

Opinion issued July 9, 2020



In The  
**Court of Appeals First District of Texas**

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**NO. 01-18-00991-CR**

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**ALFERIS COBY, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 180th District Court  
Harris County, Texas  
Trial Court Case No. 1485214**

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**MEMORANDUM OPINION**

Alferis Coby was convicted of felony murder after he and a codefendant shot Juan Ramirez during a robbery. TEX. PENAL CODE § 19.02(b)(3). On appeal he contends that the evidence was insufficient to support his conviction and the trial court erred by denying his motion to suppress. We affirm.

## **Background**

On March 12, 2015, Juan Carlos Ramirez was shot and killed during a robbery in the parking lot of a bar in downtown Houston. Ramirez's truck was stolen during the incident. Police found Ramirez's body in the parking lot, with a cell phone in his hand.

Ramirez and his friend Shu-Tin Chloe Ward had gone to the bar to see a friend perform. After the performance, they walked outside to Ramirez's pickup truck. Ward got in the truck to make a phone call, and Ramirez stood outside. Before Ward could complete the call, she heard a commotion near the truck, including voices she did not recognize. She heard Ramirez say that he would not give up his keys and that he was going to call the police. Ward attempted to lock the car and tried to call police. Before she could complete the call, someone got into the front seat of the truck, holding a gun in his hand. He lunged at her, put the gun to her head, and threatened to shoot her if she did not give him her belongings. Ward threw her phone onto the front passenger side floorboard and ran out of the truck. As she ran toward the bar for help, she heard Ramirez yell that the police were on their way. She also heard a gunshot.

Law enforcement developed a description of two suspects. They discovered that Ward's cell phone remained active and traced it to a duplex in Houston. Officers performed surveillance on the location and observed Ramirez's truck being driven

by someone who matched the description of one of the suspects. After following the car and a brief chase, they arrested Coby's codefendant. Later, they approached Coby when he left the duplex. Coby fled and crawled under a nearby house. He eventually surrendered when threatened with release of a police dog.

After he was arrested, law enforcement realized that Coby was 15 years old. They took him to a magistrate judge for statutory warnings and then to the police headquarters downtown. The same detective interviewed Coby and his codefendant separately. Simultaneously, another officer attempted to notify Coby's guardian, but Coby did not give officers a working phone number for his grandmother, and searches did not recover phone numbers for her.

When interviewed, Coby confessed to the crime. He admitted that he wanted money to buy something for his girlfriend so he and his codefendant went downtown intending to rob someone. They walked by a bar and went into the parking lot. Coby held a gun to a man while his codefendant grabbed the man's car keys, but the man grabbed for the gun. The man started chasing his codefendant while Coby got in the truck and grabbed a phone belonging to the woman inside. She got out of the car and ran. Coby admitted that he shot the man.

About a month after the murder, Ward identified Coby in a photo array as the person who got into the truck. Ward also identified her cellphone, which was recovered in the front passenger seat of the truck. Forensic searching of the phone

showed that two contacts had been added after the incident: “Smiley” and “Dino.” Ward did not know anyone by either name. Police knew that Coby used the nickname “Smiley.” Calls were made from the phone to “Smiley” on six occasions in the day after the murder. The phone’s browsing history during that time also included “Ford car on Houston news” and “man shot and killed during carjacking.”

Coby was indicted for capital murder. He pleaded not guilty. A jury found him guilty of the lesser-included offense of felony murder and assessed punishment at 70 years’ imprisonment. He appeals.

### **Sufficiency of the Evidence**

In his first issue, Coby contends that there is insufficient evidence to support his conviction. We disagree.

#### **A. Standard of Review**

In an appeal of a criminal conviction, we review the challenge to the sufficiency of the evidence under the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 318–20 (1979). *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). Under the *Jackson* standard, evidence is insufficient when, considered in the light most favorable to the verdict, no rational factfinder could have found that each essential element of the charged offense was proven beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319; *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009). We consider all evidence in the record, whether it was admissible or

inadmissible. *Winfrey v. State*, 393 S.W.3d 763, 767 (Tex. Crim. App. 2013). Legal sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge. *Hernandez v. State*, 556 S.W.3d 308, 312 (Tex. Crim. App. 2017) (quoting *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)).

