

NO. 14-24-00707-CR

**IN THE COURT OF APPEALS
FOR THE
FOURTEENTH DISTRICT OF TEXAS
HOUSTON, TEXAS**

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MARK ANTHONY VIGIL, APPELLANT

VS.

THE STATE OF TEXAS, APPELLEE

BRIEF FOR THE APPELLANT

**TRIAL COURT CAUSE NUMBER 22CR4104
IN THE 405TH DISTRICT COURT OF
GALVESTON COUNTY, TEXAS**

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ORAL ARGUMENT REQUESTED

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Appellee	The State of Texas
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MARK ANTHONY VIGIL, Appellant

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Appealed from the 405TH District Court
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Cause No. 22CR4104

BRIEF FOR APPELLANT

TO THE HONORABLE COURT OF APPEALS:

Now comes Mark Anthony Vigil, by and through his attorney of record Joel H. Bennett, of Sears, Bennett, & Gerdes, LLP, and files this brief.

STATEMENT OF THE CASE

Appellant was charged by indictment with Capital

Murder. C.R.-7. Appellant pled not guilty to the charge and a trial by jury began on September 9, 2024. CR-120; RR2-8-10. After hearing the evidence and argument of counsel, the jury found Appellant "guilty" of Capital Murder. RR6-5-6, CR-457. Appellant was automatically sentenced to Life in the Texas Department of Criminal Justice-Institutional Division. CR-462-466. Judgment and Sentence was entered and signed on September 19, 2024, as well as the Trial Court's Certification of Defendant's Right to Appeal. CR-467. Notice of Appeal was timely filed on the same day. CR-470.

APPELLANT'S FIRST ISSUE

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR A DIRECTED VERDICT OF THE INTENTIONAL OR KNOWING MURDER OF TWO PEOPLE DURING THE SAME CRIMINAL TRANSACTION. A MOTION FOR DIRECTED VERDICT IS A CHALLENGE TO THE LEGAL SUFFICIENCY OF THE EVIDENCE.

STATEMENT OF FACTS

Pheneria (Yates) Manuell lived at Summerbrooke Apartments in Kemah, Galveston County, Texas. RR2-213-214. She is a peace officer and was a courtesy officer for the apartment complex. RR2-213, 214. Richard Rocco was her boyfriend at the time. RR2-215.

On November 17, 2022, they were preparing to go to the Battle of the Badges, a charity event. RR2-217. She had gotten back to the apartments about 11 pm that evening. RR2-218. She lived in building 3 and Mr. Rocco lived in building 2. RR2-218.

State # 8 is a map of the apartment complex. RR2-218-219. She went back to her apartment and started getting ready to leave. RR2-221. She received a call from the manager who told her there were fireworks at the lake. RR2-221. She went out to investigate and as she was leaving her building, she got another call saying that shots had been fired. RR2-223. As she was headed to investigate, she saw a police unit and started running that way. RR2-224.

When she arrived, she saw another courtesy officer performing CPR on someone next to the lake. At that point she did not know who the person was; during the CPR, they rotated positions and she saw the person and realized it was Rocco. RR2-226. She was in shock; someone picked her up and moved her away from Rocco's body. RR2-227. Once she was pulled away, she saw casings on the ground and also that a couple of

vehicles were shot; Rocco's Jeep had bullet holes in it. RR2-228. Rocco was transported to the hospital and she later learned he died. RR2-230.

Sergeant Marc Healy works for the Galveston County Sherriff's Department. RR3-52. He was on duty on November 17, 2022 and was dispatched to a call of shots fired at the Summerbrooke apartments. RR3-56. When he arrived, he saw a white male having CPR performed on him, then began setting up crime scene tape. RR3-57-58. There was a red Mitsubishi and black Jeep Wrangler that had gunshot defects on the front and sides of vehicles. RR3-58. In the grassy area in front of the vehicles, he located rifle shell casings and located a handgun shell casing in front of apartment 213 (first floor apartment) building 2. RR3-61-62. There are three floors in the building; he located another handgun casing on the third floor of the same building. RR3-63. Bullet defects were found in the door of a 3rd floor apartment. RR3-65. The defect was in the door of apartment 236. RR3-81. The casing found on the 3rd floor was located in front of apartments 233 and 232, which is on the opposite side of the building from

apartment 236. RR3-81.

William Baillie lived in Summerbrooke apartments in building 2. RR3-108. He was watching television and heard a loud volley (5-15 shots) of gunfire, which sounded like they were right outside of his front door. RR3-109. He lived on the second floor; he went out on the balcony and he heard someone yell 'get on the f'ing ground'. RR3-110-111. He then heard another volley of gunfire of about 5-20 shots but they sounded like they came from between the apartment and the lake. RR3-111.

After the second set of shots, he saw a white sedan go from side of the lake to the front gate and then heard another vehicle go around the back but he could not see that one. RR3-112. He then went outside with another person who started doing CPR chest compressions while he grabbed Mr. Rocco's head and turned it because there was a lot of blood coming from his mouth. RR3-113. The police were arriving and they took over. RR3-115.

Tracie Molik lived at Summerbrooke apartments in building 1 on the second floor. RR3-120. She was at home in bed on the day of the incident when she heard

6-8 gunshots or bangs that woke her up. RR3-121. She looked out her window which faced the parking lot between buildings 1 and 2 and saw a white car with the trunk open. RR3-11-122. Someone was "rifling" in the trunk of the car and two people were standing behind the car. RR3-122. It looked like someone was trying to stop someone else from going towards Lawrence Road. RR3-122. The white car was backed into a parking spot next to the pond. RR3-122-123.

She saw three people, two of the people were fighting or wrestling, then she heard another 6-8 shots. RR3-122. One of the people that was fighting went off into the darkness. RR3-124. The person that was messing around in the trunk got into the driver's seat and someone got in behind him. RR3-124. Then the driver got out, went around to the back, passenger side and was lifting something or someone into the backseat. RR3-124. Then the car took off very slowly and drove towards the entrance gate, between buildings 1 and 2. RR3-125. When the car was leaving, it paused for a moment, the driver was concerned about someone or something in the back and then the driver turned back

and started driving. RR3-125. From her window, she could see the driver's side of the white car. RR3-129. The people were fighting or jostling were on the passenger side of the vehicle; it looked like they were on the path around the pond. RR3-129-130.

Hannah Whiteman lived at Summerbrooke apartments in building 1 on the second floor; her apartment faced the parking lot. RR3-134-135. On 11/17/2022, she woke up to loud popping sounds; she thought they were firecrackers and started filming out of her window trying to catch some kids playing with fireworks. RR3-136. The video shows the parking lot between buildings 1 and 2. RR3-137. She then heard about 5-6 shots which seemed to come from her right; then saw one car driving in front driving from pond area towards the clubhouse. RR3-137-138. State Ex. # 10 is the video that she took; the sound at the beginning of the recording she presumed are gunshots. RR3-143-144.

