

THE STATE OF TEXAS,
Plaintiff-Respondent

vs.

CLINT VERNON FELDER
Defendant-Appellant

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IN THE COURT OF APPEALS
FIRST DISTRICT

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OF TEXAS

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FILED IN
1st COURT OF APPEALS
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APPELLANT'S BRIEF

Appeal from the Judgment of the District Court of the 10th Judicial
District of Texas of Galveston, County before Judge John D. Kinard
Cause Number 18-CR-1411

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/s/Robert Finlay

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STATEMENT OF JURISDICTION

Appellant was tried by a jury with Judge John D. Kinard presiding in case number 18-CR-1411 before the 10th Judicial District Court. Found guilty, Appellant was sentenced to 60 years in state prison. On August 30, 2024 he filed his Notice of Appeal in this cause.

This Court has jurisdiction over this appeal pursuant to the Texas Constitution, Article V, Sections 5 and 6 and Articles 38.04, 36.13 and 44.25 of the Texas Code of Criminal Procedure, which gives the 14th Court of Appeals of Texas jurisdiction over final decisions and sentences of the District Courts of Texas.

ISSUES PRESENTED

ISSUE I.

**THE EVIDENCE IS INSUFFICIENT TO SUPPORT
APPELLANT'S CONVICTION FOR
INTENTIONALLY AND KNOWINGLY CAUSING
THE DEATH OF AMY BROWN BY SHOOTING
HER WITH A FIREARM.**

ISSUE II.

**THE COURT ABUSED ITS DISCRETION BY
ALLOWING THE SEARCH WARRANT OF 3510
PALM AVENUE INTO EVIDENCE.**

ISSUE III.

**THE COURT ABUSED ITS DISCRETION BY
ALLOWING THE SEARCH WARRANT FOR
THE CONTENTS OF A CELL PHONE INTO
EVIDENCE.**

ISSUE IV.

THE COURT ABUSED ITS DISCRETION BY
OVERRULING THE DEFENSE OBJECTION
AND MOTION FOR MISTRIAL ON THE
STATE'S COMMENTING ON APPELLANT'S
RIGHT TO REMAIN SILENT.

ISSUE V.

THE COURT ERRED IN FAILING TO
INCLUDE A PROPERLY REQUESTED
INSTRUCTION OF DEFENSE OF PROPERTY.

STATEMENT OF THE CASE

This is a criminal case in which the Appellant seeks reversal of his conviction for the murder of Amy Brown in Galveston County, Texas.

The Appellant was charged by an indictment with the following offense:

“Clint Vernon Felder on or about the 28th day of April, 2018 and anterior to the presentment of this indictment in the County of Galveston and State of Texas, did then and there intentionally and knowingly cause the death of an individual, namely Amy Brown also known as Amy McMullen, by shooting her with a firearm or the defendant did then and there with intent to cause serious bodily harm to an individual, namely Amy Brown also known as Amy McMullen, commit an act clearly dangerous to human life that caused the death of Amy Brown also known as Amy McMullen by shooting her with a firearm.

In cause number 18-CR-1411 before the 10th Judicial District Court, Appellant pled “not guilty,” and after having a trial by jury presided over by Judge John D. Kinard he was found guilty. Appellant received a sentence of 60 years and on August 30, 2024 his Notice of Appeal was filed in this cause.

STATEMENT OF FACTS

The indictment alleges that Appellant Clint Vernon Felder intentionally and knowingly caused the death of Amy Brown by shooting her with a firearm. (T. III, 6) The statement of facts summarizes the happenings on the night of April 28, 2018 at 3510 Palm Avenue in Texas City, Texas.

Mr. Roy Dixon owned the house at 3510 Palm Avenue but was not there that night. Aamori Dixon, 8, Roy Dixon's daughter lived there, as did his step-son, Jayden Jones, 15. (T. IV, 76) Ashley Moore, a babysitter, was living there temporarily, sleeping in Jayden Jones's bedroom. Appellant Clint Vernon Felder was also living there. Amy Brown, who had two children with Mr. Felder, was not living there; nor were their children. (T. III, 81, 85)

10:00 p.m. Incident

Ashley Moore testified that "about 10:00 p.m. on April 28, 2018, Amy Brown kicked open the door (at 3510 Palm). Amy was kind of drunk and her eyes were red like she had been crying. Mr. Felder told her: 'You got to leave,' but Amy kept coming back in."(T. III, 86, 88)

