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COURT OF CRIMINAL APPEALS
OF TEXAS

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SHOLOMO DAVID **APPELLANT**

v.

THE STATE OF TEXAS **APPELLEE**

THE STATE'S BRIEF ON PETITION FOR DISCRETIONARY REVIEW

FROM THE COURT OF APPEALS, EIGHTH DISTRICT OF TEXAS
CAUSE NUMBER 08-18-00059-CR

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TRIAL COURT: 41st Judicial District Court, El Paso County, Texas, Honorable Anna Perez, presiding

COURT OF APPEALS: Eighth Court of Appeals, Honorable Chief Justice Yvonne T. Rodriguez, Justice Gina M. Palafox, and Justice Jeff Alley

TABLE OF CONTENTS

IDENTITY OF PARTIES AND COUNSEL i

INDEX OF AUTHORITIES iv–v

STATEMENT OF THE CASE AND PROCEDURAL HISTORY vi

GROUNDS FOR REVIEW vii

STATEMENT OF FACTS 1–4

SUMMARY OF THE STATE'S ARGUMENT 5–7

ARGUMENT AND AUTHORITIES 8–28

GROUND FOR REVIEW ONE: By holding that the evidence was legally insufficient to establish David's identity as the individual who committed the offense when he was alone in a locked bathroom with the tampered-with evidence, the Court of Appeals erred by ignoring the circumstantial evidence establishing David's identity and requiring the State to disprove an alternative hypothesis regarding the offender's identity. 8–15

I. Standard of review. 8–9

II. Because David was found alone in a locked bathroom with the tampered-with evidence, and because jurors are allowed to make common-sense inferences based upon the evidence at trial, the record contains legally sufficient evidence to establish David's identity as the person who placed the marijuana in the toilet. 9–13

III. Conclusion. 13–15

<u>GROUND FOR REVIEW TWO</u>: By holding that placing marijuana in a toilet bowl containing feces does not constitute "altering" or "destroying" within the meaning of the tampering-with-physical-evidence offense, the Court of Appeals failed to apply the appropriate legal-sufficiency standard by improperly substituting its judgment for that of the jury's and disregarding the jury's common-sense inference that marijuana that has been contaminated with feces has been altered or destroyed. 16–25

I. Standard of review and applicable law. 16

II. The State proved that David altered the marijuana. 16–19

III. The State proved that David destroyed the marijuana. 19–23

IV. Conclusion. 23–25

<u>GROUND FOR REVIEW THREE</u>: Even if the Court of Appeals did not err by holding that the evidence was legally insufficient to support David's conviction for tampering with physical evidence, the Court of Appeals erred by failing to reform the conviction to the lesser-included offense of attempted tampering with physical evidence, thereby violating this Court's instruction in *Thornton v. State*. 26–28

PRAYER 29

SIGNATURES 29

CERTIFICATE OF COMPLIANCE 30

CERTIFICATE OF SERVICE 30

INDEX OF AUTHORITIES

STATE CASES

Acosta v. State, 429 S.W.3d 621 (Tex. Crim. App. 2014).....9, 19

Brooks v. State, 323 S.W.3d 893 (Tex. Crim. App. 2010) (plurality op.).....8

Cary v. State, 507 S.W.3d 761 (Tex. Crim. App. 2016).....8

David v. State, 621 S.W.3d 920
(Tex. App.—El Paso 2021, pet. granted)..... Passim

Diaz v. State, Nos. 13-13-00067-CR, 13-13-00068-CR, 2014 WL 1266350
(Tex. App.—Corpus Christi Jan. 23, 2014, no pet.)
(mem. op., not designated for publication).....21, 23

Dorsey v. State, 24 S.W.3d 921 (Tex. App.—Beaumont 2000, no pet.).....13

Gordwin v. State, Nos. 01-14-00343-CR, 01-14-00344-CR,
2015 WL 1967623 (Tex. App.—Houston [1st Dist.] July 29, 2015, pet. ref'd)
(mem. op., not designated for publication).....21

Guillory v. State, Nos. 09-18-00148-CR, 09-18-00149-CR,
09-18-00150-CR, 2020 WL 216034
(Tex. App.—Beaumont Jan. 15, 2020, no pet.)
(mem. op., not designated for publication).....14

Harris v. State, No. 12-07-00279-CR, 2008 WL 2814879,
(Tex. App.—Tyler July 23, 2008, pet. ref'd)
(mem. op., not designated for publication).....19

