01-24-00317-CR

~~No. 01-23-00317-CR~~

In the
First Court of Appeals
For the
State of Texas

———♦———

Cause No. 1785483
In the 184th District Court
Of Harris County, Texas

———♦———

ANGELO BRITTON
Appellant
v.
THE STATE OF TEXAS
Appellee

———♦———

APPELLANT'S BRIEF

———♦———

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ORAL ARGUMENT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to TEX. R. APP. P. 38.1(e), 39.1, and 39.2, Appellant requests oral argument before this Court of Appeals. This is a meritorious appeal of a criminal case, and although Appellant represents that the facts and legal arguments are thoroughly presented in this brief and in the record, Appellant also believes the decisional process of the Court of Appeals will be significantly aided by the oral arguments of counsel.

IDENTIFICATION OF THE PARTIES

Pursuant to TEX. R. APP. P. 38.1(a), a complete list of the names of all interested parties is provided below.

Trial Judge:	Honorable Katherine Thomas Presiding Judge, 184th District Court Harris County, Texas
Appellant:	Angelo Britton TDCJ No. 02502002 TDCJ – Ney Unit 114 Private Road 4303 Hondo, Texas 78861-3812
Counsel for Appellant:	Inger H. Chandler 1207 South Shepherd Drive Houston, Texas 77019

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTES

RULES

CONSTITUTIONAL PROVISIONS

TO THE HONORABLE FIRST COURT OF APPEALS:

STATEMENT OF THE CASE

On November 28, 2022, Appellant was charged by indictment with the felony offense of murder. (CR 42). A jury was selected on April 4, 2024; however, one juror was excused on April 8, 2024, due to personal reasons. (CR 640-48; 3RR 4-227; 4RR 4-12). On April 11, 2024, the court conducted a second *voir dire* examination and seated four (4) additional jurors. (CR 650-55; 5RR 4-159). On April 19, 2024, the jury found Appellant guilty as charged in the indictment, and on April 22, 2024, assessed punishment at confinement in the Texas Department of Criminal Justice—Institutional Division for thirty-five (35) years. (CR 670, 678-79; 9RR 120; 10RR 41). The trial court certified Appellant's right to appeal and Appellant filed timely notice of appeal. (CR 681, 688-89). Appellant filed a *pro se* motion for new trial on May 13, 2024, but received neither a hearing nor a ruling. (CR 691-98). Appellate counsel was appointed on June 20, 2024. (CR 700-01).

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ISSUES PRESENTED

First Issue: Was Appellant deprived of counsel during a critical stage of trial, and, if so, was Appellant harmed?

Second Issue: Did the trial court erred in denying counsel's motion for mistrial when a juror came forward expressing uncertainty about her verdict?

Third Issue: Is the evidence sufficient to support Appellant's conviction?

STATEMENT OF FACTS

On May 12, 2022, Complainant Edward Gray was found shot and killed in the middle of an underpass on Interstate 10 in Houston, Harris County, Texas. 6RR 36-46). Surveillance videos collected from a nearby 7-Eleven convenience store, a motel, and a fireworks stand, identified a suspect vehicle that was registered to Appellant's girlfriend. (7RR 66-100). Two weeks later, on May 26, 2022, the suspect vehicle was totaled in a traffic accident while being driven by Appellant. (7RR 219-20; 8RR8-13).

It was established through surveillance and phone records that Appellant and his cousin, Brandon Devereaux ("Devereaux") were with

the complainant on the night he was killed. (7RR 122-42). Devereaux was interviewed by law enforcement a month after the shooting and told investigators Appellant shot the complainant. (7RR 148-68).

SUMMARY OF THE ARGUMENTS

First Point of Error: Appellant was deprived of counsel during a critical stage of trial, resulting in harm. Accordingly, Appellant's appeal should be abated and his appellate timeline restarted.

Second Point of Error: The trial court erred in denying counsel's motion for mistrial when a juror came forward expressing uncertainty about her verdict. Accordingly, Appellant's murder conviction should be reversed and remanded for a new trial.