We consider both direct and circumstantial evidence as well as all reasonable inferences that may be drawn from the evidence. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We defer to the jury's credibility and weight determinations because the jury is the sole judge of the credibility of witnesses and the weight to be given their testimony. *Brooks*, 323 S.W.3d at 899. We resolve inconsistencies in the evidence in favor of the verdict. *Clayton*, 235 S.W.3d at 778 (“When the record supports conflicting inferences, we presume that the factfinder resolved the conflicts in favor of the prosecution and therefore defer to that determination.”).

Circumstantial evidence is as probative as direct evidence in establishing guilt, and circumstantial evidence alone can be sufficient to establish guilt. *Sorrells v. State*, 343 S.W.3d 152, 155 (Tex. Crim. App. 2011). “Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction.” *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). If an appellate court

finds the evidence insufficient, it must reverse the judgment and enter an order of acquittal. *Estrella v. State*, 546 S.W.3d 789, 797 (Tex. App.—Houston [1st Dist.] 2018, pet. ref'd).

A person commits felony murder if the person commits or attempts to commit a felony, other than manslaughter, and in the course of or furtherance of the commission, the attempt, or the immediate flight therefrom, he commits an act clearly dangerous to human life that causes the death of an individual. TEX. PENAL CODE § 19.02(b)(3).

## **B. Analysis**

As an initial matter, Coby suggests that we should not consider his confession because the trial court erroneously admitted it. He argues that without the confession, the evidence was insufficient to support his conviction. When deciding sufficiency of the evidence, appellate courts consider all evidence in the record in the light most favorable to the verdict, whether that evidence was admissible or inadmissible. *Winfrey*, 393 S.W.3d at 767. We consider all evidence before the jury, including Coby's custodial statement.

The jury heard sufficient evidence to conclude that Coby committed an act clearly dangerous to human life in furtherance of the felony offense of robbery. *See* TEX. PENAL CODE § 19.02(b)(3) (felony murder). Ward testified that, in the early morning hours, she and Ramirez were in the parking lot behind a nightclub in

midtown Houston. She got in the backseat of Ramirez's truck to make a phone call. While she was in the back seat, she heard a commotion outside that included Ramirez and a voice she did not know. She tried to lock the truck and call 911, but someone got into the front seat of the truck, pointed a gun at her, and demanded her belongings. She threw her phone into the front passenger side floorboard, got out of the truck, and ran. While she was running, she heard a gunshot. She stayed at the scene when law enforcement responded, and later told them that when she called her cell phone, someone answered. Ward later identified Coby as one of the robbers.

Law enforcement found Ramirez dead on the ground, holding his cell phone. Police located Ramirez's truck by tracking Ward's phone. The truck was found near Coby and his codefendant, and the phone was inside the truck. Officers observed the truck and surrounding area. When they approached Coby, he ran under a house. Once threatened that a police dog would come after him under the house, Coby surrendered.

Ward's phone was taken into evidence. When they searched the phone, officers discovered Coby's contact information had been entered into the phone shortly after it was stolen, and several calls had been placed to Coby after the murder. They also discovered searches in the browser history for "Ford car on Houston news" and "man shot and killed during carjacking."

A medical examiner testified that Ramirez died from a gunshot to the heart and opined that the person who shot him was at most three feet away.

The jury watched a recording of Coby's custodial statement. He admitted that he and his codefendant went to downtown Houston with the intention of robbing someone. He also admitted that he shot Ramirez. The video included footage of Coby using an officer's phone to call family and friends. During the phone calls, Coby admitted that he had made bad choices and that he "popped" a guy who died shortly after.

The jury heard sufficient evidence to convict Coby of felony murder. In doing so, the jury could consider the law of parties. The law of parties establishes that a person is criminally responsible for an offense committed by the conduct of another if he aids, encourages, or attempts to aid another person in committing the offense. TEX. PENAL CODE § 7.02(a)(2). The jury heard evidence that Ramirez was shot by Coby or his codefendant when they tried to rob him and steal his car. We hold that the evidence is sufficient to support a conviction for felony murder. We overrule Coby's first issue.