Aamori Dixon, testified that: “Amy Brown came (into the house) being crazy.” (T. V, 71, 73) Aamori told Amy that “she was not supposed to be on the property. (T.V, 73, 75) Amy began pushing Uncle Clint, hitting his chest and face. (T.V, 72) Clint told Amy: ‘What are you doing?’ (T.V, 86) and ‘Stop touching me.’ Clint was basically trying to get Amy off of him. (T.V, 72) Amy ran to the kitchen, grabbed a knife, threw it at Clint and cut the back of his head. (T. V, 72, 73) (Defense exhibits 17 and 18) There was blood on the back of Clint’s head.” (T. V, 78)

Ashley Moore testified that “Clint Felder and Norvell were pushing Amy out. Amy was fighting to get back in and they finally pulled her by her feet and pulled her out. (T. III, 86, 88) Amy busted out the window in Clint’s room. (State’s exhibit 53) She came around to the front door and her arm was bleeding. (T. III, 90, 91) She was upset. Clint was not arguing with her. (T. III, 92) Amy was not wearing shoes. I gave her some shoes and she left, walking.” (T. III, 90, 91)

2:00 a.m. Incident

Ashley Moore testified: “Around 2:00 a.m. something woke me out of my sleep. (T.III, 92) Amy had showed up a second time at the house, upset and was still arguing with Clint.” (T. III, 92, 93) Ms. Moore “opened Jayden’s bedroom door and saw Amy sitting behind a chair and Clint standing. She heard Amy screaming: ‘Ashley, call 911; both my arms are broke and 3510 Palm.’ (T. III, 92, 93, 94, 100)

“Scared,” (T. III, 97) Ashley Moore “went out the door to the outside and across the street to Ms. Laura’s house.” (T. III, 93, 94) Ms. Moore “could not find her phone and was trying to call (Mr. Dixon).” (T. III, 94)

Jayden Jones, who was still in the house and a witness, testified: “Amy Brown was angry and very mad. (T. IV, 76, 77) She had a knife in her hand. (T. IV, 78) Amy had blood on her hand and was arguing with Uncle Clint. Clint was bleeding, like from the back of the head area. (T. IV, 77)

“I left the house but went back because my Aunt Ashly told me to get my shoes. (T. IV, 77) Uncle Clint asked me to get out.

(T. IV, 79) I did not see my Uncle Clint with a gun. (T. IV 80, 83)

At 2:15 a.m. on my way out of the house, I heard a gunshot.

(T. IV, 79, 80) Outside, I asked: ‘Aunt Ashley, did you hear that?’ Ashley answered: ‘No.’ Then Aunt Ashley and I left in a truck, which was across the street.” (T. III, 95, 96, 100, 102)

Sometime later a groaning Clint Felder called 9-1-1 and told them: ‘I have been shot.’ (State’s exhibit 2; 4-28-2018—6356266 [toward the beginning]).

At 3:55 a.m. (T. III, 77) the police responded to 3510 Palm Avenue. Clint Felder was found bleeding on floor. (T. III, 74, 75) (Defense exhibits 6 through 10) Badly injured with wounds to the back of his head, (State’s exhibits 17 and 18) (Defense exhibits 8, 9, 10) Mr. Felder was transported from Palm Avenue by Life Flight to the hospital. (T. III, 203)

Amy Brown was found, deceased, on the floor of the third bedroom of the house.” (T. III, 174) (State’s exhibit 64)

Dr. Erin Barnhart, chief medical examiner for Galveston County, testified: “Amy Brown had alcohol, cocaine and other drugs in her

system. (T. IV., 144) She died from a gunshot to the head and her death would have been very fast." (T. IV., 145)

Texas City Police Department detective Jeff Winstead contacted Mr. Felder at the hospital. At trial the detective was asked: "Were you ever able to speak to him?" In front of the jury the detective answered: "I would speak to him; but he wouldn't speak to me, no."

The defense objected. (T. III., 63, 64, 65)

STANDARD OF REVIEW

ISSUE I. The State's evidence was insufficient to find Appellant guilty. After reviewing the evidence in the light most favorable to the jury's verdict, no rational finder of fact could find the essential elements of the crime beyond a reasonable doubt. *Jackson v Virginia*, 443 U.S. 307 (1979); *Butler v State*, 769 S.W. 2d 234 (Tex. Cr. App. 1989) In this case a rational factfinder must have reasonable doubt as to an essential element. *Laster v. State*, 275 S.W. 3d 512, 518 (Tex.

