NUMBER 13-14-00173-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

OMAR MONTEMAYOR, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 197th District Court of Cameron County, Texas.

MEMORANDUM OPINION

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

Appellant, Omar Montemayor, appeals from the conviction of capital murder of Sarah Montemayor and Devan Haynes. *See* TEX. PENAL CODE ANN. § 19.03(a)(7) (West, Westlaw through 2015 R.S.). Montemayor received a life sentence. By seventeen issues, Montemayor contends that: (1) reversal is required because a juror was improperly released; (2) the trial court improperly admitted extraneous evidence; (3) the

trial court should have granted his motion for mistrial due to the admission of extraneous evidence; (4) the trial court improperly admitted a 911 audio tape into evidence; (5) the trial court did not allow defense counsel to take a witness on voir dire regarding the authentication of photographs; (6) the trial court admitted evidence without the proper chain of custody being established; (7) the trial court did not allow defense counsel to take a witness on voir dire regarding the admissibility of blood swabs; (8) the trial court admitted buccal swabs without allowing defense counsel to voir dire the supporting witness; (9) the trial court should have excluded evidence pursuant to rule 107; (10) the trial court improperly admitted photographs and swab samples; (11) the trial court admitted over his objection privileged communication with his speech pathologist; (12) the trial court improperly allowed the State's expert witness to testify; (13) the trial court assisted the State's prosecutor regarding how to question the State's expert witness; (14) the trial court continued to assist the State during questioning over his objections; (15) the trial court failed to include a requested lesser-included offense in the jury charge; (16) the State prosecutor "introduced improper argument during jury arguments"; and (17) the trial court "erred in re-sentencing [him] after he had already been sentenced." We affirm.

I. IMPROPER RELEASE OF JUROR

By his first issue, Montemayor contends that the trial court improperly released a juror from service who did not state he was biased. Montemayor argues that this fact alone was insufficient to allow for the trial court to appoint an alternate juror under article 33.011 of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. art. 33.011 (West, Westlaw through 2015 R.S.). The State responds that the trial court committed

no error by releasing the complained-of juror, and even assuming error, Montemayor has not shown that he was harmed by the juror's release.

A. Pertinent Facts

On the day after the jury was selected and empaneled, the trial court announced that "[i]n chambers [he had] brought the attorneys, both sides, up to date on the fact that [there was a] juror who claim[ed] to know [Montemayor's] niece and know [Montemayor's] sister." The trial court then brought juror Juan Garcia Martinez to testify. Martinez stated,

> Yes, ma'am. I just needed to request to get taken off this jury. I was not aware—I work out on a daily basis. I work—I coach at Valley—Palm Valley Gymnastics. Last night I came to find out that [Montemayor's] sister is one of my good friends and I work out with her on a daily basis.

Martinez stated that Montemayor's sister also coached his daughter and stepdaughter in dance and gymnastics. Martinez said, "But I guess I'm embarrassed or whatnot. She [Montemayor's sister] had not mentioned this. We were talking about it last night, that I came to be on the jury. She brought it up that it was the Montemayor case." Martinez admitted that he then called his attorney "to get off the jury panel." Martinez explained to the trial court, "I have all this information. Everything is there. Like I said, I'm not—I'm not trying to get out of it. It was just something I was not aware of."

The trial court asked whether the parties opposed releasing Martinez, and Montemayor's trial counsel said, "Well, I think the question would be, Judge, whether he feels he can be fair and impartial because of the relationship . . . ." The trial court replied that it was obvious that Martinez wanted to be released and he "[was] going about it in a very wrong way." Martinez said, "Yes, ma'am." The trial court stated, "So," and defense counsel replied, "It's up to the court." The trial court then released Martinez, and he was

excused from the courtroom. Montemayor's trial counsel then sated, "Just so the record is clear, Judge, we object." However, trial counsel did not state the basis for his objection.

B. Discussion

Montemayor argues that in this case, the released juror was not "'unable or disqualified' to serve" under article 36.29 because the released juror "did not express an opinion that he was biased or prejudiced in favor or against [Montemayor], or that the juror had formed a conclusion as to guilt or innocence of [Montemayor]." *See id.* art. 36.29 (West, Westlaw through 2015 R.S.). Article 33.011 provides that "[a]lternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury renders a verdict on the guilt or innocence of the defendant and, if applicable, the amount of punishment, become or are found to be unable or disqualified to perform their duties or are found by the court on agreement of the parties to have good cause for not performing their duties." *Id.* art. 33.011. Thus, the trial court could have released a juror who became or was found by the trial court to be unable or disqualified to perform his duties and replace that juror with an alternate juror. *See id.*

Although article 33.011 states that a trial court may release a juror who is disqualified,[1] it also provides that a trial court may release a juror if it finds that the juror is "unable to perform" his duties. *See id.* "Although [article 33.011] does not define 'unable to perform,' appellate courts have concluded that 'unable' as used in Article 33.011 is indistinguishable from 'disabled' as used in Article 36.29." *Whitehead v. State*,

[1] "Bases for disqualification can be found in article 35.16." *Brown v. State*, 183 S.W.3d 728, 739 (Tex. App.—Houston [1st Dist.] 2005,) (citing *State v. Holloway*, 886 S.W.2d 482, 484–85 (Tex. App.—Houston [1st Dist.] 1994, writ ref'd)); *see* TEX. CODE CRIM. PROC. ANN. art. 35.16 (West, Westlaw through 2015 R.S.) (setting out that a juror may be disqualified if "the juror has a bias or prejudice in favor of or against the defendant").

437 S.W.3d 547, 554 (Tex. App.—Texarkana 2014, pet. ref'd). The court of criminal appeals has interpreted the term "disability," as utilized in Article 36.29, as requiring a finding that the juror is suffering from a "'physical illness, mental condition, or emotional state that would hinder or inhibit the juror from performing his or her duties as a juror,' or that the juror [is] suffering from a condition that inhibit[s] him from 'fully and fairly performing the functions of a juror.'" *Id.* (citing and quoting *Scales v. State*, 380 S.W.3d 780, 783 (Tex. Crim. App. 2012)).