### **Motion to Suppress**

In his second issue, Coby contends that the trial court improperly overruled his motion to suppress and should not have admitted his statement for three reasons: (1) the interviewing officer did not notify Coby's grandmother; (2) Coby did not



expressly waive his statutory rights by using the word “waiver” or by explicitly agreeing that he “waived his rights”; and (3) the recording device broke the recording of the statutory warnings given by the magistrate into a separate file from the statement Coby gave officers on the same digital recorder. We hold that the trial court did not err in denying Coby’s motion to suppress.

**A. Standard of Review**

We review the trial court’s ruling on a motion to suppress a statement for an abuse of discretion. *Balentine v. State*, 71 S.W.3d 763, 768 (Tex. Crim. App. 2002). When, as here, the trial court makes factual findings, we determine whether the evidence, when viewed in the light most favorable to the trial court’s ruling supports those findings. *State v. Iduarte*, 268 S.W.3d 544, 548 (Tex. Crim. App. 2008). At a suppression hearing, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Cantu v State*, 817 S.W.2d 74, 77 (Tex. Crim. App. 1991). We give great deference to the trial court’s determination of historical facts. *Iduarte*, 268 S.W.3d at 549. Mixed questions of law and fact that turn on the credibility and demeanor of a witness are reviewed for an abuse of discretion, and mixed questions of law and fact that do not turn on the credibility and demeanor of a witness are reviewed de novo. *Id.* We will affirm if the trial court’s ruling is correct under any theory of law applicable to the case. *Id.* at 548.

## **B. Applicable Law**

Because Coby was a juvenile at the time of his arrest, the Family Code controls certain issues involving his substantive rights. *Roquemore v. State*, 60 S.W.3d 862, 866 (Tex. Crim. App. 2001). “The Family Code seeks to strike a balance between the competing interests of public safety and child welfare. This balance is struck in part by limiting the investigative function of the police.” *Id.* at 872 (internal citation removed). Evidence obtained in violation of the applicable provisions of the Family Code must be suppressed. TEX. CODE CRIM. PROC. art. 38.23(a) (“No evidence obtained by an officer or other person in violation of any provision of the Constitution or laws of the State of Texas . . . shall be admitted in evidence against the accused on the trial of any criminal case.”); *see also Jeffley v. State*, 38 S.W.3d 847, 854 (Tex. App.—Houston [14th Dist.] 2001, pet. ref’d) (observing that unlawfully obtained statements are inadmissible against juvenile in criminal proceedings treating juvenile as adult).

The admissibility of custodial statements made by a juvenile is governed by section 51.095 of the Family Code. *See* TEX. FAM. CODE § 51.095. Subsection 51.095(a)(5) provides that a juvenile’s oral statement is admissible if these conditions are satisfied: (1) the statement is made while the child is in the custody of an officer, in a detention facility or other place of confinement, or in possession of the Department of Family and Protective Services; (2) the statement is recorded

by an electronic recording device; and (3) at some time before making the statement, “the child is given the warning described by Subdivision (1)(A) by a magistrate, the warning is part of the recording, and the child knowingly, intelligently, and voluntarily waives each right stated in the warning.” *Id.* § 51.095(a)(5). Section 51.095 incorporates the warnings required by *Miranda*, with additional safeguards in place to protect juveniles. *Id.* § 51.095; *see Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

A juvenile’s oral statement made as a result of custodial interrogation without the benefit of a magistrate warning is inadmissible at trial. *See* TEX. FAM. CODE § 51.0595(a)(5), (b)(1); *see also* TEX. CODE CRIM. PROC. art. 38.22 § 3. But section 51.095 does not preclude admission of a juvenile’s statement if the statement does not stem from custodial interrogation. *See* TEX. FAM. CODE § 51.0595(b), (d); *Matthews v. State*, 513 S.W.3d 45, 62 (Tex. App.—Houston [14th Dist.] 2016, pet. ref’d); *see also Laird v. State*, 933 S.W.2d 707, 713 (Tex. App.—Houston [14th Dist.] 1996, pet. ref’d) (discussing prior version of statute and explaining that it “allows an oral statement to be admitted if it is not in response to custodial interrogation”). Custodial interrogation is “questioning that is initiated by law enforcement after a person has been taken into custody or otherwise deprived of his freedom in any significant way.” *Delacerda v. State*, 425 S.W.3d 367, 386 (Tex. App.—Houston [1st Dist.] 2011, pet. ref’d).

