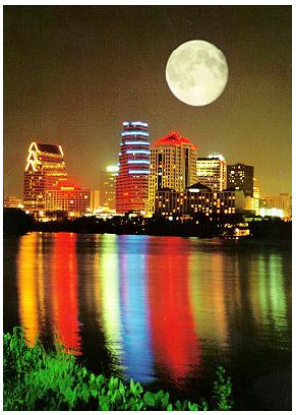

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Vol. 22, No. 34 - August 25, 2014

Case Name: Jon Thomas Ford v. The State of Texas

- OFFENSE: Murder
- COUNTY: Bexar
- C/A CASE No. 04-12-00317-CR
- DATE OF OPINION: August 20, 2014
- DISPOSITION: Conviction Affirmed OPINION: Barnard, J.
- TRIAL COURT: 186th D/C; Hon. Maria Herr
- LAWYERS: Cynthia Orr (Defense); Jay Brandon (State)

(Background Facts) On December 31, 2008, Dana Clair Edwards attended a New Year's Eve party with her friends Melissa Federspill and Alan Tarver at the home of a mutual friend. Edwards's ex-boyfriend (Appellant) and other guests also attended the party. Edwards left the party after midnight and was seen walking her dog by a neighbor between 12:30 a.m. and 1:00 a.m. on January 1, 2009. Edwards's body was later discovered by her parents in the early hours of January 2, 2009. She was found lying face down on her bathroom floor with a white, blood-soaked towel covering her head. Although the autopsy revealed lacerations and blunt force trauma to her head, the cause of death was determined to be strangulation by ligature sometime between the early morning hours and noon of January 1, 2009. After an investigation, Appellant was arrested and charged with murdering Edwards.

536 Sufficiency of the Evidence: Although Appellant was at the same New Year's Eve party as Edwards, he did not stay until midnight to celebrate the new year. Appellant left the party early because, according to testimony, he was offended by a comment made by Federspill during a group card game regarding his and Tarver's resistance toward marriage. According to Federspill, the subject of marriage "was one of the sticky spots for [Appellant] and Dana Clair" during their dating relationship. When Tarver asked later in the evening why Appellant left early, Appellant responded by text message: "No longer fun." According to Appellant, he went straight home after the party and was asleep before midnight. The State presented evidence suggesting this was not true. At trial, the State presented circumstantial evidence linking Appellant to the murder, including: (1) the testimony of Appellant's and Edwards's mutual friends, Federspill and Tarver, that Appellant's SUV was not parked in his home's driveway after the New Year's Eve party; (2) historical cell phone data reflecting activity on Appellant's phone in the vicinity of Edwards's condominium around the time of the murder; (3) pictures from a bank's ATM camera depicting a white SUV similar to Appellant's and an unidentified figure entering Edwards's condominium complex around the time of the murder; and (4) Appellant's DNA on the bloody towel covering Edwards's face. Appellant contends the evidence is insufficient to support his murder conviction.

Holding: Having reviewed the record in the light most favorable to the verdict, we hold the jury rationally could have found [Appellant] guilty of murder beyond a reasonable doubt. *** The combined and cumulative force of the incriminating circumstances presented by the State point toward [Appellant]'s guilt. *** [Appellant] counters this conclusion by arguing there is a hole in the State's storyline that is supported by the very cell phone evidence used to convict him, evidence that renders the circumstantial evidence presented by the State insufficient. [Appellant] points out the cell phone records indicate he was in the proximity of Olmos Dam at 1:32 a.m. on the morning of Edwards's murder because his cell phone recorded activity from a tower in that area. Those same cell records indicate that only 13 minutes earlier, at 1:19 a.m., [Appellant] was in the vicinity of Edwards's condo a few miles away. Problematically, the ATM photos used by the State do not show [Appellant] leaving in the same manner as the State alleges he entered the complex, i.e., walking in the front entrance. The State had no explanation for this apparent conflict and admitted as much during its closing: "[w]ill I ever be able to tell you precisely how the Defendant got over the [Gallery Court] wall or why the Defendant got over the wall? No. No." However, as stated above, we must presume the jury resolved this conflict in the evidence in favor of the verdict and defer to that determination, as we have already done on other occasions. *** In a further attack on the sufficiency of the evidence, [Appellant] directs the court, for the first time in its reply brief, to a Court of Criminal Appeals decision where the court reviewed a set of circumstantial facts and determined that "[w]hile these facts together might create suspicion, . . . they do not add up to probable cause that appellant committed the murders." Hankins v. State, 132 S.W.3d 380 (Tex.Cr.App. 2004)(see GG, Vol. 12, No. 16; 04/26/2004). [Appellant] argues that if the Court of Criminal Appeals could not find probable cause under the facts in Hankins, then this court would err to find the present facts sufficient to support [Appellant]'s guilt. This argument is not persuasive as the Hankins case is completely distinguishable. Hankins involved a determination of the existence of probable cause, a standard inapplicable to the sufficiency review we apply here.

