



**In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth**

No. 02-21-00082-CR

JOHNATHAN EUGENE COOPER, Appellant

v.

THE STATE OF TEXAS

On Appeal from the 43rd District Court
Parker County, Texas
Trial Court No. CR09-0662

Before Bassel, Womack, and Walker, JJ.
Opinion by Justice Walker

OPINION

In this postconviction DNA testing case, Appellant Johnathan Eugene Cooper appeals the trial court's order that no further DNA testing be performed in this case, an order which included findings that (1) it is not reasonably probable that Appellant would not have been convicted if the results of the DNA testing had been available during the trial of this offense and (2) additional DNA testing would not show by a preponderance of the evidence that Appellant would not have been convicted. *See* Tex. Code Crim. Proc. Ann. art. 64.03(a)(2)(A). Appellant raises five issues on appeal. We will affirm.

I. BACKGROUND

A. APPELLANT'S UNDERLYING CASES

In 2011, Appellant pleaded guilty to aggravated sexual assault of a child and, in a separate but related case, online solicitation of a minor. *See Cooper v. State*, No. 02-11-00537-CR, 2012 WL 5869600, at *1 (Tex. App.—Fort Worth Nov. 21, 2012, pet. ref'd) (mem. op., not designated for publication). The trial court consolidated Appellant's cases for a single trial on punishment. *Id.* Both cases involved the same complainant, to whom we refer as "Kori." *See id.* at *1 & n.4. She testified at the trial on punishment that Appellant had sexually assaulted her in Parker County when she was thirteen years old. Appellant did not wear a condom while having sex with Kori. *Id.* at *1. Kori identified Appellant in the courtroom and also testified that he had texted her in regard to having sex with her again after the sexual assault and that he

had asked her to bring another girl—a six-year-old—with her for him to have sex with. Kori testified that after Appellant was indicted for soliciting and sexually assaulting her, he communicated with her on the internet while using a different name, and because she believed that he was someone else, she sent him a photograph in which she was holding her breasts. *Id.* at *2.

Kori had given her cell phone and the pajama pants that she was wearing during the sexual assault to the police. An examination of Kori's cell phone and a cell phone seized from Appellant's car corroborated Kori's account of text messages between Appellant and her. A forensic biology report completed in 2009 showed that spermatozoa were located in a cutting from Kori's pajama pants, that a DNA profile was obtained from the sperm, that "the male DNA profile obtained from the sperm fraction of the pants cutting . . . was the same as the DNA from" Appellant, and that the probability of a random unrelated person having the same DNA profile was one in 243 trillion in Caucasians, one in 324 trillion in African Americans, and one in 1.4 quadrillion in Southwest Hispanics. The trial court found Appellant guilty of both offenses and sentenced him to confinement for life for aggravated sexual assault of a child and to twenty years' confinement for his online solicitation offense. *Id.* at *4. In a per curiam memorandum opinion, we affirmed Appellant's convictions and sentences on direct appeal. *See generally id.*

B. CHAPTER 64 PROCEEDINGS

In 2015, Appellant filed a motion for forensic DNA testing (his original Chapter 64 motion) with an accompanying affidavit and a brief. *See* Tex. Code Crim. Proc. Ann. art. 64.01(a-1). Specifically, Appellant sought testing of his boxer shorts—which he called “[t]he most critical and important piece of evidence”—and “tape strips” from his car, and he also sought to have Kori’s pajama pants retested. He thereafter filed more motions, including a supplemental motion to his earlier filed motion for forensic DNA testing. In December 2016, the trial court granted Appellant’s motion¹ and ordered “that the Department of Public Safety [(DPS)] laboratory conduct appropriate DNA analysis on the items of evidence received by it under this order if the presence of any biological material suitable for DNA testing is found therein” (the 2016 order). He continued to file various motions, including a motion to represent himself and a motion contending that Section 38.111 of the Texas Penal Code is unconstitutional.²

¹Before the trial court ruled on his original Chapter 64 motion, Appellant filed a petition for writ of mandamus, contending that the trial court had abused its discretion by refusing to rule on his postconviction motion for DNA testing. *In re Cooper*, No. 02-16-00430-CV, 2016 WL 7339118, at *1 (Tex. App.—Fort Worth Dec. 19, 2016, orig. proceeding) (per curiam) (mem. op.). After we requested a response to the petition, the trial court granted Appellant’s motion. *Id.* We thus dismissed the petition as moot. *Id.*

²Texas Penal Code Section 38.111(a) provides,

A person commits an offense if the person, while confined in a correctional facility after being charged with or convicted of an offense

The trial court held a hearing on Appellant's motion to represent himself, granted Appellant's request, and discharged the court-appointed attorney who had

listed in Article 62.001(5), Code of Criminal Procedure, contacts by letter, telephone, or any other means, either directly or through a third party, a victim of the offense or a member of the victim's family, if the director of the correctional facility has not, before the person makes contact with the victim:

(1) received written and dated consent to the contact from:

...

... if the victim was younger than 17 years of age at the time of the commission of the offense for which the person is confined:

(i) a parent of the victim;

(ii) a legal guardian of the victim;

(iii) the victim, if the victim is 17 years of age or older at the time of giving the consent; or

(iv) a member of the victim's family who is 17 years of age or older; and

(2) provided the person with a copy of the consent.

Tex. Penal Code Ann. § 38.111(a). Subsection (c) provides an affirmative defense to prosecution under this section that the contact was (1) indirect contact made through an attorney representing the person in custody and (2) solely for the purpose of representing the person in a criminal proceeding. *Id.* § 38.111(c). Both aggravated sexual assault of a child and online solicitation of a minor are offenses listed in Article 62.001(5) of the Code of Criminal Procedure, bringing Appellant within the purview of Section 38.111. *See* Tex. Code Crim. Proc. Ann. art. 62.001(5)(A), (J); Tex. Penal Code Ann. §§ 22.021(B) (aggravated sexual assault of a child), 33.021 (online solicitation of a minor).

been representing Appellant in this case since 2016.³ Appellant was admonished at the hearing regarding the dangers and disadvantages of self-representation.

In 2020, DPS issued a report following its analysis of DNA extracted from a towel and a pair of “burgundy shorts” taken from Appellant’s vehicle.⁴ According to the report, Kori was excluded as a contributor to the DNA profiles obtained from both the shorts and the towel. Months later, DPS issued another report after analyzing Kori’s pants.⁵ The crime laboratory was able to obtain a DNA profile from a sperm cell fraction on the pants. The lab interpreted the DNA profile as originating from a single individual and reported, “The probability of obtaining this profile if the DNA came from [Appellant] is 87.0 septillion times greater than the probability of obtaining the profile if the DNA came from an unrelated, unknown individual.” The State filed this report in the trial court and declared that DPS’s DNA analysis “is now complete.”

Appellant disagreed. He wrote a letter to the trial court objecting to the “incomplete” DNA testing and complaining that the “tape strips” he had moved to

³The trial court had appointed an attorney to represent Appellant after Appellant had filed his mandamus petition but before the trial court had ruled on his motions for DNA testing.

⁴It appears from the record that these burgundy shorts are not the “boxer shorts” Appellant referenced in his original Chapter 64 motion.

⁵For reasons that are not clear from the record, the cutting from Kori’s pants was not submitted to DPS until December 22, 2020, and therefore was not included in DPS’s 2020 analysis and report.

have tested had not been tested. He also claimed that he had retained a private laboratory to conduct DNA testing, to obtain his DNA, and to “review and follow” his original Chapter 64 motion.⁶ The State then filed a motion asking the trial court, after holding a hearing, to find that the results of the postconviction forensic DNA testing did not create a reasonable probability that Appellant would not have been convicted had the results been available during trial and that no further postconviction DNA testing was needed. *See* Tex. Code Crim. Proc. Ann. art. 64.04 (“After examining the results of testing under Article 64.03 and any comparison of a DNA profile under Article 64.035, the convicting court shall hold a hearing and make a finding as to whether, had the results been available during the trial of the offense, it is reasonably probable that the person would not have been convicted.”).

The trial court held a hearing on May 20, 2021, but Appellant objected that he had received no notice of the hearing.⁷ Over Appellant’s objection, the trial court

⁶The trial court had not ordered that DNA testing be done by a private laboratory, *see* Tex. Code Crim. Proc. Ann. art. 64.03(c)(3), so no private testing could have been done in this case even if Appellant or others had paid for it.

