

Reversed and Remanded and Opinion filed October 27, 2026



In The

Fourteenth Court of Appeals

**NO. 14-25-00603-CR
NO. 14-25-00604-CR**

THE STATE OF TEXAS, Appellant

V.

AARON BAYNE WRIGHT, Appellee

**On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Cause Nos. 1729169; 1729170**

OPINION

The State of Texas appeals the trial court's order granting a new trial to appellee Aaron Bayne Wright following his convictions for aggravated assault of a family member causing serious bodily injury with a deadly weapon and burglary of a habitation with intent to commit aggravated assault. *See* Tex. Penal Code Ann. §§ 22.02(b)(1)(A); 30.02(d). We conclude that the trial court abused its discretion when it granted appellee's motion in the interest of justice. We reverse the trial court's

order and remand to the trial court with instructions to reinstate the judgment of conviction and sentence.

BACKGROUND

The complainant in this case is Andrea Bolton, appellee's ex-wife. They had been married for twelve years, and they had had four children together. Appellee filed for divorce in 2019, and it was finalized that same year. Bolton bought her own home after the divorce. As a result, appellee had never lived in the house, nor been invited inside.

One evening Bolton's thirteen-year-old daughter was sleeping in her bedroom along with her younger sister when she was startled awake when the power went out. She laid back down in her bed to go back to sleep when she heard the house alarm go off.

Bolton testified that she was sleeping in her bed when she was awakened by a thud, and then the triggering of the house security alarm. She realized someone had broken the glass window of the back door. Bolton saw a hand reach inside the door, turn the doorknob, and enter the house. Bolton then saw appellee walk into the house. Bolton knew it was appellee because she could see appellee's face in the light of the security panel. Bolton could also tell it was appellee because he had a distinctive limp caused by atrophied muscles. Bolton saw appellee walk across the living room and toward their children's bedrooms. Believing she needed to do something to protect herself and her children, Bolton got out of her bed and went to her closet, where she retrieved her handgun. Bolton then positioned herself inside her bedroom doorway with her gun pointed at the door. Seconds later, appellee appeared in the doorway. Bolton squeezed the trigger, but the gun did not fire because Bolton had forgotten to flip the safety off. Appellee then raised his firearm

and shot Bolton in the arm, which knocked her down and caused the gun to fly out of her hands. Not wanting to just lie on the floor and let appellee shoot her, Bolton pulled herself back up facing appellee. Bolton began walking away from appellee but he fired again and shot her in her left leg, causing her to collapse by her bed. Appellee came up next to Bolton and shot her three more times, hitting her in the back and side. Thinking that appellee was going to kill her and her children would find her dead on the floor, Bolton played dead so appellee would not put a bullet in her head. As appellee walked away, he turned and looked at her with a completely blank face, then went out the back door of the house.

Once appellee left the house, Bolton pulled her cell phone down from her nightstand and called 9-1-1. Bolton could be heard on the 9-1-1 recording telling her oldest daughter to go with her brother to the neighbor's house to get help. Bolton was also recorded telling her other children to stay in their bedrooms and telling the 9-1-1 operator to hurry the first responders.

Once they arrived, the sheriff's deputies told Bolton that the power had been cut and they had to flip the breakers to turn it back on. EMS arrived and took Bolton to the hospital where she underwent several surgeries. Bolton had a pulmonary embolism and a broken leg. Bolton underwent several months of physical therapy, and she still had scars from her wounds at the time of appellee's trial. In addition, bullet fragments continue to push through Bolton's skin. Bolton testified that she had never again stayed in her house after she was attacked.

Although none of the four children in the house that night saw the actual shooting, the two oldest children who had gone to the neighbor's house for help, did watch the neighbor's security video from the neighbor's home security system. The video was recorded early in the morning of June 28, 2021. Both children identified the figures depicted in the videos as their father, appellee, and his girlfriend. Both

denied Bolton told them their father had shot her before they left the house, but the daughter admitted that she heard her mother tell the 9-1-1 operator that information.

Appellee's son testified that, after he, his mother, and his siblings moved into the house where the shooting would eventually occur, he gave his father a FaceTime tour of the house. He saw his father taking notes. Appellee took notes every time they communicated by FaceTime, but appellee always refused to tell his son why he was taking notes.

Appellee was indicted for aggravated assault of a family member, causing serious bodily injury with a deadly weapon, in cause number 1729169, and burglary of a habitation with intent to commit aggravated assault in cause number 1729170. The cases were consolidated for trial. At the close of the evidence after a lengthy trial, the jury found appellee guilty as charged in both indictments and assessed his punishment in both cases at fifty years confinement in prison. The trial court entered its judgments based on the jury's verdicts and certified appellee's right to appeal. Appellee filed a notice of appeal the same day.

