NUMBER 13-17-00420-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

TRACE BRITTON ADAMS, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 377th District Court of Victoria County, Texas.

MEMORANDUM OPINION

Before Justices Benavides, Hinojosa, and Perkes
Memorandum Opinion by Justice Perkes

A jury convicted appellant Trace Britton Adams of two counts of manufacturing or delivering a controlled substance in penalty group 3, between 28 and 200 grams, a second-degree felony. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.114 (a), (c). The trial court assessed punishment at ten years' confinement in the Institutional Division of the

Texas Department of Criminal Justice for each count to run concurrently. *See* TEX. PENAL CODE ANN. § 12.33.

By thirteen issues, which we have reorganized and consolidated, Adams argues that: (1) the evidence is legally[1] insufficient to sustain a conviction on either count; (2)–(4) the trial court erred in denying his motions to suppress evidence; (5) the trial court committed fundamental error during voir dire, and (6) his trial counsel was ineffective for failing to object; (7) the trial court erred in permitting the State to admit "evidence of post arrest silence for impeachment purposes"; (8) the trial court erred in allowing the State to make improper closing arguments; (9) the State violated *Brady*[2]; and (10) the "criminality of possession of testosterone is unconstitutional in Texas as well as the United States." We affirm.

I. BACKGROUND

Adams was arrested on May 26, 2016, after a traffic stop search yielded several vials of a testosterone-based compound, syringes, and pills inside a gym bag in the backseat of the vehicle he was driving. Subsequent search warrants executed for Adams's residences produced evidence of more vials of testosterone, syringes, pills, packaging materials, receipts from overseas purchases, and over $30,000 in cash. On February 23, 2017, Adams was indicted on two counts of manufacturing or delivering testosterone.

[1] Adams also complains that the evidence is factually insufficient to support his conviction. However, criminal verdicts can no longer be challenged on grounds of "factual" insufficiency of the evidence. *See Brooks v. State*, 323 S.W.3d 893, 894–95 (Tex. Crim. App. 2010) (citing *Jackson v. Virginia*, 443 U.S. 307, 99 (1979)).

[2] *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

A. Motion to Suppress: Traffic Stop Evidence

On March 9, 2017, the trial court held a hearing on Adams's motion to suppress evidence obtained during the traffic stop.

Joshua Vaclavik, a deputy with the Victoria County Sheriff's Office, testified he witnessed Adams make a wide right turn at an intersection, in violation of the Texas Transportation Code: "He turned directly into the—what would be considered the left inside lane, which is the—the lane furthest from the curb."

According to Vaclavik, Adams gave him verbal consent to search the vehicle and never revoked his consent.[3] During Vaclavik's search, he observed a black gym bag in the backseat of Adams's vehicle. The bag contained over two dozen individually packaged pills, more than a dozen syringes, and a black toiletries bag with "multiple syringes" and "medical pharmaceutical glass vials" labeled "testosterone." Vaclavik placed Adams under arrest for possession of items in penalty group 3. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.114 (a), (c).

During cross-examination, Adams's counsel questioned the deputy's motive in furtherance of defense's theory that there was no reasonable suspicion to effectuate a stop. Vaclavik said he had been given orders from his supervisor to follow Adams, a suspected narcotics distributor, and he had been surveilling Adams for approximately thirty to forty minutes before stopping him.

Adams did not testify.

The court denied Adams's motion and made several findings on the record:

[3] The State tendered into evidence a body-cam recording of the traffic stop without audio, even though an audio version existed. When the trial court asked the parties if they wanted a continuance, Adams declined, opting to proceed with the evidence as-is.

> The Court finds the officer's testimony to be credible. Therefore, the Court finds that the defendant did violate the transportation code when he did not, upon making a right-hand turn, stay as close as practicable to the right. The Court also finds that the defendant consented to the search of the vehicle.

B. Motion to Suppress: Search Warrants

Adams filed a subsequent motion to suppress, seeking to suppress four search warrants for: (1) the residence listed on Adams's driver's license, 284 Pebble Drive in Victoria, Texas; (2) a residence listing Adams on the lease, 333 Cody Drive in Victoria, Texas; (3) electronics found at the Cody Drive residence; and (4) a safe obtained from the Pebble Drive residence. Adams argued that the first three warrants were facially invalid, failing to meet the requirements under Code of Criminal Procedure article 18.04, subsections 4 and 5, and that the fourth warrant was invalid because it was sought on the basis of the prior invalid warrants.

On July 6, 2017, the trial court held a hearing on Adams's motion. The State called the two men responsible for procuring the search warrants, Sergeant Quinton Moses and Investigator Richard Martin, both with the Victoria County Sheriff's Office, to testify. Each individually stated they were familiar with the signatures of the judges signing the search warrants, personally witnessed the judges review and sign the warrants, and identified the signatures in the exhibits.

The trial court, having considered the testimony provided by the officers involved and taking judicial notice of the legislative intent behind the statute on the record, denied Adams's motion to suppress.

C. Trial

1. State's Case-in-Chief

At trial, Deputy Vaclavik testified regarding the traffic stop. Vaclavik stated, in

addition to seizing pills and vials containing testosterone from within Adams's vehicle, keys were seized and later used to access a locked room inside the Cody Drive residence and a safe from the Pebble Drive residence.

Investigator Martin expounded on Adams's connection to the Cody Drive residence. Although Adams's name, along with another unknown male, were on the lease, only one of the three bedrooms appeared to be occupied, said Martin. Multiple shipping labels were recovered with Adams's name affixed, and Adams's framed bachelor's degree was located in the same room as: pill grinders, a pill press, a grease gun used to lubricate a pill press, storage bins with bubble wrap and Ziploc baggies, a heat sealer, two digital scales, bins containing vials labeled "testosterone," "empty glass vials" in gallon freezer bags, rubber stoppers and "plungers" used to secure the lid on glass vials, and pill packages with markings consistent with the pills found at the traffic stop. Copies of "many" MoneyGram receipts sent to "Asian countries," with the transfer amounts ranging from $1,360 to $309, were also recovered.

Martin also testified to the contents of an in-jail phone call recording between Adams and his mother. According to Martin, Adams was aware he was in the possession of testosterone at the time of the stop because he told his mother that the vials and pills seized contained "steroids and testosterone," and Adams indicated how much testosterone each vial contained. Adams then requested that his mother pick up some of his property, which included a computer that was later found to contain "templates for label printing that were consistent with the labels that were found on the . . . vials[,] . . . pill packaging and steroids."

