PD-0207-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 4/2/2018 9:36 AM
Accepted 4/3/2018 2:08 PM
DEANA WILLIAMSON
CLERK

No. PD-0207-18

In the
Texas Court of Criminal Appeals

FILED
COURT OF CRIMINAL APPEALS
4/3/2018
DEANA WILLIAMSON, CLERK

No. 01-16-00434-CR
In the Court of Appeals
For the First District of Texas

No. 1472750
In the 338th District Court
Of Harris County, Texas

DAMON ORLANDO MILTON
Appellant
V.
THE STATE OF TEXAS
Appellee

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

CELESTE BLACKBURN
Attorney for Appellant
333 N. Rivershire Drive, Suite 285
Conroe, Texas 77304
Texas State Bar Number: 24038803
Telephone: 936-703-5000
Fax: 877-900-2822
Email: celesteblackburn@gmail.com

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

IDENTIFICATION OF THE PARTIES

Pursuant to TEX. R. APP. P. 68.4(a), a complete list of the names of all interested parties is provided below.

Trial Judge:	Honorable Wayne Mallia, Presiding Judge
Appellant:	Damon Orlando Milton #02066682 McConnell Unit 3001 S. Emily Drive Beeville, Texas 78102
Appellate Counsel for Appellant:	Celeste Blackburn 333 N. Rivershire Dr., Suite 285 Conroe, Texas 77304
Trial Counsel for Appellant:	Jacquelyn Carpenter Assistant Public Defender 1201 Franklin, 13th Floor Houston, Texas 77002
Appellate Counsel for the State:	Kim Ogg Harris County District Attorney's Office 1201 Franklin, Suite 600 Houston, Texas 77002
Trial Counsel for the State:	Keaton Forcht Harris County District Attorney's Office 1201 Franklin, Suite 600 Houston, Texas 77002

INDEX OF AUTHORITIES

CASES

RULES

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to TEX. R. APP. P. 68.4(d), the Appellant requests oral argument because it would assist the Court in reaching its decision and counsel in presenting its arguments.

TO THE HONORABLE TEXAS COURT OF CRIMINAL APPEALS:

STATEMENT OF THE CASE

On September 14, 2015, Appellant was charged by indictment with robbery. (CR11).[1] The indictment alleged that Appellant had two prior felony convictions. (CR 11). A jury found Appellant guilty of the charged offense and sentenced him to 50 years confinement in the Texas Department of Corrections—Institutional Division. (CR 58, 68, 74-76; 4RR 182; 5RR 76).[2] On May 19, 2016, Appellant filed notice of appeal, and the trial court certified his right to appeal. (CR 77, 79). On June 17, 2016, Appellant filed a motion for new trial. (Supp. CR 3-16). The motion for new trial was overruled by operation of law on August 3, 2016. (CR 3).

STATEMENT OF PROCEDURAL HISTORY

The Court of Appeals for the First District of Texas affirmed Appellant's conviction in *Damon Orlando Milton v. State of Texas*, No. 01-16-00434-CR, 2017 WL 3633570 (Tex. App.--Houston [1st Dist.], Aug. 24, 2017, pet. filed). A motion for rehearing and en banc reconsideration was filed on September 25,

[1] The clerk's record is designated by "CR."

[2] The reporter's record on appeal is designated by volume number, followed by "RR," followed by page number.

2017. On January 23, 2018, the First Court of Appeals panel denied Appellant's motion for rehearing, and the First Court en banc denied the motion for reconsideration with Justice Terry Jennings and Justice Jane Bland issuing dissenting opinions in *Damon Orlando Milton v. State of Texas*, No. 01-16-00434-CR, --- S.W.3d ---, 2018 WL 505192 (Tex. App.--Houston [1st Dist.], Jan. 23, 2018, pet. filed).

GROUND FOR REVIEW

Did the Court of Appeals error in holding the trial court did not abuse its discretion in allowing the State to play a video of a lion attempting to maul an infant during its closing arguments?

ARGUMENT

In Appellant's brief, the first issue presented was whether "the trial court abused its discretion in allowing the State to play a video, not admitted into evidence or admitted for demonstrative purposes during the trial, during its closing argument in the punishment phase of trial." (Appellant's Brief, pages 7-14).

The panel opinion found that the State "beginning its closing argument in the punishment phase by playing, over appellant's objection, a video clip of a lion aggressively trying to gain access to a baby that was protected by a glass wall"

and "intimating that keeping appellant confined in prison protected society just as the glass wall protected the child from the lion" was a "response to the theme of appellant's closing argument, i.e., that appellant has paid for his crimes and should be given a lighter sentence and another chance," and that the analogy between the glass being necessary to restrain the lion and jail being necessary to restrain appellant was a plea for law enforcement and protection of the community in light of the sheer volume of appellant's prior offenses." *See Milton*, 2017 WL 3633570 at *13-15.

The panel's decision is incorrect and this petition for discretionary review should be granted for two reasons. First, the opinion failed to address Appellant's point of error – that the *playing of the video* was error, rather than the actual argument. Second, that the *playing of the video* was a proper plea for law enforcement and/or response to Appellant's closing argument. Both of these reasons are addressed in the dissenting opinions. *See Milton*, 2018 WL 505192 at *1-11.

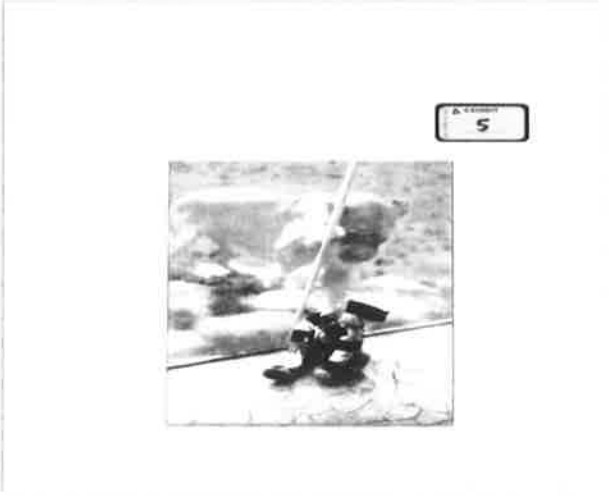
Failure to Address Appellant's Point of Error

The panel decision is not responsive to Appellant's point of error that the trial court erred in allowing *the video*, not admitted into evidence or admitted for demonstrative purposes during trial, to be played. Both the point of error in Appellant's brief and Appellant's reply brief focus on the fact that the point of

error is regarding the *video* being played. The point of error focused on the fact that the *video* was irrelevant and prejudicial to Appellant and the trial court erred in allowing it to be played. Justice Bland points this out in her dissent. She states that the video clip was "not evidence in the case" and "injected facts from outside the trial record for the purpose of increasing the defendant's punishment." *Id.* at *9. "The complained-of conduct was not the argument of counsel at all – it was a video clip played before the jury during the State's closing argument." *Id.* at *10. She further discusses, with citations, that a "brief allusion to something outside the record to make a metaphorical plea for law enforcement is not viscerally the same as introducing facts from outside the record in the form of a video clip like this one." *Id.* Because the panel did not address this issue, Appellant respectfully requests that this Court grant the petition for discretionary review.

The trial court abused its discretion in allowing the State to *play the video*, not admitted into evidence or admitted for demonstrative purposes during the trial, during its closing argument in the punishment phase of trial. Prior to the State's closing argument during the punishment phase of trial, Appellant's trial attorney objected to the State using a *video* during their closing argument. (5RR 55-56). She argued to the trial court that the *video* was highly prejudicial and irrelevant. (5RR 55-56). The *video* depicts an infant, dressed in a black and white striped suit, sitting on the ground at what appears to be a zoo. (MNT 5; Defense Exhibit

2).[3] A glass wall is behind the child. (MNT 5; Defense Exhibit 2). On the other side of the glass wall is a female lion, who is viciously attempting to gain access to the child by scratching, pawing, and biting at the child. (MNT 5; Defense Exhibit 2).



[3] The record of the motion for new trial hearing is designated by "MNT" followed by page or exhibit number. The video may also be accessed by searching "lion tries to eat baby part 1" in YouTube. https://www.youtube.com/watch?v=6fbahS7VSFs

The video was not admitted into evidence during the trial; was not relevant as it is not a video of anything associated with the alleged offense or evidence in the case; was not admitted during the trial for demonstrative purposes in assisting a witness testify; and portrayed images that were highly prejudicial and inflammatory. The panel's opinion failed to address that a *video*, with visual images and audio, not admitted was permitted, over Appellant's objection, to be played for the jury during closing argument. Justice Bland states that the "video presented facts outside the record and would never have been admitted into evidence" and concluded that the "trial court erred in allowing its admission during closing argument." *See Milton*, 2018 WL 505192 at *10.

The State asserted that the purpose of the *video* was to demonstrate that if someone doesn't have opportunity then their desires do not matter, as an example, the lion does not have the opportunity to hurt the baby, so the lion's desire does not matter. (5RR 56-57). The State **specifically** told the trial court that it did not intend to "compare the defendant to the lion, or society to the baby, no comparisons like that." (5RR 56). However, despite their assurances, the State did exactly that, and the majority opinion of the Court of Appeals agreed that this was the argument presented by the State.[4] The trial court overruled the defense

[4] "The State's analogy between the glass being necessary to restrain the lion and jail being necessary to restrain appellant was a plea for law enforcement and protection of the community in light of the sheer volume of appellant's prior offenses." *Milton*, 2017 WL 3633570 at *14.

objection, and allowed the *video* to be played during the State's closing argument. (5RR 57, 68).

This trial involved allegations of a robbery at a CVS store. There were no accusations regarding infants or lions. The *video* was played during the punishment phase of trial, and there were no allegations during that phase that involved a lion or an infant. Accordingly, a *video* of a lion attempting to attack, maul, and presumably consume an infant was irrelevant as the *video* did not make the existence of a fact of consequence in the determination of Appellant's punishment more probable than without the video, and it should not have been played in front of the jury.

The *video* had no inherent probative force during closing argument as it portrayed material unassociated with the case at hand. Rather, the *video* suggested a punishment on an improper basis. Despite the prosecutor's assurances to the trial court that he was *not* going to equate the lion to Appellant and the infant to society, he did exactly that.[5] The prosecutor specifically compared the lion in the *video* to Appellant, and implicitly compared society to the baby in the *video* in his closing argument. His use of the *video* was to compare Appellant's presence out of prison to that of a lion that would be mauling an infant but for a piece of glass.

[5] "I'm not going to compare the defendant to the lion, or society to the baby, no comparisons like that." (5RR 56).

This suggests to the jury an improper basis for determining Appellant's punishment.

The *video* also had a strong tendency to distract the jury from the main issue of deciding Appellant's punishment. As stated by the prosecutor after he played the video, "I know you're thinking, that was weird, what was that about?" (5RR 68). The *video* obviously has nothing to do with the trial or the issue of punishment. The prosecutor argued that *video* was used in demonstrating a "motive, plus opportunity, and that equals behavior" theme. (5RR 69-70). And he assured the judge that he did not intend to draw any comparisons between the lion video and Appellant. (5RR 56). But then, he did.[6] This *video* distracted the jury from the issue of deciding Appellant's punishment on legally admissible evidence rather focusing its attention to the possibility of Appellant not being in prison to that of a lion mauling a child. (5RR 71-72).

Further, the jurors were told by the State to give the *video* serious weight in determining the verdict. Specifically, "...that 30 second clip is *exactly* what this punishment phase is about" and "...that *video* has *everything* to do with this

[6] It should be noted that this issue was raised in the motion for new trial. The judge who heard the motion for new trial was not the judge who heard the trial. (MNT 7). At the time of the motion for new trial hearing, due to the short amount of time allowed for the hearing to be heard, the transcript was not available to the parties or the court. (MNT 11). In response to the assertion that the State used the video to compare Appellant to the lion and society to the infant, the prosecutor told the court that the representation of his closing argument in such a manner was "very inaccurate, and it is disingenuous. That's not what happened in this case."(MNT 10-11).

case…" (5RR 68, 72)(emphasis added). They were told repeatedly during the State's closing argument that the *video* was what the case was about, and therefore, the tendency is that the *video* was given undue weight by the jury.

