Affirmed and Majority and Dissenting Opinions filed June 23, 2020.

In The

Fourteenth Court of Appeals

NO. 14-18-00760-CR

RAUL BAHENA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause No. 1552218

D I S S E N T I N G O P I N I O N

I dissent from the majority's holdings that (1) Sergeant Larry Franks of the Harris County Sheriff's Office was a custodian of records capable of authenticating the business records at issue and (2) Appellant forfeited his right to have the merits

of his objection heard because he did not simultaneously object that (a) Sergeant Franks was not a "qualified witness" and (b) the evidence was untrustworthy.

I. Relevant Facts

During a bench conference, the State was the first to mention its witness "testifying as an expert witness *only as custodian*." (Emphasis added). This clearly contemplated and articulated representation was made in response to Appellant's objection that he had not received notice Sergeant Franks would be called to authenticate recordings of the jail phone calls at issue. These recordings were made by a third party (Securus)[1] then re-copied[2] by a fourth party (deputy Pete Galvan), neither of whom appeared for trial. The record establishes (1) Galvan was "the only deputy" with relevant recordkeeping duties, (2) Galvan placed the phone calls on the disk "and did all the work", and (3) Galvan's name was on the disk identifying him as the person who made it.

In response to an inquiry from the court, counsel for the State stated his belief that Galvan was identified in a subpoena as "custodian"; in response to an inquiry from Appellant's trial counsel, Franks stated he did not "recall getting a subpoena" but had "been in contact with ADA Sanchez for a week on this case." The record then reveals the following exchange:

> THE COURT: I think obviously counsel knows and it's well established that violation of a discovery order, if there was one, which apparently it appears that this witness was not disclosed, either this particular witness and possibly not even [the] custodian of record for the jail call [the] appropriate remedy is not exclusion of the evidence. It's a continuance and so I will

[1] Securus is a corporation paid by Harris County to facilitate inmates' telephonic communications with the outside world. Although the company is misnamed in the trial transcript as "Secure", the correct name of the company that exclusively provides telephone service to detainees at the Harris County Jail is "Securus". *See* https://www.harriscountyso.org/JailInfo/inmate_info_inmate_phonecalls.aspx.

[2] The record is silent as to how this copy was made.

> grant as much time as you need to discuss this witness' credentials or whatever else you need to but I'm not excluding the evidence because frankly I'm still mad about a visiting Judge that excluded my evidence 20 years ago despite the fact that I told him that's what the law was. I know 25 years ago the law appropriate remedy not exclusion. I don't know how in the world there could be any surprise about this given the fact that we all listened to the tape yesterday, given the fact that you're aware of the fact there were jail calls going to be admitted into evidence there can be no surprise that **the State's calling a custodian of records** to admit that evidence. However if you feel like you need some time to further investigate or question him then the Court's going to give you how much time you need.
>
> [DEFENSE COUNSEL]: How is six months?
>
> THE COURT: How much reasonable time you need? So you want us to send the jury to breakfast and you can visit with the witness?
>
> [DEFENSE COUNSEL]: I think that's a good idea.

(Emphasis added).

The next mention of a "custodian of records" comes from the court: "And sergeant if you don't mind if you would please go visit with the lawyer and see if she's got any questions about your qualifications of a custodian of records or any other questions she may have." The next is from the State to Franks: "Is he [Galvan] also custodian of records?" to which Franks replied, "Yes." On appeal, the State's brief represents that, "Evidence established that Sgt. Franks was a custodian of records for the jail calls, even if the calls were maintained by an outside entity." The first time the phrase "qualified witness" is used (aside from a quotation of Texas Rule of Evidence 803(6)) is in the State's appellate brief.

After establishing that both the inmate's name on the disk and SPN on the disk were *not* Appellant's, Franks explained that (1) it was a "simple typographical

error or mak[ing] two disks at the same time", (2) he did not "know anything about the facts of this case", (3) he had no personal knowledge concerning the voices on the disc, (4) he did not know whether Appellant was in jail at the time the phone calls were recorded, (5) he had not heard the calls prior to trial, and (6) "we can pretty much guess it's him" when "a[n] inmate is calling a known person and that phone number is located that known person at the beginning when it asks this is a[n] inmate."