⁷There is nothing in the record to reflect that Appellant personally received actual notice of the May 20 hearing. The court coordinator represented to the trial court at the hearing that notice of this hearing was sent to the prison system. The State added that “it was sent via email” and suggested that the district attorney’s office was “relying on [the prison] staff to provide notice” to Appellant but that the department “just put it on their internal calendar rather than let him know.”

reset the hearing to May 27, 2021.⁸ On May 24, 2021, Appellant filed a detailed written objection to the trial court's holding a "premature" Article 64.04 hearing. He also sent written notice to the district clerk, complaining that the trial court was "going to force incomplete work product" in the upcoming hearing; that Texas Penal Code Section 38.111 "makes Pro-se [sic] litigation illegal;" and that his rights to counsel, due process, and due course of law would be violated if the trial court overruled his objection to the premature hearing. In both the written objection and notice, Appellant also reasserted his right to counsel.

The trial court proceeded with the hearing on May 27, 2021, and denied Appellant's Motion to Rule Penal Code Section 38.111 Unconstitutional.⁹ The trial court also granted the State's motion, found that it was not reasonably probable that Appellant would not have been convicted if the results of the DNA testing had been available during his trial, and ordered that no further DNA testing be performed in this case. Appellant filed a request for findings of fact and conclusions of law and for

⁸Appellant requested "at least a 30-day continuance." of the hearing. When the trial court told him that it was "not going to be inclined to go that long out," Appellant asked for "a 14-day extension." When the trial court told him that "we're going to have a hearing on the 27th," Appellant objected that seven days' notice did not give him enough time to prepare and that he did not have the discovery he had requested from the State or the DNA results that were necessary for him "to have a meaningful review."

⁹The trial court also denied a motion to compel discovery Appellant had filed the same date as his Motion to Rule Penal Code Section 38.111 Unconstitutional.

court-appointed counsel on June 4, 2021.¹⁰ The State filed a response, and the trial court entered findings of fact and conclusions of law, along with an order appointing Appellant counsel on appeal. Appellant then filed an objection to the findings of fact and conclusions of law; a motion for new trial with attached documents, including an affidavit; and a “supplemental affidavit” in support of his motion for new trial.¹¹ The State filed a response to Appellant’s motion, and the trial court signed an order dismissing the motion for new trial. Appellant then filed a motion in arrest of judgment and an objection to the State’s response to his motion for new trial, in which he prayed that the trial court “withdraw any . . . order” detrimental to him.¹²

¹⁰Appellant then filed a notice of appeal on June 10, 2021.

¹¹The record reflects that Appellant mailed his supporting affidavit and that the clerk received and filed it before Appellant mailed his motion for new trial or his objection to the State’s proposed findings of fact and conclusions of law.

¹²The trial court’s order dismissing Appellant’s motion for new trial reflects that it was signed and filed on June 24, 2021, the same day that the State filed its response to Appellant’s motion. On its face, Appellant’s written objection to the State’s response reflects that it was “filed” via mail by Appellant—who acknowledged that he was then represented by counsel, who he directed to “adopt” the pro se filing as his own in an “abundance of caution”—on June 27 and received and filed by the trial court clerk on July 6, 2021. The content of Appellant’s objection is responsive to language in the State’s response but not the trial court’s order. It is unclear whether Appellant received the State’s response and the trial court’s order at the same time, but it appears that the trial court made no further rulings and took no action in response to this final objection from Appellant. However, once Appellant was represented by counsel, the trial court was free to disregard his pro se filings. *Jenkins v. State*, 592 S.W.3d 894, 902 n.47 (Tex. Crim. App. 2018); *Robinson v. State*, 240 S.W.3d 919, 922 (Tex. Crim. App. 2007). And by filing a notice of appeal within 30 days of the trial court’s appealable order, there is no question that Appellant timely perfected his appeal to this court. See Tex. R. App. 26.2(a).

II. DISCUSSION

On appeal, Appellant does not directly challenge the trial court's unfavorable finding under Article 64.04 but raises numerous other issues, organized into five points of error.¹³ In his first four points of error, Appellant complains of the trial court's (1) denial of his Motion to Rule Penal Code Section 38.111 Unconstitutional, (2) holding the Article 64.04 hearing prematurely, when "critical" items of evidence remained untested, (3) refusal to hear and grant his motion for new trial, and (4) failure to reappoint him counsel upon his reassertion of his right to counsel. In his fifth point of error, Appellant complains that Article 64.03 is unconstitutional as applied to him.

¹³We granted Appellant's appellate counsel's Motion for Leave to Withdraw, and Appellant has proceeded with his appeal pro se. We have taken pains to ensure that we address "every issue raised [by Appellant's brief] and necessary to final disposition of the appeal." Tex. R. App. P. 47.1. In doing so, we do not believe we have exceeded our constitutional jurisdiction by issuing an "advisory" opinion. *See* Tex. Const. art. II, § 1; *Petetan v. State*, 622 S.W.3d 321, 334 (Tex. Crim. App. 2021) ("Texas courts are not empowered to give advisory opinions."). The Supreme Court of Texas has recently drawn an important distinction when generally addressing what is and is not an "advisory opinion":

The prudential practice of courts to decline to reach issues not necessary to the disposition of a case should not be confused with the constitutional prohibition on advisory opinions. There is overlap between the two, of course. But . . . litigation would become unmanageable if it were the rule that every issue not strictly necessary to each court's disposition of the case were beyond that court's constitutional power to decide.

Tex. Comm'n on Envtl. Quality v. Maverick Cnty., 642 S.W.3d 537, 549–50 (Tex. 2022).

A. CONSTITUTIONALITY OF SECTION 38.111

In his first point of error, Appellant challenges the trial court's denial of his Motion to Rule Penal Code Section 38.111 Unconstitutional. Appellant asserts that Section 38.111 of the Penal Code is unconstitutional as applied to him. In his trial motion, however, he argued that Section 38.111 was unconstitutional "on its face."

When the trial court heard his motion, Appellant argued

. . . in a lot of ways, the motion just speaks for itself. It basically -- it prohibits -- it's something that has never been challenged before. It's something that prohibits a pro se litigant from representing himself because it forces incomplete work product. So, it's just something I just want to get a ruling on to present to the appellate court to consider.

The rest of the parties' arguments concerning Appellant's motion in the trial court addressed the trial court's authority to rule on the motion and whether the motion was moot. Appellant never complained to the trial court that Texas Penal Code Section 38.111 was unconstitutional as applied to him. The complaint made on appeal must comport with the complaint made in the trial court or the error is forfeited. *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012); *Lovill v. State*, 319 S.W.3d 687, 691–92 (Tex. Crim. App. 2009) ("A complaint will not be preserved if the legal basis of the complaint raised on appeal varies from the complaint made at trial."); *Pena v. State*, 285 S.W.3d 459, 464 (Tex. Crim. App. 2009) ("Whether a party's particular complaint is preserved depends on whether the complaint on appeal comports with the complaint made at trial.").

To determine whether the complaint on appeal conforms to that made at trial, we consider the context in which the complaint was made and the parties' shared understanding at that time. *Clark*, 365 S.W.3d at 339; *Resendez v. State*, 306 S.W.3d 308, 313 (Tex. Crim. App. 2009); *Pena*, 285 S.W.3d at 464. Here, nothing in the record shows us that Appellant intended—or that the State or the trial court understood—his complaint about Section 38.111 to be an as-applied challenge or anything other than a facial challenge to the statute. Accordingly, Appellant has forfeited this point of error. *See Clark*, 365 S.W.3d at 339.

Even were we to construe Appellant's contention on this first point as arguing that Section 38.111 is facially unconstitutional (so as to comport with the complaint he made in the trial court), we would still overrule his point of error. A statute is facially unconstitutional only if it "always operates unconstitutionally in all possible circumstances." *Peraza v. State*, 467 S.W.3d 508, 516 (Tex. Crim. App. 2015) (quoting *State v. Rosseau*, 396 S.W.3d 550, 556 (Tex. Crim. App. 2013)). To determine whether a statute always operates unconstitutionally in all possible circumstances, we must look to see if there are potential applications of the statute that are constitutionally valid. *Peraza*, 467 S.W.3d at 516. The Court of Criminal Appeals has already recognized one such application in *Schlittler v. State*, 488 S.W.3d 306 (Tex. Crim. App. 2016).¹⁴ Therefore, the statute is not facially unconstitutional.