McKayla Turco lived at Summerbrooke Apartments in building 2 on the third floor. RR3-146-147. Her name was on the lease; she lived with her boyfriend Ethan Maldonado. RR3-147-148. On November 17, 2022, she

heard loud bangs that woke her up about midnight. RR3-148. She woke up, said they need to mind their business and went back to sleep. RR3-149. The next time that something happened was about 3 am when someone banged on the door. RR3-149-150. Ethan tried to get the door open but could not. RR3-151. The police busted the door open for them and detained them for questioning. RR3-151-152.

When she got down to the ground level, she saw her Mitsubishi Mirage SE was shot up-her front windshield was all cracked, and there were bullet holes throughout her car. RR3-152-153. It was her car, nobody else drove her car. RR3-153. When asked if Appellant was someone she ever invited into that apartment, she said not that she can recall. RR3-154. At the time of the gunshots, there was no one that she would have allowed to come into the apartment. RR3-155.

Ethan's name was not on the lease. RR3-157. At the time she first heard gunshots, nobody entered the apartment; no one entered between 12-3 am either. RR3-159.

Officer John Wang is employed with South Houston

police department. RR3-163. On November 17, 2022, he responded to a call of a large disturbance. RR3-165. After speaking to someone who described two people, he eventually went to an apartment on the second floor. RR3-167. A white female opened the door; the officers removed the two people that were described to them with the consent of the homeowner. RR3-168. These two individuals were brought outside the apartment and they both had blood on their hands, arms, and clothing. RR3-171. One of the males was Gabriel Cantu and the other male was Appellant. RR3-171.

Once they were detained, the officers started calling around to surrounding agencies; Pasadena had a male at a hospital with several gunshot wounds that came from South Houston. RR3-173. The officers then asked the Cantu and Appellant what happened. RR3-173. After speaking with them, they tried to trace back to where the incident happened and went to a park about two to three blocks away. RR3-173. After searching the park area, they did not find anything to corroborate what they were told. RR3-174. Appellant was then taken to the hospital where the gunshot victim was and

released. RR3-174. The officers had Appellant's car towed; it was a white sedan. RR3-174. Officer Wang went back to the apartment complex to gather more information; while he was there, a juvenile from the residence brought him a .38 caliber silver revolver with a brown handle. RR3-175.

Joshua Rojas lived at the apartment in South Houston and he was transported from that apartment complex to the hospital. RR3-183-184. Appellant told the officers that some unknown persons started shooting at them while they were at the park. RR3-192-193. Appellant was unable to give a description of who shot at them or from where the shots came. RR3-193. The officers searched the park for shell casings and bodily fluids but did not find any. RR3-194. Appellant said that Joshua Rojas was shot at the park. RR3-195.

Andrew Elwell worked at South Houston Police Department. RR3-199. On November 17, 2022, he responded to the disturbance call. RR3-200. They received permission to search the apartment and he located a firearm in the back bedroom where Mr. Cantu and Appellant were located; it was a black rifle. RR3-

203, 215. He also made the decision to take the white Impala into evidence due to blood in the passenger seat and gloves in the car. RR3-219-220.

John Rojas is the father of Joshua Rojas. RR4-11. He lived with Joshua, Angela Warren (sic; Wren), and her son Max Warren (sic; Wren). RR4-11. Joshua's mother was also staying there that night. RR4-17. The last time he saw Joshua prior to this incident was earlier that day in Joshua's bedroom, along with Appellant and Gabriel. RR4-14-15. The three of them were there all day and they left about the time he was going to sleep. RR4-16.

The next time he saw any of them was the next morning, when Gabriel was pounding on the door. RR4-17. Gabriel came rushing in saying Joshua had been shot. RR4-17. John and Joshua's mother got up, ran outside, and Gabriel took them to where Joshua was. RR4-18. Joshua was in the backseat of a white/light cream 4 door sedan. RR4-18-19. Joshua was slumped over, eyes closed, almost gone-almost deceased but still kind of breathing a little bit. RR4-19-20.

John took the keys from Appellant and drove him to

the hospital. RR4-22-23. They took him to Bayshore hospital in Pasadena to the emergency room. RR4-23. Joshua did not survive. RR4-25.

Joshua was staying in the back bedroom. RR4-29. John was aware that Joshua had 2 firearms, a 9 mm and a .38 revolver. RR4-29-30. John had seen him with both of those guns. RR4-30.

When John went downstairs and saw his son in the vehicle, he was slumped over; Gabriel was in the backseat holding him up. RR4-36. John got Joshua and put him in the front seat. RR4-36

Angela Wren lived at the apartment with John, her son Max, and Joshua. RR4-40. Gabriel came to the door and was saying that Joshua had gotten shot; she did not see Gabriel, just heard him. RR4-43. John jumped out of bed and took off running; she stayed in the bedroom. RR4-44. After John left, Appellant and Gabriel came into the apartment. RR4-44.

When Gabriel and Chuy (Appellant) came into the apartment, Gabriel ran to the back of the apartment with his gray backpack while he was on the phone; he stayed back there talking on his phone. RR4-45.

Appellant asked Max to go into the back bedroom, then Appellant told her "I shot him. I shot him with an AK-47." RR4-46. She asked him you shot who and Appellant would not tell her. RR4-46.

The police arrived at the apartment; she saw the officers find the AK, which was sitting on the bed and they found a stolen firearm in the gray bag. RR4-49. The police left with Appellant and Gabriel; about an hour later, one of the officers came back and asked for her identification; that is when Max went to the restroom to retrieve the revolver that he found in there. RR4-51.

Maxwell Wren is 14 years old; Joshua Rojas was his stepbrother. RR4-56-57. Joshua had a cowboy gun (revolver) and a Glock 9. RR4-63. After Gabriel and Appellant came back to the apartment, he saw the revolver again. RR4-63. He saw it in the restroom between some towels after everyone left the apartment; Gabriel told him where the gun was. RR4-64. Max gave that gun to the police officer when he came back. RR4-65.

Dr. Darshan Phattak is an assistant medical

examiner for Harris County Institute for Forensic Sciences. RR4-71. State's # 18 is the autopsy report of Richard Rocco. RR4-74. Mr. Rocco's cause of death was homicide by multiple gunshot wounds. Gunshot wound labeled # 1 was an entrance wound on left side of the neck. RR4-77. A bullet was recovered from this wound from the left latissimus dorsi muscle. RR4-78. The path of the bullet was going downward, backward, and leftward. RR4-78. The gunshot wound was lethal. RR4-79.

There was a second deceased individual, Joshua Rojas. RR4-93-94. That autopsy was performed by Merrill Hines, who used to be employed there. RR4-94. State's Ex. 43 is the autopsy of Joshua Rojas. RR4-95. The autopsy showed that Joshua Rojas' death was ruled a homicide by a gunshot wound to the back. RR4-96. The entrance was on the middle of the right side of the back and the exit was on the lateral right side of the back. RR4-96-97. The bullet traveled sharply from left to right and forward, slightly downward. RR4-97.

Jai'lynn Phillips has known Appellant for about three years. RR4-112. He also knew Gabriel Cantu; he

knew Gabriel for about 6 months but did not know him very well. RR4-113. He also knew Joshua Rojas; Appellant and Joshua were best friends. RR4-114. He knew Ethan as well but does not know his last name. RR4-114. Jai'lynn would hang out with them almost every day; either at his house, Appellant's house, or Ethan's house. RR4-114. He saw on the news that Joshua was dead. RR4-118. About a week later, a detective came to his house. RR4-119.

