No. 07-14-00116-CR

In The

Court of Appeals
Seventh District of Texas

Amarillo, Texas

JACINTO SANTOS,
Appellant,

---versus---

THE STATE OF TEXAS,
Appellee.

On Appeal from Cause No. 2012-436,322
In the 140th Judicial District Court of Lubbock County, Texas
The Honorable Jim Bob Darnell Presiding

APPELLANT'S OPENING BRIEF ON THE MERITS

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ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

Pursuant to TEX. R. APP. P. 38.1(a), the following is a complete list of the names of the parties and their counsel.

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STATEMENT OF THE CASE

Nature of the Case	This is an appeal from a conviction for possession with intent to deliver between four and two hundred grams of cocaine and the resultant seventy-year sentence.
Trial Court	The Honorable Jim Bob Darnell, presiding judge of the 140th Judicial District Court of Lubbock County, Texas.
Course of the Proceedings and The Trial Court's Disposition of the Case	On February 27, 2014, a jury convicted Appellant Jacinto Santos of the first-degree felony offense of possession with intent to deliver at least four grams but not more than two hundred grams of cocaine. 6 RR 49; CR 136)[1]; s*ee* TEX. HEALTH & SAFETY CODE ANN. §§ 481.102(3)(D), 481.112(a), (d) (Vernon 2010). The jury, imposing enhancements for delivery in a drug-free zone and for possession of a deadly weapon, assessed Mr. Santos's punishment as confinement for a term of seventy years. (CR 136). Appellant filed a Notice of Appeal on March 28, 2014. (CR 140); *see* TEX. R. APP. P. 26.2(a)(1).

[1] The record in this case consists of one volume of the Clerk's Record; one sealed volume of the Clerk's Record, which is never cited; one supplemental Clerk's Record; and nine volumes of the Reporter's Record. Throughout this brief, the Clerk's Record is referenced as "CR" followed by the pertinent page number, and the Reporter's Record is referenced as "RR," with the volume of the record preceding "RR" and the page number of the record following "RR." For example, "6 RR 49" references the sixth volume of the Reporter's Record at page 49.

ISSUES PRESENTED

1. Did the trial court commit constitutional error when it allowed several inadmissible hearsay statements to serve as substantial evidence of Mr. Santos's Guilt?

2. Was the evidence sufficient to support the jury's determination Mr. Santos had possessed a deadly weapon when there was no direct evidence and only very weak circumstantial evidence linking Mr. Santos to the weapon?

3. Was the evidence sufficient to support the jury's determination Mr. Santos had possessed two baggies of cocaine found outside in a neighborhood well-known for drug trafficking on a path no one saw Mr. Santos take?

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APPELLANT'S OPENING BRIEF ON THE MERITS

TO THE HONORABLE COURT OF APPEALS:

JACINTO SANTOS, Appellant in docket number 07-14-00116-CR, submits this Brief on the Merits in support of his request to reverse the Judgment entered in cause number 2012-436,322 out of the 140th Judicial District Court and remand the case for further proceedings in the court below.

STATEMENT OF FACTS

A police officer received "received information from a Confidential Informant that Cocaine was seen by the informant within the last seventy two hours inside of the apartment located at 1303 65th drive #20." (1st Supp. CR 6). Even though he never favored the magistrate with an explanation of how he came by the information, the officer seeking the warrant was also looking for two people: Ebony Keys, a Black female, and J.C., a Hispanic male. (*Id.* 5). Slight though it was, the police were nevertheless able to obtain a no-knock search warrant for the apartment. (*Id.* 4).

Defendant's Exhibit 1, which is an aerial view of the subject apartment complex, helps to set the scene for understanding what happened when the police served the warrant. The compass rose at the top of the picture was not in the original exhibit. It has been added (based upon facts from the record) to assist the court. The full-size picture of Defendant's Exhibit 1 is attached to this document as Appendix A.

This is where the subject apartment is. (4 RR 188-89).

When serving a warrant, for their own safety, officers need to stay hidden for as long as possible. 4 RR 39-40). To that end, the team that day decided to sneak down the back side of the southernmost building of the apartment complex, which is the building running east to west at the top of the above picture (*Id.* 40). As the team rounded the southwest corner, the lead officer, Billy Koontz, saw the front door of the subject apartment. (5 RR 108). It was "at least [twenty] yards" away from him (*Id.*). There were two men standing at the front door; the door itself was closed. (4 RR 42). Officer Koontz yelled "Police. Get on the ground." (*Id.*). One of the men froze. (*Id.* 42). The other, who police would later discover to be Mr. Santos, ran. (*Id.* 43).

In the ten to fifteen seconds it took Officer Koontz to traverse the distance between the corner of the building and the apartment, he observed Mr. Santos run north and cross the street in front of the complex. (5 RR 107, 138). Officer Koontz did not see which direction Mr. Santos went after he crossed the street. (*Id.* 138). By that time his full focus was on the man still on the porch of the apartment and on quickly serving the warrant. (*Id.* 109).

After the man on the porch was secured, the team entered the two-story apartment. Inside, the officers found a man in the shower, a lady in bed in the master bedroom, and a child in another bedroom. (4 RR 46-47). Once both floors of the apartment were "cleared," the officers performed a "secondary check." (*Id.* 48). During this search, Officer Koontz looked inside one of the bedroom closets and found a duffle bag. Inside the duffle bag was a pistol. (*Id.*).

After the secondary search was finished, Officer Koontz decided to look for the man who had run away from him earlier. (4 RR 49). Officer Koontz, knowing the general direction the man had run, drove north. (*Id.*). He was not finding any clues about where the runner may have fled until he happened to cross paths with a postal carrier, who told the officer about a house in the area where the dogs were barking. (4 RR 50). Officer Koontz went to the house the postal carrier had told him about, and he found Mr. Santos hiding in the back yard. (*Id.* 53).

Officer Koontz, with the aid of two of his fellow officers, was able to flush Mr. Santos from the back yard and arrest him. (*Id.*). As the other officers were transporting Mr. Santos back to the apartment, Officer Koontz decided to look around the general path he guessed Mr. Santos may have, possibly taken. (*Id.*). In his search of the area, Officer Koontz discovered two packages of cocaine that appeared, in his opinion, to have "just been discarded." (4 RR 61). He concluded the packages were Mr. Santos's, and he had tossed them away as he ran.

Officer Koontz returned to the apartment, where the police had discovered drugs in the following places:

- In the corner of the master bedroom was a plastic shopping bag. (91-92; State's Exbs. 21, 26). Inside the bag was a shirt and pair of rolled up pants. (*Id.*). Inside one of the pants pockets was 5.57 grams of cocaine. (*Id.* 91-92, 123; State's Exbs. 60, 90).

- Also in the master bedroom next to the bed was a cell phone box. (*Id.* 87, 96). The box contained digital scales and 26.43 grams of cocaine. (*Id.* 87, 123; State's Exbs. 62, 90).

- On the top shelf of a kitchen cabinet was a bag containing 3.85 grams of cocaine. (*Id.* 130-31; State's Exbs. 74, 81, 90).

There were two items found that directly linked to Mr. Santos to the apartment:

- His wallet, found on the bottom shelf of the kitchen cabinet. (4 RR 132; State's Exb. 84).

- An appointment card setting forth the time of his next meeting with his parole officer, found on top of the dresser in master bedroom. (4 RR 84, 96).

Officers also discovered the lease for the apartment signed by Ms. Keys and a utilities bill for the apartment in her name. (5 RR 13; State's Exs. 46, 92A). They found Ms. Keys's driver's license, medical records, prescription medications, and clothes in the apartment. (4 RR 114, 118, 119, 235). Testimony at trial indicated Ms. Keys was sharing the apartment with her sister, brother-in-law, and nephew. (4 RR 236, 5 RR 59).

Regarding the man police discovered in the shower when they served the warrant: At the scene, the man told police his name was Clint Johnson. (4 RR 112). Testimony at trial established, however, the man was actually Roderick Keys, Ebony Keys's brother. (5 RR 183, State's Exb. 37). At the time, Mr. Keys was in violation of his probation, which was for his conviction of felony grade possession of a controlled substance. (5 RR 192-93).

Mr. Santos was charged with possession to distribute between four and two hundred grams of methamphetamine. (CR 7). A jury found him guilty and sentenced him to seventy years' incarceration. (*Id.* 136). This appeal follows.

SUMMARY OF THE ARGUMENT

At trial, there was piece of evidence directly establishing Mr. Santos's intent to distribute: the hearsay statement of a confidential informant. The only form of evidence directly placing Mr. Santos living in and distributing drugs from the location was likewise in the form of hearsay statements. In a hotly contested matter of who owned a pair of pants in the residence (in which cocaine was discovered), the only piece of evidence establishing the pants belonged to Mr. Santos was hearsay testimony. All of these statement were either given in preparation of a search warrant affidavit or after the search warrant was served and police were investigating the case. As such they were testimonial, and their admission was a violation of the 6th Amendment Confrontation Clause's protections. The statements were not otherwise admissible. Considering the weak nature of the State's case against Mr. Santos and the fact the pillars of the State's case were all hearsay statements, there can be no doubt the admission of the hearsay testimony contributed to the jury's verdict.