¹⁴The appellant in *Schlittler*, unlike Appellant in the present case, had been charged and convicted of the offense of improper contact with a victim under

We overrule Appellant's first point of error.

**B. NO ABUSE OF DISCRETION IN HOLDING ARTICLE 64.04 HEARING
WHEN SOME ITEMS (PREVIOUSLY ORDERED TO BE TESTED)
REMAINED UNTESTED.**

In Appellant's second point of error, he raises two issues: (1) whether the trial court abused its discretion in this Chapter 64 proceeding by not ordering DNA testing of stain swabs, hair samples, and tape lifts collected from Appellant's vehicle and (2) whether the hearing on May 27, 2021, was premature in the absence of testing of the aforementioned items.¹⁵ In its 2016 order, the trial court had ordered the Parker County Sheriff's Office "to forward all the items of evidence listed on the previous DNA reports attached to the State's reply [to Appellant's Chapter 64 motions] to the

Section 38.111. 488 S.W.3d at 311. The Court of Criminal Appeals rejected his as-applied constitutional challenge and affirmed his conviction. *Id.* at 318.

¹⁵In his statement of issues presented, Appellant lays out his second point of error as follows: "Whether The Trial Court Abused Its Discretion In Not Ordering DNA Testing Of Critical Items Identified As #9,#10,#11 Under Its Chapter 64 Proceeding And/Or Whether said Hearing Was Premature In The Absence Of Testing Of Items Identified By The Appellant and Identified In The State's Report?" This is multifarious. *See Smith v. State*, 316 S.W.3d 688, 694 (Tex. App.—Fort Worth 2010, pet. ref'd) ("A multifarious issue is one that embraces more than one specific ground."). By combining more than one contention in a single issue, an appellant risks rejection on the ground that nothing is presented for review. *Id.* However, because we are able to discern Appellant's contentions on appeal, and because he has adequately briefed those contentions, *see* Tex. R. App. P. 38.1(f), we will review and address the issues raised in his second point of error. *See Smith*, 316 S.W.3d at 694; *see also Aldrich v. State*, 928 S.W.2d 558, 559 n.1 (Tex. Crim. App. 1996) ("We could properly dismiss this entire point of error as multifarious, because it contains more than one legal theory. . . . Nevertheless, in the interest of justice, we will address the legal theories that are briefed adequately.").

appropriate DPS laboratory for [appropriate] DNA testing.” One of the reports attached to the State’s reply contained an enumerated list of “evidence received,” including the following evidence: (1) “Sealed envelope containing stain swabs collected from seats of suspect Cooper’s vehicle,” (2) “Sealed envelope containing hair samples collected from interior of suspect Cooper’s vehicle,” and (3) “Sealed envelope containing tape lifts collected from interior of suspect Cooper’s vehicle.” From the context of the record, it appears to us that these are the items to which Appellant refers as “#9,” “#10,” and “#11” in his briefs, with #11 being the “tape strips” he referenced in his Chapter 64 motion and subsequent pleadings to the trial court. Thus, the factual premise underlying the first issue Appellant raises in this point of error—that the trial court did not order DNA testing of these items—is incorrect. The trial court *did* order that the evidentiary items in question be analyzed and tested, but DPS never examined them.

We may therefore analyze the remainder of Appellant’s second point of error as: Does a trial court abuse its discretion if it holds a hearing and makes a finding under Article 64.04 when some of the items that were previously ordered by the trial court to be tested have yet to be tested?

1. Standard of Review

When reviewing a trial court’s ruling on a Chapter 64 motion, appellate courts use a bifurcated standard of review: we give almost total deference to the trial court’s resolution of historical fact issues supported by the record and applications-of-law-to-

fact issues turning on witness credibility and demeanor, but we review de novo all other application-of-law-to-fact questions. *Reed v. State*, 541 S.W.3d 759, 768–69 (Tex. Crim. App. 2017); *see Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). In this issue, however, Appellant complains not of any specific *ruling* by the trial court—he attacks the trial court’s rulings separately—but of the trial court’s action in holding a “premature” hearing “when there remained DNA testing to be done on the items not yet tested but identified.”

The scheduling of hearings is a matter within the trial court’s discretion, unless the law provides otherwise. *See Marquez v. State*, 921 S.W.2d 217, 223 (Tex. Crim. App. 1996) (“The control of the business of the [trial] court is vested in the sound discretion of the trial judge.”); *see also Smith v. State*, 850 S.W.2d 275, 280 (Tex. App.—Fort Worth 1993, pet. ref’d) (reviewing a trial court’s rescheduling of a motion hearing for an abuse of discretion); *Bush v. State*, 628 S.W.2d 270, 272 (Tex. App.—Amarillo 1982, pet. ref’d) (interpreting statute concerning pretrial hearings in criminal cases as making trial court settings of such hearings discretionary). The granting or denial of a motion for continuance is also within the sound discretion of the trial court. *Heiselbetz v. State*, 906 S.W.2d 500, 511 (Tex. Crim. App. 1995). We will therefore review the trial court’s timing of the hearing for an abuse of discretion. A trial court abuses its discretion when it acts without reference to any guiding rules and principles or acts arbitrarily or unreasonably. *Rbomer v. State*, 569 S.W.3d 664, 669 (Tex. Crim. App. 2019).

2. Analysis

For a couple of reasons, we must conclude that the trial court did not abuse its discretion here. In the first place, we are not convinced that the record evidence supports all the requisite findings that were necessary for the trial court to order DNA testing. Under the statute's plain language, a convicting court may order forensic DNA testing under Chapter 64 “only if . . . the court finds that . . . identity was or is an issue in the case; and . . . the convicted person establishes by a preponderance of the evidence that . . . the person would not have been convicted if exculpatory results had been obtained through DNA testing” Tex. Code Crim. Proc. Ann. art. 64.03(a)(1)(C), (2)(A). The trial court did not make any of these findings in its 2016 order.¹⁶ It actually made findings to the contrary, at least as to Subsection (a)(2)(A), after the May 27 hearing. Those contrary findings are supported by the record. Testing is not authorized under Chapter 64 unless the statutory requirements are met. *State v. Patrick*, 86 S.W.3d 592, 595 (Tex. Crim. App. 2002). Thus, the validity of the trial court's 2016 order was questionable to begin with.

Second, a trial court can—in the interest of judicial economy—exercise its plenary power and take actions necessary to correct, modify, vacate, or amend its own

¹⁶When the trial court does not enter separate findings, we imply findings necessary to support the ruling “so long as they are reasonably supported by the record.” *Dunning v. State*, 572 S.W.3d 685, 692 (Tex. Crim. App. 2019); see *Guzman*, 955 S.W.2d at 87. As we will detail in our discussion of Appellant's fourth issue, however, some of the findings the trial court would have implicitly made to order the testing under Article 64.03 were not reasonably supported by the record.

rulings. *See Meineke v. State*, 171 S.W.3d 551, 558 (Tex. App.—Houston [14th Dist.] 2005, pet. ref’d); *see also* Tex. Gov’t. Code Ann. § 21.001(a) (“A court has all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders, including authority to issue the writs and orders necessary or proper in aid of its jurisdiction.”); *Burnell v. State*, No. 01-10-00214-CR, 2012 WL 29200, at *3 (Tex. App.—Houston [1st Dist.] Jan. 5, 2012, pet. ref’d) (mem. op., not designated for publication) (stating that “a court has power to correct, modify, vacate, or amend its own rulings . . . within the time of its plenary jurisdiction”).

Therefore, while the trial court retained jurisdiction over Appellant’s case, it had the power to rescind its 2016 order. And if the trial court could have rescinded its 2016 order—an order that, again, we are not convinced the record supported—then we see no reason why it could not proceed with the hearing on May 27 as though testing of the untested items had never been ordered. By holding that hearing when it did, the trial court effectively rescinded its 2016 order as to the items that had yet to be tested. Because it had the power to do so, and because Appellant failed to show himself entitled to the requested DNA testing in the first place, we hold that the trial court did not abuse its discretion by conducting the hearing and making the finding required by Article 64.04 when the stain swabs, hair samples, and tape lifts from Appellant’s vehicle had not been tested. We overrule Appellant’s second point of error.