Hooper v. State, 214 S.W.3d 9 (Tex. Crim. App. 2007) 9, 11, 12, 14

Jenkins v. State, 493 S.W.3d 583 (Tex. Crim. App. 2016).....8, 18, 24

Rabb v. State, 483 S.W.3d 16 (Tex. Crim. App. 2016) ..... Passim

Ramsey v. State, 473 S.W.3d 805 (Tex. Crim. App. 2015) 12

Stahmann v. State, 602 S.W.3d 573 (Tex. Crim. App. 2020).....16, 17, 19

Thomas v. State, 645 S.W.2d 798 (Tex. Crim. App. 1983).....13

Thornton v. State, 425 S.W.3d 289 (Tex. Crim. App. 2014)..... Passim

Vaughn v. State, 33 S.W.3d 901 (Tex. App.—Houston [14th Dist.], no pet.) 21

Williams v. State, 270 S.W.3d 140 (Tex. Crim. App. 2008) 16, 20, 22, 23

Zuniga v. State, 551 S.W.3d 729 (Tex. Crim. App. 2018) 9, 13, 14

STATE STATUTES AND RULES

TEX. CODE CRIM. PROC. art. 38.04.....8, 24

TEX. PENAL CODE sec. 37.09(a)(1) ..... Passim

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The State charged Appellant, Sholomo David (hereinafter David), by indictment with the third-degree-felony offense of tampering with physical evidence. (CR 11).[1] The State further alleged that David had been finally convicted of two felony offenses, to wit: (1) assault on a public servant; and (2) harassment of a public servant. (CR 11). Following a jury trial occurring from March 23–27, 2018, the jury found David guilty of the charged offense, found the enhancement paragraphs true, and assessed punishment at 30 years' imprisonment. (CR 205). David filed a motion for new trial and a first amended motion for new trial, which were overruled by operation of law. (CR 239–40, 271–331). David timely filed his notice of appeal. (CR 249). On April 12, 2021, in a published opinion with one dissenting justice, the Eighth Court of Appeals reversed the trial court's judgment supporting David's conviction and rendered a judgment of acquittal. *See David v. State*, 621 S.W.3d 920 (Tex. App.—El Paso 2021, pet. granted). No motion for rehearing was filed in the Court of Appeals.

[1] Throughout this Petition, references to the appellate record will be made as follows: references to the clerk's record will be made as "CR" and page number, references to the reporter's record will be made as "RR" and volume and page number, and references to exhibits will be made as either "SX" or "DX" and exhibit number.

GROUNDS FOR REVIEW

GROUND FOR REVIEW ONE: By holding that the evidence was legally insufficient to establish David's identity as the individual who committed the offense when he was alone in a locked bathroom with the tampered-with evidence, the Court of Appeals erred by ignoring the circumstantial evidence establishing David's identity and requiring the State to disprove an alternative hypothesis regarding the offender's identity.

GROUND FOR REVIEW TWO: By holding that placing marijuana in a toilet bowl containing feces does not constitute "altering" or "destroying" within the meaning of the tampering-with-physical-evidence offense, the Court of Appeals failed to apply the appropriate legal-sufficiency standard by improperly substituting its judgment for that of the jury's and disregarding the jury's common-sense inference that marijuana that has been contaminated with feces has been altered or destroyed.

GROUND FOR REVIEW THREE: Even if the Court of Appeals did not err by holding that the evidence was legally insufficient to support David's conviction for tampering with physical evidence, the Court of Appeals erred by failing to reform the conviction to the lesser-included offense of attempted tampering with physical evidence, thereby violating this Court's instruction in *Thornton v. State*.

STATEMENT OF FACTS

The facts relevant to this case, viewed in the light most favorable to the verdict, are accurately set forth in the Court of Appeals' opinion, *see David*, 621 S.W.3d at 922–24, as described below.

I. The offense.

After observing narcotics-related activity occurring in several rooms at a hotel located in El Paso, Texas, agents from the Texas Department of Public Safety executed search warrants on two of the rooms. (RR3 35, 55). As the agents moved down the hotel's hallway to execute the warrants, they observed a female enter another room (for which the agents did not have a search warrant) and yell something to the room's occupants, and the door to the room was shut. (RR3 36, 38). As the agents approached the room, they heard voices and "a bunch of movements," such as shuffling sounds and the closing of a drawer, and the agents smelled the odor of marijuana coming from inside the room. (RR3 36, 38, 119). The agents knocked on the door and announced their identities as law-enforcement agents, but no one answered the door. (RR3 39, 119–20). Due to the possibilities that evidence might be destroyed or victims of human-trafficking could be present in the room, the agents breached the door. (RR3 39–41, 55).

Upon entering the hotel room, the agents detected a strong odor of marijuana

and observed two women inside the main area of the room. (RR3 42, 125). Another person, later identified as David, was in the room's bathroom behind a locked door. (RR3 42). The agents identified themselves as law-enforcement officers and ordered David to come out, but he refused. (RR3 122). After they heard shuffling and movement in the bathroom, the agents forced open the door and found David, who was fully dressed, standing between the shower and the toilet. (RR3 42, 122–23). David was alone inside the bathroom when the officers saw him. (RR3 62). As agents removed David from the bathroom, they observed a loose green leafy substance and small glass narcotic-smoking pipes in the feces-contaminated toilet. (RR3 61, 124–25; SX 16–17).

One agent, Lieutenant Gabriel Nava, testified that it was his belief that the green leafy substance in the toilet was marijuana. (RR3 68). Lieutenant Nava based this conclusion on his training and experience, as well as the appearance and smell of the substance. (RR3 68). Lieutenant Nava believed that David was the individual who tampered with the drug evidence, but he also allowed for the possibility that one of the women in the hotel room could have placed the marijuana in the toilet, and thus all three room occupants were arrested for the offense. (RR3 67, 77–78). Lieutenant Nava testified that the agents were unable to test the marijuana "because there was fecal matter mixed into [the marijuana]." (RR3 67). Lieutenant Nava stated

that although it was possible that the marijuana could have been collected, they did not attempt to retrieve the marijuana due to health concerns. (RR3 70).

