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01-24-00757-CR
FIRST COURT OF APPEALS
HOUSTON, TEXAS
3/28/2025 5:23 PM
DEBORAH M. YOUNG
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No. 01-24-00757-CR

In the First Court of Appeals
Houston, Texas

FILED IN
1st COURT OF APPEALS
HOUSTON, TEXAS
3/28/2025 5:23:19 PM
DEBORAH M. YOUNG
Clerk of The Court

LUIS LUNA,
APPELLANT,

v.

THE STATE OF TEXAS,
APPELLEE.

On Appeal from the 248th Judicial District Court
Harris County, Texas
Hilary Unger, Judge Presiding
In Cause No. 1876291

APPELLANT'S OPENING BRIEF

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Trial Judge: Hilary Unger, Presiding
248th Judicial District Court
Harris County, Texas

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To the Honorable Court of Appeals:

This case isn't about what really happened. The State didn't prove what really happened. Instead, this case is about what the State failed to prove—and how no rational juror could find beyond a reasonable doubt that Luis Luna killed his daughter.

STATEMENT OF THE CASE

Luis was indicted—and twice re-indicted—for capital murder.[1] Tex. Penal Code § 19.03(a)(2), (8).[2] He pleaded not guilty, but a jury convicted him based on a six-application-paragraph jury charge.[3] A sentence of life without parole was automatic, and the trial court pronounced sentence accordingly.[4] Tex. Penal Code §§ 12.31(a)(2); 19.03(b). This appeal followed.

[1] Clerk's Record* volume 1 (CR1) at 11–12 (final indictment, filed July 12, 2024), 49 (first indictment, filed November 23, 2020), 355 (second indictment, filed January 9, 2024); Reporter's Record volume (RR) 2:4–10.

* The Clerk's Record comprises two separate volumes. The pages in both are consecutively Bates-stamped. In volume 2, the stamped numbers and the pdf numbers are different. For example, the judgment in volume 2 is on pdf page 299 but is stamped page 715. This brief cites the *stamped* number.

[2] Penal code references are to the 2020 version.

[3] CR2:703–06, 714; RR:4:30; RR12:4–8.

[4] RR12:10.

STATEMENT REGARDING ORAL ARGUMENT

The death of a child—especially of a young child and in the manner alleged in this case—should arouse emotions in anyone: "A child died in the worst way possible; *someone* must be held accountable." To the State, Luis Luna was someone.

But to the *law*, regardless of emotion and rhetoric, Luis Luna was presumed innocent and he was entitled not to be convicted unless the State presented legally sufficient evidence of his guilt. And while the State presented a lot of evidence (seven days' worth), it never connected the dots and proved beyond a reasonable doubt that Luis was guilty of capital murder. And then the trial court compounded that failure by giving the jury erroneous and unsupported instructions that authorized them to convict Luis even in the face of insufficient evidence.

To understand why, we have to work through the *entire* record, which, though long, fell short of what due process demands. Written briefing can only do so much. We need to talk about the evidence and discuss why it doesn't prove that Luis did anything to his daughter. Oral argument would therefore be helpful in deciding this case. Tex. R. App. P. 39.1(d).

Issues Presented

1. **Legal Sufficiency.** The State presented evidence that SM died from suffocation, but no evidence from which a jury could rationally infer that Luis suffocated her or was responsible for someone else suffocating her. Is the evidence legally insufficient to convict him of capital murder?

2. **Jury Charge: Parties Instructions.** Over defense objection, the court instructed the jury on four theories of party liability even though there was no evidence to prove Luis's guilt as a party. Did Luis suffer some harm from this error?

3. **Jury Charge: Omitted Elements.** Three of the six application paragraphs omitted essential elements of the offense. Did Luis suffer egregious harm from this error?

4. **Exclusion of Defense Evidence.** The trial court excluded evidence of interrogation techniques that were used on Luis on the grounds that it "creates a false impression." Does the record fail to show that this denial of Luis's Sixth Amendment and due process rights was harmless beyond a reasonable doubt?

STATEMENT OF FACTS

Luis Luna was "the perfect father."[5]

When his child, SM, stopped breathing, he tried to save her and cooperated with the investigation.[6] After SM died, the Sheriff's Office hid the fact of her death from Luis while getting statements from him, and then they told him that his daughter was dead.[7]

While Luis swirled in grief and confusion from this news, the medical examiner concluded that SM had been beaten, sexually assaulted, and suffocated.[8] The Sheriff's Department charged Luis with capital murder and never looked back, even after someone else's DNA was found inside the child.[9]

SM is born to Luis and Ya'Niece.

Luis Luna and Ya'Niece Mason met in high school.[10] Their relationship waxed and waned over the years, and eventually Ya'Niece became pregnant.[11] After SM was born in December 2019,

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[5] RR4:168, 177, 184–85.

[6] RR4:74, 82, 110–11, 147, 171, 175; RR5: 86–87, 116; RR6:198–99; RR7:75, 134.

[7] RR5:88, 111; RR6:119, 137, 171, 192; SX308, 20:45 – 21:00; DX1, 00:08 – 00:11, 11:35 – 12:31.

[8] RR4:176, 183; RR7:84, 139; RR9:86–87, 152, 195–96, 205; DX1 12:35 – 15:09.

[9] RR6:158, 161, 216, 240; RR8:20–21, 41–42, 65, 142–44; RR9:48.

[10] RR9:171–72, 174.

[11] RR9:174–76, 199.

Ya'Niece saw Luis every now and then; he seemed interested in getting to know SM.[12]

Luis moves in with five friends.

Ya'Niece began taking SM to see Luis more after he moved into an apartment with five other young men.[13] Luis's roommates were:

1) Von: Trevonte Moulton;
2) Julio: Treverton Moulton, Von's twin brother;
3) Juice: Trevington Moulton, another Moulton brother;
4) L-Dawg: Ladarrean Watson, the Moultons' half-brother; and
5) Juvie: Henry Matthews, a friend and Juice's "partner."[14]

Von paid the rent and had the only key; everyone else had to knock in order to be let in.[15] The third-floor apartment was small; it had a living room, one bedroom, and a small enclosed "sunroom" that was through a sliding door off the living room.[16]

SX288 (detail), showing the apartment layout.

[12] RR9:177–78.

[13] RR9:179.

[14] RR4:43–44, 46–50, 99, 124–25, 129; RR7:47, 49, 51–52, 116–19.

[15] RR4:50, 58; 119–20, 160, 162–63; RR7:99–100, 121. Von claimed there was a shared "spare" key; no one else seemed to be aware of it. RR4:119–20.

[16] RR4:52, 138; RR5:98; RR6:27–28, 42, 44; RR7:55; SX288.

Luis got the sunroom because he had a child and paid part of the rent.[17] The other five slept wherever was "convenient."[18] Luis wasn't the only one who went into the sunroom, however. On July 22, 2020, Luis took a photo of two other guys hanging out with him in the sunroom.[19] Luis also had a girlfriend named Ashlea.[20] She had a car and was Luis's source of transportation.[21] The other guys "let her stay" with Luis in the apartment.[22]

SX320: Two other guys in the sunroom.

Luis becomes "the perfect father."

Ya'Niece would bring SM to visit Luis about three to four times a week.[23] Luis and Ya'Niece kept up "a romantic relationship."[24] They communicated with each other over Instagram and would have "kind of frequent" arguments.[25]

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[17] RR4:57, 96, 103–04, 131, 135; RR7:54–55, 100, 120; RR9:181.

[18] RR4:58, 131 RR7:54, 120–21.

[19] RR10:33; SX320, sl.13.

[20] RR7:56, 123.

[21] RR7:62.

[22] RR7:62.

[23] RR9:180; DX1, 01:08 – 01:25.

[24] RR9:182.

[25] RR9:187; SX318.

Ya'Niece would carry SM up to the apartment in her car seat.[26] She also brought SM's other baby items, including diapers, formula, wipes, blankets, a diaper bag, and extra clothes.[27]

These visits took on three forms: 1) Ya'Niece would leave SM with Luis; 2) Ya'Niece would stay with them; or 3) Ya'Niece and SM would spend the night.[28] If Ya'Niece stayed at the apartment, the three of them—Luis, Ya'Niece, and SM—would spend most of their time in the sunroom.[29] If Ya'Niece spent the night, all three would sleep on Luis's air mattress.[30] Ya'Niece would not let SM sleep in the car seat because she had heard that it was unsafe.[31]

These visits allowed Luis and SM to have "a father and daughter relationship," and for the other guys to see Luis and SM together.[32] Von recalled that Luis was a "loving father," who took care of SM and never did anything to hurt her.[33] Juice said the same thing: Luis

[26] RR4:66; RR7:58; RR9:184.

[27] RR4:66; RR7:58; RR9:183.

[28] RR4:64–65, 134–35; RR7:57, 59–60, 126; RR9:182; DX1, 01:16 – 01:30.

[29] RR4:66, 136; RR7:59–60, 125; RR9:180.

[30] RR9:183.

[31] RR9:183.

[32] RR4:63, 140; RR9:181.

[33] RR4:63, 105–07.

"took good care" of SM, did all the things a father would do, and never hurt her in any way.[34]

Juvie remembered that Luis was "an amazing father" who was "very protective" of SM and took care of her by feeding her, bathing her, dressing her, and changing her diapers.[35] He called Luis "the perfect father."[36]

Occasionally, Luis would bring SM into the living room to see the other guys.[37] Other times, Luis would ask his roommates to watch SM while he would "go off and do something" with a girl, or while he would go to the store.[38] They would watch her "sometimes in the living room and sometimes in the sunroom."[39] If Luis left to run an errand, he would come back quickly.[40]

August 20–21, 2020: Ya'Niece drops off SM to spend the weekend with Luis.

The weekend that SM died, Luis had asked Ya'Niece to drop her off for a visit.[41] The evidence at trial was inconsistent regarding the date,

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[34] RR7:151–52.

[35] RR4:142, 168, 181, 185.

[36] RR4:168, 177, 184–85.

[37] RR7:59.

[38] RR4:64; RR7:61.

[39] RR7:61.

[40] RR7:61.

[41] RR9:188; SX318, p.26–29.

nature, duration, and even number of visits that occurred. Ya'Niece testified that she brought SM to Luis's apartment around 10:00 or 11:00 on the night of August 21 and didn't stay.[42] Juvie testified that Ya'Niece dropped off SM on August 23.[43]

Luis's phone records—including his photos, Instagram exchange with Ya'Niece, and a text exchange with "Ash"—tell a different story, showing that Luis had SM on Thursday, August 20, 2022. His phone contained a series of pictures, taken at 3:16 p.m., of him holding SM.[44] Seven minutes later, Ya'Niece sent Luis an Instagram message saying that she would "be back in like[]30."[45]

Later that evening, at 7:02 p.m., Luis texted "Ash" and said, "I got [SM]."[46] A little over an hour later, he texted "Ash" that he was "puttin[g] her to sleep."[47] Between 9 and 11 p.m., Luis and Ya'Niece sent each other messages that indicated they were together in the apartment.[48]

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[42] RR9:188.

[43] RR4:139–40.

[44] RR10:34–35; SX320, sl.17–24.

[45] RR10:40; SX318, p. 30; SX320, sl.43.

