IN THE COURT OF APPEALS FOR THE
EIGHTH DISTRICT OF TEXAS

TERRY LEE MORRIS, APPELLANT	§	
V.	§	NO. 08-16-00153-CR
THE STATE OF TEXAS, APPELLEE	§	

APPEALED FROM CAUSE NUMBER 1382399D IN THE 396TH DISTRICT COURT OF TARRANT COUNTY, TEXAS; THE HONORABLE GEORGE GALLAGHER, PRESIDING.

§ § §

STATE'S BRIEF

§ § §

Oral argument is only requested if
Appellant is granted oral argument.

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TO THE HONORABLE EIGHTH COURT OF APPEALS:

STATEMENT OF THE CASE

THE CHARGE..... SEXUAL PERFORMANCE
HABITUAL OFFENDER NOTICE
CR. I-7

THE PLEA(S) ..... NOT GUILTY; NOT TRUE
CR. I-197

THE VERDICT (Jury)..... GUILTY; TRUE
REPEAT OFFENDER FINDING
CR. I-182, 197-98; RR. V-148-50

THE SENTENCE (Jury) ..... 60 YEARS IMPRISONMENT AND
$669 IN COURT COSTS
CR. I-193, 197

STATEMENT OF FACTS

Appellant induced a 15-year-old girl (J.C.) to take sexually explicit photos of herself and then send them to Appellant from her phone. RR. V-33 (victim was age 15); RR. V-54-58 (victim visited Appellant's Facebook page after Appellant and the victim's mother broke up; they exchanged phone numbers and later, text messages became sexual); RR. V-74 (Appellant knew victim was 15 years of age); RR. V-78-80 (Appellant asked for nude photos and asked victim to masturbate); RR. V-108 (Appellant texts to victim that what he is doing is "seriously wrong with laws"); RR. V-110 (Appellant texts that he wants to see the victim's vagina).[1]

Appellant contests neither the sufficiency of the evidence to support his conviction nor the sufficiency of the evidence to support the habitual offender finding. Appellant's br. at 10 ("Sufficiency of the evidence is not challenged . . . ."); see also CR. I-197.

[1] This January message was sent shortly before the victim's 16th birthday. RR. V-51.

SUMMARY OF THE ARGUMENT

STATE'S RESPONSE TO APPELLANT'S ISSUE ONE: Appellant's complaints on appeal were not preserved. Further, Appellant's complaints about the stun belt don't present a valid basis to attack Appellant's conviction: a stun belt activation that occurred outside the jury's presence couldn't taint Appellant's conviction, and a restraint, that an appellant fails to show was visible to the jury, is not prejudicial. (Appellant said the restraining device had been placed on his ankle.) Additionally, Appellant's complaint that Appellant was involuntarily absent from the trial was not preserved and is not supported by the record. Finally, any error in this regard, should be held harmless.

STATE'S RESPONSE TO APPELLANT'S ISSUE TWO: No abuse of discretion is shown. The filing of a lawsuit by a criminal defendant against his trial counsel doesn't create an actual conflict of interest.

STATE'S RESPONSE TO APPELLANT'S ISSUE THREE: Appellant's complaint is without merit because an informal hearing into Appellant's competence was held. Since the only complaint presented by Appellant's

briefing is that an informal competency inquiry was called for, the fact that the record establishes that two such inquiries were conducted should dispose of Appellant's third issue.

In the alternative, Appellant's complaint is without merit because an informal competency hearing wasn't required.

If Appellant's complaint were to be sustained, the appropriate remedy would be an abatement.

STATE'S RESPONSE TO APPELLANT'S ISSUE FOUR: Appellant's complaint that probable cause was lacking in the search warrant affidavit, with respect to some parts of the cell phone, wasn't preserved at trial. Appellant's complaint in the trial court was that no search of the cell phone was justified. Alternatively, Appellant's complaint on appeal lacks merit. To the extent Appellant's briefing makes a Texas Constitutional claim, such claim should be held waived by Appellant's failure to brief his state constitutional claims separately from his federal constitutional claims.

STATE'S RESPONSE TO APPELLANT'S ISSUE ONE

Complaints about the stun belt,[2] and Appellant's absence from trial

Appellant's first issue complains that: (1) the trial court's requiring Appellant to wear a stun belt in the jury's presence was improper; (2) the trial court's activating the stun belt outside the presence of the jury was improper; and (3) Appellant's refusal to attend trial was an involuntary waiver of Appellant's right to be present. Appellant's br. at 9 (Appellant's first issue complains: "The trial court abused its discretion by placing a stun belt on Appellant and repeatedly shocking him . . . .").

The State will show that Appellant's complaints on appeal weren't preserved. Further, Appellant's complaints about the stun belt don't present any basis to attack Appellant's conviction: a stun belt activation that occurred outside the jury's presence couldn't taint Appellant's conviction; and a restraint, that an appellant fails to show was visible to

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[2] Appellant's briefing refers to the device as a "stun belt," see, e.g., Appellant's br. at 3, 7, 9, 11, 14-19, 21, 27-29, 31, while the trial court calls it a "shock belt," see RR. V-18, 47, and Appellant describes it as "a shock rag or a shock collar on my ankle . . . ." RR. V-17.

the jury, isn't prejudicial.[3] (Appellant described the location of the restraint as "on [his] ankle." RR. V-17.) Additionally, Appellant's complaint that Appellant was involuntarily absent from attending trial wasn't preserved and isn't supported by the record. Finally, any error in this regard, should be held harmless.

I. *Appellant's complaints on appeal were not preserved.*

When Appellant was told that he would be required to wear a stun belt, Appellant made no objection. RR. III-23. When Appellant appeared for the start of trial on June 7, 2016, Appellant made no objection to being in a stun belt. RR. V-9. Appellant then refused to enter a plea, see RR. V-16-17, and announced to the jury that he was wearing a "shock rag or a shock collar on [his] ankle." RR. V-17. Appellant's "agitation continued to increase," RR. V-46, and the jury was sent out of the courtroom. RR. V-17. Appellant repeatedly refused "to answer the Court's questions and his demeanor continued to

[3] The State doesn't dispute that the required findings weren't made prior to placing Appellant in restraints. Long v. State, 823 S.W.2d 259, 282-83 (Tex. Crim. App. 1991); see Ramirez v. State, No. 14-05-00435-CR, 2006 WL 2345952, at *3 (Tex.App. -- Houston [14th Dist.] Aug. 15, 2006, no pet.) (mem. op., not designated for publication).

escalate." RR. V-46. Appellant was subsequently shocked. RR. V-18-20. Again, Appellant made no objection to the activation of the stun belt.[4] Appellant failed to object to the trial continuing after Appellant was stunned.

A. *Appellant's complaint on appeal was forfeited by his failure to object at trial to being placed in a stun belt.*

A defendant who does not object at trial to having to wear a stun belt cannot complain on appeal about having to wear a stun belt.

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[4] Admittedly, Appellant (*pro se*) declared "You're torturing an MHMR client." RR. V-19; see also RR. V-18 ("I'm an MHMR client.); RR. V-19 ("I take 17 pills a day for my disability, my MHMR disability. You have no right to do this."). However, the trial court wasn't required to recognize Appellant's *pro se* statement as an objection at all. Fleck v. State, Nos. 01-09-00983-CR, 01-11-00271-CR & 01-11-00272-CR, 2011 WL 1632168, at * 4 (Tex.App. -- Houston [1st Dist.] Apr. 28, 2011, pet. ref 'd) (mem. op., not designated for publication) (a *pro se* objection may have legal effect if the objection is adopted by defense counsel; if the trial court permits a hybrid representation, either as to the particular objection or in general; or, if the court denies the *pro se* objection on the merits); Costilla v. State, No. 03-10-00226-CR, 2010 WL 5463853, at *5 (Tex.App. -- Austin Dec. 23, 2010, no pet.) (mem. op., not designated for publication) (trial court was free to disregard comment by defendant -- that was claimed to be an objection on appeal -- where defendant allegedly making an objection was represented by counsel); see also Robinson v. State, 240 S.W.3d 919, 922 (Tex. Crim. App. 2007) ("[A] trial court is free to disregard any pro se motions presented by a defendant who is represented by counsel."). Appellant's comment wasn't adopted by defense counsel and wasn't ruled upon by the trial court. RR. V-19.

Even if the trial court was required to view Appellant's *pro se* statement as a legal objection it was a meaningless general objection. TEX. R. APP. P. 33.1(a).

Taylor v. State, 279 S.W.3d 818, 821 (Tex.App. -- Eastland 2008, pet. ref'd); see also Jackson v. State, No. 06-14-00097-CR, 2015 WL 2376319, at *3 (Tex.App. -- Texarkana May 15, 2015, pet. ref'd) (mem. op., not designated for publication), *cert. denied*, 136 S. Ct. 1188 (2016).[5]

The Jackson court explains that the absence of the findings required to justify the wearing of a stun belt was attributable to the absence of an objection. Jackson, 2015 WL 2376319, at *3. Numerous other courts have agreed that a complaint about the lack of findings to justify the use of a restraint must be preserved at trial. See, e.g.,

- Hawkins v. State, 12-13-00394-CR, 2015 WL 6166583, at *5 (Tex.App. -- Tyler Oct. 21, 2015, pet. ref'd) (mem. op., not designated for publication) (failure to object to shackling forfeited

[5] See also Wrinkles v. Buss, 537 F.3d 804, 812 (7th Cir. 2008) (state court properly found that complaint that defendant was required to wear stun belt was forfeited at trial); United States v. Fields, 483 F.3d 313, 356 (5th Cir. 2007) (complaint that trial court shouldn't have ordered defendant to wear stun belt wasn't preserved and is therefore reviewed only for "plain error"); State v. Dixon, 50 P.3d 1174, 1181 (Ariz. 2011) ("Because Dixon did not object to the stun belt below, under fundamental error review he must show that it was visible to the jury."); People v. Foster, 242 P.3d 105, 126 (Cal. 2010) (complaint that defendant should not have been ordered to wear a stun belt was forfeited at trial); People v. Allen, 856 N.E.2d 349, 356 (Ill. 2006) (defendant forfeited complaint that he was improperly required to wear stun belt -- court refuses to extend plain error doctrine to facts of case); People v. Schrock, 108 A.D.3d 1221, 1225-26 (N.Y. App. Div. 2013) (complaint not preserved), *lv. denied* 3 N.E.3d 1172 (N.Y. 2013).

complaint for appeal);

- State v. Johnson, 858 N.E.2d 1144, 1178-79 (Ohio 2006) (complaint that trial court erred by ordering defendant to wear a stun belt without required findings was waived by defendant's failure to object below);
- State v. Steltz, 313 P.3d 312, 315 (Or. Ct. App. 2013) (general objection to wearing a stun belt does not preserve a complaint that required findings were not made);
- Commonwealth v. Sanchez, 82 A.3d 943, 971-72 (Pa. 2013) (complaint that trial court failed to justify ordering defendant to wear a stun belt was forfeited at trial by defendant's failure to object);
- State v. Lawson, No. E201401788CCAR3CD, 2015 WL 6083243, at *14 (Tenn. Crim. App. Oct. 16, 2015) (not designated for publication) (complaint on appeal that trial court failed to justify ordering defendant to wear a stun belt was not preserved at trial).