Third Point of Error: The evidence is insufficient to support Appellant's conviction. Accordingly, Appellant's murder conviction should be reversed and a judgment of acquittal entered.

APPELLANT'S FIRST POINT OF ERROR

Appellant was deprived of counsel during a critical stage of trial, resulting in harm.

The Sixth Amendment to the United States Constitution guarantees the right to counsel at "every critical stage of a criminal prosecution" where adversarial proceedings have begun, absent a valid waiver of the right to counsel. *See Upton v. State,* 853 S.W.2d 548, 553 (Tex.Crim.App.1993); *see also Champion v. State,* 82 S.W.3d 79, 81 (Tex.App.—Amarillo 2002, no pet.); *Massingill v. State,* 8 S.W.3d 733, 736 (Tex.App.—Austin 1999, no pet.). Whether a particular stage is critical turns on an assessment of the usefulness of counsel to the accused at the time. *See Upton,* 853 S.W.2d at 553 (citing *Patterson v. Illinois,* 487 U.S. 285, 299–300 (1998); *United States v. Wade,* 388 U.S. 218, 235–39 (1967)); *see also United States v. Ash,* 413 U.S. 300, 313 (1973).

Without question, the hearing on a motion for new trial is a critical stage of the proceedings. *Connor v. State,* 877 S.W.2d 325, 326 (Tex.Crim.App. 1994); *Trevino v. State,* 565 S.W.2d 938, 940 (Tex.Crim.App. 1978). "It is the only opportunity to present to the trial court certain matters that may warrant a new trial and to make a record on those matters for appellate review." *Trevino,* 565 S.W.2d at 940.

Trevino makes clear that a criminal prosecution, within the meaning of the Sixth Amendment and article I, section 10 of the Texas Constitution, does not end with the defendant's conviction. *Massingill,* 8 S.W.3d at 736. If a hearing on a motion for new trial is a critical stage of the proceedings "then logic dictates that the time period for filing a motion [for new trial] is also a critical stage of the proceedings." TEX. R. APP. P. 21.4, 21.6; *See Burnett v. State,* 959 S.W.2d 652, 656 (Tex.App.—Houston [1st Dist.] 1997, pet. ref'd).

"The importance of counsel to a defendant immediately after conviction is recognized in both case law and statute." *Massingill,* 8 S.W.3d at 736; TEX. CODE CRIM. PROC. art. 26.04(a). A defendant "must comply with a myriad of procedural rules in order to perfect a meaningful appeal." *Ward v. State,* 740 S.W.2d 794, 797–98 (Tex.Crim.App.1987). It is indisputable that counsel can be useful in coping with legal problems in preparing, filing, and presenting a proper motion for a new trial. *Prudhomme v. State,* 28 S.W.3d 114, 118 (Tex.App.—Texarkana 2000). It is also beyond dispute that a motion for new trial can be an extremely important tool for presenting error on appeal. *Id.* While a motion for new trial is not a prerequisite to an appeal in every case, for a meaningful

appeal of some issues a defendant must prepare, file, present, and obtain a hearing on a proper motion for new trial in order to adduce facts not otherwise shown by the record. *See* TEX. R. APP. P. 21.2; *Massingill,* 8 S.W.3d at 736. "It is no more reasonable to require a defendant to perform these tasks without the assistance of counsel than it is to require him to represent himself at a new trial hearing," which is a critical stage of the proceedings. *Id*.