We disagree with Montemayor that in order to release Martinez, the trial court was required to find that he was only disqualified due to bias or prejudice in favor or against Montemayor or that the juror had formed a conclusion as to guilt or innocence. *See* TEX. CODE CRIM. PROC. ANN. art. 33.011. This is so because the trial court may have found that Martinez was unable to perform his duties due to physical illness, mental condition, or an emotional state that would hinder or inhibit him from performing his duties as a juror, or that Martinez was suffering from a condition that inhibited him from fully and fairly performing the functions of a juror, a basis that Montemayor has not challenged on appeal. *See Scales*, 380 S.W.3d at 783. And here, Martinez testified that he was embarrassed because he had been selected to be on the jury, which could affect his friendship with Montemayor's sister, that he was concerned enough about his friendship with Montemayor's sister and serving as a juror on Montemaryor's trial that he called his lawyer, and that he did not want to serve on the jury because he was concerned about this friendship. *See id.* (providing that the trial court has discretion when determining whether a juror is disabled and to seat an alternate juror and explaining that the trial court may not dismiss a juror "for reasons related to that juror's evaluation of the sufficiency of

the evidence). We conclude that the trial court's ruling to dismiss Martinez under these circumstances was within the zone of reasonable disagreement because a juror can be disabled from sitting due to "varied reasons beyond physical illness." *See Reyes v. State*, 30 S.W.3d 409, 412 (Tex. Crim. App. 2000) (en banc); *Edwards v. State*, 981 S.W.2d 359, 366–67 (Tex. App.—Texarkana 1998, no pet.) ("The Texas Court of Criminal Appeals has defined 'disabled' to mean any condition that inhibits the juror from fully and fairly performing the functions of a juror.") (citing *Ramos v. State*, 934 S.W.2d 358 (Tex. Crim. App. 1996); *Griffin v. State*, 486 S.W.2d 948, 951 (Tex. Crim. App. 1972)); *Freeman v. State*, 838 S.W.2d 772 (Tex. App.—Corpus Christi 1992, pet. ref'd).

Nonetheless, even assuming error, we conclude that the record does not support that Montemayor was harmed in this case by the release of Martinez from jury service.

> Neither the United States nor the Texas Constitution prescribes the manner in which juries are selected. This error [of dismissing one juror and replacing him with an alternate juror] involves the application of a statutory scheme and is a nonconstitutional error. Rule 44.2(b) of the Texas Rules of Appellate Procedure provides that any nonconstitutional error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

Sneed v. State, 209 S.W.3d 782, 788 (Tex. App.—Texarkana 2006, pet. ref'd) (internal citations omitted).

The record here does not show any taint from the substituted juror. *See id.* The substituted juror was subjected to the same selection process, was properly sworn, and replaced the released juror before any evidence had been presented. *See id.* "In an analogous situation, if the trial court erroneously grants a challenge for cause for the State, reversal only occurs if the defendant shows that he or she was deprived of a lawfully constituted jury." *Id.* (citing *Feldman v. State*, 71 S.W.3d 738 (Tex. Crim. App.

2002); *Jones v. State*, 982 S.W.2d 386, 394 (Tex. Crim. App. 1998)). Montemayor has not argued and the record does not show that he was deprived of a lawfully constituted jury or that any of his substantial rights have been affected. *See id.* Accordingly, we conclude Montemayor was not harmed by the trial judge's alleged error because it did not affect his substantial rights. *See* TEX. R. APP. P. 44.2(b); *Sneed*, 209 S.W.3d at 788; *Ponce v. State*, 68 S.W.3d 718, 722 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd); *see also Hill v. State*, 475 S.W.3d 407, 409 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (concluding that the appellant suffered no harm to trial court's erroneous removal of a juror because the "[a]ppellant was not deprived of a lawfully constituted jury and the record does not reflect any taint from the alternate juror"). We overrule Montemayor's first issue.

II. MISTRIAL

By his third issue, Montemayor contends that the trial court erred in failing "to grant a mistrial upon the introduction of extraneous character evidence." First, Montemayor cites the following exchange:

[State:]	During the time that she [Sarah] lived with you, did [Montemayor] have your permission to come to your house?
[Witness:]	Not my explicit permission. I didn't object to it, though.
Q.	To break into your house you didn't object?
A.	Oh, of course not.
[Defense Counsel:]	That's not what she asked, Your Honor. I object to the mischaracterization of the question, Judge.
The Court[:]	Rephrase your question.

[Defense Counsel:] Your Honor, I would ask the jury to be instructed to disregard the last question, Your Honor, and any response she may have elicited.

The Court[:] Rephrase your question.

As shown above, Montemayor's trial counsel did not object on the basis that the State was offering or that the trial court was admitting extraneous offense or extraneous character evidence. And, he did not request a mistrial on any basis; therefore, we conclude that Montemayor has not shown that he preserved error or that the trial court committed error as alleged.

Next, Montemayor cites the following exchange:

[State:] If you know. Did [Sarah] have the money to pay you rent?

[Witness:] I don't know.

Q. But did she pay you?

A. Not the full amount, no.

Q. Was that like her not to pay her bills?

A. No.

Q. She was embarrassed about that?

A. She was.

[Defense Counsel:] Again, Your Honor, how can she characterize embarrassed from the response? I object to the form of the question. Again, it goes back—Judge, it is totally improper, it is wrong, and it is irrelevant and immaterial, Your Honor.

The Court[:] Sustained.

[State:] Unfortunately, I don't have the victim here, Your Honor.

[Defense Counsel:] Your Honor—

The Court[:] Sustained.

[Defense Counsel:] Judge, can I move for a mistrial, Judge? I mean, where are we going with this? I mean—

The Court[:] Sustained.

[Defense Counsel:] Well, is the court—Is the court denying—

The Court[:] Sustained.

[Defense Counsel:] Is the court denying my mistrial, my request for mistrial?

The Court[:] Yes.

Montemayor has not provided any substantive analysis regarding the above-stated exchange and how the trial court improperly admitted extraneous offense evidence in violation of rule 404(b). *See* TEX. R. APP. P. 38.1(i). In addition, as shown above, Montemayor's trial counsel did not object to the above-stated exchange on the basis that extraneous offense evidence or extraneous character evidence had been offered or admitted. In addition, regarding his motion for mistrial, Montemayor's trial counsel did not state what grounds warranted a mistrial. Moreover, no extraneous evidence was offered or admitted because neither the witness nor the State referenced either a crime or bad act committed by Montemayor. *See McKay v. State*, 707 S.W.2d 23, 31–32 (Tex. Crim. App. 1985) ("Evidence of an extraneous offense must necessarily involve evidence of prior criminal conduct by the accused.").

Finally, Montemayor cites the following exchange:

[State:] Did you observe the relationship between the victim, Sarah Montemayor and the defendant?

A. Yes.

Q. Would you describe that relationship as abusive?

A. Yes.

[Defense Counsel:] I object, Your Honor, as leading.

The Court[:] Sustained. Don't lead your witness.

[State:] Yes, Your Honor.

[Defense Counsel:] I would ask—

Q: How would you describe that—

[Defense Counsel:] I would ask, Judge—I would ask that the court instruct the jury to disregard the last question and disregard that response, Your Honor.

The Court[:] I've made my ruling.

[Defense Counsel:] And I would ask—

The Court[:] It was sustained.

[Defense Counsel:] And I would move for a mistrial, Your Honor, again.