Crim. App. 2009) Appellant's testimony: "I was shot," and its corollary of self-defense contrasts directly with the State-introduced homicide evidence. Reasonable doubt exists as to a very essential element of the State's case. That element is--Did a murder actually occur?

ISSUE II. The court abused its discretion by allowing the search warrant of 3510 Palm Avenue into evidence. The standard is:

(1)Was the inherent probative value of the search warrant less compelling in weight than its harmful effects on the jury?
(2)Did the warrant contain hearsay? and (3)Was the hearsay admissible into evidence for any purpose? *Figueroa v State*, 473 S.W. 2d 202 (Tex. Crim. App. 1971); *Herbert v State*, 249 S.W. 2d 925 (1952); 51 Tex. Jur. 2d, Searches and Seizures, Sec. 45, p. 729.

ISSUE III. The court abused its discretion by allowing the search warrant for the contents of a cell phone into evidence. The judge abused his discretion by admitting the cell phone search warrant into evidence. It was harmful error requiring reversal and remand.

ISSUE IV. The court abused its discretion by overruling the defense objection and motion for mistrial on State's commenting on Appellant's right to remain silent. The standard of review for the trial court's decision to deny a mistrial is to under an abuse of discretion standard. *Coble v State*, 330 S.W. 3d 253 (Tex. Crim. App. 2010). The trial court's ruling not within the zone of reasonable disagreement. *Montgomery v State*, 810 S.W. 2d 372, 391 (Tex. Cr. Crim. App. 1990).

ISSUE V. The Court erred in failing to include a properly requested instruction of defense of property. Cases involving properly preserved charging errors, as here, will be affirmed only if *no* harm has occurred. *Almanza v State*, 686 S.W. 2d 157, 171 (Tex. Cr. App. 1985) Testimony that the Amy Brown was "in a closet on the floor and had knocked down all the clothes that were on like a rack in the closet" (T. IV, 88) just prior to being shot was heard by the jury. Neither impeached nor contradicted, the defense's proper and timely request for a charge on it should have been granted.

SUMMARY OF THE ARGUMENT

I. The evidence is insufficient to support the guilty verdict of Appellant intentionally and knowingly causing the death of Amy Brown by shooting her with a firearm. The State's evidence proved that at 2:00 a.m. Amy Brown was angry and very mad, (T. IV, 76, 77) had a knife in her hand (T. IV, 78) and was arguing with Mr. Felder. He was bleeding from the back of his head, (T. IV, 77) probably by a just prior bullet ricochet, lead splintering or fragment graze, Ms. Moore heard Amy Brown say: "Ashley, call 911; both my arms are broke and 3510 Palm." (T. III, 92, 100) Ms. Brown had just been fighting with Mr. Felder, who did not have a gun. (T. IV 80, 83) Ms. Brown continued her provocation. Mr. Felder was somehow able to defend himself and Ms. Brown ended up shot with her own gun. When he was able, Mr. Felder called 9-1-1 and told them: 'I have been shot.' (State's exhibit 2)

The State's allegations were therefore untrue and showed that the State had insufficient evidence to support Appellant's being found guilty.

II. The court abused its discretion by allowing the search warrant of 3510 Palm Avenue into evidence. Defense counsel objected to the introduction into evidence of a search warrant for the crime scene premises at 3510 Palm Avenue, on grounds of relevance.

(T. III, 45, 46) The inherent probative value of the search warrant was less compelling in weight than its harmful effects on the jury and it contained harmful unsworn hearsay; none of which was admissible before the jury for any purpose.

III. The Court abused its discretion by allowing the search warrant of the contents of a cell phone into evidence. The defense objected to the introduction into evidence of a search warrant for the contents of a cell phone on grounds of hearsay and prejudice. Multipage recitals of literally hundreds of words contained in the warrant were all harmful hearsay and none were admissible for any purpose.

IV. The court abused its discretion by overruling the defense objection to and motion for mistrial on the State's commenting on Appellant's right to remain silent. The error was constitutional and not cured by the court's instruction to the jury.