Appellant's trial counsel objected on the grounds that Franks was not the custodian of records and the court overruled the objection. The State then introduced and published the inculpatory recordings to the jury. During the call, someone can be heard saying, "It's f***ed up what I did. I pointed the gun at her . . . . She called the law, that's the only reason they caught me." This ostensible admission is consistent with the facts of this case. Appellant's relevant and timely argument on appeal tracks the objection he made at trial and questions concerning hearsay within hearsay have not been presented.

II. Hearsay and the "Business-Record" Exception

Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted and is inadmissible unless a statute or rule of exception applies. Tex. R. Evid. 801(d), 802. The proponent of hearsay has the burden to show the testimony fits within an exception to the general rule. *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 908 n.5 (Tex. 2004); *Skillern & Sons, Inc. v. Rosen*, 359 S.W.2d 298, 301 (Tex. 1962); *see also Ortega v. Cach, LLC*, 396 S.W.3d 622, 629 (Tex. App.—Houston [14th Dist.] 2013, no pet.) and *Zhu v. Lam*, 426 S.W.3d 333, 342 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

Hearsay exceptions are generally predicated upon the presence of sufficient indicia of reliability.

> The hearsay exception for regularly kept records is justified on grounds of trustworthiness and necessity that underlie other hearsay exceptions. Reliability is furnished by the fact that regularly kept records typically have a high degree of accuracy. The regularity and continuity of the records are calculated to train the recordkeeper in habits of precision . . . . The impetus for receiving these hearsay statements at common law arose when the person or persons who made the entry, and upon whose knowledge it was based, were unavailable because of death, disappearance, or other reason.
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> The common law exception had four elements: (1) the entries must be original entries made in the routine of a business, (2) the entries must have been made upon the personal knowledge of the recorder or of someone reporting the information, (3) the entries must have been made at or near the time of the transaction recorded, and (4) the recorder and the informant must be shown to be unavailable. If these conditions were met, the business entry was admissible to prove the facts recited in it.

2 McCormick On Evid. § 286 (8th ed.); *see also Sellers v. State*, 588 S.W.2d 915, 919 (Tex. Crim. App. [Panel Op.] 1979) (concluding a statement lacked "the indicia of reliability necessary") and *Oveal v. State*, 164 S.W.3d 735, 746 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (Frost, J., concurring) (concluding hearsay lacked "the requisite indicia of reliability" to be admissible and citing *Martinez v. State*, 993 S.W.2d 751, 758 (Tex. App.—El Paso 1999), *rev'd*, 22 S.W.3d 504 (Tex. Crim. App. 2000); *Drayton v. State*, 135 S.W.2d 703, 704 (Tex. Crim. App. 1939); and *Hughes v. State*, 128 S.W.3d 247, 252-53 (Tex. App.—Tyler 2003, pet. ref'd)).

Records of regularly conduced business activities are only admitted when "all" specific conditions enumerated within the rule are "shown by the testimony of the custodian, or another qualified witness, or by an affidavit or unsworn declaration that complies with Rule 902(10)." *See* Tex. R. Evid. 803(6)(D); *see also U.S.*

Commodity Futures Trading Comm'n v. Dizona, 594 F.3d 408, 415-16 (5th Cir. 2010) ("With respect to Rule 803(6), '[t]he exception requires that either the custodian of the business records or "other qualified witness" lay a foundation before the records are admitted.'") (quoting *United States v. Brown*, 553 F.3d 768, 792 (5th Cir. 2008)). *Cf. Guevara v. Ferrer*, 247 S.W.3d 662, 667 n.3 (Tex. 2007) (examination of federal precedent concerning rules of evidence is appropriate) (citing *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 727 (Tex. 1998) ("[T]here is much to be said for maintaining as much uniformity in state and federal evidence rules as possible.")). "The business records exception to the hearsay rule applies only if the person who makes the statement 'is himself acting in the regular course of business.'" *Rock v. Huffco Gas & Oil Co.*, 922 F.2d 272, 279 (5th Cir. 1991) (citing *Fla. Canal Indus., Inc. v. Rambo*, 537 F.2d 200, 202 (5th Cir. 1976)).