During cross-examination, Adams questioned Martin regarding whether investigators found anything amounting to illicit intent or evidence of testosterone sales.

Q. You don't know if it was a purchase or if it was sending money to somebody for payment for something else. . . . He could be sending [MoneyGrams] to a friend.

A. Could be.

. . .

Q. Outside of what's here in the courtroom today, do you have any evidence that he ever sold any steroids?

A. No, sir. I wasn't here for the testimony before me; but that I'm aware of, no, sir, there's nothing here.

Martin stated he never "witnessed" Adams sell testosterone nor did he speak with anyone who claimed to have been sold testosterone from Adams.

Roman Gonzales, Jr., a forensic scientist with the Texas Department of Public Safety in Corpus Christi, testified to the weight and chemical relation of the items tested. According to Gonzales, several items recovered tested positive for testosterone propionate, 29.96 grams, and testosterone enanthate, 49.39 grams—both chemically related to testosterone. Gonzales confirmed that his determination of the total substance weight included any present adulterants and dilutants, and not all items submitted by the State were tested "due to a 900-case backlog." Gonzales conceded on cross-examination that he did not ascertain the purity of the substances tested.

Benjamin Reddock, a clinical pharmacist, testified to the effects of anabolic steroids: "They're generally recognized as to what helps develop your sexual features and traits, what helps distinguish men from women genetically. They—or not genetically but physically, things like virilization, whether or not you develop body hair, muscle mass, acne, body oil." Reddock explained that while individuals may receive anabolic steroids as part of a medical treatment plan, anabolic steroids can also be used to promote muscle

growth. Reddock opined that testosterone propionate and testosterone enanthate are considered anabolic steroids and are pharmacologically related to testosterone.

2. Defense's Case-in-Chief

Adams testified at trial and acknowledged his previous conviction for possession with intent to manufacture a controlled substance, wherein he was sentenced to eleven years' imprisonment. Adams claimed his ex-girlfriend introduced him to amphetamines and methamphetamines, and she was ultimately responsible for his conviction: "[I]t seemed to me like it was a typical setup, like she was asking me to make meth for her."

Adams testified that a different former girlfriend was at fault for his present charges. Prior to his arrest, Adams said he received a tip that his "ex-girlfriend had called the sheriff's department and told them that [he] was making methamphetamines, making ecstasy, and also making steroids and selling them all." According to Adams, his ex-girlfriend "had access" to his home, prescription testosterone, gym bag, and vehicle. "You know, she was already telling me she was going to ruin my life; and when I saw that, of course, I knew who. . . . Yeah, I didn't—I didn't actually see her do it, but I believe that she put most of that stuff in that bag." In contravention to Deputy Vaclavik's statements, Adams testified that there was no basis for the traffic stop that ultimately led to his arrest. "I made a—I made a proper right-hand turn. I made a right-hand turn that was so perfect that you could probably use it to teach a—a driver safety course video and—I mean, it was—it was a phenomenally perfect right turn."

Adams also denied using or selling illegal narcotics, testifying that he has "been drug free for about—over eight years." Adams testified he had a prescription for testosterone "from a doctor at a place in Florida called WFN," which he states demonstrates that any syringes, vials, or labels found in his home were for personal use.

"If you went all around the world, you would never find vials that I sold with these labels on them." Adams explained that the confiscated $6,000 cash were proceeds from his job as a personal trainer; Adams said he also worked as an amateur bodybuilder and landman. Similarly, Adams testified that the $30,000 recovered was not the product of illicit dealings, but rather money that had been paid to him from his brother.

Adams alleged that the State confiscated and withheld the black notebook from evidence, which contained the "names of contacts, clients, and people from the gym" and a "calendar going back all the way probably over two years," depicting Adams's steroid use.[4]

3. Closing Arguments

Adams admitted to possession of testosterone in his closing arguments, which he reasoned made him guilty of, at most, the lesser included offense. He otherwise maintained there was no evidence of intent to deliver because "[t]he money, the receipts, the shipping labels, the labels he created" were for personal use, and the State produced "no actual evidence of the delivery."

The State, reserving most of its time for closing arguments after the defense, then asked jurors to refrain from "violat[ing] [their] common sense," arguing, in relevant part:

> The defendant got on the stand with $36,000 of cash at his disposal, with his criminal history, coming from an affluent background and neighborhood and he wants to cry wolf and he wants to tell the 12 of you that he was picked on. Instead of him taking responsibility and saying, Yeah, I'm a crook. I'm just not very good at it, and I got caught. He has consent—content—consistently and continually made excuses for his behavior.
>
> . . .

[4] In re-cross examination of Investigator Martin, Adams accused Martin of seizing a black composition notebook, seen underneath pieces of mail and a box of chalk in the background of several of the State's photographic exhibits of the Cody Drive residence. Martin denied law enforcement ever took possession of the item: "[T]here was[,] like[,] a yellow legal notepad you could see in there as well as a—a binder you had referenced, and we don't have those in evidence. They were left there at the house."

> And you have all the evidence. Dye, pill presses, label making. It wasn't for personal use. He's pushing poison. And now the 12 of you have to do something about it. . .

Adams objected to the States' "continual reference to poison in this case," and his objection was denied.

Adams was convicted on both counts, and this pro se appeal followed.

II. SUFFICIENCY OF THE EVIDENCE

By his first issue, Adams argues the evidence was legally insufficient to support his convictions.

A. Standard of Review and Applicable Law

When reviewing claims of legal insufficiency, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Whatley v. State*, 445 S.W.3d 159, 166 (Tex. Crim. App. 2014); *Martinez v. State*, 527 S.W.3d 310, 320 (Tex. App.—Corpus Christi–Edinburg 2017, pet. ref'd). The fact finder is the exclusive judge of the facts, the credibility of the witnesses, and the weight to be given to the testimony and is presumed to have resolved any conflicts in the evidence in favor of the verdict. *See Bartlett v. State*, 270 S.W.3d 147, 150 (Tex. Crim. App. 2008); *see also Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (giving deference to the fact-finder "to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.").

Sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge. *Braughton v. State*, 569 S.W.3d 592, 608 (Tex.

