NO. 01-24-00374-CR

IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS

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JASON ARMSTER v. STATE OF TEXAS

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On Appeal from Cause No. 1670075
From the 183rd District Court of Harris County, Texas

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BRIEF FOR APPELLANT

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STATEMENT OF THE CASE

Mr. Jason Jermaine Armster pleaded not guilty to murder in cause number 1670075 in the 183rd District Court before Judge Leslie Yates [5 RR 13]. A jury found him guilty of murder [CR 840] [7 RR 8]. Along with the murder charge, Armster was tried for tampering with evidence [2 RR 5], but the jury was unable to reach a verdict on that charge [7 RR 9] and the court declared a mistrial with respect to the tampering with evidence charge [8 RR 6].

The jury assessed punishment at fifty-five years' imprisonment and a $10,000 fine [CR 847] [9 RR 6]. Judge Belinda Hill, who was presiding when the jury returned its sentence, pronounced sentence [9 RR 7–8] on May 6, 2024. Armster was represented by Mr. Joe Vinas at trial. This appeal follows Armster's conviction and sentence.

ISSUES PRESENTED

1. **Custodial Interrogation—Involuntary Fifth Amendment waiver**. Waivers following the invocation of the right to counsel must be voluntary. The court believed that Mr. Armster "re-initiated" conversations with the police after invoking his right to counsel, expecting counsel to be appointed, and sitting in an interview room at the station for three hours without explanation. Was his eventual waiver voluntary?

2. **Extraneous Offenses—38.36 is not a blank check for admissibility.** The court misapprehended the scope of Article 38.36, believing any evidence relating to the relationship of the parties was admissible. But article 38.36 evidence is subject to application of the Rules of Evidence. Should evidence of little probative value and highly prejudicial impact have been admitted?

3. **Sudden Passion—Range of Punishment**. When even weak, impeached, contradicted, or unbelievable evidence suggests that a murder was committed under the influence of sudden passion caused by adequate cause, the issue must be submitted to the jury. The evidence suggested that Armster shot his wife under the immediate influence of anger, rage, and resentment caused by his belief she was cheating and her sarcastic rejoinder when challenged. Did the court err in refusing to allow the jury to consider the issue?

STATEMENT OF FACTS

Mr. Jason Jermaine Armster was charged with the murder of Charlene Grovell, alleged to have occurred on March 31, 2020 [CR 29]. Tex. Penal Code § 19.02(b)(1) & (2) (2020).

Sgt. Jose Gonzalez of the Baytown Police Department was called to the police station during his patrol shift on March 31, 2020, because Armster was turning himself in for "local warrants, basically a traffic ticket." [5 RR 22–23]. The jail could not take him due to a high temperature, so he was released from custody and his Class C warrant was reset for a new court date [5 RR 28, 35–36]. Before Armster left, law

enforcement instigated a welfare check at his house [5 RR 29, 44]. During the welfare check, John Harrison, a Lieutenant with the Precinct 3 Constable's Office, discovered a "victim deceased in the bed." [5 RR 47–50, 53–55].

Deputy Shane Ward of the Harris County Sheriff's Office Crime Scene Unit responded to the residence but found no evidence of forced entry [5 RR 112, 116, 118]. The "primary scene" was the master bedroom of the home, where they found the deceased [5 RR 119]. The police identified what they believed to be bullet strikes in the headboard and wall [5 RR 120]. The police searched the house thoroughly and found no firearms or shell casings [5 RR 124–25].

The deceased was found in bed, clothed in a shirt and underwear [5 RR 125–126].

Under interrogation, Armster would repeatedly say there was one gunshot, but the police believed there were two because they found two holes they believed to be bullet holes [6 RR 135]. No blood spatter or spray were detected at the scene [6 RR 135–36].

Based on his review of the report and photos from the autopsy, Dr. Pramond Gumpeni testified (over several defense objections) that the

cause of the decedent's death was a gunshot wound to the neck, and that the manner of death was homicide [5 RR 165–66]. He testified that it was "very apparent that the bullet traveled through the base of the neck and head exiting into the oral cavity, through the tongue and then out the mouth." [5 RR 174]

Jason Schroeder, director of the trace laboratory at the Harris County Institute of Forensic Sciences, testified that, though he wasn't the analyst, the gunshot residue kit from Armster showed "two particles confirmed as having a composition characteristic of GSR," which could have resulted from firing a weapon, handling a weapon, or being in close proximity to a firearm during discharge [6 RR 12]. He agreed that gunshot residue "gets everywhere," within several feet, that particles could transfer from surface to surface, and that no gunshot residue was found on the headboard at the crime scene [6 RR 16, 18, 20–21].

After Armster tried to turn himself in, no weapons or ballistics were recovered from the car [6 RR 26]. Investigator Anthony Thompson took him from Baytown to the detective bureau in Houston where he was placed in an interview room [6 RR 27]. Thompson agreed that Armster

was detained from the time Thompson arrived at the Baytown Police Department [6 RR 107].