To prevail on a claim of deprivation of counsel during the time to prepare, file, and present a motion for new trial, an appellant must affirmatively prove that he was not represented by counsel during a critical stage of the proceedings. *Oldham v. State,* 977 S.W.2d 354, 363 (Tex.Crim.App.1998); *Hanson v. State,* 11 S.W.3d 285, 288 (Tex.App.—Houston [14th Dist.] 1999, pet. ref'd). There is a rebuttable presumption that an appellant was represented by counsel and that counsel acted effectively. *Oldham,* 977 S.W.2d at 363. This presumption arises, in part, because appointed counsel remains as the accused's counsel for all purposes until expressly permitted to withdraw, even if the original appointment was for trial only. *See Ward v. State,* 740 S.W.2d at 796. The presumption is not rebutted when there is nothing in the record to

suggest otherwise. *Smith v. State,* 17 S.W.3d 660, 662–63 (Tex.Crim.App. 2000).[1] Importantly, the presumption does not apply when counsel has withdrawn and a defendant is without counsel during the crucial thirty days to prepare and file a motion for new trial, or the ten days in which to present the motion to the trial court. *See* TEX. R. APP. P. 21.4, 21.6; *see Massingill,* 8 S.W.3d at 735.

Here, presumption does not apply. Appellant's trial counsel withdrew after Appellant was convicted and sentenced on April 22, 2024. (CR 688-689). Appellate counsel was appointed on June 20, 2024.[2] (CR 700-01). While incarcerated and without the assistance of counsel, Appellant prepared and filed a *pro se* motion for new trial on May 13, 2024, twenty-two (22) days after he was sentenced.[3] Appellant's hand-written motion raised claims of potential prosecutorial misconduct, ineffective assistance of counsel, and discovery and/or *Brady* violations.[4]

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[1] In *Smith* and *Oldham,* the defendants failed to show that they were not represented by counsel at the time in question. *See Champion,* 82 S.W.3d at 81.

[2] This oversight was unintentional.

[3] Appellant's motion for new trial was postmarked on May 13, 2024, and file-stamped by the Harris County District Clerk's Office on May 29, 2024.

[4] The grounds for a new trial set forth in Rule 21.3 of the Texas Rules of Appellate Procedure are not exclusive. *See State v. Read,* 965 S.W.2d 74, 77 (Tex.App.-Austin 1998, no pet.). Ineffective assistance of counsel may be raised in a motion for new trial. *Reyes v. State,* 849 S.W.2d 812, 816 (Tex.Crim.App.1993). A motion for new trial need not establish a prima facie case to entitle a defendant to a hearing. *Jordan v. State,* 883 S.W.2d 664, 665 (Tex.Crim.App.1994).

There is no question Appellant was denied the right to counsel during the crucial thirty days to prepare and file a motion for new trial, or the ten days in which to present the motion to the trial court.

Harm Analysis

The denial of counsel in Appellant's case, limited to the period of time for preparing and presenting a motion for new trial, is non-structural error and subject to a harm analysis. *Garcia v. State*, 97 S.W.3d 343, 348-49 (Tex.App.—Austin (2003).

Both the United States Supreme Court and the Texas Court of Criminal Appeals have acknowledged that with some varieties of Sixth Amendment violations, "such as the actual or constructive denial of counsel altogether at a critical stage of the criminal proceeding, or an actual conflict of interest on the part of defense counsel, prejudice is presumed." *Batiste v. State,* 888 S.W.2d 9, 14 (Tex.Crim.App. 1994), *citing Strickland v. Washington,* 466 U.S. 668 (1984)*; see also United States v. Cronic,* 466 U.S. 648, 658–59 (1984). But, even if prejudice is not presumed, there is no doubt that harm occurred in this case. *See* TEX. R. APP. P. 44.1 (for those constitutional errors which are subject to harmless

error analysis reversal is required unless the court determines beyond a reasonable doubt that the error was harmless). Appellant's *pro se* motion asserted claims of prosecutorial misconduct, ineffective assistance of counsel, and potential discovery and/or *Brady* violations. The motion raised matters which were not determinable from the record; as such, a hearing would have been required if the motion had been properly presented and a hearing requested. *See Jordan v. State,* 883 S.W.2d 664, 665 (Tex.Crim.App. 1994); *Callahan v. State,* 937 S.W.2d 553, 560 (Tex.App.—Texarkana 1996, no pet.). Because Appellant was deprived of counsel, he was deprived of the opportunity to properly present his motion to the trial court, and the opportunity to have a hearing and make a record of his claims for appellate review.

