PD-0905-21
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 3/8/2022 8:15 AM
Accepted 3/8/2022 11:36 AM
DEANA WILLIAMSON
CLERK

NO. PD-0905-21

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
3/10/2022
DEANA WILLIAMSON, CLERK

MARKERRION D'SHON ALLISON,
Appellant,
v.

THE STATE OF TEXAS,
Appellee.

On Appeal from Cause Number 46,571-B
In the 124th Judicial District Court of Gregg County, Texas and
Cause Number 06-20-00020-CR
In the Court of Appeals for the Sixth Judicial District of Texas.

BRIEF FOR THE STATE

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<u>ORAL ARGUMENT NOT REQUESTED</u>

Identity of Judge, Parties, and Counsel

Pursuant to Tex. R. App. P. 68.4(a) (2014), the Judge, parties, and counsel in this suit are:

TRIAL JUDGE:	**The Honorable David Brabham** **188th Judicial District Court** **(Retired)** **Longview, Texas**
APPELLANT:	**Markerrion D'Shon Allison**
APPELLEE:	**The State of Texas**
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NO. PD-0905-21

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

MARKERRION D'SHON ALLISON,……Appellant

v.

THE STATE OF TEXAS,……...……...Appellee

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now the State of Texas, by and through its Criminal District Attorney for Gregg County, and respectfully presents to this Court its brief on the merits in the named cause.

STATEMENT OF THE CASE

Appellant was charged by indictment on March 30, 2017 in Cause Number 46,571-B with one count of aggravated robbery. [CR-I-5]. On September 17, 2019 Appellant was found guilty of the charged offense. [RR-X-15]. Appellant was sentenced to 25 years imprisonment. [RR-XI-54]. Appellant timely filed his notice of appeal on November 27, 2019. [CR-I-154-155]. On November 17, 2021, the Sixth Court of Appeals

(hereafter Court of Appeals) reversed the trial court's judgment and remanded the case for a new trial. *Allison v. State,* No. 06-20-00020-CR, 2021 Tex. App. LEXIS 9303 at 38 (Tex. App.-Texarkana 2020, pet. granted.)(mem. op. not designated for publication.) On December 14, 2021 the State filed a timely petition for discretionary review to the Court of Criminal Appeals. On February 9, 2022, the Court of Criminal Appeals granted the State's petition for discretionary review and indicated oral argument would not be permitted.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is waived.

ISSUES PRESENTED

I. Once a witness learns the meaning of a phrase from other people is the meaning of that phrase thereafter part of the personal knowledge of the witness which the witness can then testify to without violating the Confrontation Clause?

II. Are non-hard science expert witnesses required under the Confrontation Clause to perform the same level of independent testing/analysis required of hard science expert witnesses before they can give an expert opinion based on hearsay evidence?

III. Was the extraneous offense evidence concerning the January 8, 2017 shooting improperly admitted?

IV. Did the Court of Appeals err by finding harm from the admission of Detective Reed's testimony?

STATEMENT OF THE FACTS

On March 30, 2017 Appellant was indicted for the offense of aggravated robbery alleged to have been committed against Jose Jimenez on September 8, 2016. [CR-I-5]. On September 9, 2019 Appellant's case was called to trial. [RR-IV-1].

During the trial the State called Officer Heath Degarmo of the Longview Police Department. [RR-V-88]. Officer Degarmo testified that on September 8, 2016 [RR-V-92], he interviewed Jose Jimenez who reported being robbed at 1405 Clearwood [RR-V-96] by four black males. [RR-V-101].

The State subsequently called Ms. Rebekah Prater. [RR-V-144] Ms. Prater testified to having previously lived at 1405 Clearwood with a man named Justin Anderson and a man named Will Benicaso. [RR-V-146, 153]. Ms. Prater then stated that Jose Jimenez had lived at that residence prior to her moving there [RR-V-147-148] and continued to be a regular visitor to the residence. [RR-V-148-149].

On re-direct the State began to question Ms. Prater about an incident that occurred at that location on January 8, 2017. [RR-V-162]. Appellant then objected to the State introducing evidence about an extraneous offense [RR-V-162-163] and when that objection was overruled requested a limiting

instruction as to the evidence. [RR-V-163]. The court then informed the jury on what grounds they could consider the evidence and also instructed the jury that they could not consider this evidence unless they believed beyond a reasonable doubt that Appellant committed the extraneous offense. [RR-V-169-170].

Ms. Prater then testified that on January 8, 2017 she was returning to her residence with a friend named Thomas [RR-V-170] when she found two masked men waiting at the front door with another man hiding behind a car in the driveway and a fourth man inside the carport at the garage door. [RR-V-171-172]. Ms. Prater then stated that these men allowed her to enter her residence and that after she was inside she heard gunshots. [RR-V-173-175]. Ms. Prater established that no one in the residence was hit by the gunfire. [RR-V-175]. Ms. Prater then described finding a bullet hole in the window going into Mr. Anderson's bedroom. [RR-V-175, 179].

The State subsequently called Mr. Justin Anderson. [RR-VI-14]. Mr. Anderson testified that the night of September 8, 2016 [RR-VI-27] he received a phone call that "Jose" had been shot. [RR-VI-36-37]. Mr. Anderson also established this phone call occurred a little after 10:00 p.m. [RR-VI-38].

The State subsequently called Mr. Jose Jimenez. [RR-VI-86]. Mr. Jimenez established that on September 8, 2016 he was alone at the Clearwood residence [RR-VI-99] and then described being the victim of a violent robbery. [RR-VI-100-121]. Mr. Jimenez also established it was dark out when the robbery took place. [RR-VI-105].