II. Court of Appeals' opinion.

In a published opinion with one dissenting justice, the Eighth Court of Appeals reversed the trial court's judgment supporting David's guilt. *David*, 621 S.W.3d at 928. Specifically, the Court of Appeals held that the evidence was legally insufficient to establish: (1) David's identity as the person who committed the offense; and (2) that David "altered" or "destroyed" the marijuana, within the meaning of the tampering-with-physical-evidence statute, by placing it in a toilet bowl containing feces. *Id.* at 926–28. Moreover, the Court of Appeals considered and rejected the notion that it should have reformed the judgment pursuant to this Court's instructions in *Thornton v. State*, 425 S.W.3d 289, 295 (Tex. Crim. App. 2014), and *Rabb v. State*, 483 S.W.3d 16 (Tex. Crim. App. 2016), because "even if the evidence supported a finding that David intended to alter or destroy the marijuana, but failed, the evidence is legally insufficient to [establish that] David was the individual who placed the marijuana in the toilet," such that this Court's instructions in *Thornton* and *Rabb* to reform the judgment to reflect a conviction for attempted tampering with physical evidence would thus be inapplicable. *David*, 621 S.W.3d at 928 n. 1. Having sustained David's legal-sufficiency issue, the Court of

Appeals did not address David's remaining appellate issues. *David*, 621 S.W.3d at 928.

SUMMARY OF THE STATE'S ARGUMENT

This case has important implications regarding the jury's ability to consider circumstantial evidence and make common-sense deductions from that evidence in tampering-with-physical-evidence cases. In its published opinion, the Court of Appeals erred by misapplying the legal-sufficiency standard of review and improperly substituting its judgment for that of the fact-finder's, thus nullifying the jury's role as the sole determiner of the weight of the evidence and the credibility of the witnesses. Moreover, even if the Court of Appeals did not err by finding the evidence legally insufficient to establish the charged offense, because the State presented legally sufficient evidence to prove David's identity as the person who placed the marijuana in the toilet, the Court of Appeals erred by refusing to reform the judgment to reflect a conviction for attempted tampering with evidence, thereby ignoring the instructions in this Court's prior cases.

First, the Court of Appeals erred by rejecting the circumstantial evidence establishing David's identity as the individual who placed the marijuana in the toilet. The evidence demonstrated that when the agents discovered the marijuana, David was alone and fully clothed in the locked bathroom, and he was standing next to the toilet where the marijuana was found. Through its verdict, the jury impliedly used this circumstantial evidence to make a common-sense inference that David was the

person who placed the marijuana in the toilet. By requiring the State to disprove the alternate hypothesis that one of the other occupants in the room placed the marijuana in the toilet, the Court of Appeals misapplied the legal-sufficiency standard and created an unreasonable burden on the State to prove identity in a tampering case only by direct evidence, such as by a testimony from a witness who directly observed the tampering occur.

The Court of Appeals also erred by rejecting the jury's determination that David "altered" or "destroyed" the loose marijuana by placing it in a toilet containing feces. Under this Court's jurisprudence, "alter" means that the defendant "changed or modified the thing itself," while "destroy" means "that a destroyed thing has been ruined and rendered useless." By placing the marijuana in a feces-contaminated toilet, David altered and/or destroyed the marijuana because the marijuana was also contaminated with fecal matter, and the marijuana could no longer be collected, tested, or consumed. This conclusion is supported not only by a photograph showing the loose marijuana together with obviously present feces in the toilet, but also by Lieutenant Nava's testimony that the marijuana was "mixed" with fecal matter and could not be collected due to health concerns. It stands to reason that if law-enforcement officers are unwilling or unable to even test such marijuana due to health risks, any rational jury could find that the marijuana was changed or rendered

useless because it could not be collected, tested, or consumed, and that the marijuana was therefore altered or destroyed within the meaning of the offense. The Court of Appeals erred by concluding otherwise, and its opinion has the effect of placing the unreasonable burden on the State to present expert testimony or other evidence to establish that the chemical composition of the tampered-with evidence has changed, rather than relying on the common-sense inferences and conclusions that juries are allowed to form from the evidence.

Finally, even if the evidence was legally insufficient to establish that David completed the charged offense by altering or destroying the marijuana, the Court of Appeals erred by refusing to reform the judgment to reflect a conviction for the lesser-included offense of attempted tampering with physical evidence. As explained above, there was legally sufficient evidence to establish David's identity as the person who placed the marijuana in the toilet, and even if the State failed to prove the alteration/destruction element of the offense, the Court of Appeals was required under this Court's opinion in *Thornton v. State* to reform the judgment to reflect a conviction for attempted tampering with evidence.