C. APPELLANT’S MOTION FOR NEW TRIAL

Appellant next argues that the trial court abused its discretion in “denying” his motion for new trial.¹⁷ In its response to Appellant’s motion, the State had argued that motions for new trial are not authorized in Chapter 64 proceedings. The trial court apparently agreed, and the State now makes the same argument on appeal. But the State also points out that we have in the past abated an appeal in a Chapter 64 case so that the appellant (movant in the trial court) could file an out-of-time motion for new trial. *See Reger v. State*, 222 S.W.3d 510, 512 (Tex. App.—Fort Worth 2007, pet. ref’d).

Regardless of whether a motion for new trial is authorized in a Chapter 64 case, Appellant has not shown that the trial court abused its discretion in denying or dismissing his motion for new trial in this case. A trial court’s ruling on a motion for new trial will only be reversed for an abuse of discretion. *Najar v. State*, 618 S.W.3d 366, 371 (Tex. Crim. App. 2021). Under this deferential standard, we afford almost total deference to a trial court’s fact findings, view the evidence in the light most favorable to the trial court’s ruling, and reverse the ruling only “if no reasonable view

¹⁷Appellant also makes references to his “arrest of judgment” motion, but the record does not contain a request for a hearing on that motion. The record also does not indicate that the trial court ever ruled on the motion; therefore, the motion is deemed denied by rule. *See* Tex. R. App. P. 22.4. We review a trial court’s denial of motions in arrest of judgment and motions for new trial for an abuse of discretion. *Abmad v. State*, 295 S.W.3d 731, 739 (Tex. App.—Fort Worth 2009, pet. ref’d).

of the record could support” it. *Id.* (quoting *Okonkwo v. State*, 398 S.W.3d 689, 694 (Tex. Crim. App. 2013)).

**1. Appellant Was Not Entitled to a Hearing on
His Motion for New Trial.**

Construing the argument in Appellant’s brief liberally, *see* Tex. R. App. P. 38.9, he appears to argue that the trial court abused its discretion in failing to hold a hearing on his motion for new trial. A trial judge abuses his discretion in failing to hold a hearing if the motion and accompanying affidavits (1) raise matters that are not determinable from the record and (2) establish reasonable grounds showing that the defendant could potentially be entitled to relief. *Hobbs v. State*, 298 S.W.3d 193, 199 (Tex. Crim. App. 2009); *Smith v. State*, 286 S.W.3d 333, 338 (Tex. Crim. App. 2009). Most of the matters raised in Appellant’s motion for new trial and accompanying affidavits fail the first—or both—of these two prongs.

**a. Appellant failed to raise matters that are not
determinable from the record.**

In his motion for new trial, Appellant reurged complaints that the trial court had already heard and rejected without providing new evidence or legal authority to support the complaints. In fact, one of the attachments to his motion for new trial is simply a file-stamped copy of his one-page objection to the “incomplete” DNA testing. He also attached copies of articles about DNA evidence in other cases, which he claimed he could not use because the trial court had “forced” a “premature”

Article 64.04 hearing.¹⁸ But we have already determined that the trial court did not abuse its discretion by holding the Article 64.04 hearing when it did, and Appellant has never explained how the timing of that hearing prevented him from fully presenting his case to the trial court. While he only had seven days' notice of the hearing, he had received or at least was aware of the new DNA reports months in advance, and his Chapter 64 motions had been on file with the trial court for years.

Also, because material in the articles attached to Appellant's motion for new trial was scientific evidence, the trial court would have been within its discretion to find that (1) Appellant had failed to show, by clear and convincing proof, that the proffered evidence was sufficiently relevant and reliable to assist the finder of fact (in this case, the trial court), and (2) therefore this evidence was inadmissible for the trial court's consideration. *See* Tex. R. Evid. 702; *Wells v. State*, 611 S.W.3d 396, 426 (Tex. Crim. App. 2020) ("Under Rule 702, the proponent of scientific evidence must show by clear and convincing proof that the proffered evidence is sufficiently reliable and relevant to assist the [factfinder] in accurately understanding other evidence or in determining a fact in issue. . . . Unreliable scientific evidence is not helpful to the [factfinder] because it frustrates rather than promotes intelligent evaluation of the facts."); *Asberry v. State*, 507 S.W.3d 227, 229 (Tex. Crim. App. 2016) (acknowledging trial court's "broad discretion" to consider matters in Chapter 64 hearings); *Ex parte*

¹⁸One of the articles had also been attached to both Appellant's original Chapter 64 motion and his supplemental motion filed back in 2015.

Gutierrez, 337 S.W.3d 883, 893 (Tex. Crim. App. 2011) (holding that information that the trial judge may consider in a Chapter 64 proceeding “must be reliable”).

Appellant also reiterated complaints that his trial counsel’s performance was deficient and his guilty pleas involuntary. Neither the trial court nor this court has jurisdiction under Chapter 64 to entertain such collateral attacks on Appellant’s underlying conviction. *See Reger*, 222 S.W.3d at 513 (“[T]he jurisdiction afforded us under [C]hapter 64 does not extend to collateral attacks on the judgment of conviction or allow us to revisit matters that should have been addressed on direct appeal.”); *Hicks v. State*, 151 S.W.3d 672, 674 (Tex. App.—Waco 2004, pet. ref’d) (“The jurisdiction granted under [C]hapter 64 does not extend to collateral attacks on the judgment of conviction”).

b. Appellant did not establish reasonable grounds showing that he could potentially be entitled to relief.

To the extent that Appellant’s motion for new trial and accompanying affidavits¹⁹ raised matters that were not determinable from the record, Appellant failed to establish reasonable grounds showing that he could potentially be entitled to relief. He claimed that Kori’s pajama pants had been tested in violation of the Scientific Working Group on DNA Analysis Methods (SWGDM) and that the DPS laboratory had “used testing methods that are misleading . . . and have been debunked

¹⁹Appellant attached a sworn affidavit to his motion for new trial. He separately filed a “supplemental affidavit” in support of his motion for new trial.

as wrong.” In support of this ground, he referenced only his original Chapter 64 motion (wherein he had described the alleged misconduct and “misleading” methods) and the articles attached to his motion for new trial. He did not offer anything, such as an affidavit from someone with personal knowledge of the testing performed and methods used, to verify his allegations, nor did he offer any expert testimony as to how the methods used by the DNA analysts led to a “misleading” or “wrong” result.

The 2009 report indicated that human DNA was recovered and quantified from the pants cutting and described how the recovered DNA was amplified. The DNA profile obtained from the sperm fraction of the pants cutting was entered into the Combined DNA Index System (CODIS). When reviewing a case with similar facts, the Court of Criminal Appeals held that additional testing would have no “value added.” *See Swearingen v. State*, 303 S.W.3d 728, 735 (Tex. Crim. App. 2010) (“Because prior DNA testing has already resulted in a successful male DNA profile being entered into [CODIS], we find additional testing of the left-hand fingernail clippings have no value added and therefore affirm the trial court’s ruling on this matter.”). And even if Appellant had established at the hearing on May 27 that the testing that was performed was flawed or corrupted, he cannot show that proof of such would have affected the trial court’s finding that it was not reasonably probable that Appellant would not have been convicted had the results of the DNA testing been available during the trial. “The issue is whether the test results *actually obtained* demonstrate a reasonable probability of innocence; the issue is not what other, non-

existent, test results might have shown about [A]ppellant's innocence." *Booker v. State*, 155 S.W.3d 259, 267 (Tex. App.—Dallas 2004, no pet.) (emphasis added).

Appellant claimed that he was unable to hear the Article 64.04 proceeding on May 27, 2021, "in large part due to telephone issues." Appellant had no right to even be present at the hearing. *See Rose v. State*, 198 S.W.3d 271, 272 (Tex. App.—San Antonio 2006, pet. ref'd) (holding that defendant did not have the right to be present at his Article 64.04 hearing); *Booker*, 155 S.W.3d at 266 ("A convicted person has no right to be present at a post-conviction hearing such as a hearing conducted pursuant to [C]hapter 64."); *Cravin v. State*, 95 S.W.3d 506, 510 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd) (concluding that, like an applicant for postconviction writ of habeas corpus, an applicant for a postconviction DNA proceeding "enjoys neither a presumption of innocence nor a constitutional right to be present at a hearing"). Thus, he was not entitled to any relief based on his inability to hear the proceedings.