III. Texas Rule of Evidence 803(6)

A. "Custodian of Records"

The phrase "custodian of records" as utilized in Texas Rule of Evidence 803(6) appears unambiguous; I am unaware of any argument here or anywhere that this term of art is so unclear that it requires interpretation. However, the majority's holding incorrectly (and without precedent) extends the meaning of this term to justify admission of hearsay even when the record does not tend to prove the proffered witness (1) was the "custodian" of any relevant thing or (2) had any relevant knowledge tending to create a sufficient indicia of reliability. *See Sneed v. State*, 955 S.W.2d 451, 454-55 (Tex. App.—Houston [14th Dist.] 1997, pet. ref'd) ("The sponsoring witness for the evidence had no knowledge about the source or accuracy of the information contained in the proffered medical records. Thus, as to the basis of the statements and their medical accuracy, there is no evidence that establishes reliability or trustworthiness. As such, they lack the necessary indicia of

reliability sufficient to ensure the integrity of the fact finding process."); *see also id.* at 454 ("Even hearsay evidence falling within a recognized exception to the hearsay rule is inadmissible if it lacks the 'indicia of reliability sufficient to ensure the integrity of the fact finding process.'") (citing *Philpot v. State*, 897 S.W.2d 848, 852 (Tex. App.—Dallas 1995, pet. ref'd) (citing *Porter v. State*, 578 S.W.2d 742, 746 (Tex. Crim. App. 1979))).

Under these facts, Franks is not a (and certainly not "the") "custodian of records" within the meaning of Texas Rule of Evidence 803(6)(D) for either the recordings made by Securus or the recordings copied by Harris County. First, there is no evidence Franks had (1) custody, maintenance authority, or control over the original recordings, (2) access to the original recordings made by Securus, (3) the ability to copy original recordings made by Securus, (4) any knowledge surrounding the copying of Harris County's copy onto the disk presented at trial, or (5) familiarity with how any relevant recordings were kept, accessed, modified, or copied onto discs. This absence precludes (1) the possibility that Franks had custody of the recordings for purposes of Rule 803(6); and (2) the propriety of concluding there is sufficient indicia of reliability concerning the recordings of Appellant's alleged out-of-court statements.

Second, this controlling absence of reliability and trustworthiness is compounded by (1) the incorrect name on the disk; (2) the incorrect SPN on the disk; (3) error purportedly predicated upon typography or making two disks at the same time;[3] (4) deputy Galvan being the only deputy with relevant duties; (5) deputy Galvan doing "all the work"; (6) deputy Galvan making the disk; (7) deputy Galvan

[3] The record also reflects that despite these material errors (rendering the hearsay untrustworthy), these recordings produced at trial "correspond with the usual practices of the Harris County Jail."

being unavailable at trial; (8) the absence of evidence as to whether the calls in question were complete (or, if they were incomplete, (a) why they were incomplete, (b) how they became incomplete, (c) who or what process made them incomplete, (d) when they were rendered incomplete, or (e) what evidence was removed to render them incomplete); (9) the fact that Franks did not know Appellant's voice or name; (10) the fact that Franks did not even know if Appellant was in the jail at the time the recording was made; and (11) Franks' "guess" that the voice on the recording was Appellant based on a disturbingly untrustworthy explanation about inmates calling "a known person and that phone number is located that known person at the beginning when it asks this is a[n] inmate."

Here, no evidence tends to prove Franks cared for or controlled the recordings in any way. Instead, the evidence simply permits us to (at most) presume he had access to the disk with the recordings at issue. This important distinction raises a significant question the majority leaves unaddressed. *See Jordan v. Commonwealth*, 74 S.W.3d 263, 269 n.13 (Ky. 2002) ("[W]hile Botts may have access to records, she is not the custodian of records. This raises substantial questions regarding whether the witness could lay a foundation for the evidence."); *see also Custodian*, Black's Law Dictionary (11th ed. 2019) ("A person or institution that has charge or custody (of a child, property, papers, or other valuables)").