The Court[:] And again, it's denied.

Again, Montemayor's trial counsel did not object on the basis that extraneous offense evidence had been admitted; thus, his objection at trial does not comport with his argument on appeal. *See Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995) (en banc) (to preserve error for appellate review, complaint on appeal must comport with objection at trial, and objection stating one legal theory may not be used to support a different legal theory on appeal); *see also Griggs v. State*, 213 S.W.3d 923, 927 (Tex. Crim. App. 2007) (explaining that a motion for mistrial must be both timely and specific).

Thus, we will not address Montemayor's argument that the trial court abused its discretion in denying his motion for mistrial concerning the above-cited exchange because he did not object or request a mistrial on the basis that the trial court had admitted extraneous offense or extraneous character evidence. *See Griggs*, 213 S.W.3d at 927. We overrule Montemayor's third issue.

III. ADMISSION OF EVIDENCE

By his second, fourth, and ninth issues, Montemayor complains of the trial court's exclusion and admission of certain evidence. Specifically, Montemayor argues that the trial court improperly admitted evidence of his extraneous offenses, 911 audio tapes, photographs and swab samples and that it improperly excluded text messages.

A trial court's decisions concerning the admission or exclusion of evidence are reviewed under an abuse of discretion standard. *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011). A trial court abuses its discretion when its decision lies outside the zone of reasonable disagreement. *Green v. State*, 934 S.W.2d 92, 102 (Tex. Crim. App. 1996).

A. Extraneous Offense Evidence

By his second issue, Montemayor contends that the trial court improperly admitted evidence of his extraneous offenses. However, Montemayor does not cite any point in the voluminous record wherein he claims the trial court improperly admitted extraneous evidence. *See* TEX. R. APP. P. 38.1(i). Therefore, we are unable to address his issue. *See id.* We overrule Montemayor's second issue.[2]

[2] By a sub-issue to his second issue, Montemayor contends that the trial court should have sua sponte provided an instruction to the jury not to consider extraneous offense evidence unless it believed beyond a reasonable doubt that he committed such offense. However, a trial court does not have a sua sponte duty to provide a limiting instruction regarding extraneous offenses. *See Delgado v. State*, 235

B. 911 Tape

By his fourth issue, Montemayor contends that the trial court improperly admitted 911 audio tapes because the State failed to lay the necessary predicate. Specifically, Montemayor complains that "[t]here was no evidence offered at trial that the tape recordings were the original version and copies are particularly susceptible to alteration, tampering, and selective editing." Citing *Edwards v. State*, 551 S.W.2d 731, 733 (Tex. Crim. App. 1977), Montemayor argues that the State failed to do the following: (1) make "a showing that the recording device was capable of taking testimony"; (2) make "a showing that the operator of the device was competent"; (3) establish the authenticity and correctness of the recording; (4) make "a showing that changes, additions or deletions [were] not made"; (5) make "a showing of the manner of the preservation of the recording"; (6) identify the speaker; and (7) make "a showing the testimony elicited was voluntarily made without any kind of inducement." The State responds that it satisfied rule of evidence 901(a); thus, the trial court properly admitted the evidence.

The Texas Court of Criminal Appeals has stated that the *Edwards* test is no longer the standard that applies. *Angleton v. State*, 971 S.W.2d 65, 68–69 (Tex. Crim. App. 1998) (overruling in part *Kephart v. State*, 875 S.W.2d 319 (Tex. Crim. App. 1994)); *Martines v. State*, 371 S.W.3d 232, 243 (Tex. App.—Houston [1st Dist.] 2011, no pet.). ("The Court of Criminal Appeals has recognized, however, that *Edwards* was superseded

S.W.3d 244, 251 (Tex. Crim. App. 2007) ("Taking the cases together, then, a limiting instruction concerning the use of extraneous offense evidence should be requested, and given, in the guilt-stage jury charge only if the defendant requested a limiting instruction at the time the evidence was first admitted."); *see also Green v. State*, No. 13-13-00418-CR, 2015 WL 3454729, at *6 (Tex. App.—Corpus Christi 2015, no pet.) (concluding that "because the evidence was before the jury for all purposes and the trial court had no duty to instruct the jury on this evidentiary issue, the trial court did not err by failing to include a limiting instruction in the jury charge"). We overrule Montemayor's sub-issue to his second issue.

by the adoption of the Texas Rules of Criminal Evidence, and, thus, *Edwards* is "no longer needed as an authoritative guide for admissibility of 'electronic recordings' including 'sound recordings.'") (citing *Stapleton v. State*, 868 S.W.2d 781, 786 (Tex. Crim. App. 1993)). The court held that Rule 901 is "straightforward, containing clear language and understandable illustrations," and found that "attempting to cling to the *Edwards* test after the enactment of Rule 901 will result in unwarranted confusion for practitioners, trial courts, and appellate courts." *Id.* Accordingly, we agree with the State that it was not required, as argued by Montemayor, to authenticate the 911 audio tape under the *Edwards* test. *See Martines*, 371 S.W.3d at 243–44 ("Thus, because the Texas Rules of Evidence have superseded *Edwards*, the State was not required to specifically establish any of *Edwards*' seven prongs to obtain admission of the tape recording.").

"Instead, the State had to comply with Texas Rules of Evidence 901." *Id.* Pursuant to Rule 901, "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." TEX. R. EVID. 901(a). Subsection 901(b) sets out a non-exhaustive list of examples that satisfies this requirement, including authentication by the testimony of a witness with knowledge that an item is what it is claimed to be and authentication by an opinion of a person's voice based on hearing the voice at any time under circumstances that connect the voice with the alleged speaker. *Id.* 901(b)(1).

Here, Sara Ann Williams testified that (1) she called 911, (2) the 911 audio recording was a fair and accurate recording of her conversation with the 911 operator, (3) she recognized her own voice and the voice of the 911 operator with whom she had

spoken, and (4) the audio recording had not been altered.[3] Montemayor argues that this testimony failed to support a finding under *Edwards* that the tape was authentic because the witness had no working knowledge of the recording or of how the recording came to be made. However, "a witness is no longer required to be the maker of the recording or have otherwise participated in the conversation in order for his testimony that the recording is what it is claimed to be to sufficiently authenticate it." *Hines v. State*, 383 S.W.3d 615, 625 (Tex. App.—San Antonio 2012, pet. ref'd). Therefore, given that the State was not required to authenticate the recording under *Edwards* and the sponsoring witness need not have been the maker of the recording, we conclude that the trial court did not abuse its discretion by admitting the 911 audio recording. *See id.* We overrule Montemayor's fourth issue.