In the interview room in downtown Houston, after he was *Mirandized*, Armster said he "messed up" and that he got a 9mm semiautomatic firearm for protection after being the victim of a carjacking, but invoked his right to counsel after Thompson asked him to "tell me about last night" [SX 22[1] at 17:18] [4 RR 11]. The interview ended with Armster left to sit in the interview room without explanation for over three hours while Thompson went to the scene in Baytown [4 RR 14, 17, 48]. Armster remained in custody, behind locked door in the interview room [4 RR 41].

Though his stated purpose for visiting the scene while Armster was left in the interview room was to gather information for the District Attorney's intake, Thompson admitted that he did not call them on his way back downtown or when he arrived back at the bureau [6 RR 119–

[1] A rough transcript can be found in the Clerk's Record at State's Exhibit Demo 1, which is continued (with different time stamps) at page 5 of State's Exhibit Demo 3. These were shown to the jury as demonstrative exhibits. State's Exhibit 92 is an audio-only rendition of the custodial interrogation and State's Exhibit 93 is the video rendition. Exhibits 92 and 93 are redacted for the jury. State's 22, which was introduced for the suppression hearing, contains the invocation of the right to counsel.

20]. He explained that he liked "to have everything intact" when he called [6 RR 123].

Instead, upon his return to the bureau, Thompson escorted Armster to the restroom and claimed that on the way back from the restroom, he volunteered to talk about the case [4 RR 18, 49][6 RR 48, 128]. Thompson testified that after Armster was *Mirandized* again [4 RR 24] [5 RR 33], they spoke about unrelated matters for 30 minutes before Thompson asked him if he shot his wife, to which he nodded and told Thompson he shot her one time [4 RR 31, 51] [6 RR 69, 74, 130] [SX 93, 3:51:50–54, 3:57:22].

During Armster's interrogation, he said that Charlene, who he described as his soulmate, had cheated on him a long time ago [SX 93, 3:31:26, 3:25:05]. He said he never "walked in and caught" her because she was "good," but he knew what she was doing [SX 93, 3:35:30–46, 3:40:36]. He said she was "messing with" the people who had carjacked him [SX 93, 3:39:25, 3:41:00]. When asked whether this was one of the people she was cheating with, Armster gave a slight nod [SX 93, 3:41:48].

That night, when he walked into the bedroom, he said she was on the phone with a "dude," but she told him she was on the phone with her sister [SX 93, 3:42:40–3:43:21]. He admitted that might have been true in retrospect [SX 93, 3:43:25]. When Thompson asked him if he shot his wife, Armster gave a slight nod [SX 93, 3:48:25–48]. He said he knew she wasn't going to sleep. He knew she was going to leave, but she was trying to get him to go to sleep [SX 93, 3:49:04–14]. He knew she was going to leave and she just told him "take your ass to sleep." [SX 93, 4:19:45–51] After the shooting, Armster said he tried to shoot himself, but had trouble with the gun [SX 93, 3:52:30–54, 3:57:28–40]. He was distraught [SX 93, 3:53:43–47]. He covered her body and moved her slightly in the bed so the children in the house wouldn't see her [SX 93, 3:54:27–3:56:07]. He said he shouldn't have done that and should have walked away [SX 93, 4:17:30–44].

Thompson agreed that Armster's demeanor was unchanged throughout the day, that he was dejected and distraught [6 RR 138–40].

Surveillance video from March 31, 2020 of the Fred Hartmann bridge portrayed traffic on the bridge, including a car pulling over with hazard lights on, and a figure walking from the car to the side of the bridge,

then returning to the car and driving off [5 RR 71–72] [SX 20]. Surveillance video from a neighbor portrayed someone coming in and out of the garage shortly after 3:30 a.m., driving off, returning at 5:04 a.m., and departing again at 5:15 a.m. [5 RR 90–92, 100–04] [SX 5, 9–13].

Thompson testified that Armster told him he threw the gun over the Fred Hartman Bridge, into the water [6 RR 31]. He agreed that the car seen in the surveillance video of the bridge is "consistent" with Armster's car [6 RR 96–97]. Thompson agreed that, though no casings were recovered from the scene, it does not necessarily follow that someone removed them [6 RR 116].

The complainant's sister, Channon Grovell, testified that she and her sister were best friends and spoke every day [6 RR 145]. She characterized Armster and the complainant's relationship as "tumultuous," and said that "she couldn't even come see me without it being a problem or without her having to actually show him that she's at my house, like FaceTime at my house." [6 RR 148–49] Over the defense's objection, she testified that in 2014, her sister came to her house, "rapidly knocking" on the door, with a scared look on her face [6 RR

150]. At that point, she feared for the welfare of the complainant's children [6 RR 151]. She locked the door, but heard a sound outside she attributed to Armster, and when she opened the door, he was there, "and there was a hammer on the side of my apartment" that hadn't been there before [6 RR 150–51].