Notably, Franks does not even refer to himself as the custodian of Securus's *or* Harris County's recordings; instead, the record reveals that both Franks and the State believed Deputy Galvan was the custodian.[4] No evidence permits us to

[4] The record reveals the State represented that it subpoenaed Deputy Galvan (not Franks) as "custodian". Although the State asked Franks, "Is he [deputy Galvan] also custodian of records?", it never asked whether he (Franks) was a custodian. Instead, the transcript reveals the State asked whether Galvan both (1) made the record at issue and (2) was also the custodian.

Q: . . . Sergeant I'm showing you what's been pre-marked as State's Exhibit 18. Do you

conclude Franks was the custodian of the original recordings or Harris County's copies of those recordings. These failures violate the guarantees of trustworthiness that are built into the exception. *See Nat'l Health Res. Corp. v. TBF Fin., LLC*, 429 S.W.3d 125, 130 (Tex. App.—Dallas 2014, no. pet.) ("When an affiant's summary judgment affidavit contains testimony that identifies him as a record custodian and establishes his relationship with the facts of the case in a manner sufficient to demonstrate the facts at issue, the personal knowledge requirement for summary judgment affidavits may be satisfied."); and *Kyle v. Countrywide Home Loans, Inc.*, 232 S.W.3d 355, 359 (Tex. App.—Dallas 2007, pet. denied) (finding personal knowledge based on testimony that the affiant was custodian of records and a "foreclosure specialist" for the loan servicer). Even if Franks had represented that he was the custodian of records, the presentment of a generic job title with no supporting facts is nothing more than a conviction-oriented conclusion of law from a law-enforcement officer. *See Williams v. Commonwealth*, 546 S.E.2d 735, 742 (Va. Ct. App. 2001) (Benton, J., concurring) ("I agree with the majority's conclusion that the statute's second authentication requirement means the custodian must have custody of the document when the copy is made. No evidence tends to prove, however, that the copy of the certificate that was admitted into evidence was

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recognize this?
A. Yes I do.
Q. What is it?
A. It's a disk of phone calls.
Q. Okay. And the label on the disk is this pretty standard for Harris County Sheriff[']s Office?
A. Yes, sir.
Q. Okay. Does the label indicate the person who made the disk?
A. It says Elias Ramirez Fernandez.
Q. Does it indicate the person who actually put the phone calls on?
A. Deputy Pete Galvan. Deputy in my office.
Q. Is he also custodian of records?
A. Yes.

'accompanied by a certificate that [Hux] does in fact have the custody.' Nothing on the certificate indicates that fact . . . Hux's job title, 'custodian of records,' . . . does not establish that Hux had the original certificate in his possession when he certified the proffered copy to be a true copy. Being a generic 'custodian of records' does not prove custody of a particular document and certainly does not prove custody of the document when the copy was made.").

B. "Qualified Witness"

The majority also improperly casts aside Appellant's hearsay argument because he failed (at trial) to object based on the "qualified witness" prong of Texas Rule of Evidence 803(6). In doing so, the majority troublingly ignores the record while implicitly approving the trial court's admissions of evidence based upon uncontested hypothetical arguments that were never presented (thereby raising due process concerns both at trial and on appeal).[5] Even if the majority's interpretation of undisputed facts were accepted to mean that the "qualified witness" prong should be considered on appeal, its reasoning remains flawed.

The State was the first to utilize the phrase "custodian of records" at trial and never (until appeal) used the word "qualified". The trial court was the next to mention the "custodian of records" and never mentioned a "qualified witness"; instead, the record reveals the court stated (*at trial*), "the State's calling a custodian of records." There is no fact permitting us to reasonably infer that the issue of "qualified witness" was even presented to (much less ruled upon by) the trial court. Even if I were to ignore the record and accept that the trial court overruled Appellant's objection because it concluded the State satisfied its burden by

[5] *Contra Cofield v. State*, 891 S.W.2d 952, 954 (Tex. Crim. App. 1994) ("Based upon [Appellant's] objection [to hearsay] and the State's response thereto, it is obvious that the trial court and the parties were well aware that the evidence was being proffered as an exception to the hearsay rule as a statement against the passenger's penal interest.").

establishing Franks was a "qualified witness", it abused its discretion when it did so (especially because there is no evidence Appellant had (1) notice or a meaningful opportunity to be heard on this apparently dispositive issue or (2) any relevant burden (*see infra*)).