C. Rule of Optional Completeness

By his ninth issue, Montemayor contends that the trial court admitted portions of text messages between the deceased and Montemayor and that the trial court should have admitted "all portions of the texts" under the rule of optional completeness. *See* TEX. R. EVID. 107. The State responds that the record belies Montemayor's claim that the trial court omitted any of the portions of the texts he offered under rule 107.[4]

[3] *See Angleton v. State*, 971 S.W.2d 65, 67–68 (Tex. Crim. App. 1998) (concluding that the audio tape had been properly authenticated when a witness, with knowledge, testified that the enhanced recording produced at trial was an accurate copy of the relevant contents of the original recording).

[4] The record shows that after the trial court overruled Montemayor's trial counsel's objection to the State's offering certain text messages under the rule of optional completeness, the trial court agreed to allow Montemayor's trial counsel to later offer any text messages that the State had not offered into evidence. Montemayor's trial counsel later called the State's witness regarding the admitted text messages, and the trial court admitted, without objection, the portions of the text messages offered by Montemayor.

Montemayor has not cited to any point in the record wherein the trial court excluded any portions of text messages that he offered into evidence. *See* TEX. R. APP. P. 38.1(i). In addition, Montemayor has not told us where we may find the text messages that the trial court allegedly excluded or what these text messages said or how they were relevant and admissible under rule 107. *See id.* We are not required to scour a voluminous record in order to find error. *Alvarado v. State*, 912 S.W.2d 199, 210 (Tex. Crim. App. 1995) ("As an appellate court, it is not our task to pore through hundreds of pages of record in an attempt to verify an appellant's claims."). Moreover, "[i]n order to preserve error regarding the exclusion of evidence, an offer of proof is required." *Williams v. State*, 937 S.W.2d 479, 489 (Tex. Crim. App. 1996). Here, Montemayor has not pointed to any portion of the record where he made an offer of proof, and as this is a voluminous record, we will not scour the record. *See Alvarado*, 912 S.W.2d at 210. Thus, we cannot conclude that the trial court abused its discretion regarding any text messages in this case. We overrule Montemayor's ninth issue.

IV. VOIR DIRE OF WITNESSES

By his fifth, seventh, and eighth issues, Montemayor contends that the judgment should be set aside because the trial court allowed the introduction of photographs, blood swabs, and buccal swabs "without allowing [Montemayor's trial counsel] to voir dire the witness[es] on the issue of authenticity" of the photographs and buccal swabs and on the admissibility of the blood swabs.[5] However, Montemayor cites no authority requiring reversal on this basis, and he does not provide any substantive analysis of the issue. *See*

[5] By his tenth issue, Montemayor makes the same contention as his fifth and eighth issues. We overrule his tenth issue for the same reason that we overrule his fifth and eighth issues.

TEX. R. APP. P. 38.1(i). Accordingly, we are unable to reverse on these bases. We overrule Montemayor's fifth, seventh, and eighth issues.[6]

V. CHAIN OF CUSTODY

By his sixth issue, Montemayor contends that the trial court admitted several items of evidence, such as "blood swabs, weapons, and other exhibits," without proof of the chain of custody.[7] Montemayor specifically cites State's exhibit nine as being admitted without proof of the chain of custody. State's exhibit nine is the buccal swab taken from Montemayor's right cheek.

However, proof of chain of custody goes to the weight of the evidence, rather than its admissibility, when the State shows the beginning and the end of the chain of custody. *See Dossett v. State*, 216 S.W.3d 7, 17 (Tex. App.—San Antonio 2006, pet. ref'd); *Alvarez v. State*, 857 S.W.2d 143, 147 (Tex. App.—Corpus Christi 1993, pet. ref'd). Stated another way, any gaps in the chain of custody generally go to the weight and credibility of the evidence in question, not its admissibility. *Lagrone v. State*, 942 S.W.2d 602, 617 (Tex. Crim. App. 1997) (en banc); *Stoker v. State*, 788 S.W.2d 1, 10 (Tex. Crim. App. 1989) (en banc); *Alvarez*, 857 S.W.2d at 147. In addition, evidence of tagging an item of physical evidence at the time of its seizure and then identifying it at trial based upon the

[6] In the trial court, Montemayor's trial counsel objected to the trial court's refusal to allow him to take the witness who took the photographs on voir dire on the basis that the State had "not established the proper predicate for introduction." However, Montemayor does not make this argument on appeal.

[7] Regarding his complaint that "blood swabs, weapons, and other exhibits" were admitted without proof of the chain of custody, Montemayor has not cited any portion of the record wherein the trial court improperly admitted the "blood swabs, weapons, and other exhibits," he has not provided citation to appropriate authority; and he has not provided any argument in support of his complaints. Thus, we conclude that these complaints are inadequately briefed. *See* TEX. R. APP. P. 38.1(i).

tag will support admission of the evidence barring any showing of tampering or altercation. *Stoker*, 788 S.W.2d at 10.

Here, Detective Joel Yanes, a detective with the Harlingen Police Department, testified that he obtained a search warrant to take Montemayor's DNA and that he "went by Valley Baptist Medical Center, and [he] obtained saliva from" Montemayor through a buccal swab of his right cheek. According to Detective Yanes, he then sealed the buccal swab in the collection envelope. When the State offered the buccal swab as State's exhibit nine, Detective Yanes stated that he recognized the evidence envelope "which ha[d his] handwriting and ha[d] the name on the outside of it." When asked if the swab was in "substantially" the same "shape or condition as when [he] first collected it," Detective Yanes replied, "Yes." Detective Yanes stated that he submitted the envelope "into evidence" after collecting it and that the evidence had been transported to the trial court by the police department's evidence technician, Rick Vela. Because the State provided evidence concerning the beginning and the end of the chain of custody and there is no claim of tampering, we cannot conclude that the trial court abused its discretion by admitting the buccal swab of Montemayor's right cheek. *See Dossett*, 216 S.W.3d at 17; *Alvarez*, 857 S.W.2d at 147. Thus, gaps, if any, in the chain of custody in this case go to the weight and credibility of the evidence in question. *See Lagrone*, 942 S.W.2d at 617; *Stoker*, 788 S.W.2d at 10; *Alvarez*, 857 S.W.2d at 147. We overrule Montemayor's sixth issue to the extent he complains that State's exhibit nine was admitted without proof of the chain of custody.

VI. SPEECH PATHOLOGIST

By his eleventh issue, Montemayor contends that his conviction should be set aside because a speech pathologist, who interviewed him, testified regarding privileged communication. However, there is no physician-patient privilege in Texas criminal proceedings except under limited circumstances not applicable here. *See* TEX. R. EVID. 509(b). Montemayor acknowledges this, stating: "The facts herein fall outside of . . . [rule] 509 which states that there is no physician-patient privilege." *See id.* Thus, to the extent Montemayor generally complained that the testimony concerned privileged communication, we overrule this issue.

