the burden of demonstrating that the defendant knowingly, intelligently, and voluntarily waived his statutory and *Miranda* rights. *Howard v. State*, 482 S.W.3d 249, 255 (Tex. App.—Houston [1st Dist.] 2015, pet. denied).

Under the Fifth Amendment to the United States Constitution, in order to effectuate the right against self-incrimination, once a suspect has invoked his right to counsel, all interrogation by the police must cease until counsel is provided or until the suspect himself re-initiates conversation. *Dinkins v. State*, 894 S.W.3d 330, 350–51 (Tex. Crim. App. 1995) (internal citations omitted). The right to counsel is considered invoked where a person indicates he desires to speak to an attorney or have an attorney present during questioning. *Id.* at 351.

Additionally, in *Edwards v. Arizona*, the Supreme Court held that "a valid waiver of [the right to counsel] cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." 451 U.S. 477, 484 (1981). The Court "further held that an accused. . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused

himself initiates further communication, exchanges, or conversations with the police." *Id*. at 484–85. However, the "accused 'must unambiguously request counsel' during a custodial interrogation; thus, 'he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.'" *Pecina v. State*, 361 S.W.3d 68, 79 (Tex. Crim. App. 2012).

C. Discussion

During the motion to suppress hearing, both officers from the Brownsville Police Department and Bolivar testified. All agreed that upon his arrest, Bolivar was read his *Miranda* rights by Detective Thomas Clipper. Clipper and Bolivar both also agreed that Bolivar understood those rights and invoked his right to counsel; he even wrote his request for counsel on the *Miranda* sheet presented to him. That evidence is not in dispute.

However, based on additional testimony, the trial court found that Bolivar had re-initiated contact with the Brownsville Police detectives and gave a second statement, which was videotaped and played for the trial court. On the video introduced into evidence at the trial, Detective Cris Ortiz talks to Bolivar about his initial interrogation: he was given *Miranda* warnings, how Bolivar asked for a lawyer, and was subsequently taken to the booking department. Bolivar himself states he was booked into the jail, placed in a holding cell, and when a jailer came to check on him, Bolivar requested to speak to Detective Clipper. Bolivar is read his *Miranda* rights again by Ortiz and expressly waives them. He then proceeds to give a statement to Ortiz with his version of what happened when Aaron Castillo was shot. Although Bolivar does not directly say

who shot Aaron, he does mention a man he calls Checo. Bolivar places himself at the scene of the crime during the statement.

The trial court heard the testimony and denied the motion to suppress the statement, allowing it to be played at trial.[6] Since we defer to the trial court as the "'sole and exclusive trier of fact and judge of the credibility of the witnesses and evidence presented at a hearing on a motion to suppress," we uphold the finding that the statement was not involuntarily made because it is supported by the record. *Delao*, 235 S.W.3d at 238. The trial court heard testimony from both sides and made its determination that Bolivar initiated the subsequent statement and was not coerced into giving it. We are obligated to "uphold the trial court's ruling on appellant's motion to suppress if that ruling was supported by the record and was correct under any theory of law applicable to the case." *Armendariz*, 123 S.W.3d at 404. We overrule Bolivar's sixth issue.

VII. NO CONFRONTATION CLAUSE VIOLATION OCCURRED

By his tenth issue, Bolivar argues his right to confront witnesses was violated, specifically relating to the detective who signed the probable cause statement for the arrest warrant, the medical examiner, and the custodian of records for the cellular phone company.

A. Standard of Review

"In *Crawford v. Washington*, the Supreme Court held that the Sixth Amendment confrontation right applies not only to in-court testimony, but also to out-of-court

[6] Bolivar's case was abated back to the trial court by this Court to issue findings of fact and conclusions of law regarding the voluntariness of Bolivar's statement to Brownsville police. The trial court issued its findings of fact and conclusions of law and they were made a part of this record.

statements that are testimonial in nature." *Wood v. State*, 299 S.W.3d 200, 207 (Tex. App.—Austin 2009, pet. ref'd) (citing *Crawford v. Washington*, 541 U.S. 36, 51 (2004)). "The Confrontation Clause forbids the admission of testimonial hearsay unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine the declarant." *Id*. "Whether a particular out-of-court statement is testimonial is a question of law." *Id*.

A trial court's ruling admitting or excluding evidence is reviewed for an abuse of discretion. *Id*. "This means that the ruling will be upheld if it is reasonably supported by the record and is correct under any applicable legal theory." *Id*. The trial court is the sole trier of fact and judge of credibility of the witnesses and weight to be given their testimony. *See State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000). We give the trial court almost complete deference in determining historical facts, but we review *de novo* the trial court's application of the law to those facts. *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000).

B. Applicable Law and Discussion

1. Probable Cause Affiant

Bolivar argues that the State failed to produce Detective Marian Culver-Kingsbury, who filed the complaint to obtain the arrest warrant against him, at trial. Bolivar states because he was not allowed to cross-examine Detective Culver-Kingsbury that the trial court lacked jurisdiction over him. Bolivar does not explain how the failure to call the detective resulted in harm against him, or how her testimony would be testimonial in nature. Additionally, the complaint is not included in the appellate record and Bolivar does not direct this Court to a specific place in the clerk's record or reporter's record

showing where the complaint is located or where he lodged an objection before the trial court. "An appellate brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1. Therefore, we hold that no issue was preserved for appellate review and this issue is hereby waived.