After seven jury notes [CR 823–29] and the recitation of testimony relating to shell casings [7 RR 5–7], the jury returned a verdict of guilty on the murder charge but was unable to agree on a disposition for the tampering with evidence charge [7 RR 8–9]. A mistrial was granted on the tampering charge [8 RR 6].

At the punishment phase, both parties put on testimony. The court refused a requested sudden passion charge because Armster never said he was acting as a result of sudden passion or that he had some type of response to that [8 RR 50–51]. The jury sent out two jury notes[2] reflecting an impasse [CR 750–51] but returned a sentence of fifty-five years with a $10,000 fine following an *Allen* charge [CR 830] [9 RR 5–6].

[2] These jury notes appear to be incorrectly file stamped as having been written on April 6, 2024 rather than May 6, 2024.

SUMMARY OF THE ARGUMENT

Issue One

Admission of Armster's statements given to the police violated the 5th Amendment right to counsel, which the trial court found that he waived when he purportedly re-initiated contact with the police after first invoking his right to counsel.

Waivers following the invocation of the right to counsel must be voluntary. Armster's re-initiation of contact came after he spent 3 hours in an interview room, expecting his requested counsel to be appointed and appear to guide him through his interactions with the police, as envisioned by Supreme Court case law. During that time, he was given no explanations of his status, and no communication about the status of his request for a lawyer.

In this situation, the re-initiation of contact and the waiver that followed cannot be effective or voluntary given law enforcement's failure to comply with the request for counsel and the time spent without information in a highly coercive circumstance. The court erred when it did not consider the legal effect of law enforcement's failure to

scrupulously honor the assertion of the right to counsel and conclude that the waiver was involuntary.

Issue Two

Introduction of Armster's alleged menacing behavior toward his wife and sister-in-law from six years before the charged offense caused unfair prejudice in this prosecution. Though the Code of Criminal Procedure provides for introduction of prior relationship evidence in murder trials, that evidence is still subject to the Rules of Evidence.

The court expressed the belief that Article 38.36 was the beginning and end of the inquiry, allowing the testimony over objections under Rules 404(b) and 403. Therefore, the court never undertook a Rule 403 balancing test.

After weighing the evidence under Rule 403, this Court should find that the testimony was inadmissible and harmed Armster.

Issue Three

The jury was wrongly deprived from deciding whether the charged offense was committed under the influence of sudden passion arising from adequate cause.

The evidence showed that Armster believed his wife was unfaithful to him and when he questioned her, was met with sarcastic dismissiveness that triggered anger, rage, and resentment from Armster.

The court refused to allow the jury to pass on the question, wrongly penalizing the defense by requiring Armster to have uttered magic words first. The court's ruling prejudiced Armster's opportunity to have the jury give the full effect to the evidence required by law and consider a different punishment range.

ARGUMENT

I. Mr. Armster's statement was elicited after an involuntary waiver of counsel and the trial court erred in allowing the jury to hear it.

Targets of custodial interrogation in the state criminal system have a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation. *Edwards v. Arizona*, 451 U.S. 477, 482 (1981).

The court allowed both testimony chronicling Armster's custodial interrogation and publication of recordings of the custodial interrogation over his preserved Fifth Amendment objections. This was error founded on the conclusion that Armster's purported initiation of discussions with the police following an invocation of counsel was voluntary.

a. Mr. Armster's statements to police were the product of custodial interrogation and a purported waiver of counsel several hours after a request for counsel. Left incommunicado in expectation of an appointed lawyer, his eventual alleged initiation of contact and "waiver" were involuntary.

Armster was subject to custodial interrogation after being brought to the detective bureau and placed in "an interview room" [4 RR 9, 41]. As appellate courts know, custodial interrogation is important because "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

Armster was read his *Miranda* rights and eventually asserted his right to counsel, invoking the 5th Amendment's protections [4 RR 9–10, 44–45]. Deputy Investigator Thompson stopped his questioning but left Armster in custody, incommunicado in the interview room for about three hours while Thompson rode out to the scene and back [4 RR 14–15, 48].

Armster thought his attorney was on his way, but none appeared [4 RR 62]. Nor did anyone ask him whether he wanted to make a phone call

to get a lawyer, take him to a judge to have a lawyer appointed, or take him to be booked [4 RR 62]. He testified that he needed his attorney present for "[a]nything else after that, any other questions, any further questions." [4 RR 62]. Instead, Armster sat alone in custody in the interview room during which time law enforcement entered the room unbidden and took photos, DNA samples, and swabbed his hands testing for gunshot residue, all of which was recorded [4 RR 16; 5 RR 188–89, 195–96]. He had no opportunity to contact a lawyer and the police did not contact a lawyer for him [4 RR 47–48].

