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COURT OF CRIMINAL APPEALS
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No._____

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

SAMUEL UKWUACHU, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from McLennan County

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

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NAMES OF ALL PARTIES TO THE TRIAL COURT'S JUDGMENT

*The parties to the trial court's judgment are the State of Texas and Appellant, Samuel Ukwuachu.

*The case was tried before the Honorable Matt Johnson, 54th District Court, McLennan County, Texas.

*Counsel for Appellant at trial was Jonathon P. Sibley, 801 Washington Avenue, Suite 300, Waco, Texas 76710.

*Counsel for Appellant on appeal is William A. Bratton, III, 2828 Routh Street, Suite 675, Dallas, Texas 75201.

*Counsel for the State at trial were Hilary LaBorde and Robert Moody, Assistant Criminal District Attorneys, 219 North 6th Street, Suite 200, Waco, Texas 76701.

*Counsel for the State on appeal was Sterling Harmon, Chief Appellate Assistant Criminal District Attorney, and Gabriel Price, Assistant Criminal District Attorney, 219 North 6th Street, Suite 200, Waco, Texas 76701.

*Counsel for the State before this Court is John R. Messinger, Assistant State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

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No._____

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

SAMUEL UKWUACHU, Appellant

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* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

On remand from this Court, the court of appeals again reversed appellant's sexual assault conviction. This time, it did so using a "false testimony" framework that is incompatible with even its own review of the facts. Worse, it ignored central concepts of appellate review—preservation, standard of review, and deference—to do so.

STATEMENT REGARDING ORAL ARGUMENT

The State does not request oral argument. The issues are clear and summary remand is appropriate.

STATEMENT OF THE CASE

Appellant was convicted of sexual assault. The court of appeals reversed because it held the prosecutor's repeated reference to unadmitted phone records during cross-examination was the presentation of false testimony.

STATEMENT OF PROCEDURAL HISTORY

The court of appeals reversed in an unpublished opinion.[1] No motion for rehearing was filed. The State's petition is due on August 9, 2019.

GROUND FOR REVIEW

Can you have a "false testimony" claim without testimony or falsity?

ARGUMENT AND AUTHORITIES

Appellant sexually assaulted the victim in his apartment. He testified that it was consensual.[2] He also attempted to establish his roommate's presence in the apartment at the time of the sexual assault, on the theory the roommate would have heard it.[3] The relevant witnesses were his roommate, Peni Tagive, and Tagive's friend, Morgan Reed. Mid-trial but prior to their testimony, the State obtained Tagive's cellular phone records, which they argued showed Tagive was out of the

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[1] *Ukwuachu v. State*, No. 10-15-00376-CR, 2019 WL 3047342 (Tex. App.—Waco July 10, 2019) (not designated for publication).

[2] 11 RR 92, 108, 160.

[3] The victim said she screamed "Stop and No" but also said her face was forced into the pillows on appellant's bed. 5 RR 157-59. Tagive was "pretty sure" he would have heard screaming "[i]f it was loud," and heard no "resisting, wrestling, anything like that." 11 RR 53-54. Appellant said the victim "[a]bsolutely" did not scream. 11 RR 110.

apartment at the time.[4] The trial court ruled the records inadmissible for lack of a sponsoring witness but said the State could "[a]bsolutely" ask Tagive about making phone calls.[5]

The State used the records to cross-examine both Reed[6] and Tagive[7] about their chronologies and whereabouts. Reed initially disputed any conflict between her testimony and the records but eventually conceded that she could not remember "exact times" from two years prior.[8] When told his records showed he made two calls after he claimed he got home—one while out at 1:00 a.m.—Tagive agreed without qualification.[9] Appellant did not make a record objection to this use.[10]

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[4] 10 RR 14, 16.

[5] 11 RR 9. *See* TEX. R. EVID. 902(1)(A) (affidavit sufficient if served at least 14 days before trial). Appellant also argued that the records were inaccurate because of different time zones. 1 CR 585; 11 RR 8.

[6] 11 RR 30 ("Can you tell this jury why your phone records show he called you at one o'clock from across town from his apartment?"), 31 ("Okay. Ma'am, he made calls at one o'clock from across town. Would you like to tell this jury why that doesn't match up with your statement?"), 31-32 ("Well, no. You're calling him at 12:30 as well. Why are you still calling him at 1:00?"), 32 ("No. I'm looking at calls between you and Peni."), 32 ("You told this jury you were out of there by 1:00 to 1:30. Why is he still calling you?"), 32 ("It doesn't match the facts.").