Next, Montemayor argues that "[t]he evidence is clear that the State [(through the speech pathologist)] was asking [Montemayor] questions concerning the incident and that he was never given his *Miranda* warnings" and "never advised that any statements he made in writing could be used against him." *See Miranda v. Arizona*, 384 U.S. 436 (1966). However, Montemayor did not object to the speech pathologist's testimony on the basis that he was not provided *Miranda* warnings or advised that any statements he made in writing could be used against him. *See* TEX. R. APP. P. 33.1; *Jimenez v. State*, 981 S.W.2d 393, 395 (Tex. App.—San Antonio 1998, pet. ref'd) ("In his final issue, Jimenez complains that his Fifth Amendment right against self-incrimination was violated because the arresting officer did not provide him with his *Miranda* warnings until after he had performed the field sobriety tests and after the officer had elicited incriminating information from him. Jimenez, however, did not complain about his *Miranda* warnings at trial, and thus failed to preserve this error for appellate review."). We overrule Montemayor's eleventh issue.

VII. RULE 705(B) HEARING

By his twelfth issue, Montemayor contends that the trial court erred because it did not allow him to voir dire the State's expert witness in the field of ballistics and ammunition, Elizabeth J. Miller, M.D., and the State's expert witness in the field of gun residue, Thomas Kubic, Ph.D. *See* TEX. R. EVID. 705(b).

A party in a criminal case has a procedural right to voir dire an expert under rule 705(b), and the trial court must grant a party's "request to conduct a voir dire examination [outside the presence of the jury] directed to the underlying facts or data upon which the opinion is based." *Id.* However, to preserve this argument for appeal, the objecting party must clearly and specifically request a rule 705(b) hearing. *Jenkins v. State*, 912 S.W.2d 793, 813 (Tex. Crim. App. 1993). And, any objections regarding the expert's qualifications and request to take the expert "on voir dire outside the presence of the jury to 'prove up' his qualifications is not a request for a Rule 705(b) hearing to explore the 'underlying facts or data' of the expert's opinion." *Id.* at 814.

Here, when the prosecutor asked Dr. Miller what a shotgun shell "usually" contains, Montemayor's trial counsel objected stating, "Your Honor, again, she's not been qualified as an expert, Your Honor, in ballistics, so I object to her testifying to that, Judge."[8] Montemayor's trial counsel did not request a 705(b) hearing or ask to voir dire Dr. Miller outside the presence of the jury to examine the underlying facts or data upon which her opinion was based. *See* TEX. R. EVID. 705(b); *Jenkins*, 912 S.W.2d at 814. Accordingly,

[8] Although Montemayor's defense counsel said "again," his last objection to Dr. Miller's testimony was on the basis that the question called for speculation and her answer must be based on her own observation. He did not make an objection under rule 705(b) or on the basis that the witness was not qualified.

Montemayor did not preserve his appellate argument that the trial court should have allowed him to voir dire Dr. Miller outside the presence of the jury under rule 705(b).

Next, when the State presented "Dr. Kubic with State's [e]xhibits 5, 6, 12, and 13, which have already been introduced into evidence," Montemayor's trial counsel stated, "Subject to that objection we had lodged before, Your Honor. . . . And since it's being offered for a different purpose, I would like to take this witness on voir dire, if the court will allow."[9] The court responded, "Not at this point." Montemayor's trial counsel did not state that he was requesting a 705(b) hearing outside the jury's presence or that he wanted to examine the underlying facts or data of Dr. Kubic's opinion.

In *Jenkins*, when the State explained that its expert would "testify that he observed [the defendant] for two reasons and was not pursuant to an investigation of any alleged conduct," the defendant said, "I believe the Court allows me a hearing to show why [the defendant] was seen [by the expert] and the voluntariness of his statements and the basis for [the expert's] to come up with the diagnosis that he did." *See Jenkins*, 912 S.W.2d at 813. The court held that that the defendant's "statement that the court 'allows [him] a hearing' on the 'basis for [the expert] to come up with the diagnosis that he did' could be construed as a request for a Rule 705(b) hearing, but this 'request' was made in the context of [the defendant's] objections" regarding the voluntariness of statements to the expert witness. *Id.* And, the defendant's objections regarding the voluntariness of his statements did not constitute a clear and specific request for a rule 705(b) hearing. *Id.*

[9] We note that Montemayor has not cited any other portion of the record wherein he objected to the admission of these exhibits during Dr. Kubic's testimony, and upon our review of his testimony, we have found no other objections to these exhibits during Dr. Kubic's testimony. However, upon our own initiative, we have reviewed Montemayor's trial counsel's objections to the complained-of exhibits that he previously made as set out below.

Here, although Montemayor's trial counsel requested to take Dr. Kubic on voir dire, he stated that he was requesting the voir dire subject to his previous objection to the exhibits. Montemayor has not cited any portions of the record wherein he objected to admission of exhibits five, six, twelve, or thirteen. Nonetheless, during Officer Ricardo Vela's testimony, the State offered and the trial court admitted State's exhibit five, which consisted of a brown paper sack containing two blood swabs from Montemayor's left hand. Montemayor objected to admission of State's exhibit five on the basis that the trial court would not allow him to voir dire Officer Vela. He did not request a 705(b) hearing or state that he wanted to voir dire either Officer Vela or Dr. Kubic to examine the underlying facts or data upon which either witnesses' opinion was based. When the trial court admitted State's exhibit six, which is a brown paper sack containing two blood swabs from Montemayor's right hand, Montemayor specifically objected on the basis that the chain of custody had not been proven. He did not request a 705(b) hearing or request to examine anyone on the underlying facts or data that formed the basis of an opinion. Next, regarding State's exhibit twelve, which is a brown envelope containing one left hand and one right hand blood swab from the victim, Haynes, Montemayor objected on the basis that he wished to take Officer Vela on voir dire. He did not request a 705(b) hearing or ask to examine any witness on the underlying facts and data forming the basis of an opinion. Finally, regarding State's exhibit thirteen, which is a brown envelope containing one left hand and one right hand blood swab from the victim, Sarah, Montemayor objected stating, "Respectively the same objections, Your Honor." Again, he did not state he was requesting a 705(b) hearing or that he wished to voir dire a witness concerning the underlying facts or data of an opinion.

Because there is nothing in the record showing that Montemayor clearly or specifically requested a 705(b) hearing or requested to take Dr. Kubic on voir dire outside the presence of the jury[10] directed to the underlying facts or data upon which his opinion was based, we cannot conclude that the trial court violated rule 705(b) in this case.[11] *See id.* We overrule Montemayor's twelfth issue.