2. Autopsy

Bolivar claims his right to confrontation was violated when the State presented testimony regarding the autopsy from Dr. Norma Jean Farley, instead of Dr. Debra Johnson, who performed the autopsy. Additionally, Bolivar claims the trial court erred in admitting a page of the autopsy report, as well as photographs taken at the autopsy.

"Generally, autopsy reports are admissible pursuant to the public record and business record exceptions to the hearsay rule." *Moreno Denoso v. State*, 156 S.W.3d 166, 180 (Tex. App.—Corpus Christi 2005, pet. ref'd). In Bolivar's case, only one page of the autopsy report was admitted into evidence, without objection, and the autopsy report "does not fall within the categories of testimonial evidence described in *Crawford*." *Id*. (citing *Crawford*, 541 U.S. at 68); *but see Wood*, 299 S.W.3d at 210 (holding autopsy reports are testimonial in nature and the doctor who performed them would be a witness within the meaning of the Confrontation Cause). In the present case, Bolivar did not object to Farley's testimony, even after she stated she was not the medical examiner who performed the autopsy on Castillo. Additionally, Bolivar did not object to the autopsy photographs that were introduced into evidence. Therefore, Bolivar waived his complaint on appeal and preserved nothing for our review. *See* TEX. R. APP. P. 33.1.

3. Phone Records

Bolivar also argues the State was allowed in error to introduce cellular phone records without testimony from an authorized representative of the phone company authenticating them. The State introduced phone call records they claimed belonged to Bolivar through Detective Cris Ortiz, the lead investigator of the case. Bolivar objected to the admission of the phone records, stating that Ortiz was not the custodian of records and therefore, could not testify to their contents. The trial court overruled Bolivar's objection after the State responded the records were obtained in response to a subpoena from the phone provider.

Bolivar makes the claim that the records were produced for use at trial; however fails to develop the argument further. An "appellate brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1. Therefore, no issue was preserved for appellate review and this issue is waived.

VIII. ALLEGED BRADY VIOLATIONS BY THE STATE[7]

By his fifth issue, Bolivar alleges the State withheld evidence material to his defense, thereby committing *Brady* violations. He claims these violations entitle him to a new trial.

A. Standard of Review and Applicable Law

A prosecutor has an obligation to disclose exculpatory evidence if it is material to

[7] Bolivar's trial on the merits commenced on January 6, 2014. Therefore, the changes made to article 39.14 of the Texas Code of Criminal Procedure did not affect the discovery exchanged between the State and defense in this case, as the offense was committed before January 1, 2014. *See* TEX. CODE CRIM. PROC. ANN. art. 39.14 (West, Westlaw through 2015 R.S.).

the defendant's case. *See Brady v. Maryland*, 373 U.S. 83 (1963). A violation occurs when "a prosecutor 1) fails to disclose evidence, 2) which is favorable to the accused, 3) that creates a probability sufficient to undermine the confidence in the outcome of the proceeding." *Thomas v. State*, 841 S.W.2d 399, 404 (Tex Crim. App. 1992) (en banc). In order to find reversible error under *Brady* and *United States v. Bagley*, a defendant must show that:

1. the State failed to disclose evidence, regardless of the prosecution's good or bad faith;

2. the withheld evidence is favorable to him;

3. the evidence is material, that is, there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different.

Hampton v. State, 86 S.W.3d 603, 612 (Tex. Crim. App. 2002) (citing *Brady*, 373 U.S. at 83; *United States v. Bagley*, 473 U.S. 667 (1985)). "Under *Brady*, the defendant bears the burden of showing that, in light of all the evidence, it is reasonably probable that the outcome of the trial would have been different had the prosecutor made a timely disclosure." *Id*. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Id*. The "duty to disclose encompasses both impeachment and exculpatory evidence." *Harm v. State*, 183 S.W.3d 403, 406 (Tex. Crim. App. 2006) (en banc) (citing *Bagley*, 473 U.S. 667). "This duty also requires disclosure of favorable evidence only known to the police." *Id*. "Consequently, prosecutors have a duty to learn of *Brady* evidence known to others acting on the state's behalf in a particular case." *Id*. (citing *Kyles v. Whitley*, 514 U.S. 419, 437-

38 (1995)). "It is irrelevant whether suppression of the favorable evidence was done willfully or inadvertently." *Id*. "However, the state is not required to seek out exculpatory evidence independently on the appellant's behalf, or furnish appellant with exculpatory or mitigating evidence that is fully accessible to appellant from other sources." *Id*. at 407.

B. Discussion

Bolivar alleges that the State knowingly withheld evidence related to seven different items that were exculpatory. The items included: the rental vehicle he was driving on the day of the murder, Aaron's vehicle, a water bottle from the rental vehicle, 911 calls made following the murder, the criminal history of Agustin Castillo, the gang affiliation of Garza, and a police report regarding a fingerprint.

1. Rental Vehicle of Bolivar and Aaron's Vehicle

Bolivar alleges these two vehicles should have been examined for fingerprints and evidence to corroborate the information law enforcement received regarding what timeline of events. However, just alleging materiality of the information is not enough to substantiate a *Brady* violation claim. *See Bagley*, 473 U.S. at 682. Bolivar fails to show how fingerprints or damage to the vehicles would "undermine confidence in the outcome" of the case. *See id*. Additionally, although the rental vehicle was returned to its rightful owner prior to trial, Bolivar's counsel could have attempted to recover evidence from the Aaron's vehicle. The State's *Brady* obligation does not extend to evidence defense counsel could have attempted to obtain. *See Harm*, 183 S.W.3d at 407. We find no *Brady* violation regarding the vehicles. *See Bagley*, 473 U.S. at 682.