Appellant did not preserve a complaint that it violated Appellant's constitutional rights to place a stun belt on Appellant.[6]

B. *Appellant did not object at trial to the activation of the stun belt.*

As will be shown in Section II, the activation of a stun belt outside of the jury's presence is not a valid basis to attack a conviction. The State would additionally show here that Appellant failed to preserve a complaint concerning the activation of the stun belt. See United States v. Moore, 651 F.3d 30, 48 (D.C. Cir. 2011) (where defendant did not object to continuing trial after stun belt was activated no error was preserved), *aff'd in part on other grounds* Smith v. United States, ___ U.S. ___, 133 S.Ct. 714, 184 L.Ed.2d 570 (2013); see also State v. Collins, No. 1 CA-CR 12-0296, 2014 WL 2550420, at *2-3 (Ariz. Ct. App. June 5, 2014) (upholding trial court's rejection of request to remove stun belt that was objected to after accidental discharge). Appellant did not

[6] Appellant cites Simms v. State, 127 S.W.3d 924, 928-29 (Tex.App. -- Corpus Christi 2004, pet. ref'd) which arguably finds that an objection isn't required to preserve error. Appellant's br. at 18 n.22. Simms offers no analysis for why error cannot be forfeited in this instance.

object that the activations were unwarranted and did not object to the trial continuing after the activations.

C. *Appellant did not object at trial that the stun belt constructively excluded Appellant from the courtroom.*

1. *Appellant cannot complain on appeal about the alleged impact of the stun belt on Appellant's right to be present when Appellant failed to object to the stun belt at trial.*

Appellant's roughly one sentence argument about the stun belt allegedly barring Appellant from the courtroom, see Appellant's br. at 31, amounts to a mere recharacterization of Appellant's unpreserved complaints about the stun belt. See, e.g.,

- State v. Lehr, 254 P.3d 379, 384 (Ariz. 2011) (where defendant who did not object to stun belt complains on appeal that stun belt rendered his absence from trial involuntary, court reviews only for fundamental error);
- State v. Kirby, No. 1 CA-CR 14-0762, 2016 WL 3030121, at *3 (Ariz. Ct. App. May 26, 2016) (not designated for publication) (since Appellant did not object at trial to being required to wear mitts and a spit mask, appellate complaint that requirement to

wear such restraints rendered defendant's absence from trial involuntary would be reviewed only for fundamental error); see also

- Wallace v. Lawler, No. CIV.A. 09-345, 2010 WL 2105102, at *6 (E.D. Pa. Mar. 25, 2010) ("Petitioner's counsel failed to preserve the objection that Petitioner's wearing of a stun belt affected his mental psyche."), *report and recommendation adopted*, No. CIV.A. 09-345, 2010 WL 2105099 (E.D. Pa. May 21, 2010).

Since Appellant can't complain about being ordered to wear a stun belt, Appellant can't complain about the supposed consequences of the stun belt. People v. Garcia, 66 Cal.Rptr.2d 350, 353-54 (Cal. Ct. App. 1997) (trial complaint that stun belt was physical restraint did not preserve appellate complaint that stun belt was a psychological restraint), *overruled on other grounds by* People v. Mar, 52 P.3d 95, 106 (Cal. 2002).

A defendant is required to object to a violation of his constitutional right to be present before such a complaint can be considered on

appeal.[7] Lawrence v. State, No. 05-13-01138-CR, 2015 WL 1542134, at *14 (Tex.App. -- Dallas Apr. 2, 2015, no pet.) (mem. op., not designated for publication) (complaint that deposition held in the absence of defendant violated defendant's right to be present was forfeited by failure to object in trial court); see also Harris v. State, No. 74,025, 2003 WL 1793023, at *3 (Tex. Crim. App. Feb. 12, 2003) (not designated for publication) (failure to object during voir dire to proceeding without the defendant being present forfeits Confrontation Clause complaint, citing e.g., United States v. Rolle, 204 F.3d 133, 138 (4th Cir. 2000));[8] Cantu v. State, No. 04-16-00354-CR, 2017 WL 1337646, at *2 (Tex. App. -- San Antonio Apr. 12, 2017, no. pet. h.) (mem. op., not designated for publication) (right under TEX. CODE CRIM. PROC. art. 33.03

[7] Under TEX. CODE CRIM. PROC. art. 33.03, which is broader than the constitutional complaint raised by Appellant, an objection is required to preserve error prior to the selection of the jury.

[8] The right to be present attaches from the moment the work of empaneling a jury begins. Miller v. State, 692 S.W.2d 88, 90 (Tex. Crim. App. 1985); Garcia v. State, 919 S.W.2d 370, 393-94 (Tex. Crim. App. 1994) (op. on reh'g) (right to be present at voir dire is a Confrontation-Clause-based right and was affirmatively waived by defendant's statement that he didn't wish to be present); Haywood v. State, No. 14-12-00102-CR, 2013 WL 5969461, at *6 (Tex.App. -- Houston [14th Dist.] Nov. 7, 2013, no pet.) (mem. op., not designated for publication). Therefore, the decisions in Harris and Rolle support a conclusion that the right asserted in Appellant's first issue can be forfeited by a failure to object at trial.

forfeited); Munoz v. State, No. 05-14-00392-CR, 2015 WL 2394098, at *3 (Tex.App. -- Dallas May 18, 2015, no pet.) (mem. op., not designated for publication) (statement by defense counsel that defendant "had not waived her right to be present" was not an objection and did not preserve art. 33.03 complaint); Tillman v. State, No. 01-99-00993-CR, 2000 WL 210603, at *1 (Tex.App. -- Houston [1st Dist.] Feb. 24, 2000, pet. ref'd). Contra Garcia v. State, 149 S.W.3d 135, 142-45 (Tex. Crim. App. 2003) (characterizing right to translation of trial, when defendant does not understand English, as part of defendant's right to be present in the courtroom during trial and holding that this right is not subject to ordinary preservation-of-error rules, but must be implemented unless it is expressly waived); Hayes v. State, __ S.W.3d __, No. 01-15-00982-CR, 2017 WL 892632, at *4-5 (Tex.App. -- Houston [1st Dist.] Mar. 7, 2017, no. pet. h.) (right to be present is not subject to forfeiture by failing to object); Kessel v. State, 161 S.W.3d 40, 45 n.1 (Tex.App. -- Houston [14th Dist.] 2004, pet. ref'd) (right to be present is not subject to normal procedural default).

Even if Appellant presented a claim on appeal that he was forced from the courtroom and even if that complaint had not been forfeited, there was no abuse of discretion. A defendant who chooses to stop coming to court has voluntarily absented himself from the courtroom. Taylor v. United States, 414 U.S. 17, 19-20, 94 S.Ct. 194, 195-96 (1973) (rejecting contention that right to be present must first be explained to defendant before there can be a voluntary waiver of that right); Moore v. State, 670 S.W.2d 259, 261 (Tex. Crim. App. 1984) (voluntary absence established by: (1) defendant knew time to be at court; (2) defendant failed to inform court or defense counsel why he was not present; and (3) defense counsel checked most area hospitals and could not find defendant); Morrison v. State, 480 S.W.3d 647, 657 (Tex.App. -- El Paso 2015, no pet.) (defendant may "voluntarily absent himself from the trial, either expressly or through his disruptive conduct."); see also Cantu, No. 04-16-00354-CR, 2017 WL 1337646, at *2. A formal finding that the defendant voluntarily absented himself is not required. Smith v. State, No. 13-15-00442-CR, 2016 WL 3911239, at *2 (Tex.App. -- Corpus

Christi July 14, 2016, pet. ref'd) (mem. op., not designated for publication).

2. *Appellant's attempt to obtain a reversal on the basis of Appellant's stated desire to remain outside of the courtroom is prohibited as invited error.*

A defendant cannot tell a trial court that he does not want to attend trial and then complain on appeal that the trial court violated the defendant's right to be present by granting the defendant's request. Gore v. State, 332 S.W.3d 669, 672 (Tex.App. -- Eastland 2010, no pet.); see also Smith v. State, 494 S.W.3d 243, 254 (Tex. App. -- Texarkana 2015, no pet.) (a defendant who attempts suicide cannot claim that an absence caused by suicide attempt was not voluntary). As will be shown, *infra* at V.A, Appellant repeatedly informed the trial court that he did not want to attend trial. Appellant's whipsaw tactic is particularly egregious in light of Appellant's failure to timely tell the trial court of his alleged motivation for not wanting to attend trial.