ARGUMENT AND AUTHORITIES

GROUND FOR REVIEW ONE: By holding that the evidence was legally insufficient to establish David's identity as the individual who committed the offense when he was alone in a locked bathroom with the tampered-with evidence, the Court of Appeals erred by ignoring the circumstantial evidence establishing David's identity and requiring the State to disprove an alternative hypothesis regarding the offender's identity.

I. Standard of review.

"When determining whether the evidence is sufficient to support a criminal conviction, the only standard an appellate court should apply is *the Jackson v. Virginia* test for legal sufficiency." *Cary v. State*, 507 S.W.3d 761, 765–66 (Tex. Crim. App. 2016) (emphasis added); *see also Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (plurality op.). "In assessing the legal sufficiency of the evidence to support a… conviction, [a reviewing court should] consider all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, any rational juror could have found the essential elements of the crime beyond a reasonable doubt." *Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016); *see also* TEX. CODE CRIM. PROC. art. 38.04.

In determining whether the evidence is legally sufficient to support a criminal conviction, a reviewing court should not re-weigh evidence or substitute its

judgment for that of the fact finder. *Zuniga v. State*, 551 S.W.3d 729, 732 (Tex. Crim. App. 2018). Rather, a reviewing court "must give deference to the responsibility of the trier of fact to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (internal quotation marks omitted). In so doing, "[Juries] may use common sense and apply common knowledge, observation, and experience gained in ordinary affairs when drawing inferences from the evidence." *Acosta v. State*, 429 S.W.3d 621, 625 (Tex. Crim. App. 2014). This standard applies to both direct and circumstantial evidence. *Hooper*, 214 S.W.3d at 13. Moreover, circumstantial evidence is as probative as direct evidence, and circumstantial evidence alone can be sufficient to establish guilt. *Id.*

II. Because David was found alone in a locked bathroom with the tampered-with evidence, and because jurors are allowed to make common-sense inferences based upon the evidence at trial, the record contains legally sufficient evidence to establish David's identity as the person who placed the marijuana in the toilet.

In this case, agents entered a hotel room with two women present in the main area of the room, while David was in the bathroom behind a locked door. When the agents identified themselves as law-enforcement officers and ordered David to come out, he refused. After hearing shuffling noises coming from inside the bathroom, the

agents forced their way into the bathroom and saw David, who was fully clothed, standing next to the toilet that contained marijuana and feces. Nobody else was present in the bathroom at the time the agents observed David. The agents subsequently placed David and the other occupants of the room under arrest for tampering with physical evidence.

As Lieutenant Nava acknowledged, although it is theoretically possible that one of the other occupants placed the marijuana in the toilet, the most rational, common-sense inference from this circumstantial evidence is that David, who was alone in the locked bathroom with the tampered-with evidence, was the person who placed the marijuana in the toilet. Through its guilty verdict, the jury impliedly found that David was the person who committed the offense. Nevertheless, the Court of Appeals rejected the jury's evidence-based finding and held that the evidence did not establish David's identity as the person who committed the offense, reasoning that: (1) there were other individuals present in the hotel room who had "opportunity and access" to the toilet; (2) the agents did not directly observe David place the marijuana in the toilet; (3) David had only entered the hotel room minutes before officers entered the room; and (4) the jury's conclusion that David committed the offense by his "mere presence would… be an unreasonable inference, amounting to no more than mere speculation." *David*, 621 S.W.3d at 927.

By so concluding, the Court of Appeals misconstrued the distinction between a reasonable inference supported by evidence and an inference based on speculation. In *Hooper*, this Court explained this distinction:

> [A]n an inference is a conclusion reached by considering other facts and deducing a logical consequence from them. Speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented. A conclusion reached by speculation may not be completely unreasonable, but it is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt…. [J]uries are permitted to draw multiple reasonable inferences from the evidence (direct or circumstantial), but they are not permitted to draw conclusions based on speculation.

Hooper, 214 S.W.3d at 16. In so noting, this Court instructed intermediate courts of appeals to "adhere to the *Jackson* standard and determine whether the necessary inferences are based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict." *Id*. at 16–17.

In *Hooper*, this Court also provided a useful illustration of the difference between reasonable inferences and unsupported speculation:

> A woman is seen standing in an office holding a smoking gun. There is a body with a gunshot wound on the floor near her. Based on these two facts, it is reasonable to infer that the woman shot the gun (she is holding the gun, and it is still smoking). Is it also reasonable to infer that she shot the person on the floor? To make that determination, other factors must be taken into consideration. *If she is the only person in the room with a smoking gun, then it is reasonable to infer that she shot the person on the floor*. But, if there are other people with smoking guns in the room, absent other evidence of her guilt, it is not reasonable to infer

> that she was the shooter. No rational juror should find beyond a reasonable doubt that she was the shooter, rather than any of the other people with smoking guns. To do so would require impermissible speculation. But, what if there is also evidence that the other guns in the room are toy guns and cannot shoot bullets? Then, it would be reasonable to infer that no one with a toy gun was the shooter. It would also be reasonable to infer that the woman holding the smoking gun was the shooter. This would require multiple inferences based upon the same set of facts, but they are reasonable inferences when looking at the evidence. We first have to infer that she shot the gun. This is a reasonable inference because she is holding the gun, and it is still smoking. Next, we have to infer that she shot the person on the floor. This inference is based in part on the original inference that she shot the gun, but is also a reasonable inference drawn from the circumstances.