Appellee retained new counsel and filed a consolidated motion for new trial under both cause numbers. Appellee alleged three grounds supporting his motion: (1) the verdict was contrary to the law and the evidence; (2) the evidence was insufficient to support the jury's verdict; and (3) "the prosecutor's final argument at guilt and punishment violated established precedent so that the jury verdicts were contrary to the law and the evidence and resulted in [appellee's] rights to due process [sic] by the prosecutor's intentional comments on his failure to testify and injecting facts into the proceedings that were not supported by the evidence." Appellee argued in his sufficiency challenge that the jury verdict was contrary to the evidence, and it invited the trial court to reevaluate Bolton's credibility when deciding whether the evidence was legally sufficient to support the jury's guilty verdict. Appellee did not

allege ineffective assistance of counsel as a ground in his motion for new trial. The State filed a response to appellee's consolidated motion which included an objection to any amendments to the grounds alleged in appellee's consolidated motion.

The trial court conducted an oral hearing on the motion. Appellee called a single witness, his trial counsel, who testified that, among other things, his performance representing appellee during both of the State's closing arguments was deficient. Appellee's former trial counsel continued that the State's improper arguments just "got by me at the time" they were made and he failed to object, although he should have objected to each. Appellee's original trial counsel further testified that he did not have a strategic reason for not objecting to the State's improper arguments. Following the hearing, the trial court granted the motions for new trial and signed appellee's proposed findings of fact and conclusions of law making one substantive change: the trial court added that it granted the motion for new trial in the interest of justice. The State's appeal followed.

ANALYSIS

The State raises five issues in its appeal challenging the trial court's order granting appellee's motion for new trial. Because all address the trial court's granting of appellee's motion for new trial, we address them together.

I. Standard of review and applicable law

We review a trial court's ruling on a motion for new trial for an abuse of discretion. *State v. Herndon*, 215 S.W.3d 901, 906-07 (Tex. Crim. App. 2007). The court abuses its discretion only if its ruling was clearly erroneous and arbitrary, such as when no reasonable view of the record supports it. *Riley v. State*, 378 S.W.3d 453, 457 (Tex. Crim. App. 2012). The Court of Criminal Appeals has clarified that a court may not grant a new trial unless the motion asserts a valid legal reason. *State*

v. Thomas, 428 S.W.3d 99, 104-05 (Tex. Crim. App. 2014); *Herndon*, 215 S.W.3d at 907-08. The trial court’s discretion to grant a motion for new trial “in the interest of justice” is not “unbounded or unfettered.” *Thomas*, 428 S.W.3d at 104–05. Instead, “justice” means “in accordance with the law.” *Id.* at 105. That is, a court generally does not abuse its discretion in granting a new trial if the defendant (1) articulated a valid legal claim in the motion; (2) produced evidence or pointed to record evidence that substantiated his claim; and (3) showed prejudice under applicable harmless error standards. *State v. Arizmendi*, 519 S.W.3d 143, 148 (Tex. Crim. App. 2017). A trial judge may not grant a new trial on mere sympathy, an inarticulate hunch, or simply because she believes the defendant received a raw deal, or is innocent. *Herndon*, 215 S.W.3d at 907. To grant a new trial “for a non-legal or a legally invalid reason” is an abuse of discretion. *Thomas*, 428 S.W.3d at 104; *Herndon*, 215 S.W.3d at 907.

As factfinder, the trial court is the sole judge of witness credibility on a motion for new trial with respect to affidavits and live testimony submitted in the new trial proceeding. *See Dixon v. State*, 595 S.W.3d 216, 224 n.24 (Tex. Crim. App. 2020); *Okonkwo v. State*, 398 S.W.3d 689, 694 (Tex. Crim. App. 2013). Thus, we afford almost total deference to a trial court’s determination of the historical facts and of mixed questions of law and fact that turn on the credibility and demeanor of witnesses involved in the motion for new trial. *See Okonkwo*, 398 S.W.3d at 694; *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). We apply this same deferential review to a trial court’s determination of historical facts based solely on affidavits, regardless of whether the affidavits are controverted. *See Okonkwo*, 398 S.W.3d at 694. A reviewing court is not, however, bound by the trial court’s legal conclusions. *See Guzman*, 955 S.W.2d at 89.

II. A claim that appellee’s original trial counsel was ineffective cannot support the granting of the new trial because it was not alleged in the

motion for new trial.

The State argues in its first issue that, in defending the trial court's order granting him a new trial in the interest of justice, appellee is limited to the three grounds he alleged in his motion for new trial. The State continues this argument into its second issue which asserts that the trial court abused its discretion when it found appellee's trial counsel ineffective for not objecting to the State's closing arguments. The State's issues assert that, because appellee did not allege ineffective assistance of counsel as a ground in his motion and the State objected to amending the grounds, the trial court's findings that appellee's trial counsel's performance was deficient cannot provide the legal basis to support the trial court's granting of the motion in the interest of justice. We agree.