[46] RR10:43–44; SX320, sl.50.

[47] RR10:45; SX320, sl.50.

[48] RR10:41–43; SX318, p.31–33; SX320, sl.43, 45.

On Friday morning, Luis texted "Ash" that SM didn't "go to sleep til 3".[49] Half an hour later, Ya'Niece sent Luis an Instagram message that she was "home."[50]

That evening, at 6:41 p.m., Luis asked Ya'Niece to "drop [SM] off."[51] Two minutes later, he texted "Ash" that SM was "tryna watch her show."[52] At 10:40, he texted "Ash" complaining that SM doesn't "go to sleep at 9" anymore."[53] At 11:25 p.m., Luis told Ya'Niece, "u can come."[54] At midnight, Ya'Niece said that she was on her way; Luis responded "nvm u takin too long," and an argument ensued.[55] Nearly an hour later, Ya'Niece said that she had "just got" water for SM and was on her way.[56] One minute later, Luis texted "Ash" that SM "just fell asleep."[57] Luis and Ya'Niece continued arguing.[58]

At trial, Ya'Niece testified that she dropped off SM between 10 and 11 p.m., that she and Luis got into an argument because she

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[49] RR10:47; SX320, sl.58.

[50] RR10:46; SX318, p.33; SX320, sl.57.

[51] RR10:46–47; SX318, p.33–34; SX320, sl.57.

[52] RR10:48; SX320, sl.59.

[53] RR10:49; SX320, sl.62.

[54] RR10:51; SX318, p.36; SX320, sl.65.

[55] RR10:51–52; SX318, p.37–40; SX320, sl.65, 68, 75.

[56] RR10:53; SX318, p.41; SX320, sl.75.

[57] RR10:53; SX320, sl.76.

[58] SX318, p.41–43.

thought he had a girl in the apartment, and that she came up to check but saw only SM in her car seat.[59]

August 22: SM appears healthy, and Ya'Niece brings more clothes and snacks so she can stay the weekend.

On Saturday, Von recorded a short video of SM at the apartment; she had no visible injuries and appeared healthy.[60] Around noon, Luis texted "Ash" that he was feeding SM and that "she might live wit[h him] f[or] now."[61]

About 2 hours later, Luis asked Ya'Niece if SM could stay for the weekend; she responded "fine" and said she would bring some clothes and snacks that evening.[62] Luis made a short video of himself and SM on the air mattress in the sunroom; SM was asleep next to him.[63]

Just after 4 p.m., Ya'Niece said that she was "about to bring her stuff."[64] At 6:53, Ya'Niece asked if SM was okay; Luis responded that

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[59] RR9:188–90.

[60] RR4:91; RR9:151–52; SX324.

[61] RR10:54; SX320, sl.77.

[62] RR10:54–55; SX318, p.43–44; SX320, sl.81.

[63] RR10:55; SX320, sl.82.

[64] SX318, p.45.

she was.[65] A few hours later, Luis invited "Ash" to come visit him and SM the next day.[66]

August 23: A busy day.

Accounts of the next day were varied—mostly due to Luis's roommates' coming and going and smoking marijuana.[67] Von and Juvie remembered that SM spent most of her time in the sunroom with Luis.[68] At 12:29 p.m., Luis texted "Ash" that he had just given SM a bath.[69]

SM seems happy and healthy.

Sometime in the afternoon, Luis brought SM out into the living room to "interact" with the guys.[70] Von, Juvie, and L-Dawg remembered that SM appeared "healthy" and "happy" and had no injuries.[71] After a while, Luis took SM back into the sunroom.[72]

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[65] RR10:55–56; SX318, p.45–46; SX320, sl.84.

[66] RR10:57; SX320, sl.93.

[67] RR4:68, 144, 165; RR7:63, 67–69, 128–29, 149.

[68] RR4:69, 79, 108, 140–41.

[69] RR10:59; SX320, sl.99.

[70] RR4:77, 141; RR7:67

[71] RR4:79, 143; RR7:66.

[72] RR4:79, 108.

Just after 1 p.m., Ya'Niece messaged Luis that she had been asleep that morning.[73] Meanwhile, Luis texted "Ash" to talk about getting married and also confirming that she would come visit that evening.[74]

The guys come and go and smoke marijuana; Luis makes plans to get high with "Ash"; he and Ya'Niece argue.

L-Dawg left the apartment around 2 or 3 p.m. to do laundry at his mother's house.[75] Just after 2, Luis texted someone and asked him to "bring a gram."[76] They "pull[ed] up" at 3:11 and also exchanged some calls with Luis.[77] Around the same time, Luis texted "Ash" that "we gon C str8 baby" (we're going to see straight, baby).[78]

At 4 p.m., Luis sent Ya'Niece a photo of SM.[79] The photo was one of the pictures from Thursday.[80] Luis asked Ya'Niece if SM could "stay for a week" so that he could take her to see his "people," and Ya'Niece agreed.[81] She told Luis that she would "come see her for a

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[73] RR10:58; SX318, p. 47; SX320, sl.97.

[74] RR10:60–61; SX320, sl.102–04.

[75] RR4:144; RR7:63, 67, 69.

[76] RR10:62; SX320, sl.112.

[77] RR10:63–64; SX320, sl.115, 117–19.

[78] RR10:63; SX320, sl.116.

[79] RR9:190–91; RR10:64–66; SX318, p.47–48; SX320, sl.121.

[80] RR10:64–65; SX320, sl.17–24, 121.

[81] RR9:191; RR10:66; SX318, p.48; SX320, sl.123.

[little] bit and bring some more stuff."[82] Luis responded, "she has everything" and said he was taking her to see some of his "people today."[83] This led to an argument.[84]

At 6:04 p.m., Luis texted "Ash" that he and SM were about to take a nap, and he asked her if she was still going to visit.[85]

Juice, who had been gone for "two or three days," returned to the apartment around 8 or 9 that evening.[86] It was already dark in the apartment.[87] The door to the sunroom was closed, and Juice believed the lights were off.[88] He saw Von and Juvie on couches in the living room; both were asleep, and he was feeling sleepy himself.[89] They were all high from smoking marijuana.[90]

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[82] RR10:67; SX318, p.48; SX320, sl.123.

[83] RR10:67; SX318, p.48; SX320, sl.128.

[84] RR9:192; RR10:67–71; SX318, p.49–53.

[85] RR10:76; SX320, sl.157.

[86] RR7:128–29, 147.

[87] RR7:131.

[88] RR7:130.

[89] RR7:129, 148.

[90] RR4:86, 101, 165.

Luis's phone is locked—and he is unresponsive to anyone—for nearly three hours.

At 8:44 p.m., an unknown person texted Luis and asked, "yo you got a g[?]"[91] Luis didn't respond. His phone was locked when the message was sent.[92] After some brief activity, Luis's phone was again locked at 8:55, and it stayed locked for nearly three hours until 11:43.[93] During that time, Luis missed numerous communications from Ya'Niece, "Ash," and someone named "Bri."[94] Between 11:43 and 12:17, he finally responded to all the missed messages.[95]

The guys are all in the apartment by 11; Von sees Luis in the apartment without SM.

L-Dawg returned from his mother's house around 11 p.m. and saw Von, Juvie, and Juice asleep in the living room.[96] Ryan Jeng, a friend who didn't live in the apartment, was awake in the bedroom; he had come in after Juice.[97] Sometime around midnight, Von woke up and saw Luis in the apartment; SM was not with him, and the lights in the sunroom were off.[98]

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[91] RR10:90; SX320, sl.192.

[92] RR10:90.

[93] RR10:91, 102; SX320, sl.199–206.

[94] RR10:92, 103; SX318, p.53; SX320, sl.198–99, 201, 203, 205, 206.

[95] RR10:103–06; SX318, p.53–54; SX320, sl.207, 210–14, 218, 220.

[96] RR4:145, 166; RR7:63, 64, 69.

[97] RR4:137–38, 146; RR7:63–65, 149, 156.

[98] RR4:72.

August 24: Panic at the apartment.

Shortly after midnight, Von, Juvie, Juice, and L-Dawg were still in the living room when they were awakened by Luis, who was running out of the sunroom, holding SM in the air, screaming, and saying she couldn't breathe.[99] SM appeared lifeless; she was pale, her face and lips were blue, her chest was caving in, she wasn't breathing, and she was foaming at the mouth.[100]

Luis is frantic and tries to save SM.

Von, Juvie, L-Dawg, and Juice recalled Luis as hysterical, frantic, scared, panicking, freaking out, shocked, and distraught.[101] Luis set SM down and tried to give her CPR.[102] It appeared to Von that Luis was doing everything he could.[103]

SM is still breathing during the 911 call.

At 12:22 a.m., as Luis tried to give CPR, Von called 911.[104] Von told the operator that SM was not breathing, that she was conscious

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[99] RR4:70, 72, 74, 84, 109, 146–47; RR7:73, 133–34.

[100] RR4:71, 74, 82, 110, 147–48; RR7:74, 91, 132. L-Dawg added that SM had "a belt mark" on her neck, as if "somebody had tried to tie something real, real, real tight to suffocate" her. RR7:75. He immediately backtracked and called the mark "little," however. RR7:75. He clarified that by "belt," he meant the "belts" on the car seat. RR7:83.

[101] RR4:73, 110, 146–47; RR7:89, 91, 132, 151.

[102] RR4:74, 82, 147, 171; RR7:75, 134.

[103] RR4:110–11.

[104] RR4:74, 82; RR6:117, 173; RR7:75; SX304, 00:05.

and struggling to breathe, that she was not awake but was breathing "a little bit," that they could hear her breathing but her eyes were closed, that she was not responsive, and finally that she was not breathing.[105] The 911 operator gave instructions for giving CPR correctly, and Luis followed the instructions.[106] SM made a sound, and the 911 operator asked, "Is that the baby?," and Von and Luis both said, "yes."[107] They told the operator repeatedly that they could hear her breathing.[108]

Luis says that he found SM in her car seat with the straps too tight.

On the 911 call, Luis can be heard saying that "the belt part" "was around her neck."[109] Von recalled that Luis said he had left SM in her car seat.[110] Juice remembered that Luis told them that SM "was in her car seat and maybe the straps are too tight."[111] According to L-Dawg, Luis had said "he left her in the car seat accidentally with

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[105] SX304, 01:19 – 02:57.

[106] RR4:112; RR7:153–54; SX304, 03:11 – 07:09.

[107] SX304, 07:12 – 07:19.

[108] SX304, 07:19 – 07:40, 08:30 – 08:40. Von, Juvie, and L-Dawg all denied that this happened, despite the fact that it was recorded by the 911 operating system, introduced as evidence by the State, and played for the jury at trial. RR4:120–21, 172; RR7:98–99.

[109] SX304, 01:38 – 01:41.

[110] RR4:75.

[111] RR7:136.

the straps too tight; and she basically choked."[112] He clarified that Luis said that the "belts" on the car seat were "tied too tight," and that SM "choked due to the … belt tied around the neck."[113]

The paramedics' observations.

