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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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NO. PD-0442-17

IN THE COURT OF CRIMINAL APPEALS

OF TEXAS

AUSTIN, TEXAS

BRIAN JASON WHITE,
PETITIONER

VS.

THE STATE OF TEXAS,
RESPONDENT

ON APPEAL FROM THE COURT OF APPEALS FOR THE 5TH JUDICIAL DISTRICT (DALLAS), CAUSE NO. 05-15-00819-CR, AND FROM THE 199TH DISTRICT COURT, COLLIN COUNTY, TEXAS, CAUSE NO. 199-80670-2013

PETITION FOR DISCRETIONARY REVIEW

FILED IN
COURT OF CRIMINAL APPEALS

June 13, 2017

ABEL ACOSTA, CLERK

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PETITIONER REQUESTS ORAL ARGUMENT

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

STATEMENT REGARDING ORAL ARGUMENT

Oral argument would be helpful to the Court because this case presents an issue which touches on the everyday practice of criminal law impacted by a fragmented opinion of this Court. The issues raised could be better discussed in the context of oral argument, where the Court can ask questions and consider alternatives that counsel are prepared to discuss.

STATEMENT OF THE CASE

Petitioner was indicted for: Second Degree Engaging in Organized Criminal Activity, Third Degree Money Laundering, and three counts of State Jail Forgery of a Financial Instrument.

At trial, Petitioner objected to the introduction of a surreptitious audio recording, pursuant to Article 38.23 of the Texas Code of Criminal Procedure. Petitioner requested that the State show compliance with Texas Penal Code § 16.02 (Texas wiretap statute requiring one-party consent to a recorded conversation). Petitioner's objection at trial was overruled, the audio recording was admitted, and Petitioner was found guilty of all charges, except Money Laundering.

The Fifth Court of Appeals upheld the trial court's overruling of Petitioner's objection by holding that Petitioner had not met an initial burden of showing the law had been violated. This petition challenges that holding.

STATEMENT OF PROCEDURAL HISTORY

(1)	Date of Opinion from Court of Appeals:	March 8, 2017
(2)	Date of Motion for Rehearing:	March 22, 2017
(3)	Date Motion for Rehearing Disposed:	April 11, 2017
(4)	Date of Motion to Extend Time to File PDR	May 10, 2017
(5)	Date Motion to Extend Time Granted	May 10, 2017

GROUNDS FOR REVIEW

Whether the Proponent of Evidence at Trial has the Burden of Showing Statutory Compliance in Response to an Objection under Article 38.23 (The Texas Exclusionary Rule).

This case involves the proper allocation of burdens when a defendant raises a *trial objection* under Texas Code of Criminal Procedure Article 38.23.

Relying on this Court's opinion in *State v. Robinson*, the Fifth Court of Appeals allocated an initial burden to the objecting party to show a violation of law.[1] The Fifth Court of Appeals specifically held that it was the burden of the objecting party, under Article 38.23, to produce evidence of a statutory violation before the burden shifted to the State to show statutory compliance.

Robinson stands for the proposition that a movant in a pretrial motion to suppress under Article 38.23 has an initial burden of production. However, the same opinion is strongly suggestive that a party objecting at trial on Article 38.23 grounds has no burden, except for a specific and timely objection. In other words, the party seeking to introduce objected-to evidence must satisfy its normal preponderance burden as the proponent of evidence.

The Fifth Court of Appeals' holding with regard to this issue is found on Page 8 of its opinion. *White v. State*, No. 05-15-00819-CR, *8 (Tex. App. –Dallas 2017).

[1] *State v. Robinson*, 334 S.W.3d 776 (Tex. Crim. App. 2011).

ARGUMENT

At Trial Does the Proponent of Evidence Bear the Burden of Showing Statutory Compliance in Response to an Objection Under Article 38.23 (the Texas Exclusionary Rule)?