Appellee alleged three grounds in his motion: (1) the verdict was contrary to the law and the evidence; (2) the evidence is insufficient to support the jury's verdict; and (3) the State's final arguments improperly commented on appellee's failure to testify and injected new facts into the proceedings. Appellee is therefore limited to these grounds. *See State v. Zalman*, 400 S.W.3d 590, 594 (Tex. Crim. App. 2013) (stating the grounds to support the granting of a motion for new trial must be specifically set forth in the motion); *State v. Herndon*, 215 S.W.3d 901, 909 (Tex. Crim. App. 2007) (stating that a trial court does not abuse its discretion by granting a motion for new trial when the defendant articulated a valid legal claim in his motion for new trial). The first ground appellee alleged is generally treated as a challenge to the sufficiency of the evidence. *See Zalman*, 400 S.W.3d at 594 (confirming that "allegations that a verdict was against the law and the evidence raised a sufficiency challenge and *only* a sufficiency challenge.") (emphasis in original). Therefore, appellee's first two grounds both challenge the sufficiency of the evidence supporting the jury's verdicts. *Id.* Appellee's third ground challenged

the prosecutor's final arguments. Therefore, because appellee did not assert ineffective assistance of counsel as a ground in his motion for new trial, and the State objected to the addition of more grounds, the trial court could not grant a new trial in the interest of justice based on ineffective assistance of counsel. *See State v. Provost*, 205 S.W.3d 561, 566 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (“Here, appellee did not raise ineffective assistance of counsel in his motion for new trial. Thus, the trial court lacked authority to order a new trial on ineffective assistance of counsel. Moreover, because the trial court had no authority to grant a new trial on a ground not raised by the defendant in his motion, its findings of fact and conclusions of law setting forth the ineffective assistance ground are not relevant.”). We sustain the State's first issue and second issue to the extent it challenges ineffective assistance of counsel as a basis for granting appellee's motion for new trial in the interest of justice.

III. Because sufficient evidence supports the jury's verdict, appellee's first two grounds cannot support the trial court's granting of appellee's motion for new trial.

The State argues in its fifth issue that appellee's first and second grounds asserted in his motion for new trial cannot support the trial's order granting him a new trial in the interest of justice because sufficient evidence supports the jury's verdict. We must address these grounds even though the trial court did not specifically grant the motion based on them. *See Provost*, 205 S.W.3d at 566 (stating that an appellate court must address the grounds raised in the defendant's motion for new trial “even though it is apparent the trial court did not grant a new trial on those grounds”). The State additionally asserts that appellee's argument in his motion for new trial that the trial court should consider the credibility of the complainant to determine whether the evidence is legally sufficient is an incorrect statement of a trial court's authority when deciding a motion for new trial. We agree with the State

that (1) the trial court did not have the authority to reweigh Bolton's credibility; and (2) appellee's first and second grounds cannot support the grant of a new trial because sufficient evidence supports the verdict.

We apply a legal-sufficiency standard of review in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979); *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). Under this standard, we examine all the evidence adduced at trial in the light most favorable to the verdict to determine whether a jury was rationally justified in finding guilt beyond a reasonable doubt. *Temple*, 390 S.W.3d at 360; *Criff v. State*, 438 S.W.3d 134, 136–37 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd). We consider all evidence in the record, whether admissible or inadmissible. *Winfrey v. State*, 393 S.W.3d 763, 767 (Tex. Crim. App. 2013). We also consider both direct and circumstantial evidence, as well as any reasonable inferences that may be drawn from the evidence. *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We will uphold the jury's verdict unless a rational factfinder must have had a reasonable doubt as to any essential element. *Laster v. State*, 275 S.W.3d 512, 518 (Tex. Crim. App. 2009).

Although we consider all evidence presented at trial, we do not re-evaluate the weight and credibility of the evidence or substitute our judgment for that of the factfinder. *See Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). The jury alone decides whether to believe eyewitness testimony. *Mosley v. State*, 983 S.W.2d 249, 254 (Tex. Crim. App. 1998); *Price v. State*, 502 S.W.3d 278, 281 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Because the jury is the sole judge of the witnesses' credibility and of the weight given their testimony, we resolve any evidentiary conflicts or inconsistencies in favor of the verdict. *See Westbrook v.*

State, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). The testimony of a single eyewitness can be enough to support a conviction. *Aguilar v. State*, 468 S.W.2d 75, 77 (Tex. Crim. App. 1971). The fact this issue is presented in a State’s appeal from the granting of a motion for new trial does not change this fundamental standard of review. *See State v. Moreno*, 297 S.W.3d 512, 520 (Tex. App.—Houston [14th Dist.] 2009, pet. ref’d) (providing that, when deciding a motion for new trial challenging the sufficiency of the evidence, the trial court must apply the legal sufficiency standard of review because it “may not sit as the thirteenth juror and may not substitute its beliefs for those of the jury.”).

As summarized above, Bolton testified that appellee broke into her home and proceeded to shoot her five times with a handgun. *See Martinez v. State*, 633 S.W.3d 698, 705–06 (Tex. App.—Houston [14th Dist.] 2021, pet. ref’d) (concluding sufficient evidence supported guilty verdict based in part on complainant’s testimony that the defendant shot him in the back and then in the face). Bolton also testified about the seriousness of her wounds caused by appellee’s actions. The children’s identification of appellee as the perpetrator and appellee’s note taking during a FaceTime tour of the home corroborated Bolton’s identification of appellee as the perpetrator. This evidence supports the jury’s verdict and the fact the trial court expressed her belief that Bolton was not a credible witness is simply not relevant to the analysis. We sustain the State’s fifth issue.