Appellant also complained about the misconduct of an attorney his family had retained during the pendency of the Chapter 64 proceeding. This is a collateral matter that is not material to the trial court's finding under Article 64.04. The only issue for the trial court to resolve at the hearing was whether, had the results of testing under Article 64.03 been available during Appellant's trial, it is reasonably probable that Appellant would not have been convicted. *See* Tex. Code Crim. Proc. Ann. art. 64.04.

The only other attachments to Appellant's motion for new trial were letters to Appellant from the State Bar of Texas regarding a grievance he had filed against the

attorney his family had retained and a printout of emails between “Wesley Cooper” (identified in one of the letters as Appellant’s brother) and another attorney. These documents provided additional facts relating to matters Appellant had already raised at the Article 64.04 hearing, but they did not raise new matters that were not determinable from the record.

Finally, we stress that the trial court did not have to believe Appellant’s affidavits. *See Najar*, 618 S.W.3d at 373. We thus cannot conclude that the trial court abused its discretion by not considering facts it did not have to believe. We hold that the trial court did not abuse its discretion by failing to hold a hearing on Appellant’s motion for new trial. *See Smith*, 286 S.W.3d at 340; *see also Flores-Alonzo v. State*, 460 S.W.3d 197, 210 (Tex. App.—Texarkana 2015, no pet.) (“Because one reasonable view of the record supports the trial court’s decision, the trial court was within its broad discretion to deny Alonzo a hearing.”); *Chapa v. State*, 407 S.W.3d 428, 434–35 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (“Because none of appellant’s allegations were sufficient to require the trial court to hold a hearing on the motion for new trial, the trial court did not abuse its discretion in refusing to hold a hearing.”).

2. The Trial Court’s Ruling on Appellant’s Motion for New Trial was Not an Abuse of Discretion.

The only other discernable contentions Appellant makes in this point of error amount to complaints that the trial court would not correct, modify, vacate, or amend

its Article 64.04 findings and order testing of the as-yet-unttested items from Appellant's vehicle. Based on our analyses and dispositions of Appellant's second and fourth points of error, we conclude that the record supports the trial court's ruling, and therefore the trial court did not abuse its discretion when it dismissed Appellant's motion for new trial.²⁰ We overrule Appellant's third point of error.

D. DEPRIVATION OF COUNSEL

In Appellant's fourth point of error, he argues that it was improper and an abuse of discretion for the trial court to refuse to reappoint counsel to represent him upon his reassertion of his right to counsel. Appellant contends that he had the right to reassert his right to counsel at the "Article 64.04 hearing and Motion for New Trial/Arrest of Judgment stages" of this Chapter 64 proceeding. We will overrule Appellant's fourth issue for three reasons: (1) having failed to demonstrate two of the statutory preconditions to obtaining DNA testing under Chapter 64, Appellant was not entitled to appointed counsel, (2) even if Appellant had a right to counsel, the trial court's failure to reappoint him counsel sooner was not an abuse of discretion, and (3) even if the trial court abused its discretion, Appellant was not harmed.

²⁰Because Appellant expressly based his motion in arrest of judgment on the same reasons and issues listed in his motion for new trial, we likewise hold that the trial court did not abuse its discretion to deny the arrest-of-judgment motion.

**1. Having Failed to Establish That Reasonable Grounds Existed for the
Filing of His Motion Under Chapter 64, Appellant
Was Not Entitled to Appointed Counsel.**

Although a convicted person has no federal or state constitutional right to counsel in a Chapter 64 proceeding, the statute does afford him right to counsel. *See* Tex. Code Crim. Proc. Ann. art. 64.01(c); *Savage v. State*, No. 02-21-00064-CR, 2022 WL 557488, at *3 n.3 (Tex. App.—Fort Worth Feb. 24, 2022, no pet.) (not designated for publication); *Solomon v. State*, No. 02-16-00133-CR, 2016 WL 7240614, at *2 n.5 (Tex. App.—Fort Worth Dec. 15, 2016, no pet.) (mem. op., not designated for publication). The Texas Court of Criminal Appeals has admonished that in postconviction DNA cases, “[t]he entitlement to appointed counsel is not absolute; it is conditioned on three criteria,” one of which is that the trial judge must find that “reasonable grounds” exist for the filing of a motion. *Gutierrez v. State*, 307 S.W.3d 318, 321 (Tex. Crim. App. 2010); *see* Tex. Code Crim. Proc. Ann. art. 64.01(c). As noted above, the trial court would have had to have found that “reasonable grounds” existed for the filing of Appellant’s motion to support its 2016 order, but as explained below, that finding is not reasonably supported by the record.

Whether “reasonable grounds” exist for testing necessarily turns on what is required for testing. *Gutierrez*, 337 S.W.3d at 891. Basic requirements are that biological evidence exists, that evidence is in a condition that it can be tested, that the identity of the perpetrator is or was an issue, and that this is the type of case in which exculpatory DNA results would make a difference. *Id.* Appellant’s original Chapter

64 motion, accompanying affidavit, supporting brief, and supplemental motion failed to prove any of these statutory requirements, but the State has conceded that the first two requirements were met. The State maintains that Appellant failed to meet the last two requirements, and we agree. Appellant’s failure to show that identity was or is an issue in this case and that he would not have been convicted if exculpatory results had been obtained through DNA testing prove fatal to his right to counsel.²¹

a. Identity was not and is not an issue in this case.

The identity requirement in Chapter 64 relates to the issue of identity as it pertains to the DNA evidence. *Prible v. State*, 245 S.W.3d 466, 470 (Tex. Crim. App. 2008). Therefore, if DNA testing would not determine the identity of the person who committed the offense or would not exculpate the accused, then the requirement of Article 64.03(a)(2)(A) has not been met. *Id.* We have said that, for purposes of a Chapter 64 motion, identity is not an issue if “an exculpatory DNA result would not . . . exclude the movant as the assailant.” *Leatherman v. State*, No. 02-21-00163-CR, 2022 WL 3905078, at *4 (Tex. App.—Fort Worth Aug. 31, 2022, no pet.) (mem. op., not designated for publication) (quoting *Hernandez v. State*, No. 13-20-00216-CR, 2022 WL 324069, at *3 (Tex. App.—Corpus Christi–Edinburg Feb. 3, 2022, no pet.) (mem. op., not designated for publication)). Here, regardless of what testing of the untested

²¹Whether identity was or is an issue in this case and whether Appellant would not have been convicted if exculpatory results had been obtained through DNA testing are application-of-law-to-fact questions that we review de novo. *See Wilson v. State*, 185 S.W.3d 481, 484 (Tex. Crim. App. 2006).

boxer shorts and tape lifts from Appellant's vehicle would show, the results of such testing would not exclude Appellant as the assailant, nor would they determine the identity of the person who committed the offense or exculpate Appellant. Test results showing the presence or absence of Appellant's DNA on his own clothing or in his own vehicle would be meaningless, as would DNA test results on any other item of Appellant's personal property.