2. Water Bottle from Bolivar's Vehicle and 911 Calls

Bolivar argues a water bottle seen in photographs introduced into evidence should have been tested for DNA and fingerprints. Bolivar claims the bottle contained the shooter's DNA and would have exonerated him. Bolivar also alleges the State knowingly destroyed or failed to keep 911 calls made around the time of the shooting that could have identified additional witnesses and impeach Castillo. However, to prevail on a claim that the State improperly destroyed evidence, the Supreme Court has found that "the failure to preserve this 'potentially useful evidence' does not violate due process 'unless a *criminal defendant can show bad faith on the part of the police*.'" *Illinois v. Fisher*, 540 U.S. 544 (2004) (quoting *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988)) (emphasis in original).

Bolivar is unable to show bad faith on the part of the State. Although the water bottle could have been material, the evidence shown by the State was substantial. Multiple individuals testified and none of them corroborated Bolivar's version of events. We hold the State did not destroy the water bottle in bad faith. In addition, the State provided a letter to Bolivar regarding the 911 tapes. Recordings are only saved for six months in the Brownsville Police Department System and then recorded over. Also, based on the letter provided to Bolivar, there was system failure in March 2010 that caused recordings to be made unavailable. Although the tapes could have provided additional witness names that information could have been discovered in other ways by defense counsel through investigation of the neighbors. The State did not deliberately destroy either the water bottle or 911 calls. We do not find a *Brady* violation occurred. *See Harm*, 183 S.W.3d at 406.

3. Criminal History of Agustin Castillo

Bolivar states the criminal history of Agustin Castillo was not disclosed to counsel and could have been used for impeachment purposes during his testimony. However, an open file policy is generally sufficient to comply with prosecutors *Brady* obligations. *See Salazar v. State*, 222 S.W.3d 10, 14 (Tex. App.—Amarillo 2006, pet ref'd). The State rebuts Bolivar's claim by stating he never showed that this information had not been turned over. Bolivar raised the same claim regarding the criminal history in his motion for new trial, the State responds that the information regarding Castillo's criminal history was made available in their file. The trial court denied the motion for new trial, and we will defer to their finding that the information was available. No *Brady* violation was present.

4. Gang Affiliation of Garza and Police Report of Fingerprint

Bolivar additionally argues that the State failed to disclose the gang affiliation of Garza and a police report regarding a fingerprint on a box until trial had commenced. However, he does not show how these two instances were material or undermined confidence in the outcome of the case. Without more, Bolivar fails the test required to show a *Brady* violation. *See Hampton*, 86 S.W.3d at 612.

We overrule Bolivar's fifth issue.

IX. STATE DID NOT KNOWINGLY USE FALSE TESTIMONY

By his twelfth issue, Bolivar alleges the State knowingly used false or misleading testimony during the trial on the merits and did nothing to correct the false testimony.

A. Standard of Review

When a defendant argues false testimony was used, "[w]e review the record to

determine if the State 'used' the testimony, whether the testimony was 'false,' whether the testimony was 'knowingly used,' and if these questions are affirmatively answered, whether there is a reasonable likelihood that the false testimony could have affected the judgment of the jury." *Espinoza v. State,* 328 S.W.3d 32, 38 (Tex. App.—Corpus Christi 2010, pet. ref'd) (quoting *Ramirez v. State,* 96 S.W.3d 386, 394–95 (Tex.App.—Austin 2002, pet. ref'd)).

> There is no need for a defendant to show that the witness knew the testimony was false or otherwise harbored a sufficient culpable mental state to render the witness subject to prosecution for perjury. Moreover, the Court of Criminal Appeals has made clear that whether the rule is violated or not does not depend upon the defendant's ability to demonstrate the witness's specific factual assertions were technically incorrect or "false." It is sufficient if the witness's testimony gives the trier of fact a false impression.

Id. at 395 (quoting 42 George E. Dix & Robert O. Dawson, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 22.53 (2d ed. 2002)).

B. Applicable Law and Discussion

The Supreme Court "established the general proposition that a prosecutor's knowing and intentional use of perjured testimony in obtaining a conviction violates the defendant's due process rights and denies him a fair trial." *Ex parte Adams*, 768 S.W.2d 281, 288 (Tex. Crim. App. 1989) (en banc) (citing *Mooney v. Holohan*, 294 U. S. 103 (1935)). *Mooney* was expanded in *Alcorta v. Texas* to "forbid the prosecutor's passive use of perjurious testimony." *Id*. (citing *Alcorta v. Texas*, 355 U.S. 28 (1957)). "The Court held that the prosecutor's knowing failure to correct inculpatory, perjured testimony also violated due process." *Id*. The Supreme Court further expanded the proposition to include "that the prosecutor's knowing failure to correct perjured testimony, even if it relates solely to the credibility of the witness, constitutes a violation of due process." *Id*.

(citing *Napue v. Illinois*, 360 U.S. 264 (1959)).