This petition requests this Court to resolve the proper burden allocation when a Defendant objects at trial to the admissibility of evidence under Article 38.23 of the Texas Code of Criminal Procedure, rather than raise the issue in a pretrial motion.

The Fifth Court of Appeals misreads current precedent and places a burden of production on the objector/evidentiary opponent at trial. Specifically, the Fifth Court of Appeals held "[s]ince the appellant never produced evidence of a statutory violation, the State never had the burden to prove [statutory compliance with the Texas wiretap statute[2]]. *White v. State*, No. 05-15-00819-CR, *8 (Tex. App. –Dallas 2017). This holding upheld the trial court's erroneous admission of a surreptitious audio recording instrumental in convicting Petitioner. The Court of Appeals primarily relies upon this Court's opinion in *State v. Robinson* in reaching this conclusion. 334 S.W.3d 776, 779 (Tex. Crim. App. 2011). *Id.*

Robinson does not stand for this proposition. Indeed, it is strongly suggestive of the opposite result.

[2] TEX. PENAL CODE § 16.02 (prohibits the intentional intercept of "wire, oral, or electronic communication.")

The *Robinson* opinion was carefully crafted and dealt specifically with pretrial motions to suppress invoking Article 38.23. In this limited scenario, the *Robinson* Court held that the Defendant, *as the moving party in a pretrial suppression* under Article 38.23, "has the burden of producing evidence of a statutory violation." *Id.* Though the majority opinion did not address burden allocation in the context of a trial objection, two judges who were essential to a majority opinion, and one dissenting judge, did write separately to address this issue.

Judge Cochran, joined by Judge Hervey, wrote to explain that, at trial, "the State will be required to offer evidence [of statutory compliance] before [objected to evidence] is admissible." Judge Cochran continued by noting this is the ordinary burden that a proponent of evidence faces when confronted with a trial objection. *Id*. at 782 (Cochran concurrence). Judge Price agreed in this legal conclusion but wrote in dissent to protest a holding in which the court "assign[s] the burden of proof differently when a defendant first broaches the issue in a pre-trial motion to suppress rather than waiting until trial to insist the State be held to its evidentiary predicate." *Id.* at 783 (Price dissent).

Judge Cochran would later be joined by a different set of judges in reiterating what is considered the normal rule—that the proponent of evidence "must demonstrate by a preponderance of proof that the proffered item or

testimony is admissible." *State v. Medrano*, 127 S.W.3d 781, 791-92 (Tex. Crim. App. 2004)(Cochran Concurring). Joined by Judges Keller and Holcomb, Judge Cochran emphasized that this burden applies "whether it is expert testimony under Rules 702-703, lay opinion testimony under Rule 701, documents offered under Rule 902, or any evidence offered under any other [Rule of Evidence]." *Id.*

Practitioners have come to rely upon the *Robinson* opinion as leaving intact the normal rule of the evidentiary proponent's burden. Indeed, the Texas Criminal Defense Lawyers Association has specifically counseled its members to treat the *Robinson* opinion accordingly. *See The Shifting Burdens of Proof in a Motion to Suppress*, VOICE FOR THE DEFENSE, May 2015, at 34-37.

This Court should anticipate that, if left unaddressed, the Fifth Court of Appeals' opinion in the instant case will be cited as authority in the criminal courts of the Fifth Judicial Region and perhaps the entire state. The use of unpublished case law from the Fifth Court of Appeals has become prevalent due in part to a scarcity of published opinions by the Fifth Court.

Practitioners need a clear directive in this area of law. The Fifth Court of Appeals' opinion is contrary to the clearest indication this court has given on the proper burden allocation when objecting at trial pursuant to Article 38.23. For this reason, this Court should grant discretionary review.

PRAYER FOR RELIEF

Petitioner respectfully requests that this Honorable Court grant his Petition for Discretionary Review, set this case for oral argument, and ultimately reverse the decision of the Court of Appeals.