Crim. App. 2018) (citing *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)). In this case, a hypothetically correct charge would instruct the jury to find a defendant guilty of the aforementioned offense if he "knowingly manufactures, delivers, or possesses with intent to deliver a controlled substance listed in Penalty Group 3" and "the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, 28 grams or more but less than 200 grams." TEX. HEALTH & SAFETY CODE ANN. § 481.114 (a), (c).

B. Analysis

On appeal, Adams narrowly argues that, due to the unknown level and type of adulterants or dilutants, the concentration of the controlled substance remains unknown, and therefore the State failed to prove an essential element of the offense. Although Adams urges us to employ *McGlothlin v. State*, 749 S.W.2d 856, 858 (Tex. Crim. App. 1988) and *Cawthon v. State*, 849 S.W.2d 346, 347 (Tex. Crim. App. 1992) in our analysis, both cases have been superseded by statute. *See Seals v. State*, 187 S.W.3d 417, 421–22. (Tex. Crim. App. 2005) (observing that the "legislature explicitly eschewed the use of this definition for adulterants and dilutants in the context of possession of a controlled substance" that was previously "used in *McGlothlin* and *Cawthon*"). These opinions were decided before the legislature amended the statute to include a definition of "adulterant and dilutant." *See* Act of May 29, 1993, 73rd Leg., R.S., ch. 900, § 2.01, 1993 Tex. Gen. Laws 3586, 3705 (codified at TEX. HEALTH & SAFETY CODE ANN. § 481.002(49)). The code now defines "controlled substance" as the "aggregate weight of any mixture, solution, or other substance containing a controlled substance." TEX. HEALTH & SAFETY CODE ANN. § 481.002(5). Therefore, the State "is no longer required to determine the amount of controlled substance *and* the amount of adulterant and dilutant that constitute the mixture"

and only has to prove "that the aggregate weight of the controlled substance mixture, *including adulterants and dilutants*, equals the alleged minimum weight." *Melton v. State*, 120 S.W.3d 339, 344 (Tex. Crim. App. 2003) (emphasis added).

Here, the State's forensic scientist testified that no testing was done to determine the amount of or the type of adulterants and dilutants present, and he ceased testing after reaching the statutory threshold. The minimum weight of controlled substance alleged in Adams's indictment and charge was twenty-eight grams. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.114 (a), (c). Gonzales testified that the items recovered tested positive for testosterone propionate and testosterone enanthate, both chemically related to testosterone, in the amount of 29.96 grams and 49.39 grams, respectfully. *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007) (holding that fact finder has the duty to resolve conflicts in testimony, weigh evidence presented, and "draw reasonable inferences from basic facts to ultimate facts"); *Melton*, 120 S.W.3d at 344; *Jackson v. State*, 483 S.W.3d 78, 82 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd) (providing that evidence was sufficient to support a conviction where the "appellant does not contest that he knowingly or intentionally possessed PCP," but rather argues "that the State failed to present evidence that he possessed at least one gram of PCP" when the State used the entire weight of cigarettes dipped in PCP to prove the weight of the controlled substance charged).

When viewing the evidence in the light most favorable to the verdict, the jury here could have reasonably concluded that the prosecution met its burden of proving the aggregate weight of the controlled substance under the charge. *See Whatley*, 445 S.W.3d at 166; *Melton*, 120 S.W.3d at 344. We overrule Adams's first issue.

III. MOTIONS TO SUPPRESS EVIDENCE

Adams next contends that the trial court erred in denying his motions to suppress evidence. Adams argues (1) with respect to the vehicle search, the officer lacked reasonable suspicion to effectuate the traffic stop and alternatively, lacked consent to search his vehicle; and (2) the search of his two residences were based on facially invalid search warrants. We address each argument in turn.

A. Motion to Suppress Standard of Review

We review a trial court's ruling on a motion to suppress evidence under a bifurcated standard. *Lerma v. State*, 543 S.W.3d 184, 189–90 (Tex. Crim. App. 2018). Although we give almost total deference to the trial court's determination of historical facts, we conduct a de novo review of the trial court's application of the law to those facts. *Sims v. State*, 569 S.W.3d 634, 640 (Tex. Crim. App. 2019). The judgment will be reversed only if it is arbitrary, unreasonable, or "outside the zone of reasonable disagreement," *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006), and must be affirmed if "it is correct under any theory of law applicable to the case, even if the trial court did not rely on that theory." *Leming v. State*, 493 S.W.3d 552, 562 (Tex. Crim. App. 2016).

At a suppression hearing, although a defendant bears the initial burden, it shifts to the State once a defendant establishes that a search or seizure occurred without a warrant. *State v. Cortez*, 543 S.W.3d 198, 204 (Tex. Crim. App. 2018). The State must then elicit testimony demonstrating sufficient facts to prove that reasonable suspicion existed to conduct said search or seizure. *See Foster v. State*, 326 S.W.3d 609, 613 (Tex. Crim. App. 2010) (observing that reasonable suspicion "requires only some minimal level of objective justification").

B. Applicable Law and Analysis for an Investigative Stop Challenge

An investigative stop by law enforcement is a sufficient intrusion on an individual's privacy, implicating the Fourth Amendment's protections. *See Terry v. Ohio*, 392 U.S. 1, 19 (1968); *Lerma*, 543 S.W.3d at 190. In the context of a traffic stop, police officers are justified in stopping a vehicle when the officers have reasonable suspicion to believe that a traffic violation has occurred. *Lerma*, 543 S.W.3d at 190. An officer's reasonable suspicion, even if ultimately proved to be mistaken, does not *ipso facto* render a traffic stop illegal. *See Heien v. North Carolina*, 574 U.S. 54, 66 (2014); *see also State v. Wood*, 575 S.W.3d 929, 934 (Tex. App.—Austin 2019, pet. ref'd) (noting that "it was not necessary for an offense to have actually occurred; on the contrary, it was only necessary for [the officer] to have reasonably believed that an offense occurred"); *see*, *e.g.*, *Babel v. State*, 572 S.W.3d 851, 857 (Tex. App.—Houston [14th Dist.] 2019, no pet.) (holding an officer had reasonable suspicion to stop appellant's car although the officer's mistaken belief that appellant was in violation of a law mandating headlights after dark was the basis for the stop, and it was not yet dark). The court, employing an objective standard, must "take into account the totality of the circumstances in order to determine whether a reasonable suspicion existed for the stop." *Martinez v. State*, 348 S.W.3d 919, 923 (Tex. Crim. App. 2011). "[T]he subjective intent of the officer conducting the investigation is irrelevant." *Hamal v. State*, 390 S.W.3d 302, 306 (Tex. Crim. App. 2012).