Bolivar alleges that the State presented evidence known to be false and did nothing to correct it. However, Bolivar does not show how the testimony was known to be false; he just complains about evidence he was not in agreement with. For example, Bolivar claims Garza testified falsely about seeing the shooting occur. Garza did state he heard the shooting, but also testified to seeing the shooting. It is the jury's province to clarify discrepancies in the testimony and who to believe or disbelieve. *See Sharp*, 707 S.W.2d at 614. Bolivar also claims Garza perjured himself because of the plea agreement that was reached with the State. During testimony, Garza stated he did not have anything to do with the murder, but he pleaded guilty to a lesser offense. However, Bolivar questioned Garza regarding the plea of guilty and Garza explained his reasoning. The jury could choose to believe or disbelieve Garza.

Bolivar also complains that Agustin had differences in his testimony, such as he heard the shots and later stated he saw Bolivar shoot Aaron, but again, the jury is the sole determiner of the credibility of witnesses. *See id*. Bolivar also complains that the State's expert in firearms testified falsely. Bolivar's allegations are possible explanations he believes to be true. But again, the province to determine witness credibility is the jury's and we will not disturb that province. *See id*. Bolivar makes no valid claims showing where the State knowingly and deliberately used false testimony and did not correct it. *See Ex parte Adams*, 768 S.W.2d at 288. We overrule Bolivar's twelfth issue.

X. RIGHT TO TESTIFY ON OWN BEHALF

By his eleventh issue, Bolivar argues he was denied the right to testify on his own

behalf by his trial counsel.

A. Standard of Review

We review a claim of denial of the right to testify under the standard set for in *Strickland v. Washington*. 466 U.S. 668 (1984). "Although it is true that the right to testify is 'fundamental' and personal to the defendant, those characteristics do not distinguish it from the rights to trial and appeal, to which the Supreme Court has applied the *Strickland* framework." *Johnson v. State*, 169 S.W.3d 223, 232 (Tex. Crim. App. 2005). The Texas Court of Criminal Appeals has held that "a trial court has no duty to inform a testifying defendant, represented by counsel, of his right not to testify." *Id*. at 235. The court of criminal appeals sides with the "majority of jurisdictions that defense counsel shoulders the primary responsibility to inform the defendant of his right to testify, including the fact that the ultimate decision belongs to the defendant." *Id*. "Because imparting that information is defense counsel's responsibility, *Strickland* provides the appropriate framework for addressing an allegation that the defendant's right to testify was denied by defense counsel." *Id*.

"In line with the reasoning of the Supreme Court and the holdings of the federal courts that have addressed this issue, [the court of criminal appeals] holds that a complete denial of the right to testify at trial is not a structural defect but is the type of violation that can be subjected to a harm/prejudice inquiry." *Id*. at 239. "Consequently, the usual *Strickland* prejudice analysis applies: the defendant must show a reasonable probability that the outcome of the proceeding would have been different had his attorney not precluded him from testifying." *Id*.

B. Discussion

Bolivar argues that the trial record is "devoid of any plain, free, and intelligent waiver" that he gave up his right to testify in his own defense. However, there is also no indication that his trial counsel did not counsel him and that he willingly decided not to testify. In *Johnson*, the court of criminal appeals was able to make a valid determination regarding the advice given by counsel because there was a motion for new trial hearing on the issue and trial counsel was given an opportunity to testify. *See id*. at 227. Counsel had no similar opportunity here. With no evidence presented, the record does not support Bolivar's claim. Subsequently, we are unable to determine if Bolivar's rights were violated.[8] Therefore, we overrule Bolivar's eleventh issue.

XI. MOTION FOR NEW TRIAL

By his eighth issue, Bolivar alleges he was denied counsel during the time period allowed to file a motion for new trial. Additionally, by his ninth issue, Bolivar argues he was entitled to a hearing on his pro se motion for new trial.

A. Standard of Review

1. Time Period

A defendant has a right to file a motion for new trial, but must do so no later than 30 days after sentence is imposed. *See* TEX. R. APP. P. 21.4(a). "Texas courts of appeals have held the period for filing a motion for new trial is a critical stage at which a defendant is entitled to counsel." *Rogers v. State*, 305 S.W.3d 164, 170 (Tex. App.—

[8] Although the trial court, as well as this Court, does not consider the *pro se* motion for new trial filed by Bolivar, the allegation of denial of the right to testify raised against trial counsel was not presented in that motion either.

Houston [1st Dist.] 2009, no pet.). "When a defendant is deprived of effective counsel during the period for filing a motion for new trial, the remedy is to reset the appellate time limits." *Id*.

2. **Denial of Motion for New Trial**

Appellate courts review a trial court's denial of a hearing on a motion for new trial for an abuse of discretion. *Hobbs v. State*, 298 S.W.3d 193, 199 (Tex. Crim. App. 2009). "The purposes of a new trial hearing are (1) to determine whether the case should be retried or (2) to complete the record for presenting issues on appeal." *Id*. Such a hearing is not an absolute right. *Id*.; *Rozell v. State*, 176 S.W.3d 228 (Tex. Crim. App. 2005). However, a trial judge abuses his discretion in not holding a hearing "if the motion and accompanying affidavits (1) raise matters which are not determinable from the record and (2) establish reasonable grounds to show the defendant could potentially be entitled to relief." *Hobbs*, 298 S.W.3d at 199. "This second requirement limits and prevents 'fishing expeditions.'" *Id*. "A new trial motion must be supported by an affidavit specifically setting out the factual basis for the claim." *Id*. "If the affidavit is conclusory, is unsupported by facts, or fails to provide requisite notice of the basis for the relief claims, no hearing is required." *Id*. Review is

> limited to the trial judge's determination of whether the defendant raised ground that are both undeterminable from the record and reasonable, meaning they could entitle the defendant to relief. This is because the trial judge's discretion extends only to deciding whether these two requirements are satisfied. If the trial judge finds that the defendant has met the criteria, he has no discretion to withhold a hearing.

