NUMBER 13-15-00353-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

ANTONIO SANTOS, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 138th District Court of Cameron County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Rodriguez and Hinojosa
Memorandum Opinion by Chief Justice Valdez

A jury found appellant Antonio Santos guilty of murder, and the trial court sentenced him to thirty years in prison. *See* TEX. PENAL CODE ANN. § 19.02 (West, Westlaw through 2017 1st C.S.). Santos contends on appeal that: (1) he was denied the right to a speedy trial; (2) the evidence was legally insufficient; and (3) the jury charge

erroneously omitted the lesser-included offense of criminally negligent homicide. We reverse and remand for a new trial due to jury charge error.

I. BACKGROUND

In 2014, the State charged Santos with murder. Specifically, the State alleged in the indictment that, in October 1998, Santos intentionally or knowingly caused his wife's death "by impeding [her] breath or circulation with [his] hand or with an object unknown to the [g]rand [j]ury." This was not the first time Santos had faced an accusation regarding his wife's death. Santos had been previously indicted for murder in the winter of 1998, but the prosecutor assigned to the case at that time dismissed the indictment within months, citing, as the basis for dismissal, the need "for further investigation and additional forensic testing." The record does not indicate whether the State took any action to further investigate the case in the fifteen-year period that elapsed between dismissal of the first indictment and re-indictment. Nevertheless, the State re-indicted Santos in 2014. This re-indictment prompted Santos to file a motion to dismiss on speedy trial grounds, which the trial court denied. The case then proceeded to a trial on the merits, during which the jury heard the following evidence.

A. Santos Calls 911

On October 12, 1998, around midnight, Santos called 911 requesting emergency assistance at his residence in Brownsville, Texas. Santos communicated the following information to the 911 operator about the emergency:

> DISPATCHER: 911, what's your emergency?
>
> . . .
>
> SANTOS: My wife passed out.

. . .

DISPATCHER: How old is your wife?

SANTOS: Uh, 22.

DISPATCHER: Is she pregnant or anything?

SANTOS: No. I don't know. She is bleeding through her nose and she is bleeding through her mouth. She's got a heartbeat but very shallow breathing, I think you call it.

DISPATCHER: And she is breathing through the . . . nose?

SANTOS: Yeah. A little bit.

DISPATCHER: On the mouth?

SANTOS: A little bit too.

DISPATCHER: Did she suffer any illness or anything?

SANTOS: No, ma'am.

. . .

DISPATCHER: Your name[?]

SANTOS: Tony.

. . .

DISPATCHER: Okay. And all of a sudden she just fainted?

SANTOS: Well I was asleep and I don't know about 10 minutes ago, or something like that.

DISPATCHER: Uh-huh.

SANTOS: I heard her call out, Tony.

DISPATCHER: Uh-huh.

SANTOS: You know, it's kinda like a faint sigh.

DISPATCHER: Uh-huh.

SANTOS: I do really get up right away. So I got up.

DISPATCHER: Uh-huh.

SANTOS: And she was laying on the kitchen floor.

DISPATCHER: Okay. . . . Where do you have her right now, sir?

SANTOS: She is on the kitchen floor. I've tried water. I've tried mouth to mouth resuscitation.

. . .

DISPATCHER: Could you tilt her head, maybe, put a pillow on her back or anything?

SANTOS: On the back of her head?

DISPATCHER: Yeah. . .

. . .

DISPATCHER: Okay . . . [I]s she breathing? Can you feel her breathing? Can [you] feel her breathing or anything?

SANTOS: Very lightly.

DISPATCHER: Very shallow.

SANTOS: I hear, like, a gargle when she breathes.

DISPATCHER: Okay. So she is bleeding through the mouth too, right?

SANTOS: Yeah.

. . .

DISPATCHER: She just—all of a sudden, she just fainted, correct?

SANTOS: I'm guessing. Like I said, I was asleep. I just heard, like, a faint, Tony. I jumped up and she was laying on the—on the kitchen floor.

DISPATCHER: Uh-huh.

SANTOS: Oh, God. I'm tired of trying to. . .

DISPATCHER: Uh-huh.

SANTOS: Make her breathe.

DISPATCHER: Okay. We okay. Hold on. Don't hang up, okay. Hold on. So I can see—see our status. Hold on. Sir? Sir? Sir? Sir? Sir?

(End of 911 call)[1]

The first person at the scene was a Brownsville paramedic. The paramedic testified that he discovered the decedent lying face up on the kitchen floor and that she had blood on her nose and mouth and a large bruise on her chest. The paramedic also testified that he noticed that the decedent's wind pipe (or trachea) was deviated to the right, which he explained was possibly attributed to the large bruise that appeared on her chest. The paramedic testified that he checked for a pulse, but found none. The paramedic further testified that he transported the decedent to a hospital where doctors tried to revive her.

Shortly after the paramedic transported the decedent to the hospital, a Brownsville police investigator arrived at Santos's residence. The investigator testified that, although he found no evidence of forced entry into the home, the house appeared to be in

[1] An audio recording of this 911 call was admitted into evidence. Santos requested a written transcript of the 911 call for purposes of appeal, but none was provided to him by the court reporter. In his briefing to this Court, Santos provides a written transcript of the 911 call, certified by an official transcriptionist. The State now objects to this written transcript, arguing that it constitutes an attempt to impermissibly "modify the evidentiary record." We disagree. The transcript is exactly what the jury heard on the 911 call, only in written form. Furthermore, the State does not argue, and we do not find, that the written transcript is inaccurate in any way. Accordingly, we overrule the State's objection.

disarray—"[l]ike there had been problems." The investigator elaborated that there was broken glass on the floor, clumps of hair strewn about the living room and kitchen floor, and drops of blood on the wall. The investigator also found a dirty pillow on the floor containing a red smear later determined to be blood. Testing of the pillow revealed that it carried a mixture of DNA from both Santos and the decedent, though not necessarily blood DNA from each person.[2]

Additionally, the investigator found a rolled-up dollar bill with blood on the tip. The investigator testified that drug users have been known to roll up a dollar bill to snort cocaine. However, the blood was never tested to determine its donor.