Vaclavik testified he witnessed Adams "turn[] directly into . . . the lane furthest from the curb." Upon first contact, Vaclavik said he made Adams aware he had been stopped for making a "wide right at the intersection." According to Vaclavik, Adams was pulled over for suspicion of violating Texas Transportation Code § 545.101, entitled "Turning at Intersection," which provides that "[t]o make a right turn at an intersection, an operator

shall make both the approach and the turn as closely as practicable to the right-hand curb or edge of the roadway." TEX. TRANSP. CODE ANN. § 545.101(a).

During cross-examination, Adams asked Vaclavik whether the statute's language "as closely as practicable" meant "as long as they do it safely." Adams reasoned that a driver may be able to safely turn into the lane furthest from the curb in anticipation of making a left turn shortly after. Vaclavik disagreed to the extent that the latter interpretation would require an officer to know more than "what is at hand." Vaclavik opined the vehicle operator's reasoning for failing to turn into the inside lane, absent an apparent obstacle, is not a factor he considered under the statue.

The trial court listened to Vaclavik's testimony and reviewed the State's evidence of a dash-cam recording. The court found Vaclavik's "testimony to be credible" and thereafter appropriately held "that the defendant did violate the transportation code." *See Hughes v. State*, 334 S.W.3d 379, 384 (Tex. App.—Amarillo 2011, no pet.) (deferring "to a trial court's determination of historical facts that turn on the credibility of the witness" where officer testified that appellant made an illegal wide turn and appellant testified that he did not); *see also*, *Tex. Dep't. of Pub. Safety v. Garza*, No. 13-10-00330-CV, 2010 WL 4901406, at *5 (Tex. App.—Corpus Christi–Edinburg Dec. 2, 2010, no pet.) (mem. op., not designated for publication) (affirming a trial court's denial of a motion to suppress evidence obtained from a traffic stop, whereby appellant challenged the legality of a stop by an officer who observed appellant make a wide right-hand turn).

Thus, we conclude the trial court did not abuse its discretion in denying appellant's motion to suppress regarding the investigatory stop. *See Martinez*, 348 S.W.3d at 923. We overrule Adams's second issue.

C. Applicable Law and Analysis for a Consent to Search Challenge

Adams alternatively argues that the officer was precluded from searching his vehicle because he lacked the consent to do so.

The State bears the burden of proving that a defendant's consent to a vehicle search was made knowingly and voluntarily, regardless of the manner in which it was allegedly communicated—whether by words, action, or circumstantial evidence showing implied consent. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Meekins v. State*, 340 S.W.3d 454, 458–59 (Tex. Crim. App. 2011). Whether consent to search was voluntary is a question of fact to be determined in each case from the totality of the circumstances, and it must be proven by the State with clear and convincing evidence. *See Fienen v. State*, 390 S.W.3d 328, 333 (Tex. Crim. App. 2012); *Meekins*, 340 S.W.3d at 459.

Adams argues on appeal: "Vaclavik asked if I minded if he searched the car. I responded, 'Yeah.' I was asked if that was a ['']yes['] and to repeat ['']yes['']. To that[,] I responded 'yes'. . . . Saying ['']yes['] to 'Do you mind?' means 'no', or ['']yes I do mind.['] That is not consent." The trial court was privy to this alleged misunderstanding at the suppression hearing. Although Adams did not testify, Adams's counsel specifically asked Vaclavik to reiterate the language he used when he sought consent:

> Q. So your—your words were[:] May I search the vehicle, or can I search the vehicle?
>
> A. Can I search your car, I believe, were the words; but I can't—
>
> Q. And his—and his response?
>
> A. Was "yes."
>
> Q. You didn't ask if he minded if you searched his vehicle?

A. (No verbal response.)

Q. You didn't ask him if he minded if you searched his vehicle?

A. No.

Q. Mind if you searched the vehicle? And you're certain of that?

A. Yes.

Vaclavik never wavered in his assertion that Adams provided unequivocal verbal consent to search. Although the video of Vaclavik's encounter with Adams—absent sound—did not establish that Adams affirmatively responded to Vaclavik's request for consent to search, Adams's recorded conduct supported an inference that he voluntarily consented to the search. Adams gave no indication that he objected to the search, he did not withdraw consent as he watched Vaclavik search his vehicle, and Vaclavik was not seen as behaving in a threatening or coercive manner. *See Miller v. State*, 393 S.W.3d 255, 266 (Tex. Crim. App. 2012) (providing that a person who consents to law enforcement entry "may specifically limit or revoke his consent"); *see also Villarreal v. State*, 565 S.W.3d 919, 931 (Tex. App.—Corpus Christi–Edinburg 2018, pet. ref'd) (providing that where appellant "placed no limitations on the scope of his consent and never objected to the search, even as he watched [the officer] explore various parts of the vehicle for over an hour," the trial court appropriately concluded the officer had received consent).

Looking to the totality of the circumstances, we hold that the record supports a finding that Adams's consent to search was freely and voluntarily given. *Meekins*, 340 S.W.3d at 459. We overrule Adams's third issue.

D. Applicable Law and Analysis for Search Warrants

Adams's second motion to suppress dealt exclusively with four search warrants. Adams argues the warrants were facially invalid, failing to meet the requirements under article 18.04, subsection 5. *See* TEX. CODE CRIM. PROC. ANN. art. 18.04(5). At the suppression hearing, Adams conceded, "the fourth one, I believe it does," but disputed its validity on the basis of its reliance on the allegedly facially defective preceding warrants.

A search warrant must contain the following under article 18.04:

1. that it run in the name of "The State of Texas";

2. that it identify, as near as may be, that which is to be seized and name or describe, as near as may be, the person, place, or thing to be searched;

3. that it command any peace officer of the proper county to search forthwith the person, place, or thing named;

4. that it be dated and signed by the magistrate; and

5. that the magistrate's name appear in clearly legible handwriting or in typewritten form with the magistrate's signature

TEX. CODE CRIM. PROC. ANN. art. 18.04.