The detective asked if he received a call from Mark the night that Joshua died and he said that he does not remember. RR4-120. Mr. Phillips admitted he received a phone call where Joshua, Gabriel, and Appellant were on the other end on the night of the shooting. RR4-139-140. He knew that Joshua was hurt and needed to go to the hospital. RR4-142. Appellant told him that Joshua had been hurt. R4-146.

Mr. Phillips testified he heard Joshua saying that he's not okay and that he's was saying he was hurt; he remembers telling Appellant to take Joshua to the hospital; Mr. Phillips told Appellant to take him to the hospital. RR4-146-147.

Mr. Phillips knew that Ethan's girlfriend lived on a second or third story apartment in Kemah; he would go to that apartment. RR4-151. Mr. Phillips said that State Ex. 56A looks like a photograph of Ethan's girlfriend's door. RR4-158.

In State's Ex# 56, Appellant refers to Ethan as a rat. RR9-96-97. Mr. Phillips said that Appellant called him a rat because a girl said that he was a rat, a snitch. RR4-158.

On the night of the incident, there was an audio call in which he heard Joshua saying he was hurt and also heard Appellant and Gabriel. RR4-165. He remembered Gabriel saying something happened at a park. RR4-166.

Racheal Martin is an investigator with the Galveston Sheriff's Department's crime scene unit. RR4-173-174. She was called out on November 18, 2022 to Summerbrooke apartments. RR4-178. She was put in charge of evidence collection. RR4-180. There was a 9 millimeter pistol casing, which was located on the third floor landing of the apartment complex. She also collected a bullet jacketing from the third floor

landing, a projectile from inside an apartment # 236, and another jacketing from near the purple car in front of the apartment building. RR4-185-186, 187-188. Another 9 mm pistol casing was recovered from the ground near the purple car. RR4-188-189. Ten spent rifle casings were recovered from the grassy area in front of the stairwell to the apartment building. RR5-16-17. She also collected blood swabs, additional rifle casings, and one live round from the parking lot. RR5-18-20. She also recovered a Taurus G2C firearm from the parking lot in between two vehicles. RR5-22-23. Another 9 mm casing was recovered and a projectile from the gate area of the complex. RR5-24-25.

There was a jacketing and another projectile recovered from a Mitsubishi located in the parking lot. RR-25-26. State's Ex. # 13 is an AR-15 style "rifle" and State's Ex. # 16 is a .38 caliber pistol. RR5-5.

Jennifer Bell is a lieutenant with the Galveston County Sheriff's department in the identification division. In November of 2022, she was a corporal crime scene investigator. RR5-44. She was contacted by the detective to go to the scene. RR5-49-50. She saw

gunshot defects in the door threshold and frame of apartment 236. RR5-59. She also saw gunshot defects in the reddish-purple vehicle; two projectiles were seen in the vehicle, one which could be recovered and one that could not. RR5-77. There was also damage to a black Jeep that was parked next to the purple vehicle. RR5-81. State's Ex. # 164 is a diagram of the area showing the location of a pistol casing and rifle casing in relation to the building and vehicles. RR5-83-84, RR10-51. The pistol casing was by the vehicle and all of the rifle casings were by the tree. RR5-84.

South of the area where the vehicles were located, additional items of evidence were located, including blood stains in several locations, spent rifle casings, a live rifle cartridge, and a pistol. State's Ex. # 201 is a map of those items that were recovered and/or documented. RR5-97. The furthestmost blood stain from the pond is item number 16; rifle casings were found in that area. RR5-98.

She also processed evidentiary items collected from the South Houston PD including a White Chevy Malibu. RR5-109. Lt. Bell testified there was a bloodstain in

the front passenger door handle, the front passenger seat was soaked in blood, and well as other areas inside the vehicle. RR5-111-112. She also swabbed the steering wheel for DNA. RR5-114. DNA samples were collected from Appellant and Gabriel Cantu. RR5-125-126.

Lt. Bell testified that the person who left the casings by the tree near the building would have been in or near the grassy area. RR5-131. It appeared that the damage done to the Jeep was collateral to the damage to the purple car. RR5-132. The purple car belonged to the resident of 236 and the door of 236 was shot. RR5-133.

There are two holes in the door of apartment 236. RR5-138. One 9 mm shell casing was recovered from the third floor breezeway. RR5-140. If the AR was used, there would likely have been a shell casing there. RR5-141. If a revolver was used, it would not leave a shell casing and that would account for why there is not a second casing. RR5-141. Joshua Rojas was the owner of the 9 mm gun they recovered and the .38 revolver. RR5-142.

Brian Strong is employed at crime lab DPS in Austin as the supervisor for the friction ridge detail section. RR5-152. Four suitable prints were persevered on the magazine of the Taurus 9mm; Joshua Rojas was identified as the source of the prints. RR5-176, RR10-126-127. Appellant's prints were not found on any of the items he examined. RR5-196.

Rebekah Lloyd works for the DPS crime lab in Austin in the trace evidence section. RR5-205. She performed gunshot residue analysis on Gabriel Cantu's jacket. RR5-216. She found six characteristic gunshot primer residue particles on the stub collected from the jacket. RR5-219.

Shane Windsor is a forensic scientist employed by DPS in the firearms section. RR5-223, 224. Three firearms, spent casings, projectiles, and jacketing were submitted for firearm analysis. RR5-229-231. All three firearms are considered pistols as State's Ex. # 13 (AR style firearm) did not have a buttstock and therefore is classified as a pistol. RR5-231. It is a .223 or 5.56 mm caliber. RR5-232. There were fourteen submitted fired .223 casings and one fired bullet.

RR5-233, RR10-140.

The Taurus 9 mm pistol was functional; the .38 Special revolver was functional but malfunctions were detected during testing, and the .223 Remington/5.56 NATO was also functional. RR5-234-236. The .38 revolver would not rotate the cylinder as the hammer was pulled back; you could still rotate the cylinder manually but it did not operate as the manufacturer intended. RR5-235.

The test results showed that the fired bullet jacket was fired from the Taurus 9 mm, the fired bullet was fired from the .223 pistol, the three 9 mm casings were fired from Taurus, and all fourteen of the .223 casings were fired from the submitted .223 pistol. RR5-237-238.