Lastly, the *video* was repetitive of the State's argument. The *video* was unnecessary for the prosecutor to make his "motive, plus opportunity, and that equals behavior" theme. He did it initially in his descriptions of his "equation," and he did it again in a hypothetical he gave to the jury about wanting to have Chick-fil-A on a Sunday. (5RR 69). The admission of the *video* was merely a more highly prejudicial repeat of the same argument. Accordingly, the *video* should have been excluded. The trial court erred when it allowed the *video* of a lion attempting to maul an infant to be played during the State's closing argument during the punishment phase of trial. The majority's opinion fails to address the admission of the *video* to the jury; therefore, the petition for discretionary review should be granted.

Response to Closing Argument and Proper Plea for Law Enforcement

Further, the majority's opinion found that argument related to the video, was a proper plea for law enforcement and a response to Appellant's trial counsel's closing argument. Milton, 2017 WL 3633570 at *14. As it relates to a proper response to Appellant's closing argument, the panel's opinion does not comport with the reality of what occurred in the trial court. Specifically, the State,

prior to defense giving their closing argument, sought permission, over trial counsel's objection, to play the video. Therefore, the State sought to play the video and make the argument **regardless** of arguments made by Appellant's trial counsel. The State was going to make the argument that Appellant was the lion and that society was the baby and that a lengthy sentence is necessary to protect society from Appellant by playing the video **regardless** of what Appellant's trial counsel argued during her closing argument. It is more probable that, knowing the trial court allowed the State to make the closing argument by playing a video of a lion attempting to maul an infant she felt the need argue against it during her closing argument.

Further, the *playing of the video* was not necessary for the State to make a plea for law enforcement or "respond to Appellant's closing argument." The trial prosecutor claimed that the video was used to make his "motive, plus opportunity, and that equals behavior" theme. (5RR 57). However, he was able to make that same argument with a board "in addition" to the video. (MNT 11). He had a "visual aid" where "behavior and motive equals action" was written on a board. (MNT 11). He was also able to verbally describe a scenario of someone wanting to eat at a restaurant that was closed on a Sunday without having to *play* a video of someone actually going to and learning that a restaurant is closed. The *video* of a lion trying to maul an infant is not a proper plea for law enforcement nor is it a

response to Appellant's trial counsel's argument, especially when it is pre-"admitted" prior to *any* closing arguments being given.

As noted by the majority opinion of this Court, the "appropriateness of the [comparisons of defendants to predatory animals] in this case is tenuous given the nature of the crime." *Milton*, 2017 WL 3633570 at *14. If just the verbal argument comparing Appellant to a vicious lion attempting to maul an infant is "tenuous given the nature of the crime," the *playing of the video* was certainly unnecessary and improper.

A prosecutor may use colorful speech to convey the idea that the defendant will recommit the crime and may place upon the jury the responsibility to prevent the crime through punishment argument; but, here, the video exceeded "speech." Not only did the State use "colorful speech" to describe a defendant as a predatory animal that attempts to maul infants if not restrained, it played a *video* to convey the idea. It is one thing to verbally argue and describe something, and it is a whole different matter to use *unrelated video* footage during closing arguments to convey a message. The video was not "colorful speech" by the State as a plea for law enforcement nor was it a "response" to Appellant's closing argument as it was brought up and ruled on *prior* to Appellant's closing argument. Rather, it was a *video*, not admitted into evidence that contained both visual and audio statements unrelated to the case, played for the jury during closing argument. Then, in direct

contradiction to the assurances given to the trial court prior to closing argument, the prosecutor specifically compared Appellant to the lion and implicitly compared society to the infant in the video. The trial court abused its discretion in allowing the video to be played during closing arguments, and the majority's decision is incorrect.

Justice Jennings, in his dissent, discusses at length why the video's admission was not a proper plea for law enforcement. *See Milton*, 2018 WL 505192 at *1-9. He points out, which the majority opinion does not, that the nature of the offense was not violent and neither are Appellant's prior convictions. *Id.* at *5-6. Because the playing of the video was improper, this Court should grant Appellant's petition for discretionary review. Not doing so, will lead to prosecutors continuing this type of conduct. They could play video footage, not admitted into evidence, to argue for convictions and for increased punishment. Likewise, defense attorneys could play video footage of individuals wrongly convicted being released from prison to convey their theory of a case in closing argument. The courtroom is simply not a place for the State of Texas to play videos, unrelated to the case and not admitted into evidence, during their closing arguments. Allowing it to occur is a slippery slope.

PRAYER FOR RELIEF

It is respectfully submitted that First Court of Appeals erred in holding the trial court did not abuse its discretion in allowing the State to play a video of a lion attempting to maul an infant during its closing arguments; therefore, Appellant respectfully requests that this court grant this petition for discretionary review.

/s/ Celeste Blackburn

CELESTE BLACKBURN
Attorney for Appellant
333 N. Rivershire Drive, Suite 285
Conroe, Texas 77304
Texas State Bar Number: 24038803
Telephone: 936-703-5000
Fax: 877-900-2822
Email: celesteblackburn@gmail.com

CERTIFICATE OF COMPLIANCE

This is to certify that this brief complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i), if applicable, because it contains 3,195 words according to the word count on Microsoft Word.

/s/ Celeste Blackburn
Celeste Blackburn

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing petition has been sent to Appellee's attorney via efile on April 2, 2018. I further certify that a copy of the foregoing petition has been mailed to the Texas State Prosecuting Attorney at the following address on April 2, 2018:

Stacey M. Soule
State Prosecuting Attorney
P.O. Box 13046
Austin, Texas 78711

/s/ Celeste Blackburn
Celeste Blackburn

APPENDIX

2017 WL 3633570
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

Do not publish. TEX. R. APP. P. 47.2(b).
Court of Appeals of Texas,
Houston (1st Dist.).

Damon Orlando MILTON, Appellant
v.
The STATE of Texas, Appellee

NO. 01–16–00434–CR
|
Opinion issued August 24, 2017

On Appeal from the 338th District Court, Harris County, Texas, Trial Court Case No. 1472750

Attorneys and Law Firms

Janet Celeste Blackburn, for Damon Orlando Milton.

Kim K. Ogg, Molly Wurzer, for The State of Texas.

Panel consists of Chief Justice Radack and Justices Keyes and Massengale.

Opinion

MEMORANDUM OPINION

Sherry Radack, Chief Justice

*1 Appellant Damon Orlando Milton appeals from a robbery conviction. We affirm.

BACKGROUND

L. Robertson, a cashier at CVS pharmacy, testified that appellant robbed the store two days in a row, on June 21, 2015 and June 22, 2015. The second robbery was the subject of the underlying charges in this case, but evidence of the earlier robbery was used at trial for identification purposes.

A. The June 22, 2015 Robbery

On June 22, 2015, Robertson noticed appellant come into the CVS and meander around the store for 10–15 minutes while Robertson was ringing up several other customers' purchases. After there was no one else in line, appellant brought several items to the register. Robertson testified that she began scanning and bagging the items when appellant told her "this is a stick up, give me whatever is in the register, do not try anything, or I will kill you." Appellant also told Robertson that he had a weapon. She testified to feeling very nervous, threatened, and scared; she feared for her life. Surveillance footage of the June 22 robbery was played at trial, and Robertson pinpointed the spot on the tape where appellant threatened her.

Robertson gave appellant all the bills from the register and appellant stuffed them in his pockets. Appellant then grabbed a shopping bag and told Robertson to dump all the coins from the register into there. Then, after taking the unpaid merchandise that Robertson had bagged for him, appellant grabbed four beers, a bag of Starbursts, and some chips. He walked out the door, and then took off running towards other businesses in the area.

Robertson testified that appellant was wearing glasses, a blue collared shirt, jeans, and white tennis shoes. She saw he had a blue backpack that he left outside the door. Robertson provided in-court identification of appellant as the person who robbed her.

Immediately after appellant left the store, Robertson followed training protocol by calling her manager to notify the police. Officer Huckabee with the Houston Police Department testified that he was just across the freeway from the CVS when the call came in, so it took him only about a minute and a half to respond. Robertson described the perpetrator to Huckabee as African American, about 6# or 6#1# tall, short haircut, wearing a blue shirt, blue jeans, and carrying a bag. Robertson also told Huckabee that the robber had left travelling east on Crosstimbers. Huckabee radioed to all units in the area, and then began driving down Crosstimbers in the direction the robber fled. Less than half a mile from the CVS, Huckabee spotted appellant matching Robertson's description.

Huckabee detained appellant and, within 10 or 15 minutes after the robbery, he brought appellant to CVS and asked Robertson if she could identify him. She confirmed that it was appellant who had robbed her. The police also showed

Robertson the items found in appellant's backpack, which she identified as merchandise he had taken from the store. Robertson testified that he was still fresh in her mind, and she "didn't have any doubt. That was him."

*2 Officer C. Inocencio with the Houston Police Department testified that she interviewed Robertson shortly after the robbery. Robertson gave her a description of the perpetrator, and, when other officers returned to the CVS with appellant, Inocencio noted that appellant matched Robertson's description of the robber and his clothes.

Inocencio also testified that appellant had been brought back to the CVS for a "show-up procedure." She explained this process as "[I]f you have a suspect that you believe to be part of a crime that happened very recently where you can bring them back to the scene, you will read an admonishment form to your witness, and tell them, you know, that this could may or may not be the suspect." Show-ups are done only when a suspect is apprehended in close time and proximity to a crime. Inocencio testified that Robertson identified appellant during this show-up procedure as the person who robbed her.

Inocencio approached appellant to see if he would give a statement, but he did not. She then took pictures of the property recovered. Huckabee testified that items taken from CVS were found in appellant's backpack, along with parole papers containing appellant's name. The beer cans in the backpack were still chilled, indicating that they had recently been taken out of refrigeration. No weapon was found on appellant or in his possession.

B. The June 21, 2015 Robbery

Robertson testified that she was sure of appellant's identity in part because he had robbed her at the same store the previous day using the same words. She did not see a weapon either time, but she believed he had one because he told her he did. Surveillance video from the June 21 robbery was played, and Robertson identified appellant as the man in the video who threatened and robbed her. She confirmed that he wore the same clothes and spoke essentially the same words during both robberies. The only difference in his appearance was that he was not wearing glasses during the June 21 robbery, but was wearing glasses during the June 22 robbery.

C. The Verdict and Judgment

The jury found appellant guilty of robbery and, after finding two prior-conviction enhancement paragraphs "true," assessed punishment at 50 years' confinement. Appellant filed a motion for new trial, which was denied. Appellant timely appealed.

ISSUES ON APPEAL

Appellant brings the following six issues on appeal:

1. Did the trial court abuse its discretion in allowing the State to play a video of a lion attempting to maul an infant during its closing arguments?
2. Did the trial court err in denying Appellant's motion to suppress his identification by the complainant?
3. Did the trial court abuse its discretion in allowing an alleged extraneous offense as evidence pursuant to Texas Rule of Evidence 404(b) to establish identity?
4. Was Appellant's trial attorney ineffective in allowing evidence of Appellant's parole status to be admitted during the guilt innocence phase of trial, and, if so, did the error deprive Appellant of a fair trial?
5. Did the trial court err in denying Appellant's request for a lesser included offense of theft in the jury charge?
6. Is the evidence sufficient to support the jury's verdict?

SUFFICIENCY OF THE EVIDENCE

In his sixth issue, appellant challenges the sufficiency of the evidence to support his conviction for robbery. Specifically, he argues that there was insufficient evidence that Robertson was in fear of imminent bodily injury or death, an element of robbery.