IV. Appellee’s third ground alleged in his motion for new trial cannot support the trial court’s action because the State did not engage in improper argument nor comment on appellee’s failure to testify.

Appellee’s trial was contentious and it remained contentious through closing arguments. Appellee’s trial counsel lodged numerous objections to the State’s closing arguments, most of which the trial court sustained. The trial court also granted appellee’s requests for instructions to disregard, but denied all motions for

mistrial. Appellee asserted in the third ground of his motion for new trial that he was entitled to a new trial because the State engaged in improper jury argument during both phases of his trial. Appellee first asserted that the State engaged in two types of improper argument during the guilt-innocence phase of his trial: (1) the State presented argument outside the record by commenting on appellee's failure to testify by presenting statements attributed to him; and (2) it injected facts not admitted into evidence and suggested impermissible inferences based on those facts. Appellee also asserted that the State engaged in improper jury argument during the punishment phase of his trial by injecting facts not admitted into evidence and by making statements about the prosecutor's personal opinions.¹

The State argues in its second issue that the trial court abused its discretion by granting appellee a new trial based on trial counsel's failure to object to the State's closing argument because it did not comment on appellee's failure to testify. The State argues in its third issue that the trial court abused its discretion when it granted appellee's motion for new trial because it did not engage in improper jury argument by injecting facts not in evidence during the guilt-innocence phase of appellee's trial. The State argues in its fourth issue that the trial court abused its discretion because (1) it did not inject facts not in evidence during the punishment phase of appellee's trial; and (2) it did not improperly inject the prosecutor's personal opinions into the

¹ To be clear, appellee's trial counsel timely objected to each of these categories of allegedly improper jury argument except the first one, namely that the State improperly commented on appellee's failure to testify. It was only as to this argument that the trial court found counsel's failure to object deficient. As stated in Part II above, however, this ground cannot support a new trial based on the trial court's stated reason of deficient performance because the motion for new trial did not assert that trial counsel was ineffective in failing to object. In Part IV of this opinion, we address the trial court's alternative reasoning that the State's comment on appellee's failure to testify was so harmful that no objection was required. As to the other categories of improper jury argument identified in appellee's motion for new trial, the trial court sustained each of counsel's timely objections and instructed the jury to disregard the challenged arguments.

case. We once again agree with the State.

A. Standard of review and applicable law

Proper jury argument includes four areas: (1) summation of the evidence presented at trial, (2) reasonable deductions drawn from the evidence, (3) answer to opposing counsel's argument, and (4) a plea for law enforcement. *Brown v. State*, 270 S.W.3d 564, 570 (Tex. Crim. App. 2008). These four categories apply equally to both guilt-innocence and punishment phases of a criminal trial. *Harris v. State*, 996 S.W.2d 232, 237 (Tex. App.—Houston [14th Dist.] 1999, no pet.). An attorney may quote or paraphrase the jury charge provided the attorney's statement of the law is not contrary to that presented in the charge. *Orsag v. State*, 312 S.W.3d 105, 120 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd). Jury argument must be analyzed in light of the attorney's entire argument rather than just isolated sentences. *See Temple v. State*, 342 S.W.3d 572, 603 (Tex. App.—Houston [14th Dist.] 2010), *aff'd*, 390 S.W.3d 341 (Tex. Crim. App. 2013); *see also Mosley v. State*, 686 S.W.2d 180, 183 (Tex. Crim. App. 1985). The State is allowed wide latitude in drawing inferences from the evidence so long as the inferences drawn are reasonable and offered in good faith. *Temple*, 342 S.W.3d at 602. A prosecutor may argue her opinion concerning the issues in the case so long as the opinion is based on the evidence in the record and does not constitute unsworn testimony. *Id.* We also consider an attorney's remark in the context in which it appears. *Id.* at 603. Once an improper jury argument is made, an instruction to disregard the argument generally cures any error. *Shannon v. State*, 942 S.W.2d 591, 597 (Tex. Crim. App. 1996).

The United States and Texas Constitutions both guarantee that a defendant in a criminal trial shall not be compelled to give evidence against himself. *See* U.S. Const. amend. V; Tex. Const. art. I. The failure of a defendant to testify on his own

behalf shall not be taken as a circumstance against him and shall not be alluded to or commented on by counsel. Tex. Code Crim. Proc. art. 38.08. It is improper for either the State or the trial court to comment on the defendant's failure to testify. *See Bustamante v. State*, 48 S.W.3d 761, 764 (Tex. Crim. App. 2001) (citing *Davis v. United States*, 357 F.2d 438, 441 (5th Cir. 1966)).