Franks is not a qualified witness under Texas Rule of Evidence 803(6) because there is no evidence he had "personal knowledge of the mode of preparation of the records." *See Montoya v. State*, 832 S.W.2d 138, 141 (Tex. App.—Fort Worth 1992, no pet.).[6] "The requirement of firsthand knowledge is a rule more ancient than the

[6] *See also Ermisch v. HSBC Bank USA*, No. 03-16-00080-CV, 2016 WL 6575232, at *3 (Tex. App.—Austin Nov. 4, 2016, pet. denied) (mem. op.) ("Vaughn testified that in her role as a paralegal and custodian of records, she had 'care, custody, and control of all records concerning the forcible entry and detainer proceeding against [the Ermisches].' She further described how records are made and kept on behalf of HSBC's law firm. Vaughn then identified the attachments as originals or exact copies of HSBC's records and proved them up as business records."); *Canseco v. State*, 199 S.W.3d 437, 440 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd); *Mitchell v. State*, 750 S.W.2d 378, 379-80 (Tex. App.—Fort Worth 1988, pet. ref'd) ("Additionally, a qualified witness need not have personal knowledge as to the contents of the records but rather he need only have personal knowledge of the mode of preparation of the records.") (citing *Knapper v. State*, 629 S.W.2d 865, 867 (Tex. App.—Houston [14th Dist.] 1982, no pet.)); *U.S. Commodity Futures Trading Comm'n*, 594 F.3d at 416 (witness was not sufficiently qualified where she did not have sufficient "knowledge regarding the keeping of the records" or creation thereof); *United States v. Brown*, 553 F.3d 768, 792 (5th Cir. 2008) ("A qualified witness is one who can explain the record keeping system of the organization and vouch that the requirements of Rule 803(6) are met."); *id*. (affirmation of trial court's exclusion of evidence because the witness was not sufficiently qualified under Rule 803(6); although the witness "knew about the pharmacy computer system, how to operate the system, and how to extract information from it," there was no evidence he had any knowledge concerning the relevant entity's record keeping practices); *Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 307 (5th Cir. 1978) ("Under Fed.R.Evid. 803(6) . . . the testimony of the custodian or other qualified witness who can explain the record-keeping procedure is essential. If the witness cannot vouch that the requirements of Fed.R.Evid. 803(6) have been met, the entry must be excluded."); *id.* (holding witnesses without personal knowledge could not authenticate records under Rule 803(6)); *accord United States v. Reese*, 666 F.3d 1007, 1017 (7th Cir. 2012) (witness who lacked knowledge of how relevant information was generated was insufficiently qualified); *Dyno Constr. Co. v. McWane, Inc.*, 198 F.3d 567, 576 (6th Cir. 1999) (citing *Zayre Corp. v. S.M. & R. Co.*, 882 F.2d 1145, 1150 (7th Cir. 1989) (noting that a person qualified to lay the foundation under Rule 803(6) need not even be an employee of the entity keeping the records, as long as the witness understands the system by which they are made)); and *United States v. Console*, 13 F.3d 641, 657 (3d Cir. 1993) (qualified witness must have familiarity with the record-keeping system and the ability to attest to the foundational requirements of Rule 803(6)). *Cf. Echo*

hearsay rule . . . . This rule mandates that witnesses are qualified to testify to facts susceptible of observation only if it appears that they had a reasonable opportunity to observe the facts." 2 McCormick On Evid. § 247 (8th ed.). While "[m]odern technology is somewhat blurring the lines of what constitutes firsthand knowledge" (*id.* at n.1), the record before us does not reveal Franks had *any* relevant first-hand knowledge concerning the way *any* recording was kept, accessed, or copied. The record is therefore devoid of any fact which permits us to presume the strict requirements set forth in Rule 803(6) have been satisfied.