The objectives behind the law concerning search warrants are two-fold: to "ensure there is adequate probable cause to search and to prevent a mistaken execution of the warrant against an innocent third party." *Green v. State*, 799 S.W.2d 756, 757–58 (Tex. Crim. App. 1990) (citing *Bridges v. State*, 574 S.W.2d 560 (Tex. Crim. App. 1978)). Thus, the absence of a requirement will not invalidate a warrant provided "the record establishes that the officer was acting in objective good-faith reliance upon a warrant based upon a neutral magistrate's determination of probable cause." *State v. Arellano*, No. PD-0287-19, 2020 WL 2182258, at *3, ___, S.W.3d ___, ___ (Tex. Crim. App. May 6, 2020). ("[We]

hold that a warrant containing an illegible magistrate's signature in violation of Article 18.04(5) does not automatically preclude application of the statutory good-faith exception in Article 38.23(b)."); *see also Clay v. State*, 391 S.W.3d 94, 98 (Tex. Crim. App. 2013) ("[T]he failure to sign the warrant affidavit does not invalidate the warrant if other evidence proves that the affiant personally swore to the truth of the facts in the affidavit before the issuing magistrate."); *Smith v. State*, 207 S.W.3d 787, 792 (Tex. Crim. App. 2006) ("[I]t is that act of swearing, not the signature itself, that is essential. . . . [A]n affiant's failure to sign his affidavit is not necessarily fatal if it can be proved by other means that he did swear to the facts contained within that affidavit before the magistrate."); *Dunn v. State*, 951 S.W.2d 478, 479 (Tex. Crim. App. 1997) (holding that where a magistrate judge "found probable cause to issue the warrant, signed the accompanying warrants, and intended but inadvertently failed to sign appellant's arrest warrant[,]" . . . "[e]vidence obtained by a police officer acting in good faith reliance upon a warrant based upon a magistrate's determination of probable cause should not be rendered inadmissible due to a defect found in the warrant subsequent to its execution.").

Here, all four search warrants and accompanying affidavits were signed by a judge; however, the judge's name does not also appear in clearly legible handwriting or in typewritten form on the first, second, and third search warrants, as required by article 18.04(5). *See* TEX. CODE CRIM. PROC. ANN. art. 18.04(5). Just as we would evaluate the encompassing issue of probable cause by employing the "totality of circumstances" test, we also must "review technical discrepancies with a judicious eye for the procedural aspects surrounding issuance and execution of the warrant." *Green*, 799 S.W.2d at 757–58; *Arellano*, 2020 WL 2182258 at *5–6.

The officers who were responsible for swearing to the warrants before the signing judges testified at the second suppression hearing. Moses first testified that "[a]fter developing the probable cause that's within the affidavit, [he] presented the search warrant before District Judge Jack Marr." The trial court took judicial notice that Jack Marr is the district judge for the 24th Judicial District. Moses confirmed he personally observed Judge Marr examine the affidavit and its contents, and he witnessed Judge Marr sign the documents. Moses's testimony regarding the process for effectuating the second warrant was substantially similar. Moses stated Investigator Martin was also present while Judge Marr signed the warrants.

Investigator Martin then testified, affirming his presence during the signing of the first two warrants. Martin stated he was responsible for the third warrant, which he took to Judge Stephen Williams to be signed. The trial court took judicial notice that Judge Stephen Williams is the district judge for the 135th District Court. Martin testified he witnessed Judge Williams review and sign the warrant. Both officers testified they did not have any reason to believe that warrants one, two, and three were defective at the time of execution. Martin stated he was now aware that the warrants lacked compliance with article 18.04, subsection 5.

The trial court, in support of its ruling, made the following observations on the record:

> [T]he Court takes judicial notice of the legislative intent behind the statute, which was to reduce the amount of tampering with search warrants that occurred in south Texas. . . .
>
> There's not really any case law interpreting 18.04, subsection 4 and subsection 5. You look at the plain meaning of the statute. And even though you look at the plain meaning of the statute, you're also not to have absurd results; and to contend that Defendant's Exhibit No. 1 and Defendant's Exhibit No. 2, that these signatures of Judge Jack W. Marr do not comply

> with subsection 4 and 5, the Court believes would be an absurd result . . . The Court believes that it does comply under subsection 4 and subsection 5.
>
> Defendant's Exhibit No. 3, the Court is making a finding that it is dated and signed by a magistrate. The magistrate's name is not legible, and it is not in typewritten form. However, the Court is going to make a finding that the officers in this case complied or relied on this search warrant in good faith. Therefore, the defendant's Motion to Suppress with regards to Defendant's Exhibit No. 1 and 2 and 3 are denied.

Having reviewed the evidence in the light most favorable to the trial court's ruling, finding its ruling has support in the law, we hold the trial court did not err in its application of the good faith exception rule and subsequent denial of Adams's motion. *See Arellano*, 2020 WL 2182258 at *6; *Green*, 799 S.W.2d at 757–58 ("[T]o hold otherwise would defeat the purpose behind the warrant requirement, and provide protection for those to whom the issue on appeal is not one based upon the substantive issue of probable cause but of technical default by the State."). We overrule Adams's fourth issue.

IV. VOIR DIRE

A. Trial Court's Error

By his fifth issue, Adams argues for the first time on appeal that the trial court erred when it "stopped potential jurors during voir dire from answering questions truthfully which violated U.S. Const. Amend 6 and 14." U.S. CONST. amend. VI, XIV.

A trial judge has broad discretion in the manner it chooses to conduct voir dire, including the topics that will be addressed and the form and substance of the questions that will be employed to address them. *Jacobs v. State*, 560 S.W.3d 205, 210 (Tex. Crim. App. 2018), *cert. denied*, 139 S. Ct. 1448 (2019) (internal citations omitted). Moreover, as a general rule, counsel must object to the trial court's comments during trial in order to preserve error. *Proenza v. State*, 541 S.W.3d 786, 810 (Tex. Crim. App. 2017).

Here, Adams specifically takes issue with the following exchange:

VENIREPERSON: . . . . if he—anybody, frankly, he or she—they know it's illegal, they shouldn't have it. So I—I kind of feel the same way. If they get caught with it, then the court or the law enforcement—I mean, you're guilty, you know.

[DEFENSE COUNSEL]: But you understand you haven't heard any evidence in this case right now, right?