A. Standard of Review and Applicable Law

*3 We review a challenge to the legal sufficiency of the evidence under the standard enunciated in *Jackson v. Virginia*, 443 U.S. 307, 318–20, 99 S. Ct. 2781, 2788–89 (1979). *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Under the *Jackson* standard, evidence

is insufficient to support a conviction if, considering all the record evidence in the light most favorable to the verdict, no rational factfinder could have found that each essential element of the charged offense was proven beyond a reasonable doubt. *See Jackson*, 443 U.S. at 317–19, 99 S. Ct. at 2788–89; *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009). Evidence is insufficient under this standard in four circumstances: (1) the record contains no evidence probative of an element of the offense; (2) the record contains a mere "modicum" of evidence probative of an element of the offense; (3) the evidence conclusively establishes a reasonable doubt; and (4) the acts alleged do not constitute the criminal offense charged. *See Jackson*, 443 U.S. at 314, 318 n.11, 320, 99 S. Ct. at 2786, 2789 n.11; *Laster*, 275 S.W.3d at 518; *Williams*, 235 S.W.3d at 750.

The sufficiency-of-the-evidence standard gives full play to the responsibility of the factfinder to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007); *see also Brown v. State*, 270 S.W.3d 564, 568 (Tex. Crim. App. 2008) (stating jury is sole judge of credibility of witnesses and weight to give their testimony). An appellate court presumes that the factfinder resolved any conflicts in the evidence in favor of the verdict and defers to that resolution, provided that the resolution is rational. *See Jackson*, 443 U.S. at 326, 99 S. Ct. at 2793; *see also Clayton*, 235 S.W.3d at 778 (reviewing court must "presume that the factfinder resolved the conflicts in favor of the prosecution and therefore defer to that determination").

In viewing the record, direct and circumstantial evidence are treated equally; circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *Clayton*, 235 S.W.3d at 778. In determining the sufficiency of the evidence, a reviewing court examines "whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict." *Id.* (quoting *Hooper v. State*, 214 S.W.3d 9, 16–17 (Tex. Crim. App. 2007)). Finally, the "cumulative force" of all the circumstantial evidence can be sufficient for a jury to find the accused guilty beyond a reasonable doubt, even if every fact does not "point directly and independently to the guilt of the accused." *See Powell v. State*, 194 S.W.3d 503, 507 (Tex. Crim. App. 2006).

Robbery occurs when a person, in the course of committing theft and with the intent to obtain or maintain control of the property, or intentionally, knowingly, threatens or places another in fear of imminent bodily injury or death. TEX PENAL CODE ANN. § 29.02(a)(2). Theft occurs when a person commits an offense by unlawfully appropriating property with the intent to deprive the owner of the property and without the owner's effective consent. *Id.* § 31.03(a), (b)(2).

B. Analysis

Appellant argues that Robertson's "testimony regarding the words that allegedly caused her to fear for her person were not consistent throughout the trial." According to appellant, the trial was the first time Robertson claimed he said she must cooperate or "I'll kill you." Although appellant concedes that Robertson testified that appellant threatened her, he asserts that, because on the surveillance video, there were "no loud threats, no[r] movements as if she was going to be harmed ... the evidence is insufficient to show that Robertson was in fear of imminent bodily injury or death."

***4** We disagree. The record contains evidence from which a rational factfinder could have found that Robertson was "in fear of imminent bodily injury or death." Robertson testified that appellant told her, during the June 22, 2015 robbery, "this is a stick up, give me whatever is in the register, do not try anything, or I will kill you." Robertson also testified that appellant told her that he had a weapon, and she was very "nervous and threatened," and "very scared." She testified that she "feared for [her] life." She "tried to stay as calm as [she] could" and waited to call her manager to call the police until appellant had left because of his threats.

Appellant attacks Robertson's credibility by arguing that—while Robertson testified at trial that appellant threatened to kill her—she did not tell the police that in so many words immediately after the robbery. Robertson was cross-examined extensively on this point at trial and acknowledged that she had not expressly stated previously that appellant threatened to kill her.

While her trial testimony may have differed from post-robbery interviews, she never wavered on her assertion

that she was frightened for her life. When Officer Inocencio was asked at trial whether Robertson told her that appellant threatened to kill her, she testified "no." Inocencio did testify, however, that she wrote in her incident report that Robertson had said she was afraid she was going to get hurt because appellant told her he had a weapon.

In *Boston v. State*, the Court of Criminal Appeals considered the sufficiency of the evidence to support a finding that a store clerk felt in fear of imminent bodily injury for purposes of sustaining an aggravated robbery conviction. 410 S.W.3d 321, 327 (Tex. Crim. App. 2013). The perpetrator reached across the counter and grabbed money out of the cash register when the clerk opened it to give him change. *Id.* at 326. Although the perpetrator actually had a gun and laid it out on the counter, the store clerk was too flustered to notice the firearm, and no verbal threat was made against her. *Id.* Nonetheless, the court held that "the conduct in reaching over the counter and taking money from the cash register was threatening because [the perpetrator's] actions were "a menacing indication of (something dangerous, evil, etc.)." *Id.* at 327. The court ultimately concluded that these threatening actions, coupled with the clerk's testimony that "she feared that she could have been injured during the robbery" was sufficient to support a conviction for aggravated robbery. *Id.*

Despite police not finding a weapon in appellant's possession, appellant told Robertson that he did, and she testified that put her in fear of injury or death. *Howard v. State*, 333 S.W.3d 137, 140 (Tex. Crim. App. 2011) (recognizing it is enough that "the defendant is aware that his conduct is reasonably certain to place someone in fear, and that someone actually is placed in fear."). Because appellant has not established that no rational factfinder could have found that each essential element of the charged offense was proven beyond a reasonable doubt, we overrule his sixth point of error.

PRE–TRIAL IDENTIFICATION

In his second point of error, appellant complains that the trial court should have suppressed Robertson's identification of him because "it was tainted in the show-up identification by the display of all of the items recovered from Appellant next to him on the hood of the police car" and was "impermissibly suggestive."

A. Standard of Review and Applicable Law

"[A] pre-trial identification procedure may be so suggestive and conducive to mistaken identification that subsequent use of that identification at trial would deny the accused due process of law." *Barley v. State*, 906 S.W.2d 27, 32–33 (Tex. Crim. App. 1995) (citing *Stovall v. Denno*, 388 U.S. 293, 87 S. Ct. 1967 (1967)).

***5** "[T]he admissibility of an in-court identification is determined by a two-step analysis: 1) whether the out-of-court identification procedure was impermissibly suggestive; and 2) whether that suggestive procedure gave rise to a very substantial likelihood of irreparable misidentification." *Santiago v. State*, 425 S.W.3d 437, 439–40 (Tex. App.–Houston [1st Dist.] 2011, pet. ref'd). "It is appellant's burden to prove the in-court identification is unreliable by proving both of these elements by clear and convincing evidence." *Santos v. State*, 116 S.W.3d 447, 451 (Tex. App.–Houston [14th Dist.] 2003, pet. ref'd) "An analysis under these steps requires an examination of the 'totality of the circumstances' surrounding the particular case and a determination of the reliability of the identification." *Santiago*, 425 S.W.3d at 440 (citing *Barley*, 906 S.W.2d at 33).

If the indicia of reliability outweigh the influence of an impermissibly suggestive pretrial identification, the identification testimony is admissible. *Santos*, 116 S.W.3d at 451.

We review the trial court's factual findings deferentially, but we review de novo the trial court's legal determination of whether the reliability of an in-court identification has been undermined by an impermissibly suggestive pretrial identification procedure. *See, e.g., Loserth v. State*, 963 S.W.2d 770, 773–74 (Tex. Crim. App. 1998).

B. Analysis

Appellant filed a pre-trial motion to suppress the items found in his backpack. The written motion does not mention Robertson's out-of-court identification of appellant at the show-up, and it is not mentioned until the end of appellant's counsel's argument at the pre-trial motion-to-suppress hearing:

> You know, and I also find it egregious that they laid all this stuff out on the hood of their car, and then bring out the complaining witness and say, hey, by the way, is this the guy that stole all this stuff from you that you've laid right here on the front of the squad car? This is not appropriate.
>
> So the Defense did not file a motion to suppress the outcry identification, but we would like to add that into our motion to suppress; that the Court take into consideration the testimony and suppress everything that was found in the backpack, everything found in Mr. Milton's pocket, or pockets, and the out-of-court identification of Mr. Milton by the complainant.

Robertson was not called as a witness at the hearing, and the identification issue was not mentioned again. Instead, the focus of the hearing remained on the admissibility of the backpack contents. Appellant did not object to Robertson's in-court identification of appellant at trial. The State contends that appellant has waived any complaint about the identification procedures and, alternatively, that both Robertson's out-of-court and in-court identification of appellant was proper.

We need not address whether appellant has demonstrated that the show-up identification was impermissibly suggestive because we conclude that he has not established that the show-up identification procedure "gave rise to a very substantial likelihood of irreparable misidentification." *See, e.g., Santos*, 116 S.W.3d at 451 (recognizing appellant's burden to demonstrate both that the out-of-court identification procedure was unduly suggestive and that it likely caused a misidentification).

"The non-exclusive factors that we consider include: (1) the witness's opportunity to view the defendant at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the witness's level of certainty at the time of confrontation; and (5) the length of time between the offense and the confrontation." *Nunez–Marquez v. State*, 501 S.W.3d 226, 235 (Tex. App.–Houston [1st Dist.] 2016, pet. ref'd). Application of these factors does not demonstrate a likelihood of misidentification by Robertson.

***6** Robertson testified that she was able to view the defendant close-up not only on the night of the July 22, 2015 robbery, but also when he robbed her the night before, on July 21, 2015. On the night of the July 22 robbery, she gave the responding police officer an accurate description of appellant and his clothes. She testified that the perpetrator was wearing the same clothes both nights, and the surveillance video from both nights confirmed the robber was wearing the same clothes as appellant when he was apprehended. A very short amount of time passed between the July 22 robbery and the show-up identification.

We can also consider whether the witness has previously identified a different person as the perpetrator before identifying the defendant in a challenged show-up procedure, as well as whether the witness has previously identified (or failed to identify) the defendant. *Santos*, 116 S.W.3d at 453. Robertson was unwavering in her identification of appellant both when first confronted with him during the show-up, and then again at trial.

We further note that he fails to argue, and the evidence does not establish, harm from the alleged error of admitting Robertson's in-court identification. *E.g., Williams v. State*, 402 S.W.3d 425, 432 (Tex. App.–Houston [14th Dist.] 2013, pet. ref'd) (holding admission of in-court identification harmless, even if pretrial procedures were unduly suggestive and tainted witness's identification). In addition to Robertson's identification, there was significant other evidence in support of appellant's conviction. The jury viewed surveillance video of both the June 21, 2015 and June 22, 2015 robberies. Appellant matched the description Robertson gave the police immediately following the June 22 robbery. Appellant was apprehended a short time later, less than half a mile away, walking in the same direction as Robertson told police that the perpetrator had headed on foot. He matched the physical description given by Robertson, including the clothes he was wearing.

The person who robbed Robertson put the bills from the cash register into his pocket and had Robertson put her till's change in the CVS bag containing the merchandise he also stole. The backpack appellant was carrying when apprehended contained a CVS bag holding items identical to those stolen from CVS, as well as loose change. The backpack also contained a slip of paper with appellant's name on it.

Because appellant has not demonstrate a likelihood that the police's show-up procedures created a likelihood of misidentification by Robertson, and because he has not argued nor established harm, we overrule appellant's second point of error.

EXTRANEOUS OFFENSE

In his third point of error, appellant argues that the trial court abused its discretion by admitting evidence that appellant allegedly robbed the CVS on June 21, 2015—the day before the robbery for which he was being tried.

A. Standard of Review and Applicable Law

The Texas Rules of Evidence provide that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." TEX. R. EVID. 404(b); *Johnston v. State*, 145 S.W.3d 215, 219 (Tex. Crim. App. 2004). Extraneous-offense evidence may be admissible for other purposes, however, such as showing identity. TEX. R. EVID. 404(b). *Johnston*, 145 S.W.3d at 219. An extraneous offense may be admissible to show identity, however, only when identity is at issue in the case. *Page v. State*, 213 S.W.3d 332, 336 (Tex. Crim. App. 2006). "Whether extraneous offense evidence has relevance apart from character conformity ... is a question for the trial court." *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003).