Mr. Jimenez then stated that one of his attackers was wearing a mask. [RR-VI-121-122]. Mr. Jimenez also described the masked individual as being "lanky." [RR-VI-122]. Mr. Jimenez also indicated that the masked robber was about his height and then established that he was five foot eight and a half. [RR-VI-122]. Mr. Jimenez also confirmed this individual was black [RR-VI-123] and stated he could tell the individual was no older than 22. [RR-VI-124].

Mr. Jimenez also described two other individuals that participated in the robbery with him stating that one of the other robbers was "Cuban looking" and having a lighter skin tone [RR-VI-123-124], while the other robber was a heavy set black man who was about six foot tall. [RR-VI-125]. Mr. Jimenez indicated that he had seen a fourth robber as well. [RR-VI-127]. Mr. Jimenez then agreed that he had described the masked robber as "scrawny" to the police. [RR-VI-128].

On cross-examination Mr. Jimenez indicated he was 90% certain there were four robbers. [RR-VI-137]. Mr. Jimenez also confirmed he had been shot in the head during the robbery. [RR-VI-171, 173].

The State next called R. J. [RR-VI-248]. R. J. established that he knew Sean Owens-Toombs (Sean) [RR-VI-249] and Trekeymian Allison (T. K.) [RR-VI-250] (hereafter Mr. Allison) and explained that Mr. Allison lived on Shely Street which was close to Clearwood. [RR-VI-252-253]. R. J. then stated that he also knew Appellant [RR-VI-254] and explained that Appellant was Mr. Allison's cousin. [RR-VI-254-255].

R. J. then described how on September 8, 2016 after failing to purchase marihuana at the 1405 Clearwood residence [RR-VI-258, 263] he went to Mr. Allison's residence on Shely Street [RR-VI-267-268] where he encountered Appellant, Mr. Allison, and Mr. Owens-Toombs. [RR-VI-268]. R. J. then described discussing what had happened at the 1405 Clearwood residence with his associates and the group then deciding to go to the Clearwood residence to seize the drugs they believed were being kept there. [RR-VI-268-269].

R. J. then established that Mr. Allison, Mr. Owens-Toombs, and Appellant all had firearms when the group left for the Clearwood residence that night. [RR-VI-273-274]. R. J. then described how the group (led by

Mr. Owens-Toombs) entered the Clearwood residence [RR-VI-276-278] and testified to seeing Appellant searching the residence. [RR-VI-283]. Mr. Jones also testified to seeing blood on the floor. [RR-VI-285]. R. J. also stated that Appellant was wearing a mask and that he was the only one of the robbers wearing a mask. [RR-VI-288, 290].

R. J. then established that Mr. Owens-Toombs was relatively light skinned due to being half-black, half-white and that Mr. Allison was tall. [RR-VI-290-291]. R. J. then described Appellant as short [RR-VI-291] and identified Appellant in the courtroom. [RR-VI-298].

On cross-examination R. J. reiterated that Mr. Owens-Toombs was much lighter skinned than the other members of the group that had committed the charged robbery. [RR-VI-324].

The State subsequently called Detective Armando Juarezortega of the Longview Police Department to the stand. [RR-VII-102]. Detective Juarezortega established that in regards to this case, Mr. Owens, R. J., and Mr. Allison were all arrested on January 6, 2017. [RR-VII-148-149].

Detective Juarezortega then established he had interviewed Appellant on January 25, 2017 about this case. [RR-VII-152]. Detective Juarezortega then described how, as part of his investigation in this case, he listened to a jail phone call between Mr. Allison and Appellant. [RR-VII-155-156].

Detective Juarezortega also confirmed he was able to identify the voices on the record and that he believed them to be Mr. Allison and Appellant. [RR-VII-156].

The State then presented a recorded copy of Detective Juarezortega's interview with Appellant into evidence. [RR-VII-157-158; State's Exhibit 23]. On the recorded interview Appellant indicated his date of birth was May 4, 1996. [State's Exhibit 23, 18:22]. When questioned about him having been asked by Mr. Allison to "pull up a Carlo" Appellant initially claimed he did not know what the officers were talking about [State's Exhibit 23, 34:46-34:50.] Detective Juarezortega then specified to him that he had been asked to do that five times by Mr. Allison and the term was clarified as "pull a Carlos." [State's Exhibit 23, 35:22-36:15]. Even after being given these additional details, Appellant still continued to deny knowing what the police were talking about in regards to that phrase. [State's Exhibit 23, 35:53-35:55, 36:03-36:04, 36:14-36:20]. Only after Detective Juarezortega told Appellant that his phone conversation would be played at his trial did Appellant finally make comments implying he did know what the phrase "pull a Carlos" meant. [State's Exhibit 23, 36:33-36:50, 36:59-37:09].

When Detective Juarezortega indicated that Appellant's phone records could confirm whether he had been near Clearwood at the time of the offense [State's Exhibit 23, 38:55-39:20, 39:54-40:10], Appellant then indicated he did not know if he had been on Clearwood the night of the robbery. [State's Exhibit 23, 40:12-40:16].

Detective Juarezortega then established that as part of his investigation he had obtained Appellant's phone records from Verizon. [RR-VII-160]. Appellant's phone records were then accepted into evidence without objection. [RR-VII-160-161; State's Exhibit 26].

On cross-examination Detective Juarezortega was asked about the January 8, 2017 shooting incident. [RR-VII-188-190]. Appellant's trial counsel then asked Detective Juarezortega if he thought he had probable cause to arrest someone for that incident and Detective Juarezortega indicated he did not. [RR-VII-191]. Appellant's trial counsel than asked Detective Juarezortega about his discussion with Appellant about the phrase "pulling a Carlos" and Detective Juarezortega explained how Appellant had initially said he didn't know what the officers were talking about but then later in the conversation acknowledged that it was a slang term. [RR-VII-191-192].