Because Sixth Amendment violations "are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation," the remedy here is not a reversal of Appellant's conviction. *United States v. Morrison,* 449 U.S. 361, 364 (1981); *Massingill,* 8 S.W.3d at 738. Instead, Appellant respectfully requests that this Court abate his appeal and remand this cause to the trial court to restart the appellate timetable and afford Appellant the opportunity to

investigate and file a motion for new trial with the assistance of appellate counsel.

APPELLANT'S SECOND POINT OF ERROR

The trial court erred in denying counsel's motion for mistrial when a juror came forward expressing uncertainty about her verdict.

The guilt-innocence phase of Appellant's trial ended on Friday, April 19, 2024, with a guilty verdict. (9RR 119-20). The jury was not polled. (9RR 120). On Monday morning, April 22, 2024, the following testimony was taken from Deputy Thomas, bailiff for the trial proceedings:

> THE COURT: Deputy Thomas, can you proffer to the Court what happened this morning with one of the jurors?
>
> THE BAILIFF: This morning I was giving instruction that the jurors were supposed to be in court around 10:30 a.m. I went down the list to call all of the jurors. I got to call Ms. Pointer this morning, and she –
>
> THE COURT: For the record, what is Ms. Pointer's first name?
>
> THE BAILIFF: I think it's Paula Pointer.
>
> MR. GORDON: I think it's Lorna.
>
> THE COURT: It's Lorna Pointer. Okay.

THE BAILIFF: And she relayed to me that she called in Friday, and there was a discrepancy with me, because we -- we left late so we could continue the punishment phase today. Nobody was in court at the time that she called. She said she called in ill. And I expressed to her that because we were at the punishment phase of the trial, that she was needed in court so we can bring the case to a completion.

THE COURT: So she said that she was going to be ill for Monday on Friday?

THE BAILIFF: She didn't give much detail on that, but I explained to her that her presence was necessary to bring the case to a completion.

THE COURT: What did she then proffer to you?

THE BAILIFF: She said that she tried to give other information about her initial entry in the verdict as a not guilty, and I told her that she would have to convey all that before the Court and not to me.

THE COURT: Did she tell you that her verdict in this case was not guilty?

THE BAILIFF: That's what she said.

THE COURT: Did she proffer any other information to you?

THE BAILIFF: No, she did not. But I did reinforce that her presence was needed in court to bring the case to a completion.

THE COURT: Thank you. We're off the record.

(Recess taken)

THE COURT: We can go back on the record, Mrs. Lee. After reading *Morales* -- excuse me *Miranda Canales v. State*, 368 S.W.3d 870, the Court is inclined to take these additional steps. The Court will bring out all of the jurors who deliberated in this case. The Court, on its own motion, will poll the jurors individually. At that time, depending on what those jurors say, is there a verdict, I will either tell the jurors that the Court has found that the verdict is not unanimous and they must continue deliberating, or accept what -- if it is unanimous, accept the verdict that they provide the Court or take up any motions from either side.

(10RR 7-9)(sic). The trial court polled the jury, and all responded that their verdict was, "guilty." (10RR 10-12). Trial counsel moved for a mistrial:

MR. CHERNOFF: Based on the information that was provided to the bailiff this morning, it's obvious that – at least it appears obvious that one of the jurors has been bullied in some way. She goes back and forth now.

I can tell by -- I can tell by her demeanor that something went down back there, because the way she was looking. I only ask that you take that one juror and have a conversation with her and find out if

anything is going on, just so that we can be clear before we get into punishment.

(10RR 13).

The trial court conducted an in-camera hearing with the juror in question. (11RR).

THE COURT: Ms. Pointer, the reason why you were called into my chambers is because I was made aware of a conversation that you had with Deputy Thomas this morning with respect to your verdict.

JUROR NO. 36: Uh-huh (affirmative.)