B. Santos Provides a Written Statement to the Investigator

After observing the scene, the investigator asked Santos to accompany him to the police station for an interview, and Santos agreed. At the police station, Santos waived his *Miranda* rights and provided the following written statement regarding the events that transpired earlier that night:

> My wife and I went to bedroom and were watching television. I know that it was Top Gun that was showing on cable. I do not remember the channel it was on. I remember it was a [sic] Top Gun because my wife mentioned to me that Tom Cruise was such a good looking guy. We then had some fore play and I later fell asleep.
>
> Later I was awaken [sic] by a voice calling out my name. I recognized the voice as belonging to my wife [decedent]. It was not coming from the bedroom so I got up from bed and saw that she was laying on the kitchen floor face up. She was there naked and I the [sic] went over to her

[2] The DNA analyst could not say that the DNA mixture found on the pillow was blood DNA, only that it contained DNA from both Santos and the decedent. The analyst elaborated:

> [I]f [a blood stain] is on top of a stain, for example, saliva, the blood will mask that saliva stain just because it's darker. It will tend to hide it. So when we get the profile, even though we did extract or test [the] blood stain [on the pillow], it's not to say that there could have been a saliva sample underneath of that stain, so the DNA result is a mixture of two DNA profiles.

and I believe that I remember that she had blood coming out her mouth. I tried mouth to mouth at this time but she did not responded [sic]. I also hit her a couple of times on the chest because I could not hear a heartbeat. When I tried to give her mouth to mouth I found that her jaws were locked up tight as I tried to open her mouth I cut right hand fingers with her teeth.

I then shook her and dragged her to the living room. I grabbed from under her shoulders. While I was there in the living room I then shook again and I then slapped to try and wake her up. I believe that I slapped more then [sic] five times in this attempt to wake her up. I sat her up and placed her between my legs. I was shaking her to wake her up. I then dragged her to the kitchen where I had found her. Once back in the kitchen I first grabbed a glass and threw water on her and then I got some tupper ware and threw some more water on her.

After this I called Joe up which is my best friend and I was freak [sic] out and did not know what to do. I told him Joe that [my wife] is passed out and I [sic] that I did not know what to do. He said to call someone but I do not remember what he said. I then hung up and went back to [my wife] and I tried to wake her up again by shaking her and giving her mouth to mouth. Nothing happened so I then called 911. I did not call 911 first because I'm alone here in Brownsville and I did not know what to do, so I just called Joe as I was freaked out. While there in the kitchen I had grabbed her by the hair while trying to pick her and roll her over trying to place her on her side. The kitchen floor was very wet from the water I had thrown which caused the floor to be slippery and it caused me to slip all over the kitchen.

To the best of my knowledge [my wife] did not have any type of medical conditions. I tried CPR because I had learned it while I was in the military. That's why I did the mouth to mouth, I hit her chest to try to resuscitate her heart. I know that it was more the five times that I hit her chest as you can see the bruise that was left there. I do not know what happened to her to cause her pass out. All I know is that I tried everything that I know to save her.

[My wife] and I have been married since [March 28, 1998]. I have known her for about five years. We did not have any type of marital problems or any other type.

C. Medical Opinions

The jury heard medical opinions from (1) Dr. Marjorie Cornwell, (2) Dr. Randall Frost, and (3) Dr. Thomas Gonzalez regarding the cause of (and circumstances surrounding) the decedent's death. We set out what the jury heard from each doctor separately below.

1. Dr. Marjorie Cornwell

Soon after the decedent was pronounced dead, government officials ordered that an autopsy be performed by Dr. Marjorie Cornwell. Dr. Cornwell was a certified medical doctor at the time of the autopsy, in 1998, but she had not yet gained official certification as a forensic pathologist. She did, however, obtain such certification by the time of trial in 2015. Given her belated certification in forensic pathology, the trial court qualified Dr. Cornwell as an expert but instructed her to testify only in terms of "medical probability"—as opposed to "medical certainty"—when opining about the cause of the decedent's death. After being so instructed, the State admitted a copy of Dr. Cornwell's autopsy report, in which she found that:

> the pattern of abrasion over the [decedent's] nose, lacerations to the mouth, and contusions to the left cheek can be consistent with external force to cover and close the airway (nose and mouth). This does not appear to be a natural death. Manner of death appears to be homicide and being asphyxial and consistent with suffocation.

The prosecutor drew the jury's attention to certain bruising found underneath the decedent's chin—bruising that, according to Dr. Cornwell, meant that there had "been pressure to close the nose, cover the nose, cover the mouth."

In her trial testimony, Dr. Cornwell acknowledged that she did not have the benefit of an accurate toxicology report when she rendered her initial opinion regarding the cause of the decedent's death. Dr. Cornwell explained that the urinalysis came back negative for cocaine because water accidentally leaked into the decedent's bladder, thereby

diluting the sample. Dr. Cornwell admitted that only later did she learn through a blood toxicology that the decedent died with what could be considered an acute level of cocaine in her system. However, Dr. Cornwell maintained that her initial opinion regarding the cause of death would not have changed even had she known about the cocaine. Dr. Cornwell elaborated that, if anything, the cocaine may have contributed to additional excitability to the heart, which "would probably have brought about [the decedent's] heart beating so much more rapidly that it would have been a quicker death [by suffocation]."

2. Dr. Randall Frost

a. Second Opinion

After Dr. Cornwell submitted her autopsy report, the prosecutor requested a second medical opinion—this time from Dr. Randall Frost, a certified forensic pathologist. After reviewing Dr. Cornwell's autopsy report, as well as the blood toxicology, Dr. Frost concluded that the cause of death was "undetermined" and that "others might prefer to list the Cause of Death as Cocaine Intoxication, with the Manner of Death as Accident." In his response, Dr. Frost elaborated:

> The findings in this case are indeed consistent with an assault, as noted by Dr. Cornwell. Additionally, the autopsy findings are also consistent with an asphyxial death by suffocation (or smothering), also as opined by Dr. Cornwell. However, none of the findings are specific or diagnostic for either an assault or a homicidal asphyxiation. The major complicating factor in this case is a very high level of cocaine found in the decedent's blood.
>
> Cocaine toxicity may take many forms, but it is often associated with seizures or with a condition known as an excited delirium.
>
> Seizures may be fatal, and may cause violent body movements and falls which could account for many of the injuries noted on the body. In particular, the oral mucosa lacerations noted are suggestive of seizure activity. However, again, there are no autopsy findings which are specific for the diagnosis of a seizure death. Such a diagnosis must be inferred from the autopsy findings and scene information.