To determine whether an improper comment occurred, the offending language must be viewed from the jury's standpoint and the implication that the comment referred to the defendant's failure to testify must be clear. *Bustamante*, 48 S.W.3d at 765. It is not sufficient that the language might be construed as an implied or indirect allusion. *Id.* The test is whether the language used was manifestly intended or was of such a character that the jury would necessarily and naturally take it as a comment on the defendant's failure to testify. *Id.* In applying this standard, we analyze the context in which the comment was made to determine whether the language used was of such character. *See Cruz v. State*, 225 S.W.3d 546, 548 (Tex. Crim. App. 2007) (concluding "what determines the impermissibility of a reference to the defendant's failure to testify is not the use of 'I' or 'he' or 'she' or any other word, but rather the entirety of the prosecutor's statements, taken in the context in which the words were used and heard by the jury," which must be examined on a case by case basis).

It is the duty of trial counsel to confine his or her argument to the record; reference to facts that are neither in evidence nor inferable from the evidence is improper. *Alejandro v. State*, 493 S.W.2d 230, 231 (Tex. Crim. App. 1973). Error occurs when facts not supported by the record are interjected into the argument, but such error is not reversible unless, in light of the record, the argument is extreme or manifestly improper. *Brown v. State*, 270 S.W.3d 564, 570 (Tex. Crim. App. 2008).

In argument counsel may draw from the facts in evidence all inferences that

are reasonable, fair, and legitimate and will be afforded latitude so long as the argument is supported by the evidence and offered in good faith. *Griffin v. State*, 554 S.W.2d 688, 690 (Tex. Crim. App. 1977). An inference is a conclusion reached by considering other facts and deducing a logical consequence from them. *See Hooper v. State*, 214 S.W.3d 9, 16 (Tex. Crim. App. 2007).

B. The State did not comment on appellee's failure to testify during its guilt-innocence closing argument.

In this case, the weapon used to shoot Bolton was never found. Appellee's trial counsel inferred that this was the result of a poor investigation of the shooting by the Harris County Sheriff's Department. Appellee's trial counsel did this by injecting his personal belief about the investigation into his closing argument:

You saw this case unfold in front of you. You saw the sloppy, sloppy investigation by the Harris County Sheriff's Department. I've been doing this for 38 years, almost 40 years. I had never seen such a breakdown in investigation in my life, in my career. I've tried cases all over the United States. The breakdown in the investigation in this case is shameful, the lack of work, the lack of due diligence, the lack of follow-through in this case.

Appellee's trial counsel returned to the theme of a sloppy investigation and the lack of the weapon used to shoot Bolton later in his closing argument:

I want to talk a little bit more about this investigation. The gunshot residue and the weapons. You know now that there was a couple of weapons that were picked up. There is no weapon, no weapon in this case that ties back to [appellee]. None.

The State responded to these arguments during its own closing argument. The prosecutor argued:

Again, attack the investigation. Said that if Detective Seaton was a real detective, she would have done more work. Detective Seaton was given surveillance, Detective Seaton reviewed that surveillance. Detective Seaton first said, I don't think that the female in that – in that

image is Carrie Daffin, because as her brother said, she's too fat in her driver's license photo – quoting her brother, of course.

She said, that's definitely not her. But, let me continue my investigation. She goes to her home the day after the incident. Carrie Daffin gives consent for them to go into the home and find a weapon. Yes, it's not the weapon. How many times in a criminal case do we not get the weapon because who controls this evidence?

[Appellee] controls the evidence. And he had 12 miles, 15, 20, 25 minutes to dump that firearm, crossing multiple bridges, multiple creeks, multiple wooded areas. He had the perfect opportunity to just throw it out the window. I'm sure that's what he did. I just shot my ex-wife five times, I don't want them to connect this gun to me, I'm going to throw it out the window.

Appellee's trial counsel did not object to this argument by the State.

The investigation revealed that the vehicle used in the shooting was possibly a Ford F-150 pick-up truck. The security camera video taken by Bolton's neighbor showed two people wearing hoodies and baseball caps walking away from a dark-colored F-150 pick-up truck parked down the street from Bolton's house before the shooting. The same camera's video showed the same two people running away from Bolton's house and toward the pick-up truck a short time later. Other security camera videos taken along the route between Daffin's apartment and Bolton's house showed a similar F-150 driving past and then into Daffin's apartment complex. The investigation revealed that Daffin owned a dark-colored Ford F-150 pick-up truck. Medical-type gloves were discovered beside and inside Daffin's truck the day after the shooting.

The State addressed this evidence discovered during the investigation of the shooting. The State argued:

What we find in Carrie Daffin's apartment, a dark gray Ford F-150. What do we find inside? A ball cap. Who were the two people wearing in the surveillance – what were they wearing, not who were

they wearing.

What were they wearing? A ball cap. Now Detective Seaton stated it's not weird for a nurse to have gloves. Absolutely, it's not weird. It's not weird for a traveling nurse to have gloves. That's not what's weird for ya'll. What's weird is the discarded gray hoodie just on the ground. What's weird here is feet from the passenger – that's the driver's side. From the driver's side, we see gloves turned inside out. What nurse would leave gloves like that? What nurse would leave gloves like that?