Thompson claimed that upon his eventual return to the station, he escorted Armster to the restroom and he spontaneously offered to speak with Thompson [4 RR 18], in apparent accordance with Supreme Court case law allowing the accused to initiate contact with the police following an assertion of the right to counsel. *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981).

But according to Armster, when he was washing his hands, he noticed Thompson and another officer standing in the doorway [4 RR 64]. Thompson walked up to him "kind of aggressive" and asked him if he was "ready to get this off my chest." [4 RR 65–66, 73] Asked if he felt

threatened, Armster said he felt afraid [4 RR 66]. Armster said that Thompson told him that he knew he wasn't a monster, "but, man, these people think you are," and "[i]f you don't tell me something so that I can help you, then I'm gonna have to let you go." [4 RR 67] Armster's mind turned to a man he'd seen outside, sitting on a car and staring at him [4 RR 67]. He said that had he not been approached with those words and aggressive tone, he would not have discussed the case further since he was "waiting on my attorney." [4 RR 68] At the suppression hearing, Thompson was re-called and admitted another person was with him in the bathroom as a typical precaution but denied initiating a conversation in the bathroom or raising his voice [4 RR 80–82].

The court accepted the police version of the encounters, concluding that it was credible that Armster reinitiated conversation after the bathroom break and that it was not credible that the officer threatened him [4 RR 102–03]. From that followed oral conclusions that Article 38.22 was met, and the waiver of rights was knowing and voluntary [4 RR 103].

b. The court erred when it did not consider how non-compliance with the request for counsel and the inherently coercive detention affected the validity of the eventual "waiver." These legal errors require de novo review of the court's decision.

Miranda and the cases that followed it are predicated on the assumption that, when requested, counsel will be appointed for the custodial interrogation. "[T]he right to have counsel present *at the interrogation* is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today . . . [T]he need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires." *Miranda v. Arizona*, 384 U.S. 436, 469–70 (1966). *Miranda* recognizes that the authorities must not question the suspect when they conclude counsel will not be provided during a reasonable time *Id*. at 475. And when invoking counsel, the suspect will not be subject to further interrogation "until counsel was made available." *Smith v. Illinois*, 469 U.S. 91 (1984). "[O]fficials may not reinitiate interrogation without counsel present . . ." *Minick v. Mississippi*, 498 U.S. 146, 153 (1990).

The law should not fault Armster for *believing* that the invocation of his right to counsel meant that he would be appointed a lawyer and, in this situation, it may have made sense to him had the police taken him before a magistrate for booking. But nothing happened. He was left in the interrogation room for hours with random visits from law enforcement to collect potentially incriminating evidence. What would you conclude?

The court treated this as squarely within the *Edwards* rule that "an accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981).

But that holding, deceptively simple in its apparent application to this case, fits uneasily here. Although *questioning* ceased, the Armster was left in a room waiting for a lawyer, only to find the police occasionally entering to collect more evidence. His next contact was again with his interrogator which went un-recorded. Under this situation, his purported waiver cannot be effective and the supposed re-initiation of contact was

not voluntary. To the extent that the law does not recognize this, it has strayed from the intent that such decisions are made voluntarily, with full and correct information.

Armster recognizes that courts give "almost total deference" to the trial court's "rulings on questions of historical fact and on application of law to fact questions that turn upon credibility and demeanor." *Alford v. State*, 358 S.W.3d 647, 652 (Tex. Crim. App. 2012). But whether the defendant's rights were "scrupulously honored" is reviewed de novo. *Alford v. State*, 358 S.W.3d 647, 653 (Tex. Crim. App. 2012) (citing to cases). Here, the court erred when it did not consider how the non-compliance with Armster's request for counsel and the inherently coercive environment he was left in affected the validity of his purported "waiver."

Our courts use the *Mosley* factors to analyze whether the resumption of police interrogation was consistent with scrupulous observance of the right to cut off questioning. *Maestas v. State*, 987 S.W.2d 59 (Tex. Crim. App. 1999) (partially abrogated on other grounds by *State v. Ross*, 32 S.W.3d 853, 857–58 (Tex. Crim. App. 2000))(citing *Michigan v. Mosley*, 423 U.S. 96, 103–04 (1975)). The *Mosley* factors ask: (1) whether the

suspect was informed of his right to remain silent prior to the initial questioning; (2) whether the suspect was informed of his right to remain silent prior to the subsequent questioning; (3) the length of time between initial questioning and subsequent questioning; (4) whether the subsequent questioning focused on a different crime; and (5) whether police honored the suspect's initial invocation of the right to remain silent." *Id.*

Armster was twice informed of his right to remain silent, so the first two factors weigh in favor of the State. The length of time between questioning was approximately three hours. For almost the entirety of those three hours, Armster was left alone, in custody, in the interview room with no indication of what was happening or where the attorney he asked for could be. While there may be cases approving longer periods of time, here, Armster was in unchanged custody, held in limbo. This must weigh against the State. The subsequent questioning related to the same offense. This also weighs against the State. Finally, though the police stopped questioning Armster following his initial invocation, they did nothing to alter his circumstances or see that he could visit with a lawyer or continue the discussion with the police with the assistance of counsel.