An excited (or agitated) delirium is a psychotic state often associated with cocaine intoxication. In such a state, the victim may be violent, paranoid, combative, and may hallucinate. Victims often disrobe and may engage in bizarre or self destructive behavior (head banging, punching out glass, etc.). They are at high risk for sudden death, particularly if restrained. Obviously, such a condition may result in a variety of injuries to the body of the decedent. It could even serve to explain blood on many areas at the death scene and clumps of hair strewn about.

Another possible explanation for trauma noted at autopsy could be poorly performed cardiopulmonary resuscitation. Lip injuries could have been caused by trauma during intubation by EMS personnel. It may be, however, that paramedics could testify that these injuries were present upon their arrival. Petichiae and subconjunctival hemorrhage of the eyes are, indeed, often seen with asphyxial deaths, though not as commonly with suffocation as with strangulation. However, they are not specific for these conditions, being seen in a variety of natural and accidental deaths. They may simply be related to a prone position after death also. I do not know the position the decedent was actually found in by her husband.

These points being made, the statements by the decedent's husband are not very consistent with either of the conditions described above. He states that he heard his wife call out to him (in a weak voice, according to verbal reports). If the decedent had a seizure, she would probably not be able to call out at all. If she were in an excited delirium state, she would not be expected to call out weakly. Rather, screaming or yelling would be more likely. Death, if it occurred from this condition, would probably be very sudden, during the violent activities.

In summary, while the condition of the body and the circumstances of death known to me are consistent with an assault with an asphyxial death, they are not necessarily specific or diagnostic for such. In this case, the diagnosis of an asphyxial death requires the absence of another equally tenable or more tenable cause of death. In my opinion, the presence of very high levels of cocaine (nearly 5 mg/L) and its major metabolite do provide another possible explanation for many of the injuries found, and for the death of [the decedent]. For this reason, I believe that the death is best certified as Cause and Manner of Death **Undetermined**. Others might prefer to list the Cause of Death as **Cocaine Intoxication**, with the Manner of Death as **Accident**.

(Bolded in original).

The record shows that the prosecutor dismissed the first indictment the same month he received the second opinion from Dr. Frost.

b. Revised Second Opinion

Shortly after the prosecutor dismissed the first indictment, Dr. Frost submitted a "revised opinion letter" that incorporated "the results of blood DNA profiling and blood spatter analysis." In the letter, Dr. Frost revised his opinion to state that "the **cause of death** is most likely due to **asphyxia, probably by smothering**. Consequently, the manner of death is appropriately classified as **homicide**" (bold in original). Dr. Frost elaborated:

> The blood spatter analysis indicates two areas of impact spatter originating several feet from the floor. While it would be possible for a victim in an excited delirium state to injure herself and then smear or drip blood over a significant area, this activity would not explain an impact occurring well above the floor. An altercation, with blows to the decedent in a standing, kneeling, or other similar posture would be more consistent with this finding. The finding of the suspect's blood on the bathroom sink is consistent with a reported injury to his hand. If a full description of the injury and its location can be provided to me, I may be able to render an opinion as to its possible origins.

Despite receiving Dr. Frost's revised opinion, the State did not re-indict at that time.

3. Dr. Thomas Gonzalez

After the State presented its case in chief, Santos called Dr. Thomas Gonzalez, a licensed psychiatrist, to testify about the psychological and physiological effects of acute cocaine intoxication. Regarding the psychological effect of cocaine, Dr. Gonzalez testified that people can become "aggressive, violent, they can kick, they can punch, they can scratch, they can pull hair, they can do all kinds of violent things. They can either do it out of anger or they can do it out of confusion." Regarding the physiological effect of cocaine, Dr. Gonzalez testified that it can lead to mucus buildup in a person's airway

passage, causing the person to asphyxiate and die. Dr. Gonzalez testified that the decedent's toxicology report showed that she had actively used cocaine in the two-to-three-day period leading up to her death and that the decedent had a level of cocaine in her system that could be considered lethal.

On cross examination, the prosecutor emphasized that Dr. Gonzalez was neither present when the incident happened nor certified in forensic pathology. The prosecutor also intimated that Santos's admission to employing resuscitative measures prior to calling 911 could be considered "violent conduct." Additionally, the prosecutor referred to Santos's admitted familiarity with CPR during his time in the military, intimating that Santos may have been "disoriented" because the cardiac thumps he gave to the decedent left a noticeably large bruise on her chest area. In response to this line of questioning by the prosecutor, Dr. Gonzalez testified that a person may not perform CPR properly while in a state of hyperarousal or desperation. Dr. Gonzalez also testified:

> The cardiac thump[,] how effective is it if you don't know exactly what you're doing at the exact moment and if you don't have the medical equipment to do it, you know, how effective is it that's up for discussion. But is it the right move? Is it the right intervention? Is this sure? I mean, there was no heartbeat.

D. Charge Conference

At the close of the evidence, Santos specifically requested that the jury be instructed to consider criminally negligent homicide, a state jail felony, as an alternative to murder. *See* TEX. PENAL CODE ANN. § 19.05(a) (West, Westlaw through 2017 1st C.S.) (providing that a person is guilty of criminally negligent homicide "if he causes the death of an individual by criminal negligence"). In support of this request, Santos's counsel argued

> one, Mr. Santos has allegedly provided imperfect administration of CPR; two, calling [Joe] before 911; number three, that he allegedly performed the cardiac thump in an improper area with using improper force and improper manner, and also that he allegedly used CPR on a person that was already living at that particular time while he shouldn't have been. And lastly, the fact that he was slapping, pulling the hair, throwing water on [her] . . . . [Santos] may have participated in the use of narcotics with [the decedent], and that as a result of that his efforts to resuscitate, instead of resuscitating may have caused her death, her demise.

The State objected to submission of criminally negligent homicide in the jury charge. The trial court sustained the State's objection and refused the instruction, leaving the jury the sole option either to convict Santos of murder or to acquit him altogether.