### **C. Motion to Suppress Hearing**

Coby's motion to suppress his statement alleged that police violated his constitutional rights and the Texas Family Code's requirements for juvenile interrogation. The court held a hearing on his motion. Officer Burrow testified that he interviewed Coby after the Houston Police Department took him into custody. Before taking Coby's statement, Officer Burrow took him before a magistrate to receive the statutorily required juvenile warnings. He took a digital audio recorder into the judge's chambers, put the timestamp information on the recording, and left Coby alone in the room with the judge to receive his warnings. The digital recorder captured the warnings the judge gave to Coby. Officer Burrow testified that he later listened to the judge's discussion with Coby and verified that the warnings were given. After Coby received the warnings from the judge, he was taken to the juvenile processing office of the Houston Police Department Homicide Division.

While Officer Burrow interviewed Coby's codefendant and then Coby, Officer Rodriguez attempted to contact Coby's grandmother. He searched databases and called the best number he could find, but she did not answer. The following day, another officer with the Houston Police Department Juvenile Division reached her.

Officer Burrow recorded his interview with Coby on the same digital recorder, and the recorder created two files. Both were timestamped showing the warnings occurred first, followed by the statement. Officer Burrow explained that when

someone presses stop on the digital recorder, it automatically creates a new file, resulting in two files – the warnings and the interview.

Officer Burrow interviewed Coby for about thirty minutes, ending at 9:00 p.m. Coby then asked to call his girlfriend. Officer Burrow let Coby make the phone call on his city-issued cell phone and left the room. Coby spoke to his girlfriend, his grandmother, and at least two other people during the call. Video recording captured him making the phone call, and the judge viewed it during the motion-to-suppress hearing. During the call, Coby told his grandmother that he was taken by police to the Homicide Division. He told her that he had been making bad decisions, and he had been caught. He admitted to her that he had been out the night before near a bar downtown with his codefendant. He explained that they tried to rob a man, but the man fought back, and Coby “popped him in the chest and like five minutes later he died.” Coby asked her to bring his girlfriend to court so that he could see her. He told someone else on the call that he had been caught for capital murder. He also said “that just how it goes down in the jungle.”

Coby testified at the hearing, stating that he did not pay attention to the magistrate judge’s warnings. He said he signed the paper that was put in front of him and claimed not to understand the warnings or that he was waiving his rights. He also testified that he only wanted to get the statement out of the way so that he could

go to sleep. He said that if his grandmother told him he was under investigation for murder, he would not have given a statement.

Coby admitted that he did ask the judge some questions and that he responded to the judge's warnings. He also admitted that he talked to his grandmother on the phone, and that she first visited him three days later.

The trial court reviewed the video of the interrogation and the audio of the magistrate judge's warnings. The court denied the motion to suppress and made findings of fact and conclusions of law. The court found Officer Burrow's testimony credible and Coby's testimony not credible. The court found that Coby was taken to a magistrate judge without unnecessary delay and that he received warnings that complied with the Family Code's provisions requiring that the defendant be alone with a magistrate and that the warnings be recorded. The warnings were completely explained to Coby in a manner that ensured he understood him, and Coby told the magistrate that he understood. Coby was repeatedly told that he did not have to talk to officers. Although he did not use the word "waive," it was clear to the trial court that he chose to waive his rights.

The court found that the warnings were recorded using the same recorder that was used to record his statement, but the recording was not necessarily captured on the same drive. The court stated that it was unclear what device, such as a USB thumb drive, was used to capture the warnings, but that the recordings were

timestamped, and the court could determine that Coby received the warnings before he gave a statement. The court found that the process substantially complied with the Family Code.