IV. Trustworthiness

The majority also concludes Appellant loses because he did not specifically object to the absence of trustworthiness at trial. This holding ignores the fact that, "[t]he hearsay exception for regularly kept records is justified on grounds of trustworthiness and necessity that underlie other hearsay exceptions." 2 McCormick On Evid. § 286 (8th ed.); *see also United States v. Wables*, 731 F.2d 440, 449 (7th Cir. 1984) (holding the "regular practices and procedures surrounding the creation of the records" are "the very elements that are necessary for a finding of trustworthiness.") (citing *Louisville & Nashville R.R. Co. v. Knox Homes Corp.*, 343 F.2d 887, 895 (5th Cir. 1965)). Here, (1) someone else's name was on the recording of the recording, (2) someone else's SPN was on the recording of the recording, and (3) the proffered witness (a) was not a custodian of records, (b) was not a qualified witness, and (c) could not offer any trustworthy explanation as to how those errors

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Acceptance Corp. v. Household Retail Servs., Inc., 267 F.3d 1068, 1090 (10th Cir. 2001) (citing Federal Rule of Evidence 803(6) advisory committee's note (1972) describing rationale underlying exception as "[t]he element of unusual reliability . . . said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation") (citation omitted)).

occurred. These facts unavoidably invoke trustworthiness. *See* 2 McCormick On Evid. § 288 (8th ed.) ("significant mistakes and internal contradiction support exclusion for lack of trustworthiness") (citing *U.S. v. Bess*, 75 M.J. 70, 74 (Armed Forces App. 2016)). Objections to the admissibility of evidence under Rule 803(6) naturally attack the evidence's trustworthiness precisely because such trustworthiness is the naturally predominate justification for the carefully-crafted hearsay exception for records of regularly conducted business activities. *See, e.g.,* 2 McCormick On Evid. § 286 (8th ed.).

V. Burdens

Without citing any authority, the majority's analysis also presumes it was Appellant's burden to establish the inadmissibility of the State's hearsay. This is contrary to controlling law. *See Ortiz v. State*, 999 S.W.2d 600, 607 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (objection to hearsay "shifted the burden to the State to show that the evidence was not hearsay or admissible pursuant to a hearsay exception.").[7] The State's burden in this respect is long-standing. *See Moree v.*

[7] *See also Martinez v. State*, 178 S.W.3d 806, 815 (Tex. Crim. App. 2005) ("If the testimony fit some exception or exemption to the hearsay rule (or if the evidence was not being offered for the truth of the matter asserted) the State, as the proponent of the evidence, had the burden of demonstrating the applicability of that exemption or exception."); *Volkswagen of Am., Inc.,* 159 S.W.3d at 908 n.5 ("The proponent of hearsay has the burden of showing that the testimony fits within an exception to the general rule prohibiting the admission of hearsay evidence.") (citing *Skillern & Sons, Inc.,* 359 S.W.2d at 301); *In re R.H.W. III*, 542 S.W.3d 724, 738 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (citing *Volkswagen of Am., Inc.*, 159 S.W.3d at 908 n.5); and *In re E.A.K.*, 192 S.W.3d 133, 140-41 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (same). *Cf. White v. State*, 549 S.W.3d 146, 151-52 (Tex. Crim. App. 2018) (analyzing burdens); *Meador v. State,* 812 S.W.2d 330, 333 (Tex. Crim. App. 1991) (proponent has the burden to show statement meets the requirements of the rule); and *Long v. State*, 800 S.W.2d 545, 548 (Tex. Crim. App. 1990) ("As proponent of the evidence, the State had the burden to satisfy each element of this predicate for admission of the mother's testimony pursuant to Art. 38.072 . . . or to provide some other exception to the hearsay rule. Appellant did not waive his right to appellate review by failing to specifically cite to the statute or to request a hearing where the statute pertains only to hearsay statements of child abuse victims.").