Thereafter, the jury heard closing arguments from both sides, retired to deliberate, and came back with a verdict of guilty on murder. The trial court sentenced Santos to thirty years in prison, and this appeal followed.

II. SPEEDY TRIAL

By his first issue, Santos contends that the trial court erred in denying his motion to dismiss on speedy trial grounds.[3] Santos argues that the State violated his right to a speedy trial by waiting over sixteen years to bring him to trial.

A. Applicable Law and Standard of Review

The Sixth Amendment guarantees the defendant a speedy trial. U.S. CONST. amend. VI. In addressing a speedy-trial claim, the United States Supreme Court has laid out four factors that a court should consider: "(1) the length of delay, (2) the State's reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4)

[3] If we were to sustain this issue, Santos would be entitled to dismissal of the indictment with prejudice, which would afford him a higher form of relief than a new trial due to jury charge error. For this reason, we must address Santos's speedy-trial issue. *See* TEX. R. APP. P. 47.1 ("The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal").

prejudice to the defendant because of the length of delay." *See Barker v. Wingo*, 407 U.S. 514, 530 (1972).

When reviewing a trial court's application of the *Barker* factors, we use the same standard of review as in the context of a motion to suppress. *See Gonzales v. State*, 435 S.W.3d 801, 808–09 (Tex. Crim. App. 2014). That is, we give almost total deference to historical findings of fact of the trial court that the record supports but review de novo "whether there was sufficient presumptive prejudice to proceed to a *Barke*r analysis and the weighing of the *Barker* factors, which are legal questions." *Id*. We will address the four *Barker* factors separately.

B. Discussion

1. Length of Delay

Before a court engages in an analysis of each *Barker* factor, the defendant must "first make a threshold showing that 'the interval between accusation and trial has crossed the threshold dividing ordinary delay from 'presumptively prejudicial' delay." *Id.* (quoting *Doggett v. United States.*, 505 U.S. 647, 651–52 (1992)). "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker*, 407 U.S. at 530. We measure the delay from the time the defendant is formally accused or arrested to the time of trial. *See Pinnock v. State*, 105 S.W.3d 130, 135 (Tex. App.—Corpus Christi 2003, no pet.) (citing *United States v. Marion*, 404 U.S. 307, 313 (1971)).

a. Gap Years

The record shows that the State voluntarily dismissed the first indictment in 1999 and then subsequently re-indicted in 2014, leaving a fifteen-year period during which no

formal accusation was pending against Santos. As a threshold matter, we must address whether these gap years count toward the speedy trial computation in calculating the length of delay. *See id*. According to our research, when the State voluntarily dismisses an indictment and subsequently re-indicts, the time between the two indictments is not counted for speedy trial purposes unless the State delayed re-indicting in bad faith. *See United States v. MacDonald*, 456 U.S. 1, 8 (1982); *United States v. Colombo*, 852 F.2d 19, 23 (1st Cir. 1988); *see also State v. Guerrero*, 110 S.W.3d 155, 159 (Tex. App.—San Antonio 2003, no pet.). Bad faith in the speedy trial context requires a showing that "the State was trying to gain a tactical advantage [by delaying the] defendant's case." *Hopper v. State*, 520 S.W.3d 915, 928 (Tex. Crim. App. 2017). Here, there has been no showing that the State delayed re-indicting Santos for fifteen years to gain a tactical advantage in the case. Absent evidence of bad faith, it would be improper to count the period between the two indictments. *See MacDonald*, 456 U.S. at 8; *Colombo*, 852 F.2d at 23; *Guerrero*, 110 S.W.3d at 159.

Santos maintains, however, that we should treat the first indictment as though it had never been dismissed at all, because the motion to dismiss expressly stated that the indictment was being dismissed for further investigation and forensic testing, which allegedly never happened prior to re-indictment. Therefore, according to Santos, we should count the gap years. However, Santos provides no legal authority that, even if the State dismisses an indictment in good faith, the dismissal is ineffective if the State fails to fulfill the reason for dismissal prior to re-indictment, and we find none. Absent evidence of bad faith, we decline Santos's invitation to adopt a position for which we have found no legal authority. Here, the motion to dismiss expresses the reason why the State

dismissed the first indictment—i.e., "for further investigation and additional forensic testing"—but dismissal was not expressly conditioned on anything occurring in relation to that reason, making the dismissal immediately effective.

b. Countable Delay

Excluding the period between the indictments, the length of countable delay in this case is still twenty-two months, spanning over two periods: (1) seven months between Santos's initial arrest and dismissal of the first indictment (Period One)[4]; and (2) fifteen months between the second indictment and Santos's trial, (Period Two).[5] The United States Supreme Court has observed that a delay approaching twelve months is presumptively prejudicial depending on whether the case is simple or complex. *See Doggett*, 505 U.S. at 652 n.1. It is true that the delay here spans almost twice the length as the twelve-month threshold set out by the Supreme Court. *See id*. However, Santos faced one of the most serious accusations tolerated by our criminal law—first-degree murder—in a complex case with varying medical opinions concerning the cause of (and circumstances surrounding) the decedent's death, thereby necessitating more than ordinary preparation of the case in advance of trial. Balancing these considerations, we nevertheless hold that, at twenty-two months, the length of countable delay stretches into presumptively prejudicial delay—thus triggering application of the remaining three *Barker* factors. *See id*.; *see also Griffith v. State*, 976 S.W.2d 686, 692 (Tex. App.—Tyler 1997, pet. ref'd) (holding that delay of twenty-six months, which included twenty-one months

[4] Period One spans from October 1998 to May 1999.

[5] Period Two spans from January 2014 to May 2015.

from first indictment until it was dismissed and five months from second indictment until trial, was sufficient to trigger analysis of the remaining three *Barker* factors).

We conclude that *Barker's* first factor weighs in Santos's favor, though not as heavily in his favor as it would have weighed: (a) had the period between indictments been counted, and (b) had Santos been accused of a minor offense involving simple issues. *See Gonzales*, 435 S.W.3d at 809 (observing that "[w]hen the length of delay stretches well beyond the bare minimum needed to trigger a full *Barker* analysis, the length of a delay weighs against the State, and the longer the delay, the more the defendant's prejudice is compounded").