The court found that Coby was taken to the homicide division of the Houston Police Department, which is a designated juvenile processing officer. Officer Burrow interviewed Coby, and Coby initiated conversation and spoke voluntarily. While the interview was happening, another officer attempted to contact Coby's grandmother but was unsuccessful.

The findings include that Coby was given water and allowed to make phone calls from the officer's cell phone. He appeared to contact his grandmother and advise her that he had been arrested. His grandmother was notified by police the next day.

The court found that Coby's statement was freely and voluntarily given after receiving the statutory warning from a magistrate judge. Coby understood his rights and voluntarily waived them. His statement was given voluntarily without threats or coercion. The court found that the Family Code was complied with in most respects except as it relates to parental notification, but the statement was not automatically inadmissible for failure to promptly notify a guardian. The court found that there was no showing of a causal connection between the lack of guardian notification and

Coby's statement. There was no evidence that Coby's grandmother would have gone to the police station if she had been so notified.

#### **D. Failure to Notify Guardian**

First, Coby contends that the trial court erred in admitting his statement because police failed to notify his guardian before questioning him. Section 52.02(b) provides that a person taking a child into custody must promptly notify the child's parent or guardian of the person's action and a statement of the reason for taking the child into custody. TEX. FAM. CODE § 52.02(b)(1).

Even assuming the police failed to promptly notify Coby's guardian, we agree with the trial court that Coby failed to meet his burden to prove a causal connection between the failure to contact his grandmother and the making of his statement. *Pham v. State*, 175 S.W.3d 767, 772–73 (Tex. Crim. App. 2005) (“We have expressly held that a causal connection between a violation of section 52.02(b) and the obtaining of evidence *must be shown* before the evidence is rendered inadmissible.”).

Coby testified at the hearing on the motion to suppress, and the trial court found that his testimony lacked credibility. He testified that he valued his grandmother's advice and that he would not have given a statement had she told him he was under investigation for murder. The trial court heard a recording of the magistrate judge informing Coby that he had been accused of evading on foot and



that police wanted to talk to him about a murder. The record also reflects that Coby had been informed from the beginning of the interview with Officer Burrow that police placed him in custody to investigate a murder. At the beginning of the interview with Officer Burrow, which the trial court also watched, Coby was told that the charges would likely be capital murder. Given the evidence that Coby was told that he was being investigated for murder or capital murder before he made any inculpatory statements, Coby has not established that his grandmother telling him the same information would have been likely to change the outcome of his decision.

#### **E. Waiver of Rights**

Coby next contends that his statement should have been suppressed because neither he nor the magistrate judge used the word “waive” to determine whether he freely decided to speak to police.

The Family Code does not require that the defendant explicitly waive his rights. *See Marsh v. State*, 140 S.W.3d 901, 911 (Tex. App.—Houston [14th Dist.] 2004, pet. ref’d); *see also Crenshaw v. State*, No. 01-09-00791-CR, 2011 WL286126, at \*11 (Tex. App.—Houston [1st Dist.] Jan. 27, 2011, pet. ref’d) (mem. op., not designated for publication). The question is not whether a defendant explicitly waived his *Miranda* rights, but whether he did so knowingly, intelligently, and voluntarily. *Joseph v. State*, 309 S.W.3d 20, 25, (Tex. Crim. App. 2010). We consider the totality of the circumstances to determine whether he did so. *Id.*

The totality of the circumstances surrounding the interrogation shows that Coby knowingly, intelligently, and voluntarily waived his rights. The magistrate judge repeatedly explained Coby's rights. The record reflects that the magistrate judge told Coby:

You may remain silent and not make any statement at all. That means, just because they want to talk to you doesn't mean you have to talk to them. If they want to ask you questions, doesn't mean you have to answer their questions. If you want to, that's fine. If you don't want to, that's fine too. It's your right, not theirs.

The judge told Coby that if he chose to speak to police, his words could later be used as evidence if he were charged with a crime. The judge explained Coby's right to a lawyer before or during questioning, and he informed Coby that if he could not afford a lawyer, a lawyer would be appointed to represent him without cost. He told Coby that he could stop talking to the police during an interview if he changed his mind, became tired, or decided to stop. The judge reiterated, "Just because you start answering questions doesn't mean you have to continue answering questions." The judge asked Coby if he understood, and Coby responded affirmatively, including that he had no questions. The judge relayed additional information about what would happen next, and he repeated the warnings a third time, including: "You'll have to make the decision and you're going to have to tell them yes, I'll answer the questions, no, I won't, or I want to talk to a lawyer first."