RESPECTFULLY SUBMITTED

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CERTIFICATE OF SERVICE

This is to certify that on June 12, 2017 this Petition for Discretionary Review was served electronically on the Representative for the State of Texas as follows: Collin County District Attorney's Office at DAAppeals@collincountytx.gov , and on the State Prosecuting Attorney at information@spa.gov . Courtesy copies were also mailed to each of these offices at

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/s/ Kyle Therrian
Kyle Therrian

CERTIFICATE OF COMPLIANCE WITH TEX. R. APP. PROC. 9.4(i)(3)

This is to certify that the word count of this petition, as calculated by the Texas Rules of Appellate Procedure is 930 words.

/S/ Kyle Therrian
Kyle Therrian

APPENDIX

AFFIRMED; Opinion Filed March 8, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00819-CR

BRIAN JASON WHITE, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 199th Judicial District Court
Collin County, Texas
Trial Court Cause No. 199-80670-2013

MEMORANDUM OPINION

Before Justices Bridges, Evans, and Whitehill
Opinion by Justice Evans

Brian Jason White was charged in a five-count indictment with engaging in organized criminal activity, money laundering, and three counts of forgery of a contract or commercial instrument. The State abandoned one count of the forgery offense. A jury convicted appellant of engaging in organized criminal activity and money laundering and found appellant not guilty of the two forgery offenses. The trial court assessed punishment in each case at ten years' imprisonment, suspended for eight years of community supervision. The trial court ordered the sentences to run concurrently and ordered restitution in the amount of $32,822.04.[1] On appeal,

[1] Appellant was tried jointly with codefendant, Ronald Robey, who was charged with engaging in organized criminal activity and money laundering. The jury found Robey guilty of both offenses. The trial court assessed punishment in each case at ten years' imprisonment, suspended for ten years of community supervision. The trial court ordered the sentences to run concurrently and ordered 180 days in jail as a condition of community supervision. The trial court also ordered Robey to pay restitution, along with appellant, in the amount of $32,822.04.

appellant raises three issues alleging that the trial court erred in admitting an audio recording of a conversation between appellant, codefendant Robey, and a third party because: (1) the recording was unlawfully obtained, (2) the recording was not properly authenticated; and (3) the recording constituted inadmissible hearsay. Appellant also challenges the sufficiency of the evidence to support the conviction. We affirm.

BACKGROUND

The complainant, Jason Earnhardt, and his wife started Earnhardt Restoration and Roofing (ERR) in 2010. The company primarily replaced hail-damaged roofs. The Earnhardts filed articles of incorporation in Texas and an assumed name certificate in Dallas County naming Earnhardt and his wife as the sole owners of the company. They also opened a business bank account at JP Morgan Chase.

ERR's salespeople solicited business by going door-to-door in neighborhoods that had been hit by hail during a storm. ERR entered into independent project manager agreements with its salespeople that paid them 50% of the net profit realized for a particular job. ERR provided its salespeople with shirts and business cards with the company logo, signs, and customer contracts.

In May 2012, Earnhardt hired Ron Robey as a sales manager to solicit business and hire salespeople. Robey hired appellant and J.D. Roberts.[2] Robey, appellant, and Roberts signed the standard project manager agreement. At that time, the business was in good shape financially.

In June 2012, Dallas and Collin Counties were struck by a storm which produced hail damaging many structures. Homeowners Mary Lou Thurman and Andrew McAdoo testified

[2] Roberts was tried separately on charges of engaging in organized criminal activity, money laundering, and three counts of forgery of a contract or commercial instrument. A jury found him guilty of all counts and the trial court sentenced him to four years' imprisonment for the first two offenses and two years' confinement in the state jail for the forgeries, with all sentences to run concurrently. The convictions were affirmed. *See Roberts v. State*, No. 05-15-00379-CR, 2016 WL 327290 (Tex. App.—Dallas January 27, 2016, no pet.) (mem. op., not designated for publication).

that in June 2012, appellant solicited business from them to fix their roofs and represented to them that he worked for ERR. In August 2012, both Thurman and McAdoo wrote checks to ERR which they gave to appellant. Homeowners Inderjit Sethi, Siva Sankaramanch, and Jessica Carlton testified that in June and July 2012, Roberts solicited business from them to fix their roof and represented to them that he worked for ERR. These three homeowners wrote checks to ERR which they gave to Roberts. The checks written to ERR and given to appellant and Roberts totaled $32,822.04.