2. Reason for Delay

When, as here, the length of the delay triggers a speedy trial analysis, it is the State's burden to excuse the delay. *See Griffith*, 976 S.W.2d at 693. "When assessing the reasons for delay, we assign different weights to different reasons." *Gonzales*, 435 S.W.3d at 809-10. For example, a deliberate attempt by the State to delay the trial to hamper the defense should be weighed "heavily against the State." *Id*. On the other hand, a more neutral reason "such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the [State] rather than with the defendant." *Id*. When the record is silent regarding the reason for the delay, "a court may presume neither a deliberate attempt on the part of the State to prejudice the defense nor a valid reason for the delay." *Dragoo v. State*, 96 S.W.3d 308, 314 (Tex. Crim. App. 2003).

Santos focuses almost exclusively on the State's failure to explain delays between the indictments. However, the State's failure to explain delays during this period is of no consequence to our speedy trial analysis because that period does not factor into the speedy trial calculation. *See Guerrero*, 110 S.W.3d at 160 (examining the State's excuse for delays occurring only during periods counted in the speedy trial calculation). Instead, we examine the reasons, if any, for delays that count towards the speedy trial calculation—i.e., Period One and Period Two.

a. Period One—From October 1998 to May 1999

Period One spans seven months—from initial arrest to dismissal of the first indictment—during which the following events took place: (1) Santos filed several discovery motions; (2) Dr. Cornwell submitted her final autopsy report to the State; and (3) the trial court granted an "agreed" motion for continuance. None of these events reflect a deliberate attempt by the State to delay a trial to hamper the defense. *See Traylor v. State*, 534 S.W.3d 667, 675 (Tex. App.—Corpus Christi 2017, pet. granted).

b. Period Two—From January 2014 to May 2015

Period Two spans fifteen months—from re-arrest to trial—during which the following events took place: (1) Santos filed several pretrial motions, including the motion to dismiss on speedy trial grounds; (3) Santos filed a motion to depose several of the witnesses; (4) Santos requested a continuance; (5) Santos requested another continuance after replacing his court-appointed counsel with counsel of his choice; and (5) Santos filed several more pretrial motions, including an amended motion to dismiss on speedy trial grounds and a *Daubert* challenge to the admissibility of Dr. Cornwell's

testimony. As with Period One, none of these events reflect a deliberate attempt by the State to delay a trial to hamper the defense. *See id*.

We conclude that this factor does not weigh heavily against the State. *See id*.

3. Assertion of the Right to Speedy Trial

There is no indication that Santos asserted his right to speedy trial during Period One. However, the record shows that Santos promptly filed his motion to dismiss on speedy trial grounds less than one month into Period Two, and he followed up by filing an amended motion to dismiss after retaining substitute counsel. Regarding Santos's motions to dismiss, we note that the Texas Court of Criminal Appeals has observed that a defendant's speedy trial claim is weakened when he raises the claim through a motion to dismiss. *Phillips v. State*, 650 S.W.2d 396,401 (Tex. Crim. App. 1983) (observing that "although a motion to dismiss notifies the State and the court of the speedy trial claim, a defendant's motivation in asking for dismissal rather than a prompt trial is clearly relevant, and may sometimes attenuate the strength of his claim"). Nevertheless, we conclude that this factor weighs in Santos's favor, though it would have weighed more heavily in his favor had he requested a speedy trial rather than outright dismissal of the charge. *See id*.

4. Prejudice

The last *Barker* factor looks at whether the defendant suffered prejudice because of the delay. *See State v. Munoz*, 991 S.W.2d 818, 826 (Tex. Crim. App. 1999). Initially, we note that courts—including this Court—routinely hold that a defendant's acquiescence in some of the delay rebuts a presumption of prejudice resulting from excessive delay. *See Doggett*, 505 U.S. at 658; *Shaw*, 117 S.W.3d at 890; *see also Traylor*, 534 S.W.3d

at 677; *Berlanga v. State*, No. 13-14-00717-CR, 2016 WL 3225292, at *10 (Tex. App.—Corpus Christi June 9, 2016) (mem. op., not designated for publication). Here, the record shows that Santos acquiesced in some of the countable delay when he agreed to continue the case during Period One and when he twice requested to continue the case during Period Two. We conclude that Santos's acquiescence in some of the delay rebuts any presumption of prejudice that can be said to exist in this case. *See Hopper v. State*, 495 S.W.3d 468, 478 (Tex. App.—Houston [14th Dist.] 2016), *aff'd*, 520 S.W.3d 915 (Tex. Crim. App. 2017); *Traylor*, 534 S.W.3d at 677. We now determine whether actual prejudice has been shown on this record.

Courts assess prejudice "in the light of the interests which the speedy trial right is designed to protect." *Munoz*, 991 S.W.2d at 826. These interests include: "(1) preventing oppressive pretrial incarceration, (2) minimizing anxiety and concern of the accused, and (3) limiting the possibility that the defense will be impaired." *Id*. We discuss the applicability of each interest separately below.

a. Oppressive Pretrial Incarceration

The length of time Santos spent in custody before trial is not clear from the record, and Santos does not argue on appeal that this interest is implicated. Thus, the record does not support a finding that prejudice, if any, stems from oppressive pretrial incarceration during the period of countable delay. *See id*.

b. Anxiety

There was no evidence that Santos experienced anxiety during the periods of countable delay, and Santos does not argue that this interest is implicated. Thus, the

record does not support a finding that prejudice, if any, stems from anxiety experienced by Santos during the period of countable delay. *See id*.

c. Impairment of Defense

Of the three interests relevant to *Barker*'s prejudice factor, "the most serious is [this interest], because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id*.; *see United States v. Marion*, 404 U.S. 307, 332 n.4 (1971) (recognizing that a delay in prosecution can result in the loss of physical evidence, the unavailability of potential witnesses, and the impairment of the ability of the defendant and his witnesses to remember the events in question). Affirmative proof of prejudice is not essential to every speedy trial claim, because excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or even identify. *See Doggett*, 505 U.S. at 655 (observing that "impairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony can rarely be shown");

Santos argues the State's alleged failure to afford him a speedy trial impaired his defense in the following ways: (1) several witnesses either could not be located or could not remember relevant events; and (2) medical records concerning emergency treatment the deceased received at the hospital on the night of the incident have been lost. We address these items separately below.

i. *Witnesses*

Impairment of defense based on a witness's unavailability or dimming memory must be supported by a showing that, among other things, the witness's availability or memory is in some way significant or material to the outcome of the case. *See Munoz*,

991 S.W.2d at 829. Here, Santos makes a bare assertion of dimming memory without showing that any witness experienced a memory lapse significant to the outcome of the case. Such a bare assertion is insufficient to constitute a showing of impairment to his defense. *See id*. (observing that a bare assertion of dimming memories does not constitute a showing of impairment to a defense).