VENIREPERSON: No, I understand.

[DEFENSE COUNSEL]: So you don't know if he even got caught with it?

VENIREPERSON: Well, I would imagine that for some—for him to be here today, he had to get—have possession of something.

THE COURT: As the defendant sits right here today, he's presumed innocent of all the charges.

[DEFENSE COUNSEL]: But for you personally, though, you feel he must have done something wrong or he wouldn't be here?

VENIREPERSON: That's how I feel.

Adams did not object to the trial court's interjection, and the trial court's statements in this case do not constitute "fundamental error."[5] Adams has therefore waived the issue for review. *See* TEX. R. APP. P. 33.1; *Esquivel v. State*, 595 S.W.2d 516, 522 (Tex. Crim. App. 1980). We overrule Adams's fifth issue.

[5] Pursuant to Texas Rule of Evidence 103(d), appellate courts are authorized to "tak[e] notice of fundamental errors affecting substantial rights although they were not brought to the attention of the court." *Blue v. State*, 41 S.W.3d 129, 131 (Tex. Crim. App. 2000); TEX. R. EVID. 103(d). Here, the trial court's stated presumption served as a reminder to the jury of the State's burden to prove its case and as an admonishment to consider nothing but the evidence adduced at trial in passing on the defendant's guilt. *See Blue*, 41 S.W.3d at 131 (holding a "fundamental error" exception to the rules of error preservation exists where a trial court's remarks vitiated the defendant's presumption of innocence); *see also Madrid v. State*, 595 S.W.2d 106, 110 (Tex. Crim. App. 1979), *holding modified by Matlock v. State*, 392 S.W.3d 662 (Tex. Crim. App. 2013) ("The criminal law is complicated by the terms 'presumption of innocence'. . . . The so-called presumption of innocence is not an inference based on proven fact; rather, it is an assignment of a burden of proof prior to trial based on the substantive law requiring the State to prove guilt beyond a reasonable doubt.")).

B. Ineffective Assistance of Counsel

Adams additionally contends that his attorney failed to conduct voir dire more thoroughly to undercover potential biases, also in "violation of U.S. Const. Amend 6 and 14." U.S. CONST. amend. VI, XIV.

1. Standard of Review and Applicable Law

To prevail on a claim of ineffective assistance of counsel, appellant must prove by a preponderance of the evidence that: (1) counsel's performance fell below the standard of reasonableness under prevailing professional norms; and (2) there is a reasonable probability that, taking into account the totality of the evidence before the judge or jury, the appellant was prejudiced by counsel's actions or inactions. *Miller v. State*, 548 S.W.3d 497, 499 (Tex. Crim. App. 2018) (citing *Hill v. Lockhart*, 474 U.S. 52, 58–59 (1985) and *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). To demonstrate the first prong of deficient performance, the appellant must overcome the strong presumption that the challenged action "might be considered sound trial strategy." *Strickland*, 466 U.S. at 689; *see State v. Morales*, 253 S.W.3d 686, 696 (Tex. Crim. App. 2008). The presumption of a sound trial strategy generally cannot be overcome absent evidence in the record of the attorney's reasons for his conduct. *Mata v. State*, 226 S.W.3d 425, 430 (Tex. Crim. App. 2007) ("The lack of a clear record usually will prevent the appellant from meeting the first part of the *Strickland* test."); *Davis v. State*, 533 S.W.3d 498, 510 (Tex. App.—Corpus Christi–Edinburg 2017, pet. ref'd). If there is any basis for concluding that counsel's conduct was strategic, then further inquiry is improper. *Lopez v. State*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011).

2. Analysis

Adams claims that his trial counsel was ineffective because: (1) "no questions were asked about prior jury service" despite revelations that eleven out of fifty-eight jurors previously served on a jury, ten had "convicted someone," and "[f]our prior convicting jurors were selected as jurors"; and (2) a veniremen who "expressed his bias" against Adams ended up on the jury.

Adams did not file a motion for a new trial on the basis of ineffective assistance of counsel. Therefore, his trial counsel was not given an opportunity to explain his conduct, and we must assume that counsel acted with a reasonably sound and strategic motivation, *see id.*, unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). We conclude that this case does not present such a situation.

The State conducted its voir dire examination first and asked each juror who indicated they had previously served on a criminal jury panel: (1) whether the punishment went to the judge or jury, and (2) if jury, whether the jury reached a unanimous decision. At no point did the State inquire regarding whether a "unanimous decision" equated to a "conviction," and the record is otherwise silent—in opposition to Adams's claims that "conviction prone" veniremen ended up on the jury. We cannot assume from the fact that Adams's trial counsel did not engage in a discussion with veniremen concerning their individual prior jury service, knowing that the topic had already been covered by the State and time was limited,[6] that his trial counsel did not use sound trial strategy. *See Lopez*,

[6] Adams states in his appeal that the parties were "being timed" and recognizes that perhaps that was why his attorney did not question the venire regarding prior jury service. *See Fuller v. State*, 363 S.W.3d 583, 585 (Tex. Crim. App. 2012) ("The trial court has broad discretion over the process of selecting a jury. Without the trial court's ability to impose reasonable limits, voir dire could go on indefinitely." (quoting *Sells v. State*, 121 S.W.3d 748, 755 (Tex. Crim. App. 2003))). We note Adams's counsel instead used his voir

343 S.W.3d at 143; *Morales*, 253 S.W.3d at 696 ("[U]nless there is a record sufficient to demonstrate that counsel's conduct was not the product of a strategic or tactical decision, a reviewing court should presume that trial counsel's performance was constitutionally adequate"). Although Adams cites to *Miles v. State* and *Strickland v. Washington* in support of his contention that "no voir dire on the subject [of prior service] is ineffective assistance of counsel," we note that neither case patently stands for Adams's asserted proposition. *See Strickland*, 466 U.S. at 686; *Miles v. State*, 644 S.W.2d 23, 24 (Tex. App.—El Paso 1982, no pet.).