GG 512.01 Appellate Procedure / New Trials / Grounds for Granting: Appellant contends the trial court abused its discretion when it denied his motion for new trial. Specifically, Appellant argues the trial court erred because: (1) the evidence was insufficient to establish Appellant's guilt; (2) newly discovered evidence regarding the historical cell phone data and the ATM pictures tends to exculpate Appellant; and (3) it was discovered that a juror allegedly lied about his knowledge of cell towers on his juror selection form.

Holding: (Sufficient Evidence) [Appellant] first argues the trial court abused its discretion by denying his motion for new trial because the evidence was insufficient to sustain his conviction. This argument is identical to [Appellant]'s first point of error on appeal. As we held above, the evidence is sufficient to support [Appellant]'s conviction . . .. ("New" Evidence)[[Appellant]] contends he presented newly discovered, material evidence entitling him to a new trial. The new evidence includes: (1) an expert to counter Doll's testimony as to whether historical cell tower data can establish a phone's approximate location; and (2) an expert to testify that the figure seen in the ATM photos entering the Gallery Court complex could not have been [Appellant] because the figure was too tall. The State counters [Appellant]'s claims by arguing this evidence is not actually "new." We agree. *** The evidence underlying the potential "new" experts is not, in fact, newly discovered. [Appellant] had access to the historical cell data records from AT&T and the ATM images used by the State before the start of trial. Reaching new and different opinions from the same foundational evidence does not render the evidence newly discovered as required by Keeter, even if those new opinions may be material. (Allegedly Impartial Juror) [Appellant]'s final argument regarding his motion for new trial concerns juror number 66. According to [Appellant], a court deputy overheard juror 66 admit after trial that he did in fact have experience and knowledge about cell phone towers due to his training and experience with his job at H.E.B. *** [Appellant] contends having juror 66 on the jury deprived him of a fair trial because juror 66 is biased regarding the historical cell data relied upon by the State. *** [We] have not located a single instance where [Appellant]'s trial counsel specifically questioned the venire about cell phones or cell towers during voir dire. Therefore, we hold trial counsel was not diligent during voir

dire, and [Appellant] may not now claim he deserves a new trial because an allegedly biased juror was selected without fault or lack of diligence on the part of his counsel.

§§ 242.01 Juries / Notes from Jury / Reading Testimony: Appellant next contends the trial court erred by insufficiently responding to the following jury note at trial: "Jurors have a dispute concerning the testimony of AT&T expert, Ken Doll, regarding the possibility of a cell phone connection between tower SX 3155 (Gallery Court) & the residence at 333 Rosemary Ave." In response to Ford's objection, the trial court clarified its decision before actually rereading Doll's testimony to the jury, stating: "Well, in light of the way the question was phrased, it was fairly specific. And although I understand that generally it covers some of the issues, but it's in very general terms, and so I have narrowed that request to Page 67, Line 4 through Page 68 of Line 8, which covers the same issue but with more specificity, based on the question that was presented by the jury. So your objection is duly noted for the record and the request is denied." After explaining its decision to Appellant, the trial court proceeded to read back Doll's testimony concerning the specific issue of whether Appellant's phone could connect with the Gallery Court tower from his home on 333 Rosemary Ave. The testimony included cross examination by Appellant's counsel regarding, among other things, the cell tower technology available at the time in question, as well as Doll's "line of sight" rationale for why the connection with Gallery Court was impossible. Appellant contends the trial court improperly limited the amount of Doll's testimony read back to the jury in response to its note.