Aside from this bare assertion, the record below shows that the prejudice inquiry concerning witnesses centered almost exclusively on one witness—Joe Manrique, who Santos referred to in his written statement to police as "Joe." Joe died in 2012. Speedy-trial cases surveyed by this Court have found that, when a witness—even a material witness—dies prior to trial, it does not factor into the assessment of prejudice unless the witness died during a period of delay attributable to the State. *See State v. Davis*, No. 03-15-00620-CR, __S.W.3d__, 2017 WL 4584327, at *13 (Tex. App.—Austin Oct. 12, 2017, no pet.); *see also Deeb v. State*, 815 S.W.2d 692, 706 (Tex. Crim. App. 1991); *McGregor v. State*, 394 S.W.3d 90, 116 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd). Here, Joe died during the period between indictments—a period which, as previously noted, is not counted against the State for speedy trial purposes. *See MacDonald*, 456 U.S. at 8; *Colombo*, 852 F.2d at 23; *Guerrero*, 110 S.W.3d at 159. Accordingly, we need not address the extent, if any, to which Joe's testimony would have been material to Santos's defense.

In any event, the record shows that Joe made a statement to detectives shortly after the incident, in which he recounted what Santos told him over the telephone regarding the deceased's condition. From reading Joe's statement, it appears that Santos told Joe essentially the same thing he told the 911 operator—i.e., that he found

his wife unresponsive on the kitchen floor. Based on Joe's statement, the trial court determined that Joe would have offered little, if anything, in aid of Santos's defense. We agree with the trial court. To the extent that Joe would have testified consistently with his prior statement, the most we can confidently say is that Joe would have been able to corroborate Santos's admission to calling a friend prior to reporting his wife's condition to 911. Other than that, we cannot say that Joe would have offered anything the jury did not already know (or could not have learned) through other available sources.

ii. *Medical records*

The record shows that, in 2014, shortly after being re-indicted for murder, Santos subpoenaed the decedent's hospital records from the night of her death. However, by the time of Santos's request in 2014, no records could be found because the hospital retained records only as far back as ten years from the date of the request, as per its records-retention policy. Without the hospital records, there is simply no way to determine whether the records would have helped or would have hurt Santos's defense. Therefore, prejudice regarding lost medical records is inconclusive. *See Doggett*, 505 U.S. at 655 (observing that "time can tilt the case against either side [and that] one cannot generally be sure which [side] it has prejudiced more severely").

d. Summary of Prejudice Analysis

To summarize, Santos acquiesced in some of the delay, thereby rebutting a presumption of prejudice. And actual prejudice, if any, stems only from the impairment-of-defense interest, but that interest was not shown to be seriously undermined by Joe's unavailability or the loss of the decedent's hospital records. We conclude that *Barker's* prejudice factor weighs neither for nor against the State.

5. Balancing the *Barker* Factors

Having addressed the four *Barker* factors, it is necessary to balance them. The length of countable delay is twenty-two months. Given the complicated nature of the case and the seriousness of the accusation, this delay is not terribly excessive as compared to other speedy trial cases,[6] but it is nevertheless sufficient to trigger analysis of the second, third, and fourth *Barker* factors. *Barker*'s second factor does not weigh heavily against the State because none of the reasons for the countable delay involve a deliberate attempt by the State to hamper Santos's defense or gain a tactical advantage by delaying trial. *Barker*'s third factor weighs in Santos's favor because he promptly filed a motion to dismiss the second indictment on speedy trial grounds; however, Santos's speedy trial claim is weakened by the fact that he requested dismissal of the indictment rather than a speedy trial. Finally, *Barker*'s prejudice factor weighs neither for nor against the State because: (a) Santos acquiesced in some of the countable delay, thereby rebutting a presumption of prejudice; and (b) actual prejudice due to impairment of Santos's defense was not shown.

Having carefully considered the four *Barker* factors, we conclude that Santos's right to a speedy trial was not violated, and the trial court therefore did not err in denying his motion to dismiss. We overrule Santos's first issue.

III. LEGAL SUFFICIENCY AS TO CAUSATION

By his second issue, Santos contends that the State failed to prove beyond a reasonable doubt that he caused the decedent's death by suffocation because Dr.

[6] *See Doggett v. United States,* 505 U.S. 647, 651–52 (1992) (102-month delay); *Hartfield v. State*, 516 S.W.3d 57, 65 (Tex. App.—Corpus Christi 2017) (360-month delay), *cert. denied*, 138 S. Ct. 473, 199 L. Ed. 2d 374 (2017); *Berlanga v. State*, No. 13-14-00717-CR, 2016 WL 3225292, at *10 (Tex. App.—Corpus Christi June 9, 2016) (mem. op., not designated for publication) (seventy-two-month delay).

Cornwell could only say that it was medically probable he did.[7] Santos asserts it is always reasonable to doubt something that is only medically probable, and therefore, the proof is legally insufficient to satisfy the causation element of murder.

In conducting our legal sufficiency review, we must view "the evidence in the light most favorable to the jury's verdict and determine whether any rational trier of fact could have found [the causation element of murder] beyond a reasonable doubt." *Gross v. State*, 380 S.W.3d 181, 185 (Tex. Crim. App. 2012) (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)).

Regardless of whether Santos is right about the weight to be given Dr. Cornwell's medical opinion, there was other evidence available to support the causation element—chiefly, Dr. Frost's revised opinion letter, wherein he states that the manner of death is appropriately classified as homicide, "most likely due to asphyxia, probably by smothering." Santos does not address Dr. Frost's revised opinion or any other evidence relevant to the causation element but instead confines his argument solely to Dr. Cornwell's opinion.