Jessica Ehmann is the assistant technical leader for DPS crime lab, Houston. RR6-7. She performs DNA testing. RR6-9. She tested a number of different items and received the following findings:

- The blood stain from the curb near pistol came from a single source DNA, and consistent with Joshua Rojas;

- The blood stain from grassy area near the pond was a single source and consistent with Richard Rocco;
- The swab from the grip and textured surface Taurus 9 mm and magazine contained a mixture of 3 individuals, including Joshua Rojas, but Appellant and Gabriel Cantu were excluded and Richard Rocco was likely excluded;
- The stain on slide of Taurus 9 mm was a single source, consistent with Joshua Rojas;
- The swab of grip, trigger, hammer, and cylinder of .38 revolver showed a mixture of 4 individuals, Joshua Rojas is highly probable a contributor, Gabriel Cantu is possible contributor, Appellant is likely excluded, and Richard Rocco is excluded;
- The swab of grip of Radical 5.56 firearm had too many possible contributors and therefore could not be interpreted;
- The swab of stain on left side of stock of 5.56- mixture of 2 individuals, Joshua Rojas highly probably a contributor and likelihood that Appellant is 9 times greater than an unrelated,

unknown contributor. This gives limited support that Appellant is possible contributor and also that Appellant may be excluded as a contributor. Richard Rocco and Gabrieleal Cantu are excluded;

- The swabs from neck and cuffs of a jacket in the apartment; mixture of 3 individuals, Appellant is highly probable a contributor, Joshua Rojas is a possible contributor, Gabriel Cantu is likely excluded, and Richard Rocco is excluded;
- The DNA extract from cutting of right sleeve of jacket is a mixture of three individuals, Joshua Rojas is highly probable a contributor, Appellant is only 2 times more likely to be a contributor than an unknown, unrelated person, Appellant is two times greater contributor than unknown, unrelated person. This gives limited support that Appellant is possible contributor and also that Appellant may be excluded as a contributor. Gabriel Cantu is likely excluded, and Richard Rocco is likely excluded.
- The DNA extract from a different cutting from the

sleeve of the jacket is a single source, Joshua Rojas is highly probable the contributor.

- The swabs from parking lot (Items 16, 20, and 24) are all single source, Joshua Rojas is highly probable the contributor to each.
- The swab from top half of steering wheel was a mixture of three individuals, Appellant is highly probable to be one, Joshua Rojas is highly likely to be one, but Gabriel Cantu and Richard Rocco are excluded.
- The swab bottom half of steering wheel was a mixture of three individuals, Appellant is highly probable one, Joshua Rojas is also highly probable one; Gabriel Cantu and Richard Rocco are excluded.

RR10-158-162.

Gabriel Cantu was eighteen years old at the time he testified. RR6-94. Joshua Rojas was his friend; he had known Joshua for about a year. RR6-95. Joshua was seventeen years old when this happened. RR6-95. He also knew Appellant, but he called him Chuy. RR6-96.

He knew Joshua to have guns and on the night of the

incident, Joshua just had the 9 mm Taurus. RR6-96-97. Joshua also owned the .38 revolver. RR6-97. Joshua carried the 9 mm pretty much everywhere he went. RR6-97. Gabriel saw an AR that night, Appellant had it. RR6-97. Gabriel had seen the AR gun a couple of time before, Appellant had it on those times as well. RR6-97.

Earlier that night, they were at Joshua's apartment; he, Joshua, and Appellant left about 9 pm. RR6-97-98. It was Appellant's idea to leave; Appellant drove them in his white Impala. RR6-99. They stopped at some apartments and parked in front of a pond. RR6-99. The car was backed into the parking spot. RR6-99.

They all got out and walked up to an apartment in building 2. RR6-100-101. Joshua was carrying the Taurus; Appellant had the AR and the .38 Special. RR6-101. He did not know anyone who lived in the apartments and does not know Ethan Maldonado. RR6-102. They went to the third floor and when they got to the door, Appellant knocked on the door. RR6-102-103. After knocking on the door, Appellant said, "Man, f**k this", told Gabriel to move, pulled out the .38, and shot the

door two times. RR6-103. After he fired, he tried to open the door, but it did not open. RR6-103. That is when Joshua shot the door with the Taurus; Appellant told Joshua to shoot the door. RR6-104. They still could not get the door open and then they took off running. RR6-104. Before they started running, Appellant handed the .38 to Gabriel and Gabriel carried the .38 downstairs. RR6-104.

When they got downstairs, they started running towards the car. RR6-105. Appellant told them to look for the car. RR6-105. Appellant found the car and told them, "Shoot that bitch. Shoot that bitch." RR6-105.

When they stopped to shoot the car, Joshua was on the sidewalk. Appellant was a close distance behind him. Gabriel was in front of Cantu. RR6-106. Joshua shot first with the Taurus, Appellant shot next, and then Gabriel shot. RR6-106. State's Ex. # 251 is a drawing that was made while Gabriel was talking to the detective. RR6-107, RR10-178.

Gabriel said that Joshua fired more shots that he could count. RR-6. Appellant also fired too many shots

to count. RR6-109. Cantu said he tried to fire one time but cannot tell you for sure if he ever got a shot off; he never felt kickback. RR6-109-110. Gabriel said never handled that .38 before. RR6-110.

While everyone was shooting, Joshua got shot. Joshua started screaming, "Ah, you shot me. You shot me.". RR6-110. After Joshua got shot, they ran back towards Appellant's car. RR6-110. They eventually saw the man they now know as Rocco; they saw him walk up on them. RR6-110.

Gabriel was by the back passenger door of the car, Joshua was trying to get in by the front passenger seat, and Appellant was on the driver's side of the car. RR6-111. Gabriel and Appellant got into the car. RR6-111. Mr. Rocco tackled Joshua and they landed behind the car near the track. RR6-112. Rocco was holding Joshua down, telling him to get down and stay down. RR6-113. Rocco was on one knee and Joshua was face down on ground; Rocco had one knee holding him down. RR6-113. Appellant grabbed the AR and got out of the car. RR6-114.

Appellant walked around the front of the car, pointed the AR at Rocco, and Appellant told him "get off him. Get off him". RR6-114. Rocco just kept holding him down, looked at Appellant and said, "you don't got the balls to shoot me, boy". RR6-115. Appellant shot him. RR6-115. Gabriel was in the car when this happened, looking out of the back window. RR6-115. Appellant shot too many times to count. RR6-115. Rocco's body just fell over. RR6-115. Joshua got up really quick, Appellant told him to get up and said "Let's go ni**er". RR6-115. Joshua got into the front seat, Appellant was the driver, and Gabriel was in the back seat. RR6-116.

When the car started going, Joshua was talking and said he was good, and told them to get him to a hospital. RR6-116. Gabriel told Appellant to get to a hospital because he was fixing to bleed out. RR6-117. Appellant said he can't go to jail. RR6-117. Joshua was getting weaker; he stopped talking and you could see his body getting tired and slower. RR6-118. Gabriel begged with Appellant "just take him to the hospital. I don't care-I will go with him; You can

leave, whatever". RR6-118. Appellant grabbed the .38 from the center console, pointed it at him, said, "Chill bro. Sit the fuck back. We're not going". RR6-118. Appellant drove back to Josh's apartment in South Houston. RR6-119. When they got there, Gabriel ran up to the apartment to get Joshua's mom and dad. RR6-119. Appellant stayed with Joshua. RR6-119. Gabriel ran inside and told them that Joshua got shot. RR-119. They ran out of the apartment looking for Josh; Gabriel ran out with them and took his parents to Joshua. RR6-119. Joshua was still in the passenger and Appellant was still in the driver's seat. RR6-119-120.

On the way back from the apartments to South Houston, Appellant made a Facetime call to his friend John Bo (Jai'Lynn Phillips). RR6-120. Appellant stated, "I don't know what to do. I can't go to jail. I can't take him to the hospital. I can't go to jail." RR6-121.