This, too, weighs against the State and renders the eventual apparent waiver of counsel involuntary.

In its de novo review of how "scrupulously" the police honored Armster's invocation of his right to Fifth Amendment counsel, this Court should find that in this case, the invocation was only a temporary obstacle to an eventual involuntary waiver, causing the admission of what followed into evidence, in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

c. Improper admission of Mr. Armster's custodial interrogation is harmful under any standard, but especially under the constitutional error harm analysis, which applies here. Admission of Mr. Armster's statements and testimony about his interrogation contributed to his conviction or punishment beyond a reasonable doubt.

Statements admitted into evidence in violation of *Miranda* are reviewed under the "constitutional-error harm analysis, which requires the error to be found harmful unless the appellate court 'determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.'" *Sandoval v. State*, 665 S.W.3d 496, 515 (Tex. Crim. App. 2022); Tex. R. App. P. 44.2(a).

This case hinged on Armster's cooperation and police statements. Though there was evidence to show that he was out through the night

and no signs of forced entry into the house, his statements were the only direct evidence linking him to the crime. The jury, which hung over the companion charge, was certainly capable of finding reasonable doubt.

At closing, the State used information from Armster's police statement to tell the story of the case [6 RR 185–87]. Without his statement, the case was entirely circumstantial and strained. On this record, no court could determine beyond a reasonable doubt that admission of Armster's statement and the police testimony elaborating on the statement did not contribute to the punishment.

This Court should reverse and remand the conviction for a new trial, free of statements taken in violation of the Fifth Amendment.

II. The trial court wrongly introduced evidence barred by Rule 403 under cover of Article 38.36.

The court prospectively admitted evidence that the Defendant "chased the complainant with a hammer," through the complainant's sister [6 RR 98]. In the face of objections lodged under Article IV of the Texas Rules of Evidence (including Rules 404(b) and 403) [6 RR 99], the court peremptorily admitted the evidence under Article 38.36, making her

point “that it was always admissible under 38.36 because of the murder.” [6 RR 100]

When the complainant’s sister was on the stand, before she answered questions about specific incidents between the complainant and the Defendant, the defense was granted “a running objection to these acts that she’s getting ready to describe.” [6 RR 149]

a. The testimony alleged menacing behavior around the complainant six years before the charged conduct.

Channon Grovell testified that, in 2014, she and her sister, the complainant, lived in different buildings at the same town home complex [6 RR 149]. On one day during that year, her sister was knocking at her door in the evening, crying and with a scared look on her face [6 RR 150]. Grovell let her in and locked the door [6 RR 150]. She then heard another sound outside and she said it was the defendant [6 RR 150]. She said she opened the door to find Armster at the door with a “hammer on the side of my apartment.” [6 RR 151] She described the complainant as having a “very, very scared look on her face.” [6 RR 151] She also described Armster driving past her house when the complainant was there, which did not cause her concern because “he did it all the time,”

and the behavior became normal [6 RR 154–55]. Finally, she testified that he would accuse the complainant of things, which was "per usual." [6 RR 161]

b. Article 38.36, applicable to murder cases, is limited by the Rules of Evidence.

In murder trials, Texas law has long provided for admission of evidence "surrounding the killing and the previous relationship existing between the accused and deceased," as well as facts and circumstances "to show the condition of the mind of the accused at the time of the offense." Tex. Code Crim. Proc. art. 38.36(a).

Similarly, in trials for crimes committed against a member of the family or household, the Code of Criminal Procedure provides for admissibility of evidence "regarding the nature of the relationship between the actor and the alleged victim." Tex. Code Crim. Proc. art. 38.371(b).

Application of article 38.371 is explicitly "subject to the Texas Rules of Evidence," though Article 38.36 contains no such specific limitation. However, the Court of Criminal Appeals has held that "evidence admissible under Article 38.36(a) may be nevertheless excluded under

Rule 404(b) or Rule 403." *Smith v. State*, 5 S.W.3d 673, 678 (Tex. Crim. App. 1999).

"Consequently, if a defendant makes timely 404(b) or 403 objections, before a trial court can properly admit the evidence under Article 38.36(a)," it first must determine whether the evidence is relevant to a material issue under Rule 404(b) and, if so, proceed with administration of the Rule 403 balancing test. *Id*. Once Rule 403 is invoked, "the trial court has no discretion as to whether or not to engage in the balancing process." *Montgomery v. State*, 810 S.W.2d 372, 389 (Tex. Crim. App. 1990) (op. on reh'g) (internal citation omitted).