*7 The standard of review for a trial court's ruling under the Rules of Evidence is abuse of discretion. *Sauceda v. State*, 129 S.W.3d 116, 120 (Tex. Crim. App. 2004). "If the ruling was correct on any theory of law applicable to the case, in light of what was before the trial court at the time the ruling was made, then we must uphold the judgment." *Id.* Appellate courts will uphold a trial court's ruling on the admissibility of evidence as long as the trial court's ruling was at least within the "zone of reasonable disagreement." *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g).

B. Analysis

Appellant argues that evidence about robbery the previous night at CVS was not relevant to a material, non-propensity issue under Rule 404(b), and that its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury under Rule 403.

The State argues that evidence about the prior robbery was admissible under Rule 404(b) because appellant made identity an issue, and that appellant did not preserve an objection under Rule 403.

We conclude that the trial court's decision to admit evidence about the previous day's robbery was within the zone of reasonable disagreement and, thus, not error. "The issue of identity may be raised by the defendant during cross-examination of the State's witnesses." *Lane v. State*, 933 S.W.2d 504, 519 (Tex. Crim. App. 1996). "For instance, the issue of identity is raised when the state's only identifying witness is impeached by cross-examination concerning a material detail of the witness' identification." *Id.* (citing *Siqueiros v. State*, 685 S.W.2d 68, 71 (Tex. Crim. App. 1985). "That the impeachment was not particularly damaging or effective in light of all of the evidence presented is not the question. The question is whether impeachment occurred that raised the issue of identity." *Segundo v. State*, 270 S.W.3d 79, 86 (Tex. Crim. App. 2008).

While cross-examining Robertson, appellant's attorney questioned her identification of appellant. He made frequent references to the fact that she was only shown one suspect and to the alleged vagueness of her description:

> Q. Okay. So they didn't bring, like, a line up of six people to look at, is what I'm asking?
>
> A. No, just one.
>
> Q. And after they—once they got him out, was the gentlemen wearing blue jeans?
>
> A. Yes. He had on the same blue collared shirt, the jeans, and the tennis shoes. The only difference was he had took off his glasses.
>
> Q. Okay. So the person you saw had on glasses?
>
> A. Right.
>
> Q. And the person they brought back did not have on glasses?
>
> A. Right.

Q. And you would agree with me that wearing blue jeans is very common, correct?

A. Correct.

Q. And you would agree with me that a dark blue collared shirt is very common, correct?

A. Right.

Q. So it's not like this was some unique outfit, right?

A. Correct.

Q. Would you also agree with me that about 6–foot and African American is a fairly vague description?

A. Correct, it's vague.

Q. When they brought the gentlemen back in the car, he was handcuffed?

A. Yes, he was handcuffed when they got him out.

Q. Handcuffs kind of make you think of criminals, right?

A. No.

Appellant's counsel also intimated during his cross-examination of Robertson that the items recovered from appellant's backpack might not have been stolen from CVS, again because the items were common:

Q. And did [the police] also bring a light, blue backpack to the scene?

A. Right.

Q. Did you see them pull all the stuff out of the backpack?

*8 A. Yes, I did.

Q. And when you saw them pull all the stuff out of the backpack, you see beer, right?

A. Yes. Everything that he took out of the store, I seen it.

Q. You saw beer?

A. Right.

Q. And you saw chips?

A. Right. Candy.

Q. And sodas?

A. Soda, yes.

Q. You saw all that stuff. Do you know the brand name of the chips?

A. I don't know the brand name of the chips because all of it was in the CVS bag that he took from 2 the store I was working at.

Q. Do you know brand name of the soda?

A. Could have been a Dr. Pepper, anything.

Q. Okay. So let's talk about that: Dr. Pepper, very common for people to have Dr. Pepper, right?

A. Right.

Q. Also very common for people to have chips, right?

A. Uh-huh.

Q. Is that a yes?

A. Yes.

Q. It's not uncommon for a grown person to have beer as well, correct?

A. Correct.

Q. So they brought back someone with this backpack, and you end up saying, yes, that's the CVS stuff?

A. Yes.

Q. So when you saw that, you believed that the police had the right person, right?

A. Yes, they did.

The trial court agreed with the State that cross-examination of Robertson brought identity into issue.

In his brief here, appellant insists that because he did not use the word "identity," these questions did not go to identity, but rather "to show that blue jeans, Dr. Pepper, and chips are common items." He argues that there

"was no implication that because these three items are common that Robertson's identification of Appellant was less credible." Instead, he asserts, his counsel's questions "merely pointed out that some of the items found in Appellant's backpack and one item of clothing he was wearing were common."

Admissibility under 404(b), however, does not turn on use of the word "identity." Courts have recognized the issue of identity may be raised during cross-examination of a State's witness by (1) impeaching on a material detail of the witness's identification, (2) questioning the certainty of the witness's identification, (3) questioning the witness's capacity to observe (i.e., maybe mistaken), or (4) questioning the witness's truthfulness (maybe lying). *E.g.*, *Price v. State*, 351 S.W.3d 148, 151 (Tex. App.–Fort Worth 2011, pet. ref'd).

Appellant also argues that Robertson's testimony that "she was sure he committed the offense the day before did not strengthen her identification of him the day of the offense for which Appellant was on trial." But appellant's counsel called into question Robertson's recognition of appellant, and Robertson testified that (1) the robberies were committed by the same person, and (2) she was able to get a good look at appellant during the earlier robbery because he did not have glasses on.

The trial court properly granted appellant's request for a limiting instruction restricting the jury's consideration of evidence about the extraneous act (i.e., July 21, 2015 robbery) to the issue of identification. The court did not abuse its discretion by concluding that appellant raised the issue of identity when cross examining Robertson and that appellant's impeachment of Robertson rendered the extraneous offense admissible under Rule 404(b).

*9 Appellant also argues the trial court erred by admitting evidence about the previous robbery under Rule 403 of the Texas Rules of Evidence because the probative value of the extraneous-offense evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Because this complaint was not preserved in the trial court, we do not address it on appeal.

We overrule appellant's third point of error.

EVIDENCE ABOUT PAROLE STATUS

In his fourth point of error, appellant argues that he received ineffective assistance from trial counsel because she failed to object to evidence that he was on parole and, without that evidence, the appellant would not have been found guilty.

A. Standard of Review and Applicable Law

We consider claims of ineffective assistance of counsel under the two-prong test adopted in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984). To prevail on an ineffective assistance of counsel claim, appellant must show that (1) counsel's performance was deficient, meaning it fell below an objective standard of reasonableness, and (2) the deficiency prejudiced the defendant, meaning there was a reasonable probability that, but for the counsel's deficient performance, the results of the trial would have been different. *Id.*; *Ex parte Napper*, 322 S.W.3d 202, 246, 248 (Tex. Crim. App. 2010). The burden is on appellant to prove by a preponderance of the evidence that counsel was ineffective. *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996).

The first prong of *Strickland* requires that the challenged acts or omissions of counsel fall below the objective standard of professional competence under prevailing professional norms. *Perez v. State*, 310 S.W.3d 890, 893 (Tex. Crim. App. 2010). Appellate courts are highly deferential to trial counsel and avoid evaluating counsel's conduct in hindsight. *Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984). Thus, courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689, 104 S. Ct. 2065.

The second prong of *Strickland* requires a reasonable probability that the outcome of the case would have been different. *Id.* at 694, 104 S. Ct. at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome, meaning that counsel's errors must be so serious that they deprive appellant of a fair

trial. *Smith v. State*, 286 S.W.3d 333, 340–41 (Tex. Crim. App. 2009).

Allegations of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the ineffectiveness. *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001). "In the rare case in which trial counsel's ineffectiveness is apparent from the record, an appellate court may address and dispose of the claim on direct appeal." *Lopez v. State*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011). When the record is silent as to the reasoning behind an alleged deficiency by trial counsel, "we will assume that counsel had a strategy if any reasonable sound strategic motivation can be imagined." *Id.*; *see also Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001) ("[I]n the absence of evidence of counsel's reasons for the challenged conduct, an appellate court ... will not conclude the challenged conduct constituted deficient performance unless the conduct was so outrageous that no competent attorney would have engaged in it.").

B. Analysis

***10** Outside the presence of the jury, the State and appellant's attorney came to an agreement about admitting into evidence various items found in appellant's backpack when he was detained. One such item was State's Exhibit 19, a piece of paper designating a time and place for appellant's appointment with a parole officer. Appellant's counsel agreed to its admission, subject to the State's promise to redact references to parole:

> [State's counsel]: Judge, ...[o]ne of the things says he is on parole. The State is going to redact that, so all it says on there is his name. We just want to make that abundantly clear before it happened. The parole information is going to be redacted, and we'll leave everything else. The sentence at the bottom, failure to comply with warrant, we'll redact that as well. ... I just want it cleared up before it gets in front of the jury. I don't want them to know he had been just released.

Exhibit 19 as admitted, however, contained an unredacted portion for a "Parole Officer/Parole Social Worker" to sign. Appellant asserts that, despite his trial counsel's inspecting the redacted document, she did not notice or object to the reference to a parole officer at the bottom of the document.

In addition, during his direct examination, Officer Huckabee made a reference to "parole papers" being found in appellant's backpack:

> Q. Did you find anything else at that time in the backpack?
>
> A. I believe in the outer pocket of the backpack on the outside there was a pair of reading glasses. He had some clothing items inside the main compartment of the backpack as well. I believe he had some parole papers inside the backpack as well.

Appellant's counsel did not object to the reference.

Appellant raised his trial counsel's alleged ineffective assistance in a motion for new trial, which attached an affidavit from his trial counsel. Neither the motion nor the affidavit mentioned the unredacted portion of Exhibit 19, but both discussed counsel's failure to object to Officer Huckabee's parole reference. Counsel's affidavit explained that she did not want to draw undue attention to the reference:

> During the guilt innocence phase of trial, an officer sponsored by the State, during the State's questioning, provided evidence that Mr. Milton was on parole. I did not object as the damage was already done and I thought it best not to highlight the testimony for the jury.

Appellant acknowledges that this "could be considered sound trial strategy," but claims that "in light of the failure to object to the parole information on State's Exhibit 19, her trial strategy is no longer valid." Appellant further contends that, but for the jury being aware of his prior incarceration, the result of the trial would have been different.

The State responds that counsel gave a valid trial strategy for her failure to object to Huckabee's testimony, which

precludes a finding that failure to object amounted to deficient performance. We agree. *See, e.g.*, *Schiffert v. State*, 257 S.W.3d 6, 21 (Tex. App.–Fort Worth 2008, pet. ref'd) (valid trial strategy to not object to witness's reference to defendant being on parole to avoid emphasizing or calling jury's attention to comment).

As for Exhibit 19, the State points out that we are not privy to counsel's thought process because her failure to object to the unredacted reference to a parole officer was neither addressed in appellant's motion for new trial, nor in trial counsel's affidavit. In addition, the State argues that appellant cannot demonstrate harm, given that (1) there is no evidence that the jury saw Exhibit 19, as it was not described to the jury and there is no indication it was published to the jury, and (2) the reference to parole in Exhibit 19 was fleeting and "minimal in comparison to the rest of the evidence pointing to appellant as the robber that it could not have had an effect on the jury."

***11** Given appellant counsel's vigorous trial defense, as well as Robertson's eyewitness testimony, the surveillance tapes, and the stolen items found in appellant's backpack when he was apprehended in close proximity to the robbery, we cannot conclude that counsel's lack of objection to a reference to parole on Exhibit 19 (which may or may not have been seen by the jury) amounted to deficient representation or that it its redaction would have likely have led to a different result. *E.g.*, *Prejean v. State*, 32 S.W.3d 409, 411 (Tex. App.–Houston [14th Dist.] 2000, no pet.) ("Under the limited circumstances of this case, and given the overwhelming evidence of appellant's guilt, we do not believe that this omission, isolated in a record of generally competent representation, amounts to ineffective assistance of counsel ... [ ]or supports a reasonable probability that, but for this error, a different outcome might have been achieved.").

We overrule appellant's fourth point of error.

LESSER INCLUDED OFFENSE

In his fifth point of error, appellant contends that the trial court erred in denying his request that the jury be charged on theft as a lesser-included-offense.