Ladies and gentlemen, you saw me all week wearing gloves. What did I do as soon I was done with them? I threw them right away in that trash can. And you're saying a nurse would just – on the ground? Make that make sense.

On the passenger side [of Daffin's truck], another pair of gloves. So one pair was weird enough, but let's make it another pair, turned inside like out like somebody wore them, discarded on the side of the vehicle. That is odd behavior.

....

And even stranger, there's a glove underneath the passenger seat. That's stuffed up in there. Ya'll can see what the mechanics of what the seat is, who would do that? Why would you stuff a glove under your passenger seat? But if you were running on adrenaline thinking, Oh, my God. Oh, my God. Oh my God, I just shot my ex-wife, I'm going to get rid of the evidence. Gloves off, back in. Gloves off, back in. One glove under the passenger seat. Throwing my gun out on the route. That's odd behavior.

Appellee's trial counsel did not object to this argument by the prosecutor.

Appellee argued in his motion for new trial that this argument, by referencing alleged inculpatory statements by appellee, impermissibly commented on appellee's failure to testify. Appellee argued the failure to object to the argument was excused because the comment was so prejudicial that an instruction to disregard would not have cured the harmful effect. The trial court granted appellee's motion for new trial in the interest of justice. The trial court also found, consistent with appellee's

contention, that an instruction to disregard the State's improper comments on appellee's failure to testify would not have been cured by an instruction to disregard.

The State argues in its second issue on appeal that the trial court abused its discretion if it granted appellee's motion on this ground. We conclude that the State's closing argument was not one that the jury would necessarily or naturally take as a comment on appellee's decision not to testify. *See Bustamante*, 48 S.W.3d at 765 (stating that the offending language must be viewed from the jury's standpoint and the implication that the comment referred to the defendant's failure to testify must be clear and not just language that may be construed as an implied or indirect allusion to the failure to testify). The State's argument was instead a direct response to appellee's argument that the State's investigation was sloppy. *See Randolph v. State*, 353 S.W.3d 887, 892 (Tex. Crim. App. 2011) (stating that "comments about the failure to testify are permissible if they are a fair response to the defendant's claims or assertions.") (internal quotations omitted); *Villarreal v. State*, 79 S.W.3d 806, 812–13 (Tex. App.—Corpus Christi 2002, pet. ref'd) (comment that defendant had not offered reasonable explanation for evidence was in answer to defendant's jury argument and was at most indirect allusion to failure to testify). Further, the State's argument was made in the context of appellee's state of mind at the time of the offense and the immediate flight therefrom, not his actions and demeanor during his trial. *Cf. Snowden v. State*, 353 S.W.3d 815, 817 (Tex. Crim. App. 2011) (holding that State's argument that the defendant did not give "two hoots about the mother of his baby or his baby because he looks her in the eye and punches her in her 38 week old stomach without remorse, just like he is today" impermissibly commented on defendant's failure to testify); *Orellana v. State*, 489 S.W.3d 537, 549 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (concluding in an ineffective assistance of counsel case that the State's argument that the defendant did not care

and that if they looked into his eyes there would be nothing there because he does not care was improper comment on defendant's failure to testify). Finally, the State's argument was based on a reasonable deduction from the evidence. *See Saldivar v. State*, 980 S.W.2d 475, 502 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd) (rejecting defendant's contention that State's closing argument commented on the defendant's failure to testify because the closing argument was based on a reasonable deduction from the evidence). We sustain the State's second issue.

C. The State did not inject new facts not supported by the record evidence during closing arguments.

Appellee argued in his motion for new trial that the State twice injected facts not supported by the evidence into its closing argument during the guilt-innocence phase of appellee's trial. Appellee first asserted that the following argument by the prosecutor was improper:

Detective Seaton went up and down FM 2978 to multiple businesses trying to find surveillance for that, to match that vehicle. And as we could see, she found some. She found it entering the apartment. She found it exiting the apartment. She found it at a residence nearby. It's also in the surveillance from the neighborhood.

Appellee objected to the argument asserting that it was not supported by the record. The trial court sustained the objection and instructed the jury to disregard the argument. The trial court denied appellee's request for a mistrial. Appellee moved for a new trial based on this argument. The trial court granted the new trial, but did not specify this ground as a reason it did so. The State challenges this ground as a possible basis for the trial court's action in its third issue.

We conclude that the trial court erred when it sustained appellee's objection to this argument and, if it relied on this ground to support the granting of appellee's motion for new trial in the interest of justice, it abused its discretion when it did so.

The State's argument was based on evidence before the jury, including Detective Seaton's testimony and numerous videos which the jury viewed. The fact the videos were blurry or caught only glimpses of the passing vehicle does not mean the trial court could ignore them when it ruled on appellee's motion for new trial, nor that the prosecutor could not mention the evidence. We conclude that the argument was a reasonable deduction from the trial evidence. *See Saldivar*, 980 S.W.2d at 502. Further, the prosecutor's argument was a direct response to appellee's argument which pointed out the flaws and limitations of the video evidence and challenged the thoroughness of Detective Seaton's investigation. *See Randolph*, 353 S.W.3d at 892.