The presence or absence of a third party's DNA on these items would likewise be of no moment. The presence of Kori's DNA on Appellant's boxers or the tape lifts would certainly not exculpate Appellant or exclude him as her assailant, and the absence of her DNA (the result that the tone and tenor of Appellant's original Chapter 64 motion suggest he was hoping for) would not be probative on the issue of identity because Appellant's car and boxers were not seized immediately after the sexual assault. *Cf. Copple v. State*, No. 02-19-00120-CR, 2020 WL 101867, at *4 (Tex. App.—Fort Worth Jan. 9, 2020, no pet.) (mem. op., not designated for publication) (stating that “when articles have been washed or cleaned in some manner, they are not considered probative of a movant's innocence”); *see also Baylor v. State*, No. 02-10-00561-CR, 2011 WL 4008026, at *1 (Tex. App.—Fort Worth Sept. 8, 2011, no pet.) (mem. op., not designated for publication) (holding that trial court properly denied

DNA testing on stocking cap possibly washed in time before its seizure because the absence of DNA results would not create a probability of non-conviction).²²

Regarding the issue of identity with respect to the semen on Kori's pajama pants, Appellant seems to have "admitted his way out of meeting" this requirement. *See Manns v. State*, No. 02-19-00312-CR, 2020 WL 1466314, at *7 (Tex. App.—Fort Worth Mar. 26, 2020, no pet.) (mem. op., not designated for publication). In his original affidavit, Appellant alleges that Kori "admitted to having sex with . . . a 24-year-old guy[when] she was under 16 years old" and that "[t]here were several adults [Kori] had sex with that the State was aware of yet never investigated or prosecuted." Appellant thus made a viable argument that at least one other person had sexually assaulted Kori, but he then undermined that argument with his statement in the same affidavit that "[t]here was no evidence in this case that any other person (including the female complainant) acting as a party to [Appellant] could have left DNA samples that were analyzed." And at the Article 64.04 hearing, Appellant told the trial court: "This is about her DNA, not mine. Anybody who sat in my passenger side seat of my

²²An unsworn document apparently attached to Appellant's declaration of inability to pay costs (filed the same day as his original Chapter 64 motion, affidavit, and brief in support) contains the statement, "The vehicle where said alleged sexual intercourse occurred was never cleaned or tampered with. All evidence was preserved; vehicle detained." The trial court, as the sole judge of the credibility of this statement, was entitled to discredit it, and we defer to that determination. By Appellant's own admissions in his affidavit, "the alleged crime . . . was reported within approximately 24 hours of the act of sexual intercourse alleged to have occurred in this case, to wit: early-morning of October 19, 2008," and he was arrested on October 20, 2008, giving him ample time to wash his clothes and clean his car.

car would have my DNA on the crotch area of their clothes. That does not mean I had sexual intercourse with them. . . .” To accept this argument,²³ the trial court would have had to have accepted Appellant’s implied concessions that (1) Kori had sat in his car and (2) it was in fact his DNA on her pajama pants. Based on these facts, identity was not and is not an issue in this case. Therefore, Appellant was not entitled to court-appointed counsel. *See Duran v. State*, No. 02-17-00405-CR, 2018 WL 3075030, at *3 (Tex. App.—Fort Worth June 21, 2018, pet. ref’d) (mem. op., not

²³Appellant compared his case to that of a Johnson County man who was charged with indecency with a child by contact based on the allegations of his fifteen-year-old niece. *See Said & Done, Voice for the Defense*, January/February 2016, at 20-21. Evidence showed the man’s semen DNA in the complainant’s pajama pants, but it turned out that his ex-girlfriend had worn the same pants for a tryst the next day, thus providing an innocent explanation for the presence of his DNA. *Id.* In his supplemental affidavit filed the month after the Article 64.04 hearing and almost six years after his original Chapter 64 motion, Appellant claimed that he had been in a sexual relationship with an “older relative” of Kori’s and that he had “hooked up” with this relative, who wore Kori’s pajama pants, in the passenger-side seat of his car. According to Appellant, the pants had “sat” in his car’s passenger-side seat “several times,” which “explains how/why [Appellant’s] DNA is located in [the pants’] crotch area.” Appellant did not allege these facts in the supporting affidavit attached to his original Chapter 64 motion or, from what we can tell, at any point prior to the Article 64.04 hearing. To show that “reasonable grounds” existed for the filing of Appellant’s motion and thereby that he was entitled to appointed counsel, Appellant needed to allege these facts in the affidavit attached to his Chapter 64 motions. *See* Tex. Code Crim. Proc. Ann. art. 64.01(a-1) (“The motion must be accompanied by an affidavit, sworn to by the convicted person, containing statements of fact in support of the motion.”); *Dunning*, 572 S.W.3d at 697 (“When a defendant files a Chapter 64 motion to obtain DNA testing, he must include an affidavit in which he alleges facts showing that the test results will be so exonerating that he would not have been convicted at trial had the results been available.”). Further, even if the trial court had accepted these newly alleged facts as true, Appellant still inculpated himself as the donor of the semen on Kori’s pajama pants and thereby removed identity as an issue in this case.

designated for publication) (“Because identity was not and is not an issue, there were no reasonable grounds for a [C]hapter 64 DNA testing motion to be filed. Therefore, Duran was not entitled to appointed counsel; thus the trial court did not err by not appointing him counsel.”).

b. Appellant did not establish by a preponderance of the evidence that he would not have been convicted if exculpatory results had been obtained through DNA testing.

Even if Appellant had shown that identity was or is an issue in this case, he was still not entitled to court-appointed counsel in the trial court because he failed to establish by a preponderance of the evidence that he would not have been convicted if exculpatory results had been obtained through DNA testing. From Appellant’s pleadings in the trial court, we glean that the “exculpatory results” he anticipated were the absence of Kori’s DNA (and Appellant’s semen) on his boxers or the tape lifts from his vehicle. Based on Kori’s allegations that Appellant picked her up in his Mazda RX-8, forced off her clothes in the passenger-side seat, turned her over backwards in the seat, and had sexual intercourse in the passenger-side seat; that he partially pulled his clothes down, wore no condom, and “was yanking/pulling her hair during the assault;” and that she sat back down in the passenger-side seat after the assault and got dressed while he drove her back home, Appellant claims there would have been “an ample amount of” Kori’s DNA on those boxers and tape strips “or at least semen also mixed with said evidence.”

But the Court of Criminal Appeals has held that the term “exculpatory results” in Article 64.03(a)(2)(A) “means only results excluding the convicted person as the donor of this material.” *Reed*, 541 S.W.3d at 774. Thus, DNA test results excluding Kori as the donor of any biological material found on Appellant’s boxers or the tape lifts from his vehicle are not the type of “exculpatory results” covered by the statute, and we have already explained why the absence of Appellant’s DNA would not exculpate him. The presence of Appellant’s semen on Kori’s pajama pants further undermines any exculpatory effect that the absence of her DNA or his DNA on the boxers or the tape lifts might have. *See Leatherman*, 2022 WL 3905078, at *4 (reasoning that medical examiner’s amended forensic DNA report, which confirmed presence of victim’s blood on convicted person’s jeans, undermined any exculpatory effect that absence of her DNA on other articles of his clothing might have).

As for the semen on Kori’s pajama pants, Appellant has not argued in the Chapter 64 proceedings before the trial court or in this appeal that someone *else* was the donor of this material.²⁴ Rather, he contended that “[n]ew testing should be ordered, because newer evidence, research and techniques are available; or in the alternative, is a result of ineffective assistance of counsel for failure to obtain a rebuttal to said State’s evidence, or do any investigation, at no fault of” Appellant.

²⁴We realize that the DNA on Kori’s pajama pants was eventually retested, and the test results were not exculpatory for Appellant. However, we do not consider “post-trial factual developments” when reviewing whether a Chapter 64 movant met his burden under Article 64.03(a)(2)(A). *Reed*, 541 S.W.3d at 774.

His ineffective-assistance-of-counsel argument is not a ground for the testing or retesting of evidence provided by Chapter 64, *see* Tex. Code Crim Proc. Ann. art. 64.01(b)(2), and even if “newer, more discriminating DNA testing showed that another perpetrator was involved, that finding would not exonerate [A]ppellant because it would show nothing more than there was another party to the crime, at best.” *Wilson*, 185 S.W.3d at 485.

Ultimately, in addition to the foregoing reasons, Appellant did not and could not establish by a preponderance of the evidence that he would not have been convicted if exculpatory results had been obtained through DNA testing in light of the substantial other evidence of his guilt. A movant does not satisfy his burden under Article 64.03 if the record contains other substantial evidence of guilt independent of that for which the movant seeks DNA testing. *Swearingen*, 303 S.W.3d at 736. In Appellant’s case, he judicially confessed to the charged offenses. *Cooper*, 2012 WL 5869600, at *1. At his trial, Kori identified Appellant in the courtroom and testified in graphic detail about his sexual assault and online solicitation of her. Text messages from her cell phone and a cell phone seized from Appellant’s car corroborated her testimony.