Holding: The trial court's reasoning appears in line with the Court of Criminal Appeals' directive regarding jury notes: "the trial court must then interpret the communication, decide what sections of the testimony will best answer the inquiry, then limit the re-reading accordingly." *** The jury asked specifically about the possibility of a "cell phone connection between tower SX 3155 (Gallery Court) & the residence at 333 Rosemary Ave.," and the testimony read back by the trial court included Doll's answer to that specific question, i.e., it is impossible because the tower did not have line of sight with the residence. The testimony proffered by Ford addresses the issue as a broad general principle and not as a response to the jury's specific question. Accordingly, we hold the trial court did not clearly abuse its discretion in responding to the jury's note as it did.

§§ 31.15 Search & Seizure / Warrantless Searches / Evidence Obtained by the Grand Jury: After proving that Appellant was not at home around the time of the murder as he claimed, the State turned to historical cell phone data obtained from Appellant's cellular provider, AT&T, to determine where he in fact was in the early hours of January 1, 2009. The information revealed in the records includes: the date and time of a cellular device's usage; the type of usage; the number calling and called during the usage; the duration of the usage; and the exact location (latitude and longitude coordinates) of the tower that processed the usage of the cellular device. According to the State's historical cell data expert Kenneth Doll, an employee of AT&T, this data is collected even from passive activity on the cellular device -- including letting a call go to voicemail by not answering it -- because even with passive activity. AT&T's records regarding Appellant's cell phone were acquired by the State pursuant to a court order under Article 18.21, C.Cr.P., not by search warrant. At trial, Appellant contested the admissibility of the cell phone records with a motion to suppress, which the court denied. Appellant argues the State improperly acquired and used historical cell phone data collected by AT&T to connect him to Edwards's murder.

Holding: Article 18.20 defines "electronic communication" for the purposes of the order as "a transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system." *** We hold the information collected by the State in this case is AT&T's records of the transfer of signs, signals, and data from [Appellant]'s cellular phone serviced by AT&T and falls within the definition of an "electronic communication" subject to disclosure via court order. *** [Appellant] attempts to distinguish the information obtained by the State as "cellular site information" concerning connection and location data that is not "intelligence of any nature" referenced by Article 18.20, Section 1(15); however, this argument is without merit because it ignores the full

scope and definition of "electronic communication" set out above. Accordingly, we overrule this complaint and hold the records acquired from AT&T were obtained pursuant to a proper order under Article 18.21.

Ed Note: The Court of Appeals rejected Appellant's claim under Article 38.23, C.Cr.P., regarding the cell phone tower information, holding that the records from AT&T do not violate Article 18.21, C.Cr.P., and, therefore, Art. 38.23 could not serve as a basis to exclude the evidence.

32.01 Search & Seizure / Warrantless Searches / Reasonable Expectation of Privacy: in addition to his statutory claims, Appellant argues that the State unconstitutionally obtained his cellular records from AT&T without a search warrant. Specifically, he contends the State's warrantless acquisition of the records from AT&T violated his constitutional rights under the Fourth Amendment. Ford relies on the Supreme Court's decision in U.S. v. Jones, 10-1259 (January 23, 2012)(see , Vol. 20, No. 1; 01/30/2012), to argue individuals have a reasonable expectation of privacy "in our technologically advanced tools that also reveal our locations."