THE COURT: And I'm having some trouble reconciling with what you told the bailiff and what you stated in open court when you were polled.

Is -- you understand that you have an individual verdict and that if your verdict is not unanimous with the other jurors, you have the ability to continue deliberations. And if at the conclusion of the deliberations, you still have not reached a unanimous verdict, the Court has to declare a mistrial.

Is your verdict guilty, or is your verdict not guilty?

JUROR NO. 36: Can I speak in whole?

THE COURT: Yes, ma'am.

JUROR NO. 36: Okay. It was not guilty in the beginning.

THE COURT: Okay.

JUROR NO. 36: And two other people. But that piece of paper that you sent in there, most people didn't understand it. So it started off one way, then went another way. So it had to be explained by the foreman what exactly what was said on that piece of paper.

And then -- I'm 60 years old. I have never been a juror before, and I ain't never did court like this before. And when our notepad was took away, I lost it. Because I can't be remembering what's all on there.

And one of the reasons I was saying not guilty is because I couldn't remember all that evidence that was presented. So the foreman had to go through a whole bunch of it, because I go, I don't remember that. I don't remember that.

And then he went through detail what he remembered what was on a particular one that I had a question with. And I said, Okay. I changed it, because I didn't hear that. Because the forensic lady that did the DNA, remember she was there one day

and a half or left and come back. I didn't hear what she said the next day. I thought she was through, but came back and you-all dismissed her. So I didn't hear what she said in total, and they had to tell me. So that's when I changed in my head.

But I was just upset because I felt like they were all against me. That's all. And I did -- I took it to another level when they seemed like they were against me. And I'm a victim of domestic violence. And I say, If I was sentenced -- that I had to protect me and my son. That was 30 years ago that I had to do some harm to my ex-husband. I said, would y'all put me in prison for the rest of my life?

So, yeah, we had words. It was heated. It was definitely heated. But my verdict -- it was changed when he went through and said that the forensic lady with the DNA found the evidence underneath the fingernails. Because I didn't hear that. I didn't hear that.

THE COURT: Do you believe that your verdict was changed because you felt pressured to conform with what the other jurors –

JUROR NO. 36: Partly, yes. Partly, yes.

THE COURT: Or did you -- were you able to have a discussion about the issues that you

disagreed with and then you changed your mind?

JUROR NO. 36: Yeah, I had -- he had to tell to me. They each had to tell it to me. Because I didn't hear, like I said, the lady that did all the DNA and what she had did with the blood and all that. I didn't hear when she came back the second day. So they all went around the table and said what they heard.

And then I said, Okay. And even the lady on the other end, we all had to come -- because, yeah, everybody was going by this piece of paper, you know. But –

THE COURT: And for the record, this is not the jury charge.

JUROR NO. 36: Okay.

THE COURT: Okay. So do you disagree with the other jurors with respect to your verdict, or do you agree with the verdict based on the evidence?

JUROR NO. 36: Based on evidence.

THE COURT: Okay.

JUROR NO. 36: Agree upon it on the evidence.

THE COURT: Okay. You said something that gave me a little bit of pause. When you

said that you felt pressured, did you feel like you were under duress to –

JUROR NO. 36: In -- yeah, in the beginning. Because like -- being you said in the paper saying the way it supposed to be did, and so everybody agreed that we was going to put our verdict inside a cup. Then after we put it into cup and then he pull it out and he read it, then they wanted us to say why.

I had a problem with that. Why do I have to tell you why it was that I say it as guilty -- I mean, innocent or whatever? Still mine. Why do I have to -- yes, do I have to tell that in detail?

THE COURT: Okay.

JUROR NO. 36: To me, it's if I say that person is guilty or that person is innocent, just should be it. It shouldn't be that nobody coming around questioning me. Why do you think that they went around the table and asked why after they read the 9 guilty, 3 not?

THE COURT: And after your piece of paper was polled and yours said not guilty, at that point did you change your verdict based off of discussion about the evidence; or was it -- did you feel pressure, like you were under pressure or under duress to vote guilty?