Id. (quoting *Smith v. State*, 286 S.W.3d 333, 340 (Tex. Crim. App. 2009)).

B. Applicable Case Law and Discussion

1. Time Period

"'[A]ppointed trial counsel remains as the defendant's counsel for all purposes until he is expressly permitted to withdraw, even if the appointment was for trial only.'" *Rogers*, 305 S.W.3d at 170 (quoting *Ward v. State*, 740 S.W.2d 794, 800 (Tex. Crim. App. 1987) (en banc)). "'[I]t is abundantly clear that an appointed attorney's legal responsibilities do not magically and automatically terminate at the conclusion of the trial. . . . The continuity of representation from trial to appeal is necessary to correct the ambiguity of representation which all too often follows a conviction.'" *Rogers*, 305 S.W.3d at 170 (quoting *Ward*, 740 S.W.3d at 800). "Our appellate review, therefore, begins with the presumption that trial counsel continued to effectively represent appellant during the window for filing a motion for new trial." *Rogers*, 305 S.W.3d at 171. The "burden to produce evidence to rebut the presumption falls on the appellant." *Id*.

Besides timely filing a motion for new trial and supporting affidavits, the defendant must present the motion to the trial court. *Rozell*, 176 S.W.3d at 230. The Texas Court of Criminal Appeals has held that "to present a motion in the context of a motion for new trial, the defendant must give the trial court *actual notice* that he timely filed a motion for new trial and requests a hearing on the motion for new trial." *Id*. (emphasis in original).

Here, both Bolivar and his trial counsel filed motions for new trial on February 3, 2014. However, a "defendant has no right to hybrid representation." *Robinson v. State*, 240 S.W.3d 919, 922 (Tex. Crim. App. 2007). The Texas Court of Criminal Appeals also held that "as a consequence, a trial court is free to disregard any *pro se* motions presented by a defendant who is represented by counsel." *Id*. Bolivar was still represented by

trial counsel on February 3, 2014. His trial counsel filed their motion to withdraw on February 25, 2014, as well as a notice of appeal on behalf of Bolivar. The motion to withdraw was granted on February 28, 2014, and appellate counsel was appointed. At no time during the critical time to file a motion for new trial was Bolivar not represented by counsel. Although Bolivar argues the trial court did not rule on his *pro se* motion for new trial, in *Robinson*, as in Bolivar's case, "because the motion for new trial was presented *pro se* while the appellant was represented by counsel, the trial court was free to rule on it, or disregard it." *Robinson*, 240 S.W.3d at 922. The trial court was within its discretion to rule on the motion for new trial presented by trial counsel and disregard the motion filed *pro se* by Bolivar. We overrule Bolivar's eighth issue.

2. Denial of Hearing on Motion for New Trial

"A right to a hearing on a motion for new trial is not absolute." *Rozell*, 176 S.W.3d at 230. The Texas Court of Criminal Appeals has held that to "present a motion in the context of a motion for new trial, the defendant must give the trial court *actual notice* that he timely filed a motion for new trial and requests a hearing on the motion for new trial." *Id*. (emphasis in original). However, a "hearing is *not* required when the matters raised in the motion for new trial are subject to being determined from the record." *Reyes v. State*, 849 S.W.2d 812, 816 (Tex. Crim. App. 1993) (en banc) (emphasis in original). Additionally, the defendant must "at least allege sufficient facts that show reasonable grounds to demonstrate that he could prevail" on his motion for new trial. *Hobbs*, 298 S.W.3d at 199–200.

Bolivar's trial counsel timely filed his motion for new trial, which laid out five specific issues which they felt were grounds for warranting a new trial. The five issues

complained of were: (1) the Court misdirected the jury as to the law; (2) the prosecution failed to disclose the criminal history of a witness; (3) the prosecutor argued outside the record during closing arguments; (4) the verdict was contrary to the law and evidence; and (5) the Court committed error and violated defendant's federal and state rights by admitting Bolivar's video statement. In addition, attached to the motion is the certificate of service on the District Attorney's Office as well as a certificate of presentation to the court. The State filed its answer in opposition to Bolivar's motion for new trial two days following and disputed all of the issues complained of. The trial court considered both motions in chambers and denied Bolivar's motion for new trial. The trial court made a proper determination of the issues based on the two motions and was not required to hold a hearing on Bolivar's *pro se* motion for new trial. *See Reyes*, 849 S.W.2d at 816. We overrule Bolivar's ninth issue.

XII. COURT REPORTER FAILED TO FULLY TRANSCRIBE RECORD

By his thirteenth issue, Bolivar complains that the trial court reporter did not record the complete record of all hearings and, therefore, he is entitled to a new trial.