The record also reflects that after Coby left the judge's chambers, he initiated the conversation with Officer Burrow by asking what would likely happen to him. The officer responded that it was Coby's decision. The officer reminded Coby that the judge had read him his legal warnings.

The record supports the trial court's conclusion that Coby knowingly, intelligently, and voluntarily waived his rights, and gave a statement.

**F. Recording of the magistrate judge's warning and the custodial statement**

Finally, Coby argues that the trial court erred in denying his motion to suppress because there was a break in the recording between the magistrate judge's warnings and his digitally recorded statement.

Section 51.095(a)(5)(A) notes that the magistrate judge's warning should be "a part of the recording" when taken as a warned, custodial statement. *See* TEX. FAM. CODE § 51.095(a)(5)(A) ("[B]efore making the statement, the child is given the warning described by Subdivision (1)(A) by a magistrate, the warning is a part of the recording, and the child knowingly, intelligently, and voluntarily waives each right stated in the warning."). Article 38.22 of the Code of Criminal Procedure requires that police record a defendant's oral custodial statement, and that "prior to the statement but during the recording the accused is given the warnings . . . and the accused knowingly, intelligently, and voluntarily waives any rights set out in the warning." TEX. CODE CRIM. PROC. art. 38.22 § 3(a) (1–2).

Coby argues that because the digital recorder used by officers separated the magistrate judge's warnings into a distinct audio file from the subsequent recording of the custodial statement, the trial court should have deemed them inadmissible. The State argues that the trial court's ruling should be upheld because the evidence shows substantial compliance with the requirements of Section 51.095(a)(5)(A) given that the warnings and interview occurred on the same digital device and timestamps show the warnings occurred consecutively.

We need not decide whether the audio recorder's separation of the warning and statement into two files violates section 51.095 because Coby has not shown that he was harmed by the admission of his recorded custodial statement. Statutory errors that result in erroneous admission of a statement are subject to a non-constitutional harm analysis. *Nonn v. State*, 117 S.W.3d 874, 880–81 (Tex. Crim. App. 2003) (addressing analysis of an article 38.22 violation as non-constitutional harm because such a violation did not render the statement unconstitutional). When performing a rule 44.2(b) harm analysis, we uphold the verdict unless the erroneous admission had a substantial and injurious effect on the jury's verdict. *Id.*; see TEX. R. APP. P. 44.2(b).

The record reflects that Coby admitted to his role in the murder during phone conversations with his family. Coby had no right to privacy in the contents of these conversations, and no police action caused him to make the inculpatory statements.

*See Cortez v. State*, 240 S.W.3d 372, 382 (Tex. App.—Austin 2007, pet. ref'd) (“[Juvenile] appellant’s claim of privacy in a police station interview room is not consistent with historical notions of privacy.”). Officer Burrow offered Coby his cell phone, and Coby appeared to call several family members and friends. The statements Coby made during the phone calls were not a result of a custodial interrogation as they were not in response to questions initiated by law enforcement. *See Delacerda*, 425 S.W.3d at 386. During the conversations, Coby admitted that he was “fixing to go down for capital murder.” He admitted that he had made bad decisions and been caught. He also stated: “We were out all night. We went to go there, we tried to get this man, and he fought back, and I popped him in the chest and like five minutes later he died.”

Physical evidence also tied Coby to the murder. Police tracked Ward’s cell phone to the house that Coby left immediately before he was arrested. The victim’s stolen car was found nearby with the phone inside. When police approached, Coby ran under a house. He only surrendered after police threatened K-9 intervention.

We overrule Coby’s second issue and uphold the trial court’s denial of his motion to suppress.

### **Conclusion**

We affirm the judgment of the trial court.

Peter Kelly  
Justice

Panel consists of Chief Justice Radack and Justices Kelly and Goodman.

Do not publish. TEX. R. APP. P. 47.2(b).