Luis kept doing chest compressions until an ambulance arrived.[114] The paramedics quickly took SM from the apartment down to the ambulance.[115] They observed that SM was not breathing and had no pulse or heart movement.[116] They noticed "ligation marks around her neck" and what looked like a "thermal burn" around her mouth.[117]

SM was wearing a "super soiled" diaper that "hadn't been changed in a long time."[118] The diaper was only wet—there were no feces in it.[119] One of the paramedics, Joshua Shavers, pulled down the front of the diaper to assess SM's vaginal area.[120] That pull was

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[112] RR7:76–77.

[113] RR7:83.

[114] SX304, 08:40 – 9:00, 09:30 – 10:00.

[115] RR4:82–83, 114; RR5:25–26; RR7:135; SX304, 10:00 – 10:15; SX305, p.2.

[116] RR5:28, 29–30, 41, 43; RR9:95; SX305, p.2.

[117] RR5:30, 31, 41–42, 43; SX305, p.2.

[118] RR5:46; SX305, p.2.

[119] RR5:59.

[120] RR5:59.

"pretty rapid, but a good physical."[121] Shavers did not record any bleeding or obvious trauma in his report.[122]

Luis was still "frantic."[123] He appeared to be "concerned about the well-being of his child, and he followed the paramedics to the ambulance, which they found to be "distracting," so they had him removed from the ambulance.[124]

Lifesaving measures were unsuccessful.[125] Based on SM's "pallor appearance," dilated eyes, blood sugar, and body temperature (95.9 degrees at 12:36 a.m.), the paramedics estimated that there had been a "prolonged downtime" of at least 30 minutes.[126] But they didn't pronounce her as dead because of their protocol "for kids."[127]

SM is pronounced dead at the hospital.

The paramedics took SM to Texas Children's Hospital, West Campus.[128] Hospital staff noted that she had bruising on her forehead and a bruise on her left cheek that looked like a hand

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[121] RR5:59.

[122] RR5:58, 60; SX305, p.2.

[123] RR5:29, 57.

[124] RR5:29, 58, 61–62.

[125] RR5:28, 36–36; SX305, p.1.

[126] RR5:28, 30, 31, 33, 36, 39, 42; RR9:95; SX305, p.1.

[127] RR5:36–37.

[128] RR5:49–51.

print.[129] They observed redness and peeling around her mouth; there were scratches and superficial abrasions on her neck and a bruise on her left knee.[130] Rigor had set in on her jaw, and her neck was rigid.[131] Her skin was blue due to lack of oxygen.[132]

SM's genitals and rectum were "normal."[133] Her diaper now had fecal matter in it, but it was discarded at the hospital and was never recovered or tested.[134] At 1:12 a.m., SM's body temperature was taken rectally; it was 89.8 degrees.[135] She was pronounced dead at 1:16 a.m., twenty minutes after she arrived.[136]

Harris County Sheriff's Deputy Shane Ward photographed SM's body at the hospital.[137] He noticed "raw" spots around SM's lips, "bruising on the side of her face," and scratches on her neck and shoulder.[138] He took a photo of her genitals because he "believed that to be swollen and not normal."[139]

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[129] RR9:98; SX311, p.16.

[130] RR9:98–100 SX311, p.16.

[131] RR9:98–99; SX311, p.16.

[132] RR9:97; SX311, p.16.

[133] RR9:100; SX311, p.16.

[134] RR6:118, 212–13.

[135] RR9:95; SX311 p.19, 22, 38, 43.

[136] RR5:52–53; RR9:100; SX305, p.4; SX311, p.17.

[137] RR7:6–7, 9–10, 13–15, 17; SX123–135.

[138] RR7:16, 21–23; SX124, 129–131, 134–135.

[139] RR7:20; SX126.

The investigation begins.

Harris County Sheriff's Deputy David Papa had removed Luis from the ambulance.[140] Luis was still upset.[141] He led Papa up to the apartment, which was "chaotic" and "smelled some like marijuana, old food, and urine."[142]

Papa and Deputy Jorden Davis detained all the men in order to identify them, and Papa eventually ordered them out of the apartment but wouldn't let them leave the scene.[143] Luis begged to "go back to her, please," but Papa wouldn't allow it.[144] Papa looked through the apartment, including the sunroom, a couple of times.[145]

SX307 (stills): The sunroom both times Papa looked in.[146]

[140] RR5:29, 70–72, 93; SX307, 00:00 – 00:05.

[141] RR5:73.

[142] RR5:74, 102, 107, 115; SX307, 00:10 – 01:05; SX308, 00:00 – 00:31.

[143] RR5:76–77, 83, 98, 119, 125, 127–28, 132; RR7:137.

[144] SX307, 01:20 – 01:27.

[145] RR5:87, 94–95, 97; SX307, 01:50 – 05:39, 27:40 – 31:45.

[146] These two screenshots are shown out of chronological order to match the layout of the room and the order of later photos.

Luis reports that SM had diaper rash and breathing problems.

Papa asked Luis if SM had any problems; Luis said she had a diaper rash, and also that Ya'Niece had said that SM had trouble breathing "the same that she always does."[147]

Ya'Niece admitted at trial that SM had a diaper rash that weekend, but she denied that SM had trouble breathing or any other health issues at the time.[148]

SM's medical records, meanwhile, showed that she had suffered from a fever and a diaper rash about three weeks earlier.[149] And in February, Ya'Niece had reported that SM "gasps at night while sleeping" and that she had "noisy inhalation with laying down and sometimes with crying."[150] SM's doctor had diagnosed her with "airway malacia" at the time.[151]

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[147] RR5:87; SX307, 08:00 – 08:20.

[148] RR9:186, 192–93.

[149] RR9:108; SX312 (RR14:103).

[150] RR9:111; SX312 (RR14:169).

[151] SX312 (RR14:170). No one explained at trial what this is, but a two-second Google search reveals the answer: According to the University of Michigan Medical School, "airway malacia" is a condition in which part of the airway "is soft and easily collapses," which "causes the airway to become blocked and makes it very hard for the child to breathe." https://www.med.umich.edu/1libr/PedHomeVent/Malacia.pdf. One symptom of this condition is that oxygen levels can drop suddenly, "causing the baby to turn blue." *Id.* This information is not in the record, however, so Luis cannot and does not rely upon it in this brief. *See Johnson v. State*, 624 S.W.3d 579, 585 (Tex. Crim. App. 2021) ("An appellate court cannot consider an item that is not a part of the record on appeal.").

Luis was still "frantic" and asked if he could "go now" to be with his daughter; Davis told him no.[152] Luis yelled in frustration that "my daughter is in the—."[153] A few minutes later, he was still agitated, loudly telling Davis, "It's not about that, it's about my daughter, is she good?"[154] He said, "I woke up and seen my f-----g daughter and was like, what the f--k?" and then later added, "She was breathing, bro."[155]

SX308 (still, cropped): Luis yells in frustration.

Luis describes finding SM in her car seat when he woke up.

Papa testified that Luis was "forthcoming in establishing a timeline" of what had happened and that he was the last person to see SM alive.[156] Papa asked Luis, "When was the last time you saw her, and she was okay?" and he replied: "I went to sleep, like seven o'clock. Woke up, barely out of my sleep—it was about an hour before this—she was good," and then he woke up again and saw "the

[152] RR5:133, 141; SX307, 08:20 – 08:30.

[153] SX307, 08:30 – 08:42.

[154] SX307, 11:00 – 11:07.

[155] RR5:138; SX307, 11:17 – 11:22, 14:00 – 14:02.

[156] RR5:86–87.

seat belt part that was around her armpits" up at her neck, so he immediately took her out of the car seat and saw her eyes weren't opening.[157]

Luis began trying to reach Ya'Niece over Instagram.[158] When she answered, Luis frantically told her to go to the hospital.[159] After he hung up, Luis asked one of his roommates if they saw that SM "had s--t on her lips," and the roommate replied, "That's new."[160] Around this time, the ambulance arrived at the hospital, and an officer at the hospital told Papa that SM had died.[161] Papa didn't tell Luis that SM was dead; instead, Davis told Luis that due to COVID, he wouldn't be able to see SM at the hospital even if he went.[162] Luis told Davis that Ya'Niece "just told me [SM] had a breathing issue, and I did not notice it until she came back."[163] Davis asked what the breathing issue was, but as Luis began trying to describe the breathing issue, Papa interrupted to ask for "the mother's date of birth."[164]

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[157] RR5:87; SX307, 15:30 – 16:30.

[158] RR5:135–36, 142–43; SX307, 18:00 – 18:30; SX308, 16:55 – 17:55; SX318, p. 54.

[159] RR9:193, 203–04; SX307, 18:30 – 19:25; SX308, 18:05 – 19:36.

[160] SX307, 20:15 – 20:22.

[161] RR5:88, 111; SX305 (showing hospital-arrival time of 00:56:47; SX307, 20:11 (corresponding with that same time).

[162] SX308, 20:45 – 21:00.

[163] SX308, 21:08 – 21:13.

[164] SX308, 21:13 – 21:21.

Deputy Davis suggests SIDS and keeps talking about SIDS, so Luis tells Ya'Niece that it might be SIDS.

Davis told Luis that "SIDS" was a possibility, but that law enforcement had to investigate SM's breathing issues before she could let him leave the scene.[165] Luis said, again, "she was breathing," to which a supervising sergeant said, "that's something that God does … sometimes babies just die."[166]

Luis exclaimed, "What are they talking about, SIDS?" and Davis replied, "That's just a possibility," and Luis shot back "But she was still breathing!"[167] Luis agitatedly tried to call Ya'Niece again as Davis kept talking about SIDS as "a possibility."[168]

SX308 (still, cropped): Luis holds his head while Davis continues to talk about SIDS.

[165] SX308, 23:05 – 23:30.

[166] SX308, 24:00 – 24:15.

[167] SX308, 25:35 – 25:50.

[168] RR5:148; SX308, 27:00 – 27:30.

Luis finally got Ya'Niece on Instagram and told her, "They said they think it's SIDS."[169] Davis interrupted and said, "We don't think it's SIDS, it's just a possibility."[170] Ya'Niece apparently didn't hear that part; she testified at trial that *Luis* suggested SIDS.[171]

Luis tells Ya'Niece that he found SM in her car seat.

Luis told Ya'Niece that he and SM were both asleep, and that he checked on her, and that "they said it recently happened."[172] He described finding SM with "her neck … down on the armpit part of her car seat."[173] He told Ya'Niece that SM "was breathing" and that "now they came and told me they think it might be SIDS."[174] He asked if she had taken SM to the hospital when she started having trouble breathing.[175]

Luis describes SM's breathing problems.

Luis told Deputy Davis that Ya'Niece had just told him about SM's breathing problems about three days earlier, and that she had said

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[169] SX308, 27:55 – 28:27.

[170] RR5:149; SX308, 28:28 – 28:32.

[171] RR9:193.

[172] SX308, 30:15 – 30:22.

[173] SX308, 30:30 – 31:10.

[174] SX308, 31:45 – 32:00.

[175] SX308, 32:40 – 32:58.

SM "was doing it while she was awake, too."[176] Luis demonstrated the sound that SM made when she had trouble breathing.[177]

Luis then said, "Her car seat was kind of moved. It wasn't the same way I left it."[178] Deputy Papa asked Luis why his clothes were wet; Luis told him, "That's my daughter's pee from me holding her."[179] Papa noted in his report that Luis smelled strongly of urine.[180]

Luis talks to Investigator Ferrell and tells the same story yet again, after which Ferrell finally tells Luis that SM died.