Other testimony and evidence admitted at the trial demonstrated that Appellant had attempted to impersonate Kori online to make it appear as if Kori was attempting to blackmail Appellant and to make it appear as if Kori had lied about the sexual assault. A forensic computer examiner had found pictures associated with Kori’s

MySpace account on computers and an external hard drive seized from Appellant's residence. *Id.* at *2, *3, *5. They also found evidence that Appellant had searched for a map to Kori's house. And, as we wrote in our opinion in Appellant's original direct appeal, "the record includes significant evidence . . . of [A]ppellant actually having sex with underage girls and desiring to have sex with others." *Id.* at *8. Therefore, even were we to assume that the results of all of the postconviction DNA testing Appellant sought under Article 64.01(b) would prove favorable to him, he failed to meet his burden under Article 64.03(a)(2)(A) because he cannot overcome the mountain of other evidence of his guilt. *See, e.g. State v. Swearingen*, 424 S.W.3d 32, 38 (Tex. Crim. App. 2014) ("We are not persuaded that results showing the presence of another DNA donor in the fingernail scrapings would overcome the 'mountain of evidence'[] of the appellee's guilt." (quoting *Swearingen*, 303 S.W.3d at 736)); *Swearingen*, 303 S.W.3d at 736 ("Moreover, in light of the overwhelming evidence of appellant's guilt, even if we were to grant appellant's request to test all of the items proffered and those results were exculpatory, appellant cannot show by a preponderance of the evidence, or that there is a 51% chance, that he would not have been convicted.").

Accordingly, we hold that Appellant was not entitled to appointed counsel at the time he "reasserted" his right to counsel, and the trial court did not err in not appointing him counsel at that time. *See Russell v. State*, No. 02-19-00416-CR, 2021 WL 2006401, at *5 (Tex. App.—Fort Worth May 20, 2021, pet. ref'd) (mem. op., not designated for publication) ("Because Appellant was not entitled to DNA testing

under Article 64.03, the trial court did not reversibly err by denying him appointed counsel under Article 64.01(c).”), *cert. denied*, 142 S. Ct. 2754 (2022); *Ford v. State*, No. 02-18-00080-CR, 2018 WL 4627163, at *2 (Tex. App.—Fort Worth Sept. 27, 2018, no pet.) (mem. op., not designated for publication) (holding that the trial court reasonably found that no reasonable grounds existed for appellant’s motion for postconviction testing and therefore did not err by not appointing counsel); *Brown v. State*, No. 02-15-00414-CR, 2016 WL 5957021, at *3 (Tex. App.—Fort Worth Oct. 13, 2016, no pet.) (mem. op., not designated for publication) (“Because identity is not an issue . . . and DNA testing would resolve no significant issue in this case, the trial court . . . did not abuse its discretion by not appointing counsel . . . because the record reflects no reasonable grounds for a motion to be filed.”).

2. The Trial Court Did Not Abuse Its Discretion.

Supposing Appellant did meet his burden, thus triggering his right to counsel under Article 64.01(c), there was still no error in the trial court’s delayed reappointment of counsel. The timeline is important here. In his written objection to the “premature” Article 64.04 hearing, Appellant stated, “Mr. Cooper re-asserts his right to counsel, or stand by [sic] counsel due to complications of Penal Code 38.111, Denial to subpoena witnesses, court[’]s hostial approch [sic] to Mr. Cooper[’s p]ro se request.” Appellant signed and dated the document May 20, 2021, and the trial court clerk received and file-stamped it May 24, 2021. However, at the hearing on May 27, 2021, Appellant did not reassert his right to counsel, nor did he object to proceeding

with the hearing without counsel (or standby counsel). When the trial court asked him if he was ready to proceed, Appellant responded, “I am in part.” At another point later in the hearing, Appellant referenced the trial court’s grant of his request to represent himself pro se but did not reference his subsequent “reassertion” of his right to counsel.

After the hearing, Appellant filed a notice of appeal and requested court-appointed counsel and findings of fact and conclusions of law. On June 14, 2021, the trial court entered findings of fact and conclusions of law and appointed new counsel to represent Appellant. The trial court found that Appellant’s “Objection to This Premature Art. 64.04 Post-Conviction DNA Hearing,” in which Appellant stated that he “re-assert[ed] his right to counsel, or stand by counsel,” was not brought to the trial court’s attention prior to the hearing on May 27, 2021. The trial court also found that Appellant “did not object to representing himself at the May 27, 2021, hearing, did not request appointment of counsel, and did not otherwise bring the issue of appointed counsel to the [trial c]ourt’s attention.” Appellant then filed his supplemental affidavit,²⁵ in which he stated, “Although [the] trial court abused its

²⁵Appellant certified that his motion for new trial was mailed May 27, 2021, by placing it into the prison mailbox “to Authorities to process.” He attached a supporting affidavit, which was also signed and dated May 27, 2021. He signed and dated his supplemental affidavit June 14, 2021, the same day that the trial court entered findings of fact and conclusions of law and appointed Appellant new counsel. For reasons that are unclear from the record, the trial court clerk received and filed the affidavit first, on June 16, 2021, and the motion for new trial was not received and filed until June 21, 2021.

discretion in denying me my right to reassert counsel on May 27, 2021, I, to my knowledge[,] am with-out [sic] counsel to assist me during this Motion for New Trial stage and supplement the exhibits for appeal review.” Nothing in the record establishes that the trial court was made aware of Appellant’s prehearing reassertion of his right to counsel or his subsequent requests for appointed counsel prior to June 14, 2021.

A defendant may waive the right to counsel and represent himself in a criminal proceeding. *See Faretta v. California*, 422 U.S. 806, 819–20, 95 S. Ct. 2525, 2533 (1975); *Moore v. State*, 999 S.W.2d 385, 396 (Tex. Crim. App. 1999); *Medley v. State*, 47 S.W.3d 17, 23 (Tex. App.—Amarillo 2000, pet. ref’d). If a defendant properly asserts his right to self-representation, then the record must show that he knowingly and intelligently waived his right to counsel after being made aware of the dangers and disadvantages of self-representation. *Funderburg v. State*, 717 S.W.2d 637, 642 (Tex. Crim. App. 1986); *see Faretta*, 422 U.S. at 819–20, 95 S. Ct. at 2533. A defendant may also waive his right to represent himself once it has been asserted. *Funderburg*, 717 S.W.2d at 642, *Lathem v. State*, 514 S.W.3d 796, 811 (Tex. App.—Fort Worth 2017, no pet.). The trial court may find a waiver of the right where it reasonably appears that the defendant has abandoned the initial request or vacillated on the issue. *Lathem*, 514 S.W.3d at 811. “The test as to whether the defendant has waived his right to self-representation after once asserting it is whether it reasonably appears from the defendant’s words or conduct that he has abandoned his initial request.” *Id.* at 806.

We review the trial court’s decision to allow for self-representation for an abuse of discretion. *See McIntosh v. State*, No. 02-17-00378-CR, 2019 WL 983725, at *2 (Tex. App.—Fort Worth Feb. 28, 2019, no pet.) (mem. op., not designated for publication). Likewise, the trial court’s decision as to the effect the withdrawal of a defendant’s waiver of the right to counsel would have on the orderly administration of justice will not be disturbed on appeal absent an abuse of discretion. *Huggins v. State*, 627 S.W.3d 549, 555 (Tex. App.—Waco 2021, pet. granted); *Medley*, 47 S.W.3d at 24.

Here, the record shows that Appellant requested court-appointed counsel, then asserted his right to self-representation, was then made aware of the dangers and disadvantages of self-representation, persisted in his desire to represent himself, and voluntarily represented himself for nearly two years after his court-appointed counsel was discharged. Appellant does not contend that he did not knowingly and intelligently waive his right to counsel but that he “only sought” self-representation “on Art[icles] 64.01-64.03.” He argues that the Article 64.04 hearing and time for filing a motion for new trial are separate stages where reappointment is required. Appellant cites no legal authority supporting this last argument, nor does he refer us to where in the record his request to represent himself was specifically limited to the stages of this Chapter 64 proceeding that preceded the Article 64.04 hearing. His “Motion to Self-Representation During Ch. 64 Trial Court DNA Proceedings” states on its face that Appellant was filing “this motion to self-represent himself during trial court DNA proceedings.” He cited *Faretta* and stated the case law on self-

representation, but he never articulated to the trial court that he was only waiving his right to counsel and seeking the right to self-representation *up until* the Article 64.04 hearing.²⁶ To reverse the trial court’s judgment on a legal claim that was never presented in the trial court would violate ordinary notions of procedural default. *Neal v. State*, 150 S.W.3d 169, 179 (Tex. Crim. App. 2004). We decline to do so here.