A. Standard of Review and Applicable Law

Rule 13.1 of the Texas Rules of Appellate Procedure states in part that the official court reporter must "attend court sessions and make a full record of the proceedings unless excused by agreements of the parties." *Valle v. State*, 109 S.W.3d 500, 508 (Tex. Crim. App. 2003) (quoting TEX. R. APP. P. 13.1). Rule 34.6(f) provides for a new trial:

> (1) if the appellant has timely requested a reporter's record;
>
> (2) if, without the appellant's fault, a significant exhibit or a significant portion of the court reporter's notes and records has been lost or destroyed or – if the proceedings were electronically recorded – a significant portion of the

record has been lost or destroyed or is inaudible;

(3) if the lost, destroyed, or inaudible portion of the reporter's record, or the lost or destroyed exhibit, is necessary to the appeal's resolution; and

(4) if the lost, destroyed, or inaudible portion of the reporter's record cannot be replaced by agreement of the parties, or the lost or destroyed exhibit cannot be replaced either by agreement of the parties or with a copy determined by the trial court to accurately duplicate with reasonable certainty the original exhibit.

TEX. R. APP. P. 34.6(f).

B. Discussion

Bolivar complains there were seven bench conferences, seven untranslated Spanish statements, two hearings that incorrectly identified Judge Pate as the presiding judge when it was actually Judge Euresti prior to his recusal, and a discussion regarding jury charge that was off the record.

1. Bench Conferences

Regarding the bench conferences during Bolivar's trial on the merits, Bolivar did file a pretrial motion to have a full record recorded. However, "while the granting of a pretrial motion to record bench conferences relieves a party of the burden of asking to have each bench conference recorded as it occurs, it does not preserve error." *Valle*, 109 S.W.3d at 508; *see State v. Herndon*, 215 S.W.3d 901, 910–11 (Tex. Crim. App. 2007). "As part of error preservation, a party is required to object." *Valle*, 109 S.W.3d at 508. In order to preserve error, Bolivar was required to object on the official record to the lack of the bench conferences being recorded. *See id*. Bolivar did not object to any of the seven bench conferences not being recorded that he now complains of. The record does not reflect that Bolivar made an objection to the court reporter's failure to

record the bench conferences nor does Bolivar allege he made such an objection at trial. Therefore, Bolivar has failed to preserve his complaint for appeal. *See* TEX. R. APP. P. 33.1.

2. Missing Spanish Translations

Next, Bolivar complains of seven instances where Spanish words were used and not translated for the record. However, there was no objection to the lack of translations raised by Bolivar. Bolivar asserts that because these instances were not recorded by the court reporter that significant portions of the trial testimony are missing. Rule 34.6(f) applies "whether we are faced with the loss or destruction of the entire record or only a portion of the record." *Routier v. State*, 112 S.W.3d 554, 570 (Tex. Crim. App. 2003). "The unavailability of the record through no fault of the appellant is not immune from a harm analysis." *Id*. at 571. The appellant must "show (1) that a significant portion of the record was lost or destroyed, (2) through no fault of his own, (3) that the missing portion of the record is necessary to his appeal, and (4) the parties cannot agree on the record." *Id*. Here, Bolivar did not object to the lack of translation. Even though he filed a pretrial motion to have the entire trial transcribed, Bolivar's lack of objection does not preserve error. "As part of error preservation, a party is required to object." *Valle*, 109 S.W.3d at 508. Therefore, Bolivar has failed to preserve his complaint for appeal. *See* TEX. R. APP. P. 33.1.

3. Presiding Judge Over Hearing

Bolivar also alleges the court reporter misidentified two title pages of the trial transcript with Judge Pate as the presiding judge instead of Judge Euresti. Although he alleges this hinders his ability to raise bias on appeal, Bolivar does not raise any issues

showing how a typographical error causes harm. We find no error with the misidentification on the title pages.

4. Jury Charge Discussion

Bolivar also alleges court reporter error when she did not transcribe an off the record discussion regarding the jury charge. However, Bolivar again did not object. *See Valle*, 109 S.W.3d at 508. The trial court also proceeded to discuss the charge and any objections on the record, shortly following the off the record discussion:

> Let's get this on the record where we are and we'll see whether or not there's going to be any change in the language.

At that time, Bolivar was allowed to make objections to the jury charge language, to which his attorneys did. His counsel did not object to the initial discussion being off the record and therefore, Bolivar did not preserve error. "As part of error preservation, a party is required to object." *Valle*, 109 S.W.3d at 508. Therefore, Bolivar has failed to preserve his complaint for appeal. *See* TEX. R. APP. P. 33.1. We overrule Bolivar's thirteenth issue.

XIII. DEFENDANT NOT DENIED COUNSEL AT CRITICAL STAGES OF TRIAL

By his third issue, Bolivar argues he was denied his right to counsel at critical stages of the trial under his Sixth Amendment rights.

A. Standard of Review and Applicable Law

The right to counsel is encompassed in both the Fifth and Sixth Amendments of the United States Constitution. *See* U.S. CONST. amend. V, VI. The "Fifth Amendment prohibits the government from compelling a criminal suspect to bear witness against himself." *Pecina v. State*, 361 S.W.3d 68, 74–75 (Tex. Crim. App. 2012). "Before

questioning a suspect who is in custody, police must give that person *Miranda* warnings." *Id*. at 75 (citing *Miranda v. Arizona*, 384 U.S. 436 (1966)). "Once formal adversary proceedings begin, the Sixth Amendment right to counsel applies in exactly the same way as the Fifth Amendment right applies to custodial interrogations." *Id*. at 76–77.

The Sixth Amendment "right to counsel attaches once the 'adversary judicial process has been initiated,' and it guarantees 'a defendant the right to have counsel present at all 'critical' stages of the criminal proceeding." *Id*. at 77, n. 34 (quoting *Montejo v. Louisiana*, 566 U.S. 778, 786 (2009)). An "accused may invoke his Sixth Amendment right 'at or after the initiation of adversary judicial criminal proceedings–whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *Id*. at 77, n. 34 (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)). This is the "'starting point' for the Sixth Amendment right to trial counsel because 'it is only [when adversary proceedings commence] that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified.'" *Id*. at 77, n. 34 (quoting *Kirby*, 406 U.S. 689).