On re-direct Detective Juarezortega confirmed that Appellant had acknowledged living at the 404 Shely residence. [RR-VII-193]. Detective Juarezortega also stated that the description Mr. Jimenez had given of the masked robber (scrawny, dark skinned, around 5'8 in height) was consistent with Appellant's appearance. [RR-VII-197-198].

A hearing was then held outside the presence of the jury on the qualifications of Detective Jayson Reed of the Longview Police Department to testify as to the meaning of the phrase "pull a Carlos." [RR-VIII-18-19]. Detective Reed established he had been a law enforcement officer for 28 years [RR-VIII-19] and described how most of his law enforcement career had been in counter-drug operations. [RR-VIII-19-24]. Detective Reed also described having received specialized training regarding criminal gangs. [RR-VIII-24].

Detective Reed then described how in his counter-narcotics work he frequently heard the use of slang terms. [RR-VIII-29]. Detective Reed then described a number of slang terms used in the illegal narcotics community [RR-VIII-29-31] and explained that he had learned the term "wet" meant PCP by talking to informants. [RR-VIII-31].

The prosecutor then asked Detective Reed about the term "pull a Carlos" and Detective Reed indicated that prior to this case he had never

heard that term. [RR-VIII-31]. Detective Reed then explained how what slang terms are being used is constantly changing and that it can vary by region of the country as well. [RR-VIII-31-32].

Detective Reed then testified to being asked by the prosecutor to research what "pull a Carlos" meant and explained how he had contacted one of his confidential informants to discover what the term meant. [RR-VIII-33]. Detective Reed then stated that he had worked with this particular informant since 1998 and considered them to be credible. [RR-VIII-33]. Detective Reed also stated he did not tell the informant why he needed to know what that phrase meant. [RR-VIII-33-34]. Detective Reed then stated he had also spoken to Officer Bethard with the Longview Police Department and Investigator Hall Reavis with the Gregg County Criminal District Attorney's Office as to what that term meant. [RR-VIII-34]. Detective Reed then stated that as a result of his research he had an expert opinion as to what that term meant and stated he believed it to mean to do a shooting and possibly to do a shooting to get rid of a witness. [RR-VIII-35].

The trial court ruled Detective Reed could testify as an expert witness as to the meaning of that phrase. [RR-VIII-50]. The State then called Detective Reed to testify before the jury. [RR-VIII-55].

Detective Reed testified that slang terminology was always changing. [RR-VIII-67]. Detective Reed then explained to the jury how he had been asked by the trial prosecutor to research the meaning of the term "pull a Carlos" [RR-VIII-71] and stated that to accomplish this he had spoken to one of his confidential informants [RR-VIII-71-72] as well as Officer Chris Bethard of the Longview Police Department and Investigator Hall Reavis of the Gregg County District Attorney's Office. [RR-VIII-74-75]. Detective Reed then stated that in his opinion the term "pull a Carlos" meant to conduct a shooting. [RR-VIII-75].

On re-direct Detective Reed gave examples of how he had learned over the course of his career what various drug slang terms meant by talking to informants. [RR-VIII-85].

The State then called Investigator Hall Reavis. [RR-VIII-95]. Investigator Reavis sponsored into evidence the recorded jail call between Appellant and Mr. Allison. [RR-VIII-100-102; State's Exhibit 24]. Investigator Reavis also established that this phone call took place on January 7, 2017. [RR-VIII-102; State's Exhibit 25].

The State then published the recorded jail call. [RR-VIII-111; State's Exhibit 24]. On the recording, Mr. Allison asked Appellant to do/pull a Carlos for him on five separate occasions. [State's Exhibit 24, 02:19, 02:27-

02:31, 08:39, 10:44-10:48, 13:59-14:01]. Following the fourth request to do a Carlos, Mr. Allison also asked Appellant to put money on his books for him. [State's Exhibit 24, 10:48-10:50]. Mr. Allison then twice stressed the need to "go on get that out of the way" less they end up in trouble. [State's Exhibit 24, 11:06-11:18]. Following Mr. Allison's fifth request for a Carlos, Appellant indicated he would do as requested. [State's Exhibit 24, 14:02]. Mr. Allison then advised Appellant to be careful, and Appellant indicated he would. [State's Exhibit 24, 14:03-14:07].

During the recorded conversation there were also a statement about how the talk on the street was about a man being shot in the head [State's Exhibit 24, 01:20-01:34], that "R. J." was on the other side [State's Exhibit 24, 04:29-04:34], and a reference to "Jose" [State's Exhibit 24, 05:32]. The two also discussed how their names had gotten out. [State's Exhibit 24, 11:27-12:32.]

The State subsequently called Detective Chris Taylor of the Longview Police Department. [RR-VIII-131]. Detective Taylor was established without objection as an expert in computer and phone forensics. [RR-VIII-135]. Detective Taylor established that he had reviewed Appellant's phone records and sponsored into evidence a map showing the area where Appellant's phone was when used the night of January 8, 2018. [RR-VIII-

150-151; State's Exhibit 28]. The 1405 Clearwood residence was marked within that area on the map. [State's Exhibit 28]. Detective Taylor also testified that the phone records showed that on the evening of January 8, 2017, Appellant's phone was used in the general area of 1405 Clearwood. [RR-VIII-151, 153; State's Exhibits 26, 28].

The jury found Appellant guilty of the charged offense. [RR-X-15]. Appellant was sentenced to 25 years confinement. [RR-XI-54].

SUMMARY OF THE ARGUMENT

Detective Reed's testimony did not violate the Confrontation Clause because the meaning of the term "pull a Carlos" was within his personal knowledge at the time he testified, and he was subject to cross-examination about his knowledge. That he learned the meaning of the term from others and that he learned it to aid in a criminal investigation does not make that knowledge any less his personal knowledge.