In late July 2012, Robey stopped coming to the office and did not communicate with ERR. Around that time, Earnhardt learned that some of ERR's customers had written checks to the company that he had never received. He also learned that ERR had customers he was not aware of. During that same time, ERR started receiving hundreds of calls and emails based on Craigslist ads that Earnhardt had not posted or authorized. This eventually led to ERR's phone system being shut down. Earnhardt learned that Robey and appellant had posted the Craigslist ads after he received a call from a man named Brandon who worked for Robey, appellant, and Roberts as their IT person. Brandon sent Earnhardt a copy of a recorded conversation on which Robey, Brandon, and appellant can be heard talking about the Craigslist postings used to "blow the phones up" at ERR.

Earnhardt reported Robey's activities to the police. The investigation revealed that on July 30, 2012, an assumed name certificate was filed in Collin County under the name Earnhardt Restoration & Roofing listing Robey, Roberts, and appellant as owners. The certificate was signed by each of them. The assumed name certificate was then used to open bank accounts under ERR's name at Woodforest National Bank and JPMorgan Chase Bank listing Robey, Roberts, and appellant as the owners of the accounts. Appellant, Robey, and Roberts then

deposited customers' checks made out to ERR directly into these bank accounts. Earnhardt was never given access to these accounts.

Robey testified and admitted that he, appellant, and Roberts used ERR to file the assumed name certificate and establish the bank accounts. He testified that all three of them deposited checks made out to ERR into these accounts and that he, appellant and Roberts were working together as a partnership. Robey acknowledged that he and Brandon placed the fake Craigslist ads in order to shut down ERR's phone system and prevent Earnhardt from finding out what they were doing. Robey offered several justifications for these actions, including that he believed he had entered into a partnership with Earnhardt, that Earnhardt was not paying Robey his fair share of the profits, that he had an ownership interest in the money, and that he was trying to protect the customers. Robey admitted that between July 30, 2012 and August 21, 2012, he and his partners ran seven jobs through the ERR business they had set up and that they took at least $35,000 in checks that were made out to ERR.

ANALYSIS

I. Audio Recording

In three issues, appellant alleges that the trial court abused its discretion in admitting the audio recording of a conversation between Robey, appellant, and Brandon, the IT person who worked for the partnership formed by Robey, appellant, and Roberts.

During a pretrial hearing, the State indicated that it intended to use Earnhardt to authenticate the recording for admission into evidence. Counsel objected, arguing that it could not properly be authenticated by Earnhardt and that it was illegally obtained because Earnhardt was not a party to the conversation. The State represented to the trial court that Earnhardt could identify the three voices on the recording, that the recording was provided to Earnhardt by one of the three people heard in the recording, and that the discussion on the recording pertained to the

use of fake Craigslist ads in order to "blow up" ERR's phones and emails as part of the organized criminal activity. After listening to the recording and the parties' arguments, the trial court ruled that "assuming the State lays the appropriate predicate," the recording would be admitted because the issues raised "goes more to weight than admissibility."