This was not done. As noted above, the court was of the view that Article 36.38 was a beginning and end of the inquiry and erred by not undertaking a Rule 403 balancing test.

c. The danger of unfair prejudice substantially outweighed the marginal probative value of the evidence.

Rule 403 allows courts to exclude otherwise relevant evidence when its probative value is substantially outweighed by a danger of, among other things, unfair prejudice, confusion of the issues, misleading of the

jury, undue delay, or needless presentation of cumulative evidence. Tex. R. Evid. 403.

i. The evidence bore minimal probative value.

Evidence is probative if it tends to make a fact of consequence more or less likely. Tex. R. Evid. 401(a). Evidence of the Armster's allegedly menacing behavior from six years before the offense was ostensibly admitted to show the previous relationship between he and the complainant to demonstrate the "condition of the mind at the time of the offense." Tex. Code Crim. Proc. art. 38.36(a).

The State needed to prove that the Armster intentionally or knowingly caused the death of the complainant, or that he intended to cause her serious bodily injury and committed an act clearly dangerous to human life, causing her death. Tex. Penal Code § 19.02(b)(1), (b)(2). There was no dispute that the complainant was shot and killed and Armster's statement revealed his distrust and anger, insofar as that was part of their "previous relationship." More than that, his statement and the conditions surrounding it revealed that he believed he was responsible for her death.

Evidence of their relationship from 2014 and his alleged behavior tended to make a fact of consequence from 2020 only marginally more likely, if at all.

ii. The evidence could only impress the jury in an irrational, indelible way.

In a 403 analysis, the court must inquire into the evidence's potential to impress the jury in an irrational, but nevertheless indelible way. *Montgomery v. State*, 810 S.W.2d 372, 390 (Tex. Crim. App. 1990) (op. on reh'g) The Court focuses on whether the evidence tends to suggest a decision on an improper, often emotional basis. *Hart v. State*, 688 S.W.3d 883, 894 (Tex. Crim. App. 2024) (citing *Valadez v. State*, 664 S.W.3d 133, 142 (Tex. Crim. App. 2022)).

The portrayal of Armster's allegedly threatening, stalking behavior from six years prior, presumably to illuminate the relationship with the complainant and demonstrate the condition of his mind six years later had, was of such marginal relevance that the only impression it could have left would be to impress the jury in an irrational, indelible way. 38.36's statutory grant of the cover of relevance opened the door to the

State to pile on, portraying him as an untethered villain, happy to victimize his wife and sister-in-law over trifling matters.

iii. The State called the complainant's sister specifically to prove the allegations, strategically ending the trial with the testimony for maximum impact on the jurors.

Channon Grovell's testimony only occupies about 15 pages of the transcript [6 RR 145–61]. But the substance of her testimony was almost entirely devoted to the extraneous conduct allegations with some time spent defining the complainant's family. And she was the last witness before the State rested its case, which, in accordance with the strategic focus on the importance of "primacy and recency," likely imbued the testimony with special impact on the jury. The testimony necessarily pulled the jury's attention away from the charged cases to focus on the Armster's alleged wrongdoing, painting him as a jealous, controlling, menacing husband and brother-in-law. This was the last evidence the jury heard before the State rested [6 RR 161]. Though the testimony did not occupy reams of paper, it was placed strategically to have maximum impact.

iv. The State had no great need for the evidence to prove an outstanding element of its case.

Montgomery says we should weigh this part of the Rule 403 inquiry by asking how great the proponent's need for the extraneous transaction was. *Montgomery v. State*, 810 S.W.2d 372, 390 (Tex. Crim. App. 1990) (op. on reh'g). The evidence of Armster's allegedly bad behavior from 2014 was introduced for the jury's consideration of "all relevant facts and circumstances surrounding the death, if any, and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense, if any." [CR 833, 835].

Those factors were of truly marginal significance given the evidence of the Armster's attempts to turn himself in, his lengthy custodial statements, and Investigator Anthony Thompson's testimony. In view of this record, the questions *Montgomery* asks answer themselves:

> Does the proponent have other available evidence to establish the fact of consequence that the extraneous misconduct is relevant to show? If so, how strong is that other evidence? And is the fact of consequence related to an issue that is in dispute?

The State had evidence from Armster's own mouth! The defense focused on building reasonable doubt and alleging the police

investigation was compromised by confirmation bias. This had some obvious success, as there was no verdict reached in the tampering case. But the defense was otherwise left to focus on what the jury did not know while highlighting ambiguities in the Armster's words and pointing to differences between physical evidence and his words.

The State's need for the evidence was minimal. Its brief closing argument referred to Channon's testimony, but did not mention Armster's alleged conduct in 2014 [6 RR 184–89]. It was simply not important to the charged offense.

v. The clear disparity between the degree of prejudice and the probative value of the extraneous conduct evidence requires reversal.