In the alternative the Court of Appeals erred in requiring Detective Reed, a non-scientific expert witness, to conduct the same kind of testing and analysis expected of hard science expert witnesses before he could give an expert opinion based on hearsay information. If the Court of Appeals had applied the correct less rigorous standard for the admission of non-hard science expert testimony then Detective Reed's testimony would have been

found to be admissible since he followed a reasonable course of inquiry to make a reasoned conclusion as to what the phrase "pull a Carlos" meant.

Footnote 32 in the Court of Appeals' opinion stating, without legal analysis, that the extraneous offense evidence was improperly admitted should be treated as dicta. Furthermore, the extraneous offense evidence was properly admitted since Detective Reed's testimony was admissible under the Confrontation Clause and with that testimony there was sufficient evidence to link Appellant to the extraneous offense incident which was relevant to the charged offense as consciousness of guilt evidence.

In the further alternative any error from the admission of Detective Reed's testimony was harmless beyond a reasonable doubt and must be disregarded as it is not believable that the admission of that testimony had any impact on the verdict in this case given the strength of the State's case and the weakness of proof concerning the extraneous offense.

ARGUMENT

I. Detective Reed's testimony did not violate the Confrontation Clause since the meaning of the term "pull a Carlos" was within his personal knowledge.

The Court of Appeals committed reversible error in finding a violation of Appellant's Sixth Amendment confrontation rights in the admission of Detective Reed's testimony concerning the meaning of the term of gang

slang, "pull a Carlos." *Allison*, 2021 Tex. App. LEXIS 9303 at 42. There was no such violation because in testifying to the meaning of that phrase Detective Reed was testifying to a fact that was within his personal knowledge and was subject to cross-examination.

The United States Supreme Court has already determined that there is no Confrontation Clause violation when a witness is testifying to facts within their personal knowledge. See *Williams v. Illinois,* 567 U.S. 50, 70 (2012.) This is only logical. The entire purpose of cross-examination is to enable parties to challenge the basis of a witnesses' knowledge, and thus as long as a witness is testifying to facts within their personal knowledge that purpose is satisfied when that witness is subject to cross-examination.

In the present case there is no question that the meaning of the phrase "pull a Carlos" was within Detective Reed's personal knowledge at the time he testified at the trial. The trial record shows that while Detective Reed did not know what the phrase "pull a Carlos" meant when he was first asked about it pre-trial by the prosecutor [RR-VIII-71], Detective Reed subsequently researched what that phrase meant by consulting with several people and had a definite conclusion as to the meaning of the phrase by the time he testified. [RR-VIII-71-75]. Thus the meaning of the phrase was certainly within his personal knowledge at the time he testified, and since

Detective Reed was testifying to a fact within his personal knowledge, and since he was subject to cross-examination [RR-VIII-75-84, 89-94], Appellant's Confrontation Clause rights were fully protected and Detective Reed's testimony was proper.

The Court of Appeals disregards Detective Reed's testimony because he learned the meaning of that phrase "pull a Carlos" by asking other people what said phrase meant. See *Allison,* 2021 Tex. App. LEXIS 9303 at 32-33. Such a holding makes no sense. Asking other people what a word or phrase means (either directly or indirectly by accessing a dictionary) is one of the two principle methods by which language acquisition occurs (the other being figuring out the meaning of a word by context), and obviously once a person learns what a word or phrase means then thereafter the meaning of that word or phrase is within their personal knowledge. Thus there is no logical reason to disregard a witnesses' knowledge concerning the meaning of a phrase simply because the witness learned it's meaning through other people. To do so is to ignore the very reality of how people learn what words and phrases mean. A witness testifying to something in their personal knowledge does not violate the Confrontation Clause and that should be true even if the original source of the witnesses' knowledge was another person.

Nor should it matter that Detective Reed learned the meaning of the phrase "pull a Carlos" to aid in a criminal case. [RR-VIII-31, 33.] Police officers often testify as expert witnesses on matters for which they have received specialized training with the expectation that they will someday testify based off of that training. As just one extremely common example of this practice, traffic enforcement officers throughout the United States are trained on how to administer field sobriety tests with the expectation that they will someday have to explain how those field sobriety tests are administered and scored in a court of law. Is any police officer that testifies as to what the clues are on the walk and turn test are and how many clues indicate a suspect is intoxicated now violating the Confrontation Clause because that officer is testifying based on facts the officer learned from other people with the specific expectation that the officer would use that information in future criminal cases? To find a Confrontation Clause violation in such a circumstance would be to place a ridiculous burden on the State anytime it tried to have a police officer testify as an expert witness while not meaningfully protecting defendant's Confrontation Clause rights since those rights are already fully vindicated by having the testifying officer available for cross-examination.

The State anticipates Appellant might try to distinguish the above hypothetical from the present case by arguing that in this case Detective Reed was not relying on generalized training that he was given but rather sought out information to aid in the specific case, but such a distinction on the source of personal knowledge would still lead to absurd results. Just consider the situation where an officer studies his training manual the night before they are to testify about the field sobriety tests (as any conscientious officer would do) so as to insure the accuracy of their testimony about how the tests are performed and scored. In such a situation the officer is familiarizing themselves with facts to aid in a specific case. Does that studying (done to aid the officer's testimony in a specific case) make that officer's subsequent testimony about the field sobriety tests a Confrontation Clause violation because they studied the manual to aid them in a specific case? Such a conclusion would mean that an officer who is confident testifying to what they learned at the police academy without doing any refresher reading is not violating the Confrontation Clause when they testify, while another officer, testifying to the exact same facts that they obtained from the exact same source material, is somehow violating the Confrontation Clause.

Likewise what if an officer learns a fact to aid in a specific case. Does that knowledge make any subsequent use of that fact a Confrontation Clause violation? If Detective Reed for instance testifies in a future case as to the meaning of the phrase "pull a Carlos" is that testimony still a Confrontation Clause violation even though the detective is not testifying in the case for which he originally learned that information?