Police officers found a gun, wrapped in a bag, put into another bag, and then placed in a closet. There was no direct evidence linking Mr. Santos to the gun. The circumstantial evidence indicating Mr. Santos possessed the gun was likewise small in number and force. In light of all the evidence, the jury was not justified in finding beyond a reasonable doubt Mr. Santos possessed a deadly weapon.

Also, the evidence was insufficient to support the jury's finding that Mr. Santos possessed two baggies of cocaine found the neighborhood. When the police approached Mr. Santos, he ran north. The police lost sight of Mr. Santos as he crossed the street in front of the apartment complex – a street known to be an open air drug market.

The officer who had seen Mr. Santos flee participated in the initial and secondary sweep of the apartment. Then the officer went searching for Mr. Santos, found Mr. Santos hiding in a backyard one street north, and arrested him. After Mr. Santos was apprehended, a police officer began "backtracking" the path he guessed Mr. Santos would have taken. During his search of an area known for drug activity, the officer found two baggies of cocaine on the back side of an apartment building. Because the evidence only established Mr. Santos's starting point and ending point, the jury was required to speculate as to the path taken by Mr. Santos in between the two points. A verdict based upon speculation, even reasonable speculation, cannot stand.

ARGUMENTS

I. MR. SANTOS'S SIXTH AMENDMENT CONFRONTATION CLAUSE RIGHTS WERE VIOLATED WHEN THE TRIAL COURT ALLOWED MULTIPLE HEARSAY STATEMENTS TO SERVE AS SUBSTANTIAL EVIDENCE OF MR. SANTOS'S GUILT

There were two very damaging categories of hearsay evidence admitted against Mr. Santos at trial:

A. Statements regarding Mr. Santos living at the apartment: At trial an officer testified a confidential information had told him "a Hispanic male by the name of J.C. was selling narcotics out of [the apartment]"[2] (5 RR 39). The statement was expounded upon when an officer offered extended testimony regarding the details of Mr. Santos's coming and goings at the apartment, which information also came from an unidentified third party. (*Id.* 41-43). Finally the statement was supported by a police officer who testified a man found in the apartment (Clifton Johnson, A.K.A. Roderick Keys) had also said Mr. Santos was staying at the apartment. (*Id.* 73).

B. Statements regarding the pants: At trial, officers testified they were told the pants in which police discovered cocaine belonged to Mr. Santos. (*Id.* 56). The statement was given by Ebony Keys to a Sergeant Roger Dalton. (*Id.* 60-61). Neither Ms. Keys nor Sergeant Dalton testified at trial. This was the only evidence indicating the pants belonged to Mr. Santos.

[2] Earlier testimony established Mr. Santos identified himself as J.C. to the arresting officer. (RR vol. 4, pg. 54).

Defense counsel objected to the admission of all of these statements as a violation of Mr. Santos's Confrontation Clause rights and as impermissible hearsay and hearsay within hearsay. (*Id.* 37-38, 39, 41). The trial court overruled all of counsel's objections. (*Id.* 36, 37, 38, 39, 41).

A. A Defendant's Right to Confront Witnesses Against Him

The Sixth Amendment of the United States Constitution guarantees a criminal defendant the right to be confronted with the witnesses against him. U.S. CONST. AMEND. VI. This right is so fundamental to basic notions of justice that by the time the concept was formalized in American law in 1789 by its adoption into the Bill of Rights, it had been part of the English legal system for over three hundred years. John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law*, vol. 4, pgs. 2963-65, §§ 2190-91 (1905) (attached as Appendix B) (explaining the right to confront ones accusers was recognized by the English Court of Chancery in the 1400s as it was modeling itself after the ecclesiastical law).

The right is undeniable, but determining when the State has violated the right can require a good deal of analysis. The starting point in modern constitutional law is determining whether the statement is "testimonial." *Crawford v. Washington*, 541 U.S. 36, 53-54 (2005), To that end, the Supreme Court has identified three broad areas of testimonial statements. *Id.* 51-52. The category of

testimonial statements relevant to the case at bar are those "made under circumstances which would leave an objective witness reasonably to believe that the statement would be available for use at a later trial." *Langham v. State*, 305 S.W.3d 568, 576 (Tex. Crim. App. 2010). Whether an out-of-court statement is testimonial is a question of law. *De la Paz v. State*, 273 S.W.3d 671, 680 (Tex. Crim. App. 2008).

B. Admission of the Hearsay Statements of a Confidential Informant that Mr. Santos was Dealing Narcotics out of the Apartment Violated Mr. Santos's Confrontation Clause Rights and Contributed to His Conviction

In *Langham*, the Court of Criminal Appeals evaluated the statements of a confidential informant that the police relied on in obtaining a search warrant. 305 S.W.3d at 572. The Court concluded "it is manifest that the 'primary purpose' of [the officer's] communication with his confidential informant was to pave the way for a potential criminal prosecution . . . to apprehend and eventually prosecute those in the residence who were involved . . . in the illegal enterprise." *Id.* 579. Accordingly, the Court held the statements of a confidential informant given for the purpose of the police obtaining a search warrant are testimonial. *Id.* 579-80.

Finding a statement is testimonial, however, is not the end of the analysis, for even testimonial statements do not violate the Confrontation Clause if they are "offered for some evidentiary purpose other than the truth of the matter asserted." *Id.* 576.

> When the relevance of an out-of-court statement derives solely from the fact that it was made, and not from the content of the assertion it contains, there is no constitutional imperative that the accused be permitted to confront the declarant. In this context, the one who bears "witness against" the accused is not the out-of-court declarant but the one who testifies that the statement was made, and it satisfies the Confrontation Clause that the accused is able to confront and cross-examine him.

Id. 576-77. Additionally, if the declarant is unavailable to testify in court and the accused has had a prior opportunity to cross-examine him, the court may allow the hearsay statements for the truth of the matter asserted without fear of violating the defendant's Confrontation Clause rights. *See Crawford*, 541 U.S. at 53-54.

1. The Hearsay Statements Were Inadmissible Testimonial Evidence

In Mr. Stantos's case, the following exchange took place at the very beginning of the State's re-direct of officer Don Clements (testimony had already shown Mr. Santos identified himself as J.C. (RR, vol. 4, pg. 54)):

> Q. Investigator Clements, what was the purpose of being at this residence that day?
>
> A. To execute a search warrant, that we had received information that a Hispanic male by the name of J.C. --
>
> [DEFENSE]: Objection, you Honor. This calls for hearsay.
>
> THE COURT: Overruled.
>
> [DEFENSE]: Also as well as my client's 6th Amendment right, and pursuant to Washington v. Crawford.
>
> THE COURT: Overruled.

Q. . . . You can answer.

A. We had received information that a Hispanic male was selling narcotics out of this apartment.

Q. And he was identified by what nickname?

A. J.C.

[defense counsel asks for and obtains a running objection]

Q. . . . So the information for the basis of this search warrant was that a Hispanic male by the name of J.C. was selling narcotics out of that location; is that correct?[3]

A. That is correct.

(5 RR 38-39). During the same line of questioning, the following testimony was elicited:

Q. Okay. Did you receive information through your investigation that this Defendant, Jacinto Santos, was J.C.?

[defense counsel again objects and is again overruled]

A. Yes.

. . .

Q. Did you have reason to believe that Jacinto Santos was staying in that apartment?

A. Yes.

[3] The record actually shows the "information for the basis of the search warrant" was that "Investigator Billy Koontz received information from a Confidential Informant that *Cocaine was seen* . . ." at the apartment. (1st Supp CR 6 (emphasis added)). There is no mention in the affidavit of *any* drug sales. (*See id*. 5-8). There is not any information indicating the amount of drugs seen, meaning one could not even infer drug trafficking based on the affidavit. There is also no mention of exactly what "J.C.'s" role was. (*See id.*). The officer's statement is flatly contradicted by the record.

. . .

A. We actually had information that he had another location other than this one.

Q. Okay.

A. That he had multiple locations.

[defense counsel objects and is overruled]

Q. Investigator Clements, did you also have information that the west bedroom where most of the narcotics were located was the room that J.C., Jacinto Santos, stayed in?

A. That's correct.

Q. What was your understanding of how that arrangement was?

[defense counsel objects and is overruled]

A. It was our understanding the room - - or the apartment's in Ebony Keys' [sic] name. She stayed in that west bedroom[4] unless Jacinto Santos and his wife or girlfriend was there. Then he stayed in that bedroom and she stayed on the couch.

(5 RR 41-43). Finally, the prosecution elicited this line of testimony:

Q. Okay. You had plenty of information to point you to the fact that J.C., Jacinto Santos, was staying in that west bedroom; is that correct?