VIII. TRIAL COURT BIAS

By his thirteenth issue, Montemayor contends that the trial court was biased and violated article 38.05 of the Texas Code of Criminal Procedure. *See* TEX. CODE. CRIM. PROC. ANN. art. 38.05 (West, Westlaw through 2015 R.S.). Montemayor complains of several instances wherein he claims that the trial court assisted the State and argues that those statements "taken as a whole are calculated to convey to [the jury] [the trial court's] opinion in the case" and must have influenced the jury "since the [trial court] was predicating the testimony of the expert witness for the State." Montemayor further complains of the following:

> On objection to speculation by the pathologist as to posture of the body when the shots occurred the Court volunteered its own questions when the State could not lay the proper predicate, the Court espouses "Ma'am, is this cover[ed] in your education?" The Court continues "So what is covered in your education that would lead you to be able to give an opinion that would be helpful to this jury on the subject?" Counsel for [Montemayor] counters with "Note my objection to the Court, Your Honor, interceding and assisting the State of Texas attempting to prove their case."

A. Waiver

> In ruling upon the admissibility of evidence, the judge shall not discuss or comment upon the weight of the same or its bearing in the case,

[10] Montemayor concedes that he did not request to conduct the voir dire outside the presence of the jury.

[11] In addition, it is not apparent from the context of the objections that Montemayor sought a rule 705(b) hearing.

> but shall simply decide whether or not it is admissible; nor shall he, at any stage of the proceeding previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the case.

TEX. CODE CRIM. PROC. ANN. art. 38.05. To constitute reversible error in violation of article 38.05, the judge's comment must be reasonably calculated to prejudice the defendant's rights or benefit the state. *Marks v. State*, 617 S.W.2d 250, 252 (Tex. Crim. App. [Panel Op.] 1981). Error under article 38.05 is preserved only if the complaining party objected to the judge's comment. *Sharpe v. State*, 648 S.W.2d 705, 706 (Tex. Crim. App. 1983); *Moore v. State*, 907 S.W.2d 918, 921 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd); *see also* TEX. R. APP. P. 33.1; *Ramirez v. State*, No. 13-10-00205-CR, 2012 WL 170996, at *11 (Tex. App.—Corpus Christi Jan. 19, 2012, pet. ref'd) (mem. op., not designated for publication) ("[A]ssuming that the trial court made an improper comment, [the appellant] failed to object to it. And absent a timely and specific objection to the improper comment [by the judge], any error was waived.").

First, Montemayor complains of the following statements made by the judge: (1) "[Montemayor's] attorney objects to the pathologist testifying on ballistics because she has not been qualified as an expert in ballistics and the Court instructs the state 'Ask her about knowledge in this area'"; (2) "Defense counsel objects to witness testifying as ballistic expert when she has not been qualified, and the Court instructs the State 'Ask her the basis of her knowledge'"; (3) "The State attempts to introduce evidence of a satellite pellet [hole] and the Court instructs the State 'No, no, no. I heard—What is her theory based on her knowledge and her experience'"; (4) "On examination that Court instructs the pathologist 'Forget that part, Doctor' as she comments on the State's effort [to] solicit testimony"; and (5) "Counsel for [Montemayor] objected to speculation and the

Court instructs 'If she has knowledge, based on her experience and education' and the Court states 'I'm predicating it on that.'" However, Montemayor did not object to any of these statements by the judge on the basis that they were either improper or conveyed the judge's opinion of the case to the jury. Thus, any error was waived regarding these complaints. *See Sharpe*, 648 S.W.2d at 706; *Moore*, 907 S.W.2d at 921; *see also* TEX. R. APP. P. 33.1; *Ramirez*, 2012 WL 170996, at *11. Accordingly, we overrule Montemayor's thirteenth issue to the extent he complains of these statements made by the trial court.

B. Improper Questions

A trial judge is permitted to question a witness for the purpose of clarifying an issue or assisting the court in ruling on an objection. *Brewer v. State*, 572 S.W.2d 719, 721 (Tex. Crim. App. 1978); *Moore v. State*, 275 S.W.3d 633, 636–37 (Tex. App.—Beaumont 2009, no pet.). In addition, a trial judge is permitted to correct a misstatement of the law, explain a point of law or clear up confusion, or to expedite the proceedings. *Jasper v. State*, 61 S.W.3d 413, 421 (Tex. Crim. App. 2001); *Moore*, 275 S.W.3d at 636; *Murchison v. State*, 93 S.W.3d 239, 262 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd). However, when the trial court goes beyond permissible questioning, two potential dangers arise: (1) the trial court may convey its opinion of the case and influence the jury's decision, *Morrison v. State*, 845 S.W.2d 882, 886 n.10 (Tex. Crim. App. 1992); and (2) "the judge in the zeal of his or her active participation may become an advocate in the adversarial process and lose the neutral and detached role required for the fact finder and the judge." *Moreno*, 900 S.W.2d at 359–60.

When the State asked Dr. Miller, "If Devan [Haynes] is six three and the person that is shooting him is five eight, what would Devan Haynes' position be at the time he was shot," Montemayor's trial counsel objected on the basis that Dr. Miller's answer would be speculative. The trial court instructed the State to "[l]ay your predicate." The State asked the same question, and Montemayor's trial counsel objected stating, "Again, it's speculation, Your Honor." The trial court said, "Cover her predicate better." The State asked, "In your experience with your knowledge and your training and the 1,000—over 1,000 autopsies that you have done, if . . . if the victim is much taller . . . than the person that is shooting at him, can you explain to the jury what position was the victim's body . . . at the time it was shot?" Montemayor's trial counsel responded, "Same objection, Your Honor. It's pure speculation by this witness."

The trial court then told the prosecutor that based on her questioning, the State had not shown the proper predicate. The prosecutor asked Dr. Miller to explain what could happen to a body if the victim is taller than the shooter and "What can you infer from that based on your knowledge and experience . . . in this case." Montemayor's trial counsel said, "Your Honor, it's speculative. Your Honor, I don't think the proper predicate has been established, the proper fact scenario has not been established, so I would object on that, Your Honor." The trial court then asked Dr. Miller, "Ma'am is this covered in your education," and Dr. Miller said, "Yes." The trial court asked Dr. Miller, "So what is covered in your education that would lead you to be able to give an opinion that would be helpful to this jury on this subject?" Dr. Miller replied, "Part of my training involves the examination of gunshot wounds and the course that they take throughout the body and to determine what the potential positions of the body or weaponry might create that path,

that course." The trial court said, "I will let [the State] continue with that questioning." At this point, Montemayor's trial counsel objected on the basis that the trial court was "interceding and assisting the State of Texas in attempting to prove their case."