State, 183 S.W.2d 166, 168-69 (Tex. Crim. App. 1944) ("It must be remembered that, in cases of this character where hearsay testimony is sought to be used against an accused and identifying him as the guilty party, the burden is upon the State to show that such testimony falls within an exception which authorizes the introduction of such testimony. Unless, then, the testimony is shown to fall within the exception, its admissibility has not been established."). "Because the State failed to carry its burden, the trial court erred in admitting the [evidence]." *De La Paz v. State*, 273 S.W.3d 671, 681 (Tex. Crim. App. 2008).

The State never suggested that Franks was "qualified" to be a witness in any capacity other than as a custodian of records. The State also cites to no authority for its conclusory presumption that we have jurisdiction to examine whether Franks was a qualified witness despite never arguing it at trial. The State's failure to cite any such authority waives the argument and we should ignore it in its entirety. *See Sarsfield v. State*, 11 S.W.3d 326, 328 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd) ("The State does not support its conclusory argument with any authority, and this argument is waived.") (citing Tex. R. App. P. 38.1(h); *Lane v. State*, 933 S.W.2d 504, 511 & n.7 (Tex. Crim. App. 1996); and *Johnson v. State*, 853 S.W.2d 527, 533 (Tex. Crim. App. 1992)). These "ordinary notions of procedural default should apply equally to the defendant and the State." *State v. Mercado*, 972 S.W.2d 75, 78 (Tex. Crim. App. 1998). I accept this guidance from Texas' highest criminal court concerning equal application of the law in criminal cases and am deeply troubled by the majority's silent rejection thereof. To compound matters, the majority's erroneous acceptance of a hypothetical (yet still mistaken) justification never addressed by the trial court amplifies its erroneous focus on Appellant's alleged failure to attack the "trustworthiness" of the State's evidence,[8] particularly given the

[8] *See Davis v. State*, 872 S.W.2d 743, 749 (Tex. Crim. App. 1994) ("The burden lies with

fact that the State's copy of the recording is inexplicably connected to some other inmate. Under these facts, this copy of a recording of an out-of-court statement being introduced to prove Appellant pulled a gun on complainant defies reason because it is ridiculously untrustworthy.[9]

VI. Harm

We cannot reverse a conviction due to the erroneous admission of hearsay testimony unless we conclude that it affected the appellant's substantial rights. *See* Tex. R. App. P. 44.2(b); *Taylor v. State*, 268 S.W.3d 571, 592 (Tex. Crim. App. 2008). An error affects a substantial right when it has a substantial and injurious effect or influence in determining the jury's verdict. *Taylor*, 268 S.W.3d at 592; *Saldinger v. State*, 474 S.W.3d 1, 7 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). An error does not affect a substantial right "if we have fair assurance that the error had no influence or only a slight influence on the jury." *Saldinger*, 474 S.W.3d at 7. Due to the unavoidable absence of such an assurance here (plus the presence

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the party seeking to admit the statement, and the test is not an easy one; the evidence of corroborating circumstances must *clearly* indicate trustworthiness.") (emphasis in original) (citing *United States v. Salvador,* 820 F.2d 558, 561 (2nd Cir.) (suspicion with which drafters regarded such statements by third parties is reflected in fact that burden is on accused to justify admission of statement and corroboration which must "clearly" indicate *trustworthiness* is "not an insignificant hurdle") (emphasis added)). *See also* 2 McCormick On Evid. § 288 (8th ed.) ("Logic places the initial burden on the proponent of the documents admission to show that it meets the basic requirements of the rule with the opponent having the burden to show lack of *trustworthiness* based on the source of information or the method or circumstances of preparation.") (emphasis added).