[7] 11 RR 60 ("You know your phone records show you were across town at one o'clock in the morning and you were making calls to Morgan at one o'clock in the morning."), 60 ("Okay. You know your phone call -- phone calls -- records also show you were making a call around 2:00 in the morning."), 62 ("What did you call him for about eleven o'clock in the morning from your apartment?").

[8] 11 RR 31-32, 34-35.

[9] 11 RR 60-61. This conflicted with his trial and grand jury testimony. 11 RR 46-47, 60.

[10] Only two objections were made during the State's use of the records, both during Reed's testimony. 11 RR 30-31. The first was in an off-the-record bench conference (the question was

In his motion for new trial, however, appellant claimed the records "were used during the State's questioning of [Tagive] without authentication, introduction into evidence, or use of a witness qualified to interpret the records[, which] created a false image to the jury that was reckless on the part of the State."[11] After he lost, appellant framed the issue on appeal as a "due-process false-evidence claim."[12] The court of appeals adopted this framework.[13] Its error analysis is two sentences:

> We find that the State's repeated references to what the cell phone records showed, including the location and time of calls made, without their admission into evidence created a false impression with the jury. Testimony was elicited from both Ukwuachu's roommate and Ukwuachu's roommate's friend while referencing records that were not in evidence and in a manner that indicated that the records definitively showed Ukwuachu's roommate's location at certain critical times when they did not.[14]

The court did not identify any testimony that was false.

As the court of appeals acknowledged, the error alleged requires that the State used material testimony that is false to obtain a conviction.[15] No testimony fits that description. Relief cannot be based on the witnesses' testimony because both Reed

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immediately repeated without objection) and the second was to a misstatement of Reed's testimony.

[11] 1 CR 653.

[12] App. Br. at 25 (citing cases like *Ex parte Weinstein*, 421 S.W.3d 656 (Tex. Crim. App. 2014), and *Ex parte Chavez*, 371 S.W.3d 200 (Tex. Crim. App. 2012)).

[13] Slip op. at 3-4.

[14] *Id*. at 6.

[15] *Id*. at 4 (citing *Chavez*, 371 S.W.3d at 207-08).

and Tagive insisted their testimony was truthful even after being cross-examined with the records.[16] Tagive reaffirmed his truthfulness in an affidavit attached to appellant's motion for new trial.[17]

Nor can relief be based on the phone records themselves. First, they never became evidence because they were never admitted.[18] Second, not even appellant's expert said the records *are* false, or that they *did* leave a false impression. All he said is that they *could* leave a false impression if not reviewed by an expert.[19] The mere possibility that the State's confidence in its questions was unwarranted is not proof of falsity.

Whatever claim appellant might have had was forfeited.

The conclusion that appellant failed to prove his "false testimony" claim is not surprising, as that was never really appellant's claim. Rather, both appellant and the court of appeals appear concerned with the State's "use" of the records during questioning. Even if couched as a series of questions asked in bad faith or that assume facts not in evidence, or as a prosecutor "testifying," objectionable questions

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[16] 11 RR 34, 70.

[17] 1 CR 660.

[18] They still are not part of the record; appellant did not include them in his motion for new trial nor offer them into evidence at the hearing.

[19] 1 CR 662 (appended). As the court of appeals acknowledged, the State said the records had been reviewed by their expert. Slip op. at 6. *See* 10 RR 60 (prosecutor explains that his investigator, who was also their designated expert, had plotted the cell phone tower location information on a map).

require objections.[20] Appellant argued that contemporaneous objection was unnecessary[21] but the court of appeals did not address it.

All of this hints at a larger problem.

The biggest problem in this case is the lack of adherence to procedural norms. In addition to preservation, the court of appeals ignored the deferential standard of review. Remember, appellant raised his "false impression" claim for the first time on a motion for new trial. He lost. Yet, the court of appeals never mentioned the abuse-of-discretion standard[22] or the presumption that the trial court made all findings that support its ruling—including rejecting appellant's expert's affidavit.[23] Had it applied the proper standard, rejecting appellant's claim for failure to substantiate his "false testimony" claim would have been easy.

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[20] *Roberts v. State*, 220 S.W.3d 521, 533 (Tex. Crim. App. 2007) (citing TEX. R. APP. P. 33.1(a)(1)). Even if the State's cross-examination is equated to "false testimony," complaints about the admission of evidence are also forfeitable. *Saldano v. State*, 70 S.W.3d 873, 889 (Tex. Crim. App. 2002) (even "constitutional" admissibility complaints are forfeitable).