Appellant’s procedural-default problem further precludes us from reversing on this issue because the record does not show that the trial court was made aware of Appellant’s “reassertion” of his right to counsel any sooner than June 14, 2021, when the trial court appointed him new counsel. As a prerequisite to presenting a complaint for appellate review, the record must show that the complaint was made to the trial court by a timely request, objection, or motion that stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity “to make the trial court aware of the complaint,” unless the specific grounds were apparent from the context. Tex. R. App. P. 33.1(a)(1)(A); *Montelongo v. State*, 623 S.W.3d 819, 822 (Tex. Crim. App. 2021). Further, the party must obtain an express or implicit adverse trial-court ruling or object to the trial court’s refusal to rule. Tex. R. App. P. 33.1(a)(2); *Dixon v. State*, 595 S.W.3d 216, 223 (Tex. Crim. App. 2020). It was Appellant’s responsibility to make the trial court aware of his

²⁶In fact, Appellant did not even make this argument in his written objection (wherein he purported to reassert his right to counsel) filed ahead of the Article 64.04 hearing.

reassertion of the right to counsel (or waiver of his right to represent himself). He had the opportunity to do this at the Article 64.04 hearing and failed to do so. He also failed to obtain an adverse ruling from the trial court or object to the trial court's refusal to reappoint him counsel. Thus, because it never reasonably appeared to the trial court—prior to June 14, 2021—that he had abandoned his initial request to represent himself, the trial court did not abuse its discretion by not appointing Appellant new counsel sooner. *See Lathem*, 514 S.W.3d at 806.

3. There Was No Harm to Appellant Even If the Trial Court Erred.

Even assuming without deciding that the trial court erred, any error in the trial court's failure to reappoint counsel for Appellant sooner is not reversible.

a. Harm analysis for non-constitutional error

Because Appellant had no constitutional right to counsel in a Chapter 64 proceeding, the assumed error is non-constitutional, and we apply Rule 44.2(b). *Tex. R. App. P. 44.2(b)*. That Rule requires us to disregard any nonconstitutional error that does not affect Appellant's substantial rights. *Id.* Neither Appellant nor the State has the burden to prove harm or harmlessness as to whether Appellant's substantial rights were affected; rather, the reviewing court has the duty to assess harm by independently examining the record as a whole. *Loch v. State*, 621 S.W.3d 279, 282 (Tex. Crim. App. 2021). Put differently, if we have a “grave doubt” that the result of the proceeding was free from the substantial influence of the error, then we must treat the error as if it did have a substantial influence on the proceeding's outcome. *Burnett*

v. State, 88 S.W.3d 633, 637 (Tex. Crim. App. 2002) (quoting *United States v. Lane*, 474 U.S. 438, 449, 106 S. Ct. 725, 732 (1986)). A grave doubt exists when “the matter is so evenly balanced” that we feel “in virtual equipoise as to the harmlessness of the error.” *Id.* at 637–38 (quoting *O’Neal v. McAninch*, 513 U.S. 432, 435, 115 S. Ct. 992, 994 (1995)).

b. No harm from any assumed error

We have no grave doubts about the influence of the assumed error on the outcome of Appellant’s proceeding. We have already recounted the “mountain of evidence” of Appellant’s guilt in this case. Additionally, the results of the testing that was conducted pursuant to the trial court’s 2016 order did not exculpate Appellant; they confirmed—with an even greater probability—that the semen on Kori’s pajama pants was in fact Appellant’s. Appellant offered no exculpatory evidence at the Article 64.04 hearing. Thus, we have no trouble concluding that—even if Appellant had a right to counsel and was erroneously deprived of it for a few weeks after he effectively reasserted that right—the trial court’s delay in reappointing counsel had no influence on the ultimate result of the proceeding: the trial court’s unfavorable finding under Article 64.04. Because Appellant’s substantial rights were not affected, any abuse of discretion by the trial court in this regard was harmless. Tex. R. App. P. 44.2(b). Appellant’s fourth issue is overruled.

E. CONSTITUTIONALITY OF ARTICLE 64.03

In his fifth point of error, Appellant argues that Article 64.03 is unconstitutional as applied to him.²⁷ Specifically, Appellant contends that there is a conflict in the language between 64.03(a)(1)(C) and 64.03(b) “that puts the trial court in an impossible position” in cases where the defendant pleaded guilty, confessed, or admitted to the crime:

Appellant was deprived of a fair hearing, and application of 64.03, because he had involuntarily pled guilty previously based on erroneous advice of counsel. Appellant was denied his right to prove identity as an issue, as required by the statute, because he was essentially treated the same as a defendant who admitted to the crime or confessed, according to the plain language of the statute.

²⁷Appellant states the issues presented under his fifth point of error as follows:

Whether Article 64.03(a)(1)(C) requires that the convicting court find identity was or is an issue in the case before ordering forensic DNA testing. Whether Article 64.03(b) states that a convicted person who pleaded guilty or nolo contendere or, whether before or after conviction made a confession or similar admission in the case may submit a motion under this chapter, and the convicting court is prohibited from finding that identity was not an issue in the case solely on the basis of that plea, confession, or admission, as applicable. Whether Article 64.03 violates procedural due process because (1) it is impermissibly overbroad as applied and is (2) unequally and unfairly applied to appellant who plead [sic] guilty involuntarily based on the ineffective assistance of counsel? [Capitalization altered]

The first two of these issues can be resolved in the affirmative with the plain language of the statute. *See* Tex. Code Crim. Proc. Ann. art. 64.03(a)(1)(C), 64.03(b). We therefore turn our focus to the remaining issue: Appellant’s due process argument.

Appellant further argues that the statutory provision stating that a trial court may not find that identity was not an issue solely on the basis of a guilty plea “is vague, overbroad, and imprecise” and operates in cases like this to treat a convicted person exactly like he confessed to the crime. “This is unequal treatment by the application of 64.03,” according to Appellant, “and that is the textbook example of unconstitutional as applied.”

Appellant did not raise any of these constitutional arguments in the trial court. In the following exchange at the Article 64.04 hearing, Appellant made clear that he was *not* challenging the constitutionality of any statute other than Texas Penal Code Section 38.111:

[The State]: So, I guess, if we can, do you have the motion to hold the uncon- -- is there a -- what is the request to hold unconstitutional? Chapter 64?

[Appellant]: Oh, no, no, no. No, sir. It's -- it's filed January 2nd, 2020. And in a lot of ways, the motion just speaks for itself. It basically -- it prohibits -- it's something that has never been challenged before. It's something that prohibits a pro se litigant from representing himself because it forces incomplete work product. So, it's just something I just want to get a ruling on to present to the appellate court to consider.

[The State]: Oh, Penal Code Section 38.111.

[Appellant]: Yes, sir.

Before concluding the hearing, the trial court repeatedly asked Appellant if he had “anything else” to take up, and Appellant never made any of the unconstitutional-as-applied arguments against Article 64.03 that he now makes on appeal. “[A] challenge

to the constitutionality of a statute is a forfeitable right and must be preserved in the trial court during or after trial.” *Holmes v. State*, 380 S.W.3d 307, 308 (Tex. App.—Fort Worth 2012, pet. ref’d); see *Karenev v. State*, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009). Both facial and as-applied challenges must be raised in the trial court to preserve error. *Reynolds v. State*, 423 S.W.3d 377, 383 (Tex. Crim. App. 2014); see *Flores v. State*, 245 S.W.3d 432, 437 n.14 (Tex. Crim. App. 2008) (noting the “well-established requirement that appellant must preserve an ‘as applied’ constitutional challenge by raising it at trial”). A constitutional objection must also alert the trial court to the constitutional bases for the objection, allowing the trial court to make a reasoned ruling. See *Clark*, 365 S.W.3d at 340.

Because Appellant never raised his as-applied challenge to the constitutionality to Article 64.03 in the trial court, he has not preserved this issue for our review. See Tex. R. App. P. 33.1(a)(1)(A); *Curry v. State*, 910 S.W.2d 490, 496 (Tex. Crim. App. 1995). We overrule Appellant’s fifth point of error.

III. CONCLUSION

Having overruled all of Appellant’s points of error on appeal, we affirm the order of the trial court.

/s/ Brian Walker
Brian Walker
Justice

Publish

Delivered: June 29, 2023