A. Standard of Review and Applicable Law

The Texas Code of Criminal Procedure provides, "[i]n a prosecution for an offense with lesser included offenses, the jury may find the defendant not guilty of the greater offense, but guilty of any lesser included offense." TEX. CODE CRIM. PROC. art. 37.08. It also states that an offense is a lesser-included offense if

> (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged;
>
> (2) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission;
>
> (3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or
>
> (4) it consists of an attempt to commit the offense charged or an otherwise included offense.

TEX. CODE CRIM. PROC. art. 37.09.

The determination of whether a lesser-included-offense instruction requested by a defendant must be given requires a two-step analysis. *Rousseau v. State*, 855 S.W.2d 666, 672–73 (Tex. Crim. App. 1993); *Royster v. State*, 622 S.W.2d 442, 446 (Tex. Crim. App. 1981) (plurality op. on reh'g). The first step asks whether the lesser-included offense is included within the proof necessary to establish the offense charged. *McKithan v. State*, 324 S.W.3d 582, 587 (Tex. Crim. App. 2010). We must compare the statutory elements and any descriptive averments in the indictment for the greater offense with the statutory elements of the lesser offense. *Ex parte Amador*, 326 S.W.3d 202, 206 n.5 (Tex. Crim. App. 2010); *Ex parte Watson*, 306 S.W.3d 259, 263 (Tex. Crim. App. 2009). Because "a defendant cannot be held to answer a charge not contained in the indictment brought against him," the evidence produced at trial does not determine the first step. *See Watson*, 306 S.W.3d at 263.

The second step of the lesser-included-offense analysis is to determine if there is some evidence from which a rational jury could acquit the defendant of the greater

offense while convicting him of the lesser-included offense. *Guzman v. State*, 188 S.W.3d 185, 188–89 (Tex. Crim. App. 2006). The evidence must establish the lesser-included offense as "a valid rational alternative to the charged offense." *Segundo v. State*, 270 S.W.3d 79, 90–91 (Tex. Crim. App. 2008). We review all of the evidence presented at trial. *Hayward v. State*, 158 S.W.3d 476, 478–79 (Tex. Crim. App. 2005); *Rousseau*, 855 S.W.2d at 673.

B. Analysis

The trial court refused appellant's request that the jury be charged with theft as a lesser-included offense of robbery. Appellant argues that there is evidence that "refutes or negates that Appellant threatened Robertson or placed her in fear of imminent bodily injury or death." Accordingly, he argues, there is evidence from which the jury could have rationally convicted appellant of the lesser-included-offense of theft, rather than robbery.

***12** The State responds that a charge of theft would have been improper, because there was no evidence that appellant only committed theft, but did not threaten Robertson or place her in fear of imminent bodily injury or death. We agree.

In performing our analysis, we "consider all admitted evidence without regard to the evidence's credibility or potential contradictions or conflicts." *Roy v. State*, 509 S.W.3d 315, 317 (Tex. Crim. App. 2017). "Although little evidence is needed to trigger an instruction, the relevant evidence must affirmatively 'raise[ ] the lesser-included offense and rebut[ ] or negate[ ] an element of the greater offense.' " *Roy*, 509 S.W.3d at 317 (quoting *Cavazos v. State*, 382 S.W.3d 377, 385 (Tex. Crim. App. 2012)).

Appellant's argument is premised on the speculation that the jury could have believed only part of Robertson's testimony, i.e., believed her testimony that appellant stole items from CVS while disbelieving that—in the course of doing so—he threatened her or placed her in fear of imminent bodily injury or death. However, "it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense, but rather, there must be some evidence directly germane to the lesser-included offense for the finder of fact to consider before an instruction on a lesser-included offense is warranted." *Sweed v. State*, 351 S.W.3d 63, 68 (Tex. Crim. App. 2011). Robertson's uncontradicted testimony was that appellant told her that he had a weapon, and that she was scared that he might injure or kill her. Appellant points to evidence of the ways in which he did *not* threaten her, focusing on the fact that he did not display a gun, did not make threatening gestures, and did not reach into his pockets. But this is not affirmative evidence contradicting the evidence of the ways that he *did* threaten her. Because appellant cites no evidence negating the manner in which Robertson testified that he threatened her nor any affirmative evidence that he is guilty only of theft, the trial court did not err in denying his request for a jury instruction on the lesser-included offense of theft.

We overrule appellant's fifth point of error.

CLOSING ARGUMENT VIDEO

In his first point of error, appellant argues that the trial court abused its discretion in allowing the State "to play a video of a lion attempting to maul an infant during its closing argument."

A. Standard of Review and Applicable Law

A trial court's ruling on an objection to improper jury argument is reviewed for abuse of discretion. *See Garcia v. State*, 126 S.W.3d 921, 924 (Tex. Crim. App. 2004). The law provides for, and presumes, a fair trial, free from improper argument by the State. *Long v. State*, 823 S.W.2d 259, 267 (Tex. Crim. App. 1991). Proper jury argument generally must encompass one of the following general areas: (1) a summation of the evidence presented at trial; (2) a reasonable deduction drawn from that evidence; (3) an answer to the opposing counsel's argument; or (4) a plea for law enforcement. *Guidry v. State*, 9 S.W.3d 133, 154 (Tex. Crim. App. 1999); *Sandoval v. State*, 52 S.W.3d 851, 857 (Tex. App.–Houston [1st Dist.] 2001, pet. ref'd). To determine whether a party's argument properly falls within one of these categories, we must consider the argument in light of the entire record. *Sandoval*, 52 S.W.3d at 857.

***13** Determining harm in improper argument cases requires balancing the following three factors: "(1) severity of the misconduct (prejudicial effect), (2) curative

measures, and (3) the certainty of conviction/punishment absent the misconduct." *Klock v. State*, 177 S.W.3d 53, 65 (Tex. App.–Houston [1st Dist.] 2005, pet. ref'd) (citing *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998)).

B. Analysis

The State began its closing argument in the punishment phase by playing, over appellant's objection, a video clip of a lion aggressively trying to gain access to a baby that was protected by a glass wall. The State then described the analogy between the video and appellant's sentence, intimating that keeping appellant confined in prison protected society just as the glass wall protected the child from the lion:

> Let me talk to you about that video. That lion was cute, and it was laughable, and it was funny because he's behind that piece of glass. That motive of that lion is never changing, never changing. It's innate. Given the opportunity, remove that glass, it's no longer funny, it's a tragedy. That's what's going to happen, that's a tragedy. That's what going on with this case.
>
> ....
>
> Nothing funny about that lion when he's outside that piece of glass, that's a tragedy. Nothing funny when Damon Milton is outside of prison, that's a tragedy.
>
> ....
>
> When you've got five [prior convictions] and another one reduced, quit giving him chances, quit removing that glass. Keep that glass there, remove the opportunity, and send him to prison for every second that he deserves.

Appellant argues that use of the video to compare the prospect of appellant's presence outside of prison to that of a lion that would be mauling an infant was inflammatory and suggested to the jury an improper basis for determining appellant's punishment.

The State responds that (1) colorful speech and analogies may be used to convey the idea that a defendant will recommit a crime and place upon the jury the responsibility to prevent future crime through punishment, (2) the State's use of the video was a permissible summation of the evidence, (3) the State was responding to the defendant's closing argument, (4) the State's use of the video was an appropriate plea for law enforcement.

The State also points out that this Court has previously held that reference to the same lion and baby video was a permissible analogy relevant to a plea for law enforcement. *See Thompson v. State*, 01–14–00862–CR, 2015 WL 9241691, at *3 (Tex. App.–Houston [1st Dist.] Dec. 17, 2015, no pet.) (mem. op., not designated for publication). In that case, the State did not play the video, but described it:

> I don't know if any of you saw that[;] it was in a video back on CNN ... where it was a mother, who had her little baby, and she was holding—she was at the zoo—and she [was] holding this baby near the lion cage. And there was a clear plastic barrier between the baby and the lion, and the baby is sitting there dancing, moving around, and the lion comes out. It's gnawing right there. Everybody thinks, oh, it's hilarious. It's cute. It's so great mom's filming it, sends it to CNN, everybody watches it. But was that really cute? What would have happened if the glass barrier was not there? That baby is a goner. Because the motivation of a lion, a lion is a killer. A lion is a predator. That lion would have eaten that baby and nothing would have changed.
>
> ***14** The Defendant is a killer. He is a predator.

Id. We held that the "use of the analogy of appellant as a lion that must remain caged" is "in the context of this case, proper as [a] plea[ ] for law enforcement." *Id.*

Finally, the State argues that, even if the trial court abused its discretion in allowing the tape to be played, appellant has not demonstrated harm.

We reject the State's argument that the video represented a visual aid in the summation of the evidence. Thus, we are presented with the question: Was the video within the permissible bounds of responding to appellant's arguments or making a plea for law enforcement?

In *Thompson*, we explained that while some cases have found comparisons of defendants to animals during the punishment phase of trial permissible, other cases have found such analogies to be improper when not

warranted on the record. *Id.* Whether such a reference is appropriate is determined on a case-by-case basis dependent upon context. *Id.* ("Texas law has made it clear that context is highly important when deciding whether a closing argument is proper or improper." (citing *Burns v. State*, 556 S.W.2d 270, 285 (Tex. Crim. App. 1977)). In *Thompson*, the defendant shot at two people, killing one of them, as the victims were running away from the defendant. *Id.* In that context, we held that the State's comments, "[D]o we want to remove that clear plastic barrier between the lion and the baby? Do we want to do that?" were part of the prosecutor's exhortation for the jury to give appellant a lengthy sentence so as to keep the community safe. *Id.*

During the punishment phase of this case, the jury was presented evidence of appellant's numerous prior convictions, which all involved theft to some degree, including forgery, unauthorized use of a motor vehicle, theft from a person, and robbery. Appellant's counsel argued that, while appellant has an extensive criminal history, it is not a violent one. She also argued that he has already been punished for all the past crimes highlighted by the State. Finally, she pleaded for leniency, stressing that Robertson was not injured in this robbery, "I understand he messed up, I get that, but how long are we going to have him pay for this situation where no weapon was used, she wasn't touched, she wasn't bruised, she wasn't scratched, she wasn't hit."

The State's argument that—given the opportunity to reoffend—appellant would continue to commit crimes was a response to the theme of appellant's closing argument, i.e., that appellant has paid for his crimes and should be given a lighter sentence and another chance. The State's analogy between the glass being necessary to restrain the lion and jail being necessary to restrain appellant was a plea for law enforcement and protection of the community in light of the sheer volume of appellant's prior offenses.

We note, however, that *Thompson* and other cases permitting comparisons of defendants to predatory animals were cases involving murder or other violent behavior. The appropriateness of the same analogy in this case is tenuous given the nature of the crime. Our resolution of this issue rests on the entire context of the case; if appellant had not had a sustained record of reoffending upon release from confinement, and if appellant's attorney had not pleaded for a lower sentence to give appellant another chance in society, use of the video may well have been improper. Given the context, we hold the trial court did not abuse its discretion by overruling appellant's objection to the use of the video during the State's closing argument.

***15** We overrule appellant's first issue.

CONCLUSION

We affirm the trial court's judgment.

All Citations

Not Reported in S.W.3d, 2017 WL 3633570

End of Document

2018 WL 505192
Only the Westlaw citation is currently available.

Court of Appeals of Texas,
Houston (1st Dist.).

Damon Orlando MILTON, Appellant
v.
The STATE of Texas, Appellee

NO. 01–16–00434–CR
|
Opinion issued January 23, 2018

On Appeal from the 338th District Court, Harris County, Texas, Trial Court Case No. 1472750

Attorneys and Law Firms

Celeste Blackburn, 333 N. Rivershire dr. Suite 285, Conroe, TX 77304, for Appellant.

Kim Ogg, District Attorney, Molly Wurzer, Assistant District Attorney, Harris County, Texas, 1201 Franklin, Suite 600, Houston, TX 77002, for Appellee.

Panel consists of Chief Justice Radack and Justices Keyes and Massengale.
En banc reconsideration was requested. See Tex. R. App. P. 49.7.
A majority of the justices of the Court voted to deny the motion for en banc reconsideration.
The en banc court consists of Chief Justice Radack and Justices Jennings, Keyes, Higley, Bland, Massengale, Brown, Lloyd, and Caughey.