[defense counsel objects and is overruled and obtains a running objection]

[4] The west bedroom was where the majority of the drugs were found in the apartment. (RR, vol. 4, pgs. 87, 92).

Q. In fact, you did record in your report *multiple interviews*[5] that were conducted; is that correct?

A. That's correct.

Q. And everything pointed to the fact that Jacinto Santos stayed in the west bedroom?

A. That's correct.

. . .

Q. Okay. And, in fact, the individual that you identified as being Clint Johnson also confirmed that Jacinto Santos stayed at that apartment; isn't that correct?

A. That's correct.

(5 RR 72-73 (emphasis added)). In its final closing statement to the jury, the State emphasized Officer Clements's testimony:

> But what we do know is that there was enough information to get a search warrant. What was the information? Hispanic male. Goes by the name of J.C. dealing dope out of that apartment. Not just that apartment complex. Not just in that neighborhood. Not just in the area. J.C., that apartment, selling dope.
>
> . . .
>
> Who identified themselves as J.C.? Anybody else on the scene? That was the name that this Defendant gave the police. And his full name is Jacinto Santos, but J.C. is the name he identified himself with. He's the one that had been seen dealing dope out of that apartment. He was one of the targets of the search warrant. . . .
>
> This isn't new information, folks. *He's been doing it before. That's the cause to get the search warrant in the first place.*

(RR, vol. 6, pg. 42-43) (emphasis added).

[5] The record does not show how many interviews, and with whom, the police conducted.

The statement from the confidential informant that "a Hispanic male by the name of J.C. was selling narcotics out of [this apartment]" was clearly testimonial. It was given by a third party confidential informant for the purpose of obtaining a search warrant. (5 RR 38; 1st Supp. CR 6 (indicating the confidential informant had on several past occasions provided information for the purposes of "search warrants and arrest of persons trafficking in illegal narcotics")). The purpose of the statement when it was uttered by the informant was "to apprehend and eventually prosecute" "J.C." *See Langham*, 305 S.W.3d at 579. It was testimonial for purposes of the Sixth Amendment. *See Crawford*, 541 U.S. at 66, *Langham*, 305 S.W.3d at 579.

The additional statements offering further specifics about Mr. Santos's links to the apartment were likewise testimonial. There is little information given about who gave the statements, how the officer obtained the statements, or the context in which they were given. It is clear, however, they were likely given by during the course of the police investigating the case, i.e. for the purpose of developing a "factual predicated for later litigation." *See id.* They were also testimonial in nature. *See id*; *Hereford v. State*, __ S.W.3d __ (Tex. App.—Amarillo Sept. 8, 2014, no pet. h.) (holding in the absence of any indicia suggesting otherwise, an anonymous 911-caller's statement was testimonial).

The statements of Clint Johnson A.K.A. Roderick Keys were also given to the police in response to police questioning after they had discovered and apprehended Mr. Keys. They are likewise, undeniably testimonial. *See Crawford*, 541 U.S. at 66 (holding statements given in response to police interrogation while the declarant was in police custody and was herself a suspect were testimonial).

Moreover, all of these statements were offered for the truth of the matter asserted. The State never contended they were offered for any other purpose. (5 RR 38-39). Had the trial court required response from the State on the issue, it would have perhaps tried to justify admission of the statements as providing background into why the officers were there. *See Langham*, 305 S.W.3d at 577. In Mr. Santos's case, however, the jury already knew the officers were there to execute a search warrant. (4 RR 30). In its entire cross-examination, the defense never challenged the officers' initial presence at the scene. The specific information that the confidential informant had seen J.C. (A.K.A. Mr. Santos) dealing narcotics out of the apartment, and that was the reason the police had obtained the search warrant in the first place, was not only factually incorrect (see footnote 3) it was completely unnecessary. Moreover, the State's final closing arguments confirm the State directed the jury to rely upon the statements for the truth of the matter asserted.

As a final matter, there was no indication the confidential informant or informants were unavailable to testify. Additionally, Mr. Santos filed a motion for the trial court to order the State to reveal the identity of the informant so that it could cross-examine him. (CR 58-60). The trial court denied the motion. (*Id.* 61).

The statements regarding Mr. Santos living in and selling drugs out of the apartment were testimonial. They were used for the truth of the matter asserted. The State never showed the declarants were unavailable to testify at trial and that Mr. Santos had a prior opportunity to cross-examine them. Consequently, admission of the statements over Mr. Santos's timely and specific objections violated his Sixth Amendment right to confrontation. *See Crawford*, 541 U.S. at 66, *Langham*, 305 S.W.3d at 579.

2. Admission of the Hearsay Testimony Contributed to Mr. Santos's Conviction

If the appellate court finds the trial court committed error implicating a constitutional right of the appellant, the appellate court must reverse the conviction unless it determines, beyond a reasonable doubt, that the error did not contribute to the conviction or punishment. *See* TEX. R. APP. P. 44.2(a).

> [T]he emphasis of a harm analysis pursuant to Rule 44.2(a) should not be on "the propriety of the outcome of the trial." That is to say, the question for the reviewing court is not whether the jury verdict was supported by the evidence. Instead, the question is the likelihood that the constitutional error was actually a contributing factor in the jury's deliberations in arriving at that verdict—whether, in other words, the error adversely affected "the integrity of the process leading to the conviction."

Scott v. State, 227 S.W.3d 670, 690 (Tex. Crim. App. 2007) (internal citations omitted). There are several factors upon which the Court may rely in its analysis. *See id.* Specifically, in evaluating error implicating the Confrontation Clause, appellate courts consider factors such as "1) how important was the out-of-court statement to the State's case; 2) whether the out-of-court statement was cumulative of other evidence; 3) the presence or absence of evidence corroborating or contradicting the out-of-court statement on material points; and 4) the overall strength of the prosecution's case." *Langham*, 305 S.W.3d at 582.

In this case, there were at least five adults with known links to the apartment at the time of the search:

> 1. Ebony Keys, whose personal effects were in the apartment and whose name was on the lease and utility bills to the apartment. (4 RR 114-15, 118, 234-35). Ms. Keys was found in the apartment in the room with the majority of the drugs at the time of the search. (*Id.* 235).
>
> 2. Clint Johnson, A.K.A. Roderick Keys, who is Ebony Keys's brother. (5 RR 183-84). Mr. Keys was also in the apartment at the time of the search. (4 RR 112).
>
> 3. Tony Montalvo, who was standing next to Mr. Santos on the front porch of the apartment and who actually lived in the apartment with his family. (4 RR 236).
>
> 4. Roxanne Montalvo, who was Mr. Montalvo's wife and who also lived in the apartment. (5 RR 59).
>
> 5. Mr. Santos.

Of all five people, Mr. Santos is the only who established he had a residence other than the apartment. (5 RR 203-04). The only time the jury heard about Mr. Santos living in the apartment was through hearsay testimony. It is true one of the officers testified he saw Mr. Santos about to put a key in the door of the apartment. (4 RR 93). Mr. Santo's wallet and parole appointment card were found in the apartment. (*Id.* 132). There were a pictures in the apartment of various "group shots," and Mr. Santos was in some of the pictures. (*Id.* 133). There was evidence about a pair of pants in the apartment belonging to Mr. Santos, discussed below. This evidence, however, does very little to establish Mr. Santos was living in the apartment, an apartment otherwise indisputably occupied by four other adults.

The evidence does nothing to establish Mr. Santos was dealing narcotics out of the apartment. The *only* direct evidence of Mr. Santos distributing drugs from the apartment was the hearsay statements. Without the statements, the State's case was extremely weak. Those statements, and those statements alone, are what put Mr. Santos operating out of the apartment. *See Langham*, 305 S.W.3d at 582. Both the impact of the evidence and the importance of it to the State's case is highlighted by the fact the State brought it up and discussed it at length immediately before jury retired to deliberate. The likelihood that the constitutional error allowed by the court contributed to the jury's deliberations is undeniable. *See Scott*, 227 S.W.3d at 690. Reversal is warranted. *See* TEX. R. APP. P. 44.2(a).

C. Admission of the Hearsay Statements that the Pants in Which Narcotics Were Found Belonged Mr. Santos Violated Mr. Santos's Confrontation Clause Rights and Contributed to His Conviction

Another very damaging piece of hearsay evidence was admitted against Mr. Santos at trial: When the police executed the search warrant, they discovered a pair of men's pants, rolled up, in a plastic bag with a white shirt. (4 RR 91-92). The bag was found in the floor in the corner of the room where Ms. Keys was discovered. (*Id.*, State's Exb. 21). Cocaine was found in the pants pocket. (*Id.*, State's Exb. 23). The *only* evidence linking Mr. Santos to the pants was (i) the hearsay statement of Ms. Keys (5 RR 61) and (ii) the hearsay statement(s) of one or more unidentified individuals (*Id.*).

In *Crawford*, the Supreme Court dealt with statements made by a woman while she was in police custody, herself a potential suspect in the case. *Crawford*, 541 U.S. at 65. Her statements were made in response to police questioning. *Id.* When they were offered against the defendant at trial through the testimony of the police officer, they were testimonial and given in violation of the defendant's Confrontation Clause rights. *Id.* at 65-68.