Josh's dad grabbed the keys from Appellant and drove off in Appellant's car. RR6-121-122. After they left with Joshua, Appellant and he walked back into the apartment. But before they drove away, Gabriel went

into the backseat, got Josh's sweater and pants, the .38, hid it in Joshua's sweater and covered it up with the pants. The AR was in Appellant's backpack. RR6-122. They went into Joshua's room and threw his clothes on the bed; the backpack with the AR was on the bed when the cops came. RR6-122-123. Gabriel said that he hid the .38 in the restroom as soon as the police arrived. RR6-123. The police asked him why he had blood on his hand, Gabriel said he went along with Appellant's story and told them they were at the park and some dude pulled up and started shooting. RR6-124.

Before they got to Joshua's apartment, Appellant told Gabriel, "Just say we're at the park. Tell the parents we're at the park. People came up and just started shooting at us". RR6-124. The police searched the apartment and found then AR, then took them to the park. RR6-125. State Ex. # 250 is the agreement between him and the State; in the agreement, he is signing for 15 years in prison. RR6-128. He was originally arrested for and charged with capital murder in November 2022. RR6-128. Gabriel talked to the police in August of 2023. RR6-129.

After Gabriel was picked up by his mom that night, he went back to the Joshua's apartment to get his jacket. RR6-136. At 2:35 am, Gabriel texted Max (Joshua's stepbrother) to hide the tool-the handgun. RR6-136. Joshua was at the hospital and Gabriel's concern the jacket and hiding the gun. RR6-136.

Gabriel knew that Joshua owned two guns-the 9 mm and the .38. RR6-139-140. He had taken pictures with both guns. RR6-140.

When they leave the apartment that night, Appellant has his AR, Joshua had his 9mm, and Cantu denies he had the .38. RR6-145. Gabriel said that Joshua had two guns. RR6-145. When they got out of the car at the Kemah apartment, only Joshua and Appellant are carrying guns; Gabriel denied having a gun at that time. RR6-147. Gabriel said that Appellant has the AR and the .38 and Joshua has 9 mm. RR6-147.

Gabriel said they crossed the parking lot and when they get to the 3rd floor, Appellant knocked on the door. RR6-148. Gabriel testified that Appellant shot the door twice with the .38; told the jury that Appellant pointed the .38, pulled the top of it back,

pulled the trigger back, and shot it RR6-148. Gabriel said that Appellant pulled it back again and shot it two times total. RR6-148. After that, Joshua shot the 9mm. RR6-149. Gabriel admitted that the first time he talked to the detective, he told him that Joshua never shot the gun; Gabriel admitted he lied to the detective. RR6-149. Gabriel was shown the picture of the door with two bullet holes in it. Gabriel repeats that Appellant shot the door twice with the .38 and Joshua also shot the door. RR6-151.

They ran down from the third floor to the first floor to head to Appellant's car. RR6-151. As they were leaving the 3rd floor, that is when Appellant handed him the .38. RR6-153. Appellant stopped them and said let's shoot Ethan's car. RR6-153-154. Joshua shot first and Appellant was shooting, and Gabriel said he shot last. RR6-154.

When they came downstairs, they were leaving to go to Appellant's car. RR6-156. All three of them shot the car. RR6-156. They did not see Mr. Rocco at this time. RR6-156. During the time that they were shooting the car, Joshua gets shot in the back. RR6-156. When

Joshua got shot, they were still over by the apartment building. RR6-156-157. After Joshua was shot, then they made their way back to Appellant's car. RR6-158. Gabriel is carrying the .38, Joshua is carrying his gun, and Appellant has the AR. RR6-159.

Gabriel gets into the car, then he sees Mr. Rocco for the first time. RR6-159. Mr. Rocco tackles Joshua to the ground but Gabriel does not get out of the car to help his friend, he just stays inside the car and watches. RR6-160. Gabriel was asked how Joshua got into the car after Mr. Rocco was shot and Gabriel said that Joshua got up and jumped in; he got in by himself. RR6-160.

Gabriel was asked if he remembered talking to Joshua's sister and he did. RR6-163. When asked if he told Joshua's sister that they could not go to the hospital because they had the tools (guns) with them and that they are panicked, Gabriel testified that he could not remember his exact words. RR6-164.

Gabriel said he was the guy that was just going along for the ride. RR6-164. Gabriel admitted in his text string with Max, he never told the truth, he lied

to Max about what happened to Josh, he lied to the police in South Houston, and he lied to the detective when talking about the case. RR6-164-165. Gabriel admitted that the agreement he cut with the prosecutors was for him to tell the truth, but he has been lying this entire time he has not told the truth until recently. RR6-166.

Gabriel admitted that he lied to the detective about Joshua shooting the gun because he was trying to protect Joshua's name. RR6-170. Gabreil agreed that Joshua was shot on accident. RR6-170.

Seth Rowlands is a major crimes investigator with the Galveston County Sheriff's Department assigned to this case. RR7-15. In August of 2023, he met with Gabreil Cantu and his attorney. RR7-34. After the interview with Cantu, additional items of evidence were sent to DPS for testing, including the swabs of the bloodstains from placard 16. RR7-38. Placard 16 was the closest blood evidence to the vehicle that was shot up. RR7-38. The lab report corroborated their belief that Joshua Rojas was shot over by the vehicle and not by the pond. RR7-39.

State's Exhibit # 263 is an audio recording recovered through a search warrant of Appellant's Instagram account. RR7-45. The substance of the recording is as follows, 'Joshua got shot bro and I don't know what the f*** to do. But I love you. Bye. I am probably going to be in jail for a long time bro. I love you bro. I'm not fixin' to do this sh** bro. Josh, no Josh, no.' State # 263. Detective Rowlands believed that the recording was made on the car ride from the Summerbrooke apartments to the apartment complex in South Houston. RR7-46.

Detective Rowlands confirmed that the recovered .38 Special revolver had two spent casings in the cylinder and four live rounds. RR7-52. Through his investigation, he learned that the .38 revolver was basically Gabriel Cantu's gun; Cantu and Joshua went everywhere together and Joshua always has the 9 mm and Cantu would carry the .38 with him. RR7-53. Based upon the investigation, Detective Rowlands believed that Gabriel Cantu was handling the .38 that night. RR7-58. During his interview with Cantu, Detective Rowlands repeatedly told Cantu that he did not believe him when

Cantu was talking about the .38 gun. RR7-58-59.

Neither the State nor Defense had any objections to the Charge of the Court. RR4-219.

SUMMARY OF ARGUMENT

The trial court erred in overruling Appellant's motion for instructed verdict for the theory of the intentional or knowing killing of two individuals. This is a challenge to the legal sufficiency of the evidence. The evidence was completely undisputed that the shooting of Joshua Rojas was an accident. Even the State unwittingly admitted that the killing of Joshua Rojas did not meet the elements of capital murder. The State argued to the trial court that Joshua Rojas was "knowingly in the line of fire". The State's argument admits that Appellant had no intent to cause the death of Joshua Rojas, one of the two alleged victims.