The Sixth Amendment right to counsel "extends to all 'critical stages' of the criminal proceeding, not just the actual trial." *Gilley v. State*, 418 S.W.3d 114, 120 (Tex. Crim. App. 2014) (quoting *Hidalgo v. State*, 983 S.W.2d 746, 752 (Tex. Crim. App. 1999)). However, "not every event following the inception of adversary judicial proceedings constitutes a 'critical stage' so as to invoke the right to counsel under the Sixth Amendment." *Id*. (quoting *Green v. State*, 872 S.W.2d 717, 720 (Tex. Crim. App. 1994)). "Generally, an Article 15.17 initial appearance and magistration marks the initiation of adversarial judicial proceedings in Texas and 'plainly signals' the attachment of a

defendant's Sixth Amendment right to counsel." *Pecina*, 361 S.W.3d at 77. In order for the right to counsel to attach, the "accused 'must unambiguously request counsel' during a custodial interrogation; thus, 'he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.'" *Id*. at 79 (quoting *Davis v. United States,* 512 U.S. 452, 459 (1994)).

B. Discussion

Bolivar argues he was denied his Sixth Amendment right to counsel, which attached when the Brownsville Police Department was granted a warrant for his arrest. However, Bolivar's Sixth Amendment right to counsel did not attach until he was arraigned by a magistrate following his arrest. *See id.* at 77. Bolivar also alleges his Fifth Amendment rights were invoked at the time the warrant was procured; however, those rights are invoked based on the reading of *Miranda* warnings prior to custodial interrogation. *See id*. at 75.

It is undisputed by the State that Bolivar was arraigned in an Article 15.17 hearing on February 7, 2009 and counsel was appointed to him on March 6, 2009. However, the reason for the delay in the appointment of counsel is not found within the appellate record. Although Bolivar argues that he was prejudiced by this delay due to discovery matters that could have been procured by his appointed counsel, the Supreme Court has held that its "cases have never suggested that the purpose of the right to counsel is to provide a defendant with a preindictment private investigator." *United States v. Gouveia*, 467 U.S. 180, 191 (1984). Bolivar was appointed counsel before his arraignment in the trial court and does not complain of any violations committed before then. Simply

claiming discovery could have been conducted does not show how Bolivar was harmed and Bolivar does not point us to specific places in the record that show harm. Therefore, we find Bolivar was provided counsel for "critical stages" of the trial process following his preindictment arraignment. *Pecina*, 361 S.W.3d at n. 34. We overrule Bolivar's third issue.

XIV. DISQUALIFICATION OF HABEAS JUDGE AND ABUSE OF DISCRETION FROM COURT OF APPEALS

By his second issue, Bolivar argues the habeas corpus judge was disqualified and this Court abused its discretion in a previous appeal. Bolivar claims these two events led to a violation of double jeopardy when the State put him to trial. Bolivar's argument centers around a prior district court hearing regarding a motion to revoke probation, where the trial court found the murder allegation to be "not true."

A. Applicable Law and Discussion

This issue has already been decided by this Court. *See Ex Parte Bolivar*, 386 S.W.3d 338 (Tex. App.—Corpus Christi 2012, no pet.) (holding the district court did not err in denying a writ of habeas corpus regarding a probation revocation establishing collateral estoppel because the judgment made no fact finding or legal conclusion regarding the underlying offense). Prior decisions are governed by the "law of the case" doctrine. *See State v. Swearingen*, 478 S.W.3d 716, 720 (Tex. Crim. App. 2016). "According to that doctrine, 'an appellate court's resolutions of questions of law in a previous appeal are binding in subsequent appeals concerning the same issue.'" *Id*.; *see Ex Parte Granger*, 850 S.W.2d 513, 516 (Tex. Crim. App. 1993) (en banc). "Therefore, 'when the facts and legal issues are virtually identical, they should be

controlled by an appellate court's previous resolution.'" *Swearingen*, 478 S.W.3d at 720. "Law of the case is a court-made doctrine designed to promote judicial consistency and efficiency that eliminates the need for appellate courts to prepare opinions discussing previously resolved matters." *Howlett v. State*, 994 S.W.2d 663, 666 (Tex. Crim. App. 1999). "The doctrine assures trial courts that they can rely on the appellate court's disposition of an issue in presiding over the case and provides an incentive for the trial courts to follow these decisions closely." *Id*. "An appellate court may reconsider its earlier disposition on a point of law if the court determines there are 'exceptional' circumstances that mitigate against relying on its prior decision." *Id*. We decline to do that here. The issue has been decided previously by this court and we stand by the disposition. Bolivar's second point of error is overruled.

XV. INITIAL TRIAL JUDGE NOT CONSTITUTIONALLY DISQUALIFIED

By his first issue, Bolivar alleges the initial trial judge, Benjamin Euresti, was constitutionally disqualified from sitting as presiding judge in pre-trial hearings, and his bias warrants Bolivar a new trial. However, Judge Euresti recused himself in 2011.