[21] App. Br. on Remand 39 ("It is widely considered to be fundamental to the proper functioning of our adjudicatory process that the prosecution not create a false impression to the jury.").

[22] *See Burch v. State*, 541 S.W.3d 816, 820 (Tex. Crim. App. 2017) ("An appellate court reviews a trial court's denial of a motion for new trial for an abuse of discretion, reversing only if no reasonable view of the record could support the trial court's ruling."). The only exception is for jury-charge error raised in a motion for new trial, as "[a] statute [like TEX. CODE CRIM. PROC. art. 36.19] cannot be superceded by a rule." *Igo v. State*, 210 S.W.3d 645, 647 (Tex. Crim. App. 2006).

[23] *See Riley v. State*, 378 S.W.3d 453, 457 (Tex. Crim. App. 2012), *overruled on other grounds by Miller v. State*, 548 S.W.3d 497 (Tex. Crim. App. 2018), ("The trial court is free to disbelieve an affidavit, especially one unsupported by live testimony."). The trial court also could have believed that the State's designated expert reviewed the records before cross-examination. *See* n. 19, *supra*.

This case keeps getting older.

This is the second time the State has asked this Court to grant review in this case. Trial was nearly four years ago, and it is not clear that a clean retrial is possible. The first time up, this Court unanimously reversed on split opinions because the issues were complicated.[24] This time the issue is simple. This Court should summarily remand this case for proper consideration of this point of error so that the outstanding points of error can be decided and a retrial, if necessary and possible, can be had.

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals grant this Petition for Discretionary Review and summarily remand for consideration of preservation and, if necessary, under the proper standard of review.

Respectfully submitted,

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[24] *Ukwuachu v. State*, PD-0366-17, 2018 WL 2711167 (Tex. Crim. App. June 6, 2018), *reh'g denied*.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool the applicable portion of this document contains 1,635 words.

/s/ John R. Messinger
JOHN R. MESSINGER
Assistant State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that on this 26th day of July, 2019, the State's Petition for Discretionary Review was served electronically on the parties below:

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APPENDIX

IN THE
TENTH COURT OF APPEALS

No. 10-15-00376-CR

SAMUEL UKWUACHU,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 54th District Court
McLennan County, Texas
Trial Court No. 2014-1202-C2

MEMORANDUM OPINION

Samuel Ukwuachu appeals from a conviction for the offense of sexual assault. TEX. PENAL CODE ANN. § 22.011. In six issues, Ukwuachu complains that his due process rights were violated due to the presentation of false testimony relating to cell phone records of his roommate during the State's cross-examination of his roommate's friend (issue one) and his roommate (issue two); that the indictment was defective; that evidence of an extraneous offense was improperly admitted; that his due process rights were

violated due to an abuse of the grand jury process by the State; and that text messages between the victim and a friend of hers the night of the alleged offense were improperly excluded. Because we find that Ukwuachu's due process rights were violated by the use of false testimony, we reverse the judgment of the trial court and remand for a new trial.[1]

INDICTMENT

Because the validity of the indictment would result in the greatest relief if granted, we will address that issue first. In his third issue, Ukwuachu complains that the indictment against him is facially insufficient for failing to allege the manner and means in which the lack of consent was obtained. Ukwuachu did not file a motion to quash the indictment prior to trial.

"The sufficiency of an indictment is a question of law." *State v. Moff*, 154 S.W.3d 599, 601 (Tex. Crim. App. 2004). "[T]o comprise an indictment within the definition provided by the constitution, an instrument must charge: (1) a person; (2) with the commission of an offense." *Cook v. State*, 902 S.W.2d 471, 477 (Tex. Crim. App. 1995). "[A] written instrument is an indictment or information under the Constitution if it accuses someone of a crime with enough clarity and specificity to identify the penal statute under which the State intends to prosecute, even if the instrument is otherwise defective."

[1] We initially reversed the judgment based on the issue relating to the text messages; however, the Court of Criminal Appeals reversed our judgment and remanded this proceeding for us to consider Ukwuachu's other issues. *See Ukwuachu v. State*, 2018 Tex. Crim. App. Unpub. LEXIS 442, 2018 WL 2711167 (Tex. Crim. App. June 6, 2018).