ARGUMENT AND AUTHORITIES

Appellant was charged with Capital Murder, alleged to have been committed in two different manners. One alleged manner and means was that Appellant killed two or more individuals during the same criminal transaction. Appellant moved for a directed verdict on

this allegation at the close of the State's case. A motion for directed verdict is a challenge to the legal sufficiency of the evidence. Appellant motion was good and should have been granted as the evidence is legally insufficient to prove Appellant intentionally or knowingly killed two individuals in the same criminal episode.

"To determine whether evidence is sufficient to support a conviction, a reviewing court views all the evidence in the light most favorable to the verdict to decide whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); Brooks v. State, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). This requires the reviewing court to defer to the jury's credibility and weight determinations because the jury is the 'sole judge' of witnesses' credibility and the weight to be given testimony. Jackson, 443 U.S. at 319; Brooks, 323 S.W.3d at 899." Garcia v. State, 367 S.W.3d 683, 686 (Tex. Crim. App. 2012).

The Fourteenth Court of Appeals described the proper

legal analysis in reviewing a conviction for the sufficiency of the evidence in Lashly v. State, 401 S.W.3d 738, 742-743 (Tex. App.—Houston [14TH Dist.] 2013, no pet.). The Court wrote:

“The legal-sufficiency standard is the only standard a reviewing court should apply in determining whether the evidence is sufficient to support a guilty verdict. Brooks v. State, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). The critical inquiry is, in viewing the evidence in the light most favorable to the prosecution after a verdict of guilt, whether any rational jury could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed2d 560 (1979); Brooks, 323 S.W.3d at 912...

“Each fact does not need to directly and independently point to the guilt of the appellant as long as the cumulative force of all the incriminating circumstances is ultimately sufficient to support the conviction. Hooper v. State, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

Circumstantial evidence is equally as probative as direct evidence in establishing guilt, and circumstantial evidence alone can be sufficient to support a conviction. *Id.*

"When performing a legal sufficiency review, courts may not reevaluate the weight and credibility of the evidence and substitute their own judgment for that of the jury. Montgomery v. State, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012); see also Isassi v. State, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010) ("[O]ur role is not to become a thirteenth juror."). When faced with a record supporting contradictory inferences, we presume the jury resolved conflicts in favor of the verdict. Montgomery, 369 S.W.3d at 192." Lashly v. State, 401 S.W.3d at 742-743.

Appellant's First issue addresses one of the manner and means listed in the indictment. Appellant's Second issue will address the deficiencies of the other manner and means. The evidence presented was insufficient to prove that he intentionally or knowingly killed two

individuals in the same criminal episode.

The relevant provision of the Capital Murder statute states, "A person commits an offense if the person commits murder as defined under Section 19.02(b)(1) and the person murders more than one person during the same criminal transaction". *Tex. Penal Code § 19.03(a)(7)*.

Tex. Penal Code § 19.02(b)(1) states, "A person commits an offense if he intentionally or knowingly causes the death of an individual." Murder under this section is a result of conduct offense. It requires that the actor intent the result. *Cook v. State*, 884 S.W.2d 485, 491 (Tex. Crim. App. 1994).

The defendant in *Cook* was charged with the intentional or knowing murder of an individual under *Tex. Penal Code 19.02(a)(1) [now, 19.02 (b)(1)]*. *Cook v. State*, 884 S.W. 2d at 486. The Texas Court of Criminal Appeals explained in *Cook*, "We have long held that intentional murder is a 'result of conduct' offense. *Martinez v. State*, 763 S.W.2d 413, 419 (Tex. Crim. App. 1988), and *Lugo-Lugo*, 650 S.W.2d at 80, 88. As a 'result of conduct' offense '[w]hat matters is that the conduct (whatever it may be) is done with the

required culpability to effect the result the Legislature has specified." Alvarado, 704 S.W.2d at 39 (emphasis in original). Cook v. State, 884 S.W.2d at 490.

The result of the conduct, namely to cause the death, is a necessary mens rea element of Tex. Penal Code 19.02(b)(1). Absent proof of this element, a conviction under 19.02(b)(1) cannot stand. In this particular case, the evidence is undisputed that the shooting and killing of Joshua Rojas was accidental and there was never an intent to kill or even injure Joshua Rojas. The State repeatedly admitted this fact during trial, both to the trial court and the jury.

"Under Section 19.02(b)(1), the mens rea element requires that the accused must have intentionally or knowingly caused the death of the victim. Cook v. State, 884 S.W.2d 485, 490 (Tex. Crim. App. 1994). **Thus, a conviction under Section 19.02(b)(1) requires an intent to cause death.** As such, Appellant's contention that Allen's death was an accident would be relevant to a conviction under Section 19.02(b)(1) to the extent that it was an unintended result." Walter v. State, 581

S.W.3d 957, 969-70 (Tex. App.-Eastland 2019, pet. ref'd). (Emphasis added).

The Eastland Court of Appeals went on to discuss the necessary mens rea required under *Tex. Penal Code 19.02(b)(2)*, which requires an intent to cause serious bodily injury, and *19.02(b)(3)*, which is an unintentional murder committed in the course of committing a felony, coupled with committing or attempting to commit an act 'clearly dangerous to human life.'. *Walter v. State*, 581 *S.W.3d* at 970.

Under the State's theory at trial and as argued to the jury, the statutory definition of capital murder that both murders be committed under *Tex. Penal Code 19.02 (b)(1)* would be nullified and deleted from the statute. This is not the law. The State knew the evidence did not support the required mens rea under *19.02(b)(1)* and admitted as much to the jury and the jury.

The only evidence before the jury came from the State's cooperating witness, Gabriel Cantu. Cantu testified that Appellant and Joshua Rojas were friends. The three of them were headed towards Appellant's

vehicle when they stopped. They then began to commit a separate offense of criminal mischief/deadly conduct, by shooting multiple firearms at one vehicle. During this shooting, bullets also hit Mr. Rocco's Jeep, which was parked next to the intended vehicle. Mr. Cantu explained how all three of them were standing in relation to the vehicle. Joshua shot first, then Appellant, and then Mr. Cantu. During the shooting of the vehicle, Cantu heard Joshua say that he had been shot. When specifically asked, Mr. Cantu agreed that Joshua Rojas was shot by accident. The State did not dispute this fact.

The State argued during final argument that "the word 'accident' doesn't remove fault from knowing. Knowing...had to do with being aware that your conduct is reasonable to cause a certain result. If you fire a gun with someone in the line of fire, as a reasonable person...knows they're going to hit someone". RR7-128. The State improperly and incorrectly argues that a felony murder would be sufficient to warrant a conviction for capital murder as long as two people died during the course of the felony. This is not law. The

State was required to prove that Appellant had the objective to cause the death of Joshua Rojas and it failed to do so. The evidence to support this manner and mens is legally insufficient and cannot support the verdict.

Likewise, when Appellant moved for a directed verdict on the allegation of an intentional or knowing killing of two individuals, the State made a similar and equally unsupported theory of law. The State incorrectly asserted, "Knowing has to do with someone committing an offense when they are aware that something was going to occur. We have seen diagrams and we have seen shell casings in the location to show that Joshua had been very much in the line of fire of that car when the Defendant was shooting at it." RR7-70. As explained above, the offense under *Tex. Penal Code § 19.02(b)(1)* requires a showing that causing the death of the individual was the desired result of a defendant's conduct. There was no such evidence and the Court's denial of the motion for directed verdict was error. The evidence is legally insufficient to support this theory. Likewise, the jury instruction was erroneous as it

provided the jury with a theory that was not supported by any evidence.