At trial, Earnhardt testified that in late July 2012, ERR started receiving hundreds of calls and emails based on fake Craigslist ads which eventually led to ERR's phone system being shut down. Earnhardt's belief that Robey and appellant had posted the ads was confirmed after he received a call from Brandon. Earnhardt testified that Brandon gave him a copy of a recorded conversation. After listening to the recording, Earnhardt identified the three voices as being those of Robey, appellant, and Brandon. Earnhardt testified that he recognized the voices of Robey and appellant because he worked with them and "they have very distinct voices." Earnhardt recognized Brandon's voice because he had talked to him on the phone. After questioning Earnhardt on voir dire, counsel objected to the recording's admissibility based on hearsay, lack of a proper foundation, and the State's failure to establish that the recording was obtained legally. The trial court overruled the objections and the recording was admitted into evidence. While the recording was played for the jury, Earnhardt identified the various statements being made as belonging to Robey, appellant, or Brandon. The three men can be heard talking about the Craigslist postings used to "blow the phones up" at ERR. During the conversation, Robey explained to Brandon that the reason for the Craigslist postings was to prevent customers from contacting the office and alerting ERR that Robey, Roberts, and appellant were working on contracts under ERR's name and obtaining payments from ERR customers. Robey and appellant told Brandon that contracts worth $30,000 would be in jeopardy if ERR were to find out.

A. Legality of audio recording.

Appellant contends that the audio recording was inadmissible under Article 38.23 of the Code of Criminal Procedure because the State failed to prove that the recording was not obtained in violation of section 16.02 of the Texas Penal Code.

Under the Texas exclusionary rule, evidence obtained in violation of state or federal law may not be admitted against the accused in a criminal case. TEX. CODE CRIM. PROC. ANN. art. 38.23 (West 2005). A defendant who moves for suppression under article 38.23 due to the violation of a statute has the burden of producing evidence of a statutory violation. *Robinson v. State*, 334 S.W.3d 776, 779 (Tex. Crim. App. 2011). Only when this burden is met does the State bear a burden to prove compliance. *Id*. In this case, the burden never shifted to the State to prove compliance with section 16.02 of the Texas Penal Code because appellant did not produce evidence that the statute was violated.

Section 16.02 prohibits a person from intentionally intercepting a "wire, oral or electronic communication." TEX. PENAL CODE ANN. § 16.02 (West Supp. 2016).[3] It is an affirmative defense to prosecution of such an offense if the person is a party to the communication. TEX. PENAL CODE ANN. § 16.02(c)(4)(A) (West Supp. 2016).

During the pretrial hearing, counsel argued that the recording was the "equivalent of a wiretap" because it "was a surreptitiously recorded conversation between two people or three people that the witness was not a party to." When questioned by the trial judge about the fact that Brandon was a party to the conversation and that the witness believed that the recording came from Brandon, the following exchange occurred:

> MR. PRICE: It's the belief. That's part of the deal. There's really no way to know where it came from. Whether the person

[3] *See also* TEX. CODE CRIM. PROC. ANN. art. 18.20 § 2 (West Supp. 2015) which also prohibits the admission into evidence of a communication intercepted in violation of §16.02 of the Texas Penal Code.

that identified himself as Brandon is even actually the person that recorded the conversation.

THE COURT: Right. But you told me before the break that you believe it was illegally obtained. And so that's why I was trying to identify who all was part of the conversation. And, again, I haven't heard in the context of the trial, but it sounds like it was belief that it was received from this Brandon person.

MR. PRICE: That's the way it's represented.

THE COURT: Okay. You may continue.

MR. PRICE: Certainly, we never consented to the recording of any conversation of that nature. There's nothing to indicate on the recording itself that anyone was aware that the conversation was being recorded.

THE COURT: Other than Brandon?

MR. PRICE: Well, there's nothing on the recording, period, that suggests anyone to the conversation is aware of it.

THE COURT: Right. But is there anything that says that Brandon was not aware like someone else reportedly gave it to Brandon?

MR. PRICE: I don't know. I don't even know if Brandon is a real person's name or if that's just a made up name.

THE COURT: That's the name -- somebody says Brandon on the audio. So, I don't know. You may continue.

MR. PRICE: Okay. Well, I mean, all I can say to that, Your Honor, is we don't know where the recording was created. We don't know when the recording was actually created. And there's certainly nothing on the recording itself that would suggest that the parties were aware they were being recorded.