II. *A trial court's use, outside the presence of the jury, of restraints on a defendant does not provide a basis to attack a conviction.*

The rule that Appellant attempts to invoke places limits on what a trial court can do to a defendant which might prejudice the jury. Shiflett v. State, 146 A.3d 504, 517 (Md. Ct. Spec. App. 2016) (finding no abuse of discretion in ordering that defendant to wear a stun cuff during trial, but noting: "[v]isible physical restraints during trial are inherently prejudicial to criminal defendants because they highlight the need to separate the defendant from the community at large, and undermine the presumption of innocence and the fairness of the fact-finding process") (Internal quotes omitted). The point of the rule is that a juror who sees a defendant in shackles or a stun belt might construe the restraint as evidence of the defendant's guilt. Cooks v. State, 844 S.W.2d 697, 722 (Tex. Crim. App. 1992) ("When a defendant is viewed by the jury in handcuffs or shackles, his presumption of innocence is seriously infringed.") (emphasis added). No prejudice or harm will be found when the appellant "fails to direct [the appellate court's]

attention to any place in the record showing that the jury actually saw the shackles." Long v. State, 823 S.W.2d at 283 (emphasis added).

Appellant was stunned only outside the presence of the jury.

In contrast to the limitation invoked by Appellant, the jury never saw the stun belt activated. RR. V-17-20. The jury's determination of Appellant's guilt or innocence was thus completely divorced from the activation of the stun belt. Weaver v. State, 894 So.2d 178, 193 & n.12 (Fla. 2004) (finding no abuse of discretion by the trial court ordering the use of a stun belt throughout the proceedings and noting that, even where an accidental discharge of a stun belt actually occurs, the issue is whether the accidental discharge has prejudiced the defendant and finding no prejudice because the accidental discharge of the stun belt occurred outside the presence of the jury.); People v. Ashline, 124 A.D.3d 1258, 1259 (N.Y. App. Div. 2015) (restraining defendant during suppression hearing was harmless since restraint did not impact result of suppression hearing), *leave to appeal denied*, 61 N.E.3d 508 (N.Y. 2016); State v. Webster, 127 Wash. App. 1056, No. 22594–1–III, 2005

WL 1335518, at *3 (Wash. Ct. App. 2005) (not published) ("Mr. Webster provides no authority for his contention that his fair trial right is impaired because he wore a shock belt during pretrial proceedings.").

The propriety of the activation of the stun belt cannot provide a basis for Appellant to attack his conviction and consideration of that topic would constitute a prohibited advisory opinion.[9] See Tucker v. State, 136 S.W.3d 699, 701 (Tex.App. -- Texarkana 2004, no pet.) (refusing to issue a prohibited advisory opinion and noting "the distinctive feature of which is that it decides an abstract question of law without binding the parties").

It is noteworthy that the case cited throughout Appellant's argument, see Appellant's br. at 14-15, 17-18, 27-29, is a civil suit that sought damages and an injunction. Hawkins v. Comparet-Cassani, 251 F.3d 1230, 1235 (9th Cir. 2001) ("Hawkins filed suit against the presiding judge, the Los Angeles Municipal and Superior Courts, the Los Angeles County Sheriff, and the County of Los Angeles. He sought compensatory and punitive damages, a declaratory judgment that use

[9] Even the unjustified (*i.e.*, inadvertent) activation of a stun belt in the presence of the jury can be harmless. Chavez v. Cockrell, 310 F.3d 805, 809 (5th Cir. 2002).

of the stun belt is unconstitutional, and an injunction prohibiting the defendants from using the stun belt 'on any person by any judge or law enforcement officer in Los Angeles County.'"). The issue in this appeal is not whether the trial court violated Appellant's rights but whether the jury's verdict was tainted by error that was preserved and that was harmful.

III. *The mere wearing of an unseen stun belt in the jury's presence could not have prejudiced the jury.*

Appellant makes no showing, as required by Long, that the stun belt was visible to the jury (pursuant to the actions of the trial court). See Canales v. State, 98 S.W.3d 690, 697 (Tex. Crim. App. 2003) (nothing in the record indicated the jury ever saw, or heard, or was otherwise aware, that defendant was wearing shackles, so he made no showing of harm or prejudice); People v. Manibusan, 314 P.3d 1, 35 (Cal. 2013) (wearing stun belt is harmless where there is no evidence that belt was seen by jury). The jury's verdict couldn't have been affected by restraints that they never saw. United States v. Howard, 480 F.3d 1005, 1012 (9th Cir. 2007) (noting there is no prejudice to a

defendant where the restraints were not visible to the jury); United States v. Baker, 432 F.3d 1189,1240-1246 (11th Cir. 2005) (finding no abuse of discretion where the judge did not make the required defendant-by-defendant findings before shackling the defendants in leg irons that could not be seen by the jury); United States v. McKissick, 204 F.3d 1282, 1299 (10th Cir. 2000) (concluding that without evidence that jury knew that defendants were wearing stun belts, court will not presume prejudice); Knight v. McDonough, No. 4:05cv187/MP/MD, 2007 WL 566520, *14 (N.D. Feb. 20, 2007) (not published) (noting that "[p]etitioner has not shown the court, nor has the court found, any case that prohibits the use of restraint devices the jury cannot see"); Powell v. Heimgartner, 640 Fed. App'x 705, 708 (10th Cir. 2016) (affirming well-reasoned state-court decisions of the Kansas Supreme Court that held, among other things, that without evidence that jury noticed stun belt there was no showing of prejudice); Commonwealth v. Romero, 938 A.2d 362, 375 (Pa. 2007).

While Appellant chose to inform the jury that he was wearing a stun belt on his ankle, see RR. III-17, Appellant cannot complain about prejudice that the Appellant himself injects into the case. See, e.g.,

- DeLeon v. Strack, 234 F.3d 84, 88 (2d Cir. 2000) ("[A]ny prejudice that resulted from the handcuffs was caused by [petitioner's] own action in calling the jury's attention to them.");
- Andrade v. Martuscello, No. 12 CIV. 6399 RJS AJP, 2013 WL 2372270, at *19 (S.D.N.Y. June 3, 2013) (not designated for publication) ("To the extent that any potential jurors observed Andrade's handcuffs as a result of his own actions, any prejudice is attributable to Andrade."), *report and recommendation adopted sub nom*. Andrade v. Martusello, 12-CV-6399 RJS AJP, 2015 WL 4154108 (S.D.N.Y. July 9, 2015);
- Williams v. Lempke, No. 11 CIV. 2504 PGG JLC, 2012 WL 2086955, at *14 (S.D.N.Y. June 1, 2012) (not designated for publication) ("Williams voluntarily exposed [restraints] to prospective jurors during voir dire. . . . Thus, any prejudicial impact resulting from the use of restraints is properly attributable

to Williams, not the State."), *report and recommendation adopted*, No. 11 CIV. 2504 PGG, 2014 WL 5035219 (S.D.N.Y. Sept. 29, 2014);

- Mizell v. Warden, Madison Corr. Inst., No. 1:10-CV-53, 2011 WL 2636255, at *3 (S.D. Ohio July 6, 2011) ("The stun belt was not visible to the jury until Mizell lifted up his shirt and showed them."); cf.
- Bland v. Hardy, 672 F.3d 445, 450 (7th Cir. 2012) ("A stun belt may be less prejudicial to a defendant than a courtroom full of armed guards.").

IV. *No abuse of discretion in the activation of the stun belt.*

Even if Appellant had preserved a complaint about the activation of the stun belt, and even if the activation of a stun belt outside the presence of the jury could afford him a basis to attack his conviction, Appellant has failed to show an abuse of discretion.

Appellant was shocked outside the presence of the jury. RR. V-17-20. The trial court explained, roughly 28 pages later in the record, that

the stun belt had been activated because Appellant's agitation was escalating and Appellant was nearing a weapon:

> [W]hen Mr. Morris began his statements in the presence of the jury and before I was able to send the jury back out, the defendant had gone from merely standing next to counsel to beginning to move to his right just a little bit towards the edge of the table and his agitation continued to increase.
>
> Once the jury was outside the presence -- once the jury was outside of the courtroom and outside the presence of the jury, the record will adequately reflect that the defendant continually refused to talk -- to answer the Court's questions and his demeanor continued to escalate.
>
> Let the record reflect that within about five feet from where the defendant was standing there is an 87-inch electronic Smart Board that weighs over 200 pounds that is readily within reach of the defendant, that had he grabbed that board, could have brought it over to the counsel table to affect the safety of the lawyers, Mr. Ray and the two prosecutors that would be sitting within anywhere from three to five feet if he went the other way.
>
> It was based on the totality of his continuing escalation and his movements that the Court ordered that the shock belt be initiated. It was done for the safety of all of the lawyers and all of the participants.

RR. V-46-47.[10] This account of what precipitated the activation of the stun belt was not disputed in any way by Appellant's counsel.

The fact that defense counsel, who was present for all of these events, did not dispute the trial court's account should dispose of Appellant's claim on appeal that the trial court's statements were not supported by the record. Appellant's br. at 28-30. Loredo v. State, 159 S.W.3d 920, 923-24 (Tex. Crim. App. 2004) (complaining party has an obligation to correct a trial judge's erroneous recollection of the facts when the erroneous recollection is what motivated the trial court's adverse ruling). Moreover, the State is unaware of a need for the record to independently support a trial court's description of events that occur in the courtroom. If Appellant's theory were correct, then a trial court would be barred from granting requests to have "the record reflect" various matters -- as such reflections are never independently supported by the record.

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[10] The trial court's comments when shocking Appellant (RR. V-18-20) would be troubling had the trial court not explain in the passage quoted above what was happening when the shocks were ordered.

V. *Appellant has not shown that his absence from trial was involuntary.*

Appellant's brief offers approximately one sentence of argument that Appellant was excluded from the courtroom. Appellant's br. at 31. The matter of whether Appellant was voluntarily absent from the courtroom is a question of fact to be determined from the totality of all the circumstances. See State v. Villarreal, 475 S.W.3d 784, 799 (Tex. Crim. App. 2014) (discussing consent); see also Smith, 494 S.W.3d at 254 (trial court's finding that absence was voluntary is presumed to be correct absent evidence that absence was not voluntary).