The State believes these hypotheticals show how treating an officer testifying to facts within their personal knowledge as a Confrontation Clause violation if the officer learned those facts to help in a specific case leads to absurd results. Officers need to be constantly learning to be effective public servants, and that is especially true in a subject area like the meaning of gang slang which is constantly evolving and can be very different in different parts of the country. [RR-VIII-31-32]. Thus it makes no sense to invalidate the testimony of officers that are proactive and try to learn relevant material to aid their investigations.

Nor is it necessary to require officers to produce the original teachers who instructed the officer on a relevant fact to insure a defendant's confrontation rights. The main purpose of the Confrontation Clause is to secure for the opposing party the opportunity for cross-examination. *Johnson v. State,* 490 S.W.3d 895, 909 (Tex. Crim. App. 2016). That

purpose is satisfied so long as the defense has the opportunity to question the testifying expert police officer about the basis of their personal knowledge because cross-examining the officer will let the factfinder determine for themselves if the officer's testimony regarding that fact is credible or not which is all that the Confrontation Clause is meant to protect.

Accordingly, since Detective Reed was testifying to a fact that was within his personal knowledge and was subject to cross-examination, there was no Confrontation Clause violation in his testimony. Therefore the Court of Appeals erred in finding a violation and that holding from the Court of Appeals should be reversed.

II. Detective Reed's testimony was also properly admissible as expert witness testimony.

A. The Court of Appeals erred by imposing the requirement of testing and analysis that is applicable for hard science expert to a non-scientific expert witness.

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Furthermore, even assuming in arguendo that the meaning of the term "pull a Carlos" was outside of Detective Reed's personal knowledge at the time he testified, that still would not render Detective Reed's expert opinion on the meaning of that term inadmissible.

The Confrontation Clause is not violated merely because an expert bases their opinion on inadmissible testimonial hearsay. See *Wood v. State*,

299 S.W.3d 200, 213 (Tex. App.—Austin 2009, pet. ref'd.); *Hutcherson v. State,* 373 S.W.3d 179, 183-184 (Tex. App.-Amarillo 2012, pet. ref'd.); *Johnson v. State,* 605 S.W.3d 843, 848-849 (Tex. App.-Houston [1st Dist.] 2020, pet. ref'd.) This is because the testifying expert's opinion itself is not hearsay, and the testifying expert is available for cross-examination. *Wood,* 299 S.W.3d at 213. Nor does the use of testimonial hearsay to help form an expert's opinion violate the Confrontation Clause since the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. *Id.,* citing *Crawford v. Washington,* 541 U.S. 36, 59, n.9 (2004). Accordingly, there was nothing improper in Detective Reed using hearsay information to help form the basis for his expert opinion on the meaning of the phrase "to pull a Carlos" since the detective was available for cross-examination regarding his expert opinion. [RR-VIII-75-84, 89-94]

The Court of Appeals did not dispute that an expert witness can testify to an opinion formed from hearsay information but instead cited to the *Johnson* case out of the Dallas Court of Appeals for the proposition that a testifying expert cannot simply parrot out of court statements under the guise of an expert opinion to get around the Confrontation Clause. See *Allison*, 2020 Tex. App. LEXIS 9303 at 33 (citing *Johnson v. State,* Nos. 05-09-

00494-CR and 05-09-00495-CR, 2011 Tex. App. LEXIS 284 at 12 (Tex. App.-Dallas 2011, no pet.)(mem. op. not designated for publication). The Court of Appeals then found that Detective Reed's testimony was not "based on his own testing and/or analysis" and used that finding as justification for their conclusion that Detective Reed's expert testimony was just him parroting what had been told to him by others rather than a true expert opinion and thus was barred by the Confrontation Clause. *Allison,* 2020 Tex. App. LEXIS 9303 at 32-33. Such a conclusion is not legally justified and was plain error.

In holding that an expert witness must perform their own testing or analysis on information given to them before they can use that information as a basis for an expert opinion at trial the Court of Appeals appears to have followed the logic of the numerous cases where Texas courts found Confrontation Clause violations in forensic scientist expert witnesses testifying to the contents of a laboratory analysis that were conducted by a different forensic scientist. See *Johnson,* 2011 Tex. App. LEXIS 284 AT 8-12; *Paredes v. State,* 462 S.W.3d 510, 517 (Tex. Crim. App. 2015). However, those cases are all distinguishable from the current case as those cases all involved "hard science" expert witnesses testifying about matters that were readily subject to scientific testing/analysis. That is very different

than the present case which involves an expert testifying about the meaning of gang slang, a non-scientific field of study where conclusions are based on experience and training rather than the scientific method and thus not an area where independent testing and analysis is possible.

Expert testimony falls into three broad subject matter areas. See *Nenno v. State,* 970 S.W.2d 549, 560 (Tex. Crim. App. 1998) *overruled on other grounds by State v. Terrazas,* 4 S.W.3d 720 (Tex. Crim. App. 1999). First there are the hard science subjects. These are areas in which precise measurement, calculation, and prediction are generally possible and include subjects such as mathematics, physical science, earth science, and life science. See *Weatherred v. State,* 15 S.W.3d 540, 543, n. 5 (Tex. Crim. App. 2000). Second there are the soft science subjects. These cover most of the social sciences such as psychology, economics, political science, anthropology, and sociology. *Id*. Finally, there are the non-science subjects which cover fields based primarily on experience and training as opposed to the scientific method. See *Nenno,* 970 S.W.2d at 561. Knowledge of the meaning of gang slang falls under this last category as that is a subject matter area based on experience, training, and personal knowledge rather than scientific testing.