Deputy Investigator Jack Ferrell arrived at the apartment at 2:10 a.m., just as "EMS was leaving the scene."[181] Von, Juice, Juvie, L-Dawg, Ryan Jeng, and Luis were all still there.[182] Ferrell found Luis to be "cooperative," and everything he did was "contrary to suspicious behavior."[183]

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[176] SX308, 35:15 – 35:25

[177] SX308, 35:40 – 35:45.

[178] SX308, 38:40 – 38:51.

[179] RR5:104, 139; SX308, 45:50 – 46:00.

[180] RR5:104.

[181] RR6:101–02, 113–14, 116, 173.

[182] RR6:116. Juice and Ryan Jeng left before an investigator could talk to them. RR6:120.

[183] RR6:198–99.

When Ferrell spoke with Luis in Ferrell's car, he knew that SM was reported to have died in her sleep, that she had a bruise on her face and some minor scratches, and that her genitals "were a little swollen," but that "the doctor did not believe there was any kind of other trauma."[184] All he told Luis, however, was, "I don't know her condition right now."[185]

Luis told Ferrell that Ya'Niece had told him that SM's "breathing was a little off."[186] Luis said that he had heard SM "gasping but not opening her mouth" when she was sleeping.[187] He said that SM hadn't been sick recently, that she hadn't had any recent injuries except "normal injuries … that a baby gets," and that she had a diaper rash.[188]

Luis told Ferrell the same thing he told everyone else—that he woke up, checked on SM, saw her head was down, noticed her eyes wouldn't open, panicked, tried to give CPR, and ran out of the sunroom yelling for help.[189] He described giving CPR and twice said that he could hear SM breathing.[190]

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[184] RR6:119, 137, 171, 192; DX1.

[185] DX1, 00:08 – 00:11.

[186] DX1, 02:12 – 02:27.

[187] DX1, 02:27 – 02:55.

[188] DX1, 03:35 – 04:20, 05:20 – 05:28.

[189] DX1, 05:41 – 07:12.

[190] DX1, 07:07 – 08:10.

Ferrell asked Luis about the injury on SM's mouth, and Luis said that he noticed it too but didn't know what it was.[191] He didn't know if SM had any allergies.[192] He fed her a vegetable "squeeze pouch" and formula for dinner.[193] Luis told Ferrell that SM slept without a shirt, so there would be marks from the car-seat belt "on her arm."[194]

After getting Luis to talk this long, and after getting his consent to search the apartment, Ferrell finally told him, for the first time, "Your daughter did not survive."[195] Luis erupted: "She's—? I just asked you! I just asked you!"[196]

As Luis became even more distraught, breathing heavily, Ferrell peppered him with questions: "Is there anything that you can think of that happened today that would have caused this?" "You need to tell me now if you know of something." "Like, if you saw something, if somebody did something, or you saw her fall."[197]

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[191] DX1, 09:00 – 09:15.

[192] DX1, 09:27 – 09:30.

[193] DX1, 09:34 – 09:54.

[194] DX1, 09:56 – 10:38.

[195] DX1, 11:35 – 12:31.

[196] DX1, 12:35 – 12:42.

[197] DX1, 13:03 – 13:25.

Luis cried out, "No!"[198] He said, "The only time she ever falls is—when I'm bathing her. Nothing happened to her!"[199] He said that SM would have an "old" bruise on her forehead from the sink, "but that's it."[200] Luis shut down and just cried for about a minute, before he said, "The only thing they told me was that it was probably SIDS."[201]

The first crime scene unit documents the scene.

Luis and his roommates consented to a search of the apartment.[202] Deputy Ward took photos of the apartment and noted the "dirty" conditions of the entire place.[203] There were no signs of forced entry.[204]

Ward noticed ashes, an ashtray, and a digital scale that were "probably associated with sales" of drugs.[205] (Ferrell didn't think the scene was consistent with drug dealing.[206]) There were no weapons.[207]

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[198] DX1, 13:25.

[199] DX1, 13:27 – 13:35.

[200] DX1, 13:44 – 13:59.

[201] DX1, 14:20 – 15:09.

[202] RR6:198; RR7:24.

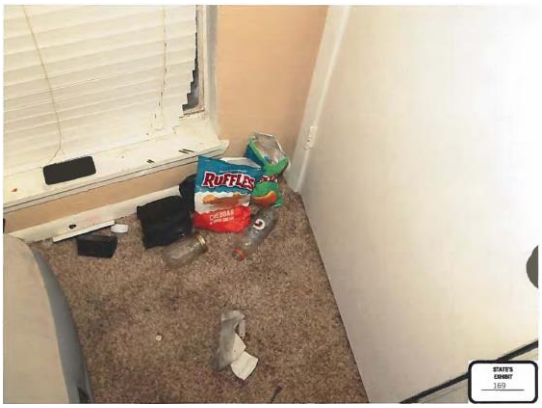
[203] RR4:118; RR7:23–25, 28–30, 41–43; SX136–187.

[204] RR7:27.

[205] RR7:43–45.

[206] RR6:143.

[207] RR6:142.

SX167 & 169: The sunroom as Ward photographed it.

Ward photographed the sunroom, which appeared exactly as it had when Papa looked at it.[208] The car seat was "dirty" but functional, but Ward thought the straps were "too small."[209] (Ferrell had initially testified that the straps were "loose," but then he changed his testimony and said that "[i]t didn't feel like enough room for a child to be in there."[210])

The car seat was discolored and wet, and it smelled like urine.[211] Ward brought the car seat downstairs to Luis, who demonstrated how he had used it to hold SM.[212]

SX173: The car seat as Ward photographed it.

[208] RR7:30–31, 33; SX167, 169.

[209] RR7:32; SX173.

[210] RR6:141, 150.

[211] RR6:212.

[212] RR6:212.

Behind the car seat was a formula can, diapers, and "random trash.[213] The sunroom was "pretty filthy" and smelled like urine.[214] Ward collected a bottle, some formula, and a squeezable food pouch from the kitchen area for possible testing later.[215] No testing was ever performed on these items.[216] Ward didn't swab or fingerprint anything in the apartment because "we knew who was inside the apartment, and we weren't trying to find out if anybody else had been in there."[217]

Back at the apartment, Luis is in shock and grieving.

The roommates returned to the apartment after the investigators left.[218] Luis, who had finally learned that SM died, was unexpressive.[219] Juvie described him as showing "no remorse," and L-Dawg thought he "didn't care," while Juice was more understanding: "everybody express their feelings different."[220]

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[213] RR7:33; SX177.

[214] RR7:46.

[215] RR7:35, 46.

[216] RR7:35–36.

[217] RR7:36–38.

[218] RR4:88, 150; RR7:81, 143.

[219] RR7:84, 139.

[220] RR4:176, 183; RR7:84, 139.

Ya'Niece came to the apartment, too; she thought Luis was acting "a little weird," like "something was off."[221] (She, too, had appeared "ambivalent" and "apathetic" after learning that SM died; hospital staff attributed it to "shock."[222])

Luis texted "Ash" at 10:26 a.m. and asked her to come over.[223] Luis, Ashlea, and Ya'Niece all went into the sunroom for a while.[224] Luis never said anything to Ya'Niece about hurting his child.[225]

The Medical Examiner declares a homicide.

Assistant Medical Examiner Jennifer Ross performed an autopsy on SM at 10:25 a.m. on August 24.[226] SM's body was "identified by bands that encircle the right and left ankles," and her body showed signs of the paramedics' medical intervention.[227]

Dr. Ross declared that the manner of death was "homicide" and that the cause of death was "multiple blunt force injuries with suffocation and sexual assault."[228] She testified at trial that neither

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[221] RR4:88; RR9:195–96, 205.

[222] RR9:194; SX311, p.25, 32.

[223] SX320, sl.244.

[224] RR4:88–89; RR7:82; RR9:196.

[225] RR9:205.

[226] RR8:12–13, 54; RR9:68, 84; SX315.

[227] RR9:90–91, 93; SX315, p.3.

[228] RR9:86–87, 152; SX315, p.1.

sexual assault nor blunt force injuries actually caused the death.[229] She could not determine who caused any of SM's injuries.[230]

The only injuries that caused SM's death were those that caused suffocation.[231] Dr. Ross observed "abrasions around [SM]'s mouth" and an abrasion on the inside of her mouth as well, which she said was "consistent with some sort of suffocation, putting something over the mouth with some movement."[232] Dr. Ross observed petechial hemorrhages, which are caused by struggling to breathe, in SM's eyelids.[233]

SM had other injuries that did not cause or contribute to her death, including: rib fractures that were consistent with CPR; bruising on SM's forehead and a bruise on her face that was "consistent with a slap mark, a handprint mark"; internal bruising in the same area; and various scratches, abrasions, and bruises on SM's head, face, left ear, neck, shoulder, chest, abdomen, back, and feet.[234]

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[229] RR9:87, 163–64.

[230] RR9:156.

[231] RR9:162–63.

[232] RR9:90, 114, 133, 143, 144–45; SX315, p.3, 11.

[233] RR9:114, 143, 147.

[234] RR9:106, 113, 115–16, 120–22, 132–139, 144, 162, 167; SX315, p.3–7, 10–11.

SM's ankles "had linear markings consistent with a ligature" wrapped around them.[235] Dr. Ross said, "anything" could cause those marks.[236] One of the marks was narrower than the others; Dr. Ross said that it could have been caused by something the size of a narrow cord or shoestring.[237]

SM's external genitalia appeared "swollen and red and irritated."[238] There was bruising, tearing of the skin, abrasions, and chafing in the area, along with bruising on the buttocks and "tears at the anus."[239] Dr. Ross described the injuries as consistent with "forceful sex" rather than from a finger or a thermometer.[240] The injuries did not show any signs of healing, which indicated that they happened "happened at or near the time of death"—meaning "hours before, during the death, [or] right after the death."[241] Dr. Ross concluded that sexual assault did not cause SM's death.[242]

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[235] RR9:116–17, 139–40; SX315, p.6–7, 11.

[236] RR9:141.

[237] RR9:141.

[238] RR9:106; SX315, p.6, 11.

[239] RR9:117, 121, 122–24, 126.

[240] RR9:127–28.

[241] RR9:126, 128–29, 158.

[242] RR9:163.

Dr. Ross believed that SM had been dead at least a couple of hours before she was declared dead.[243] Rigor mortis, which had been noted by hospital staff, was absent at the time of autopsy.[244] According to Dr. Ross, rigor mortis "starts about one to two hours after death," then "becomes stiffer and stiffer up to about 12 hours after death," and "then it disappears."[245] She said that this meant SM had been dead for "more than 12 hours" at the time of the autopsy.[246]

Based on SM's 89.8-degree temperature at the hospital and her understanding that "temperature changes approximately one to two degrees per hour after death," Dr. Ross estimated that SM could have died as early as 6:00 p.m. the night before.[247] She did not explain how SM's body temperature dropped six degrees—from 95.9 in the ambulance to 89.8 at the hospital—in just over half an hour.[248]

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[243] RR9:160, 169.