A. *Appellant constructively waived his right to be present by his misconduct.*

Appellant offers no discussion of a trial court's considerable discretion to exclude a disruptive defendant from the courtroom. Compare Illinois v. Allen, 397 U.S. 337, 342-43, 90 S.Ct. 1057 (1970) (trial judge has power to exclude disruptive defendant from trial after appropriate warnings, on theory that defendant has waived Sixth Amendment rights) with Appellant's br. at 27 (conceding that "Appellant's behavior was at times obstreperous"). "Obstreperous" is

defined as "1. resisting control or restraint in a difficult manner; unruly. 2. noisy, clamorous, or boisterous." http://www.dictionary.com/browse/obstreperous.

The trial court first warned Appellant to conform his behavior or face being excluded from the courtroom. RR. V-18. When Appellant continued to be obstreperous the trial court found that Appellant's behavior justified excluding him from the courtroom. RR. V-21. Appellant did not object to that determination at trial and does not contest it on appeal.

B. *The trial court was entitled to find that Appellant failed to carry his burden to establish that his waiver of the right to be present was involuntary.*

A trial court is entitled to find a waiver of the right to be present where a defendant fails to appear for a known trial setting and his counsel is present and does not object to trial continuing in the defendant's absence. Commonwealth v. Carusone, 506 A.2d 475, 478 (Penn. Sup. Ct. 1986). If the defendant wishes to thereafter assert that his waiver was involuntary the defendant should carry the burden of proof. Id.; see also In re S.D., No. 2 CA-JV 2014-0146, 2015 WL

1331338, at *1 (Ariz. Ct. App. Mar. 23, 2015) (not designated for publication) (claim that juvenile forgot about trial will not carry juvenile's burden to establish that waiver was involuntary).

Typically, meritorious claims of an involuntary waiver are based on either: (1) the trial court requiring a defendant to give up a constitutional right as a condition of attending trial, see State v. Garcia-Contreras, 953 P.2d 536, 539 (1998) (requested civilian clothing not available), or (2) attendance at trial was impossible. Commonwealth v. Campbell, 983 N.E.2d 1227, 1230 (Mass. App. Ct. 2013) (defendant not transferred to court from jail); Maupin v. State, 694 P.2d 720, 722-24 (Wyo. 1985) (defendant's absence due to heart attack not voluntary and proceedings conducted in his absence not harmless beyond a reasonable doubt; conviction reversed and case remanded for further proceedings).

1. *The trial court was not required to accept that Appellant refused to attend trial out of fear of being stunned.*

Appellant argues that he was absent from trial because of the stun belt. Appellant's br. at 31. Appellant never claimed at trial that his absence was caused by the stun belt. Indeed, Appellant only made a

general claim of fear in one of the several reports concerning Appellant's refusal to attend trial:

> THE COURT: Before we bring the jury back in, at the break, Mr. Ray, did you have a chance to talk to Mr. Morris to see if he wanted to join us?
>
> MR. RAY: I did, Judge. He informed me that he would like to stay where he is in the holdover.

RR. V-46 (emphasis added).

> THE COURT: We can break for lunch. Okay. Mr. Ray, at the break, the Court had the bailiff inquire as to whether or not Mr. Morris wished join us. It's my understanding he does not.
>
> MR. RAY: Judge, I spoke with him during the break before Mr. Novak came in here just a few minutes ago. He said he did not want to come testify. I told him that he --
>
> THE COURT: He didn't want to come in and be present?
>
> MR. RAY: That's what I meant to say. I asked him if he wanted to come in and be present, not testify. Hadn't got to that yet.
>
> THE COURT: Okay.

MR. RAY: I asked him if he wanted to come in court and be present. He said he didn't want to. He said he was scared. I told him he didn't have anything to be scared about. But he would have to behave, that he couldn't run his mouth to the Court, in front of the jury, or anything else. He had to be quiet. That didn't change his opinion about what he wanted to do.

Then I told him if he did change his mind, to let the bailiff -- you got a bailiff back in the holdover cell with him, let the bailiff know and I'd bring that to your attention.

RR. V-91-92 (emphasis added).

THE COURT: Mr. Ray, outside the presence of the jury, have you inquired whether your client wishes to come back into court?

MR. RAY: Judge, I've talked to him. He says he does not.

RR. V-121 (emphasis added).

Q. Okay. Next question is, do you want to be in the courtroom during the final argument?

A. No, sir.

RR. V-134 (emphasis added).

The trial court was entitled to find strong support for a determination that Appellant's absence from trial was voluntary in the fact that Appellant did not ask to be present. State v. Kirby, No. 1 CA-CR 14-0762, 2016 WL 3030121, at *3 (Ariz. Ct. App. May 26, 2016) (not designated for publication). If Appellant was afraid of the stun belt, Appellant would be expected to request that the stun belt requirement not be imposed in future court appearances and would be expected to suggest alternative security methods. See id.; see also Williams v. Lempke, No. 11 CIV. 2504 PGG JLC, 2012 WL 2086955, at *15 (S.D.N.Y. June 1, 2012) (defendant never claimed that shackles were what caused him to be absent from trial), *report and recommendation adopted*, No. 11 CIV. 2504 PGG, 2014 WL 5035219 (S.D.N.Y. Sept. 29, 2014); State v. Holleman, 2 CA-CR 2007-0243, 2008 WL 3919361, at *2 (Ariz. Ct. App. Aug. 26, 2008) (not designated for publication) (where defendant agreed to allow voir dire to begin without him while he waited for civilian clothing, defendant could not later complain that his waiver of the right to be present was rendered involuntary by the absence of civilian clothing).

2. *Even if the trial court was required to find that Appellant refused to attend trial because he was afraid of being stunned, the trial court was not required to find that such a fear rendered Appellant's absence involuntary.*

The logical conclusion of Appellant's complaint is that all forms of court security can be prevented by a defendant's refusal to attend trial unless the security measure is withdrawn. Defendants are required to cope with court security measures. People v. Vargas, 668 N.E.2d 879 (N.Y. 1996) (rejecting claim that waiver of right to attend bench conferences was rendered involuntary by trial court's statement that numerous security personnel would surround defendant at bench conference). A shock belt is supposed to be intimidating in much the same way that armed bailiffs encourage peaceful behavior from a defendant (and others in the courtroom). See People v. Reed, 148 A.D.2d 809, 810 (N.Y. Sup. Ct. App. 1989) (claim that absence of defendant from court was involuntary because defendant was afraid of additional security officers in courtroom was "clearly insufficient" to establish that absence was involuntary).

VI. *Any error* was *harmless.*

The issue of harm is reviewed under TEX. R. APP. P. 44.2(a). Jasper v. State, 61 S.W.3d 413, 422-23 (Tex. Crim. App. 2001). An appellate court should consider everything in the record, including any testimony or physical evidence admitted for the jury's consideration, the trial court's instructions to the jury, the State's theory, any defensive theories, closing arguments, and even voir dire if material to the appellant's claim. Morrison, 480 S.W.3d at 664.

For all practical purposes, the outcome of the guilt phase of trial was decided during the suppression hearing. There was no remotely plausible defense possible after the admission of the material from Appellant's cell phone. All the elements of the charged offense were established by this documentary evidence. E.g., RR. V-34. Further, the victim testified and confirmed the documentary proof from Appellant's phone. RR. V-67-70, 75-79. Indeed, Appellant's obstreperousness was surely attributable to the hopelessness of Appellant's case. See RR. II-10 (Appellant rejects offer of 20 years, explaining "I'm 53 years old. That's a life sentence.")

Appellant presented no defense witnesses. Appellant's closing argument presented the fanciful defenses that (1) someone else might have used Appellant's phone to solicit lewd photographs from the daughter of Appellant's former girlfriend; or (2) the text messages found to have been sent from Appellant's phone were never sent and the phone company had somehow erred in showing them as having been sent. RR. V-139. Appellant's presence during the testimony of the five witnesses presented at the guilt stage or during argument at the guilt stage could not have advanced either of those might-have defenses.

Given the utter hopelessness of Appellant's case and the lack of anything that could be contributed by Appellant's presence at the guilt stage any error should be found to be harmless. See Deck v. Missouri, 544 U.S. 622, 635, 125 S.Ct. 2007 (2005) (even if a trial court orders visible shackles without adequate justification, relief is not warranted if the State proves "beyond a reasonable doubt that the shackling error complained of did not contribute to the verdict obtained"); Jasper, 61 S.W.3d at 424 (defendant's absence from statutory exemption portion of voir dire was harmless since defendant could not have prevent excusal

of potential jurors); State v. Locklear, 754 S.E.2d 258 (N.C. Ct. App. 2014) (any error in ordering defendant wear a stun vest was harmless because (1) no evidence vest was seen by jury; (2) claim that vest interfered with thought process was not supported by mere reference to the vest being uncomfortable and distracting; and (3) overwhelming evidence supported verdict); see also Williams v. Lempke, No. 11 CIV. 2504 PGG JLC, 2012 WL 2086955, at *15 (S.D.N.Y. June 1, 2012) (shackling order was harmless where it did not contribute to conviction), *report and recommendation adopted*, No. 11 CIV. 2504 PGG, 2014 WL 5035219 (S.D.N.Y. Sept. 29, 2014).

Appellant's first issue should be overruled.

STATE'S RESPONSE TO APPELLANT'S ISSUE TWO

Was the trial court required to allow Appellant's appointed defense counsel to withdraw because Appellant had filed a lawsuit against his appointed counsel and Appellant did not get along with his counsel?

In his second issue, Appellant complains that the trial court was required to allow Appellant's appointed counsel (Mr. William "Bill" Ray) to withdraw from the case because: (1) Appellant had filed a lawsuit against his appointed counsel, and (2) Appellant did not get along with his appointed counsel. Appellant's br. at 32-39.