JUROR NO. 36: When they first pulled it out of there and they went around the table and I said not guilty and they asked why, I let them pass me up. I didn't want to say nothing. I didn't want to say anything. They needed to discuss it more for me to see why I should be changing mine's to guilty.

So they did. All 11 -- well, they took out the two. So the other nine, they each explained to me what was said on there, what I might not have heard, what I might have missed. So that's when I changed it. Because I didn't hear that. When I was in court, I didn't hear all that. That's something I missed.

THE COURT: Okay. And based off of the discussion about the evidence that you missed, you changed your verdict –

JUROR NO. 36: Yes, ma'am.

THE COURT: -- to guilty.

JUROR NO. 36: Yes.

THE COURT: And are you telling all of us that it was -- you felt like you were under duress, or was it –

JUROR NO. 36: I did at the beginning. I'm not going to lie.

THE COURT: Okay.

JUROR NO. 36: In the beginning I did. Because I do have anxiety. I do have panic attacks, and when somebody -- I felt pressured. I did in the beginning. I did. When we put the little -- what we wanted to say in the cup, pulled it out, it's going around the table, that I didn't think that they needed to do to me. When I put it on that piece of paper not guilty, that's all I should have been for me.

THE COURT: Okay. So is your verdict today guilty because you wanted to comply with what the other jurors were doing or guilty based off the discussion that you-all had about the evidence?

JUROR NO. 36: No, I made my decision after the discussion.

THE COURT: Okay.

JUROR NO. 36: Because I ain't going to lie, I was upset. They had to calm me down. Because we did get a little heightened in there. We were real close in there. We got to know about each other family and everything. Everybody was close. So they had to calm me down.

THE COURT: Okay.

JUROR NO. 36: I even got hugs and everything because they didn't know what I –

THE COURT:	And Ms. Pointer, I don't want to -- under the rules, the jurors' deliberations are secret. Okay. So we don't want to get too much into –
JUROR NO. 36:	Okay.
THE COURT:	-- what happened. But it's important that we know what your individual verdict is.

(11RR 4-11)(sic). Neither side had any further questions. (11RR 11). The trial court accepted Ms. Pointer's verdict of "guilty" that was given during the poll. (11RR 12).

The denial of a motion for mistrial is reviewed for an abuse of discretion. *Archie v. State*, 221 S.W.3d 695, 699 (Tex.Crim.App. 2007); *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex.Crim.App. 2004). A trial court abuses its discretion if its decision is outside the zone of reasonable disagreement. *Archie*, 221 S.W.2d at 699.

The trial court's denial of Appellant's motion for mistrial violated his due process right to a unanimous verdict. *See Ramos v. Louisiana*, 590 U.S. 83, 93 (2020)("[I]f the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court."); *Ngo v. State*, 175 S.W.3d 738, 745 (Tex.Crim.App. 2005)(recognizing that "[u]nder [the Texas] constitution,

jury unanimity is required in felony cases, and, under [Texas] statutes, unanimity is required in all criminal cases").

There is no question that Ms. Pointer stated that her verdict was "guilty" when she was polled by the trial court three days after the jury's verdict was announced. Appellant acknowledges that, historically, that is the end of the analysis. "[O]nce a jury is polled and each juror affirms his verdict, the verdict is unanimous." *Mora v. State*, No. 04-12-00495-CR, 2013 WL 5948123, at *3 (Tex. App.—San Antonio Nov. 6, 2013, pet. ref'd)(mem. op., not designated for publication)(first citing *Miranda-Canales v. State*, 368 S.W.3d 870, 875 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd), then citing *Wood v. State*, 87 S.W.3d 735, 736 (Tex. App.—Texarkana 2002, no pet.)). Courts have continuously held that post-verdict regrets do not overturn convictions. *See Miranda-Canales*, 368 S.W.3d at 873-76 (concluding that trial court had "acted properly" by denying appellant's motion for mistrial after juror expressed post-verdict reservations concerning guilty verdict); *Tompkins v. State*, 869 S.W.2d 637, 641 (Tex.App.—Eastland 1994)("The record shows that, when the jury was polled, she announced in open court that she voted 'guilty.' Her private reservations do not cancel the legal effect of her vote;

consequently, there was a unanimous verdict finding appellant guilty."), *pet. dism'd, improvidently granted*, 888 S.W.2d 825 (Tex.Crim.App. 1994); *see also Wood*, 87 S.W.3d at 739-40 (recognizing that a juror may not change her verdict after it has been accepted).