Similarly, when Adams's counsel questioned a venireperson regarding whether evidence should be inadmissible if obtained illegally, and the venireperson responded, "It's just hard to throw that evidence away when you had that evidence," the same venireperson also stated they would be able to follow the law "as hard as it might be to throw that evidence away." Again, we are left to presume that counsel engaged in sound strategy when he declined to utilize a strike on a venireperson who stated he could follow the law. *See Morales*, 253 S.W.3d at 698 (acknowledging that an attorney's decision to retain a prospective juror, who initially stated she would not consider probation in "this type of case" but ultimately stated she could follow the law, "could well have been a reasonable tactical choice, albeit a difficult one"); *see also Buntion v. State*, 482 S.W.3d 58, 84 (Tex. Crim. App. 2016) (noting that before "a prospective juror may be excused for cause on this basis, the law must be explained to him, and he must be asked whether he can follow that law, regardless of his personal views.").

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dire examination time to explain the presumption of innocence, the burdens of proof, the defendant's right against self-incrimination, and to ascertain the venire's biases towards drugs and law enforcement accountability.

We conclude that Adams has failed to satisfy the first prong of *Strickland*, thus we need not analyze the second prong. *See Lopez*, 343 S.W.3d at 143; *Mata*, 226 S.W.3d at 433; *see also* TEX. R. APP. P. 47.1. We overrule Adams's sixth issue.

V. POST-ARREST SILENCE

Adams asserts it was error for the trial court "to admit evidence of post arrest silence for impeachment purposes,[7] a violation of the due process clause of the U.S. Const. Amend. 5 and 14." U.S. CONST. amend. V, XVI.

Specifically, Adams argues he testified at trial that he "did not give Vaclavik permission to search his car," and the State then inappropriately referenced a recorded jail phone call between Adams and his mother.[8] When Adams testified that he was unable to recall his statements to his mother, a jail call recording was admitted into evidence over Adams's objection that a proper predicate had not been laid. The record, in pertinent part, reads as follows:

> [STATE]: Your Honor, at this time the State is tendering State's 24 to opposing counsel and moving to offer into evidence.
>
> [DEFENSE]: I'm going to object. The predicate hasn't been laid, Your Honor.
>
> [COURT]: Objection is overruled. State's Exhibit No. 24, for the limited purposes of impeaching this witness, is admitted.

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[7] A testifying defendant is subject to cross-examination and impeachment like any other witness—except as limited by overriding constitutional or statutory prohibitions. *Heidelberg v. State*, 144 S.W.3d 535, 537 (Tex. Crim. App. 2004). Pursuant to the Fifth and Fourteenth Amendments of the U.S. Constitution, the State may not comment on a defendant's post-arrest silence or use evidence of a defendant's post-arrest silence for purposes of impeachment. *See Fletcher v, Weir*, 455 U.S. 603, 607 (1982); *Doyle v. Ohio*, 426 U.S. 610, 61–20 (1976); *but see Salazar v. State*, 131 S.W.3d 210, 214 (Tex. App.—Fort Worth 2004, pet. ref'd) ("The State cannot improperly comment upon a defendant's post-arrest silence when he did not remain silent.").

[8] Adams states on appeal he "knew his conversation was being recorded at the jail" and does not dispute the voluntariness of the statements made during the call.

[DEFENSE]: Judge, just for the record, there's been no evidence—

[REPORTER]: I can't hear you.

[DEFENSE]: There's been no evidence put on that this recording was made with a device that can accurately record. There's been no evidence that this recording was made by someone who even knew how to make a recording.

[COURT]: It's noted. Objection is overruled.

Here, Adams's trial "predicate" objection is of no relevance to the constitutional arguments he now asserts on appeal. *Compare* TEX. R. EVID. 901 (governing admissibility of electronic recordings and authentication requirements) *with* U.S. CONST. amend. V, XVI. Therefore, we find that Adams failed to preserve the issue of "post-arrest silence" as claimed in this context for review.[9] *See Heidelberg v. State*, 144 S.W.3d 535, 539 (Tex. Crim. App. 2004); *see also Bird v. State*, 692 S.W.2d 65, 69 (Tex. Crim. App. 1985) (holding that when "[t]he only objection offered when the key was offered was that the proper predicate had not been laid," such objection was "too general to preserve error."); TEX. R. APP. P. 33.1(a) (to preserve error, a defendant must make a timely and specific objection). Accordingly, we overrule Adams's seventh issue.

VI. JURY-ARGUMENT ERROR

Adams argues by his eighth issue that he is entitled to a reversal because the State engaged in improper closing arguments when the State: claimed he pushed "poison," insulted Adams, "inject[ed]" its opinion on witness credibility, argued in furtherance of

[9] Even if we assume, without deciding, that Adams had properly preserved error, Adams misapplies the constitutional protection against evidence of post-arrest silence as he argues that his post-arrest *voluntary* statements made during an in-jail call to his mother were used to impeach statements made pre-arrest. *See Garcia v. State*, 126 S.W.3d 921, 924 (Tex. Crim. App. 2004) ("Appellant does not claim his waiver [of silence] was involuntary. Thus, appellant's complaint about his right to remain silent 'during the time his statement was made' is nonsensical.").

community expectations, misrepresented and "distorted" the evidence, and "waited until [its] argument couldn't be rebutted to make these claims."

A. Preservation

Adams failed to preserve error regarding all except the State's "pushing poison" comment.[10] *See Hernandez v. State*, 538 S.W.3d 619, 622 (Tex. Crim. App. 2018) (providing that to preserve a complaint of jury-argument error, the defendant must immediately make a contemporaneous objection and receive an adverse ruling; otherwise, error is waived). Therefore, we proceed only in review of what was preserved. *See id.*; *see also* TEX. R. APP. P. 33.1(a). The relevant exchange reads as follows:

> [STATE]: . . . And you have all the evidence. Dye, pill presses, label making. It wasn't for personal use. He's pushing poison. And now the 12 of you have to do something about it—
>
> [DEFENSE]: Your Honor, I object to the continual reference to poison in this case. There's been no evidence of anything being poisonous.
>
> [COURT]: Objection is overruled.

B. Standard of Review and Applicable Law

Permissible jury argument falls into one of four categories: "(1) summation of the evidence, (2) reasonable deduction from the evidence, (3) an answer to the argument of opposing counsel, and (4) plea for law enforcement." *Milton v. State*, 572 S.W.3d 234, 239 (Tex. Crim. App. 2019) (citing *Freeman v. State*, 340 S.W.3d 717, 727 (Tex. Crim. App. 2011)). Should a prosecutor's arguments exceed the bounds of these areas, such action will not constitute reversible error "unless, in light of the record as a whole, the argument is extreme or manifestly improper, violative of a mandatory statute, or injects

[10] For additional context, Adams's only objection occurred twelve pages into the State's closing argument on volume eight of the reporter's record.

new facts harmful to the accused into the trial proceeding." *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000). We review a trial court's ruling on an objection of improper jury argument for an abuse of discretion. *Milton*, 572 S.W.3d at 241**.**

C. Analysis

Adams specifically objected to the alleged lack of "evidence of anything being poisonous." The State counters that its argument was a reasonable deduction from the evidence. We agree.