The State will show that Appellant has failed to show an abuse of discretion.

I. *Standard of Review -- Trial Court's Ruling on a Motion to Withdraw*

When reviewing a trial judge's ruling on a motion to withdraw, an appellate court applies an abuse of discretion standard. King v. State, 29 S.W.3d 556, 566 (Tex. Crim. App. 2000); Green v. State, 840 S.W.2d 394, 408 (Tex. Crim. App. 1992). The test for abuse of discretion is not whether the facts presented an appropriate case for the trial court's actions; instead, it is a question of whether the trial court acted without

reference to guiding rules and principles or acted arbitrarily or unreasonably. Pierce v. State, No. 06-16-00118-CR, 2017 WL 510559, at *3 (Tex.App. -- Texarkana Feb. 8, 2017, no. pet. h.) (mem. op., not designated for publication).

II. *The mere filing of a lawsuit by a criminal defendant against his trial counsel does not create an actual conflict of interest.*

For a defendant to demonstrate that a conflict of interest violated his right to reasonably effective assistance of counsel, he must show that: (1) defense counsel was actively representing conflicting interests; and (2) the conflict had an adverse effect on specific instances of counsel's performance. Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Appellate courts are particularly concerned about the possibility of a defendant filing lawsuits and grievances to delay legal proceedings or to force a change of counsel. Perry v. State, 464 S.W.2d 660, 664 (Tex. Crim. App. 1971).

To establish a violation of the right to conflict-free counsel, a defendant must show "that an actual conflict of interest adversely affected his lawyer's performance." United States v. Moore, 159 F.3d

1154, 1157 (9th Cir. 1998) (internal quotation marks omitted); see Carter v. Armontrout, 929 F.2d 1294, 1300 (8th Cir. 1991) (explaining that a pending lawsuit between a defendant and defense counsel "may give rise to a conflict of interest," but the defendant "does not necessarily create such a conflict" merely by filing the lawsuit); Townsend v. State, 85 S.W.3d 526, 529 (Ark. 2002) (rejecting claim that defendant's act of filing a lawsuit against counsel required trial court to grant motion to withdraw: "[i]n the absence of a showing of prejudice, we will find no abuse of discretion in the trial court's decision to deny counsel's motion to withdraw"); Robinson v. State, 719 S.E.2d 601, 617 (Ga. Ct. App. 2011) (an appellant, who claims that his lawsuit against counsel created a conflict of interest, "must establish, at a minimum, that the conflict of interest adversely affected his counsel's performance," citing Mickens v. Taylor, 535 U.S. 162, 170-72, 122 S.Ct. 1237 (2002)); Morrison v. State, 381 P.3d 643, 2012 WL 6561128 at *1 (Nev. 2012) (Table) (mere existence of lawsuit by defendant against counsel does not require the granting of a motion to recuse).

A lawsuit against counsel does not create any incentive for counsel not to seek victory for his client in the criminal trial. Moore, 159 F.3d at 1158 (no actual conflict existed when lawsuit threat was not inconsistent with attorney's "goal of rendering effective assistance"); see also United States v. Shwayder, 312 F.3d 1109, 1117-20 (9th Cir. 2002) (defendant must show "counsel was influenced in his basic strategic decisions" by the conflict of interest); United States v. Baker, 256 F.3d 855, 860 (9th Cir. 2001) ("attorney has an actual, as opposed to a potential, conflict of interest when, during the course of the representation, the attorney's and the defendant's interests diverge with respect to a material factual or legal issue or to a course of action") (citation and internal quotation marks omitted).

III. *Appellant failed to carry his burden in the trial court hearing to show entitlement to new counsel.*

A. *The trial court satisfied the "necessary inquiries" standard.*

An initial matter is Appellant's apparent complaint that the trial court failed to hold a hearing. Appellant's br. at 9. This complaint is asserted in the text of Issue Two, but does not seem to be argued

anywhere in the body of Issue Two. In any case, Appellant's possible complaint is mistaken. The trial court did hold a hearing, RR. IV-4-6; CR. I-161, that satisfied the "necessary inquiries" standard. See Dunn v. State, 819 S.W.2d 510, 519 (Tex. Crim. App. 1991). The reason the hearing was short was because neither Appellant nor his counsel presented anything to the trial court other than the bare fact that Appellant had filed a lawsuit against counsel and the trial court. See People v. Horton, 906 P.2d 478, 500 (Cal. 1995) (affirming denial of motion to withdraw after a discussion of a lawsuit filed by defendant against counsel); see also Liggins v. State, No. 05-96-01364-CR, 1999 WL 1018097, at *5 (Tex.App. -- Dallas Nov. 10, 1999, pet. ref'd) (not designated for publication) ("This interchange between appellant and the trial court implies appellant had several opportunities to explain the perceived conflict. However, appellant advised the trial court the day before trial that he had sued his attorney. Appellant neither informed the trial court nor this Court of the nature of his lawsuit. Appellant's trial counsel stated he had no notice that appellant filed a civil lawsuit against him. Other than appellant's statements quoted

above, nothing in the record supports appellant's statement that he filed a lawsuit against his attorney. On the basis of this record, we cannot conclude the trial court erred by not inquiring further into appellant's claim of a conflict of interest at the hearing the day before trial.").

Appellant's trial counsel informed the trial court that this lawsuit was the second suit filed by Appellant. RR. IV-4. The Federal District Court had dismissed the first suit as frivolous on May 27, 2016. RR. IV-4-5.

The trial court also had good reason to believe that it understood the nature of Appellant's federal suit. The trial court had previously heard Appellant complain at length about his counsel. RR. II-6-11.[11]

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[11] Appellant's briefing repeatedly fails to construe the record in light of the deferential standard of review. First, Appellant's briefing cites RR. II-9 as a place where the trial court denied the request for counsel to withdraw. Appellant's br. at 35. No such ruling appears on that page. Instead, the trial court after listening to Appellant's account of Mr. Ray having done something illegal, see RR. II-7-9, advised Appellant to get along with his attorney: "Mr. Ray is your lawyer." RR. II-9.

Appellant's briefing next asserts that "A few weeks later a pre-trial hearing was held wherein Appellant again urged his attorney be removed." Appellant's br. at 35 (citing RR. III-24). There was no request for counsel to be removed at RR. III-24. Instead, Appellant simply declared that "I don't have an attorney, sir." RR. III-24. Nor did Appellant request that counsel be removed on RR. III-35-36. Instead, Appellant merely declared that he had

B. *The trial court properly found that Appellant had failed to carry his burden.*

A defendant must bring his complaints about counsel to the trial court's attention and must carry the burden of proving he is entitled to new counsel. Stephenson v. State, 255 S.W.3d 652, 655 (Tex.App. -- Fort Worth 2008, pet. ref'd) (citing Malcom v. State, 628 S.W.2d 790, 791 (Tex. Crim. App. [Panel Op.] 1982) and Webb v. State, 533 S.W.2d 780, 784 n.3 (Tex. Crim. App. 1976)); People v. Massa, 648 N.E.2d 123, 129 (Ill. App. Ct. 1995) ("[I]t is the defendant's responsibility to provide the court with legitimate reasons supporting his request for new counsel."). While events that happen after a motion to withdraw can demonstrate a lack of harm, subsequent events cannot retroactively demonstrate an abuse of discretion. Butler v. State, 300 S.W.3d 474, 485 (Tex.App. -- Texarkana 2009, pet. ref'd) ("Based on the minimal complaints Butler presented to the trial court, we find the trial court did not abuse its discretion in denying Butler's motion [to remove counsel].").

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sued his counsel, the trial court and two other judges. RR. III-35.

It was clear from the exchanges at RR. III-35-36 and RR. IV-4-6, that Appellant's suits were frivolous and intended merely to support a last-minute request for a change of counsel.

With regard to Appellant's claim that he did not get along with counsel, "personality conflicts and disagreements concerning trial strategy are typically not valid grounds for withdrawal." King, 29 S.W.3d at 566. "The Sixth Amendment's guarantee of a person's right to counsel does not include the right to appointed counsel of defendant's choice." Pierce, 2017 WL 510559, at *3. "[T]he trial court is under no duty to search for counsel until it finds an attorney amenable to the accused." Id. (citing Malcom, 628 S.W.2d at 791).

Appellant's second issue should be overruled.

STATE'S RESPONSE TO APPELLANT'S ISSUE THREE

The trial court conducted the informal inquiry into Appellant's competence that Appellant complains was required.

Appellant's third issue complains that a suggestion that Appellant was incompetent was presented to the trial court and required the trial court to conduct an informal inquiry into Appellant's competence. Appellant's br. at 39-49.

The State will show that Appellant's complaint is without merit because an informal hearing was held and because an informal hearing was not required.

Prior to the early June 2016 trial, Appellant was examined by Dr. Womack (a defense-expert, who examined Appellant about seven months before trial), as well as by Dr. Norman (a court-appointed expert, who examined Appellant about one year before trial). RR. III-9-10. Each expert found Appellant to be competent. RR. III-9-11; RR. VIII-15. The trial court conducted an informal inquiry at the start of trial and found Appellant to be competent. RR. III-9-11; RR. III-18. Finally, Dr. Womack watched Appellant's testimony (RR. VII-122-88)

and informed the trial court that he had no doubt Appellant was competent. RR. VIII-15.

I. *Standard of Review -- Informal Competency Inquiry*

An appellate court reviews a complaint that a trial court erred in not conducting an informal competency inquiry for an abuse of discretion. Montoya v. State, 291 S.W.3d 420, 426 (Tex. Crim. App. 2009); Hobbs v. State, 359 S.W.3d 919, 924 (Tex.App. -- Houston [14th Dist.] 2012, no pet.). The issue in such a review is whether the trial court's decision was arbitrary or unreasonable. Montoya, 291 S.W.3d at 426. "A trial court's first-hand factual assessment of a defendant's competency is entitled to great deference on appeal." McKenzie v. State, No. 14-15-00723-CR, 2016 WL 5112198, at *2 (Tex.App. -- Houston [14th Dist.] Sept. 20, 2016, pet. ref'd) (mem. op., not designated for publication).