The error committed in allowing the State to present this theory to the jury must be evaluated after reviewing Appellant's Second Issue. When alternative theories of the same offense, in this case Capital Murder, the evidence will be considered legally sufficient if the evidence will support either theory. "Where different theories of the offense are submitted to the jury in the disjunctive, as in the instant case, a general verdict is sufficient if the evidence supports one of the theories." Russo v. State, 228 S.W.3d 779, (Tex. App.-Austin 2007, pet. ref'd) (Citations omitted). As the evidence is legally sufficient to support the theory of murder committed in the course of robbery, we need not address the second point of error."

Therefore, the harm analysis must be evaluated after reviewing the sufficiency of the State's alternative theory, which is address in Appellant's Second Issue.

For all the foregoing reasons, Appellant's First Issue should be sustained, the case be reversed, and the case remanded for further proceedings consistent with

this Court's opinion.

APPELLANT'S SECOND ISSUE

THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUSTAIN A VERDICT OF CAPITAL MURDER FOR THE MURDER IN THE COURSE OF COMMITTING A BURGLARY. THE EVIDENCE DOES NOT SUPPORT A FINDING THAT A BURGLARY OR ATTEMPTED BURGLARY OCCURRED. THE EVIDENCE IS FURTHER INSUFFICIENT TO PROVE THE SHOOTING OCCURRED DURING THE IMMEDIATE FLIGHT FROM THE ALLEGED BURGLARY.

STATEMENT OF FACTS

No additional statement of facts is necessary. The factual recitation for the First Issue is incorporated for this issue for all purposes.

SUMMARY OF ARGUMENT

The evidence is legally insufficient to prove that the murder of Mr. Rocco was in furtherance of an attempted burglary of a habitation. The evidence does not support a finding that a burglary or attempted burglary occurred. Additionally, the shooting of Mr. Rocco was done in the immediate flight from a Criminal Mischief offense, which was not the alleged offense in the indictment and not a proper predicate offense for Capital Murder. The shooting was not in the immediate flight from a burglary, but rather a criminal mischief

of the victim's Jeep. Due to the intervening event, the new offense, the flight was not in furtherance of the burglary and therefore the evidence is legally insufficient to support a conviction for capital murder.

ARGUMENT AND AUTHORITIES

Appellant was charged with Capital Murder, alleged to have been committed in two different manners. One of the manner and means was discussed in Appellant's First Issue. The alternative manner and means (Paragraph I) alleged Appellant intentionally killed an individual, Mr. Rocco, in the course of committing a burglary of a habitation, of Ethan Maldonado. CR-7. The evidence presented at trial does not support a finding that Appellant committed or attempted to commit a burglary and further, the evidence does not support a finding that if there was an attempted burglary, that the killing of Mr. Rocco was in furtherance of the alleged burglary of a habitation. Evidence of a murder in furtherance or in immediate flight from a burglary is legally insufficient.

Appellant set forth the relevant case law regarding the review of legal sufficiency in his First Issue. The

law as previously set forth is incorporated her by reference.

First, the only evidence of an attempted entry by Appellant, Rojas, or Cantu was the testimony of Gabriel Cantu. An accomplice witness as a matter of fact. Mr. Cantu testified that Appellant first knocked on the door, then shot the door twice with the .38 revolver pistol. He further testified that Appellant then grabbed the door handle and the door would not open. No other witness heard Appellant knocking on the door or saw him attempt to make entry into the apartment. There was no description or evidence that Appellant or the other two individuals attempted to force the door open or kick the door open. There were no footprints on the door. There was no testimony or physical evidence that anyone tried to force the door open after it was shot.

The only evidence supporting Mr. Cantu's testimony of what happened on the third floor is the two bullet defects in the door. This is evidence of the offense of deadly conduct, it does not corroborate the necessary element of intent to enter to commit theft or other felony. Further, Mr. Cantu's testimony is contradicted

by the physical evidence and the testimony of the firearms expert. Mr. Cantu testified that he had no firearm when they went up the stairs and Appellant had two, including the .38 Special. This portion of his testimony is refuted by the lead detective, Seth Rowlands. During Rowland's investigation, he determined that the .38 Special was owned by Joshua Rojas but was basically Mr. Cantu's gun who carried it everywhere he went with Joshua Rojas. RR7-53. Detective Rowland testified that he believe Gabriel Cantu lied about his possession and use of the .38 Special. Mr. Cantu also admitted he was willing to lie to protect Joshua Rojas' name and did not want people to remember him as a menace. RR6-170.

Mr. Cantu testified that Appellant used the .38 Special to shoot the door twice. When asked to describe how that happened, he stated that Appellant pointed the gun at the door, pulled the trigger, and the gun went off. Then he pulled the trigger again and shot a second time. This is physically impossible. The firearms expert testified that the .38 Special would discharge a round but it malfunctioned to the extent that the

cylinder would not rotate when the trigger was pulled as it was designed to do. He testified that to fire a second round, the shooter would have to physically rotate the cylinder to line up the second round to be fired. Mr. Cantu did not describe this in his testimony. The physical evidence proves his testimony was false.

Mr. Cantu's testimony is sufficiently corroborated to prove the offense of Deadly Conduct, but is not sufficiently corroborated to prove the offense of burglary of a habitation. *Tex. Code Crim. Proc. § 38.14.* states, "A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense.". But this statute requires that some non-accomplice evidence that tends to connect the defendant to the crime, but not every element of the crime. *State v. Ambrose*, 487 S.W.3d 587, 598 (Tex. Crim. App. 2016). Cantu's testimony connects Appellant to a crime but not to a burglary, only a deadly conduct. No other evidence in the case shows an intent to enter. The

evidence is insufficient to prove an intent to enter.

Secondly, the evidence in this case fails to prove that Mr. Rocco was killed in the immediate flight from the alleged burglary. For the offense of capital murder, "in the course of committing" the offense means "conduct occurring in an attempt to commit, during the commission, or in the immediate flight after the attempt or commission of the offense." Dawkins v. State, 495 S.W.3d 890, 895 (Tex. App.-Houston [14TH Dist.] 2016, no pet.) citing Robertson v. State, 871 S.W.2d 701, 705 (Tex. Crim. App. 1993).

The Charge of the Court did not instruct the jury on this definition, but the sufficiency of the evidence is reviewed based upon a hypothetically correct jury charge. Gollihar v. State, 46 S.W.3d 243, 252 (Tex. Crim. App. 2001). Therefore, even though the jury was not so instructed, there must be some evidence that the killing took place in the "immediate" flight from the alleged burglary of a habitation.

As discussed by the Court of Criminal Appeals in Sweed v. State, 351 S.W.3d 63 (Tex. Crim. App. 2011), immediate flight is not defined in the Penal Code, but

then references Black's Law Dictionary. In footnote # 5, the Court of Criminal Appeals wrote, "...Black's Law Dictionary defines 'immediate' as '[o]ccurring without delay; instant,' '[n]ot separated by other persons or things,' or '[h]aving a direct impact; without an intervening agency.' Black's Law Dictionary 751 (7th ed. 1999)." Sweed v. State, 351 S.W.3d at 69.