Viewing the evidence in the light most favorable to the jury's verdict, we conclude that, irrespective of Dr. Cornwell's opinion, a rational jury could have found the causation element of murder beyond a reasonable doubt. *See id*. We overrule Santos's second issue.

[7] If we were to sustain this issue, Santos would be entitled to a judgment of acquittal on murder, which would afford him a higher form of relief than a new trial due to jury charge error. For this reason, we must address Santos's legal-sufficiency issue. *See* TEX. R. APP. P. 47.1.

IV. JURY CHARGE

By his third issue, Santos contends that the trial court erred in refusing to instruct the jury on criminally negligent homicide.

A. Standard of Review and Applicable Law

A two-step test exists for determining whether a trial court is required to give an instruction on a lesser-included offense. *See Sweed v. State*, 351 S.W.3d 63, 68 (Tex. Crim. App. 2011). Recently, the Texas Court of Criminal Appeals reiterated the two-step test in *Bullock v. State*:

> The first step is to determine whether the requested instruction pertains to an offense that is a lesser-included offense of the charged offense, which is a matter of law. Under this first step of the test, an offense is a lesser-included offense if it is within the proof necessary to establish the offense charged. . . .
>
> The second step in the analysis asks whether there is evidence in the record that supports giving the instruction to the jury. Under this second step, a defendant is entitled to an instruction on a lesser-included offense when there is some evidence in the record that would permit a jury to rationally find that, if the defendant is guilty, he is guilty only of the lesser-included offense. The evidence must establish that the lesser-included offense is a valid, rational alternative to the charged offense.
>
> More particularly, the second step requires examining all the evidence admitted at trial, not just the evidence presented by the defendant. The entire record is considered; a statement made by the defendant cannot be plucked out of the record and examined in a vacuum. Anything more than a scintilla of evidence is adequate to entitle a defendant to a lesser charge. Although this threshold showing is low, it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense, but rather there must be some evidence directly germane to the lesser-included offense for the finder of fact to consider before an instruction on a lesser-included offense is warranted. However, we may not consider the credibility of the evidence and whether it conflicts with other evidence or is controverted. Accordingly, we have stated that the standard may be satisfied if some evidence refutes or negates other evidence establishing the greater offense or if the evidence presented is subject to different interpretations.

509 S.W.3d 921, 924-25 (Tex. Crim. App. 2016) (internal citations and quotations omitted).

Jury charge error requires reversal when the defendant properly objected to the charge, and there was "some harm" to his rights. *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013); *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). Courts have routinely found some harm when the trial court's denial of a requested instruction on a lesser-included offense leaves the jury with the sole option either to convict the defendant of the greater offense or to acquit him. *See Saunders v. State*, 913 S.W.2d 564, 571 (Tex. Crim. App. 1995); *Gibson v. State*, 726 S.W.2d 129, 133 (Tex. Crim. App.1987); *Mitchell v. State*, 807 S.W.2d 740, 742 (Tex. Crim. App.1991); *Hayes v. State*, 728 S.W.2d 804, 810 (Tex. Crim. App. 1987). In such situations, "a finding of harm is essentially automatic" because there is a distinct possibility that "the jury, believing the defendant to have committed some crime, but given only the option to convict him of the greater offense, may have chosen to find him guilty of that greater offense, rather than to acquit him altogether, even though it had a reasonable doubt that he really committed the greater offense." *O'Brien v. State*, 89 S.W.3d 753, 756 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd). The erroneous omission of a requested lesser-included offense also is harmful when the penalty imposed for the greater offense exceeds the potential maximum penalty for the lesser-included offense. *Bridges v. State*, 389 S.W.3d 508, 512 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *Bignall v. State*, 899 S.W.2d 282, 284 (Tex. App.—Houston [14th Dist.] 1995, no pet.).

B. Analysis

In view of the foregoing authorities, reversal would be warranted if the two-step test is satisfied, and Santos suffered some harm to his rights. We address each requirement separately below.

1. Step One

The first step is easily satisfied here: "[c]riminally negligent homicide is a lesser included offense of murder, so the only question presented in this case is whether this record contains evidence that [Santos] is 'guilty only' of criminally negligent homicide." *Saunders v. State*, 840 S.W.2d 390, 391 (Tex. Crim. App. 1992) (citations omitted).

2. Step Two

Our review of the record reveals three rational theories as to what happened on the night of the decedent's death. The factual narrative of each theory may vary slightly depending on which evidence the jury found credible. We discuss each theory, and the evidence supporting it, separately below.

a. Theory One: Guilty of Murder

The first theory is the one advanced by the State. Under this theory, the decedent may have consumed a lot of cocaine before she died, but she did not die *because* of a cocaine overdose. Instead, Santos intentionally or knowingly caused the decedent's death by impeding her breath or circulation with his hand or with an object unknown to the grand jury. Santos and the decedent engaged in some type of altercation, as evidenced by the broken glass, clumps of hair, and drops of blood in the house. Santos may have punched the decedent in the face, causing her nose and mouth to bleed. During the altercation, Santos suffocated the decedent by covering her nose and mouth, bruising the bottom part of the decedent's chin. Santos might have also used a pillow to

impede the decedent's airway, smearing the decedent's blood (and possibly his own blood) on the pillow in the process. After suffocating the decedent to the point of unconsciousness, Santos may have undertaken various resuscitative efforts to bring her back to life. This would explain the large bruise on the decedent's chest caused by repeated cardiac thumps while performing CPR. After attempting unsuccessfully to resuscitate the decedent, Santos called Joe and then called 911. Some of the details Santos recited in his written statement may be true, but his statement does not recount the whole truth of what happened. Instead, Santos left out the part where he deliberately suffocated the decedent to death. Evidence supporting this theory includes, among other things, Dr. Cornwell's autopsy report and her trial testimony, Dr. Frost's revised opinion letter, the physical evidence at the scene, and reasonable inferences to be drawn from that evidence. By finding Santos guilty of murder, the jury apparently embraced this theory.