Evidence suggesting the need for an informal competency inquiry may be based on observations made in relation to defendant's capacity to: (1) rationally understand the charges against him and the potential consequences of the pending criminal proceeding; (2) disclose to counsel

pertinent facts, events, and states of mind; (3) engage in a reasoned choice of legal strategies and options; (4) understand the adversarial nature of criminal proceedings; (5) exhibit appropriate courtroom behavior; and (6) testify. See TEX. CODE CRIM. PROC. art. 46B.024(1).

II. *Appellant has failed to show an abuse of discretion.*

Appellant claims that the need for an informal hearing was raised by Appellant's "mental health history, his repeated lack of understanding of the proceedings, his inability to make choices in his best interest and his rambling and, at times, non-lucid testimony." Appellant's br. at 43. Appellant's argument in support of his claim then consists largely of numerous conclusory and hyperbolic declarations followed by string citations to the record.[12] Rather than go through the vast swathes of the record cited by Appellant's briefing, in an attempt to

[12] An example of one of Appellant's many conclusory assertions is: "The record reflected Appellant's mental illness prevented him from pursuing his own best interests through engaging rationally with counsel or in his testimony to the jury." Appellant's br. at 48. Assuming that Appellant is correct that Appellant exercised poor judgment at trial, there is absolutely nothing in the record reflecting that the cause of Appellant's poor judgment was Appellant's mental illness.

determine what Appellant's brief is referring to, the State will address the topics identified by Appellant.

A. *The trial court conducted two informal inquiries.*

The trial court conducted an informal inquiry at the start of trial. RR. III-9-11, 18. A second informal inquiry was conducted outside the jury's presence during the punishment phase. RR. VIII-14-16.

Since the only complaint presented by Appellant's briefing is that an informal competency inquiry was called for, the fact that the record establishes that two such inquiries were conducted should dispose of Appellant's third issue. Nonetheless, the State will show in Sections B. through G., that more inquiries were not needed in the event that: (1) the Court concludes that neither of these portions of trial amounted to an informal inquiry, or that (2) Appellant is complaining that even more informal inquires were needed.

1. *The two discussions of Appellant's competence satisfied the requirement for an informal inquiry.*

An informal inquiry can be quite informal. Jackson v. State, 391 S.W.3d 139, 142 (Tex.App. -- Texarkana 2012, no pet.) (trial court's

inquiry to defense counsel coupled with its own observations of defendant constituted sufficient informal inquiry into defendant's competence); see also Robins v. State, No. 01-14-00582-CR, 2016 WL 1162884, at *5 (Tex.App. -- Houston [1st Dist.] Mar. 24, 2016, pet. ref'd) (mem. op., not designated for publication) ("even in making an informal inquiry, a trial court is not required to follow specific protocols"). It is appropriate to consider expert testimony provided later in the trial when upholding a trial court's resolution of an informal inquiry. Luna v. State, 268 S.W.3d 594, 599-600 (Tex. Crim. App. 2008) (reviewing court concludes that exchanges between trial court and defense counsel and defendant were adequate informal inquiry -- reviewing court also considers opinion of a psychiatrist, who later testified, in making its holding).

At the start of the early June 2016 trial, the trial court conducted an informal inquiry and found Appellant to be competent. RR. III-9-11, 18. Appellant attempts to discount this determination by pointing out that a court-ordered evaluation by Dr. Norman occurred over a year before the trial court's inquiry while the defense-expert's formal report

was more than seven months old. Appellant's br. at 45. Dr. Womack's formal report was from October 2015. RR. III-18. The trial court, however, was entitled to construe the comments of Appellant's counsel as demonstrating that Dr. Womack had provided a more recent evaluation: "Womack says he [is] competent." RR. III-10.

Another factor worth consideration is the absence of any contention from Appellant's counsel in the informal hearing that Appellant was incompetent. Jackson, 391 S.W.3d at 142 ("[T]he trial court specifically gave defense counsel an opportunity to raise any concerns about Jackson's competency and was advised of none.").

2. *Once an informal inquiry has been conducted, a repetition of previous suggestions does not require additional inquiries.*

A trial court is entitled to consider the fact that an informal competency inquiry has already been conducted when deciding whether a suggestion of incompetence has been raised. Jackson, 391 S.W.3d at 143 (rejecting claim that need for an informal inquiry was established in punishment phase: "the trial court had already conducted an informal inquiry prior to accepting Jackson's plea"); see also Johnson v.

State, 429 S.W.3d 13, 18 (Tex.App. -- Houston [14th Dist.] 2013, no pet.) (after a defendant has been found competent to stand trial, inappropriate court behavior does not evidence a lack of understanding of the proceedings and require a second competency examination).

B. *Appellant's citations to the record fail to demonstrate that an (additional) informal competency inquiry was required.*

Appellant's argument begins with a string citation to 56 pages of the record. Appellant's br. at. 43 (citing RR. II-5-7; RR. III-4-9, 12-17, 22-23, 26-31; RR. IV-4-6; RR. V-11, 16-21; RR. VIII-11-14, 47-65). The next six pages of Appellant's brief then return to these pages. Appellant's br. at 43-49. Accordingly, the State will begin with a brief overview of the pages that Appellant cites:

- RR. II-5-7: The State's guess is that Appellant's briefing cites these pages because Appellant thinks it noteworthy that Appellant wanted to discuss a search and seizure issue when he was asked about tendering psychiatric records. Appellant provided a somewhat rambling answer that expressed a distrust of counsel. Far from demonstrating incompetence, Appellant's

observation of an issue related to the search warrant and a problem with the motion to suppress demonstrates unusual acuity concerning his trial. See also RR. II-8 (Appellant correctly complains that the motion to suppress "call[s] SW29499 a warrant when initially it's an affidavit").[13]

- RR. III-4-9: Appellant professes not to understand the three charges against him. RR. III-4. Next, Appellant refuses to answer whether he knows what it means to be charged with the offense of Indecency With a Child. RR. III-5. Appellant then professes to not understand that he could be charged with Aggravated Perjury if he lies under oath. RR. III-6. Appellant then acknowledges that he understands that he can be sent to prison for lying in court. RR. III-6. Appellant then states that he was released from a mental hospital in 1981. RR. III-7.
- RR. III-12-17: These pages involve the trial court going over the

[13] Appellant's irritation involved the numbering of the search warrant and search warrant affidavit. The actual warrant is numbered "SW29500" (RR IX-8) while the attached affidavit is numbered "SW29499." RR. IX-11. Appellant's motion to suppress mistakenly attacks both of these as "search warrants." CR. I-122. Appellant's counsel explained his mistake to the trial court and how the affidavit got a different number. RR. III-25.

charged offenses and the joinder of charges. (Appellant elected to have his offenses tried separately.) Appellant indicated that he did not understand some of the consequences of the cases being tried separately. Appellant's counsel stated that he had gone over those issues with Appellant on several occasions. Appellant presumably cites these pages to demonstrate that even after consulting with counsel Appellant was still not an expert in Texas criminal trial procedure. Appellant ultimately stated that he understood having separate trials might result in stacked sentences, but Appellant nonetheless wanted separate trials. RR. III-15.

- RR. III-22-23. These pages involve Appellant electing not to wear civilian clothes for trial. The State's guess is that Appellant cites these pages because Appellant responded to a question from the trial court about clothing with an answer about electing to go to the jury for punishment. Moments earlier, Appellant had informed the trial court that Appellant wanted the trial court to assess punishment. RR. III-20. It is no evidence of incompetence

that Appellant changed his mind about who he wanted to assess his punishment and wanted to make his wishes perfectly clear to the trial court.

- RR. III-26-31. Appellant's testimony begins on RR. III-29. Appellant's testimony concerned the number on the search warrant. The State has no real idea why these pages are repeatedly included in Appellant's chain cites.
- RR. IV-4-6. Appellant never speaks on these pages. Instead, Appellant's counsel advises the trial court that Appellant has filed a federal lawsuit against counsel, the trial court, Sharen Wilson (the Tarrant County Criminal District Attorney), Tom Wilder (the Tarrant County District Clerk), Magistrate Ann Collins, and Detective C. Dell.
- RR. V-11 Appellant attempted to object when the trial counsel explained the procedure that the trial would follow.
- RR. V-16-21. Appellant refuses to enter his plea after he is arraigned in front of the jury. RR. V-16. Instead, Appellant informs the trial court and the jury that "before I say that, I have

the right to make a defense." RR. V-16-17. Next, Appellant blurts out that he has been ordered to wear a "shock collar on [his] ankle," claiming it is "to prevent [Appellant] from saying anything in my defense." RR. V-17. Appellant also informs the jury that he has filed a lawsuit against his attorney and the trial judge. RR. V-17. Appellant further states that his lawsuit against the trial judge and his attorney is "in relation to the Ken Paxton case . . . ." RR. V-17. And that Appellant has asked both his attorney and the trial judge to "recuse" themselves "off [Appellant's] case," but that they have refused to do so. RR. V-17. Appellant adds, "I have that right." RR. V-17.

Following Appellant's eruption, the jury is ordered out of the courtroom, see RR. V-17, and the trial court states "[t]he defendant has a right to object to procedures whereby a party asserts a piece of evidence or other matters --." The trial court admonishes Appellant to "not make any additional outbursts like that . . . ." RR. V-18. The trial court warns Appellant that Appellant will be shocked or removed from the courtroom if he

does not conduct himself in an appropriate manner. RR. V-18; see also RR. V-19 ("You have no right to disrespect the Court."). The trial court repeatedly asks Appellant if Appellant will follow the rules and behave. RR. V-18. Instead of answering the question(s) asked, Appellant continues to talk about other matters and is shocked. RR. V-18, 20.