But Appellant's case is different.

The trial court's in-camera examination of Ms. Pointer exposed the coercion she experienced in the jury room. She was still quite emotional about it. After attempting to reach the court on Friday evening and sitting with her verdict all weekend, Ms. Pointer recalled in detail the struggles she had, and the pressure she felt to change her verdict. She felt her privacy was violated when she was called upon to explain her "not guilty" verdict:

> "To me, it's if I say that person is guilty or that person is innocent, just should be it. It shouldn't be that nobody coming around questioning me." (11RR 8)(sic).
>
> "When I put it on that piece of paper not guilty, that's all I should have been for me." (11RR 10)(sic).

Three days later, when asked if she believes that her verdict was changed because she felt pressured to confirm with what the other jurors wanted, she replied, "Partly, yes. Partly, yes." (11RR 7-8). Though she

ultimately stated that her changed verdict was "based on the evidence," she vacillated, and hesitated, and questioned her decision. (11RR 8-10).

But beyond the duress and coercion that can be experienced in a jury room, is a verdict truly "based on the evidence," if that evidence was misrepresented? Ms. Pointer identified to the trial court the singular piece of evidence that led to her to change her verdict from "not guilty" to "guilty:"

> "…it was changed when he went through and said that the forensic lady with the DNA found the evidence underneath the fingernails. Because I didn't hear that. I didn't hear that."

(11RR 6).

Ms. Pointer likely "didn't hear that" because it was never said. In fact, the evidence, if any, that Appellant's DNA was underneath the complainant's fingernail scrapings and clippings was miniscule. (8RR 196-97; 9RR 12-36).

Appellant was *excluded* as a contributor to the complainant's left hand fingernail scrapings, and there was *limited evidence for inclusion* on the complaint's right hand fingernail scrapings. (9RR 12, 33-36); *State's Exhibit 158, p. 4*; *State's Exhibit 160, p. 2* (emphasis added). As explained by the laboratory reports:

- ***Limited support for inclusion*** *generally occurs when a DNA profile has a low amount of genetic information for one or more contributors. For this reason, a true contributor to the DNA profile may fall within this limited range. Additionally, a person who did not contribute to the DNA profile may also coincidentally fall within this range.*

State's Exhibit 160, p. 6.

Ms. Pointer changed her verdict because she believed the presence of Appellant's DNA on the complainant's fingernail scrapings was strong evidence of his guilt. Had she understood the scientific basis of the results, her verdict would not have changed.

The trial court's error in denying Appellant's motion for mistrial constituted reversible error. Accordingly, Appellant's conviction should be reversed, and the cause remanded for new trial.

APPELLANT'S THIRD POINT OF ERROR

The evidence is insufficient to support Appellant's conviction.

In a plurality opinion, the justices of the Court of Criminal Appeals concluded that the *Jackson v. Virginia* legal sufficiency standard is the only standard for determining whether the evidence was sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt. *Brooks v. State*, 323 S.W.3d 893, 894-895 (Tex.Crim.App. 2010)(citing *Jackson v. Virginia,* 443 U.S. 307, 319 (1979). In a sufficiency review, an appellate court views all evidence in

the light most favorable to the verdict and determines whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Salinas v. State*, 163 S.W.3d 734, 737 (Tex.Crim.App. 2005).