[244] RR9:92; SX315, p.2.

[245] RR9:92.

[246] RR9:92, 169.

[247] RR9:101, 151, 157, 169.

[248] *Compare* RR5:33 *with* RR9:100. When pressed about her time-of-death estimates on cross-examination, Dr. Ross declared only that "kids cool quicker than adults because they're smaller," but she never provided any alternative to her 1-to-2-degrees-per-hour testimony. RR9:159.

August 25: The investigation turns criminal.

Based on the homicide determination, Ferrell got a search warrant to go through the apartment again.[249] The warrant was executed Tuesday evening.[250] Detective Wallace Wyatt directed the search.[251]

Deputy Cathy Helstrom assisted.[252] She collected evidence and photographed the apartment, including the sunroom.[253] When she photographed the sunroom, there was a black trash bag in the room that wasn't in Dep. Ward's earlier photos.[254]

SX30 & 32: The sunroom as it appeared August 25. The black trash bag is between the closet door and the windowsill in SX32. A second bag, inside the water-heater closet, was never mentioned at trial.

The sunroom was "messy" and "unkept," and Helstrom had to unstack and move things in order to document everything.[255] She

[249] RR6:144–45, 150, 205; RR8:22, 54.

[250] RR4:87–88, 150; RR6:81–82, 150, 205; RR7:140–41, 161–63.

[251] RR6:23–24, 48, 53, 56–59, 69–71, 82, 97, 152; RR8:7, 12–13, 31.

[252] RR6:12–14, 19–22; RR8:17.

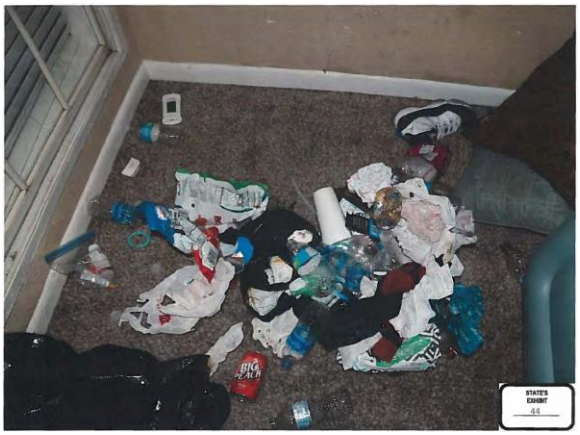
[253] RR6:23, 42; SX4–35, 297.

[254] RR6:46, 57; RR7:34; *compare* SX32 *with* SX169.

[255] RR6:45, 48, 95; SX36–40.

flipped up the air mattress to make space and then went through everything that had been behind the car seat or on the mattress, including a small backpack, some pillows and blankets, a couple of lighters, some clothing, and a pack of diapers.[256] There was also a charger cord on the floor near the closet.[257] Under the mattress, she found a diaper wipe that appeared to have blood on it.[258]

Helstrom emptied the black trash bag onto the floor of the sunroom, exposing its contents to "the contaminants in this room" because "contamination is inevitable."[259] From this pile, she collected clothing, a blanket, a thermometer, and eight more diaper wipes.[260] The wipes appeared to be "soiled," but Helstrom couldn't tell whether they were soiled with fecal matter, urine, or both.[261]



SX44: The contents of the trash bag.

Wyatt did not collect the baby bottles that were in the kitchen because there was "[n]o reason to think they would have been

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[256] RR6:52, 56, 69–71, 72, 75, 81; RR8:32; SX98, 101, 102, 110, 112, 114, 281.

[257] RR6:73–74; SX109.

[258] RR6:53–54, 80; SX 41–43, 61.

[259] RR6:57–58; SX44.

[260] RR6:71–72, 76–81; RR8:33; SX46, 50, 54, 59, 65, 75, 94, 105.

[261] RR6:96–97.

involved in a homicide."[262] He did not look for or collect fingerprints because he "knew everybody that lived there" and "had no reason to believe there was another person."[263]

Luis is interrogated.

Luis, Ya'Niece, Juice, Von, and Juvie were brought to the Sheriff's Department for questioning while the search warrant was executed.[264] Luis was there for over seven hours.[265] He was "cooperative" and consented to a DNA sample and a search of his phone, which investigators extracted and returned to him.[266] Von, Juice, and Juvie also gave DNA samples.[267] L-Dawg and Ryan Jeng gave samples later, in early 2023.[268]

August 31: Luis is arrested.

Ferrell got an arrest warrant then arrested Luis on August 31; he seized Luis's phone at that time and interrogated him again.[269] Detective Wyatt got search warrants both for another extraction of

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[262] RR8:31–32.

[263] RR8:32, 63.

[264] RR6:152–53, 213–14; RR7:164–65; RR8:14, 19, 58.

[265] RR6:153.

[266] RR6:154, 161, 217–18; RR7:166, 170–71, 186; RR8:40, 42; SX309–10, 316–17, 327–28.

[267] RR4:89–90, 151; RR6:156; RR7:142, 176–81.

[268] RR6:157, 162–67; RR7:85.

[269] RR6:158, 161, 216; RR8:20–21, 41–42.

Luis's phone and for Luis's Instagram records.[270] The phone extraction showed that Luis viewed adult pornography "every few days," including between 6 and 7:30 p.m. on August 23.[271]

Evidence is tested, and an unknown DNA profile is found.

Lauren Bauer, a DNA analyst at the Harris County Institute of Forensic Sciences, tested evidence that had been collected from the apartment and from SM's body.[272] She compared the DNA on the evidence to DNA samples from SM, Luis, Juvie, Juice, Von, Ryan Jeng, and L-Dawg.[273] During the testing, she discovered an unidentified DNA profile that she labeled "12A-1 SP."[274]

None of the DNA found on SM's body came from Luis.[275] There was "limited support" for concluding that DNA in SM's mouth came from the unidentified perpetrator, 12A-1 SP.[276]

Luis's DNA was on evidence from the sunroom where he lived, including some of the wipes, blankets, a digital thermometer, infant

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[270] RR8:42–43.

[271] RR10:78, 85–86, 119–20, 130–31; SX317, p.1–3; SX320, sl.169–70.

[272] RR8:70, 113–20; SX314.

[273] RR8:121–25; SX314, sl.4–9.

[274] RR8:41, 59, RR8:126–29, 176–77; RR9:38–39; SX314, sl.10.

[275] RR8:139–46; RR9:36–37, 49–50; SX314, sl.17–25.

[276] RR8:142–44; RR9:48; SX314, sl.23.

and adult clothing, the car seat, a neck gaiter, and a charging cable.[277] L-Dawg's DNA was on one of the shirts.[278]

The DNA of the unidentified perpetrator, 12A-1 SP, was on six of the diaper wipes, SM's car seat, and the comforter from Luis's bed.[279] In addition to 12A-1 SP, eight of the nine diaper wipes had DNA from other contributors that were never identified.[280] So did the baby shorts, blanket, and car seat, as well as other clothes, the comforter, and the charging cable.[281]

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[277] RR8:146–212; RR9:10–33, 53–54; SX314, sl.28–30, 33, 39, 48, 54, 59–60, 66–67, 70–71, 74, 77–78, 80–81, 84–85, 87, 88, 92, 95, 98–101, 103–05, 107–08, 110–11.

[278] RR9:16–18, 42; SX314, sl.95.

[279] RR8:159–60, 167–71, 174–84, 200–04; RR9:23–25, 48; SX314, sl.42, 50–51, 54, 60, 62, 65–67, 85, 103.

[280] RR8:149–50, 158, 162, 164, 167, 174–84, 186; SX314, sl.30 (3 contributors; only SM and Luis matched), 41 (2 contributors, SM matched), 42 (4 contributors, 12A-1 SP matched), 47 (2 contributors, SM matched), 48 (3 contributors, SM and Luis matched), 50 (3 contributors, SM and 12A-1 SP matched), 60 (3 contributors, Luis and 12A-1 SP matched), 62 (3 contributors, SM and 12A-1 SP matched), 64 (2 contributors, SM matched), 65 (2 contributors, 12A-1 SP matched), 67 (3 contributors, Luis and 12A-1 SP matched), 68 (2 contributors, SM matched), 71 (2 contributors, Luis matched).

[281] RR8:188, 198, 201, 203, 205, 207–09; RR9:17–18, 23, 25, 30, 32; SX314, sl.74 (shorts: 3 contributors, only Luis matched), 81 (blanket: 2 contributors, Luis matched), 84 (car seat: 3 contributors, SM and Luis matched), 85 (car seat: 3 contributors, Luis and 12A-1 SP matched) 87 (hoodie: 4 contributors, SM and Luis matched), 90 (sweat pants: 2 contributors, Luis matched), 92 (DOPE shirt: 4 contributors, SM and Luis matched), 95 (Houston shirt: 4 contributors, Luis and L-Dawg matched), 96 (Houston shirt: 5 contributors, *none* matched), 102 (comforter: 5 contributors, *none* matched), 103 (comforter: 3 contributors, Luis and 12A-1 SP matched), 104 (comforter: 2 contributors, Luis matched), 110 & 111 (charging cable ends: 3 contributors each, SM and Luis matched).

Semen was detected on several pieces of evidence, including some of the wipes, baby blankets, a onesie, and the comforter.[282] Blood was detected on some of the wipes, a blanket, and the neck gaiter.[283] Bauer could not say whose semen or blood it was, however, because she did not determine whether any of the analyzed DNA came from semen or blood.[284]

Even after learning of the 12A-1 SP DNA profile, Ferrell did not try to track down anyone else who might have been at the apartment.[285] Detective Wyatt took over the case in 2023 and never located the person with the 12A-1 SP profile, either.[286] He never got any other DNA profiles and never looked at any private DNA databases to try to find a match.[287]

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[282] RR8:146–47, 151, 157–58, 166–68, 172, 175, 177, 184, 190, 196, 200; RR9:19; SX320, sl.27, 31, 40, 49, 52, 56, 61, 63, 69, 76, 79, 83, 97.

[283] RR8:146, 158, 161, 168, 172, 177, 196; RR9:27; SX320, sl.27, 40, 45, 52, 56, 63, 79, 106.

[284] RR8:94, 132.

[285] RR6:240.

[286] RR6:169–70; RR8:10, 41.

[287] RR8:65.

Summary of the Argument

Issue One

The evidence is legally insufficient to support Luis's conviction for capital murder. The State presented no evidence that Luis was guilty as a party. And, based on the cumulative force of all the evidence, no rational juror could infer that Luis caused SM's death.

Issue Two

The court erred by including parties instructions when there was no evidence of party liability. Luis suffered some harm from this error because the evidence does not clearly support his guilt as a primary actor, and the instructions deprived Luis of his defensive theory.

Issue Three

The court erred by omitting essential elements from half of the application paragraphs. The error egregiously harmed Luis because it affected the basis of the case, deprived him of a valuable right, and vitally affected his defensive theories.

Issue Four

The court erroneously excluded the interrogation evidence because it was admissible and no theory of law supports its exclusion. This constitutional error was not harmless beyond a reasonable doubt.

ARGUMENT

Issue One

1. The evidence is legally insufficient to support Luis's conviction for capital murder.

Despite seven days of testimony, the State failed to prove beyond a reasonable doubt that Luis is guilty of capital murder under any of the six theories that the court submitted to the jury.