1. The Hearsay Statements Were Testimonial

In this case, Ms. Keys was not only leasing and staying in the apartment with narcotics, she was found lying in bed with the pants right next to her in a bag on the floor. (4 RR 46, 48, 91, State's Exb. 21). She was immediately handcuffed

and arrested that day and later indicated herself. (State's Exb. 39, 5 RR 61-62). Ms. Keys's statements were given to a Sergeant Dalton in response to his questioning. (5 RR 61). They were then offered at trial as *the* piece of evidence proving the pants belonged to Mr. Santos. (5 RR 41, 61, 75). The police officer also testified Ms. Keys "wasn't the only one who said [that the pants were Mr. Santos's]." (5 RR 61). The officer did not elaborate as who else had made such a statement or the context in which it was made. In its final closing statement, the State reiterated, "The interviews that were conducted in that house . . . what they did say is, 'Those are [Mr. Santos's] pants.' His pants." (6 RR 45).

The similarity between the statement found to be testimonial in *Crawford* and Ms. Keys's statement in this case is apparent. Under *Crawford* Ms. Keys's statement, given in response to police questioning after the police had served the search warrant and arrested her, was testimonial. *See Crawford*, 541 U.S. at 65; *Davis v. Washington*, 547 U.S. 813, 822 (2006) (holding statements "are testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."). The additional statement or statements given by persons unknown fall into the same testimonial category as Ms. Keys's statement. *See Davis*, 547 U.S. at 822.

2. The Hearsay Statements Were Not Otherwise Admissible

Otherwise inadmissible testimonial statements may nevertheless come into evidence if the defendant "opens the door." *Schutz v. State*, 957 S.W.2d 52, 71 (Tex. Crim. App. 1997). The purpose of the "opened door," or the "false impression," legal theory is to ensure the jury is not misled by hearing only part of the relevant facts offered by the proponent. *Cerda v. State*, 557 S.W.2d 954, 957 (Tex. Crim. App. 1977). Accordingly, if a defendant asks questions that could leave the jury with a false impression of the nature of the evidence, he has opened the door to allow the State to ask "narrowly-tailored questions" the cure the potentially false impression created by the defendant. *Wells v. State*, 319 S.W.3d 82, 94 (Tex. App.—San Antonio 2010, pet. ref'd). This is so even if the State must elicit testimonial hearsay evidence to correct the false impression. *Id.*

For example, if a defendant frames questions regarding a third party's statements so as to make it appear as though the declarant's statements were broader or narrower than they actually were, the State may then ask about the specifics of the statement so as to correct any false impression the defendant's questions may have given then jury. *See id.*; *Goodman v. State*, 302 S.W.3d 462, 472-73 (Tex. App.—Texarkana 2009, pet. ref'd); *McClenton v. State*, 167 S.W.3d 86, 93 (Tex. App.—Waco 2005, no pet.).

In the whole of his cross-examination of Officer Clements, Mr. Santos's attorney asked the following question regarding the pants:

> Q. We didn't test these clothes to make sure and see if we could take any hairs or any type of DNA evidence to determine who in fact owned these clothes, did we?
>
> A. No, we did not.

(5 RR 225). After counsel passed the witness, the State approached the bench and the following encounter occurred:

> [PROSECUTION]: Your Honor, at this time I think the Defense has certainly kicked the door wide open into getting in the additional information that they did have that these were Jacinto Santos' [sic] pants, and that he was living at this apartment. That was information received. And I think that this line of questions has firmly opened the door to that coming in.
>
> THE COURT: I would agree.
>
> [DEFENSE]: May I respond, your Honor?
>
> THE COURT: No.

(5 RR 36). In responding anyway, defense counsel pointed out the only question he asked regarding the pants,

> was if there was any DNA evidence found on that. There were no questions that were elicited or otherwise - -
>
> THE COURT: The Court will note your objection.
>
> [DEFENSE]: And there's no other questions that were asked as to the ownership, whether he knew the ownership of these items. The only questions that were asked, Judge, is whether there was any DNA evidence that was found on them . . .

THE COURT: Counsel, be seated.

(5 RR 36-37). The State then elicited testimony from the officer at least one person on the scene said the pants belonged to Mr. Santos. (5 RR 41, 56, 75).

The record reflects defense counsel did inquire about whether there was any DNA evidence collected from the pants, to which the officer responded there was not. At most counsel's question left the jury with the impression the police investigation did not include collection of DNA evidence, an impression which according to the record is accurate. Even then, if the question did in fact open the door to additional questioning by the State, that questioning had to be narrowly tailored so as to not "stray beyond the scope of the invitation." *Schutz v. State,* 957 S.W.2d at 71. Questions such as "why didn't you collect DNA evidence" if perhaps there was a reason for them not collecting it or "why was testing of DNA evidence not done" would have been examples of such questions. Ironically, the State never asked these types of questions. Instead, the State, relying on defense counsel's question regarding DNA evidence, asked questions about who all the police spoke with and what all those declarants. The State's questions had no relevance to the police collection of DNA evidence. The trial court erred in permitting the questioning. *See id.*; *Wells*, 319 S.W.3d at 94; *Goodman*, 302 S.W.3d at 472-73; *McClenton*, 167 S.W.3d at 93.

Beyond these actions by the State against Mr. Santos and in violation of his constitutional rights, the Court should consider the impact on other criminal cases if it approves such broadly tailored questioning based upon such a narrow question by the defense. Under the rationale of the trial court's ruling, if a defense attorney asks even one question about the thoroughness of a police investigation (apart from the investigation as it related to out-of-court declarants), then the State would be allowed to get into evidence testimonial statements that otherwise violate the defendant's constitutional protections. If this case were approved, defense counsel would be faced with either not challenging any aspect of the quality of the police investigation or waiving their client's Sixth Amendment right to confront witnesses. This policy absolutely eviscerates the Sixth Amendment.

3. The Trial Court's Error Contributed to Mr. Santos's Conviction

At trial, ownership of the pants was hotly contested—the State contended they belonged to Mr. Santos while the defense contended they belonged to Mr. Johnson A.K.A. Keys. The pants were found in a plastic shopping bag with a T-shirt. (5 RR 63). The pants were 36x30, and the shirt was a small. (*Id*. 63-64). Mr. Santos could not fit into a small T-shirt, but Mr. Keys looked like he could. (*Id*. 65). On the other hand, Mr. Santos looked like he could fit into size 36 pants whereas, if he were wearing the pants at his waist, such a size would be too large for Mr. Keys. (*Id.* 63, 65).

Mr. Keys was also found showering in the bathroom next to the bedroom where the clothes were found. (4 RR 125). The only evidence tipping the scale in determining ownership of the pants was the hearsay statements that the pants were Mr. Santos's. Moreover, considering the fact these particular drugs were found not out in the open but tucked into the pocket of pants that were then rolled up and placed in a bag, it is much more likely only the person who owned the pants knew of the drugs.

The error in allowing the testimony about Ms. Keys's statement, in the context of the debate between who the likely owner of the pants was, was exacerbated by the fact the trial court refused to allow into evidence that Mr. Keys was, at the time, on probation for felony-grade possession of a controlled substance. (5 RR 193-94). Moreover, the error itself was particularly egregious: admission of the statement did violence to Mr. Santos's protections under the Confrontation Clause. Adding insult to injury is the fact Ms. Keys's statement was not even given to the officer who uttered it at trial. Rather, Ms. Keys told Sargent Dalton who told Officer Clements who told the jury that the pants were Mr. Santos's. (5 RR 61). The statement is more attenuated than the rumors spread by teenage girls; it had no place in a criminal trial that resulted in a seventy-year term of incarceration. It certainly was unworthy of being *the* determining piece of evidence in resolving the ownership issue.

The hearsay statements constituted the determining evidence in the debate over who owned the pants. They were very important to the State's case. *See Langham*, 305 S.W.3d at 582. They were not cumulative of other evidence. *See id.* There was no other evidence (such as DNA or fingerprint evidence) to independently corroborate or contradict the statements. *See id.* The only way the jury reached its verdict on the issue of the drugs found in the pants was if it relied upon the statements. *See Scott*, 227 S.W.3d at 690. It cannot be said, beyond a reasonable doubt, that the error did not at least contribute to the conviction. *See* TEX. R. APP. P. 44.2(a).

II. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE JURY'S FINDING THAT MR. SANTOS USED OR EXHIBITED A DEADLY WEAPON

A police officer discovered a semi-automatic gun in Ebony Keys's apartment. (4 RR 70, 86). The gun was wrapped in a plastic bag which was then placed in a gym bag. (*Id.*). The gym bag was in the master bedroom closet. (*Id.*). There was no evidence of any of the other items also in the bag. (*Id.* 228-29). A serial number check on the gun indicated the gun was not stolen. (5 RR 115). The police did not, however, run a check on the serial number to find out to whom the gun was registered. (*Id.* 115-16). They were unable to locate any fingerprints on it. (4 RR 157). Defense counsel point-blank asked the officer, "Are you aware of any evidence that ties that gun to Jacinto Santos?" The officer answered, "I am not." (5 RR 115).