Opinion
Reconsideration en banc denied.

OPINION DISSENTING FROM DENIAL OF EN BANC RECONSIDERATION

Terry Jennings, Justice, dissenting.

*1 [A]rguments which de-humanize an accused do not aid jurors in their task; rather, they discredit a criminal justice system founded on the basic beliefs that an accused stands before a jury as an equal peer and that the State's prosecutors seek as their first goal justice, not convictions at any cost.... [W]hen arguments degrade to likening litigants to animals, it is appropriate for the ... court to ... intervene.[1]

A jury found appellant, Damon Orlando Milton, guilty of the offense of robbery.[2] After finding true the allegations in two enhancement paragraphs that he had twice been previously convicted of felony offenses, the jury assessed his punishment at confinement for fifty years. In his first issue, appellant contends that the trial court erred in overruling his objection, made at the punishment phase of trial, to the portion of the State's closing argument during which it played a videotape recording titled, "Lion tries to eat baby PART 1" (the "lion-tries-to-eat-baby video"),[3] which contains the following two still frames:


Because the panel errs in holding that the trial court did not err in overruling appellant's objection, I respectfully dissent from the Court's order denying en banc reconsideration in this case. *See* TEX. R. APP. P. 41.2(c).

Background

The complainant, LaSondra Robertson, testified that she previously worked as a store clerk and cashier at a CVS Pharmacy located in Harris County, Texas. On June 22, 2015, appellant came into the store and looked around for about ten or fifteen minutes. While appellant walked around the store, he behaved like "any other customer," and the complainant was not alarmed or

afraid. Appellant, after apparently waiting for "no one else [to be] around," approached the complainant and placed several inexpensive "food items" [4] on the counter. Again, she was not afraid of appellant nor alarmed by his actions. As the complainant began to scan the items that appellant had placed on the counter, he "leaned over" and told her, "[T]his is a stick up, give me whatever is in the [cash] register, do not try anything, or I will kill you." Although appellant had told the complainant that he had a weapon, she did not see one. She then felt nervous and scared, and she gave him "the money out of the register." Appellant picked up the "food items" that he had previously placed on the counter and grabbed "four beers," "a bag of Starburst[s]," and "some chips" before walking out of the store.

*2 The complainant explained that during the entire time that appellant stood at the counter with her, his hands stayed on the counter within her sight. He did not have a weapon in his hands, did not "mess[ ] with [the] waistband" of his pants, and did not place a weapon on the counter. He also did not touch her or cause her to sustain any scratches, bruises, or any bodily injury. The complainant did not know how much money appellant had taken from the cash register, but the only dollar bills in the register were in denominations of twenty dollars or less. She also explained that she did not tell any of the law enforcement officers, who arrived at the scene after the robbery, that appellant had told her he was going to "kill" her. The first time that she had ever stated that appellant threatened to kill her was in her trial testimony.

Houston Police Department ("HPD") Officer C. Inocencio testified that following the incident, appellant was found to be in possession of a CVS Pharmacy bag, "some kind of food products," "cash money," "rolled coins," and "assorted [loose] change." The "food products" found in appellant's possession had a total value of $17.53. Inocencio explained that the complainant never reported that appellant had threatened to "kill her."

HPD Officer A. Huckabee testified that when he detained appellant shortly after he had left the CVS Pharmacy, he did not have in his possession a firearm, a knife, or any type of weapon. [5] And appellant fully cooperated with law enforcement officers.

At the punishment phase of trial, the trial court admitted evidence of appellant's criminal record, revealing that on August 17, 1993, he was convicted of two separate offenses of robbery [6] and sentenced to confinement for seven years for each offense, to run concurrently; on September 26, 1994, he was convicted of the offense of theft [7] and sentenced to confinement for fourteen years; on August 27, 2002, he was convicted of the offense of evading arrest [8] and sentenced to confinement for ten months; on May 31, 2007, he was convicted of the misdemeanor offense of attempted unauthorized use of a motor vehicle [9] and sentenced to confinement for eight months; and on January 22, 2013, he was convicted of the offense of forgery [10] and sentenced to confinement for ten months.

During its closing argument at the punishment phase of trial, the State, after playing the lion-tries-to-eat-baby video for the jury, stated:

> *[T]hat 30–second clip is exactly what this punishment phase is about....*
>
> ... I'm asking you to start at 40 [years]. I'm not ashamed to ask you that, I'm not hesitant to ask for that. Start at 40 [years], consider the range of punishment.
>
> ....
>
> I'm not an expert on human behavior, and probably there are a couple on the panel more qualified to talk about this than I am. But I believe in the simplest form, human behavior is motive, plus opportunity, and that equals behavior....
>
> Let me talk to you about that video. That lion was cute, and it was laughable, and it was funny because he's behind that piece of glass. That motive of that lion is never changing, never changing. It's enate. *Given the opportunity, remove that glass, it's no[ ] longer funny, it's a tragedy. That's what's going to happen, that's a tragedy. That's what [is] going on with this case.*
>
> ....
>
> ... In a vacuum, that resume right there, a sterile courtroom, it's almost laughable because *we know [appellant]'s such a bad guy.* It's almost laughable, *just like that lion.* You're laughing at that lion because he's behind that piece of glass. *Nothing funny about that lion when he's outside that piece of glass, that's a tragedy. Nothing funny when [appellant] is outside of prison, that's a tragedy. That's what I meant when I said that*

video has everything to do with this case, because he's never changing his motive.

***3** Remember the good old days? Everybody here is over 20 years old and used to talk about the good old days, how everyone played outside until it was dark, and then kids came home for dinner. And I never even had to lock my house, my neighbors would just come and go. *[Appellant] is why we don't have the good old days. He's the reason you lock[ed] your house when you left, he's the reason you locked your car when you came to court today, [appellant] is the reason we don't have the good old days.*

....

... I'm not going to thank you for your verdict that you return on punishment. Because quite frankly, I'm envious of your position. Every one [of] you can go home tonight and turn on the news, and you're going to see the nightly news, and say, man, our city has really gotten violent. I wish somebody would do something about that.

....

Man, I wish I could do something about that.... You, 12, have the opportunity to when you turn on that news, say, man, it's gotten bad, but I finally did something about it....

This isn't a 25–year case, this isn't a 35–year case, maybe it's a 40–year case. The Legislator [sic] said two convictions, 25, that's where you start. When you've got five and another one reduced, *quit giving him chances, quit removing that glass. Keep that glass there, remove the opportunity, and send him to prison for every second that he deserves. He surely doesn't deserve less than 40.*

(Emphasis added.)

Improper Argument

In his first issue, appellant argues that the trial court erred in overruling his objection to the portion of the State's closing argument at the punishment phase of trial during which it played the lion-tries-to-eat-baby video for the jury because the video was "not admitted into evidence during ... trial"; was not relevant; "portrayed images that were highly prejudicial and inflammatory"; "suggested a punishment on an improper basis"; and "compare[d] [a]ppellant's presence out of prison to that of a lion that would be mauling an infant but for a piece of glass." And he asserts that the State's misconduct in playing the video affected his substantial rights.

The law provides for, and presumes, a fair trial free from improper argument by the State. *Long v. State*, 823 S.W.2d 259, 267 (Tex. Crim. App. 1991); *Thompson v. State*, 89 S.W.3d 843, 850 (Tex. App.–Houston [1st Dist.] 2002, pet. ref'd). The Court reviews a trial court's ruling on an objection to improper jury argument for an abuse of discretion. *Garcia v. State*, 126 S.W.3d 921, 924 (Tex. Crim. App. 2004). Although the State is afforded wide latitude in its jury arguments, proper jury argument is generally limited to: (1) summation of the evidence presented at trial; (2) reasonable deductions drawn from that evidence; (3) answers to opposing counsel's argument; and (4) pleas for law enforcement. *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000); *Acosta v. State*, 411 S.W.3d 76, 93 (Tex. App.–Houston [1st Dist.] 2013, no pet.).

It has long been established that the State cannot use its closing argument to place matters before the jury that are outside the record and prejudicial to the accused. *Everett v. State*, 707 S.W.2d 638, 641 (Tex. Crim. App. 1986); *Thompson*, 89 S.W.3d at 850. Arguments referencing matters that are not in evidence and may not be inferred from the evidence are usually "designed to arouse the passion and prejudices of the jury and as such are highly inappropriate." *Borjan v. State*, 787 S.W.2d 53, 57 (Tex. Crim. App. 1990); *Thompson*, 89 S.W.3d at 850. The purpose of closing argument is "to facilitate the jury in properly analyzing the evidence presented at trial so that it may arrive at a just and reasonable conclusion based on the evidence alone, and not on any fact not admitted in evidence." *Campbell v. State*, 610 S.W.2d 754, 756 (Tex. Crim. App. [Panel Op.] 1980) (internal quotations omitted).

***4** Here, the panel held that the trial court did not err in overruling appellant's objection to the State's playing of the lion-tries-to-eat-baby video for the jury because the video was played in "response to the theme of appellant's closing argument" and constituted a plea for law enforcement. In doing so, the panel relied exclusively on this Court's prior decision in *Thompson v. State*, No. 01-14-00862-CR, 2015 WL 9241691 (Tex. App.–

Houston [1st Dist.] Dec. 17, 2015, no pet.) (mem. op., not designated for publication). *See* TEX. R. APP. P. 47.7(a).

In *Thompson*, the defendant and the complainant, a fifteen-year-old boy, confronted each other at an apartment complex. 2015 WL 9241691, at *1. As the defendant approached the complainant, he showed the complainant a firearm tucked into his pants. *Id.* The complainant then told the defendant that he was not "worried" about the firearm because he had a firearm as well. *Id.* (internal quotations omitted). A verbal confrontation ensued, and when it escalated, the complainant turned to run away. *Id.* The defendant then shot the complainant as he was running away, resulting in the complainant's death. *Id.*

After the jury found the defendant guilty of murder, the State, during its closing argument in the punishment phase of trial, referenced the same lion-tries-to-eat-baby video at issue in the instant case. *Id.* at *1–2. Specifically, the State, over the defendant's objection, argued:

> I don't know if any of you saw that[;] it was in a video back on CNN ... where it was a mother, who had her little baby, and she was holding—she was at the zoo—and she [was] holding this baby near the lion cage. And there was a clear plastic barrier between the baby and the lion, and the baby is sitting there dancing, moving around, and the lion comes out. It's gnawing right there. Everybody thinks, oh, it's hilarious. It's cute. It's so great [the] mom's filming it, sends it to CNN, everybody watches it. But was that really cute? What would have happened if the glass barrier was not there? That baby is a goner.
>
> Because the motivation of a lion, a lion is a killer. A lion is a predator. That lion would have eaten that baby and nothing would have changed.
>
> The [d]efendant is a killer. He is a predator.
>
> .....
>
> ... Do we want to remove that clear plastic barrier between the lion and the baby? Do we want to do that?
>
> .....
>
> ... That's your decision. You get to decide because he'll get out eventually. He will. You get to decide when you feel comfortable having this predator, this killer back with our families on our streets.
>
> For the sake of all of us, for the sake of your community, I ask that you send him away for as long as you feel comfortable with. I ask that [it] be a long time. I ask that you refer to either the first or second page of your verdict sheets, and you give him a number of years that you feel comfortable telling your family that you kept a murderer out of our waters.

Id. at *1–2 (first, second, third, and tenth alterations in original). The jury then sentenced the defendant to confinement for thirty years. *Id.* at *1.