Hooper, 214 S.W.3d at 16 (emphasis added).

This case presents an almost-identical scenario to the first hypothetical above: after agents heard shuffling noises behind a locked bathroom door and forced their way into the bathroom, David was found standing over the "smoking gun" while he was alone in the bathroom. Again, it was possible that one of the other individuals in the room committed the offense by previously placing the evidence in the toilet before David entered the bathroom; nevertheless, the State was not required to disprove every alternative hypothesis to show that legally sufficient evidence established David's identity. *See Ramsey v. State*, 473 S.W.3d 805, 808 n. 3 (Tex. Crim. App. 2015) (noting that this Court has long since rejected the reasonable-hypothesis construct, which requires "every other reasonable hypothesis raised by

the evidence [to be] negated" for a conviction to be upheld), *accord Zuniga*, 551 S.W.3d at 739. Moreover, a jury could have rationally inferred that because: (1) the agents heard shuffling noises in the bathroom; and (2) David was found fully clothed in the bathroom, David was not present in the bathroom to relieve himself, but that he was instead there to tamper with the marijuana. Moreover, contrary to the Court of Appeals' reasoning, this evidence established more than David's mere presence in the bathroom, and thus there is sufficient evidence to establish David, and not one of the other occupants of the room, was the person who committed the offense. *See David*, 621 S.W.3d at 927; *see also Dorsey v. State*, 24 S.W.3d 921, 927 (Tex. App.—Beaumont 2000, no pet.) (recognizing that mere presence, when combined with other facts, may suffice to establish that the accused was the person who committed the offense), *citing Thomas v. State*, 645 S.W.2d 798, 800 (Tex. Crim. App. 1983).

III. Conclusion.

Could any rational jury have found that, based upon the evidence when viewed in the light most favorable to the verdict, David committed the offense? Yes. In this case, the defense argued that the State had failed to prove that David was the person who altered or destroyed the marijuana, but through its guilty verdict, the jury impliedly considered and rejected that defensive theory by relying on the evidence

at trial establishing David's guilt. Instead of permitting juries to make common-sense inferences based upon the evidence at trial, however, the Court of Appeals' opinion has the effect of placing the unreasonable burden on the State to prove tampering cases by direct evidence only, and to not only require the State to prove that the defendant was alone when the evidence was tampered with, but also to provide testimony from a witness who directly observed him tamper with the evidence.

By holding that the State failed to prove that David, who was alone in a locked bathroom with the tampered-with evidence, was the person who committed the offense, the Court of Appeals rejected the *most* rational, evidence-supported inference the jury could have possibly made. Thus, the Court of Appeals erred by: (1) substituting its determination of the weight of the evidence for that of the jury's; (2) requiring the State to disprove every reasonable alternative hypothesis regarding the perpetrator's identity; and (3) rejecting the jury's rational, evidence-supported finding that David was the person who committed the offense. *See Zuniga*, 551 S.W.3d at 733; *Hooper*, 214 S.W.3d at 16–17; *see also Guillory v. State*, Nos. 09-18-00148-CR, 09-18-00149-CR, 09-18-00150-CR, 2020 WL 216034, at *1, 4 (Tex. App.—Beaumont Jan. 15, 2020, no pet.) (mem. op., not designated for publication) (holding that sufficient evidence supported the defendant's tampering-with-

physical-evidence conviction where, *inter alia*, the police observed the defendant with cocaine residue on his hands alone in his bedroom, which was next to the bathroom where the tampered-with evidence was located, and where the bathroom was only accessible through the bedroom).

For these reasons, this part of the Court of Appeals' opinion should be reversed.

<u>GROUND FOR REVIEW TWO</u>: By holding that placing marijuana in a toilet bowl containing feces does not constitute "altering" or "destroying" within the meaning of the tampering-with-physical-evidence offense, the Court of Appeals failed to apply the appropriate legal-sufficiency standard by improperly substituting its judgment for that of the jury's and disregarding the jury's common-sense inference that marijuana that has been contaminated with feces has been altered or destroyed.

I. Standard of review and applicable law.

The State here relies on and adopts the same standard of review addressed in Section I of the State's first ground for review above. As it pertains to this case, a person commits tampering with physical evidence if, knowing that an investigation or official proceeding is in progress, he alters, destroys, or conceals any thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding. TEX. PENAL CODE sec. 37.09(a)(1). As explained in greater detail below, the terms "alter" and "destroy" are not statutorily defined; rather, this Court has previously provided definitions for both terms. *See Stahmann v. State*, 602 S.W.3d 573, 578–79 (Tex. Crim. App. 2020) (defining "alter"); *Williams v. State*, 270 S.W.3d 140, 146 (Tex. Crim. App. 2008) (defining "destroy").