The prosecutor first asked Dr. Miller what happens when the victim is taller than the shooter based on her "experience with your knowledge and your training" and then asked what Dr. Miller could infer from such a situation based on her experience and knowledge. After Montentemayor's trial counsel objected to Dr. Miller's testimony because the State had not laid the proper predicate, the trial court asked whether Dr. Miller's education covered this type of information and what part of her education would be helpful to jury on this subject. We conclude that in this exchange, the trial court merely rephrased the prosecutor's question in order to clarify it to the witness, who had not answered the prosecutor's questions regarding what experience, knowledge, and training she had to testify about heights of victims and shooters and the trajectory of bullets. The trial court's question did not convey its opinion about the case to the jury, and the trial court did not become an advocate because it was engaging in its gatekeeping function to determine whether Dr. Miller was qualified to opine on the subject and to expedite the proceedings. *See Jasper*, 61 S.W.3d at 421; *Moore*, 275 S.W.3d at 636; *Murchison*, 93 S.W.3d at 262; *see also Rodgers v. State*, 205 S.W.3d 525, 527 (Tex. Crim. App. 2006) (explaining that under Texas Rule of Evidence 702, the trial court must be satisfied that three conditions are met: (1) the witness qualifies as an expert by reason of his knowledge, skill, experience, training, or education; (2) the subject matter of the testimony is an appropriate one for expert testimony; and (3) admitting the expert testimony will

actually assist the fact-finder in deciding the case). We overrule Montemayor's thirteenth issue.[12]

IX. LESSER-INCLUDED OFFENSES

By his fifteenth issue, Montemayor contends that the trial court committed reversible error by failing to include in its jury charge requested instructions on the issue of sudden passion and the lesser-included offense of aggravated assault. Specifically, Montemayor states, "Appellant contends that because of the sudden passion that the Appellant did not have an intent to cause serious bodily injury. The jury should have been provided a proper application paragraph on the issue of sudden passion and lesser included charge of aggravated assault."

Courts follow a two-step analysis when considering whether a defendant is entitled to a lesser-included offense instruction. *Hall v. State*, 225 S.W.3d 524, 535–36 (Tex. Crim. App. 2007). First, the court must determine as a matter of law whether the requested offense is a lesser-included offense of the charged offense. *Id.* Next, the court must determine whether there is any evidence in the record allowing a jury to rationally find that if the defendant is guilty, he is guilty of the lesser-included offense. *Bignall v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994).

As we understand his first argument, Montemayor claims that the trial court should have provided a sudden passion jury charge instruction during the guilt/innocence phase of his trial because his testimony raised an issue of fact regarding whether he intended

[12] By his fourteenth issue, Montemayor contends that his conviction should be set aside due to cumulative error of the trial court assisting the State. However, we have found no error in his thirteenth issue, and Montemayor cites no other instances in the record wherein the trial court assisted the State. We overrule Montemayor's fourteenth issue.

to shoot his victims. However, the law provides that a sudden passion instruction applies during the punishment phase of a trial. *See* TEX. PENAL CODE ANN. § 19.02(d). Section 19.02(d) of the penal code states, that

> [a]t the punishment stage of a trial, the defendant may raise the issue as to whether he caused the death under the immediate influence of sudden passion arising from an adequate cause. If the defendant proves the issue in the affirmative by a preponderance of the evidence, the offense is a felony of the second degree.

Id. Therefore, we cannot conclude that the trial court was required to provide a sudden passion jury charge instruction during the guilt/innocence phase of trial.[13] We overrule Montemayor's fifteenth issue in that respect.

Next, as we understand it, Montemayor argues that there was more than a scintilla of evidence supporting a rational finding that he committed the lesser offense of aggravated assault because he testified that he did not recall shooting the victims. Montemayor does not cite any other evidence in support of his argument.

A person commits aggravated assault by intentionally, knowingly, or recklessly causing serious bodily injury to another; or by using or exhibiting a deadly weapon while intentionally, knowingly, or recklessly causing bodily injury to another person. TEX. PENAL CODE ANN. § 22.02(a) (Vernon 1994). Thus, to be entitled to such an instruction, the record must contain evidence of these elements. *See Bignall*, 887 S.W.2d at 23. Montemayor only cites his testimony that he did not remember shooting the victims. This is not sufficient evidence to show that Montemayor either intentionally, knowingly, or recklessly caused serious bodily injury to another. *See Sledge v. State*, 860 S.W.2d 710,

[13] "Sudden passion is a mitigating circumstance, which, if proved by a preponderance of the evidence, reduces the offense of murder to a felony of the second degree." *Trevino v. State*, 60 S.W.3d 188, 192 (Tex. App.—Fort Worth 2001), ***aff'd***, 100 S.W.3d 232 (Tex. Crim. App. 2003).

712 (Tex. App.—Dallas 1993, pet. ref'd) (providing that the appellant had been entitled to lesser-included offense instruction of aggravated assault because the appellant admitted to shooting a weapon into a crowd but stated that he had not intended to shoot anyone); *see also Reynolds v. State*, No. 05-96-00401-CR, 1997 WL 797082, at *4 (Tex. App.—Dallas Dec. 23, 1997, no pet.) (mem. op., not designated for publication) (stating that "*Sledge* is distinguishable because the defendant admitted firing the shots and denied intending to kill anyone. In this case, appellant could not remember firing the gun but stated she did not intend to kill" the victim and that the appellant's "testimony does not constitute evidence she intentionally, knowingly, or recklessly caused bodily injury to [the victim]"). The evidence showed either that Montemayor committed an intentional killing or that Montemayor was completely unaware of the act that subsequently caused the victims' death.[14] Finding no evidence from which the jury could have rationally found that Montemayor, if guilty at all, was guilty only of aggravated assault, we conclude that the trial court did not err by refusing to provide a lesser-included offense instruction. We overrule Montemayor's fifteenth issue.

X. PROSECUTOR'S COMMENTS

By his sixteenth issue, Montemayor contends that the prosecutor's comments during closing argument were in violation of his "right to a fair trial." Specifically, Montemayor complains that "[t]he State during closing argument referred to the Appellant

[14] Moreover, the intent to kill may be inferred from the use of a deadly weapon in a deadly manner. *Adanandus v. State*, 866 S.W.2d 210, 215 (Tex. Crim. App. 1993). And when a deadly weapon is fired at close range and death results, the law presumes an intent to kill. *Womble v. State*, 618 S.W.2d 59, 64–65 (Tex. Crim. App. 1981). Here, the evidence supports a finding that both victims were shot with a firearm at close range, and the jury could have reasonably inferred the intent to kill element of the offense from Montemayor's use of a firearm.[14] *See Mohammed v. State*, 127 S.W.3d 163, 166–67 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) (holding trial court did not err in denying requested jury instruction on lesser-included offense of felony murder where evidence showed defendant "committed an intentional killing").

being away for three and one-half years . . . and that he was helped by his family" and "[b]y doing so the State was making a comment to the Defendant's failure to testify or offer evidence and further making reference to evidence outside of the record." However, Montemayor did testify at his trial. Thus, we are unable to conclude that the prosecutor's statements amounted to a comment on his failure to testify. Moreover, Montemayor has not cited to any portion of the record wherein the prosecutor referred to him "being away for three and one-half years" or wherein he objected to such comment. "A defendant's failure to object to a jury argument or a defendant's failure to pursue to an adverse ruling his objection to a jury argument forfeits his right to complain about the argument on appeal." *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996). Therefore, Appellant was required to timely raise his appellate complaint to the trial court before we may address it, and because he did not, error, if any, is not preserved. *Id.*; *see* TEX. R. APP. P. 33.1.