The distinctions in expert subject matter areas are important because while the *Kelly* requirement of reliability applies for expert testimony in all three categories, *Kelly* is to be applied with less rigor in subject matter areas involving the soft sciences or non-sciences than it is with subjects involving the hard sciences. See *Nenno,* 970 S.W.2d at 561*; see also Kelly v. State,* 824 S.W.2d 568 (Tex. Crim. App. 1992). The rationale for applying *Kelly* less rigorously for the soft sciences and non-science subjects than for hard science subjects is obvious and logical. The hard sciences are well suited to scientific testing, since they are the areas where precise measurement, calculation, and prediction are generally possible. See *Weatherred,* 15 S.W.3d at 543, n. 5. Conversely, the ability to conduct scientific testing is greatly limited in regards to the soft sciences (where ethical restrictions in experimenting on humans necessarily restrict scientific testing) and completely absent in the non-science fields (which are not based on the scientific method at all and thus are plainly not suitable for scientific testing.) Additionally, hard science methods of validation such as assessing the potential rate of error or subjecting a theory to peer review may often be inappropriate for testing reliability in areas outside the hard sciences. *Nenno,* 970 S.W.2d at 562.

Because the non-hard science fields of expertise are much less suited to scientific testing and analysis than the hard sciences, it is illogical to impose the same kind of testing and analysis requirements that apply when an expert is testifying about a hard science subject to experts testifying about non-hard science subjects. You can perform scientific testing on the identity of an unknown substance or on how much alcohol is contained within a vial of blood. You cannot perform scientific testing on the meaning of gang slang. Instead the meaning of gang slang is precisely one of those subjects where expertise comes from experience and training and personal knowledge rather than the scientific method and thus it is not a field of study where independent testing and analysis is possible.

By requiring Detective Reed to perform independent testing and analysis on the meaning of the phrase "pull a Carlos" before the detective would be allowed to give his expert opinion concerning the meaning of that phrase, the Court of Appeals imposed a methodology designed for hard science expert witnesses on a non-hard science expert witness. This was clear error. The soft sciences and fields that are based primarily on experience and training as opposed to the scientific method are permissible areas for expert testimony under Rule of Evidence 702. See *Nenno,* 970 S.W.2d at 561. Thus it must be possible to make such evidence admissible

and that means the standard for admitting expert opinions in such areas cannot include a requirement (independent testing and analysis of the underlying data) that is simply not possible in those fields of study.

This Honorable Court has already recognized that it makes no sense to hold non-hard science expert witnesses to the same reliability standards as hard science. See *Nenno,* 970 S.W.2d at 561. For the same exact reasons it makes no sense to require non-hard science expert witnesses to perform independent testing and analysis of their data before they can use that data in forming their expert opinion.

B. Detective Reed's expert testimony would have been admissible if the Court of Appeals had applied the correct standard for expert testimony.

Thus it is clear the Court of Appeals applied the wrong standard in this case in evaluating Detective Reed's testimony and by doing so the Court of Appeals created reversible error because if the correct, less rigorous standard for the admission of non-hard science expert opinions (which did not require scientific testing and analysis) had been applied then Detective Reed's testimony would certainly have been found admissible under the Confrontation Clause for while Detective Reed may not have performed scientific testing on the meaning of the phrase "pull a Carlos" (since no such scientific testing was possible), he did follow a reasonable course of action

to determine what that phrase meant with him consulting multiple people on what "pull a Carlos" meant. [RR-VIII-71-75]. The fact that Detective Reed consulted with more than one person on the meaning of the phrase shows he did not just blindly recite what someone else had told him but rather conducted a proper investigation on the meaning of the phrase with him only coming to a conclusion after he had spoken to enough people to feel confident in his conclusion.

The trial record also shows that Detective Reed was given several descriptions of what the phrase "pull a Carlos" meant which required him to "boil down" the meaning of the phrase. [RR-VIII-35.] (Detective Reed specifically described the phrase as being related to both drive by shootings and targeting a witness before giving his conclusion that what the term really meant was to do a shooting.) [RR-VIII-35]. That Detective Reed had to evaluate several descriptions of what the phrase meant and "boil down" (i.e. summarize) what was told to him, shows that while he may not have performed scientific testing in this matter, he did analyze what was said to him with him synthesizing the information he received to get at the essential meaning of the term, and that in turn shows that Detective Reed did not simply parrot what was told to him but did in fact perform his own analysis on the information given to him before rendering his opinion on the meaning

of the phrase. Therefore since Detective Reed conducted a thorough investigation which resulted in him coming to a reasoned conclusion as to the meaning of the phrase "pull a Carlos", his testimony was not simply him parroting what someone else told him but was instead proper expert witness testimony concerning the meaning of a term of gang slang and thus was admissible under the Confrontation Clause.

III. Resolution of the Confrontation Clause issue invalidates the dicta statement made by the Court of Appeals in Footnote 32 that evidence concerning the January 8, 2017 extraneous offense shooting incident should not have been admitted

In addition to their ruling on the Confrontation Clause issue, the Court of Appeals' opinion also included a footnote which stated that they also believed admitting the extraneous offense evidence concerning the additional shooting allegedly committed by Appellant was an error. See *Allison,* 2021 Tex. App. Lexis 9303 at 38 n.32. This footnote did not state why the Court of Appeals believed this evidence was improperly admitted. *Id.* Given the lack of any legal analysis on that point by the Court of Appeals the State believes that Footnote 32 should be regarded as dicta rather than any actual holding in this matter. However, if Footnote 32 is found to be part of the holding in this case then the State believes that resolution of the Confrontation Clause challenge to Detective Reed's

testimony invalidates Footnote 32 since if Detective Reed's testimony was admissible under the Confrontation Clause then that evidence provides a sufficient basis for the trial court to conclude that there was sufficient evidence of Appellant's involvement in that extraneous offense to satisfy the linkage requirements of Texas Rule of Evidence 104, and evidence of the extraneous offense itself would be admissible under Texas Rule of Evidence 404(b) as consciousness of guilt evidence.