II. The State proved that David altered the marijuana.

On direct appeal, the State argued that the marijuana had been altered once it had been "wetted with toilet water mixed with fecal matter that the agents were unwilling and/or unable to collect." *David*, 621 S.W.3d at 927. Applying this Court's

definition of "alter" from *Stahmann*, 602 S.W.3d at 578–79, the Court of Appeals rejected the State's argument, reasoning that:

> [T]he State failed to present any evidence from any witness or expert demonstrating the toilet water had indeed altered or destroyed the marijuana…. Common sense tells us that water does not necessarily alter everything it touches…. Whether the marijuana can be dried and used is an unanswered question. We cannot simply assume that it is unusable simply because it is repugnant that one would even attempt to do so.

David, 621 S.W.3d at 927–28; *see also Stahmann*, 602 S.W.3d at 578–79 (defining "alter" to mean "that the defendant changed or modified the thing itself, not that he merely changed its geographic location."). But, the Court of Appeals misconstrued *Stahmann*. In that case, this Court held that the defendant's act of throwing a prescription bottle over a fence did not constitute alteration because "the mere act of throwing a pill bottle did not change the bottle itself," but only resulted in a change of the pill bottle's location. *Stahmann*, 602 S.W.3d at 579–80. This Court further reasoned that the act of throwing the pill bottle over the fence had not altered the "physical state" of the pill bottle. *Id*. at. 579.

This case presents an entirely different scenario: David did not merely change the marijuana's geographic location by placing the marijuana in the toilet; rather, he changed or modified the nature of the marijuana itself because when the marijuana, which was loose and not contained in a sealed container, became "mixed" with fecal

matter, the marijuana was no longer capable of being collected, tested, or consumed. In support of this notion, Lieutenant Nava testified that the agents were unable to safely test this evidence due to the obvious health concerns associated with handling the marijuana, which had become mixed with fecal matter.[2] Photographs of the marijuana in the toilet, which were admitted at trial as State's Exhibits 16 and 17 and show a green, leafy substance with obviously present feces in the toilet, supported Lieutenant Nava's testimony.

Nevertheless, the Court of Appeals rejected this evidence and improperly equated placing the marijuana in water that was obviously contaminated with fecal matter (as shown by Lieutenant Nava's testimony and the photographs) with placing the marijuana in sterile tap water. *See David*, 621 S.W.3d at 928. But, a rational jury could have used their "common sense and appl[ied] common knowledge, observation, and experience gained in ordinary affairs when drawing inferences from the evidence" to reasonably conclude (without the need for expert testimony) that because the marijuana, a leafy substance, had become "mixed" with the fecal

[2] Because a reviewing court should consider all the evidence at trial in a legal-sufficiency review, the fact that the defense elicited Lieutenant Nava's testimony on this matter during cross-examination should make no difference in this Court's consideration of this evidence. *See Jenkins*, 493 S.W.3d at 599. Moreover, a reviewing court should view this evidence in the light most favorable to the verdict, regardless of whether it is questionable that the officers did not attempt to collect the marijuana. *See id*.

matter, merely removing the marijuana from the water and allowing the marijuana to dry out would not have resulted in the marijuana being fit for testing or consumption because the fecal matter would still be present on or within the marijuana. *See Acosta*, 429 S.W.3d at 625.

Thus, the jury could have rationally concluded from Lieutenant Nava's testimony that the loose marijuana had become inseparably combined with fecal matter, thus changing its nature. By placing the marijuana in a toilet containing feces, David intended to impair its verity, legibility, or availability as evidence in a subsequent investigation because the marijuana was altered and thus became unsuitable for collection, testing, or consumption. Through its verdict, the jury impliedly, and rationally, found so, and the Court of Appeals erred by holding that legally insufficient evidence supported the alteration element of the offense. *See Stahmann*, 602 S.W.3d at 579–80; *see also Harris v. State*, No. 12-07-00279-CR, 2008 WL 2814879, at *3 (Tex. App.—Tyler July 23, 2008, pet. ref'd) (mem. op., not designated for publication) (holding that a defendant's act of chewing and swallowing marijuana constituted legally sufficient evidence of alteration and destruction under section 37.09).

III. The State proved that David destroyed the marijuana.

With somewhat-less explanation, the Court of Appeals also rejected the

State's argument that David destroyed the marijuana within the meaning of section 37.09(a)(1). *David*, 621 S.W.3d at 928. But, David's act of placing the marijuana in the toilet that contained feces constituted destruction of the marijuana because it had the effect of ruining and rendering the marijuana useless. *See Williams*, 270 S.W.3d at 146 (defining "destroy" to mean "that a destroyed thing has been ruined and rendered useless."). In *Williams*, 270 S.W.3d at 146, this Court held that the defendant's act of smashing a crack pipe constituted destruction of evidence because it was "ruined and rendered useless when [he] stepped on it and broke it to pieces." This case is similar to *Williams*: as asserted above, David's act of placing the marijuana a toilet containing feces, thereby contaminating it, had the effect of ruining it and rendering it useless for collection, testing, or consumption. Although the State did not present expert testimony establishing that the marijuana's chemical composition had changed due to the contamination, neither did the State in *Williams* present expert testimony to show that the crystalline structure (or some other physical property) of the glass pipe had changed as a result of the defendant's act. *See Williams*, 270 S.W.3d at 146. Rather, it was sufficient to show that the marijuana in this case had been ruined and rendered useless for being collected, tested, or

consumed by becoming contaminated with feces through David's act. *See id*.[3]

This case contrasts with *Rabb*, 434 S.W.3d at 617–18, where this Court held that the defendant's swallowing of a baggie of narcotics did not constitute destruction because there was no evidence regarding the status of the baggie and "[the] act clearly [did] not cause the destruction of the drugs, or [the drugs] would be useless to the transporters." This Court further reasoned that although juries are free to make common-sense inferences, and although it was possible that the drugs had been destroyed, there was no evidence in the record upon which the jury could have relied upon to conclude that the drugs were, in fact, destroyed. *Rabb*, 434 S.W.3d at 617.