Before the sentencing stage began, the trial court *sua sponte* made the following ruling:

> Based on the Court's review of the case law dealing with the issue of deadly weapon under 42.12 3(g), the Court is of the opinion that the evidence is insufficient to show that the Defendant used or exhibited a deadly weapon during the course and commission of the offense. And for that reason, the Court will not submit a special issue to the jury concerning that.
>
> [PROSUCUTION]: Yes, your Honor. We understand.

(7 RR 10). After some additional proceedings, the prosecution brought up the deadly weapon issue again, contending the case of *Coleman v. State*, 145 S.W.3d 649 (Tex. Crim. App. 2004), supported submission of the issue to the jury. (7 RR 35). The court recessed, apparently to obtain a copy of the case. (*Id.* 36). When it resumed, the trial court ruled it would "allow you to read the notice of the deadly weapon" but "reserve[d] the right to determine whether that information will be presented to the jury in the Court's Charge." (*Id.* 37).

During the charge conference, defense counsel objected to the inclusion of the deadly weapon special issue because the evidence was legally insufficient to justify it. (8 RR 10). The court ruled, "Based on the Court's review of the case of Coleman versus State, 145 SW 3rd, 649, that was decided by the Court of Criminal Appeals in 2004, the Court will overrule your objection to that being included in the Court's Charge." (*Id.* 10-11). The jury's subsequently found Mr. Santos had possessed a deadly weapon.

A. Determining When Evidence is Sufficient to Support a Deadly Weapon Finding

In determining whether the evidence is sufficient to support a finding of guilt, the reviewing court should evaluate all of the evidence in the light most favorable to the verdict and determine whether the fact-finder was "rationally justified in finding guilt beyond a reasonable doubt." *Brooks v. State*, 323 S.W.3d 893, 902 (Tex. Crim. App. 2010); s*ee Jackson v. Virginia*, 443 U.S. 307, 318 (1979). This standard applies to a review of a jury's findings on punishment issues. *Garcia v. State*, 919 S.W.2d 370, 378 (Tex. Crim. App. 1994).

Article 42.12, section 3g(a)(2) of the Texas Code of Criminal Procedure permits the entry of a deadly weapon finding when it is shown the defendant used a deadly weapon during the commission of a felony offense. The core of this statute, like the core of all criminal statutes, requires the State to first establish the defendant's knowledge or intent to possess the deadly weapon.

Courts have created a means to the end of establishing possession via a number of "affirmative links" to be employed in evaluating whether the State established the defendant's intent to possess the contraband. *Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995) (stating "the necessity of proving an affirmative link between the accused and the contraband in his possession is mainly to establish his knowledge or intent"). "Because, under our law, an accused must not only have exercised actual care, control, or custody of the

[contraband], but must also have been conscious of his connection with it and have known what it was, evidence which affirmatively links him to it suffices for proof that he possessed it knowingly." *Id.* While affirmative links are most frequently used in evaluating possession of a controlled substance, "the State must likewise affirmatively link the accused to a weapon which he is alleged to have unlawfully possessed." *Gill v. State*, 57 S.W.3d 540, 544 (Tex. App.—Waco 2001, no pet.).

After intent to possess is established, additional considerations come into play. It is at this point that analysis of the pillar cases of deadly weapon law becomes necessary. The first such case is *Patterson v. State*, 769 S.W.2d 938, 941 (Tex. Crim. App. 1989). The second such case is *Coleman v. State*, 145 S.W.3d 649 (Tex. Crim. App. 2004). In *Coleman*, the court dealt with the issue, specific to the facts of that case, of whether a jury could find a defendant used a deadly weapon in the course of drug distribution if the defendant was not physically in the residence at the time of the search. *Id.* 654-55. The court held that it could. *Id.* A helpful concurrence in *Coleman* set forth a list of factors appellate courts could rely on in determining the sufficiency of evidence proving the defendant used a deadly weapon during the commission of a felony.[6] *Id.* 658-60.

[6] The list includes (i) the type of gun involved; (ii) whether the gun was loaded; (iii) whether the gun was stolen; (iv) the proximitiy of the gun to the drugs, drug paraphernalia, or drug manufacturing materials; (v) the accessibility of the gun to whomever controlled the premises; (vi) the quantity of drugs involved; and (vii) any evidence that might demonstrate an alternative purpose for the guns. *Coleman*, 145 S.W.3d at 658-60.

B. The Evidence was Insufficient to Establish Mr. Santos Possessed the Deadly Weapon

In Mr. Santos's case, the State never made it past the initial showing of intent to possess the firearm. There was no direct evidence linking Mr. Santos to the gun. Specifically, the gun was not found on Mr. Santos's person, it did not have his fingerprints on it, and the police did not determine whether it was registered to him.[7] (4 RR 70, 86, 157; 5 RR 115-16).

There was likewise very little circumstantial evidence linking Mr. Santos to the gun. *See Evans v. State*, 202 S.W.3d 158, 161-62 (Tex. Crim. App. 2006) (setting forth a list of circumstantial evidence, "affirmative links," that will suffice to sustain a finding of possession). Mr. Santos was not in the apartment when the search was conducted. *See id.* The gun was not in plain view but was instead wrapped in a bag which was then placed in another bag which was then put in a bedroom closet. *See id.*; (4 RR 70). Apart from the pair of pants discussed in section I.B above, the only other item in the bedroom belonging to Mr. Santos was his parole appointment card, found on the dresser in the room itself, not in the closet. *Evans*, 202 S.W.3d at 161-62. (4 RR 84).

[7] There were other items in the bag with the gun, a fact shown by the pictures of gun in the bag. (State's Exbs. 11-15). Such items could have shed light on whose bag it was, whether the items were specific identifying documents or simply products that may have been used by a male or female or that perhaps would have contained some testable DNA. The other items in the bag, however, were not available for the jury's review: A police officer (who did not testify at trial) went through the bag and discarded such evidence because he independently determined those items had no evidentiary value. (4 RR 230).

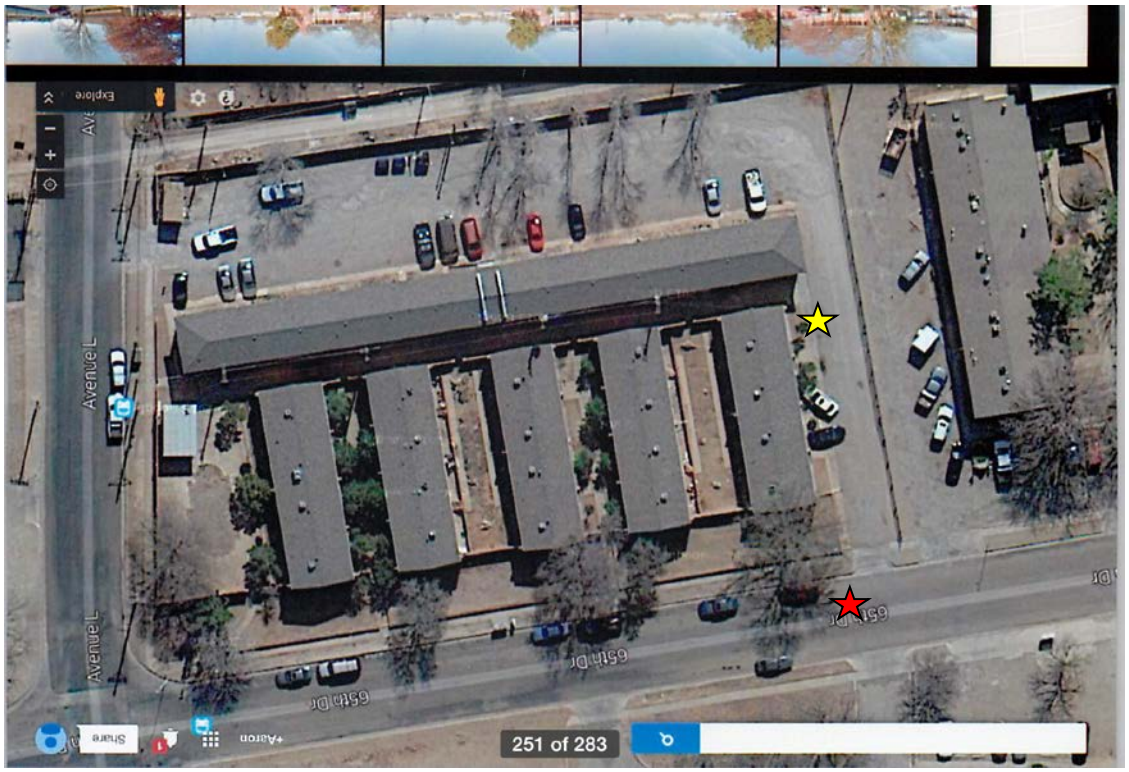
Moreover, Mr. Santos did not have sole access to the apartment in which the gun was found. *See id*. In fact, at least four other individuals had access to the apartment. (4 RR 234-36; 5 RR 59). The apartment was not even in Mr. Santos's name. *See Evans*, 202 S.W.3d at 162; (4 RR 115). The affirmative links between Mr. Santos and the gun are small in number and force.