Evidence that a defendant sought to silence a potential witness is properly admissible evidence as conscious of guilt evidence. See *Harris v. State,* 645 S.W.2d 447, 456 (Tex. Crim. App. 1983)(holding that consciousness of guilt evidence is some of the strongest evidence there is); see also *Antwine v. State,* 572 S.W.2d 541, 543 (Tex. Crim. App. 1978)(holding that evidence a defendant attempted to silence a witness qualifies as consciousness of guilt evidence.) And in this case Detective Reed's testimony concerning the meaning of the phrase "pull a Carlos" would tend to support that Appellant was involved in trying to silence a potential witness.

The extraneous offense evidence was that on January 8, 2017 there was a shooting at the 1405 Clearwood residence (the location where the victim of the charged offense, Mr. Jose Jimenez was living at the time of the

charged offense) [RR-V-96, 144, 170, 175], and also a location that Mr. Jimenez continued to regularly visit. [RR-V-148-149]. The evidence was also that on January 7, 2017 [RR-VIII-102; State's Exhibit 25] Appellant had a telephone conversation with Mr. Trekeymian Allison (hereafter Mr. Allison), an individual who had been identified as one of Appellant's accomplices in the charged offense (the aggravated robbery of Mr. Jimenez) [RR-VI-268-269, 273-274, 276-278], and in that conversation Mr. Allison and Appellant discussed the charged offense [State's Exhibit 24] and, over the course of that conversation, Mr. Allison asked Appellant five separate times to "pull a Carlos" for him. [State's Exhibit 24, 02:19, 02:27-02:31, 08:39, 10:44-10:48, 13:59-14:01.] Mr. Allison also told Appellant that he needed to do this for them less they end up in trouble [State's Exhibit 24, [11:06-11:18] and advised Appellant to be careful after he agreed to Mr. Allison's request. [State's Exhibit 24, [14:02-14:07.]

The testimony from Detective Reed, concerning the meaning of the phrase "pull a Carlos" would thus be relevant since evidence that said phrase means to conduct a shooting [RR-VIII-75] would in turn support the reasonable inference that if Mr. Allison and Appellant were taking about the charged offense and in the course of that conversation Mr. Allison repeatedly asked Appellant to do a shooting for him, and then the very next

day a shooting happened at the exact same location where the original aggravated robbery offense occurred, then Appellant was likely involved in said shooting which logically must have been done to intimidate if not outright eliminate the witness to their previous crime.

Nor does it matter that this requires the jury to make multiple inferences. A fact finder is permitted to make multiple reasonable inferences so long as each is supported by the evidence. See *Hooper v. State,* 214 S.W.3d 9, 15 (Tex. Crim. App. 2007.) Here both the conclusion that Appellant conducted the January 8, 2017 shooting and that said shooting was done to intimidate and/or eliminate the witnesses of the charged offense are reasonable inferences from the evidence permitted, and thus the evidence of the extraneous offense was relevant and admissible in the case.

Accordingly, since there was no Confrontation Clause impediment to Detective Reed's testimony, his testimony was properly admissible as it was relevant to a matter (the January 8, 2017 attempt to silence a witness in the case) that was itself relevant and not unfairly prejudicial to the charged offense and for which there was enough evidence to link Appellant to the extraneous offense. Therefore the extraneous offense evidence was admissible.

IV. In the alternative any error from the admission of Detective Reed's testimony was harmless and should have been disregarded.

In the further alternative any error from the admission of Detective Reed's testimony was harmless and should be disregarded because it is clear beyond a reasonable doubt that the admission of that testimony had no impact on the outcome of the case.

Error concerning the improper admission of evidence in violation of the Confrontation Clause is constitutional error. *Davis v. State,* 203 S.W.3d 845, 849 (Tex. Crim. App. 2006). Constitutional error is to be disregarded if a reviewing court is satisfied beyond a reasonable doubt that the error was harmless. *Id.* at 849. In making this determination reviewing courts are to look to a number of factors including: 1) the importance of the improperly admitted testimony to the State's case; 2) whether the evidence was cumulative with other evidence; 3) the presence or absence of evidence corroborating or contradicting the evidence on material points and 4) the overall strength of the State's case. *Id.* at 852.

In the present case even without Detective Reed's testimony the State had a very strong case against Appellant. Mr. Jimenez described being robbed by four men, one of whom wore a mask. [RR-VI-121-122]. That is consistent with the description of the robbery provided by accomplice

witness, R. J., who testified that Appellant was one of four individuals who committed the charged offense [RR-VI-268-269, 273-274, 276-278, 283], and that Appellant was the only one of the four robbers who wore a mask. [RR-VI-288, 290].

Mr. Jimenez also gave a description of the masked robber which established that said individual was "lanky" [RR-VI-122] and "scrawny" [RR-VI-128], was no more than 5 foot, eight and a half inches tall [RR-VI-122], was black [RR-VI-123], and was no older than 22 years old. [RR-VI-124]. That description of the masked robber is consistent with the testimony of R. J., who testified that Appellant was short [RR-VI-291] and dark skinned [RR-VI-324] and with the testimony of Detective Juarezortega, who agreed that the description provided by Mr. Jimenez of the masked robber as being scrawny, dark skinned, and around 5'8 in height was consistent with Appellant's appearance. [RR-VII-197-198]. Mr. Jimenez's estimation of the masked robber's age is likewise consistent with Appellant's statement that he was born on May 4, 1996 [State's Exhibit 23-18:22] (which would mean Appellant was 20 years old at the time of the charged offense.)

Mr. Jimenez also described two of the other robbers and stated that one of the other robbers was "Cuban looking" and had a lighter skin tone [RR-VI-123-124], while the other robber was a heavier set black male who

was about six foot tall. [RR-VI-125]. Those descriptions are likewise consistent with R. J.'s description of two of the other participants in the robbery, Mr. Owens-Toombs and Mr. Allison, as R. J. described Mr. Owens-Toombs as being relatively light skinned [RR-VI-290, 324] and described Mr. Allison as being tall [RR-VI-291] and dark skinned. [RR-VI-324].