b. Theory Two: Not Guilty

The second theory is that Santos committed no criminal offense. Under this theory, the decedent died of asphyxiation by ingesting lethal levels of cocaine. Santos did everything he could to save the decedent's life. Nothing Santos did to save the decedent's life contributed to her death, and even if it did, the conduct fell below criminal negligence. Evidence supporting this theory includes Dr. Frost's initial opinion, Dr. Gonzalez's testimony, Santos's statement, and the physical evidence at the scene. By finding Santos guilty of murder, the jury apparently rejected this theory.

c. Theory Three: Guilty Only of Criminally Negligent Homicide

The third theory is that Santos acted with criminal negligence in attempting to revive the decedent, which contributed to her death. Under this theory, the decedent went on a two-to-three-day binge, consuming cocaine with a rolled-up dollar bill to the point that it gave her nose bleeds. This explains why the tip of the dollar bill had blood on it. The decedent was coming down from a bout of cocaine delirium when Santos discovered her on the kitchen floor, barely breathing. The decedent's heartrate was elevated due to the cocaine in her system, which would have had the effect of quickening her death by suffocation if her airway was blocked or impeded in any way. Instead of calling 911, Santos engaged in the following conduct, failing to perceive the risk that the decedent's condition was made worse because of it: (1) he performed mouth-to-mouth; (2) shook and hit her several times on the chest, causing a large bruise; (3) dragged her to the living room, where he further shook and repeatedly slapped her; (4) called Joe, further delaying emergency treatment; and (5) dragged her back to the kitchen, where he threw water on her, shook her again, and performed mouth-to-mouth. Additionally, there was evidence from which a jury could infer that Santos's repeated cardiac thumps were so forceful that they caused the decedent's wind pipe (or trachea) to deviate to the right, thereby quickening the decedent's death. The State characterized Santo's conduct as "violent" and suggested that he might have been "disoriented" from some type of intoxicant. Evidence supporting this theory includes portions of Dr. Cornwell's testimony, Santos's written statement, portions of the paramedic's testimony, Dr. Gonzalez's testimony, and the physical evidence at the scene.

We believe this evidence supported a rational finding that Santos failed to perceive the risk that his resuscitative efforts and delay in seeking treatment worsened the

decedent's already vulnerable condition, thereby demonstrating a gross deviation from the standard of care that an ordinary person would have exercised in the same situation. *See* TEX. PENAL CODE ANN. § 6.03(d) (West, Westlaw through 2017 1st C.S.) (providing that a person acts with criminal negligence, or is criminally negligent, with respect to the result of his conduct when "he ought to be aware of a substantial and unjustifiable risk that . . . the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint."). By omitting the lesser-include instruction in this case, the jury did not have an opportunity to consider this theory, which was error.[8]

In reaching our decision, we emphasize the low evidentiary hurdle for submitting a lesser-included offense to the jury, as recently stated by our sister court in *Gomez v. State*:

> The evidence can be raised from any source. Anything more than a scintilla of evidence entitles the defendant to the lesser charge. If there is more than a scintilla of evidence supporting the lesser-included charge, the trial court must include the instruction regardless of whether the supporting evidence is strong, weak, unimpeached, or contradicted. The credibility of the evidence, and whether it conflicts with other evidence, must not be considered in deciding whether the charge on the lesser-included offense should be given. Likewise, where the evidence given at trial is subject to two reasonable inferences, the jury should be instructed on both inferences.

[8] We note that this theory of criminal responsibility implies concurrent causation—namely, that Santos's allegedly criminally negligent conduct combined with the effect of cocaine in the decedent's system to bring about her death (i.e., the result). Under Texas Penal Code section 6.04(a), a person is criminally responsible "if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the [person] clearly insufficient." TEX. PENAL CODE ANN. § 6.04(a) (West, Westlaw through 2017 1st C.S.). Although the evidence showed that the decedent's system contained acute levels of cocaine, there was no evidence indicating that, even without Santos's actions, the cocaine (concurrent cause) was clearly sufficient to bring about the decedent's death. *See id*. (providing that a concurrent cause excuses the defendant's guilt only when it was clearly sufficient to produce result and conduct of defendant was clearly insufficient).

499 S.W.3d 558, 561 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd).

We conclude that the second step of the two-step test is satisfied here because there was some evidence that Santos only committed criminally negligent homicide.

3. Harm Analysis

We now ask whether Santos suffered "some harm" by the failure to charge criminally negligent homicide.[9] Here, the jury was allowed only the option to convict Santos of murder or to acquit; the jury chose to convict and assessed Santos's punishment at thirty years' imprisonment. Had the jury instead been allowed to consider and convict based on the uncharged lesser-included offense of criminally negligent homicide, the maximum potential sentence would have been two years. *See* TEX. PENAL CODE ANN. § 19.05(b) (providing that criminally negligent homicide is a state jail felony); *see also id*. § 12.35(a) (providing that the maximum term of imprisonment for a state jail felony is two years). Because Santos would have received a shorter sentence had the jury convicted him of that lesser-included offense, we conclude that he was harmed by the failure to charge the jury on the lesser-included offense. *See Bridges*, 389 S.W.3d at 513; *O'Brien*, 89 S.W.3d at 756–57; *Bignall*, 899 S.W.2d at 284; *Gomez*, 499 S.W.3d at 564. We sustain Santos's third issue.[10]

[9] To avoid a "some harm" analysis, the State argues that Santos abandoned his request for a lesser-included instruction when he stated, "That's fine" after the trial court refused it. However, the State provides no authority, and we find none, to support its position that a defendant who requests and is denied a lesser-included instruction should be treated as having abandoned the request if he states, "That's fine" after the trial court denies the request. Therefore, we analyze the failure to charge criminally negligent homicide under the some-harm standard set out above. *See Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013).

[10] We note that Santos also argues on appeal about allegedly erroneous evidentiary rulings made by the trial court and the effectiveness of his trial counsel. If sustained, these complaints would entitle Santos to a new trial. However, we need not address these complaints because the case is being remanded for a new trial due to jury charge error. TEX. R. APP. P. 47.1.

V. CONCLUSION

We reverse the trial court's judgment and remand the case for a new trial.

/s/ Rogelio Valdez
ROGELIO VALDEZ
Chief Justice

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

Delivered and filed this
17th day of May, 2018.