The trial court permitted submission of the deadly weapon issue in reliance on the *Coleman* decision. In *Coleman*, however, the issue of possession was not disputed. The defendant admitted to the police he lived alone in the house where guns were found. 145 S.W.3d at 650-51. Rather, the issue in *Coleman* was whether the jury could find the defendant "used" the firearms in furtherance of an offense when he was not in his house at the time of the search. *Id.* 655. The crux of the case was determination of whether the weapons were "used," not whether they were possessed, as possession was freely admitted. As such, *Coleman* was inapplicable to Mr. Santos's case where possession was never initially established. The trial court erred in permitting the instruction based on an inapplicable case.

There was no direct evidence Ms. Santos possessed the gun, any circumstantial evidence he possessed or knew of the gun was very weak. *See Evans*, 202 S.W.3d at 162. Evaluating the entire record in the light most favorable to the verdict, the jury was not justified in finding beyond a reasonable doubt Mr. Santos possessed a deadly weapon. *See Jackson*, 443 U.S. at 318.

III. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE JURY'S FINDING THAT MR. SANTOS POSSESSED THE DRUGS FOUND OUTSIDE IN A NEIGHBORHOOD WELL-KNOWN FOR DRUG TRAFFICKING ON A PATH NO ONE SAW MR. SANTOS TAKE

When Mr. Santos saw the SWAT team round the back corner of the apartment complex, he ran. He went North, crossing the street in front of the complex. (4 RR 43). Defendant's Exhibit 1 coupled with trial testimony establishes Mr. Santos, starting at the apartment (indicated by the yellow star, which has been added to the exhibit for purposes of this brief), ran North. (*Id.*). The officer lost sight of Mr. Santos as Mr. Santos was crossing 65th Drive (indicated by the red star, which has also been added to the exhibit for purposes of this brief). (5 RR 138).



Even though the officer did not see past 65th Drive, Defendant's Exhibit 2 from trial shows what the general area on the other side of the street, north of Ms. Keys's apartment, looks like:

Mr. Santos was eventually found hiding in the backyard of a house on block north of 65th Drive. (*Id.* 49). No one knows which path Mr. Santos took or how he ended up in that backyard.

When the officer was looking around the neighborhood, on the general path he thought Mr. Santos would have taken, he discovered two baggie of cocaine. (5 RR 165). The jury's verdict finding Mr. Santos guilty of possessing the baggies of cocaine was not rationally justified by the evidence.

A. Determining When Evidence is Sufficient to Support a Possession Finding

As discussed in section II, above, in reviewing whether the evidence is sufficient to support a finding of guilt the reviewing court should evaluate all of the evidence in the light most favorable to the verdict and determine whether the fact-finder was "rationally justified in finding guilt beyond a reasonable doubt." *Brooks v. State*, 323 S.W.3d 893, 902 (Tex. Crim. App. 2010); s*ee Jackson*, 443 U.S. at 318. This standard takes into account the fact a jury may draw multiple reasonable inferences in reaching its determination but may not rely on "mere speculation or factually unsupported inferences or presumptions." *Hooper v. State*, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007). The appellate court in evaluating sufficiency claims is tasked with the responsibility of determining whether the jury relied upon factually supported, reasonable inferences, speculation, or presumption. *Id.* 16.

> A presumption is a legal inference that a fact exists if the facts giving rise to the presumption are proven beyond a reasonable doubt . . . In contrast, an inference is a conclusion reached by considering other facts and deducing a logical consequence from them. Speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented. A conclusion reached by speculation may not be completely unreasonable, but it is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt.

Id.

In order to establish a defendant perpetrated the crime of possession with intent to distribute, the State must first prove possession. Two elements are required in establishing possession: (i) "the defendant exercised control, management, or care over the substance, and (ii) the accused knew the matter possessed was contraband." *Evans*, 202 S.W.3d at 161. When there is no evidence directly linking the accused to the contraband, circumstantial evidence must otherwise link the two for a conviction to stand. *Id.* at 161-62.

The Court of Criminal Appeals has favorably cited the non-exhaustive list routinely employed by appellate courts in analyzing whether circumstantial evidence sufficiently links the defendant to a controlled substance:

> (1) the defendant's presence when a search is conducted; (2) whether the contraband was in plain view; (3) the defendant's proximity to and the accessibility of the narcotic; (4) whether the defendant was under the influence of narcotics when arrested; (5) whether the defendant possessed other contraband or narcotics when arrested; (6) whether the defendant made incriminating statements when arrested; (7) whether the defendant attempted to flee; (8) whether the defendant made furtive gestures; (9) whether there was an odor of contraband; (10) whether other contraband or drug paraphernalia were present; (11) whether the defendant owned or had the right to possess the place where the drugs were found; (12) whether the place where the drugs were found was enclosed; (13) whether the defendant was found with a large amount of cash; and (14) whether the conduct of the defendant indicated a consciousness of guilt.

Id. at 162 n. 12.

B. The Evidence was Insufficient to Establish Mr. Santos Possessed Cocaine Found Outside in a Neighborhood Known for Drug Trafficking

When the police rounded the back corner of the southernmost building at the apartment complex, Mr. Santos ran North. (5 RR 105). The apartment where Mr. Santos was standing was at the very back of the apartment complex. (*See* 4 RR 189, Defendant's Exb. 1 (Attached as Appendix A)). Mr. Santos kept running, crossing 65th Drive, which is the street in front of the building. No one saw which way Mr. Santos ran once he reached the other side of 65th Drive. (5 RR 105). The one officer who saw him run stated, "the last place I saw him is he was crossing 65th Drive." (*Id.* 138). One block to the north of 65th Drive is 62nd Street. (4 RR 49). Acting off the tip of a postal worker, the officer looking for Mr. Santos went to a house on 62nd Street. (4 RR 49). Mr. Santos was found hiding in the backyard of that house. (*Id.* 51-54).

From the front porch of Ms. Keys's apartment, one can see a street (65th Drive) and buildings across the street. (Defendant's Ex. 14; 5 RR 136-38). Those buildings are more apartments. (5 RR 135-37). On the back porch of one of the apartments in this complex across the road from the subject apartment, Officer Koontz found two baggies of cocaine. (4 RR 57). He concluded the baggies were tossed by Mr. Santos as he was fleeing. (*Id.*).

To put this discovery into perspective: 65th Drive is not just another street. It is an "[o]pen air drug market. You can pull up and buy narcotics off the street on 65th Drive." (4 RR 35). Defendant's Exhibit 1, the aerial view of the street referenced earlier and attached to this brief at Appendix A, shows that in front of Ms. Keys's apartment complex and also across the street from the complex there are several large trees. "Typically there's going to be people . . . underneath these trees" (5 RR 104-05) who are waiting, drugs-in-hand, for drivers to pull up to them and purchase narcotics (*Id.* 141). Those dealers are there waiting for customers "all the time." (*Id.*). Given the nature of the area, when the police come around news of their presence quickly spreads. (*Id.* 142). An officer theorized when police are in the area, the dealers first hide their drugs and then try to get back over to watch the police in the hopes of spotting potential undercover officers. (*Id.*).

The State had to prove Mr. Santos had exercised control, management, or care over the baggies. *See Evans*, 202 S.W.3d at 161. No officer saw Mr. Santos discard the baggies. The police did not conduct any form of investigation to determine whether residents or other onlookers had seen or heard anything, so no citizen offered any evidence directly linking Mr. Santos to the area. (4 RR 33). Because the police did not see if they could get any fingerprints off the baggies, there was no fingerprint evidence linking Mr. Santos to the drugs. (*Id.* 34). In short there was no direct evidence of Mr. Santos's having possessed the drugs.

Of course, a jury need not base its verdict off of direct evidence. The Court well knows a verdict based solely upon circumstantial evidence is just as valid as one based on direct evidence. The circumstantial evidence in Mr. Santos's case, however, is paper thin. Mr. Santos was not under the influence of drugs when he was arrested nor did he smell of them. *See Evans*, 202 S.W.3d at 161. He did not have any contraband or currency on him. *See id.* He did not make any incriminating statements. *See id.*

Moreover, Mr. Santos was not in the area when the baggies were discovered. While Mr. Santos did flee when the police came up on him, there was no evidence linking the path of his flight to the location of the drugs. Mr. Santos was not present when the baggies were discovered. The drugs were found in plain view, but they were outside in an area easily accessible to any number of people. *See id.* Mr. Santos was not near to the drugs. *See id.* Those baggies were just as accessible to him as to any other person walking by. *See id.*

Of additional consideration is the fact this was in an area teeming with people who have narcotics on their person, ready to sell, who scatter to hide their drugs when the police show up. (5 RR 104-05). In *Williams v. State*, the Houston Court of Appeals dealt with a man who ran when the police approached him. 859 S.W.2d 99, 101 (Tex. App.—Houton [1st Dist] 1993, pet. ref'd). During his flight, the police observed the man walking near a large tree. *Id.* 100. After the police

apprehended the man, they went back to the tree and found narcotics "in the same general area the officers observed appellate moving around." *Id.* 101. When he was apprehended, the runner was not in full control of his mental facilities.