The second area where appellee asserted that the State included facts not in evidence in its closing argument concerned appellee's girlfriend, Carrie Daffin. Appellee called Daffin's mother, Diane Allen, to testify during his trial. Allen testified that she lived with Daffin and knew appellee because he was Daffin's friend and he was around quite a bit. Allen continued that she saw both Daffin and appellee the night before the assault occurred. Allen also stated that she specifically recalled getting up at 3:15 a.m. the same morning that the assault on Bolton occurred because she woke up to go to the restroom. Allen testified that she was surprised when she saw appellee looking into the refrigerator. Allen also testified that she heard someone leave Daffin's apartment about 5:00 a.m. that same morning.

On cross-examination, Allen admitted that she normally was not up at three o'clock in the morning but she specifically recalled it happening on this particular day. Allen further admitted that she could not recall what time she woke up the day before, nor the day after, June 28, 2021, the day of the assault. Finally, Allen admitted that her daughter, appellee's girlfriend, was also charged in the assault on Bolton.

Cell phone records for appellee and Daffin were admitted into evidence. In

addition, both sides called expert witnesses to testify about those records. It was undisputed that both appellee and Daffin's cell phones remained connected to the same cell phone tower in the vicinity of Daffin's apartment from about 10:30 p.m. on June 27, 2021, until about 7:00 a.m. on June 28, 2021. Appellee's expert testified that he found a text message sent by Daffin to someone named Douglas Adonis Flores on the morning June 29, 2021. Daffin asked Flores if he had seen the news and then discussed with Flores the news that appellee had been arrested. Flores asked if Daffin knew where appellee was during the time the assault on Bolton occurred and she responded at 8:37 a.m. on June 29, 2021, that appellee was at home lying in bed with her.

During his closing argument, appellee addressed Allen's testimony and the cell phone records. Appellee's trial counsel argued:

From the second [Bolton] said, my ex-husband did it, that was it. It was over. Not one moment of thought that it wasn't him.

They went to Carrie Daffin's apartment and her mother said, they were here all night. I woke up in the middle of the night and he was in the kitchen.

What did Detective Seaton do with that? Nothing. Nothing. They got the phone records and embedded in the phone records was a text message from Carrie Daffin to her friend. He was in bed with me all night. They didn't look at it.

The State responded to that argument during its own closing. The State argued:

The phones. They're at the location.² I can't believe I get to say this as a prosecutor. That shows premeditation, y'all. They planned it. They knew we would be looking at their phones and they planned it. They also talked about Carrie Daffin's text message conversation with

² The cell phone records indicated that Daffin and appellee's phones were near Bolton's home, the "location," before the morning of the assault.

a person saying that the defendant was in bed with her the night before.

Ladies and gentlemen, Carrie Daffin has a reason to lie. She has been charged with an offense, as well. She has a motive to lie. She knew we would be looking at her phones. She knew she had this –

Appellee objected that there was “no evidence of that.” The trial court sustained the objection and instructed the jury to disregard the argument. The trial court then denied appellee’s motion for mistrial. Appellee raised this argument in his motion for new trial, but the trial court did not specify this closing argument by the State as a basis for granting appellee’s motion.

The State argues on appeal that, to the extent the trial court relied on this argument for granting appellee a new trial in the interest of justice, the trial court abused its discretion because there was nothing improper about the argument. We agree. The State’s argument was reasonably based on evidence admitted during the trial, which we summarized above. *See Griffin*, 554 S.W.2d at 690 (stating that, during argument, counsel may draw from the facts in evidence all inferences that are reasonable, fair, and legitimate and will be afforded latitude so long as the argument is supported by the evidence and offered in good faith). In addition, the argument was a direct response to appellee’s argument inferring that Allen’s testimony offered an alibi to appellee. *See Brown*, 270 S.W.3d at 570 (stating that responding to opposing counsel’s argument is a proper subject of closing argument). We sustain the State’s third issue on appeal.

V. The State’s punishment phase argument was not improper, and it could not support the trial court’s granting of appellee’s motion for new trial.

At the conclusion of the evidence admitted during the punishment phase of appellee’s trial, the State argued:

[Appellee] then breaks the window, enters the home, walks past [Bolton], walks back to her, shoots her once. She falls down. She gets

back up because she has to stand up to him and you heard why. He has been controlling her for 13 years. She gets shot a second time. He then walks over above her and shoots her three more times to finish the job. And but for Dr. Evans, he and his team at Memorial Hermann, she wouldn't be here.

This was an attempted murder and thus we need to treat it like that. So there were five people in the home: [Bolton and her four children]. [Bolton] was shot five times. When you get back there, I want you to start your analysis at 50. Five shots, five people in the home.