Duron v. State, 956 S.W.2d 547, 550-51 (Tex. Crim. App. 1997). If the State fails to allege an element of an offense in an indictment or information, then this failure is a defect in substance. *Studer v. State*, 799 S.W.2d 263, 268 (Tex. Crim. App. 1990). The accused must object to substance defects before trial begins; otherwise the accused forfeits his right to raise the objection on appeal or by collateral attack. TEX. CODE CRIM. PROC. ANN. art. 1.14(b) ("If the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal or in any other postconviction proceeding."); *Duron*, 956 S.W.2d at 550-51. Because Ukwuachu did not file a motion to quash the indictment in this proceeding, this complaint has been waived. We overrule issue three.

FALSE TESTIMONY

In his first and second issues, Ukwuachu complains that his due process rights pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 19 of the Texas Constitution were violated by the State's use of false testimony. The false testimony relates to Ukwuachu's roommate's location and whether phone calls were made around the time of the alleged offense. The complaint is that the false testimony was created by the way in which the State made use of his roommate's cell phone records, which were provided to Ukwuachu on the second day of the trial, but which were excluded from evidence.

Regardless of whether done knowingly or unknowingly, the State's use of material testimony that is false to obtain a conviction violates a defendant's right to due process under the Fifth and Fourteenth Amendments. *Ex parte Chavez*, 371 S.W.3d 200, 207-08 (Tex. Crim. App. 2012). The due-process inquiry is twofold: (1) was the testimony, in fact, false, and if so, (2) was the testimony material. *Ex Parte Weinstein*, 421 S.W.3d 656, 665 (Tex. Crim. App. 2014). As to the falseness inquiry, the false testimony or evidence need not rise to the level of perjury to violate due process; it is sufficient if the testimony or evidence is "false." *Id*., at 665-66. But whether the testimony is "false" is determined by asking whether the testimony, taken as a whole, "gives the jury a false impression." *Chavez*, 371 S.W.3d at 208. If the testimony is determined to be false, we must then determine whether the testimony was "material." *Weinstein*, 421 S.W.3d at 665. False testimony is material if there is a "reasonable likelihood" that it affected the judgment of the jury. *Id*. (*citing Chavez*, 371 S.W.3d at 206-07).

On the second day of trial, the State informed the trial court that it had just received Ukwuachu's roommate's cell phone records and had shown them to Ukwuachu's roommate and Ukwuachu's roommate's attorney. Ukwuachu objected to the records and was given a continuance for the afternoon to review the records and to speak with Ukwuachu's roommate regarding whether or not he would testify or whether he would invoke his Fifth Amendment right to not testify against himself. Based on what the phone records allegedly showed, Ukwuachu's roommate was threatened with perjury charges

by the State relating to grand jury testimony he had been forced to give shortly before trial if he were to choose to testify at trial consistent with his grand jury testimony.[2] Based on the time and location data shown in the phone records, the State argued that Ukwuachu's roommate was across town during the alleged assault rather than in their apartment as the roommate had testified before the grand jury. But the times shown in the phone records were in UTC (Coordinated Universal Time), which was five hours different from local time. Due to this five-hour difference in time for when the calls were made, Ukwuachu claimed that his roommate's testimony was not shown to be untrue by the records as argued by the State. The trial court did not allow the admission of the phone records but allowed the State to ask questions about making phone calls.

Notwithstanding the exclusion of the phone records, during its cross-examination of both Ukwuachu's roommate and Ukwuachu's roommate's friend, the State referred to the phone records as though they definitively showed that Ukwuachu's roommate was calling his friend from across town during the time when the roommate had testified he was in the apartment he shared with Ukwuachu. In addition to using the records during cross-examination, in its closing argument the State referenced the time and location data of the calls as showing that Ukwuachu's roommate was not in the apartment during the

[2] The State discovered Ukwuachu's roommate's cell phone number during grand jury testimony he was subpoenaed to provide a few weeks prior to Ukwuachu's trial. The alleged violation of Ukwuachu's due process rights relating to Ukwuachu's roommate's being forced to testify before the grand jury relating to this offense is the basis for Ukwuachu's fifth issue. The State used the information received from the grand jury to subpoena Ukwuachu's roommate's cell phone records and to impeach his roommate's testimony at trial.

alleged assault as Ukwuachu's roommate had testified.

At the motion for new trial hearing, Ukwuachu provided an affidavit by an expert in computer forensics who contended that it was impossible to accurately verify location data solely from the records without additional review by an expert, that the latitude and longitude given on this type phone records was rarely precisely accurate, and that it would take many hours for an expert to accurately provide the location of where an individual was when a call was made. The State had contended that it had just received the records from the cell phone provider during trial, although the State mentioned that its expert designated prior to trial had reviewed them.