V. The Court erred in failing to include a properly requested instruction of defense of property. During the 10:00 p.m. incident Ms. Brown busted out the window in Mr. Felder's bedroom. (State's exhibit 53) (T. III, 90, 91) At 2:15 a.m., just before being shot, "Amy Brown had knocked down all the clothes that were on like a rack in the closet." (T. IV, 88) Since the defense properly preserved the charging error, (T. V., 108) the case should be affirmed only if *no* harm has occurred. *Any* harm, regardless of degree, is sufficient to require a reversal. Being deprived of due process under the 4th, 5th and 8th Amendments of the U.S. Constitution and the Texas Constitution harmed Appellant.

ARGUMENT

ISSUE I.

**THE EVIDENCE IS INSUFFICIENT TO SUPPORT APPELLANT'S
GUILTY VERDICT OF INTENTIONALLY AND KNOWINGLY
CAUSING THE DEATH OF AMY BROWN BY SHOOTING HER
WITH A FIREARM.**

Appellant Clint Vernon Felder was found guilty of intentionally and knowingly causing the death of Amy Brown, also known as Amy McMullen, by shooting her with a firearm. (T. III, 6)

On the evening of April 28, 2018 Aamori Dixon, Jayden Jones, Ashley Moore and Clint Felder were living a 3510 Palm (T. IV, 76, 82) Amy Brown, uninvited, kicked open the door and provoked two aggressive and tragically-ending incidents that night. (T. III, 81, 85)

At 10:00 p.m. Amy Brown, in the commission of on-going criminal mischief, drunk, red-eyed and crazy, fought to get in. Mr. Felder told her: 'You got to leave,' and she had to be pulled out. (T. III, 86, 88) In a rage she busted out the window in Mr. Felder's

room. (State's exhibit 53) (T. III, 90, 91) Once back inside, Ms. Brown was pushing Mr. Felder, hitting his chest and face. (T.V, 72) She ran to the kitchen, grabbed a knife, threw it at him and cut the back of his head—an attempted murder. (T. V, 72, 73) Ashley Moore gave Ms. Brown some shoes and she finally left, walking." (T. III, 90, 91)

At 2:00 a.m. a most important sequence of events occurred. Amy Brown, who had been the an aggressive perpetrator all evening, returned. Ms. Brown was angry and continued her drunken fighting with Mr. Felder as she had done earlier. The defense contends that Ms. Brown escalated the fight and shot Mr. Felder. Mr. Felder had been wearing a blood stained Texan cap which had bullet holes shot through it (T. III, 210) and suffered a glancing gunshot wound to the back of his head. (State's exhibits 17and 18) (Defense exhibits 8, 9, 10) The State offered no evidence contradicting his being shot.

The defense contends that Ms. Brown's shot was loud enough to awaken Ashley Moore out of her sleep. (T.III, 92)

Ms. Moore saw Mr. Felder standing. Ms. Brown was sitting behind a chair and still arguing with Mr. Felder, (T. III, 92, 93) who was bleeding from the back of his head (T. IV, 77) Ms. Brown screamed: ‘Ashley, call 911; both my arms are broke; 3510 Palm.’ (T. III, 92, 93, 94, 100) Ashley Moore went outside and across the street. (T. III, 93, 94)

Just then, coming out of his bedroom, Jayden Jones saw Amy Brown, angry and very mad. She had a knife in her bloody hand (T. IV, 76-78) and was arguing with Mr. Felder. Jayden left the house but then went back to get his shoes. (T. IV, 77) Mr. Felder spoke to him and Jayden noticed that Mr. Felder did not have a gun. (T. IV 79, 80, 83) Jayden left.

What happened in the next short interval of time proves that Mr. Felder acted in self-defense, not murder. The defense contends that Amy Brown substituted a gun for her knife and resumed her fight with Mr. Felder. Already having wounded him with her first shot, Ms. Brown set about finishing the job she had started. Mr. Felder struggled against Ms. Brown in defense of his life and property and

saved himself. Ms. Brown, the instigator of the whole incident, ended up shot with her own gun. Outside, Jayden heard a gunshot but Ashly Moore did not. (T. IV, 79, 80

The medical examiner testified that Amy Brown died from a gunshot wound to the head and that her death “would have been very fast.” (T. IV., 145) Despite this, she apparently lived long enough to make a 9-1-1 call.

Injured and confused-sounding, Mr. Felder later called 9-1-1, saying: ‘I’ve been shot.’ (State’s exhibit 2; 4-28-2018—6356266 [toward the beginning]). The police responded to 3510 Palm Avenue. Clint Felder was found bleeding on floor, (T. III, 74, 75) (Defense exhibits 6 through 10) He was taken to the hospital via Life Flight.