On appeal, the defendant asserted that the trial court had erred in overruling his objection to the State's closing argument to the jury, particularly the State's reference to the lion-tries-to-eat-baby video. *Id.* at *2. This Court, however, noting the particularly gruesome nature of the crime, i.e., the murder of a fifteen-year-old boy as he was fleeing, held that the trial court did not err because the State's argument, including its "use of the analogy of [the defendant] as a lion that must remain caged," constituted a proper plea for law enforcement given "the context of th[e] case." *Id.* at *3. Notably, in reaching its holding, the Court looked to other cases, which had also held that the reference to a defendant as "an animal" was not improper because of the extremely violent and gruesome nature of the criminal offenses that had been committed. *See id.* (citing *Burns v. State*, 556 S.W.2d 270, 285 (Tex. Crim. App. 1977) (holding reference to defendant as animal not improper where defendant brutally tortured and murdered fifty-eight-year-old man); *Belton v. State*, 900 S.W.2d 886, 898–99 (Tex. App.–El Paso 1995, pet. ref'd) (reference to defendant as animal not improper where defendant broke into family's home, terrorized them, shot mother and two children, and killed one child)); *but see Rangel v. State*, No. 01-92-01128-CR, 1994 WL 362796, at *5 (Tex. App.–Houston [1st Dist.] July 14, 1994, pet. ref'd) (not designated for publication) (State's calling defendant "an animal and a creep" improper (internal quotations omitted)).

***5** The problem with the panel's reliance on *Thompson*, and the cases cited in *Thompson* which involve seriously violent criminal offenses, is that, here, the Court is not faced with a gruesome or incredibly violent criminal offense. *See Thompson*, 2015 WL 9241691 at *1 (murder of child fleeing scene); *see also Burns*, 556 S.W.2d at 273, 280–

81 (beating, torturing, murder, and rape of elderly man); *Belton*, 900 S.W.2d at 898 (robbery of family home and murder of child in front of mother and siblings). [11]

When appellant came into the CVS Pharmacy where the complainant was working, she was not afraid of him nor alarmed by his actions, as appellant behaved like "any other customer." After being in the store for about ten or fifteen minutes, appellant, who had apparently waited for "no one else [to be] around," then approached the complainant, placing several inexpensive "food items" on the counter. Again, she was not afraid of appellant nor alarmed by his actions. After the complainant scanned the items that appellant had placed on the counter, he "leaned over" and told her that he had a weapon and to give him the money in the cash register. The complainant, however, never saw a weapon. And she noted that appellant's hands remained on the counter within her sight the entire time, he did not "mess[ ] with [the] waistband" of his pants, and he did not place a weapon on the counter. He did not touch the complainant or cause her to sustain any scratches, bruises, or bodily injury. After the complainant gave appellant the money from the cash register, he picked up the "food items" that he had previously placed on the counter and grabbed "four beers," "a bag of Starburst[s]," and "some chips" before walking out of the store. The complainant did not know how much money appellant had taken from the cash register, but the only dollar bills in the cash register were in denominations of twenty dollars or less. The "food items" taken by appellant had a total value of $17.53. When appellant was later detained by law enforcement officers shortly after leaving the CVS Pharmacy, he did not have in his possession a firearm, a knife, or any type of weapon. And he fully cooperated with law enforcement officers.

***6** A surveillance videotape recording from the date of the offense, admitted into evidence as State's Exhibit 6, shows appellant calmly walking up to the counter at the CVS Pharmacy. No other customers are present when appellant approaches the counter. After the complainant scans several items that appellant places on the counter, he calmly leans forward and says something to her. What he says to her cannot be heard on the videotape recording, but he does not make any threatening or violent gestures. And he does not touch the complainant. Appellant's hands remain on the counter throughout the entire incident. After the complainant gives appellant the money from the cash register, he walks off-screen and then is seen calmly walking out of the store.

The panel in its opinion does note the difference between the circumstances of the present case and those present in *Thompson* and "other cases permitting comparisons of defendants to predatory animals," particularly because such cases have involved murder "or other violent behavior." [12] And the panel admits that "[t]he appropriateness of the [lion-tries-to-eat-baby video] analogy in this case is tenuous given the nature of the crime" committed by appellant. *See Alexander v. State*, No. 04-95-00154-CR, 1996 WL 382984, at *3–4 (Tex. App.–San Antonio July 10, 1996, pet. ref'd) (not designated for publication) (argument likening defendant to animal improper in case where defendant convicted of delivery of controlled substance); *cf. Stringfellow v. State*, No. 05-02-00475-CR, 2003 WL 152760, at *3–4 (Tex. App.–Dallas Jan. 23, 2003, no pet.) (not designated for publication) (only in cases involving "[p]articularly brutal facts" may there be "a reasonable deduction to justify a prosecutor's reference to a defendant as an animal"). Regardless, the panel reasons that because appellant had prior convictions, the trial court did not err in allowing the State to play the lion-tries-to-eat-baby video for the jury during its closing punishment argument.

Notably though, just as the criminal offense committed by appellant in the instant case is neither gruesome nor violent, rendering the State's playing of the lion-tries-to-eat-baby video improper, the criminal offenses of which appellant had previously been convicted are also of a non-violent nature. [13] Simply put, nothing in appellant's prior criminal history warrants a comparison between him and a predatory animal attempting to eat an innocent baby. [14] *See Tompkins v. State*, 774 S.W.2d 195, 217 (Tex. Crim. App. 1987) (State's reference to defendant "as an animal" "served no legitimate purpose except to jeopardize the State's case on appeal" (internal quotations omitted)).

***7** As the Texas Court of Criminal Appeals has previously explained in regard to the State's arguments to juries: "This Court should not have to point out that comments by the attorneys should always be confined to the record and the legitimate deductions from the testimony of the witnesses." *Id.* at 218. And "there is abundant room for legitimate discussion of the testimony [in the case] and the law applicable, without indulging in

personal abuse of the man who is at the bar of justice." *Swilley v. State*, 114 Tex.Crim. 228, 25 S.W.2d 1098, 1099 (1929). Notably, "[i]t takes far less talent to indulge in abuse than in making an intelligent assessment of the facts and the law to aid the jurors in their task." *Grant v. State*, 472 S.W.2d 531, 534 (Tex. Crim. App. 1971).

Based on the foregoing, I would hold that the State's playing of the lion-tries-to-eat-baby video for the jury during its closing argument at the punishment phase of trial was improper. [15]

When an argument exceeds permissible bounds, it constitutes reversible error when an analysis of the record as a whole shows that the argument is extreme or manifestly improper, is violative of a mandatory statute, or injects new facts harmful to the defendant into the trial proceeding. *Wesbrook*, 29 S.W.3d at 115; *see also* TEX. R. APP. P. 44.2(b). An appellate court, in assessing the harm of an improper jury argument during the punishment phase of trial, looks to three factors: (1) severity of the misconduct (the magnitude of the prejudicial effect of the State's remarks); (2) measures adopted to cure the misconduct (the efficacy of any cautionary instruction by the judge); and (3) the certainty of the same punishment being assessed absent the misconduct (the strength of the evidence supporting the conviction). *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998); *see also Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004).

In regard to the first *Mosley* factor, the State's playing of the lion-tries-to-eat-baby video during its closing punishment argument was highly prejudicial. *See Hawkins*, 135 S.W.3d at 77–78 (when assessing severity of improper jury argument, primary focus is prejudicial effect of misconduct); *Watts v. State*, 371 S.W.3d 448, 459 (Tex. App.–Houston [14th Dist.] 2012, no pet.) (must examine prejudicial effect of State's remarks). Here, after playing the video for the jury, the State told the jury that the video was "exactly what th[e] punishment phase [of appellant's trial was] about." The State then characterized appellant as "a bad guy" and compared him to the lion in the video; namely, a lion who was attempting to eat an innocent baby. The State further argued:

> *... Nothing funny about that lion when he's outside that piece of glass, that's a tragedy. Nothing funny when [appellant] is outside of prison, that's a tragedy. That's what I meant when I said that video has everything to do with this case, because he's never changing his motive.*
>
> ***8** Remember the good old days? Everybody here is over 20 years old and used to talk about the good old days, how everyone played outside until it was dark, and then kids came home for dinner. And I never even had to lock my house, my neighbors would just come and go. *[Appellant] is why we don't have the good old days. He's the reason you lock[ed] your house when you left, he's the reason you locked your car when you came to court today, [appellant] is the reason we don't have the good old days.*
>
> ....
>
> This isn't a 25–year case, this isn't a 35–year case, maybe it's a 40–year case. The Legislator [sic] said two convictions, 25, that's where you start. When you've got five and another one reduced, *quit giving him chances, quit removing that glass. Keep that glass there, remove the opportunity, and send him to prison for every second that he deserves. He surely doesn't deserve less than 40.*

(Emphasis added.)

The State's comparison of appellant to a violent, predatory animal seeking to attack a defenseless baby was prejudicial, did not advance a legitimate purpose in this case, and was designed to arouse the passion and prejudices of the jury. *See Tompkins*, 774 S.W.2d at 217; *Watts*, 371 S.W.3d at 459; *Thompson*, 89 S.W.3d at 850. And the State played the lion-tries-to-eat-baby video during the rebuttal portion of its closing argument and immediately prior to the jury's deliberation. Thus, the harmful effect caused by the video could not have been attenuated by any argument of appellant's counsel. *See Brown v. State*, 978 S.W.2d 708, 715 (Tex. App.–Amarillo 1998, pet. ref'd); *see also Bush v. State*, No. 04-13-00466-CR, 2014 WL 309780, at *5 (Tex. App.–San Antonio Jan. 29, 2014, no pet.) (mem. op., not designated for publication). The severity of the misconduct in this case weighs in favor of appellant. *See Gonzalez v. State*, 455 S.W.3d 198, 206 (Tex. App.–Houston [1st Dist.] 2015, pet. ref'd) (first factor weighed in favor of defendant where State's action "clearly improper"); *cf. Graves v. State*, 176 S.W.3d 422, 430 (Tex. App.–Houston [1st Dist.] 2004, no pet.) (first factor did not weigh in favor of defendant where State's misconduct "small" and only "mildly inappropriate" (internal quotations omitted)).

In regard to the second *Mosley* factor, no measures were taken to cure the State's misconduct. In fact, the trial court overruled appellant's objection to the State's playing of the lion-tries-to-eat-baby video to the jury. *See Good v. State*, 723 S.W.2d 734, 738 (Tex. Crim. App. 1986) (overruling objection to improper argument "puts the stamp of judicial approval on the improper argument" (internal quotations omitted)); *Watts*, 371 S.W.3d at 460 ("When a trial court overrules an objection to an improper argument, it implicitly places its imprimatur on the argument, thereby magnifying the harm."); *see also Sneed v. State*, No. 10-11-00231-CR, 2012 WL 2866304, at *3 (Tex. App.–Waco July 12, 2012, no pet.) (mem. op., not designated for publication) (trial court did not take "any curative measures" where it overruled defendant's objection to improper argument). Because no curative measures were taken in this case, the second factor weighs in favor of appellant. *See Watts*, 371 S.W.3d at 460.

In regard to the third *Mosley* factor, because the jury found true the allegations in the two enhancement paragraphs that appellant had twice been previously convicted of felony offenses, appellant was subject to the habitual offender punishment range of not less than twenty-five years and not greater than ninety-nine years or life. *See* TEX. PENAL CODE ANN. § 12.42(d) (Vernon Supp. 2016). The State argued to the jury that appellant should not receive "less than 40" years due to his predatory nature and the need for society to keep him behind "glass." And the jury assessed appellant's punishment at confinement for fifty years. *See Abbott v. State*, 196 S.W.3d 334, 349 (Tex. App.–Waco 2006, pet. ref'd) (considering severity of defendant's sentence and jury's decision to assess severe sentence which State had requested); *cf. Lockett v. State*, No. 06-05-00138-CR, 2006 WL 940648, at *7 (Tex. App.–Texarkana Apr. 13, 2006, pet. ref'd) (mem. op., not designated for publication) (improper jury argument did not affect defendant's substantial rights where jury assessed punishment at confinement "nearer the lower end of the punishment range"). Here, there is doubt that the same sentence would have been assessed had the trial court not overruled appellant's objection to the lion-tries-to-eat-baby video, especially considering that the circumstances of this case and appellant's prior criminal convictions do not show him to be a violent, predatory offender. *See Sneed*, 2012 WL 2866304, at *4 (reversing judgment of trial court and remanding for new trial on punishment where "some doubt that the same sentence would have been assessed without the [trial court] overruling [defendant's] objection to the improper argument"). This third factor weighs in favor of appellant.