You're starting at 50 because this, I challenge you, is scarier than murder. This is terrifying because he knows what to do the next time. He knows exactly what to do. This is scarier than murder because [Bolton] had the courage to walk in here and testify for two days and he knows that she had the courage to do that.

You are the barrier between her and her safety and her children's safety. You are the barrier between him and her because when he gets out, he is going to want to finish the job.

Appellee objected "improper final argument." The trial court sustained the objection and instructed the jury to disregard the argument but denied appellee's motion for mistrial.

The prosecutor continued her argument saying, "this is scarier than murder because he's still mad at her." Appellee objected again, asserting it was "improper final argument." The trial court sustained the objection and instructed the jury to disregard but denied appellee's motion for mistrial. The prosecutor resumed her argument: "I ask you to start at 50, but there's only one answer here, there's only one guarantee that [Bolton] is safe." Appellee once again objected that the prosecutor's argument was improper and the trial court sustained the objection. It then told the attorneys to approach the bench.

Once at the bench, the trial judge told the prosecutor: "You're getting close to grievance. You're getting close to unethical and grievance area. And I am about to

grant this mistrial.” Appellee’s trial counsel added: “that’s three times, Judge.” The trial judge responded, “I know. I am about to grant this mistrial. At this time, it’s denied; but this is your final warning.” At this point the prosecutor resumed her argument and told the jury that “the only answer is life” and ended her argument. The jury then retired to the jury room to determine appellee’s punishment.

One of the grounds appellee raised in his motion for new trial was that the above argument by the State was improper because the State made “clearly speculative” statements that were calculated to “inflame and prejudice” the jury against him. Appellee also asserted that the State’s argument veered outside the record and contained expressions of the prosecutor’s personal opinions. Finally, appellee argued that the State ignored the trial court’s rulings that the arguments were improper. The trial court did not specify this ground as a basis for granting appellee’s motion, but it did make findings that the State’s argument was improper because the prosecutor disregarded the trial court’s rulings and was also calculated to inflame and prejudice the jury against appellee. The trial court additionally found that the arguments were outside the record, expressions of the prosecutor’s personal opinions, and there was no legitimate basis for the arguments. The State challenges this ground as an improper basis to grant a new trial in its fourth issue. The State asserts there was nothing improper about any of the challenged arguments during the punishment phase. We address the State’s fourth issue under the same standard of review stated above.

We turn first to appellee’s contention that the prosecutor ignored the trial court’s rulings and continually repeated the same improper argument. Even if we assume for purposes of appeal that the prosecutor ignored the trial court’s rulings and continued with the same exact argument, we conclude this action would not have provided a basis to support the granting of a new trial in the interest of justice

because there was nothing improper about the prosecutor's argument.

First, the prosecutor's argument did not veer from the record. The evidence supports the prosecutor's statement that appellee broke the glass and entered Bolton's home where he shot Bolton five times. Arguing the facts of the case does not constitute an improper attempt to inflame and prejudice the jury against the defendant. *Orellana*, 489 S.W.3d at 548 (concluding that prosecutor calling the defendant an MS-13 thug was not an improper argument because it was based on a reasonable deduction from the evidence); *Arthur v. State*, 11 S.W.3d 386, 393 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (concluding State's punishment phase argument summarizing evidence and urging the jury to assess defendant's punishment in light of everything he has done was not improper). We conclude the remainder of the State's argument was a plea for law enforcement and a response to appellee's earlier argument that community supervision, or, at most, ten years in prison would be an appropriate punishment for appellee. *See Freeman v. State*, 349 S.W.3d 717, 729 (Tex. Crim. App. 2011) (providing that the State may argue that juries should deter specific crimes by their verdict); *Borjan v. State*, 787 S.W.2d 53, 56 (Tex. Crim. App. 1990) (stating that an argument for a jury to consider the impact of its verdict on the community and even specific segments of the community can be a proper plea for law enforcement); *Miles v. State*, 312 S.W.3d 909, 912 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (holding that State's argument asking jury to look at the defendant's criminal history where he had been given chance after chance and stating that "when he gets out, based on this, he's going to be right back in here somewhere," was a proper plea for law enforcement); *Andrade v. State*, 246 S.W.3d 217, 231 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd) (stating that prosecutor's argument summarizing the evidence with respect to the defendant's commission of the charged murder and an attempted murder in California was a

proper plea for law enforcement); *Longoria v. State*, 154 S.W.3d 747, 765 (Tex. App.—Houston [14th Dist.] 2004) (holding prosecutor’s argument that defendant might commit another crime was a permissible plea for law enforcement); *Pittman v. State*, 9 S.W.3d 432, 434 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (finding that the State’s seven statements relating to the defendant killing another person were proper pleas for law enforcement). We sustain the State’s fourth issue.

CONCLUSION

Having sustained the State’s issues, we reverse the trial court’s order granting a new trial to appellee and remand to the trial court with instructions to reinstate the judgments of conviction and sentence.

/s/ Chad Bridges
Justice

Panel consists of Justices Jewell, Hart, and Bridges.

Publish — TEX. R. APP. P. 47.2(b).