There was also further evidence linking Appellant to the charged aggravated robbery offense in the January 7, 2017 jail call between Appellant and his accomplice Mr. Allison. That call that took place the day after Mr. Allison, Mr. Owens, and R. J. were all arrested in this matter [RR-VII-148-149] and had Appellant and Mr. Allison discussing the charged aggravated robbery offense in terms that linked both of them to the charged offense. [See State's Exhibit 24]. Appellant and Mr. Allison discussed how the talk on the street regarding their case was about a man being shot in the head [State's Exhibit 24, 01:20-01:34] (Mr. Jimenez had been shot in the head during the charged offense [RR-VI-173]), mentioned that "R. J." was on the other side [State's Exhibit 24, 04:29-04:34] (R. J. was the initials of one of their accomplices in the offense, and he did in fact cooperate with law enforcement) [RR-VI-248-368], and referenced "Jose" [State's Exhibit 24,

05:32] (the first name of the victim of the charged offense.) The two also discussed how their names had gotten out. [State's Exhibit 24, 11:27-12:32.] Thus even without the references to pulling a Carlos in this conversation, it still provided many links connecting Appellant to the aggravated robbery of Mr. Jimenez.

Appellant's interview with Detective Juarezortega also showed that Appellant could not dispute that he might have been near Clearwood (the street where the robbery occurred) [RR-VI-99] the night of the offense [State's Exhibit 23, 40:12-40:16.] Appellant also lied to the police during that interview as Appellant initially denied having been asked to "pull a Carlos" [State's Exhibit 23, 34:46-34:50, 35:53-35:55, 36:03-36:04, 36:14-36:20.] (Appellant's conversation with Mr. Allison shows that Mr. Allison asked Appellant five separate times to "pull a Carlos" for him.) [State's Exhibit 24, 02:19, 02:27-02:31, 08:39, 10:44-10:48, 13:59-14:01]. Lying to police officers is consciousness of guilt evidence. See *King v. State,* 29 S.W.3d 556, 565 (Tex. Crim. App. 2000)(noting that evidence of false statements was admissible as consciousness of guilt evidence.)

Appellant's phone records also show that Appellant's phone was in the general area of 1405 Clearwood (the location of the charged offense) at a time frame within a couple of hours of the charged offense. [RR-VI-38;

VIII-150-151; State's Exhibits 26, 28]. Phone records showing that a defendant's phone was used close in time and space to where an offense occurred is also evidence that can link a defendant to that offense. See *Nelson v. State,* 405 S.W.3d 113, 124 (Tex. App.-Houston [1st Dist.] 2013, pet. ref'd.); *Ford v. State,* 444 S.W.3d 171, 180 (Tex. App.-San Antonio 2014, affirmed, 477 S.W.3d 321 (Tex. Crim. App. 2015).

Thus with the accomplice testimony, the victim's testimony, the telephone call between Appellant and his accomplice regarding the case, Appellant's deceptive behavior with the police, and the phone records placing Appellant in general temporal and physical proximity to where the offense occurred, the State clearly had a very strong case proving Appellant committed the charged offense even absent the testimony concerning what "pull a Carlos" meant.

Conversely the evidentiary value from Detective Reed's testimony turned out to be rather slight as it related to an extraneous offense that one of the State's own witnesses, Detective Armando Juarezortega, asserted that the State did not have probable cause to link to a specific defendant. [RR-VII-192]. Detective Juarezortega's testimony on this point was particularly significant because the trial court instructed the jury, both with a limiting instruction and again in the jury charge, that they could not consider the

extraneous offense evidence for any purpose unless they were convinced beyond a reasonable doubt that Appellant committed the offense. [RR-V-169-170]; IX-17-18]. It is generally presumed that a jury follows the trial court's instructions. *Colburn v. State,* 966 S.W.2d 511, 520 (Tex. Crim. App. 1998). Nor is there any evidence in this case that the jury disobeyed the trial court's instructions regarding the extraneous offenses. [RR; CR]. Thus it must be presumed the jury in this case did follow the trial court's instructions and that in turn means there is no chance that the jury would have considered any of the evidence concerning the extraneous offense (including Detective Reed's testimony about the term "pull a Carlos") since it is not plausible the jury would have believed the State proved the extraneous offense beyond a reasonable doubt when even one of the State's own witnesses, Detective Juarezortega, testified that the State could not prove who committed the extraneous offense.

Thus between the strength of the State's case as to the charged offense and the fact that it is not plausible that the jury actually considered the extraneous offense evidence, there is proof beyond a reasonable doubt that any improper admission of testimony from Detective Reed in violation of the Confrontation Clause was harmless beyond a reasonable doubt and thus must be disregarded. Additionally, any error from the admission of the

extraneous offense evidence in this case would also be harmless for the same reason.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the State prays that this Honorable Court reverse the ruling of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(3), I, Brendan Wyatt Guy, Assistant Criminal District Attorney, Gregg County, Texas, certify that the number of words in Appellee's Brief submitted on March 8, 2022, excluding those matters listed in Rule 9.4(i)(3) is 8,010.

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CERTIFICATE OF SERVICE

I, Brendan Wyatt Guy, Assistant Criminal District Attorney, Gregg County, Texas, certify that a copy of the foregoing brief was sent by electronic mail to Ms. Gena Bunn, Attorney for Appellant, Markerrion D'Shon Allison, at gbunn@genabunnlaw.com and by United States mail to Ms. Stacy M. Soule, P. O. Box 13046, Capitol Station, Austin, Texas 78711, State Prosecuting Attorney, on this the 8th day of March, 2022.

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