*9 Balancing the three *Mosley* factors, due to the prejudice experienced by the State's playing of the lion-tries-to-eat-baby video during its closing punishment argument to the jury, the lack of cure for the State's misconduct, and the severity of appellant's sentence, I would further hold that the trial court's error in allowing the State to play the video to the jury was harmful.

Moreover, this Court's approval of the State's use of the lion-tries-to-eat-baby video in this case will no doubt encourage the State to improperly use it in other cases involving non-violent offenses. *See Alexander v. State*, No. 04-95-00154-CR, 1996 WL 382984, at *4 (Tex. App.–San Antonio July 10, 1996, pet. ref'd) (not designated for publication) ("[A]rguments which de-humanize an accused do not aid jurors in their task; rather, they discredit a criminal justice system founded on the basic beliefs that an accused stands before a jury as an equal peer and that the State's prosecutors seek as their first goal justice, not convictions at any cost."). Accordingly, I would grant en banc reconsideration, sustain appellant's first issue, reverse the trial court's judgment as to punishment, and remand for a new punishment hearing in this case. *See* TEX. R. APP. P. 41.2(c) (extraordinary circumstances require en banc reconsideration).

Justice Jennings, dissenting from the denial of en banc reconsideration with separate opinion.

Justice Bland, dissenting from the denial of en banc reconsideration with separate opinion.

OPINION DISSENTING FROM DENIAL OF EN BANC RECONSIDERATION

Jane Bland, Justice, dissenting.

Because the State introduced a video clip during its closing argument that was not evidence in the case, thus injecting facts from outside the trial record for the purpose of increasing the defendant's punishment, we should grant en banc review and reverse for a new punishment hearing.

Proper closing arguments (1) summarize the evidence; (2) make reasonable deductions from the evidence; (3) respond to arguments of opposing counsel; or (4) plead for law enforcement. *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000). Even when an argument exceeds the permissible bounds of these approved areas, it will not constitute reversible error unless the argument is extreme or manifestly improper, violates a mandatory statute, or injects new facts harmful to the accused into the trial proceeding. *Id.*

In *Dang v. State*, the Texas Court of Criminal Appeals noted that "[t]he statutory right to argue at the close of the evidence is derived by inference from Articles 36.07 and 36.08." 154 S.W.3d 616, 619 (Tex. Crim. App. 2005) (referring to TEX. CODE CRIM. PROC. arts. 36.07, 36.08). The Court further noted:

> Article 36.07 gives broad discretion to the trial court regarding the general order of arguments with the caveat that the State has the right to present the concluding argument. Because the legislature addressed the order in which arguments should be presented, we can assume that an implicit right to closing argument exists.
>
> Under Article 36.08, the court is prohibited from restricting arguments in felony cases to less than two on each side. This Court has interpreted this to mean that a defendant is entitled to two arguments if he is represented by more than one lawyer. If a defendant has the right to two closing arguments, then we can presume that he has the right to one closing argument.

***10** *Id.* at 619–20.

In the civil context, Rule 269 of the Texas Rules of Civil Procedure provides: "Arguments on the facts should be addressed to the jury, when one is impaneled in a case that is being tried, under the supervision of the court. Counsel shall be required to confine the argument strictly to the evidence and to the arguments of opposing counsel." TEX. R. CIV. P. 269(e).

None of these authorities provide for presenting extraneous material beyond counsel's rhetorical summation of the evidence. The complained-of conduct was not the argument of counsel at all—it was a video clip played before the jury during the State's closing argument. The introduction of that 35–second video showed: a toddler sitting near a lion confined in a zoo, with the lion repeatedly lunging and pawing at the child from behind the glass. These facts were concededly completely unrelated to the facts of this case. The State used the video to equate the defendant to that of a predatory animal, who, like that animal, should be caged to protect innocent children. Given that the video presented facts outside the record and would never have been admitted into evidence, the trial court erred in allowing its admission during closing argument. *See Wesbrook*, 29 S.W.3d at 115.

The video clip was central to the State's plea for a lengthy confinement as punishment for this recidivist defendant. Its introduction before the jury caused harm. The State used the video to begin its rebuttal: "Ladies and gentlemen, I know you're thinking, that was weird, what was that about? *But that 30–second clip is exactly what this punishment phase is about.*"

The State later referred to the video a second time: "Let me talk to you about that video. That lion was cute, and it was laughable, and it was funny because he's behind that piece of glass. That motive of that lion is never changing, never changing. It's [in]nate. Given the opportunity, remove that glass, it's no longer funny, it's a tragedy. That's what's going to happen, that's a tragedy. That's what's going on with this case."

A brief allusion to something outside the record to make a metaphorical plea for law enforcement is not viscerally the same as introducing facts from outside the record in the form of a video clip like this one; the former is easily categorized as argument by analogy in the minds of jurors, coming, as it does, directly from counsel's summation. *Compare Murphy v. State*, No. AP-74851, 2006 WL 1096924, at *22 (Tex. Crim. App. Apr. 26, 2006) (not designated for publication) (holding analogy to military ambush not harmful where evidence established defendant was lookout and analogy helped emphasize and explain evidence), *and Broussard v. State*, 910 S.W.2d 952, 959 (Tex. Crim. App. 1995) (concluding argument comparing defendant to volcano was permissible analogy that emphasized and explained evidence where evidence supported conclusion that defendant behaved peacefully sometimes but had propensity towards violence), *with Alejandro v. State*, 493 S.W.2d 230, 231 (Tex. Crim. App. 1973) (noting that "[i]t is the duty of trial counsel to confine their arguments to the record; reference to facts

that are neither in evidence nor inferable from the evidence is therefore improper").

*11 The video recording of the event at the zoo is not counsel's argument, but is instead the display of inadmissible facts—unrelated to this case, never introduced as evidence, and never tested by cross-examination. The video was not merely argument by analogy, but instead placed central emphasis on a wholly collateral matter through a powerful medium, to incite the protective instincts of the jury. A world of video happenings now is at any lawyer's fingertips, but the law requires that a jury make its decision based on the evidence relevant to sentencing. *See* TEX. CODE CRIM. PROC. art. 37.07, § 3(a)(1) (during punishment phase of trial "evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing"). Videos that are not introduced as evidence should not be played during closing argument—our statutes and rules do not allow for it. The State's choice to introduce an inadmissible video clip was a calculated effort to increase the punishment level in this case. As such, it constitutes reversible error. *See Wesbrook*, 29 S.W.3d at 115.

Because the State's jury argument in this case went beyond the bounds of proper argument by introducing a video that was not evidence in the case, we should reverse and remand for a new punishment hearing. Because we do not, I respectfully dissent.

All Citations

--- S.W.3d ----, 2018 WL 505192 (Mem)

Footnotes

1 *Alexander v. State*, No. 04-95-00154-CR, 1996 WL 382984, at *4 (Tex. App.–San Antonio July 10, 1996, pet. ref'd) (not designated for publication).

2 *See* TEX. PENAL CODE ANN. § 29.02(a)(2) (Vernon 2011).

3 A copy of the videotape recording appears in the record but may also be found on YouTube. *See* Jpbsmama, *Lion tries to eat baby PART 1*, YOUTUBE (May 2, 2012), https://www.youtube.com/watch?v=6fbahS7VSFs.

4 The complainant noted that the "food items" consisted of candy and a soda.

5 HPD Officer P. Pac similarly testified during the punishment phase of trial that appellant was not in possession of a weapon when he was detained by law enforcement officers.

6 *See* TEX. PENAL CODE ANN. § 29.02(a).

7 *See id.* § 31.03(a) (Vernon Supp. 2016).

8 *See id.* § 38.04(a) (Vernon 2016).

9 *See id.* § 15.01(a) (Vernon 2011), § 31.07(a) (Vernon 2016).

10 *See id.* § 32.21(b) (Vernon 2016).

11 In *Burns v. State*, the defendant and another man drove the complainant, a fifty-eight-year-old man, to "a caliche pit" where they took his money, clothes, boots, watch, and false teeth. 556 S.W.2d 270, 273, 280 (Tex. Crim. App. 1977). They then beat the complainant, the other man "screwed [the complainant] in the ass," and they left him in the pit, naked except for socks. *Id.* at 280 (internal quotations omitted). When the defendant and the other man later returned to the pit, the complainant "looked like he was almost dead[,] his face was black and blue and bloody," and his jawbone was broken. *Id.* at 280–81 (internal quotations omitted). They then put the complainant on the hood of their car and continued to beat him, including kicking him in the head. *Id.* at 281. When the complainant fell to the ground, the defendant picked him up, put him back on the car, and continued to beat him. *Id.* at 273, 281. They then grabbed the complainant by each leg and pulled him off the car "real fast," "let[ting] him fall to the ground." *Id.* at 281 (internal quotations omitted). The defendant "gigg[led]," "act[ed] like [what he was doing] was fun," and thought what he had done was "funny." *Id.* at 280–81 (internal quotations omitted). One witness also testified that the defendant and the other man made the complainant eat his own feces. *Id.* at 281.

In *Belton v. State*, the defendant and another man, carrying firearms, broke into a family's home where a mother and her three children were present. 900 S.W.2d 886, 892 (Tex. App.–El Paso 1995, pet. ref'd). The defendant used his firearm to beat one of the children in the head. *Id.* After rampaging through the family's home, the defendant and the other man shot the mother and two of the children, ultimately killing one of the children in the presence of his mother and siblings. *Id.*

12 *See Burns*, 556 S.W.2d at 273, 280–81; *Thompson*, 2015 WL 9241691, at *1; *Belton*, 900 S.W.2d at 892; *see also Stringfellow v. State*, No. 05-02-00475-CR, 2003 WL 152760, at *3–4 (Tex. App.–Dallas Jan. 23, 2003, no pet.) (not designated for publication) (reference to defendant as "animal" reasonable deduction where he brutally attacked complainant, hit her, shoved her, ripped her clothes, forced her to perform oral sex, threatened to kill her, repeatedly raped her, and robbed her); *Resendez v. State*, No. 14-99-01374-CR, 2001 WL 777861, at *1–3 (Tex. App.–Houston [14th Dist.] July 12, 2001, pet. ref'd) (not designated for publication) (reference to defendant as "animal" and "monster" reasonable deduction where defendant sexually molested and had sexual intercourse with complainant, a female relative, beginning when she was five or six years old and continuing over a period of years); *Navarro v. State*, No. 08-99-00214-CR, 2000 WL 1476638, at *8–9 (Tex. App.–El Paso Oct. 5, 2000, no pet.) (not designated for publication) (reference to defendant as "monster" reasonable deduction where defendant broke into home of pregnant woman, beat her "about the face, torso, and stomach, and then proceeded to rape her in front of her two children").

13 The trial court admitted evidence of appellant's criminal record, revealing that on August 17, 1993, he was convicted of two separate offenses of robbery and sentenced to confinement seven years for each offense, to run concurrently; on September 26, 1994, he was convicted of the offense of theft and sentenced to confinement for fourteen years; on August 27, 2002, he was convicted of the offense of evading arrest and sentenced to confinement for ten months; on May 31, 2007, he was convicted of the misdemeanor offense of attempted unauthorized use of a motor vehicle and sentenced to confinement for eight months; and on January 22, 2013, he was convicted of the offense of forgery and sentenced to confinement for ten months. *See* TEX. PENAL CODE ANN. §§ 15.01(a), 29.02(a), 31.03(a), 31.07(a), 32.21(b), 38.04(a).

14 Further, the request of appellant's attorney that the jury sentence appellant to "a lower sentence" does not justify the State's comparison of appellant to a predatory animal trying to eat an innocent baby.

15 Despite the panel's decision in the instant case, the State should refrain from using this lion-tries-to-eat-baby video in the future. *See Grant v. State*, 472 S.W.2d 531, 534 (Tex. Crim. App. 1971) ("It takes far less talent to indulge in abuse than in making an intelligent assessment of the facts and the law to aid the jurors in their task."); *Alexander*, 1996 WL 382984, at *4 ("[A]rguments which de-humanize an accused do not aid jurors in their task; rather, they discredit a criminal justice system founded on the basic beliefs that an accused stands before a jury as an equal peer and that the State's prosecutors seek as their first goal justice, not convictions at any cost.").

End of Document