Holding: [Appellant] cannot successfully complain about the State's warrantless retrieval of the AT&T records. The cell site data acquired by the State is simply the business records memorializing [Appellant]'s voluntary subscriber transaction with AT&T for the service he wanted from his cellular provider all along, i.e. the ability to transmit and receive data on AT&T's network of cell towers. *** The fact that this data happens to reveal the general location of [Appellant]'s cell phone, and presumably himself, at given points in historical time is of no consequence to the legal analysis here. *** This information -- AT&T's records of which towers [Appellant]'s phone connected with to receive cellular service -- was what the State used to determine his phone's approximate location at certain times on the night Edwards was murdered. Ultimately, [Appellant] voluntarily decided to obtain a cell phone, chose AT&T as a service provider, and availed himself of the benefits of its network of cell towers. *** Accordingly, we overrule this issue and hold [Appellant] voluntarily disclosed the location of his cell phone through cell site data to a third party.

Concurring / Dissenting Opinions: Justice Chapa filed a dissenting opinion. He would hold that Appellant retained an objectively reasonable expectation of privacy in his physical movements and location and reverse the conviction.

31.024 Search & Seizure / Probable Cause (Misstatements in Affidavit?): Appellant alleged before the trial court that Detective Carrion falsely stated Tarver and Federspill's testimony, and mischaracterized the photos taken of the Gallery Court entrance from the ATM camera. Specifically, Appellant challenged Detective Carrion's characterization of the testimony regarding whether Appellant's car was not seen in the church parking lot, Appellant's responses to text messages, as well as the detective's recitation of the contents of the ATM photographs. The motion was denied without a hearing. On appeal, Appellant contends he was entitled to a hearing on his motion to suppress the searches resulting from warrants to obtain his DNA, search his home, and search his vehicle made under Franks v. Delaware. 438 U.S. 154 (1978). Appellant claims Detective Leroy Carrion's affidavits, which were used to obtain the search warrants, contained false statements that were necessary to the threshold finding of probable cause.

Holding: [Even] without the portions of Detective Carrion's affidavit challenged by [Appellant], we hold Detective Carrion's affidavit was sufficient to establish probable cause to support the search warrants. Specifically, the redacted affidavits assert: [Appellant] is a recent ex-boyfriend of Edwards; he attended the same New Year's Eve party as Edwards; he drove to the party in his white Chevy Tahoe; despite allegedly heading home after the party, [Appellant]'s friends did not see his Tahoe parked in his driveway after the party; surveillance photos depict a vehicle similar to [Appellant]'s entering and exiting Edwards's condominium complex around 11:40 p.m.; surveillance photos depict a figure consistent in appearance with [Appellant] walking into the complex at 11:42 p.m.; and male DNA was found on the towel covering Edwards's head. Given the nexus between [Appellant] and Edwards's murder from the information remaining in Detective Carrion's affidavits, under the totality of the circumstances, we hold there is a fair probability

evidence relating to the murder would have been found in [Appellant]'s vehicle, home, and DNA. *** Accordingly, we hold [Appellant] did not satisfy the third prong required for a Franks hearing and overrule his point of error.

222 Evidence / Relevancy: At trial, Edwards' mother testified that a power cord used to charge a cordless electric drill was missing from her daughter's condominium. Specifically, Deborah Edwards testified: "She had one and she bought her father one just like it. And when we were putting things up, the cord was missing from hers. It was in her office. . . . She bought them at the same time." The State then moved to introduce into evidence the identical charging cord from the drill Edwards had purchased for her father. Appellant objected that the cord was not relevant and invited speculation. The State responded that the proffered "exhibit is an exact copy of the charging cord that is missing from the deceased's cordless charger that was in the office where she was found murdered by strangulation." The trial court overruled Appellant's objection and admitted the cord into evidence.

Holding: [Appellant] contends the trial court erred, but we disagree. *** Here, the power cord introduced by the State was properly admitted over objection as demonstrative evidence of an item missing from the victim's home. The victim died from strangulation by ligature and it is relevant that a possible ligature, the power cord, was missing from the victim's home. *** [Appellant]'s counter argument seems to focus on the State's purpose for introducing the power cord -- to present it as the murder weapon used to strangle Edwards. [Appellant] argues, in essence, the admission of the cord as the speculative murder weapon is not based on the evidence and deprived him "of a fair trial by allowing the State to present to the jury a full story and avoid the fact that it lacked any weapons and any real evidence against [Appellant]." This argument is without merit. The State elicited testimony that the cord was missing from the crime scene, presented an identical cord into evidence, and argued that the missing cord could have in fact been the murder weapon. Such "speculation" is a proper use of circumstantial evidence and a question of fact for the jury to resolve.