Amy Brown was found deceased on the floor of the third bedroom of the house. (T. III, 174) The State offered no gunshot residue tests of her hands, nor any DNA comparisons of her blood with clothing, surfaces or objects found at the scene. She had alcohol, cocaine, hydrocodone and buprenorphine in her system. (T. IV., 144)

Defense counsel argued during his Motion for Directed Verdict

(Judgment of Acquittal) (T. IV. 157, 158) then again on his closing argument (T. V. 115 through 123) that there was “insufficient evidence to prove as a matter of law that Mr. Felder was not acting in self-defense.

The Court’s charge states that “the Defendant is not required to prove self-defense. Rather, the State must prove, beyond a reasonable doubt, that self-defense does not apply to the Defendant’s conduct.”

There was a lack of incriminating evidence presented by the State, and evidence of Mr. Felder’s right to defend himself was so compelling that the jury’s rejection of it should be considered irrational. *Westbrook v State*, 29 S.W. 3d (Tex. Crim. App. 2000)

The State bears the burden of proving the factual sufficiency of the evidence beyond a reasonable doubt under a “complete and correct” standard of review. *Johnson v State*, 23 S.W. 3d 1, 10-11 (Tex. Crim. App.—2000).

Here, “taking a neutral review of all the evidence, both for and against the verdict, demonstrate that the proof of guilt is so obviously weak as to undermine confidence in the factfinder’s determination. The proof of guilt, adequate if taken alone, is

greatly outweighed by contrary proof.” *Clewis v. State*, 922 S.W. 2d 126 (Tex. Crim. App. 1996)

The Court must defer to the factfinder’s findings and may find the evidence factually insufficient only when necessary to prevent a manifest injustice. *Cain v. State*, 958 S.W. 2d 404, 407 (Tex. Crim. App. 1997); *Clewis*, 922 S.W. 2d at 135; *Santellan v State*, 939 S.W. 2d 155, 164 (Tex. Crim. App. 1997).

In making this determination, the court must review and consider all of the evidence as a whole, *Id.* at 408; *Clewis*, 922 S.W. 2d at 129, without the prism of the “in the light most favorable to the prosecution” construct. *Cain*, 958 S.W. 2d at 408; *Clewis*, 922 S.W. 2d at 129. “The court must review all the evidence impartially and set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.” *Clewis*, 922 S.W. 2d at 129.

What is wrong and unjust about Mr. Felder’s case is that the State’s evidence did not prove beyond a reasonable doubt that Mr. Felder did not act in self-defense. Evidence presented against him was insufficient in two ways. The State did not present evidence

sufficient to rebut his self-defense claim. Also, conflicts within the State's witnesses' testimony rendered its case inherently improbable and therefore insufficient to sustain the conviction.

Ray, *Law of Evidence*, Sec. 41; 1 Texas Practice 48.

The evidence substantiated Mr. Felder's use of reasonable force to protect himself from the attacks of Amy Brown and justified an otherwise criminal act. Mr. Felder was in a place where he had a right to be, his home. He did not provoke, instigate or participate willingly in Amy Brown's angry assaults against him. He had a reasonable fear of death and great bodily harm when Ms. Brown first threw a knife at him and cut him, then later when she was again attacking him.

Mr. Felder having met his burden of producing sufficient evidence to raise the issue of self-defense, the State was required to disprove his defense beyond a reasonable doubt. It had to produce evidence which established beyond a reasonable doubt that Mr. Felder did *not* act in self-defense, which it did not do. *Saxton v State*, 776 S.W. 2d 685, 686 (Tex. App.—Houston [14th Dist.] 1989) The evidence of Mr. Felder acting in self-defense was not contradicted and no legal issue was

presented for the jury's determination.

The Due Process Clause of the 14th Amendment to the U.S.

Constitution requires that every state criminal conviction be supported by evidence that a rational factfinder could find as sufficient to prove all the elements of the offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 362-364 (1970); *Colt v State*, 808 S.W. 2d 473, 475 (Tex. Crim. App. 1991). Section 2.01 of the Texas Penal Code requires the same. The State failed to disprove Mr. Felder's defense of self-defense beyond a reasonable doubt.