During the trial, Earnhardt testified that Brandon gave him the copy of the recording and identified Brandon's voice on the recording.[4] Although counsel questioned Earnhardt on voir

[4] When Robey testified during the trial and was asked who recorded the conversation, he replied that he thought his name was Brandon and explained that Brandon was the person who was going to build a website for their new roofing company. Robey went on to state that he had lots of conversations with Brandon on a daily basis and that to his knowledge, there were four different recordings that were sent to Earnhardt.

dire before the recording was admitted into evidence, no evidence was elicited from Earnhardt indicating that the conversation was recorded by someone other than Brandon. Earnhardt's testimony that he never met Brandon face-to-face or that he had no personal knowledge where the participants in the conversation were located when the recording was made is not evidence of a statutory violation. Since appellant never produced evidence of a statutory violation, the State never had the burden to prove that Brandon was the person who recorded the conversation. Therefore, the trial court was authorized in finding the admission of the recording was not barred by article 38.23. *See Robinson*, 334 S.W.3d at 779 (admission of blood tests not barred by article 38.23 when appellant presented no evidence that the person who drew the blood was not qualified); *Hernandez v. State*, 421 S.W.3d 712 (Tex. App.—Amarillo 2014, no pet.) (statement not barred by article 38.23 when there was no evidence presented from appellant or any other witness of deceptive representations made to appellant regarding allegation that statement was wrongfully obtained because appellant was being unlawfully restrained); *Forsyth v. State*, 742 S.W.2d 815, 818 (Tex. App.—Houston [1st. Dist.] 1987, pet. ref'd) (testimony at suppression hearing did not establish that the motel manager knowingly or intentionally intercepted a wire or oral communication; testimony only established that the police officers did not know how she got the information, although the manager had overheard some phone conversations). We overrule appellant's first issue.

B. Authentication.

Appellant contends that the State failed to properly authenticate the recording because there was no testimony from a witness with personal knowledge of the recording; there was no evidence of who created the recording or when or where the recording was made; there was confusion as to what the item actually purported to be; and there were unusual and unexplained noises within the item. The State argues that the recording was properly authenticated pursuant

to TEX. R. EVID. 901(b)(4) (Distinctive Characteristics and the Like) and 901(b)(5) (Opinion About a Voice). We agree with the State.

Authentication of an item of evidence is a condition precedent to admissibility. TEX. R. EVID. 901(a); *Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012). The requirement of authentication is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. *Butler v. State*, 459 S.W.3d 595, 600 (Tex. Crim. App. 2015). The rule provides several nonexclusive, illustrative examples of sufficient authentication or identification, including voice identification, and the presence of "distinctive characteristics, taken in conjunction with circumstances." TEX. R. EVID. 901(b)(4), (b)(5); *Druery v. State*, 225 S.W.3d 491, 502 (Tex. Crim. App. 2007); *Wilson v. State*, 884 S.W.2d 904, 906 (Tex. App.—San Antonio 1994, no pet.). In a jury trial, it is the jury's role ultimately to determine whether the evidence is what its proponent claims; the preliminary question for the trial court to decide is simply whether the proponent of the evidence has supplied facts that are sufficient to support a reasonable jury determination that the proffered evidence is authentic. *Tienda*, 358 S.W.3d at 638. Appellate review of a trial court's ruling on an authentication issue is for an abuse of discretion. *Id.* The trial court does not abuse its discretion by admitting evidence where it reasonably believes a reasonable juror could find that the evidence proffered is authentic. The trial court's ruling will be affirmed so long as it is within the "zone of reasonable disagreement." *Id*.

In this case, Earnhardt identified the voices of appellant and Robey based on the fact that he worked with them and "they have very distinct voices." Earnhardt recognized Brandon's voice because he had talked to him on the phone. Further, Robey testified that he heard the recording and the people on the recording were himself, appellant and, Brandon. Robey also stated that he had lots of conversations with Brandon on a daily basis.