At this point, Appellant announces that he is firing his attorney and wants to represent himself. RR. V-19. When the trial court then asks Appellant how far Appellant has gotten in school, Appellant refuses to answer. RR. V-19-20. Appellant is ordered from the courtroom. RR. V-20-21.

- RR. VIII-11-14. These pages concern Appellant's testimony about whether he wants his medical records introduced or for Dr. Womack to testify. Appellant states that counsel told him that Dr. Womack reported that there was nothing wrong with Appellant. RR. VIII-13. Counsel disagrees with this characterization of what he told Appellant. RR. VIII-13.

- RR. VIII-47-65. This is Appellant's testimony at punishment. At one point, Appellant became irritated with his counsel for stating that the jury was going to send Appellant to prison. RR. VIII-58-59.[14] Appellant later invoked his right to remain silent when asked about abusing his children. RR. VIII-60-61. Appellant subsequently stated that he did not wish for two defense witnesses to testify. RR. VIII-64.

C. *Mental illness does not create a suggestion of incompetence*.

Appellant vaguely asserts that Appellant's mental health history required an informal hearing. Appellant's legal theory is not viable. Montoya, 291 S.W.3d at 425 ("past mental-health issues raise the issue of incompetency only if there is evidence of recent severe mental illness, at least moderate retardation, or bizarre acts by the defendant"); McKenzie, 2016 WL 5112198, at *3; Clemens v. State, Nos. 05-15-00025-CR & 05-15-00027-CR, 2016 WL 347149, at *3 (Tex.App. -- Dallas Jan. 28, 2016, no pet. h.) (mem. op., not designated for

[14] The jury instruction required the jury to assess a prison sentence. CR. I-193-94.

publication) ("Assuming Mrs. Clemens's testimony showed that appellant is mentally ill, the fact that a defendant is mentally ill does not by itself mean he is incompetent."); Bill v. State, No. 01-12-00124-CR, 2012 WL 4857922, at *3 (Tex.App. -- Houston [1st Dist.] Oct. 11, 2012, no pet.) (mem. op., not designated for publication) (PTSD diagnosis did not require informal inquiry into competency).

D. *Poor judgment does not create a suggestion of incompetence.*

Appellant points vaguely to his "inability to make choices in his best interest" as evidence creating a suggestion of incompetence. Appellant's legal theory is not viable. Crump v. State, No. 06-14-00011-CR, 2014 WL 1410330, at *2 (Tex.App. -- Texarkana Apr. 11, 2014, no pet.) (mem. op., not designated for publication) ("The fact that Crump violated certain conditions of his community supervision reflects poor judgment, but does not suggest that he did not have a rational and factual understanding of the proceedings against him or that he somehow was unable to consult with his attorney with a reasonable degree of rational understanding.").

One instance of alleged poor judgment relied upon by Appellant is his failure to elect to be tried wearing civilian clothing. Appellant's br. at 45-46; RR. IV-11-12; RR. III-23. This is not viable basis for contending that an informal hearing was required. Robins, 2016 WL 1162884, at *5 ("His failure to cooperate with counsel and decision not to be tried in civilian clothes, without more, are not probative of his incompetence to stand trial."); see also Estelle v. Williams, 425 U.S. 501, 508, 96 S.Ct. 1691, 1695 (1976) ("[I]nstances frequently arise where a defendant prefers to stand trial before his peers in prison garments. The cases show, for example, that it is not an uncommon defense tactic to produce the defendant in jail clothes in the hope of eliciting sympathy from the jury.").

E. *Rambling testimony and incivility do not require an informal inquiry.*

Rambling testimony will only require an informal inquiry where the rambling suggests that the defendant "lacked a rational understanding of the case against him." Baldwin v. State, 227 S.W.3d 251, 256 (Tex.App. -- San Antonio 2007, no pet.); see also Rojas v. State,

228 S.W.3d 770 (Tex.App. -- Amarillo 2007, no pet.) (no abuse of discretion in failing to conduct further informal inquiry or to appoint an expert to evaluate defendant when he made comments during voir dire and throughout trial, engaged in nonresponsive answers on the stand and expressed view that police conspired to frame him).

Appellant's brief never properly identifies the location of Appellant's supposed rambling testimony. Appellant certainly does not identify testimony from Appellant that suggested that Appellant lacked a rational understanding of the case against him.

Disruption and incivility will not require an informal hearing. Anthony v. State, __ S.W.3d. __, No. 06-15-00233-CR, 2016 WL 3476918, at *2 (Tex.App. -- Texarkana June 22, 2016, no pet.) (defendant's initial refusal to provide thumbprint for judgment did not require an informal hearing); LaHood v. State, 171 S.W.3d 613, 619 (Tex.App. -- Houston [14th Dist.] 2005, pet. ref'd) (no abuse of discretion in failure to *sua sponte* inquire into defendant's competency despite outbursts during trial, requests for medicine, comments concerning "psych meds" and claim of difficulty understanding proceedings); see

also McKenzie, 2016 WL 5112198, at *4 (outbursts did not require an informal inquiry). A defendant's failure to enter a plea when being arraigned does not require an informal inquiry. Baugh v. State, No. 14-06-00553-CR, 2007 WL 1247311, at *3 (Tex.App. -- Houston [14th Dist.] May 1, 2007, no pet.) (mem. op., not designated for publication).

A defendant's comments expressing unconventional views will not require an informal inquiry. Nelson v. State, No. 10-13-00116-CR, 2013 WL 5526229, at *3 (Tex.App. -- Waco Oct. 3, 2013, no pet.) (mem. op., not designated for publication) (informal inquiry was not necessitated by defendant's discussion of the judicial system and his disapproval of criminalizing the use of marijuana and mushrooms). Similarly, rambling testimony is not evidence of incompetence. Baldwin, 227 S.W.3d at 255-56 ("nonresponsive and damaging" testimony did not raise need for an informal inquiry).

It is worth noting that Appellant was capable of politely sitting in court for extended periods of time. RR. IV-13-195 (Appellant attends voir dire without speaking on the record).

F. *Disagreements with defense counsel are not evidence of incompetence.*

A defendant is incompetent to stand trial if he does not have a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding. Robins, 2016 WL 1162884, at *2 (citing TEX. CODE CRIM. PROC. art. 46B.003(a)). A defendant's failure to cooperate with counsel is not evidence that he lacks the ability to cooperate. Robins, 2016 WL 1162884, at *5; Burks v. State, 792 S.W.2d 835, 840 (Tex.App. -- Houston [1st Dist.] 1990, writ ref'd) (defendant's general failure to cooperate with counsel not probative evidence of incompetence).

Appellant's brief makes numerous conclusory claims that Appellant was unable to have "meaningful consultation with counsel" or "to relate with counsel." Appellant's br. at 47.[15] If one slogs through the string cites provided by Appellant, see discussion *supra* at B, one finds no actual support for a claim that Appellant lacked the ability to

[15] On March 19, 2015, Appellant claimed that he had an irreconcilable conflict with his first attorney, Mr. Armando Flores. CR. I-50-55. On June 1, 2015, the trial court allowed Mr. Flores to withdraw. CR. I-71-73. On June 1, 2015, the trial court appointed Ms. Elizabeth Cortright to represent Appellant. CR. I-109. Mr. Ray was appointed on June 25, 2015. CR. I-114.

cooperate with counsel. Baugh, No. 14-06-00553-CR, 2007 WL 1247311, at *3 (rejecting claim that suggestion of incompetence was raised by defendant's alleged failure to speak to defense counsel: "Otherwise, a defendant could avoid criminal justice by simply choosing not to speak with his attorney.")

G. *A lack of legal expertise is not evidence of incompetence*

A defendant's misunderstanding of legal matters does not present evidence of incompetence. McKenzie, 2016 WL 5112198, at *4 (although documents tendered by defendant to trial court may show "appellant lacks familiarity with the intricacies of legal analysis and terminology, they fail to evidence an inability to understand the nature of, and object to, the proceedings against him, consult with counsel, and assist in preparing his defense"); Guerrero v. State, 271 S.W.3d 309, 315 (Tex.App. -- San Antonio 2008) ("The mere fact that [the defense presented by the defendant] was an incorrect legal defense does not amount to 'some evidence' that Guerrero lacked a rational or factual understanding of the proceedings."), *rev'd in part on other grounds*, 305 S.W.3d 546 (Tex. Crim. App. 2009)

Appellant understood the punishment range he was facing for the habitualized offense of Sexual Performance of a Child. RR. III-12-13. Appellant understood that he could have all three offenses tried together or he could have them tried separately. When informed that separate trials might result in consecutive sentences, Appellant chose to face the possibility of having his sentences stacked. RR. III-15-16. Appellant asked that the jury decide his punishment. RR. III-22, 23; RR. IV-10.

As discussed earlier, Appellant found a factual error in defense counsel's motion to suppress which the trial court was entitled to find demonstrated remarkable acuity. See RR. II-8. Similarly, Appellant was aware that cell phone searches raised specific issues. RR. IV-195 (Appellant asks trial court whether a provision in Chapter 18 of the Code of Criminal Procedure applied to Appellant's case).[16]

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[16] The provision cited by Appellant (pro se) was TEX. CODE CRIM. PROC. art. 18.01, but Appellant's reference to "magistrate" suggests that Appellant had TEX. CODE CRIM. PROC. art. 18.0215 in mind. See RR. III-25-26 (defense counsel explains that a new statute that allegedly requires a district court to sign a search warrant for a cell phone search wasn't in effect when search warrant was signed).