A. Applicable Law and Discussion

Bolivar alleges that Judge Euresti was disqualified from sitting as the presiding judge because Judge Euresti had outside knowledge and a pre-existing antagonistic relationship with Bolivar. Under the standard to evaluate bias necessary for recusal, "the recusal of a judge is appropriate *only if* the movant provides sufficient evidence to establish that a reasonable person, knowing all the circumstances involved, would harbor doubts as to the impartiality of the judge." *Abdygapparova v. State*, 243 S.W.3d 191, 198 (Tex. App.—San Antonio 2007, pet. ref'd). However, in this case, Judge Euresti

recused himself in August of 2011. Prior to August of 2011, the motion to suppress Bolivar's statement had been heard. Although Judge Euresti denied the motion to suppress Bolivar's statement, Bolivar does not point to the record how he was harmed by Judge Euresti's rulings. Bolivar alleges Judge Euresti made many rulings "contrary to well-established law and Supreme Court precedent." However, Bolivar's brief must "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record."[9] TEX. R. APP. P. 38.1(i). We conclude this issue is inadequately briefed and presents no argument for review "as this Court is under no obligation to make appellant's arguments for [him]." *Lucio v. State*, 351 S.W.3d 878, 896 (Tex. Crim. App. 2010). We overrule Bolivar's first issue. *See* TEX. R. APP. P. 38.1.

XVI. TRIAL JUDGE WAS NOT DISQUALIFIED TO RENDER JUDGMENT

By his sixteenth issue, Bolivar alleges the trial judge, Judge Robert Pate, who presided over the trial was constitutionally and statutory disqualified and rendered a void judgment.

A. Applicable Law and Discussion

The Texas Constitution requires elected and appointed state officials to take their respective oaths "before they enter upon the duties of their office." TEX. CONST. art. XVI, § 1(a), (b). Visiting judges must take an oath 'before accepting an assignment as a visiting judge," but the statute does not specify that they must renew their oath before every assignment. *See* TEX. GOV'T. CODE ANN. § 25.0017 (West, Westlaw through 2015 R.S.).

[9] Bolivar directs the court to consider arguments made outside the record in prior appellate briefs and motions filed in addition to this brief. We decline to consider anything outside the record for this case.

"It has long been a 'cardinal rule' of appellate procedure in Texas that we 'must indulge every presumption in favor of the regularity of the proceedings and documents' in the trial court." *Murphy v. State*, 95 S.W.3d 317 (Tex. App.—Houston [1st Dist.] 2002, pet ref'd). "The presumption of regularity is a judicial construct that required a reviewing court, 'absent *evidence* of impropriety,' to indulge every presumption in favor of the regularity of the trial court's judgment." *Id*. (quoting *Light v. State*, 15 S.W.3d 104, 107 (Tex. Crim. App. 2000)) (emphasis added). Texas courts have "consistently upheld the 'presumption of regularity of the judgment and the proceedings absent a showing to the contrary.'" *Id*. (quoting *Dusenberry v. State*, 915 S.W.2d 947, 949 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd)). The burden is on the defendant to overcome the presumption. *Id*. Appellants "who make such a challenge must make a prima facie showing that the trial judge did not take the required oaths before we will consider the issue on the merits." *Id*.

Although Bolivar did not raise this issue in the trial court, a "challenge to a trial judge's legal qualifications may be raised for the first time on appeal." *Murphy*, 95 S.W.3d at 320; *see Wilson v. State*, 977 S.W.2d 379, 380 n. 3 (Tex. Crim. App. 1998). We "hold that the presumption of regularity of trial court judgments and proceedings applies to appellate challenges of visiting trial court judges for alleged failures to take their constitutionally required oaths." *Murphy*, 95 S.W.3d at 320.

However, Bolivar has failed to make a prima facie showing that Judge Pate, who presided over the trial on the merits, did not take the required oath before presiding over his trial, and has presented no evidence of any impropriety to overcome the presumption of regularity. The record reveals that at no time during the trial court proceedings did

Bolivar object or challenge Judge Pate's authority to hear his case, nor did he present the issue in his motion for new trial. *See* TEX. R. APP. P. 33.1; s*ee also McMillian v. State*, No. 13-11-00123-CR, 2012 WL 3241830 (Tex. App.—Corpus Christi 2012, no pet.) (mem. op., not designated for publication). Bolivar's allegation that Judge Pate failed to take the oath required alone does not defeat the presumption. Bolivar submitted documentation from the Fifth Judicial District post briefing that included Judge Pate's current oath; however, these documents are not part of the appellate record and do not conclusively show the appropriate oath was not in place at the time of trial.[10] We overrule Bolivar's sixteenth issue.

XVII. CONCLUSION

We affirm the trial court's judgment.[11]

GINA M. BENAVIDES,
Justice

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

Delivered and filed the
15th day of September, 2016.

[10] Additionally, oaths of office for public officials are kept on file with the Texas Secretary of State, not the Judicial District governing said area.

[11] Bolivar's "Motion for Directed Verdict of Acquittal", "Motion to Strike the Written Findings of Fact and Conclusions of Law and Remand for New Evidentiary Hearing on Motion to Suppress Statement", "Supplemental Motion to Strike the Written Findings of Fact and Conclusions of Law and Remand for New Evidentiary Hearing on Motion to Suppress Statement", "Motion for Plea to the Jurisdiction", and "Motion to Vacate Judgment for Lack of Jurisdiction", as well as any and all pending motions filed by Bolivar are denied and considered moot. Additionally, Bolivar's motion to consolidate this cause number with 13-16-00304-CR is also denied.