Having already found sufficient evidence to support a conviction for manufacturing or delivering a controlled substance in penalty group 3, we find the State's statement that Adams was "pushing poison," was analogous to a statement that Adams was pushing an illicit substance, which was not without evidentiary support—as Adams specifically claims. *See*, *e.g.*, *Gaither v. State*, 383 S.W.3d 550, 555 (Tex. App.—Amarillo 2012, no pet.) (holding that a prosecutor's argument that "[appellant] made the decisions to bring this poison into our community. He may have used it as well, but he's the one that made the decision to bring this kind of poison into our community and to further put it out on our streets, make it available to other people" was permissible); *Lawson v. State*, 896 S.W.2d 828, 833 (Tex. App.—Corpus Christi–Edinburg 1995, writ ref'd) (allowing the statement: "I ask [you to] send a very strong message to this man and everyone else in this community . . . who thinks it's okay to get out there and poison the community."); *cf. Ex parte Lane*, 303 S.W.3d 702, 711 (Tex. Crim. App. 2009) (holding a prosecutor's broad argument that "people," "drug dealers," and "they" are bringing drugs "so it will poison them and turn them into addicts" went beyond a deduction of evidence concerning appellant's guilt of the charged offense of methamphetamine possession and was

therefore, improper). The trial court did not abuse its discretion in overruling Adams's objection. *See Milton*, 572 S.W.3d at 241. We overrule Adams's eighth issue

VII. *BRADY* VIOLATION

Per his ninth issue, Adams requests a reversal as the "proper remedy for a *Brady* violation," arguing that his "due process rights were violated when police did not turn over [a] composition notebook and copies of prescriptions that were exculpatory."

In *Brady v. Maryland*, the United States Supreme Court concluded that the suppression by the prosecution of evidence favorable to a defendant violates due process if the evidence is material either to guilt or punishment, without regard to the good or bad faith of the prosecution. 373 U.S. 83, 87 (1963). To establish a *Brady* violation, an appellant must show: (1) the state suppressed evidence; (2) the suppressed evidence is favorable to defendant; and (3) the suppressed evidence is material. *Harm v. State*, 183 S.W.3d 403, 406 (Tex. Crim. App. 2006). However, "*Brady* and its progeny do not require prosecuting authorities to disclose exculpatory information to defendants that the State does not have in its possession and that is not known to exist." *Id.* (quoting *Hafdahl v. State*, 805 S.W.2d 396, 399 (Tex. Crim. App. 1990)). A complaint of a *Brady* violation must be preserved for review. *See* TEX. R. APP. P. 33.1(a)(1); *Keeter v. State*, 175 S.W.3d 756, 760–61 (Tex. Crim. App. 2005).

Although Adams raised the issue of the missing composition notebook in his cross-examination of Investigator Martin, Adams did not object, request a continuance, or move for a dismissal or new trial on the basis of a *Brady* violation. *See Keeter*, 175 S.W.3d at 760–61. Thus, Adams has failed to preserve this issue for review. *See id.*; *see also Pena v. State*, 353 S.W.3d 797, 809 (Tex. Crim. App. 2011) (providing that to preserve a *Brady* complaint, the record must show that appellant raised the issue with the trial court and

obtained a ruling or objected to the trial court's failure to rule); *see*, *e.g.*, *Moody v. State*, 551 S.W.3d 167, 170 (Tex. App.—Fort Worth 2017, no pet.) (holding that appellant preserved his *Brady* violation claim via his motion to dismiss); *State v. Fury*, 186 S.W.3d 67, 73–74 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd) (finding that where appellant did not request a continuance following complainant's trial testimony regarding previously undisclosed evidence and did not obtain a ruling from the trial court regarding an alleged *Brady* violation, appellant waived any *Brady* complaint). We overrule Adams's ninth issue.

VIII. CONSTITUTIONALITY

In his last issue on appeal, Adams contends that the statute criminalizing the possession of testosterone is unconstitutional.

"When reviewing the constitutionality of a statute, 'we commence with the presumption that such statute is valid and that the Legislature has not acted unreasonably or arbitrarily in enacting the statute.'" *Peraza v. State*, 467 S.W.3d 508, 514 (Tex. Crim. App. 2015) (quoting *Ex parte Granviel*, 561 S.W.2d 503, 511 (Tex. Crim. App. 1978)). The burden rests upon the appellant to establish its unconstitutionality. *Id.; see* TEX. GOV'T CODE ANN. § 311.021 (stating that courts presume "compliance" with the Texas and United States Constitutions). Generally, a statute constitutionality challenge "may not be presented for the first time on direct appeal." *Ex parte Beck*, 541 S.W.3d 846, 852–53 (Tex. Crim. App. 2017) (citing *Karenev v. State*, 281 S.W.3d 428, 429–34 (Tex. Crim. App. 2009)). As the Texas Court of Criminal Appeals most recently re-affirmed in *Ex parte Beck*, "a facial constitutional challenge to a statute does not implicate an absolute requirement or prohibition that is exempt from ordinary preservation-of-error requirements." *Id.* Our review of Adams's objections to the trial court does not reveal any

reference to statutory unconstitutionality. Therefore, absent an exception,[11] Adams cannot make the argument for the first time on appeal. *See id.* Adams's last issue is overruled.

IX. CONCLUSION

The trial court's judgment is affirmed.

GREGORY T. PERKES
Justice

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

Delivered and filed the
21st day of May, 2020.

[11] Where a defendant seeks relief for a conviction of a "non-crime under a statute that has already been held to be invalid," he may raise the issue of unconstitutionality for the first time on appeal. *See Smith v. State*, 463 S.W.3d 890, 896 (Tex. Crim. App. 2015); *but see Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1220 (5th Cir. 1991) (discussing the constitutionality of Texas Health and Safety Code § 481.114 in a limited context).