Evidence is insufficient under this standard in four circumstances: (1) the record contains no evidence probative of an element of the offense; (2) the record contains a mere "modicum" of evidence probative of an element of the offense; (3) the evidence conclusively establishes a reasonable doubt; and (4) the acts alleged do not constitute the criminal offense charged. *See Jackson,* 443 U.S. at 314, 318 n.11, 320; *Laster v. State*, 275 S.W.3d 512, 518 (Tex.Crim.App. 2009); *Mottin v. State*, 634 S.W.3d 761, 765 (Tex.App.—Houston [1st Dist.] 2020, pet. ref'd).

A murder conviction may be based on circumstantial evidence. *See Temple v. State*, 390 S.W.3d 341, 359 (Tex.Crim.App. 2013)(citing *Clayton v. State*, 235 S.W.3d 772, 778 (Tex.Crim.App. 2007)). "Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex.Crim.App. 2007). "Each fact need not point directly and

independently to guilt if the cumulative force of all incriminating circumstances is sufficient to support the conviction." *Nisbett v. State*, 552 S.W.3d 244, 262 (Tex.Crim.App. 2018).

A person commits the offense of murder if he "intentionally or knowingly causes the death of an individual" or the person "intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual." TEX. PENAL CODE § 19.02(b)(1), (2).

In Appellant's case, no direct evidence established Appellant as the individual who caused the death of the complainant. The circumstantial evidence that was presented – namely, that Appellant was with the complainant at the time of his death – was equally true of Brandon Devereaux. But Devereaux was never treated as a suspect. In fact, despite knowledge of his presence at the scene, he was not interviewed by law enforcement until a month after Appellant was arrested and charged. In that time, Devereaux did not report the incident to law enforcement, but rather got a new phone number. (8RR 145-49). The State granted Devereaux immunity in exchange for his testimony at trial, but his testimony was not supported by the evidence. (8RR 48-57, 88, 122-

23). Devereaux testified that Appellant and the complainant were passing a PCP-laced cigar back and forth in the car, yet there was no PCP in the complainant's system. (8RR 40, 101-02, 131); *State's Exhibit 126*. Devereaux testified that the complainant "lunged forward" toward Appellant before he heard a "pop," but there was not soot or stippling near the gunshot entrance wound. (8RR 45-46, 109-11, 135). Devereaux testified that the complainant was acting "funny" at the store – trying to rip open the door; however, there was no evidence of this presented by any other witness, including store employees. (8RR 102). Devereaux's credibility was tainted by his history of theft and crimes of moral turpitude. (8RR 87). There was no evidence of bad blood between Appellant and the complainant – they were neighbors and friends. (7RR 164, 171-91).

Based on the evidence presented by the State, it is just as reasonable – and based on credibility and false testimony, perhaps more reasonable – that Appellant was merely present at the time Devereaux killed the complainant. Accordingly, the evidence is insufficient to support the jury's verdict, and Appellant's conviction should be reversed and a judgment of acquittal entered.

CONCLUSION & PRAYER

It is respectfully submitted that the trial court denied Appellant counsel during a critical stage of trial, namely, the thirty days to prepare and file a motion for new trial and ten days in which to present the motion to the trial court; accordingly, Appellant's appeal should be abated and his appellate timeline restarted.

It is respectfully submitted that the trial court abused its discretion when it denied Appellant's motion for mistrial when a juror came forward expressing uncertainty about her verdict; accordingly, Appellant's conviction should be reversed and his case remanded for a new trial.

It is further respectfully submitted that the evidence is insufficient to support a conviction for murder; accordingly, Appellant's conviction should be reversed and an acquittal entered.

Respectfully submitted,

/s/ Inger H. Chandler

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been delivered to the Harris County District Attorney's Office via e-filing on March 24, 2025.

/s/ Inger H. Chandler
INGER H. CHANDLER

CERTIFICATE OF COMPLIANCE

This is to certify that this brief complies with the typeface requirements of TEX. R. APP. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of TEX. R. APP. P. 9.4(i), if applicable, because it contains 6,430 words according to the word count on Microsoft Word.

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