512.01 Appellate Procedure / New Trials / Grounds for Granting: Ford contends his "conviction should be reversed and he should be granted a new trial" because of several alleged instances of improper jury argument by the State. Specifically, Ford argues that the State improperly called Ford a liar twelve times during opening statements.

Holding: Because the trial court sustained Appellant's ongoing objection to the State's accusations in its opening statement, and instructed the jury to disregard said statements, "[t]he only adverse ruling -- and thus the only occasion for making a mistake -- was the trial court's denial of the motion for mistrial." *** Therefore, the proper issue is whether the trial court abused its discretion by denying Appellant's request for a mistrial. *** Only in extreme circumstances of incurable prejudice will mistrial be required. *** In evaluating whether the trial court abused its discretion by denying a mistrial for improper argument, we apply and balance the following three factors: (1) the severity of the misconduct (magnitude of the prejudicial effect of remarks); (2) the measures adopted to cure the misconduct (efficacy of any cautionary instruction by the trial court); and (3) the certainty of conviction absent the misconduct (strength of evidence supporting conviction). *** Here, after applying the foregoing factors to the statements made by the State, we hold the trial court did not abuse its discretion by denying [Appellant]'s request for a mistrial.

334 Prosecutorial Misconduct / Improper Argument: Appellant contends the State improperly shifted the burden of proof during its closing argument. After discussing Appellant's alibi and the evidence presented at trial, the State made the following closing argument: "If not him, who? I mean, they're going to tell you that's shifting the burden of proof. . . Who? They've put on a case. They've called witnesses. They – they have certainly cross-examined. Who?" Appellant's objection to this argument was overruled by the trial court.

Holding: [The] trial court properly overruled [Appellant]'s objection because the State's argument was a reasonable deduction from the evidence. *** Having presented its theory of the case and web of circumstantial evidence linking [Appellant] to the murder, it was a reasonable deduction from

the evidence for the State to argue no one else could have or would have committed this crime except [Appellant]. Accordingly, we hold the State engaged in proper jury argument. *** [Appellant] counters by citing to Dee v. State, 388 S.W.2d 946 (Tex.Cr.App. 1965), for the proposition that prosecutorial jury argument that shifts the burden of proof is reversible error. Not only does [Appellant]'s passing citation fail to describe how the State actually shifted the burden of proof, but also [Appellant]'s reliance on Dee is misplaced. The eventual reversal in Dee was not based on an improper argument shifting the burden of proof, but rather the prosecution's argument erroneously placing the defendant's character in issue. *** Accordingly, Dee is not on point and does not offer any direct support for [Appellant]'s position.

Ed Note: The Court of Appeals also held that the defendant did not preserve his claims ❶ that State's applications for AT&T's data were inadequate under federal law; ❷ that the Texas Constitution provided greater protection than those provided by the federal constitution; ❸ that his First Amendment right to freely associate was violated by the State's warrantless acquisition of historical cell site records of his phone from AT&T; ❹ that the trial court erred by admitting demonstrative evidence of items which Edwards mother testified were missing from her daughter's condominium when she was packing it up three years after the murder; ❺ that the State improperly commented on his failure to testify during its closing argument. The Court also ruled that ❻ the trial court did not err when it denied the defendant's oral request for a continuance because the failure to file a written motion preserves nothing for appellate review; ❼ the defendant's motion for independent testing of DNA evidence in the State's possession was not timely filed; and ❽ the defendant did not preserve his claim that evidence of the Gillespie County burglary is admissible "alternate perpetrator evidence" or "context evidence" with regard to the deceased's murder.