At the time that Mr. Rocco was killed, Appellant, Mr. Rojas, and Mr. Cantu were fleeing from a separate crime with a separate victim than the alleged burglary of habitation. Even if this Court finds there is legally sufficient evidence of a burglary, the flight from the burglary had ended when the three individuals stopped and started a new offense with a new victim.

Once the decision to stop was made and achieved, the three actors embarked on a separate offense and they were no longer fleeing from the alleged burglary. Mr. Cantu's testimony was that the three actors had come down from the third floor to the first floor and stopped their attempt to leave. The testimony was that the three actors halted the flight and decided to shoot at one vehicle and actually hit two different vehicles.

As the Court of Criminal Appeals discussed in Sweed, "immediate" requires a finding of "without delay" and "not separated by other person or thing" and "without intervening agency". But Appellant's case was separated by chosen delay, separated by another thing—namely the new offense, and with the intervening act of shooting the vehicles. The actors had embarked on a new offense and were no longer in flight without an intervening event.

The testimony from Mr. Cantu was that Mr. Rocco was not seen on the third floor of the apartment complex. He was not seen when they stopped, shot, and hit the two vehicles. The shooting at the vehicles was not in furtherance of the alleged burglary, but rather a separate and distinct offense. At that point, the three actors were committing either criminal mischief or deadly conduct. They were no longer in furtherance of the alleged burglary. The Jeep vehicle that was shot belonged to Mr. Rocco.

Even after the shooting of the vehicles, Mr. Rocco was not seen at that time. Then, the three actors fled to Appellant's vehicle, which was parked by the pond in

the parking lot. It was only after Mr. Cantu and Appellant were inside the vehicle that Mr. Rocco was first seen. Mr. Rocco was seen by Mr. Cantu when Rocco tackled Mr. Rojas. Mr. Rocco appeared in this incident only after his vehicle has been shot by the three actors. The evidence only supports the finding that Mr. Rocco was protecting his property, namely his Jeep. He was shot during the flight from the criminal mischief/deadly conduct, not from the burglary. The flight from the burglary had been abandoned and terminated by the actors. In fact, the incident involving Mr. Rocco entailed an entirely new offense with an entirely new victim. Mr. Rocco was a victim of the criminal mischief of his Jeep and only became involved, based on the evidence, after the shooting of his Jeep. His involvement and his damage were separate and apart from that of Ethan Maldonado.

Counsel for Appellant admits that there are cases discussing a continuous string of events would still constitute immediate flight from the event, including Zagone v. State, 565 S.W3d 366 (Tex. App.-Houston, [14TH Dist.] 2018, no pet.), Oggletree v. State, 851 S.W.2d

367 (Tex. App.-Houston [1st Dist.] 1993, pet. ref'd), and Rabb v. State, 681 S.W.2d 152 (Tex. App.-Houston [14th Dist.] 1984, pet. ref'd) In those case, the flight issue resolved around whether or not the assault was in relation to the theft or attempted theft that had occurred. Appellant's case is distinguishable from the prior precedent as none of those cases involved a separate and intervening criminal conduct with the criminal conduct involving separate victim.

The review of whether the particular facts of a case are "immediate" requires a fact specific analysis. The Fifth Circuit review this very issue and held, "The issue of immediate flight tends to be a more subjective assessment...Courts determine whether a defendant's conduct constitutes one continuous criminal episode on a case-by-case basis." Garcia v. Dretke, 388 F.3d 496, 503 (5TH Cir. 2004).

In Garcia, the Fifth Circuit elaborated the proper analysis under Texas law and outline the analysis:

"Texas courts have discussed a few common themes when examining whether a criminal episode was continuous. One pivotal consideration appears

to be whether an intervening event occurs. An "intervening" event denotes an event that produces an effect or result. Another consideration is whether the alleged different incidents are discrete. A "discrete" event denotes an event that is separate and distinct from another event. Finally, considerations of temporal and proximate circumstances appear relevant in determining whether a criminal episode is continuous."

Garcia v. Dretke, 388 F.3d 496, 503 (5TH Cir. 2004).

The evidence in this case shows that the Jeep that was shot belonged to Mr. Rocco. Mr. Rocco's appearance during the events that unfolded that night did not occur until after the three actors abandoned the flight from the alleged burglary of a habitation and began an intervening and discrete event. The shooting of vehicles, either one or two, is a separate and distinct from the alleged burglary. Mr. Rocco did not appear on the third floor of the apartment building. Mr. Rocco was not seen when the three actors came down to the first floor. Mr. Rocco was not seen during the actual

shooting of the two vehicles. Mr. Rocco only became involved after his vehicle was shot and while the three actors were leaving after the criminal mischief of the vehicles. Further, criminal mischief is not a predicate offense for the offense of Capital Murder. The facts of this specific case show there was a separate and intervening act that terminated the flight from the burglary and a separate and distinct act began. The evidence does not support a finding that Appellant was in the immediate flight from the alleged burglary of a habitation.

Counsel expects the State to argue that the shooting of the vehicle related to Ethan Maldonado, which incidentally cause damage to the Jeep, was part of the three actors' intent to get Ethan Maldonado. But this argument actually bolsters Appellant's previous point that a burglary of a habitation was not proven to the jury. The only evidence provided to the jury was that Appellant or Joshua Rojas, or Gabriel Cantu shot the door of Ethan Maldonado's apartment. There was not testimony that any of the three attempted to force the door open and make entry.

The State presented two manner and means alleging that Appellant committed Capital Murder. As discussed in Appellant's Issues One and Two, neither theory is supported by sufficient evidence. The State's argument to both the trial court and the jury regarding the intentional and knowing killing of two individuals admits that Appellant's desire had no result of his conduct to cause the death of Joshua Rojas. This is a necessary element. The State has admitted there is no proof of that fact. Secondly, the evidence does not support a finding that there was a burglary or attempted burglary. Finally, any flight from the alleged burglary or attempted burglary was terminated and interrupted by an intervening event. When the three actors terminated the flight from the events on the third floor, they began a separate and distinct act of criminal mischief/deadly conduct of Mr. Rocco's vehicle. Flight from this event does not support the charge of Capital Murder.

For all the foregoing reasons, Appellant's Second Issue should be sustained, the case be reversed, and the case remanded for further proceedings consistent with

this Court's opinion.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, the Appellant, Mark Anthony Vigil, prays that the Judgment of the Trial Court be reversed and remanded for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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/s/ Joel H. Bennett

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CERTIFICATE OF SERVICE

I hereby certify that Appellant's Brief has been served upon the Galveston County Criminal District Attorney's Office on this the 21st day of April, 2025 by email to Rebecca.klaren@co.galveston.tx.us.

/s/ Joel H. Bennett

Joel H. Bennett

Certificate of Compliance

In compliance with TRAP 9.4(i), I certify that the word count in this reply brief is approximately 11,144

words.

 /s/ **Joel H. Bennett**_____

Joel H. Bennett