In contrast, Lieutenant Nava testified that the feces had become "mixed into [the marijuana,]" which (as shown by the State's photographs showing the marijuana in the toilet) was clearly not contained in a baggie or some other protective container. Lieutenant Nava further testified that that the agents did not collect the marijuana due to health concerns. A rational inference from this testimony and the State's

[3] Several courts have overruled legal-sufficiency-of-evidence challenges to tampering convictions where the defendant destroyed evidence by placing the evidence in the toilet and flushing it. *See, e.g.*, *Vaughn v. State*, 33 S.W.3d 901, 903–04 (Tex. App.—Houston [14th Dist.], no pet.); *Gordwin v. State*, Nos. 01-14-00343-CR, 01-14-00344-CR, 2015 WL 1967623, at *3–4 (Tex. App.—Houston [1st Dist.] July 29, 2015, pet. ref'd) (mem. op., not designated for publication); *Diaz v. State*, Nos. 13-13-00067-CR, 13-13-00068-CR, 2014 WL 1266350, at *2 (Tex. App.—Corpus Christi Jan. 23, 2014, no pet.) (mem. op., not designated for publication).

photographs was that the marijuana's availability as evidence in the investigation had been impaired, and that the marijuana was no longer of any use to a potential user. Because the jury's inferences regarding the marijuana in this case were based upon evidence in the record, and not mere speculation, *Rabb* is distinguishable. *See Rabb*, 434 S.W.3d at 617–18.

Through its everyday, common-sense experience, any rational jury could have reasonably found that feces-contaminated marijuana had been destroyed by David's actions because it had been ruined and rendered useless for consumption or use as evidence. Moreover, the burden should not be put on the State to present expert testimony in every tampering case to establish that the chemical composition of the evidence has changed when it is obvious to any rational juror that the evidence has been "altered" or "destroyed" within the meaning of section 37.09(a)(1). Neither should the burden be put on the State to prove that the defendant actually rendered the evidence unavailable for use in a subsequent investigation; rather, under the plain language of section 37.09(a)(1), the State must only prove the defendant's intent to impair the evidence's verity, legibility, or availability as evidence in the investigation, and that the defendant ruined the evidence and rendered it useless. *See* TEX. PENAL CODE sec. 37.09(a)(1); *Williams*, 270 S.W.3d at 146.

For these reasons, the Court of Appeals also erred by rejecting the jury's

conclusion that David destroyed the marijuana and holding that the State had failed to prove that element of the offense. *See Williams*, 270 S.W.3d at 146, *cf. Rabb*, 434 S.W.3d at 617–18; *see also Diaz*, 2014 WL 1266350, at *2 (holding that there was legally sufficient evidence to prove that the defendant destroyed cocaine where the officer saw the defendant coming out of the bathroom where cocaine was found around the rim of the toilet bowl and in the toilet water, and recognizing that the State may prove destruction of evidence through circumstantial evidence).

IV. Conclusion.

Every person older than a toddler knows that fecal matter contains bacteria and other toxic substances, and that for health reasons it should not be touched, let alone ingested. Moreover, a reasonable, rational person would not drop food into a toilet, reach into the toilet to retrieve it, and proceed to consume the food, whether or not the toilet had been contaminated with human waste. A rational, common-sense inference from the evidence in the record is that if law-enforcement officers are unwilling or unable to handle and test feces-contaminated marijuana due to health concerns, such marijuana is no longer fit for consumption, its nature and/or usefulness has permanently changed, and it has thus been "altered" or "destroyed" within the meaning of section 37.09(a)(1).

Could the agents in this case have attempted to collect the loose marijuana,

despite the repugnance and possible health-related risks of doing so? Possibly. Could the marijuana have been smoked or otherwise consumed after being mixed with fecal matter? Possibly. But, such assertions amount to nothing more than mere speculation because of the absence of supporting evidence in the record. Rather, given its guilty verdict, the jury impliedly credited Lieutenant Nava's testimony regarding the "mixed" state of the marijuana with fecal matter, as well his testimony that the agents did not collect the marijuana due to the health risks associated with doing so. Under the proper standard of review, this Court should thus not re-weigh this evidence in light of what *could* have been done, which would amount to nothing more than mere speculation. Nor should it substitute its judgment of the facts proved at trial for that of the jury's. Rather, this Court should view this testimony in the light most favorable to the verdict. *See* TEX. CODE CRIM. PROC. art. 38.04; *Jenkins*, 493 S.W.3d at 599.