1.1. Standard of Review

Convicting a criminal defendant on legally insufficient evidence violates due process. *Baltimore v. State*, 689 S.W.3d 331, 340 (Tex. Crim. App. 2024).

The test for legal sufficiency is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Baltimore*, 689 S.W.3d at 340. The reviewing court defers to the factfinder's resolution of conflicts in testimony, weighing of evidence, and drawing reasonable inferences from basic facts to ultimate facts, in light of the "cumulative force of all evidence." *Baltimore*, 689 S.W.3d at 341.

The reviewing court compares the evidence at trial to the essential elements of the offense as defined by the hypothetically

correct jury charge, which accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. *Baltimore*, 689 S.W.3d at 341; *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997).

The law authorized by the indictment comprises the statutory elements of the offense as modified by the indictment allegations. *Baltimore*, 689 S.W.3d at 341. When the indictment alleges some, but not all, of statutorily listed methods of committing an offense, the State is limited to the methods alleged. *Ramjattansingh v. State*, 548 S.W.3d 540, 546 (Tex. Crim. App. 2018).

To prevail on a legal sufficiency challenge when multiple theories of conviction were submitted to the jury and the jury returned a general verdict, an appellant must attack every theory. *Kitchens v. State*, 823 S.W.2d 256, 259 (Tex. Crim. App. 1991).

1.2. Six theories of conviction were submitted to the jury.

In this case, the sixteen-paragraph indictment alleged two kinds of capital murder: of a child under 10, and in the course of committing or attempting to commit aggravated sexual assault.[288]

[288] CR1:11–12.

As authorized by this indictment, the elements of capital murder are that:

- Luis Luna
- intentionally or knowingly
- caused the death of an individual (SM)
- and either:
  - intentionally committed the murder in the course of committing or attempting to commit aggravated sexual assault, or
  - murdered an individual under 10 years of age.

Tex. Penal Code § 19.03(a)(2), (8). These two theories were submitted as paragraphs 1 and 4.[289]

A person is guilty as a party to an offense if, "acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense." Tex. Penal Code § 7.02(a)(2). This theory was submitted to the jury with respect to each capital murder allegation as paragraphs 2 and 5.[290]

A person is guilty as a party under "conspirator liability":

> If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose

[289] CR2:703–05.

[290] CR2:704–05.

> and was one that should have been anticipated as a result of the carrying out of the conspiracy.

Tex. Penal Code § 7.02(b); *see George v. State*, 634 S.W.3d 929, 938 (Tex. Crim. App. 2021). This theory was submitted to the jury with respect to each capital murder allegation, based on a conspiracy to commit aggravated sexual assault, as paragraphs 3 and 6.[291]

1.3. The evidence is insufficient to support any of the six theories.

Six theories—two as a primary actor; four as a party—and the State failed to prove any of them.

1.3.1. There is *no* evidence of party liability.

First, the State presented *no* evidence of party liability. To establish party liability, there must be "sufficient evidence of an understanding and common design to commit the offense." *Gross v. State*, 380 S.W.3d 181, 186 (Tex. Crim. App. 2012). Physical presence, alone, is not sufficient to sustain a conviction as a party. *Id.* at 188. "There must be other facts to show that the accused participated in the offense." *Id.* The State cannot rely on unsupported speculation about what the defendant may have said. *Id.*

The State presented evidence that someone else—the unidentified 12A-1 SP—may have sexually assaulted and killed SM, but the State presented no evidence that Luis was present when that

[291] CR2:705–06.

happened, much less that he said or did anything to participate in or encourage that offense. Not even the prosecutor, in closing argument, was willing to speculate about any such agreement or encouragement.[292]

The State may respond that it can rely on Luis's presence in the sunroom as a "factor" under *Gross*. Not so. The State presented no evidence that any other actor was present in the sunroom *while Luis was in there*.

Or the State may argue that Luis denied leaving SM alone in the sunroom, and that this is some evidence that, if an unknown person committed the offense, Luis was present and encouraged them. Such an argument would be based on the trial court's comment that Luis said "he was always with the child."[293] But the record shows that the trial court was wrong—Luis never said that. Instead, it was *Deputy Wyatt* who opined, while commenting on Luis's conversation with Ferrell, that Luis "was saying" "he never left her alone."[294] But in reality, Luis merely told Ferrell that he was "real picky about who I let touch my child," so no one else in the apartment had touched SM, except that they "may have held her for … a few seconds."[295]

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[292] RR11:6–21, 50–70.

[293] RR10:98.

[294] RR8:26.

[295] DX1, 04:51 – 05:07.

Simply put: There was no evidence from which a jury could rationally find that Luis was guilty under any theory of party liability. *Gross*, 380 S.W.3d at 186.

1.3.2. There is insufficient evidence of primary-actor liability because any conclusion that Luis had sole access to SM at the time of her injuries is based on unsupported speculation.

Turning to the two theories of primary-actor liability, the evidence is legally insufficient because the cumulative force of all the evidence does not support a rational conclusion that Luis caused SM's death. *Baltimore*, 689 S.W.3d at 341.

The State must prove beyond a reasonable doubt that the defendant is the person who committed the offense charged. *Miller v. State*, 667 S.W.2d 773, 775 (Tex. Crim. App. 1984). The identity of the perpetrator can be proved by direct or circumstantial evidence. *Earls v. State*, 707 S.W.2d 82, 85 (Tex. Crim. App. 1986). Proof of identity cannot be based on speculation or unreasonable inferences that are not based on facts or evidence. *Hooper v. State*, 214 S.W.3d 9, 16 (Tex. Crim. App. 2007).

A "mere modicum" of evidence is not sufficient to rationally support a conviction beyond a reasonable doubt. *Baltimore*, 689 S.W.3d at 340. The question "is not whether there was *any* evidence to support a conviction, but whether there was sufficient evidence to

justify a rational trier of the facts to find guilt beyond a reasonable doubt." *Id.* (emphasis in original).

The evidence shows that SM died of suffocation.[296] While the injury on her mouth was consistent with someone putting something over her mouth, Dr. Ross could not determine who caused that injury.[297] Dr. Ross did not see the so-called "ligation marks" on SM's neck that Shavers claimed to have seen.[298] And she apparently ignored SM's airway malacia diagnosis.[299]

In the absence of any direct proof that Luis caused the fatal injuries, the case turned on circumstantial evidence—specifically, the State's contention that Luis was the only person with SM when she died. After all, when an adult defendant has sole access to a child at the time the child sustains the injuries, the evidence is sufficient to support a conviction for murder if the child dies. *Bearnth v. State*, 361 S.W.3d 135, 140 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd); *Garcia v. State*, 16 S.W.3d 401, 405 (Tex. App.—El Paso 2000, pet. ref'd).

The problem with such a circumstantial case against Luis is that any conclusion that he had sole access to SM when she sustained her

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[296] RR9:86–87, 114, 143, 147, 152, 162–63; SX315, p.1.

[297] RR9:90, 114, 133, 143, 144–45, 156; SX315, p.3, 11.

[298] RR5:30, 31, 41–42, 43; SX305, p.2.

[299] SX312 (RR14:170).

injuries is based on unsupported speculation rather than rational inferences. Juries may draw multiple reasonable inferences, but only "as long as each inference is supported by the evidence presented at trial." *Hooper*, 214 S.W.3d at 15. Juries are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions. *Id.*

Dr. Ross placed the time of death as early as 6 p.m. Sunday, and she testified that SM's injuries could have been sustained "hours before" that.[300] During that time frame, multiple people came and went from the apartment.[301] The only time anyone saw Luis, he was *not* in the sunroom and SM wasn't with him.[302]

While Luis claimed to have fallen asleep with SM around 7 p.m., he never said that he was alone with SM—he couldn't know that, for he was asleep.[303] And the evidence was clear that other people had been in the sunroom: Luis had taken a photo of two other guys in there; Ashlea would "stay" in the room; and the DNA of L-Dawg, the mysterious 12A-1 SP, and *at least five other people* was also in the

[300] RR9:101, 126, 128–29, 151, 157–58, 169.

[301] RR4:137–38, 144, 146; RR7:63–65, 67, 69, 128–29, 147, 149, 156.

[302] RR4:72.

[303] RR5:87; SX307, 15:30 – 16:30; DX1, 05:41 – 07:12.

room.[304] Any conclusion that Luis had "sole access" to SM when she was injured would therefore be purely speculative and unsupported by the facts at trial. Because the conclusion that Luis had "sole access" to SM is unsupported, the jury could not rationally infer that he caused SM's injuries or death. *Hooper*, 214 S.W.3d at 15.

This case is unlike *Martin v. State*, 246 S.W.3d 246, 261–62 (Tex. App.—Houston [14th Dist.] 2007, no pet.), a case in which the defendant "was only one of several other people who had the opportunity to injure" the child, but the evidence was nevertheless sufficient to convict. There, the court pointed out that there was extensive medical testimony regarding four kinds of blunt-force trauma that caused the death, a "narrowed" time frame in which the death occurred, coupled with evidence that the defendant failed to call 911, delayed in getting the child to the emergency room, tried to prevent the child's father from calling 911, gave inconsistent statements about what happened, didn't like the child, and had previously threatened to harm the child. *Id.* at 262. The court concluded that all of this evidence together was sufficient to permit a rational jury to convict the defendant. *Id.* at 263.

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[304] RR7:56, 62, 123; RR8:159–60, 167–71, 174–84, 200–04; RR9:16–18, 23–25, 42, 48; RR10:33; SX314, sl.30, 41–42, 47–48, 50–51, 54, 60, 62, 64–68, 71, 74, 81, 85, 87, 90, 92, 95, 96, 102–04, 110–11; SX320, sl.13.

Compared with the evidence in *Martin*, there is hardly even a "mere modicum" of evidence in this case—which is not enough. *Baltimore*, 689 S.W.3d at 340. Dr. Ross testified that SM died of suffocation, not blunt-force trauma, and she offered only bare assurances that it was "possible" that SM was suffocated with a pillow, hand, cloth, or other object.[305] Dr. Ross didn't narrow the time frame of SM's death; instead, she broadened it, testifying that based on rigor and body temperature SM could have died any time between 6 p.m. and 10:30 p.m. Sunday.[306]

Luis, unlike the defendant in *Martin*, did everything he could to help—and get help for—SM: he alerted his roommates, he tried to give CPR and continued as Von called 911, he kept asking the paramedics to do more, and he begged Papa to let him go be with her.[307] He was forthcoming and cooperative with law enforcement, and he told everyone the exact same story about what happened.[308] True, he mentioned SIDS to Ya'Niece, but Deputy Davis had been talking about SIDS nonstop for about five minutes.[309] And the

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[305] RR9:143–44.

[306] RR9:92, 101, 151, 157, 160, 169.

[307] RR4:70, 72, 74, 82, 84, 109–11, 146–47, 171, 174; RR5:58; RR7:73, 75, 133–34; SX307, 01:20 – 01:27.

[308] RR4:75; RR5:86–87, 98; RR6:198–99; RR7:76–77, 83, 136; SX307, 15:45 – 16:30; SX308, 30:30 – 32:00; DX1, 05:41 – 07:12.