III. *If Appellant's complaint were sustained, the appropriate remedy would be an abatement.*

If Appellant's third issue were to be sustained, the appropriate remedy would be a retrospective informal inquiry. Huff v. State, 807 S.W.2d 325 (Tex. Crim. App. 1991) (*per curiam*) (finding retrospective determination was the proper relief); Ex parte Winfrey, 581 S.W.2d 698, 699 (Tex. Crim. App. 1979); Greene v. State, 225 S.W.3d 324, 329 (Tex.App. -- San Antonio 2007, ordering abatement); see also Mayfield v. State, No. 07-14-00055-CR, 2016 WL 785269, at *5 (Tex.App. -- Amarillo Feb. 26, 2016, order) (mem. op., not designated for publication); Durgan v. State, No. 09-04-00501-CR, 2009 WL 857618, at *2 (Tex.App. -- Beaumont Apr. 1, 2009, no pet.) (mem. op., not designated for publication). Nonetheless, in light of the testimony of Dr. Womack there is little reason for such an abatement.

Appellant's third issue is without merit and should be overruled. If the Court sustains Appellant's third issue, an abatement would be the appropriate remedy.

STATE'S RESPONSE TO APPELLANT'S ISSUE FOUR

Probable Cause to Search Some Parts of Appellant's Cell Phone

Appellant's fourth issue complains that the search warrant affidavit lacked sufficient probable cause to search some parts of Appellant's cell phone. Appellant's br. at 49-54. See also Appellant's br. at 52 (arguing that "[r]estricting deferential review to the four corners of the instant search warrant, there was no substantial basis supporting probable cause to search Appellant's entire cell phone, citing RR. IX-1-7) (emphasis added).

To the extent Appellant's briefing is making a Texas Constitutional claim, see Appellant's br. at 50, such claim should be held waived by Appellant's failure to brief his state constitutional claim(s) separately from his federal constitutional claims. Buntion v. State, 482 S.W.3d 58, 68 n.2 (Tex. Crim. App. 2016) (numerous state and federal constitutional complaints not addressed as inadequately briefed, citing TEX. R. APP. P. 38.1(i) and Bell v. State, 90 S.W.3d 301, 305 (Tex. Crim. App. 2002)). On appeal, an appellant has a duty to justify in his briefing his contention that the Texas Constitution

provides him with greater rights than does its federal counterpart. Barley v. State, 906 S.W.2d 27, 36 (Tex. Crim. App. 1995) (where appellant failed to separately brief his point of error regarding alleged violations of the Texas Constitution, appellant's rights asserted under the Texas Constitution were not adequate because neither argument nor authority had been provided in support thereof, citing Heitman v. State, 815 S.W.2d 681 (Tex. Crim. App. 1991)); Arnold v. State, 873 S.W.2d 27, 33 (Tex. Crim. App. 1993) (refusing to examine state constitutional grounds where appellant failed to analyze, argue, or provide authority to establish that his protection under the Texas Constitution was different from that provided by the United States Constitution). Appellant's briefing presents no separate Texas Constitutional argument. Appellant's br. at 49-54.

The State will further show that Appellant's complaint on appeal was not preserved at trial. Alternatively, the State will show that Appellant's complaint on appeal lacks merit.

I. *Appellant's complaint on appeal does not comport with his objection in the trial court.*

An issue raised on appeal must comport with the objection made at trial, *i.e.*, an objection stating one legal basis may not be used to support a different legal theory on appeal. Bekendam v. State, 441 S.W.3d 295, 300 (Tex. Crim. App. 2014). A motion to suppress evidence is a specialized objection to the admissibility of evidence. Black v. State, 362 S.W.3d 626, 633 (Tex. Crim. App. 2012). Thus, appellate contentions regarding suppression must comport with the specific assertions made in a motion to suppress, and an appellant fails to preserve error when he files a motion to suppress arguing one legal theory at trial and then asserts a different legal theory on appeal. Rothstein v. State, 267 S.W.3d 366, 373 (Tex.App. -- Houston [14th Dist.] 2008, pet. ref'd); see also TEX. R. APP. P. 33.1

During the suppression hearing, Appellant jettisoned his written motion to suppress (CR, I-122-24) as being based upon two mistakes. RR. III-25-26.[17] In place of the motion to suppress, the objection

[17] Appellant's reliance on appeal on his written motion to suppress, see Appellant's br. at 13, 53, is accordingly inappropriate. Douds v. State, 472 S.W.3d 670, 674 (Tex. Crim. App. 2015) (complaints raised in written motion

presented by Appellant to the trial court was that probable cause was lacking for any search of the cell phone:

> Basically my position is now there's no probable cause from the four corners of the affidavit and search warrant to issue a search warrant for the phone.

RR. III-26; see also RR. V-28 (Appellant invokes his prior objection when exhibits SX-4 through SX-14 are admitted before the jury); RR. V-96 (same); RR. V-117-18 (same); RR. V-118-19 (same); RR. V-126 (same).

In contrast to Appellant's trial objection, Appellant's appellate complaint is that probable cause was lacking for only some searches of the phone. Specifically, Appellant complains that there were parts of

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to suppress that are later disavowed by defendant at suppression hearing are forfeited), *cert. denied*, 136 S. Ct. 1461 (2016); Moser v. State, No. 04-13-00826-CR, 2016 WL 5399645, at *5 (Tex.App. -- San Antonio Sept. 28, 2016, pet. ref'd) (mem. op., not designated for publication) (following Douds); Bankston v. State, No. 05-14-00076-CR, 2015 WL 2265675, at *1 (Tex.App. -- Dallas May 13, 2015, no pet.) (mem. op., not designated for publication) (where motion to suppress is broadly written, a defendant who limits his complaint in suppression hearing cannot later invoke broader written objection on appeal).

Furthermore, to the extent the written motion addressed subdivisions of the cell phone's contents, the motion complained of the retrieval of material rather than the search. CR. I-124 ("Any retrieval of text messages exceeds the authorization of the searches referenced herein in either warrant.").

the phone for which probable cause was lacking. And Appellant then identifies "phone contacts, call logs and text messages that don't contain photographs" as areas that shouldn't have been searched. Appellant's br. at 53. In other words, the objection Appellant presented at trial was that the police lacked sufficient justification for believing that evidence of Appellant's crimes could be found in the cell phone. On appeal, Appellant concedes that there was sufficient reason to believe that evidence of Appellant's crimes could be found on the cell phone. Now, Appellant argues there was insufficient justification to believe that evidence of Appellant's crimes could be found in some parts of the cell phone. The trial court was never given a chance to rule on the issue Appellant presents on appeal. See Thomas v. State, 505 S.W.3d 916, 924 (Tex. Crim. App. 2016) ("The objection must be sufficiently clear to give the judge and opposing counsel an opportunity to address and, if necessary, correct the purported error.").

Appellant's fourth issue wasn't preserved below and should be found to have been forfeited in the trial court.

II. *Appellant's complaint that the affidavit lacked probable cause to search certain parts of his cell phone lacks merit.*

The warrant properly allowed the State to copy the cell phone as a necessary part of the process of searching the phone.[18] The warrant also properly allowed a search of all parts of the cell phone that might contain photographs. See United States v. Ross, 456 U.S. 798, 820-21, 102 S.Ct. 2157, 2170-71 (1982) ("A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search."); Torres v. United States, 200 F.3d 179, 187 (3d Cir. 1999) ("[C]ourts specifically have held that a warrant encompasses the authority to search the entire building if the person who is the target of the search has access to or control over the entire premises."). The warrant lists pornography as the basis for the search. RR. IX-9. The warrant states that the phone "may contain incriminating data relevant to the object of this warrant." RR. IX-9.

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[18] A similar procedure is provided for in FED. R. CRIM. P. 41(e)(2)(B).

Appellant's argument seems to be that police were only entitled to look in places on the phone where Appellant believes that a photo might be. Appellant notes that the only thing mentioned about the phone in the affidavit is that the victims were shown a picture of a penis on the phone. Appellant's br. at 52.

Appellant's premise about where photos might be on a phone isn't supported by the record. Appellant seems to contend that the police shouldn't have been allowed to copy and analyze "phone contacts, call logs and text messages" because they cannot contain photographs. Appellant's br. at 53. Appellant points to no evidence and to no authority that these parts of an Iphone are incapable of storing photos. Lugar v. Commonwealth, 202 S.E.2d 894, 897 (Va. 1974) ("[Consent to search for a fugitive] gave the officers the right to make a reasonable search of places in the apartment where a fugitive might hide. It did not give them the privilege of searching in bank bags, trash containers or other spaces which obviously could not hide a man.") (emphasis added). Indeed, it is beyond dispute that text messages can include photos. RR. V-106-07;http://www.dummies.com/consumer-

electronics/smartphones/iphone/how-to-send-photos-with-text-messages-from-your-iphone/

Appellant's focus on probable cause for the search is akin to an argument that police executing a search warrant for drugs in a residence are only entitled to see drugs. Police have a right to see anything which is in plain view when the police presence is lawful. See United States v. Carey, 172 F.3d 1268, 1272-73 (10 Cir. 1999) (police executing a search warrant to look for drug material on computer plainly viewed first image of child pornography but it was an illegal seizure, not authorized by the warrant, for police to retrieve subsequent images of child pornography). Complaints about retrieving material present seizure and warrant authorization issues -- not probable cause to search issues. See generally Russo v. State, 228 S.W.3d 779, 802 (Tex.App. -- Austin 2007, pet. ref'd) ("The plain view doctrine applies only to seizures, not searches.")

Finally, Appellant's argument is inconsistent with the expert testimony about how a phone "dump" works. RR. V-99-100. The search phase consisted of running a program to find out what was on the

phone. There is no indication that this program could have only searched for photos or photos of penises -- and certainly no indication that such a limited search would have found all such photos.

Appellant's issue four should be overruled.

CONCLUSION

Appellant's trial was without prejudicial error.

PRAYER

The State prays that Appellant's conviction be affirmed. If Appellant's third issue is sustained, the cause should be abated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

There are 14,995 words in the portions of the document covered by TEX. R. APP. P. 9.4(i)(1).

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CERTIFICATE OF SERVICE

A copy of the State's Brief has been electronically sent to appellate counsel for Appellant, Ms. Lisa Mullen at Lisa@MullenLawOffice.com on the 8th day of May 2017.

/s/ DAVID M. CURL
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