In sum, the purpose of section 37.09 is "to maintain the honesty, integrity, and reliability of the justice system," and to prohibit persons from creating, destroying, forging, altering, or otherwise tampering with physical evidence that may be used in an official investigation or proceeding. *See Wilson v. State*, 311 S.W.3d 452, 458 (Tex. Crim. App. 2010). To allow the Court of Appeals' decision to stand would be to abrogate that purpose by unreasonably allowing suspects to face lessened criminal

liability (or none at all) when they place contraband in feces-contaminated toilets and decide not to flush the toilet, even when the evidence in the record establishes that the contraband has still been rendered unavailable for use in a subsequent investigation. Through its holdings, the Court of Appeals erred by substituting its judgment for that of the jury's, and by negating the jury's abilities to use its everyday experience and common-sense inferences in making its determinations of fact. Thus, the record contains legally sufficient evidence to establish that David altered or destroyed the marijuana by placing it in a toilet that contained feces, and the Court of Appeals erred by holding otherwise.

For these reasons, this part of the Court of Appeals' opinion should also be reversed.

<u>GROUND FOR REVIEW THREE</u>: Even if the Court of Appeals did not err by holding that the evidence was legally insufficient to support David's conviction for tampering with physical evidence, the Court of Appeals erred by failing to reform the conviction to the lesser-included offense of attempted tampering with physical evidence, thereby violating this Court's instruction in *Thornton v. State*.

In *Thornton*, this Court held that when the State has proven all the elements of the tampering-with-physical-evidence offense, other than the actual or effective concealment, alteration, or destruction of the evidence, and when the court of appeals has reversed the tampering conviction on legal sufficiency grounds, the judgment should be reformed to reflect a conviction for attempted tampering with physical evidence. *See Thornton*, 425 S.W.3d at 295; *see also Rabb*, 483 S.W.3d at 21–22 (applying *Thornton*). In this situation, a judgment should be reformed to reflect a conviction for attempted tampering with physical evidence if the State proves: (1) knowing that an offense had been committed, and with (2) the specific intent to conceal, alter, or destroy evidence, and the specific intent to impair the availability of the evidence in a later investigation or proceeding, the defendant (4) did an act amounting to more than mere preparation that (5) tended but failed to result in the concealment, alteration, or destruction of the evidence. *See Thornton*, 425 S.W.3d at 300–01.

Here, the Court of Appeals refused to reform the judgment to reflect a

conviction for attempted tampering with physical evidence because the court held that the State failed to prove David's identity as the person who put the marijuana in the toilet, which would be a necessary element of the lesser-included offense of attempted tampering with physical evidence. *David*, 621 S.W.3d at 928 n. 1. As explained in the State's first ground for review above, which the State here relies on and adopts, the State presented sufficient evidence to establish David's identity, and thus the Court of Appeals erred in refusing to reform the judgment on this basis. And, even if this Court concludes that the State failed to prove that David effectively altered or destroyed the marijuana, the record still contains legally sufficient evidence to establish the remaining elements of the offense, such that the State proved that David committed attempted tampering with physical evidence. Simply, the evidence was legally sufficient to prove that David, at the very least, intentionally attempted, but failed, to alter, destroy, or conceal the marijuana with the intent of impairing its availability in the agents' investigation, and that he knew that an offense had been committed (i.e., possession of marijuana). *See Thornton*, 425 S.W.3d at 300–01.

Thus, even if this Court does not reinstate David's conviction for tampering with physical evidence, the Court of Appeals' judgment should nonetheless be reversed, and the case should be remanded to the trial court with instructions to

reform the judgment to reflect a conviction for attempted tampering with physical evidence and to hold a punishment hearing pursuant to this post-reformation conviction. *See Thornton*, 425 S.W.3d at 295, 307; *see also Rabb*, 483 S.W.3d at 21–22, 24.

PRAYER

WHEREFORE, the State prays that this Court vacate the judgment of the Court of Appeals, hold that legally sufficient evidence supports David's conviction, and remand the case to the Court of Appeals for consideration of David's remaining appellate issues. In the alternative, the State prays that this Court vacate the judgment of the Court of Appeals and remand the case to the trial court to reform the judgment to reflect a conviction for attempted tampering with evidence and to hold a punishment hearing pursuant to this post-reformation conviction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the foregoing document, beginning with the statement of facts on page 1 through and including the prayer for relief on page 29, contains 5,997 words, as indicated by the word-count function of the computer program used to prepare it.

/s/ Justin M. Stevens
JUSTIN M. STEVENS

CERTIFICATE OF SERVICE

(1) The undersigned does hereby certify that on June 25, 2021, a copy of the foregoing State's brief on the petition for discretionary review was sent by e-mail via the E-serve system to David's attorney, Peter R. Escobar, at escobaroffice_mail@sbcglobal.net.

(2) The undersigned also does hereby certify that on June 25, 2021, a copy of the State's brief on the foregoing petition for discretionary review was sent by e-mail via the E-serve system to the State Prosecuting Attorney at information@SPA.texas.gov.

/s/ Justin M. Stevens
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