We find that the State's repeated references to what the cell phone records showed, including the location and time of calls made, without their admission into evidence created a false impression with the jury.[3] Testimony was elicited from both Ukwuachu's roommate and Ukwuachu's roommate's friend while referencing records that were not in evidence and in a manner that indicated that the records definitively showed Ukwuachu's roommate's location at certain critical times when they did not.

We must next determine whether or not the testimony was "material," that being that there is a "reasonable likelihood" that it affected the judgment of the jury. *Chavez*, 371 S.W.3d at 206-07. If a due-process violation stemming from a use of material false testimony is found, harm is necessarily proven. *Weinstein*, 421 S.W.3d at 665.

[3] We do not disagree with the trial court's exclusion of the records.

It was extremely important to the State's case to put the roommate outside the apartment at the time of the alleged assault. Ukwuachu's roommate testified that he was in the apartment prior to Ukwuachu returning home the night of the alleged assault, heard Ukwuachu and a female come into the apartment, and did not hear any sounds or signs of a struggle as the victim described in her testimony. The State went to great lengths to discredit Ukwuachu's roommate's testimony by showing his location at the time the phone calls were made using records the State could not get admitted into evidence.

This was a case where the central issue was consent. There was no dispute that sexual intercourse occurred. The credibility of Ukwuachu, the victim, and his roommate, who were the only persons potentially in the apartment, was the most significant aspect of the trial. The State's case was strengthened significantly by showing that Ukwuachu's roommate was not in the apartment or that he was making calls at times he had contended he was asleep based on records that the State knew it could not admit into evidence and that created a false impression. We find that there is a "reasonable likelihood" that the false impression affected the judgment of the jury. *Chavez*, 371 S.W.3d at 206-07. Because of this, we sustain issues one and two and reverse the judgment of the trial court and remand for a new trial. Because we are reversing the judgment and remanding for a new trial, it is not necessary for us to address Ukwuachu's other remaining issues. TEX. R. APP. P. 47.1.

CONCLUSION

Having found that the use of the cell phone records constituted a due process violation, we reverse the judgment of conviction and remand this proceeding for a new trial.

TOM GRAY
Chief Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Neill
Reversed and remanded
Opinion delivered and filed July 10, 2019
Do not publish
[CR25]

THE STATE OF TEXAS §
§
§ **AFFIDAVIT**
COUNTY OF TARRANT §

BEFORE ME, the undersigned authority, on this day personally appeared **DAN JAMES,** who, states on his oath as follows:

"My name is **DAN JAMES,** I am over 18 years of age and fully competent to make this affidavit. I am the owner of the Institute of Computer Forensic Examinations and Criminal Investigations located in Fort Worth, Texas. In my capacity as the owner of this business, I provide investigative expert and other services to effectively represent those accused of criminal offenses in both State and Federal Court. Attached hereto is my curriculum vitae which fully sets forth my qualifications including education, training and experience in this field.

In my capacity as an investigator, I was provided the subscriber information and/or call detail issued by AT&T for the cellular number 254-730-0257 which was provided pursuant to a search warrant issued on the 21st day of July, 2015 in McLennan County, Texas.

An examination of the records provided pursuant to the search warrant, begins by clearly stating that the call times were stored and displayed UTC. UTC is a primary time standard by which the world regulates clocks and time. A conversion from UTC to Central Daylight Savings Time would be a difference of 6 hours. Therefore, when analyzing the records provided by AT&T for cellular number 254-730-0257, the times reflected on the records would have to be adjusted by 6 hours earlier than the time stated in order to convert the connection time to that time in Waco, Texas on October 20, 2013.

Further the longitude and latitude figures provided on the mobility usage, in my experience, are rarely accurate. Those figures cannot be relied upon to accurately provide locations of cell towers used to connect the calls. In my experience it would take an expert to spend a number of hours to evaluate the records and cell tower locations in order to make a final determination of whether the longitude and latitude listed is accurate. Without the proper training and expertise necessary in order to properly evaluate the accuracy of these records, any use of those records would be reckless and without any factual basis.

On October 19-20, 2013, daylight savings time was in effect for the State of Texas and in particular Waco, Texas. Therefore, a 6 hour time difference existed between the UTC times reflected on the record and the actual time in Waco, Texas.

DAN JAMES

SUBSCRIBED AND SWORN TO BEFORE ME the undersigned notary of public on this the 19th day of Sept, 2015.

KAREN DUVALL
Notary Public
STATE OF TEXAS
My Comm. Exp. 08-21-2016

NOTARY PUBLIC
STATE OF TEXAS