[309] RR5:148; RR9:193; SX308, 23:05 – 28:27.

evidence showed that Luis was a loving and attentive father and that no one had ever seen him do or say anything negative or harmful toward SM.[310]

Thus, unlike in *Martin*, there is no evidence—not direct, not circumstantial, *none*—from which a jury could rationally conclude that Luis suffocated SM. In the absence of such evidence, no rational jury could find beyond a reasonable doubt that Luis caused SM's death.

1.4. Conclusion

The evidence is insufficient to prove either that Luis caused SM's death or that he is criminally responsible for her death as a party. The evidence is therefore legally insufficient to support his conviction for capital murder. *Jackson*, 443 U.S. at 319; *Kitchens*, 823 S.W.2d at 259. This Court should reverse and render a judgment of acquittal. Tex. R. App. P. 43.2(c).

[310] RR4:63, 105–07, 140, 142, 151–52, 168, 177, 181, 184–85; RR9:181

Issues Two & Three
(Jury-Charge Issues)

The jury charge in this case contained two errors—one objected to, one not—that harmed Luis.

Standards of Review and Harm for Jury-Charge Issues

The trial court must provide the jury with a written charge distinctly setting forth the law applicable to the case. Tex. Code Crim. Proc. art. 36.14. Review of jury-charge error is a two-step process: first, the reviewing court must decide whether error exists; second, it must review any error for harm. *Villarreal v. State*, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015).

If the defendant timely objected to a jury-charge error, the judgment must be reversed if "the error appearing from the record was calculated to injure the rights of [the] defendant," which means that reversal is required if there was "some harm" to the accused. Tex. Code Crim. Proc. art. 36.19; *Almanza v. State*, 686 S.W.2d 157, 171–74 (Tex. Crim. App. 1985). "Some harm" means "the presence of any harm, regardless of degree." *Arline v. State*, 721 S.W.2d 348, 351 (Tex. Crim. App. 1986).

If the defendant didn't object to the error, he is entitled to reversal if he suffered egregious harm, which occurs when the charge error affects the very basis of the case, deprives the defendant of a

valuable right, or vitally affects a defensive theory. *Villarreal*, 453 S.W.3d at 433.

Neither party bears the burden of showing harm or lack thereof. *Id.* Whether harm exists is based on four factors: 1) the entire jury charge, 2) the state of the evidence, 3) the jury arguments, and 4) any other relevant information as revealed by the record as a whole. *French v. State*, 563 S.W.3d 228, 235–36 (Tex. Crim. App. 2018); *Villarreal*, 453 S.W.3d at 433.

2. Issue Two: The jury charge erroneously instructed the jury on party liability, and Luis suffered some harm.

Over defense objection, the court's charge included instructions on four theories of party liability—"aiding" under sec. 7.02(a)(2) and "conspiracy" under sec. 7.02(b), both applied to each alleged theory of capital murder.[311] This was error because the evidence was insufficient to support a conviction based on party liability, and Luis suffered some harm because the evidence does not "clearly support" Luis's guilt as a primary actor.

2.1. Instructions on party liability should be given only when the evidence is sufficient to support a conviction as a party.

Party liability must be "supported by the evidence" before it may be submitted to the jury. *In re State ex rel. Weeks*, 391 S.W.3d 117, 124

[311] CR2:700–06; RR10:96–100, 153.

(Tex. Crim. App. 2013). A parties instruction is permitted when "there is sufficient evidence to support a jury verdict that the defendant is criminally responsible under the law of parties." *Ladd v. State*, 3 S.W.3d 547, 564–65 (Tex. Crim. App. 1999).

A trial court errs by submitting a parties instruction if the evidence adduced at trial would not support a jury verdict under the law of parties. *Id.* To support a jury verdict under the law of parties, there must be "sufficient evidence of an understanding and common design to commit the offense." *Gross*, 380 S.W.3d at 186. Mere presence of a person at the scene of a crime—either before, during, or after the offense—without more, is insufficient to sustain a conviction as a party to the offense. *Thompson v. State*, 697 S.W.2d 413, 417 (Tex. Crim. App. 1985).

2.2. There was no evidence of party liability in this case.

The court erred in submitting the parties instructions in this case because there was no evidence to prove that Luis was a party.

The State offered no evidence of any "understanding and common design" between Luis and anyone. *Gross*, 380 S.W.3d at 186. The State presented no evidence of 12A-1 SP's identity—in fact, the State made no real effort to *find out* 12A-1 SP's identity.[312] While both 12A-1 SP's and Luis's DNA was on some of the wipes, the car

[312] RR6:240; RR8:65.

seat, and the comforter, the State could not and did not present any evidence of *when* or *how* that DNA was left.[313]

In the absence of any evidence of who 12A-1 SP was or when 12A-1 SP's and Luis's DNA got on the evidence, there was no evidence that Luis ever had any contact or relationship with 12A-1 SP, much less any "understanding and common design to commit" capital murder. *Gross*, 380 S.W.3d at 186.

A recent case from the Eastland Court of Appeals, *Henderson v. State*, No. 11-22-00031-CR, 2024 WL 269627, at *6 (Tex. App.—Eastland Jan. 25, 2024, no pet.) (mem. op., not designated for publication), gives a good counterexample of what sufficient party-liability evidence looks like. There, the defendant was present at the crime scene, he and the other *known* person lived together, both individuals separately took incriminating actions during the investigation, the other person's DNA was found on the defendant's shoes, and both of their DNA was on the decedent's phone, tying them both to the murder. *Id.*

Nothing of the sort is present here. Without any evidence of *who* 12A-1 SP was, *when* or *how* 12A-1 SP's DNA ended up in Luis's room, or *what* Luis may have done or said to 12A-1 SP, there is no evidence that Luis was liable as a party to 12A-1 SP's conduct, and the court

[313] RR8:94, 132, 146–212; RR9:10–33, 53–54

erred to include the parties instructions. *Weeks*, 391 S.W.3d at 124; *Ladd*, 3 S.W.3d at 564–65.

2.3. Party-instruction error is harmless only when the evidence "clearly supports" the defendant's guilt as a primary actor.

The Court of Criminal Appeals and this Court have both said that a party-instruction error is "harmless" if "the evidence clearly supports" a defendant's guilt as a primary or principal actor. *Ladd*, 3 S.W.3d at 564–65; *see also Malbrough v. State*, 612 S.W.3d 537, 562–63 (Tex. App.—Houston [1st Dist.] 2020, pet. ref'd); *Nelson v. State*, 405 S.W.3d 113, 126 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd).

2.4. The evidence in this case does not "clearly support" Luis's guilt, so the instruction was not harmless.

The instruction was harmful under *Ladd* because the evidence does not "clearly support" Luis's guilt as a primary actor. *Ladd*, 3 S.W.3d at 564–65. Far from it—the evidence is *legally insufficient* to convict Luis as a primary actor. And even if this Court finds that the evidence somehow creeps above the "mere modicum" threshold to be legally sufficient, it cannot say, on the totality of the record, that the evidence "clearly supports" Luis's guilt. *Id.* at 564–65.

2.5. The *Ladd* harm standard is incomplete.

Even if this Court concludes that the paltry evidence against Luis somehow "clearly supports" his guilt, it shouldn't stop there. The

Ladd harm standard, which looks only at evidence of guilt, short-circuits the full *Almanza* analysis and should not be used to affirm convictions.

Since it decided *Ladd* in 1999, the Court of Criminal Appeals has said that, to the extent any prior jury-charge test can be read to short-circuit a full *Almanza* analysis in favor of a single factor, that test should be overruled. *Vasquez v. State*, 389 S.W.3d 361, 368–69 (Tex. Crim. App. 2012). The *Ladd* harm test is such a test; this Court should evaluate harm under a full *Almanza* analysis.

2.6. A full *Almanza* analysis likewise shows that Luis suffered some harm from the error.

Under the four factors for determining harm under *Almanza*, the record shows that Luis suffered some harm in this case. *French*, 563 S.W.3d 228, 235–36. The **jury charge** reveals harm: two-thirds of the available theories of liability were erroneously included. So does the **state of the evidence**: the case against Luis as a primary actor was weak; the parties instructions authorized the jury to convict Luis even if they had doubt of his primary guilt.

The **jury arguments** compounded the error: the State repeatedly and extensively relied on the parties instructions in its closing arguments. It specifically invited the jury to convict Luis even if they were all split between the six theories of liability and the alternate

manners and means.[314] And it promised the jury that "if we knew who the unknown male was, we would charge him too, *under the law of parties*."[315]

Finally, **other relevant information in the record** is that the parties instructions transformed Luis's defensive theory into a liability. The only DNA *on* SM was potentially from 12A-1 SP.[316] This should have supported Luis's defensive theory that *he didn't do anything* and that someone else—12A-1 SP—was the sole actor.

Instead, the parties instructions caused the very evidence that Luis relied on to show his innocence—someone else's DNA—to become damning evidence of guilt: If no one else was in the room, Luis was guilty; if someone else was in the room, Luis was guilty. Heads, the State wins; tails, Luis loses.

2.7. Conclusion

A full *Almanza* analysis shows that Luis suffered some harm from the court's erroneous parties instructions. That's all that is required for reversal. *Arline*, 721 S.W.2d at 351. This Court should reverse and remand. Tex. R. App. P. 43.2(d).

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[314] RR11:8–18.

[315] RR11:19–20 (emphasis added).

[316] RR8:142–44; RR9:48.

3. Issue Three: The jury charge erroneously omitted essential elements from *half* of the application paragraphs, and Luis suffered egregious harm.

Though unobjected to, the fourth, fifth, and sixth application paragraphs omitted essential elements of the offense.[317] This error egregiously harmed Luis because the instructions omitted the *gravamen* of the offense and therefore denied Luis the right to a unanimous jury verdict.

3.1. The application paragraph should include all the essential elements of the offense in order to protect the defendant's jury-trial right.

The application paragraph is the "heart and soul" of the jury charge that instructs the jury under what circumstances they should convict or acquit the defendant. *Mendez v. State*, 545 S.W.3d 548, 553–54 (Tex. Crim. App. 2018). An incomplete application paragraph is erroneous. *Id.* at 554.

The right to due process and the right to trial by jury both entitle a criminal defendant to have a jury determine every element of the offense. *Apprendi v. New Jersey*, 530 U.S. 466, 467, 477 (2000); *United States v. Gaudin*, 515 U.S. 506, 510 (1995); *Alkayyali v. State*, 668 S.W.3d 445, 452–53 (Tex. App.—Fort Worth 2023, pet. granted); *Flores v. State*, 48 S.W.3d 397, 402 (Tex. App.—Waco 2001, pet. ref'd). Accordingly, an incomplete application paragraph

[317] CR2:704–06.

that omits essential elements of the offense violates due process and the right to trial by jury. *Id.*

3.2. Application paragraphs 4, 5, and 6 each omitted essential elements.

In this case, the fourth and fifth application paragraphs did not require the jury to find that SM died or that the alleged conduct caused her death, while the sixth application paragraph did not require the jury to find the capital element that murder was committed "in the course of committing or attempting to commit" aggravated sexual assault.[318]

These are essential elements of capital murder. Tex. Penal Code §§ 19.02(b)(1), 19.03(a)(2), (8). Omitting them from the application paragraph was error. *Mendez,* 545 S.W.3d at 553–54; *Alkayyali,* 668 S.W.3d at 452–53; *Flores*, 48 S.W.3d at 402.