> However, appellant was not found to be in personal possession or exercising control over the cocaine, and there was no evidence of furtive gestures toward the cocaine. [An officer] testified this was a heavy drug traffic area and that other drug suspects had run this same way before. Appellant did not make any incriminating statements, and no contraband or drug paraphernalia was found on his person. Further, no testimony was presented describing what, if anything, appellant did when he was near the tree. There was no testimony, for example, that appellant hid behind the tree, dropped anything next to the tree, or made any suspicious or unusual movements while near the tree.

Id. Given this set of facts, the court found the evidence "insufficient to sustain a finding that appellate possessed cocaine beyond a reasonable doubt." *Id.* 102.

Mr. Santos's case meets all of the points from *Williams* that instructed that court to reverse the conviction. Mr. Santos's case has the added consideration of the fact that, unlike the defendant in *Williams*, he was never even observed in the area where the drugs were found. *See Simmons v. State*, Nos. 05-11-01267-CR, 05-11-01283-CR, 2013 WL 1614114, at * 7 (Tex. App.—Dallas Feb. 20, 2013, no pet.) (holding evidence sufficient to support possession conviction when the officer "never lost sight of appellant" during the chase in which the appellant threw down drugs).

Additionally, the police did not know how many drug dealers were nearby in the area when Mr. Santos ran.[8] *See Noah v. State*, 495 S.W.2d 260, 263 (Tex. Crim. App. 1973) (finding persuasive evidence that no one else was around the area where the contraband was discovered or that it was unlikely anyone had touched the tossed evidence). One of the officers opined it was "highly unlikely" the drugs were dropped by somebody other than Mr. Santos. (5 RR 34). The other officer likewise testified he thought it was unlikely the drugs could have come from someone else: "*I don't think* they'd throw them on the ground in that neighborhood and risk losing that amount of narcotics." (5 RR 143 (emphasis added)). The fact remains, however, the drugs were discovered in an area where many people are likely to, at any given point in time, be trying to quickly distance themselves from narcotics. (4 RR 35, 216; 5 RR 104-05, 141-42). Finding discarded drugs in an "open air drug market" (4 RR 35) is simply not as remarkable as finding drugs in an area in which drugs are not usually located. The location of the drugs speaks to the increased likelihood that any other runner could have so discarded the baggies.

[8] During his testimony one of the officers indicated "Nobody was observed" selling drugs in front of the complex or running when the police arrived. (5 RR 30). Another indicated the police "did not see" anyone on the street. (*Id.* 143). This is technically true, as not a single officer was near the street or in any position to observe the street for fear of being compromised. (*Id.* 145, 200). Their entire approach was from the back of the complex. (4 RR 39-40). The officers did not see the street at all and consequently did not know how many sellers were stationed on the street at the time the police started yelling "police" (4 RR 42); how many of them ran; and which way they went. (5 RR 144). Testimony did, however, establish sellers were on that street ready to sell "all the time." (*Id.* 141).

In the totality of all the evidence, there was *one* affirmative link between Mr. Santos and the baggies, which was his initial flight from police. The only way the jury could have found Mr. Santos had tossed the two baggies of narcotics during his flight from police is if it relied upon the police officer's pure speculation regarding Mr. Santos's path. (Even given such reliance, however, the evidence would likely still not be sufficient to sustain the verdict). The jury knew Mr. Santos's starting point, ending point, and general path of travel, i.e. "North." In finding Mr. Santos guilty of possessing those drugs, the jury had to take the three elements it did know and theorize about Mr. Santos's route. Such theorization, without additional evidence reasonably justifying it, was insufficient to find Mr. Santos guilty. Giving it a very generous view, the jury's speculation may have even been reasonable, especially given the police officer's own testimony supporting such speculation. (5 RR 125). But it was based upon speculation nonetheless.[9] It cannot stand. *See Hooper*, 214 S.W.3d at 15. Because the jury's verdict was not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt, reversal of the conviction is warranted. *See Jackson*, 443 U.S. at 318.

[9] The egregiousness of finding Mr. Santos was the one who discarded the baggies is even more heightened by the fact the canine unit searching the location immediately afterward "hit on" an unknown person's pair of shoes discovered nearby the discarded baggies. (8 RR 47). In all fairness to the verdict, however, such information was not presented to the jury. After the jury had already sentenced Mr. Santos, and the trial had concluded, the prosecution put on the record that the canine report page was inadvertently excluded from the discovery of the case. (*Id.*).

PRAYER

Appellant Jacinto Santos, prays this Court would find that the trial court committed reversible error by allowing impermissible hearsay testimony and that the evidence supporting the jury's verdict was insufficient. Accordingly, Mr. Santos asks the Court to reverse the Judgment and remand the case for a new trial. Alternatively, Mr. Hereford prays the Court would find the evidence supporting the jury's deadly weapon finding was insufficient and strike the finding from the judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 3, 2014, a copy of this brief was served on opposing counsel, Jeffrey S. Ford of the Lubbock County District Attorney's Office, via electronic mail.

I further certify that on October 3, 2014, a paper copy of this brief was sent to Mr. Jacinto Santos, TDCJ # 01919583 at the Allred Unit, 2101 FM 369 North, Iowa Park, Texas 76367.

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CERTIFICATE OF COMPLIANCE

I certify the foregoing Brief on the Merits complies with Rule 9.4(i)(2)(A) of the Texas Rules of Appellate Procedure. The brief, excluding those portions detailed in Rule 9.4(i) of the Texas Rules of Appellate Procedure, is 9,868 words long. I have relied upon the word count function of Microsoft Word, which is the computer program used to prepare this document, in making this representation.

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Appendix A

Defendant's Exhibit 1
Aerial Photo of Apartment Compex

Explore
Avenue L
Avenue L
65th Dr
65th Dr
65th Dr
Share
+Aaron
251 of 283

Appendix B

Excerpt from John Wigmore's
A Treatise on the System of Evidence in Trials
at Common Law

notion of a freedom or right.[20] In the next century, and hardly before then, do we find a plain recognition of the duty; and it is noticeable that there are two stages of development, for the duty of attendance to be sworn comes earlier than the duty of disclosure of knowledge. The obligation to attend and bear testimony generally had been settled; but for some time afterwards there appears still to be lacking the full conception that the answer to a specific question on the stand can be compelled; and that all desired facts are bound to be disclosed.[21] The history of the various claims of exemption, from that time onward,[22] shows that the final achievement was in the early 1600s distinctly a new one:

1612, Sir *Francis Bacon*, in the *Countess of Shrewsbury's Trial*, 2 How. St. Tr. 769, 778: "You must know that all subjects, without distinction of degrees, owe to the king tribute and service, not only of their deed and hand, but of their knowledge and discovery. If there be anything that imports the king's service, they ought themselves undemanded to impart it; much more, if they be called and examined, whether it be of their own fact or of another's, they ought to make direct answer."

But as yet there was one important step to be taken. The statute of Elizabeth had apparently intended to provide only for civil causes. In criminal causes, the date when process began to be issued for the Crown's witnesses does not appear; though presumably it preceded the time of Elizabeth's statute. But the accused in a criminal cause was not allowed to have witnesses at all,[23] — much less to have compulsory process for them. By the early 1600s this disqualification began to disappear, and the accused was occasionally allowed to put on witnesses, who spoke without oath. After two generations, and by 1679, under the Restoration, the judges began to grant him, by special order, compulsory process to bring them;[24] and finally, at slow intervals, in 1695 and in 1701, he was guaranteed this right by general statutes.[25] This guarantee was afterwards embodied in most of the constitutions of the United States.

In the remaining important field of jurisdiction, the Court of Chancery, the general doctrine becomes a part of English history at a time when it was already in part achieved in another system of law. When the Chan-

[20] 1599, Dobson *v.* Crew, Cro. Eliz. 705 (bond to give testimony; the Court said that, even apart from the bond, "he is compellable by the law").

[21] As late as about 1630, a clerk of the Star Chamber, Hudson, is found writing (Treatise on the Star Chamber, part III, § 21, Hargraves' Collectanea Juridica, II, 209) that "the great question hath been, whether a witness which in examination will not give any answer shall be compelled to make answer to the interrogatories; . . . [and Lord Chancellor Egerton] gave me answer, that he knew no law to compel a witness to speak more than he would of his own accord." This was certainly not the then practice of the Star Chamber (*post*, § 2250), but the statement looks like a reminiscence of the ecclesiastical law, as noticed *infra*, note 27.