The recorded conversation was also authenticated by its unique contents coupled with the trial testimony regarding corresponding events. As noted by the State, the conversation regarding whether to continue to "blow up" ERR's phones and emails with fake Craigslist ads so that Earnhardt would not discover their scam involved a very unique topic known only by a few people, including appellant and Robey. Consistent with the conversation on the recording, both Earnhardt and his employee, Matthew Salvatore, testified that ERR's phone system had blown up due to thousands of calls a day and had to be shut down based on fake Craigslist ads that someone had posted. Further, the evidence linking the conversation to actual events established a relevant time frame of late July and August, 2012.

Appellant's claim that there was "confusion" as to "what the item is actually purported to be" is not supported by the record. Although the State was reluctant to classify the recording as a phone call under TEX. R. EVID. 901(b)(6)(A) for purposes of authentication, the State identified the recording as a conversation between parties on the phone, which classification was borne out both by the recording itself and by Robey's testimony about the recording.

Appellant's claims that the recording was not properly authenticated because there was no evidence of who created the recording or when or where the recording was made, and the item contained unusual and unexplained noises, also fail. The evidence presented by the State and co-defendant Robey indicated that Brandon recorded the conversation. Further, a witness is no longer required to be the maker of the recording or have participated in the conversation in order for his testimony that the recording is what he claims it is to be sufficient to authenticate it. *See Angleton v. State*, 971 S.W.2d 65, 67 (Tex. Crim. App. 1998); *Hines v. State*, 383 S.W.3d 615, 625 (Tex. App.—San Antonio 2012, pet. ref'd). With regard to the unusual and unexplained noises on the recording, absent evidence of alterations, this claim goes to the weight of the evidence and not to its admissibility. *See Robinson v. State*, 739 S.W.2d 795, 802 (Tex.

Crim. App. 1987); *see also* *Druery v. State*, 225 S.W.3d at 502-03; *Martines v. State*, 371 S.W.3d 232, 245 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

We hold that the trial court did not abuse its discretion in admitting the audio recording because there was sufficient evidence for the trial court to find the audio recording was what Earnhardt and the State claimed it to be—a recording of a conversation between appellant and his co-conspirators regarding their ongoing scheme to induce homeowners into contracts under ERR's name without Earnhardt's knowledge. We overrule appellant's second issue.

C. Hearsay.

Appellant claims that the audio recording constituted inadmissible hearsay. In his brief, appellant concedes that the recorded statements of appellant are not hearsay under TEX. R. EVID. 801(e)(2)(A) (statement made by opposing party), but argues that statements made by Brandon are hearsay.

We conclude that appellant's trial objection was insufficient to preserve any error in the admission of any portion of the audio recording because his objection did not specifically point out which portions of the recording were objected to as inadmissible. When evidence is admitted, a part of which is admissible and a part of which is not, it is incumbent on the party objecting to the admissibility of the evidence to specifically point out what part is inadmissible to preserve the alleged error. *See Whitaker v. State*, 286 S.W.3d 355, 369 (Tex. Crim. App. 2009); *Sonnier v. State*, 913 S.W.2d 511, 518 (Tex. Crim. App. 1995). During the pretrial hearing, appellant did not object to the recording based on hearsay. At trial, appellant made only a general objection to the entire recording. On appeal he complains only of the statements made by Brandon. We overrule appellant's third issue.

II. Sufficiency of the Evidence

Appellant claims that the evidence is insufficient to support the conviction because the State failed to prove appellant's intent to participate in a combination to carry on criminal activities.

In reviewing the sufficiency of the evidence, we view all the evidence in the light most favorable to the verdict, and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 313 (1979); *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010). We assume the fact finder resolved conflicts in the testimony, weighed the evidence, and drew reasonable inferences in a manner that supports the verdict. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We defer to the trier of fact's determinations of witness credibility and the weight to be given their testimony. *Brooks*, 323 S.W.3d at 899.