Regarding the second comment that Montemayor "was helped by his family," Montemayor cites a portion of this voluminous record wherein his trial counsel made opening remarks to the venire prior to voir dire and jury selection. Nowhere in this portion of the record does his trial counsel make reference to "help" from his family. We are not required to scour a voluminous record in order to find error. *Alvarado*, 912 S.W.2d at 210. Moreover, Montemayor has not cited the record wherein he objected to the prosecutor's statement in closing argument that his family helped him, and upon our review of the prosecutor's closing argument, we have found no mention of Montemayor's family helping him or an objection to such statements. We overrule Montemayor's sixteenth issue.

XI. RE-SENTENCING

By his seventeenth issue, Montemayor contends that "the [trial court] erred in re-sentencing the Defendant after he had already been sentenced."[15] Specifically, Montemayor argues that it is unlawful for a trial court to re-sentence a defendant by imposing a longer sentence than had been imposed prior to the re-sentencing of the defendant. Although Montemayor cites authority for the proposition that if a trial court properly sentences a defendant, the trial court may not re-sentence the defendant to a longer sentence, *see Harris v. State*, 153 S.W.3d 394 (Tex. Crim. App. 2005), he provides no substantive analysis regarding how the trial court erred here. In this case, the trial court sentenced Montemayor to life and then "re-sentenced" him to life without parole. *See* TEX. PENAL CODE ANN. § 12.31 (West, Westlaw through 2015 R.S.) ("An individual adjudged guilty of a capital felony in a case in which the state seeks the death penalty shall be punished by imprisonment in the Texas Department of Criminal Justice for life without parole or by death.").

Nonetheless, this situation is distinguishable from *Harris*. In *Harris*, the trial court sentenced the defendant to ten years' incarceration for possession of more than five pounds but less than fifty pounds of marihuana, a third-degree felony. *Harris*, 153 S.W.3d

[15] On February 14, 2014, the trial court stated that the jury had found Montemayor guilty of capital murder and sentenced Montemayor to "life in the penitentiary." On February 24. 2014, the trial court held a hearing for clarification of sentencing and state's oral motion to withdraw original exhibit. At this hearing, the trial court stated:

> Mr. Montoya, the jury found you guilty of capital murder, and the sentence is life in the penitentiary without parole. That's the part the last time you were here I failed to put on the record, that is, without parole. So I needed to bring you back so that you could be told that.
>
> I think your attorneys have talked to you about it. I know we mentioned it throughout, but I need to have mentioned it at the sentencing phase.

at 395; *see* TEX. HEALTH & SAFETY CODE ANN. § 481.121(b)(4) (West, Westlaw through 2015 R.S.). The next day, the trial court recalled the defendant, and explained that the State had previously submitted evidence of prior felony convictions for enhancement purposes, and the trial court had found those allegations to be true. *Id.* Accordingly, pursuant to Texas Penal Code section 12.42(d), the trial court sentenced the defendant to twenty-five years' incarceration. *Id.*; *see* TEX. PENAL CODE ANN. § 12.42(d) (West, Westlaw through 205 R.S.) (providing for a minimum of twenty-five years' incarceration when the State provides that the defendant has been previously convicted of two felony offenses, among other things).

The court of criminal appeals reversed, concluding that the facts did not support the contention that the defendant's original sentence of ten years was statutorily unauthorized at the time that it was pronounced because at the time that the trial court pronounced the original ten-year sentence, it had not specifically found the enhancements to be true on the record. *Harris*, 153 S.W.3d at 396. At the time of its original ten-year sentence, the trial court had properly sentenced the defendant within the range of punishment for an un-enhanced offense. *Id.* at 397. The linchpin of the court of criminal appeals' decision was that the trial court had not found the enhancement to be true as required by section 12.42(d). *Id.* (citing TEX. PENAL CODE ANN. § 12.42(d)). The court of criminal appeals stated:

> The trial court's actions in this case were neither a mere correction of an unauthorized sentence, nor a nunc pro tunc order within the inherent authority of the court that would permit revision of the written judgment to comply with the oral pronouncement of sentence. The first sentence imposed was authorized by law, and the court's action on the second day was more than correcting a clerical error to make the judgment comply with the sentence pronounced. In the instant case, the trial court validly

> sentenced appellant one day, and the next day called appellant back and increased his sentence.

Id. at 397–98.

The court of criminal appeals distinguished its decision in *Harris* from *Cooper v. State*, 527 S.W.2d 898 (Tex. Crim. App. 1975). In *Cooper*, after the defendant pleaded guilty to the offense of delivery of heroin, the trial court assessed punishment of four years' incarceration. *Id.* Subsequently, the trial court held a hearing with the defendant and his trial counsel present wherein it announced that "it had discovered that the minimum punishment fixed by the applicable law for delivery of heroin is five years, and accordingly, over appellant's objection, set aside the punishment and sentence, assessed punishment at five years . . . ." *Id.* at 399. The court of criminal appeals found that the trial court had not erred, concluding that "the trial court was not authorized to assess the punishment at 4 years because such period is not within the range set forth in the statutes . . . ." *Id.* The court held that the original four-year sentence was void. *Id.* The court reasoned that "[t]he original punishment and sentence being void, the trial court acted properly and within his authority in assessing a lawful punishment at the subsequent hearing, and in pronouncing sentence based on such punishment" and "[t]he fact that the punishment of five years, being the minimum authorized by law, exceeds the unauthorized, void punishment of four years does not present a double jeopardy problem." *Id.*

We find the facts of this case analogous to the facts in *Cooper*. *See id.* Here, Montemayor was convicted of capital murder, which requires a sentence of life in prison without the possibility of parole. *See* TEX. PENAL CODE ANN. § 12.31(a)(2) (setting out that the mandatory sentence of a capital murder conviction is "life without parole, if the individual committed the offense when 18 years of age or older"). *See id.* Thus, under

section 12.31(a)(2), the trial court was not authorized to assess a punishment other than life without the possibility of parole. *See id.*; *see also Cooper*, 527 S.W.2d at 399. We overrule Montemayor's seventeenth issue.

XII. CONCLUSION

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.