[22] *Post*, § 2212 (trade secrets), § 2286 (confidences), § 2290 (attorney and client).

[23] The history of this disqualification has already been examined (*ante*, § 575).

[24] *Ante*, § 575.

[25] 1695–6, St. 7 & 8 W. III, c. 3, § 7 (persons indicted for treason and misprision "shall have the like processe of the court where they shall bee tryed, to compell their witnesses to appeare for them att any such tryal or tryals as is usually granted to compell witnesses to appear against them"); 1702, St. 1 Anne, c. 9, § 3 (requires that witnesses produced for the accused in felony shall be sworn); the latter statute was treated by implication as authorizing compulsory process: 1824, Starkie, Evidence, I, 86.

cellors in the 1400s were forming the procedure of their court after the model of the ecclesiastical law, they found a doctrine *de testibus cogendis* long canvassed as a theoretic principle in the system from which they borrowed. There had indeed been a time when that system was passing through a development something like our own, — at least, when the compellability of witnesses was a new thing; the decretals of the 1200s indicate this;[26] and a final settlement had not been reached when the English Court of Chancery began to flourish, and to borrow the Continental rules.[27] But the Chancellors, without waiting, pushed the principle to the extreme test of practicality, and invented the keen compulsory weapon of the subpœna writ.[28] This gave them more than a century's start of the common-law Courts in the recognition of a definite testimonial compulsion and duty. It may be supposed, moreover, that the rapid increase in the activity of the Chancery during the 1500s was one of the causes which contributed to the introduction at that time of compulsory process for witnesses in the common-law courts, and was the chief influence in prescribing for that process the specific form of the *subpœna* writ. It may even be that the Chancery's priority in the use of compulsory process was itself one of the causes that had made it more efficient and more popular.

§ 2191. **Constitutional Guaranty of Compulsory Process.** This history of the law securing for accused persons the right to compulsory process for their witnesses shows that the purpose of the statutes was merely to cure the defect of the common law by giving to parties defendant in criminal cases the common right which was already in custom possessed both by parties in civil cases and by the prosecution in criminal cases. The Bills of Rights in most of the Constitutions have incorporated this statutory right,[1]

[26] Corpus Juris Canonici, Decretal. II, 20 (*de testibus et attest.*), 21 (*de testibus cogendis*); Glasson, cited *supra*, note 8.

[27] That law seems to have suffered an arrest of development, and never to have reached explicitly the complete conception of a testimonial duty. "The canon law recognized a public duty and liability to bear witness, . . . although to be sure the earlier doctrine had partially refused this recognition, for criminal cases in general, or at least for the *accusatio*-proceeding in particular" (Hinschius, Kirchenrecht, 1897, VI, pt. 1, § 364, p. 97, note 1). The modern Church jurists, in regard to the coercion of a witness, "incline to hold it allowable, at least when proof cannot be supplied in any other manner" (Droste, Canonical Procedure, tr. Messmer, 1887, § 66). Even in modern French criminal procedure (which is founded on canon-law methods), a witness who refuses on the stand to answer a specific question cannot be compelled (Bodington, French Law of Evidence, 1904, p. 116).

[28] For the history of the *subpœna* writ, see the quotation from Lord Campbell, *supra*, note 19, and further, Hudson, Treatise of the Star Chamber, pt. III, § 21, in Hargr. Coll. Jurid. II, 207; Leadam, Select Cases in the Star Chamber, Seld. Soc. Pub. vol. XVI, p. xxii; Spence, Equitable Jurisdiction, I, 328, 345, 369; Choice Cases in Chancery, 1 (1672).

[1] The usual provision is that in criminal cases the accused shall have the right to "compulsory process for obtaining witnesses" (or, "process to compel the attendance of witnesses") "in his favor" (or, "in his behalf"); special variations are noted below; the figures indicate the date, article, and section of the Constitutions: Ala. 1875, I, 7; Ark. 1874, I, 8; Cal. 1879, I, 13; Colo. 1876, II, 16; Conn. 1818, I, 9; Del. 1831, I, 7; Fla. 1887, Decl. of R. 11; Ga. 1877, I, 5; Ida. 1889, I, 13; Ill. 1870, II, 9; Ind. 1851, I, 13; Ia. 1857, I, 10 (for criminal cases, the usual clause; "Any party to any judicial proceeding shall have the right to use as a witness, or take the testimony of, any other person, not disqualified on account of interest, who may be cognizant of any fact material to the cause"); Kan. 1859, Bill of R. 10; Ky. 1891, 11; La. 1898, 9; Me. 1819, I, 6; Md. 1867, Decl. of R. 21 ("to have process for his witnesses; to examine the witnesses for and against him on oath"); Mass 1780, Decl. of R. 12 ("a right to produce all proofs that may be favorable to him"); Mich 1850, VI, 28; Minn. 1857, I, 6; Miss. 1890, III, 26; Mo. 1875, III, 22; Mont. 1889, I, 16; Nebr. 1875, I, 11; N. H.

because those clauses of the Constitutions were intended to sanction permanently the more fundamental features of just and liberal criminal procedure, particularly in the parts which had at various times in the past been found liable to abuse. The Constitutions, in this instance, provided nothing new or exceptional; but gave solid sanction, in the special case of accused persons, to the procedure ordinarily practised and recognized for witnesses in general.

It follows that this right does not override and abolish such *exemptions and privileges* as may be otherwise recognized by common law or statute; the right guaranteed is merely the general right to the compulsory process which is required for making practical the testimonial duty, so far as that duty otherwise exists.[2] So, also, this guarantee does not define the extent to which testimonial attendance is conditional on the party's *tender of expenses;*[3] whether an accused must make such a tender remains to be determined by the law as otherwise defined.[4]

§ 2192. **Duty to give Testimony; General Principle.** For three hundred years it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence. We may start, in examining the various claims of exemption, with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional and are so many derogations from a positive general rule:

1742, *Bill for Indemnifying Evidence*, Cobbett's Parliamentary History, XII, 675, 693 (the debate being upon a bill to pardon in advance such witnesses as should criminate themselves in testifying to the frauds of Sir Robert Walpole, Earl of Orford, the debate

1793, Bill of R. 15 (like Mass.); N. J. 1844, I, 8; N. C. 1875, I, 11 ("to confront the accusers and witnesses with other testimony"); N. D. 1889, I, 13; Oh. 1851, I, 10; Or. 1859, I, 11; Pa. 1874, I, 9; R. I. 1843, I, 10; S. C. 1895, I. 18; S. D. 1889, VI, 7; Tenn. 1870, I, 9; Tex. 1876, Bill of R. 10; U. S. 1787, Am. 6; Utah 1895, I, 12; Va. 1902, I, 8 (like Vt.); Vt. 1793, I, 10 ("to call for witnesses in his favor"); Wash. 1889, I, 22; W. Va. 1872, III, 14; Wis. 1848, I, 7; Wyo. 1889, I, 10.

The Federal clause first occurs in its present form in the resolution of amendment by Congress, March 4, 1789, but it was founded on the recommendations of the Constitutional Convention of New York and of North Carolina, July 26 and Aug. 1, 1788; their proposal declared the accuser's right "to have the means of producing his witnesses" and "to call for evidence" (Elliot's Debates, I, 328, 334, 339, IV, 243). None of the other ratifying States (except Rhode Island, after the Congress above mentioned) seem to have called for this clause.

[2] 1897, State *v.* Wiltsey, 103 Ia. 54, 72 N. W. 415 (witness prevented by illness); 1854, *Re* Dillon, 7 Sawyer 561, 569 (Hoffman, J.: "The object and effect of the constitutional provision were merely to give to the accused the right to such process as is usually granted to compel witnesses to appear on the side of the prosecution against them"; here, a foreign consul's privilege). The contrary was maintained by the Executive, through Mr. Marcy, Secretary of State, in this same matter of Consul Dillon, so far as the consular exemption was based on a treaty made subsequent to the Federal Constitution; the authorities are cited *post*, § 2372.

It would seem that, for procuring the attendance of a *convict in prison*, process (usually provided for by statute) would be obtainable even in civil cases; but this right has sometimes been placed upon the basis of the constitutional provision: 1196, Hancock *v.* Parker, 100 Ky. 143, 37 S. W. 594.

[3] *Contra:* 1853, West *v.* State, 1 Wis. 209, 230 ("It would be in many cases but bitter mockery to grant the prisoner the right to have witnesses examined in his behalf, and then to deny him the necessary process of the law to procure their attendance").

[4] For these requirements as to tender of expenses, see *post*, § 2201.

For other analogies, as to constitutional provisions merely sanctioning a general principle, and not affecting its exceptions, see *ante*, § 1397.

For the question whether the statutory rule refusing a continuance, where the *accused's witnesses' desired testimony is admitted* to be as averred, is in violation of the constitutional provision guaranteeing compulsory process, see *post*, § 2595.