The court's abuse of discretion in admitting this evidence without conducting a 403 balancing test after the defense's objection requires this Court to review for a violation of Armster's substantial rights. Because "the error had more than a slight influence on the verdict, Armster is entitled to a new trial" on the merits of the charges. *Hart v. State*, 688 S.W.3d 883, 897 (Tex. Crim. App. 2024); Tex. R. App. P. 44.2(b).

Every 403 factor from *Montgomery* breaks in favor of Armster. The evidence was of minimal probative value, it was not an important part of

the State's proof of any charged element, it was particularly inflammatory, and though it did not occupy a large part of the evidence, a witness was specifically called to testify to it and it was elicited at the end of trial so it would be fresh in the jury's mind. The court abused its discretion in admitting it, clinging to the rationale in 38.36 without considering Rule 403, which exists to prevent scenarios very much like this one.

Given the harmful abuse of discretion, this Court should reverse and remand for a new trial, free of unfairly prejudicial evidence.

III. The trial court wrongly precluded the jury from considering sudden passion in assessing Mr. Armster's punishment.

The court wrongly refused the defense's requested submission of the sudden passion instruction at the punishment phase of the trial. The court misapprehended the state of the evidence and the standard for jury submission, remarking, "your client never said that he was acting as a result of that or that he had some type of response to that." [8 RR 51]

a. The defense is entitled to a sudden passion instruction so long as some evidence supports it, no matter how weak, impeached, contradicted, or unbelievable the evidence may be.

At the punishment phase in murder trials, the defense may raise the issue of whether the offense was committed "under the immediate influence of sudden passion arising from adequate cause." Tex. Penal Code § 19.02(d). When the issue is proven by a preponderance of the evidence, the offense becomes a second degree felony. *Id*.

"Sudden passion" is "passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense and is not solely the result of former provocation." Tex. Penal Code § 19.02(a)(2). "Adequate cause" is "cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection." Tex. Penal Code § 19.02(a)(1).

Like other jury charge issues, "[i]t does not matter that the evidence supporting the submission of a sudden passion instruction may be weak, impeached, contradicted, or unbelievable. If the evidence thus raises the issue from any source, during either phase of trial, then the defendant has satisfied his burden of production, and the trial court must submit the issue in the charge" if requested. *Wooten v. State*, 400 S.W.3d 601, 605 (Tex. Crim. App. 2013).

b. Suspicion, ridicule, anger, rage, and resentment led to sudden passion in this case.

The trial evidence tells a simple, uncontroverted story: Armster, firmly suspicious of his wife, encountered her in the bedroom, thought she was leaving him to cheat on him (or, possibly, forever), was dismissively told to just go to sleep, and suddenly shot her. He then tried to kill himself, disposed of the gun, and turned himself in, full of grief and unremitting remorse. Sudden passion is the only plausible explanation. But the court's ruling wrongly prevented the defense from making the argument, blocking the jury from considering whether a preponderance of the evidence showed sudden passion.

Instead, the court required magic words from the defense while ignoring everything else apparent from the interrogation and the evidence. The record amply supports an inference that Armster acted under the immediate influence of anger, rage, *and* resentment, and that his wife's sarcastic dismissiveness, in the context of their relationship, would produce such a passion in a person of ordinary temper. Moreover, the murder was committed before the capacity for cool reflection was regained, and provocation, passion, and homicide were all causally

connected. *McKinney v. State*, 179 S.W.3d 565, 569 (Tex. Crim. App. 2005). One followed another, like falling dominos, ending in Armster's attempted surrender of himself to the police.

He presented to Sgt. Gonzalez as a man who was crying, sometimes sobbing, and laying down in the backseat of Gonzalez's car [5 RR 43]. Indeed, Gonzalez was concerned for his "physical, mental, emotional well-being." [5 RR 44] When the Harris County Sheriff's Department took over for transportation to downtown Houston and custodial interrogation, he remained dejected, distraught, and sad . . . sitting with his head in his hands for the hours he was left alone [6 RR 139–40].

The defendant's testimony alone is sufficient to raise a defensive issue. *Beltran v. State*, 472 S.W.3d 283, 290 (Tex. Crim. App. 2015) (citing *Shaw v. State*, 243 S.W.3d 647, 662 (Tex. Crim. App. 2007)). Here, the jury heard from Armster when his custodial interrogation was published to the jury [6 RR 29]. From that, the Court knows he was convinced that his wife, who he considered his "soulmate," had been unfaithful for some time and told Investigator Thompson that she was going to leave several times [6 RR 131]. Thompson's impression was that Armster believed his

wife was going to leave, which is what Thompson believed triggered the whole situation [6 RR 87].

Investigator Thompson agreed that, on the night in question, Armster didn't believe his wife was actually talking to her sister on the phone and Thompson understood him to mean that she was on the phone with a male trying to act like it was a female so he wouldn't get upset [6 RR 63].