[9] *See Sneed*, 955 S.W.2d at 454 ("The *Porter* court [578 S.W.2d 742, 746 (Tex. Crim. App. 1979)] concluded that because the documents offered by the State and admitted at trial contained hearsay upon hearsay and opinions regarding the defendant from unnamed sources, it defied reason 'to suggest that [these documents], merely because they were collected in a file in a government office, have the indicia of reliability sufficient to insure the integrity of the fact finding process commensurate with the constitutional rights of confrontation and cross-examination.' . . . . We recognize that in *Porter* the proponent of the erroneously admitted evidence was the State, but the analysis there is relevant here because the primary focus is the reliability of the evidence, not the status of the proponent.").

of an improperly admitted apparent confession from an unidentified person concerning materially similar facts), this erroneous admission of untrustworthy hearsay had a substantial and injurious effect or influence in determining the jury's verdict and therefore affected a substantial right.

Under these facts, the State should be estopped from arguing the admission of the calls did not affect a substantial right. In its appellate brief concerning legal sufficiency of the evidence, the State contends that, "for seven months, as documented in his jail calls, Appellant tried to get friends or family to bribe Soria so that she would either recant or not cooperate with prosecution." The only other facts cited by the State for legal sufficiency are (1) the complainant knew Appellant, (2) the complainant identified Appellant, (3) Appellant tried to evade capture, and (4) Appellant's phone calls concerning the complainant evidence his guilt because he knew she would "establish that he was the person who robbed her." Therefore, the State's active reliance upon inadmissible out-of-court statements to meet the standards of legal sufficiency where so few other facts establish Appellant's guilt beyond a reasonable doubt constitutes harm that demands reversal.

The record before us shows (1) all non-privileged phone calls in the Harris County Jail are recorded; (2) the calls in question were not privileged; (3) the system records both sides of each call; (4) both sides hear a recorded message saying "that the phone call could be recorded"; (5) phone calls are traced according to what SPN and pin number (specific to each inmate) are entered into the system; (6) Franks knew inmates stole or traded SPNs; (7) Franks knew each inmate's PIN was simply the inmate's month and day of birth (rather than a personally selected number); (8) someone else's name and SPN were on the disk containing the relevant statements; (9) Franks did not know if Appellant was in the jail at any relevant time; (10) Franks did not know Appellant's voice; (11) Franks did not make the disk;

(12) Galvan was "the only deputy" with relevant recordkeeping duties; (13) Galvan placed the phone calls on the disk "and did all the work"; (14) Galvan's name was on the disk revealing that he was the person who made it; and (15) Franks testified that said error was based on a "typographical error or mak[ing] two disks at the same time." Additionally, the person who was recorded said, "It's f***ed up what I did. I pointed the gun at her . . . . She called the law, that's the only reason they caught me." Therefore, this improperly admitted evidence affected a substantial right because (1) it constituted a confession concerning materially similar facts from one of thousands of inmates in Harris County's custody and (2) is tied to Appellant via (a) an incorrect name and (b) an incorrect SPN. These recordings lack the necessary "indicia of reliability sufficient to ensure the integrity of the fact finding process." *Sneed*, 955 S.W.2d at 454-55. This admission from an unknown person effectively corroborated the complainant (and only eyewitness). Without this unauthenticated confession, the jury could have reasonably chosen to disbelieve said witness.

VII. Conclusion

The trial court erred when it admitted recordings of out-of-court recordings of statements under the regularly conducted business activity exception to the prohibition against hearsay because they were not authenticated by a custodian of records or qualified witness. The majority errs by (1) approving the trial court's apparently implicit reliance on an exception to the prohibition against hearsay that was never presented (despite a valid objection), (2) approving the trial court's admission of evidence that lacks a sufficient indicia of reliability, and (3) faulting Appellant for neither (a) objecting to the hearsay at issue based on trustworthiness and (b) arguing Franks was not a "qualified witness". Even if the "qualified witness" exception to the prohibition against hearsay had been both presented in accordance with the State's burden and ruled upon, the trial court still abused its discretion

because there is no evidence tending to show (1) Franks was sufficiently "qualified" within the meaning of the rule, or (2) the evidence was even remotely trustworthy. Because these errors affected Appellant's substantial rights, his conviction should be reversed.

/s/ Meagan Hassan
Justice

Panel consists of Chief Justice Frost and Justices Wise and Hassan (Frost, C.J., majority).
Publish — Tex. R. App. P. 47.2(b).