3.3. The error egregiously harmed Luis.

Luis suffered egregious harm from this error thrice over. The error **affected the basis of the case** because "causing death" and the capital element are the *gravamen* of capital murder. *Gardner v. State*, 306 S.W.3d 274, 302 (Tex. Crim. App. 2009). It **deprived Luis of the valuable right** to have a jury determine every element of the offense. *Apprendi,* 530 U.S. at 467, 477; *Gaudin*, 515 U.S. at 510;

[318] CR2:704–06.

Alkayyali, 668 S.W.3d at 452–53; *Flores*, 48 S.W.3d at 402. And it **vitally affected two defensive theories**—that Luis wasn't responsible for causing SM's death, and that Luis wasn't responsible for sexually assaulting SM.

A full *Almanza* review confirms this. *Villarreal*, 453 S.W.3d at 433. First, the **entire jury charge** exacerbated the error. As argued in issue two, the charge shouldn't have contained parties instructions—which included paragraphs 5 and 6—at all. And, for some inexplicable reason, the charge contained two full sets of application paragraphs—one set under the heading "Criminal Responsibility" and the other appropriately labelled "Application"—and yet both sets omitted the same elements.[319] Application paragraphs should tell the jury not just under what circumstances they are to convict, but also under what circumstances they are to *acquit*. *Mendez*, 545 S.W.3d at 553–54. Because causing death and the capital element are the gravamen of capital murder, a jury should acquit if either element isn't proved, and the application paragraph should tell them that. *Id.*; *Gardner*, 306 S.W.3d at 302. Here, however, the charge instructed and allowed the jury to convict Luis *even if* they didn't find that he was responsible either for causing SM's death or for doing so in the course of committing or attempting to commit sexual assault.

[319] CR2:700–06.

Second, the **state of the evidence** shows the significance of the error. Evidence that Luis was responsible for causing SM's death was insufficient; evidence that he conspired to sexually assault her was non-existent. The charge nonetheless dictated conviction.

The State's **jury argument** magnified the error. The State made a detailed "pick and choose" argument to the jury, in which it told them that they need not be unanimous about the 6 theories of liability in the charge.[320] In fact, the prosecutor emphasized that a majority of jurors could convict based on the three instructions that erroneously omitted essential elements.[321]

No **other relevant information in the record** mitigates the harm from these omissions. Instead, the record shows that Luis's defensive theory was that he was innocent, while the charge instructed the jury to convict him even in the face of missing elements.

3.4. Conclusion

The omission of essential elements from half of the application paragraphs was egregiously harmful. *Villarreal*, 453 S.W.3d at 433. This Court should reverse and remand. *Id.*; Tex. R. App. P. 43.2(d).

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[320] RR11:8–18.

[321] RR11:15 (encouraging Jurors 2 and 5 to convict based on paragraph 4, Jurors 3 and 4 on paragraph 6, Juror 7 on paragraph 5, Jurors 9 and 10 on paragraphs 4–6).

Issue Four
(Exclusion of Evidence)

4. The trial court erroneously excluded evidence of Luis's interrogation, in violation of his Sixth Amendment rights, because "creates a false impression" is not a valid basis for excluding evidence.

Defense counsel sought to cross-examine Jack Ferrell about the interrogation techniques that he used on Luis.[322] The court excluded this evidence because it "creates a false impression before the jury."[323] This was error because "false impression" is not a basis for excluding evidence, and no other applicable theory of law supports the trial court's decision. The error is reversible because it denied Luis his Sixth Amendment right to confrontation, incorporated by the due-process right to present a defense.

4.1. Standard of Review

A trial court's ruling to exclude evidence is reviewed for an abuse of discretion. *Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016). A court abuses its discretion when its decision is outside the zone of reasonable disagreement. *Id.* The court's ruling should be upheld if it is correct under any applicable theory of law. *Id.*

[322] RR6:218–19.

[323] RR6:224, 230–31, 235, 242.

4.2. The court excluded the interrogation evidence because it would "create a false impression."

Ferrell had testified that Luis never invoked his rights to counsel or to remain silent during his interrogations.[324] Defense counsel sought to ask Ferrell about the techniques that Ferrell used, including:

- Trying to convince Luis that he doesn't have "any hope of escaping" what he was accused of, by:
  - Saying things like, "I'm not going to go way," "We're not going to stop";
  - Accusing him of being dishonest;
  - Saying that the case would get worldwide attention;
  - Saying that everybody's story lines up except Luis's;
  - Telling Luis that all the evidence points toward him;
  - Telling Luis that "saying you didn't do this isn't enough" and "Today is your opportunity" to say more;
- Minimizing the nature of what happened, by:
  - Suggesting that it was a "mistake";
  - Suggesting that Luis got "frustrated";
- Tempting Luis to say things that aren't true or to blame others, by:
  - Suggesting that Von did it;
  - Telling Luis to blame "somebody" in the apartment;
- Plying on a "guilty conscience," by:
  - Saying "[SM] wants you to tell the truth";
  - Suggesting that Luis is "ashamed and embarrassed";
  - Saying that Luis is only upset because of the consequences; and
  - Telling Luis to "do the right thing."[325]

[324] RR6:217.

[325] RR6:221–34.

The State stipulated that these are common interrogation techniques and that Ferrell used them on Luis.[326] Defense counsel wanted the jury to see that Luis was "putting up with" these "aggressive" techniques and that he "withstood" Ferrell's tactics and answered his questions.[327]

The State objected that the evidence was hearsay, irrelevant, and created a false impression before the jury.[328] The court overruled the State's hearsay objection because the interrogation questions were not offered for the truth of what was said.[329]

The court didn't rule on the State's relevance objection; instead, it concluded that, because Luis took a polygraph that the State "is not able to get into," questions about Ferrell's interrogation techniques would create a "false impression" because Luis "did make statements" as part of the polygraph.[330] Because some of the interrogation happened after the polygraph, the court excluded evidence of all of it.[331]

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[326] RR6:234–35.

[327] RR6:220, 225.

[328] RR6:220–21, 223–24.

[329] RR6:223.

[330] RR6:226–27.

[331] RR6:235.

4.3. The court erred because "creates a false impression" is a doctrine of admissibility, not exclusion.

The court's exclusion of the evidence because it "creates a false impression" was error because that is not a valid basis for excluding evidence. To the contrary, inadmissible evidence may become *admissible* if it corrects a false impression created by an opposing party. *Tovar v. State*, 221 S.W.3d 185, 191 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *Redmond v. State*, 629 S.W.3d 534, 546 (Tex. App.—Fort Worth 2021, pet. ref'd); *see also Chavarria v. State*, No. 01-23-00302-CR, 2024 WL 3528448, at *4 (Tex. App.—Houston [1st Dist.] July 25, 20024, no pet.) (mem. op., not designated for publication).

If defense counsel's asking Ferrell about his interrogation techniques truly "created a false impression," the remedy would have been for the State to offer any otherwise-inadmissible statements that might have corrected it. In fact, defense counsel suggested exactly that remedy, but the State refused to do so unless Luis would waive his Fifth Amendment right not to testify and take the stand.[332]

That the statements may have occurred around the time of a polygraph is immaterial. If statements made before, during, or after a polygraph are admissible evidence, the proper procedure for introducing the evidence is to redact from such evidence all

[332] RR6:227.

references to the polygraph examination. *Wright v. State*, 154 S.W.3d 235, 239 (Tex. App.—Texarkana 2005, pet. ref'd) (citing *Hoppes v. State*, 725 S.W.2d 532, 536 (Tex. App.—Houston [1st Dist.] 1987, no pet.)). The State could have done so here. It chose not to.

4.4. No other applicable theory of law supports the court's ruling.

The court correctly concluded that the interrogation was not hearsay. Hearsay is an out-of-court statement offered for the truth of the matter asserted. Tex. R. Evid. 801(d). As the court recognized, the evidence was offered to prove what happened, not the truth of what was said.[333]

The court didn't expressly rule on the State's relevance objection, but its implicit denial of that objection is within the zone of reasonable disagreement. Evidence is relevant if it "has any tendency to make a fact more *or less* probable than it would be without the evidence" and the fact is of consequence in determining the action. Tex. R. Evid. 401. It is well-established that evidence regarding "consciousness of guilt" is relevant. *Mottin v. State*, 634 S.W.3d 761, 770 (Tex. App.—Houston [1st Dist.] 2020, pet. ref'd). As defense counsel argued, the evidence here showed that Luis withstood hours of aggressive, threatening interrogation by Ferrell without ever breaking or confessing. This evidence, in accordance with rule 401,

[333] RR6:223

makes it "less probable" that Luis had a guilty conscience and is therefore just as relevant to proving Luis's innocence as the converse would be to proving his guilt. Tex. R. Evid. 401.

4.5. The error is constitutional and reversible.

The court's error denied Luis the opportunity to cross-examine Ferrel about facts that were relevant to his innocence. It therefore denied Luis his Sixth Amendment confrontation right, which is incorporated by the due-process right to present a defense.[334] *Crawford v. Washington*, 541 U.S. 36, 42 (2004); *Washington v. Texas*, 388 U.S. 14, 18 (1967).

When the record reveals constitutional error subject to harmless-error review, the reviewing court must reverse the conviction unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction. Tex. R. App. P. 44.2(a). Whether a constitutional error is harmless beyond a reasonable doubt is determined by considering "any and every circumstance apparent in the record that logically informs" the analysis. *Hughes v. State*, 691 S.W.3d 504, 523 (Tex. Crim. App. 2024). The evaluation is performed in a neutral manner, not in the light most favorable to the prosecution. *Id.* The State, as the beneficiary of the error, has the

[334] Defense counsel objected on this basis. RR6:241.

burden to show on appeal that the constitutional error was harmless beyond a reasonable doubt. *Id.*

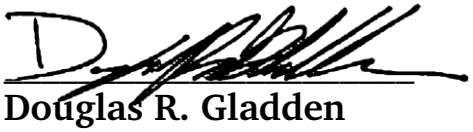
In this case, the harm to Luis cannot be overstated. Defense counsel was prevented from showing the jury that Luis withstood Ferrell's interrogation tactics, pressure, and threats. In a purely circumstantial case like this one, evidence of Luis's clear conscience in the face of aggressive interrogation would have been strong evidence of his innocence.

This Court cannot conclude beyond a reasonable doubt that keeping this evidence from the jury did not contribute to Luis's conviction, so it must reverse and remand. Tex. R. App. P. 43.2(d), 44.2(a).

Prayer

Luis prays that this Honorable Court reverse the trial court's judgment and render a judgment of acquittal, or that it remand the case for a new trial.

Respectfully submitted,



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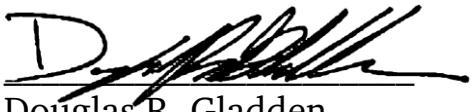

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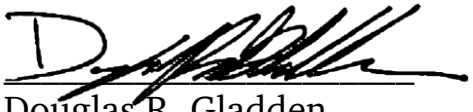

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