The Court also knows that, in Armster's view, his wife held other power in the relationship, simultaneously discouraging him from getting a job and ridiculing his inability to maintain employment.[3] As far as he was concerned, Armster *knew* she was leaving. When he asked her about it, she brazenly told him to "take your ass to sleep."

At a minimum, this was sufficient evidence to submit the instruction. But it also travels the distance from the "weak, impeached, contradicted, or unbelievable" to the proof by a mere preponderance of evidence that the murder was the result of sudden passion arising from adequate

[3] Investigator Thompson clarified this, explaining that he understood Appellant to mean that she did and didn't want him to get a job. "Right when he get on his feet, she'll bring him down and they'll argue back and forth or go back and forth about him working." [5 RR 89]. If he got a job, Charlene thought he would leave her, but she wanted him to get a job [5 RR 90].

cause. The court erred when it refused to give the instruction and wrongly required the Armster to spell out specifically that he killed his wife due to sudden passion.

Because the law requires submission of the instruction on "weak" or "contradicted" evidence, it cannot be true that the defendant must utter magic words to raise the issue. This would be akin to requiring a defendant claiming self defense to admit to every element of the offense. *Gamino v. State*, 537 S.W.3d 507, 511–12 (Tex. Crim. App. 2017). The jury is entitled to infer words that are implied by the evidence, and "it was the jury's call whom to believe and what to believe. It was not the trial court's prerogative to preempt the issue because it thought the Armster's version was weak, contradicted, or not credible." *Gamino*, 537 S.W.3d at 512–13 (quoting the underlying appellate opinion from that case).

c. Because error was preserved and "some harm" exists, Mr. Armster is entitled to a new punishment hearing at which the jury may consider the issue.

The defense requested a sudden passion instruction, citing to Investigator Thompson's testimony that he believed Armster believed his wife was cheating on him, and that was why Armster said he did it . . .

because she was going to leave him [8 RR 50–51]. But the court denied it, apparently requiring the Armster to have specifically invoked sudden passion during his custodial interrogation [8 RR 51]. This preserved the issue, meaning it was subject to *Almanza's* "some harm" review. *Wooten v. State*, 400 S.W.3d 601, 604, 606 (Tex. Crim. App. 2013) (analyzing denial of requested sudden passion for "some harm.").

Burdens of proof have little meaning in a harm analysis and the reviewing court "should make its own assessment as to whether harm occurred." *Trevino v. State*, 100 S.W.3d 232, 241 (Tex. Crim. App. 2003). The court reviews the entire record to determine whether the "some harm occurred, which is to say whether the error "was calculated to injure the rights of the defendant." Tex. Code Crim. Proc. art. 36.19, *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g).

When the court reviews the entire record, including the Armster's words, demeanor, and police interpretations of them, one reasonable conclusion becomes apparent: this murder was a tragic, split-second reaction triggered by sudden anger, rage, and resentment that resulted in panic, remorse, and self-recriminations.

This Court also knows that the jury flatly rejected the State's request to the jury for a life sentence, specifically predicated on its argument that sudden passion wasn't before the jury "because it wasn't [sudden passion] because this was cold blooded." [8 RR 70–71]. With the issue before the jury, more direct defense arguments would have been unlocked to equip the jury to find sudden passion. Provision of the sudden passion instruction could have directed the jury's impulses and deliberations to give effect to the evidence they saw and arguments they heard, allowing them to find that the murder was committed under the influence of sudden passion. *Ex parte Vasquez*, 830 S.W.2d 948, 951 (Tex. Crim. App. 1992) (concluding that prejudice was shown in ineffective assistance of counsel context when counsel did not request a jury instruction on an affirmative defense because the failure precluded the jury from giving effect to a defense).

With one enhancement and a finding of sudden passion, Armster would have faced the first-degree felony punishment range of 5-99 years' imprisonment or life. But at trial, he faced a minimum of 15 years' imprisonment. Tex. Penal Code § 12:42(b), (c)(1).

In exercising its normative judgment about what sentence to assess, the jury's consideration of the enhanced first-degree range with a 15-year minimum could have generated an inherent, institutional pressure to impose a greater sentence. Consideration of a punishment range beginning with a 5 year minimum would necessarily have changed the starting place for the jury's sentencing deliberations. When courts consider sentences incorrectly assessed under a habitual punishment range, courts refuse even to engage in harmless error analysis. *Jordan v. State*, 256 S.W.3d 286, 293 (Tex. Crim. App. 2008). Here, at the very least, Armster has suffered some harm from the failure of the judge to allow a sudden passion instruction and argument. Accordingly, this Court should vacate the sentence and remand for a new punishment hearing.

PRAYER

Jason Armster prays that this Honorable Court reverse the trial court's judgments and remand for a new trial and punishment hearing.

Respectfully submitted,

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I certify that a true copy of this brief was served on Jessica Caird, attorney for the State of Texas, on November 19, 2024, by electronic service to caird_jessica@dao.hctx.net.

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