A person engages in the act of organized criminal activity "if, with the intent to establish, maintain, or participate in a combination or in the profits of a combination . . . he commits or conspires to commit . . . theft. TEX. PENAL CODE ANN. § 71.02(a)(1) (West Supp. 2016). A combination is defined as "three or more persons who collaborate in carrying on criminal activities. . . ." TEX. PENAL CODE ANN. § 71.01(a) (West 2011). The State must prove more than an agreement to commit a single crime, there must be evidence of an agreement to act together in a continuing course of criminal activities. *Nguyen v. State*, 1 S.W.3d 694, 696-97 (Tex. Crim. App. 1999). The individual acts do no need to be criminal offenses. *Id*. Circumstantial evidence is sufficient to prove the existence of an agreement. *Nwosoucha v. State*, 325 S.W.3d 816, 831 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd). The jury may infer an agreement among a group working on a common project when each person's action is consistent with realizing the common goal. *Id*.

Appellant argues that the evidence is not legally sufficient because it only shows that he is guilty of the commission of one crime, theft or possibly fraud. While appellant concedes that the evidence proved that he deposited one check made out to ERR in appellant's bank account, and concedes that there was evidence introduced that other individuals also deposited checks on different dates, he argues that there was no testimony that any of the deposits were made together in combination with anyone else, and that there was no evidence of a plan to commit any type of theft or fraud in the future. Appellant's argument fails to take into account the following evidence:

> (1) On July 30, 2012, appellant went with Robey and Roberts to the Collin County District Clerk's Office and filed an Assumed Name Certificate under ERR's name, listed themselves as owners of ERR and provided Robey's home address as their office address. Each of the men signed the documents, presented a driver's license, and swore to the accuracy of the information;
>
> (2) On that same day, appellant, Robey and Roberts used the assumed name certificate to open a bank account in ERR's name at Woodforest National Bank listing themselves as partners in ERR. In opening the bank account, each of the men presented their driver's licenses, which were copied and included in the bank's file. Earnhardt did not have access to this account;
>
> (3) A short time later, the three men opened a bank account at JPMorgan Chase Bank under ERR's name, listed themselves as general partners, and signed their names on the account. Earnhardt did not have access to this account;
>
> (4) Three checks from customer accounts appellant had established were deposited into the Woodforest account, two checks written to ERR by customer Mary Lou Thurman, and one check written to ERR by customer Andrew McAdoo; and
>
> (5) On August 22, 2012, Appellant withdrew money from the Woodforest account.

In *Barber v. State,* 764 S.W.2d 232 (Tex. Crim. App. 1988), the appellants set up a scheme to steal oil. The court of criminal appeals found that the element of "intent to establish,

maintain, or participate in a combination or the profits of a combination" was proved "by evidence of putting up the money for the operation, leasing property where stolen oil would be stored, calling to set up operations, setting up telephone service at the terminal where oil would be sold, moving oil storage tanks to the leased property, purchasing trucks and hiring drivers to transport the stolen oil, opening bank accounts, and making agreements for the sale of the oil." *Id.* The court noted that in the context of a legitimate business, none of these actions constitute evidence of a crime. However, "[i]n the context of organized crime when the goal is to set up a criminal organization, the acts listed above provide evidence of intent to do more than agree to commit one crime." *Id.*

Appellant's participation in filing the assumed name certificate in ERR's name, opening bank accounts, depositing checks from customer accounts he had established into those bank accounts, and withdrawing money from one of those accounts, provides evidence of intent to do more than agree to commit one crime. Appellant's fourth issue is overruled.

CONCLUSION

We affirm the trial court's judgment.

/David W. Evans/
DAVID EVANS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

BRIAN JASON WHITE, Appellant

No. 05-15-00819-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 199th Judicial District Court, Collin County, Texas
Trial Court Cause No. 199-80670-2013.
Opinion delivered by Justice Evans. Justices Bridges and Whitehill participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 8th day of March, 2017.