After reviewing the evidence in the light most favorable to the jury's verdict, no rational finder of fact could find the essential elements of Mr. Felder's crime beyond a reasonable doubt. *Jackson v Virginia*, 443 U.S. 307 (1979); *Butler v State*, 769 S.W. 2d 234 (Tex. Cr. App. 1989) His conviction should be reversed and remanded.

ISSUE II.

THE COURT ABUSED ITS DISCRETION BY ALLOWING THE SEARCH WARRANT OF 3510 PALM AVENUE INTO EVIDENCE.

Defense counsel objected to the introduction into evidence of State's exhibit 7, a search warrant for the crime scene premises at 3510 Palm Avenue, on grounds of relevance. (T. III, 45-46)

Rule 403 of the Texas Rules of Evidence provides:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."

At issue is whether the quest for truth at trial was helped or hindered by the introduction by the State of a search warrant what the defense viewed as confusing, emotionally charged and cumulative.

By not properly balancing the various elements of Rule 403, the trial court abused its discretion. Had the court properly and reasonably evaluated allowing

the search warrant of the premises into evidence, it would have concluded the following: 1) that the inherent probative value of the search warrant was far less compelling in weight than its harmful effects on the jury; 2) that the State had no need for its presentation; 3) that the warrant's listing of "articles that may have been used during the crime" was inflammatory, suggesting that a "crime" rather than self-defense had occurred; 5) that judicial approval of the word "crime" would be given undue weight by the jury and 6) that the jury was not equipped to evaluate objectively the probative force of the search warrant. *Gigliobianco v State*, 210 S.S. 3d 637 (Tex. Crim. App. 2006); *State v Mechler*, 153 S.S. 3d 435, 440 (Tex. Crim. App. 2005); *Montgomery v State*, 810 S.W. 2d 372, 389 (Tex. Crim. App., 1990).

The search warrant also contained harmful unsworn hearsay, none of which was admissible before the jury for any purpose. (Appellant hereby incorporates by reference his argument regarding this evidence as applicable from his Argument III.)

The Court's allowing the introduction into evidence of State's exhibit 7, a search warrant for the crime scene premises at 3510 Palm was a harmful error and an abuse of discretion. Appellant asks that his

case be reversed on account of the error and be remanded.

ISSUE III.

THE COURT ABUSED ITS DISCRETION BY ALLOWING THE SEARCH WARRANT OF THE CONTENTS OF A CELL PHONE INTO EVIDENCE.

Defense counsel objected to the introduction into evidence of State's exhibit 8, a search warrant for the contents of a cell phone. The grounds were hearsay and labeling the investigation as a murder case. Using the word "murder" prominently in the warrant prejudged for the jury that a murder rather than self-defense had occurred. It also implied that self-defense was not valid. (T. III, 60-61)

Multipage recitals of literally hundreds of words were contained in the search warrant. They were all harmful hearsay and none were admissible before the jury for any purpose. *Figueroa v State*, 473 S.W. 2d 202 (Tex. Crim. App. 1971); *Herbert v State*, 249 S.W. 2d 925 (1952); 51 Tex. Jur. 2d, Searches and Seizures, Sec. 45, p. 729. Their admission over objection was error. *Torres v State*, 522 S.W. 2d 821 (Tex. Crim.

App. 1977); *Foster v State*, 779 S.W. 2d 845, 858 (Tex. Crim. App. 1989); *McGowan v State*, 255 S.W. 2d 512 (1953); *Arnold v State*, 248 S.W. 2d 738, (1952); *Byars v State*, 229 S.W. 2d 169 (1950).

The search warrant was hearsay to the extent that it was offered to prove the truth of the matters asserted therein and should have been excluded. Tex. R. Evid. 801-802. The admission of such hearsay is constitutional error. *Johnson v State*, 967 S.W. 2d 410, 417 (Tex. Crim. App. 1998); *King v State*, 953 S.W. 2d 266, 272 (Tex. Crim. App. 1997); *Tate v State*, 988 S.W. 2d 887, 890 (Tex.App.--Austin 1999. pet. ref'd)

A defendant's right is affected when the error has a substantial and injurious effect or influence in determining the jury's verdict. *Morales v State*, 32 S.W. 3d 862, 867 (Tex. Crim. App. 2000)

In assessing the likelihood that the jury's decision was adversely affected by the error, the appellate court should consider everything in the record, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error, how it might be considered in connection with other evidence and any defensive theories. *Llamas v State*, 12 S.W. 3d

469, 471 (Tex. Crim. App. 2000); *Medina v State*, 7 S.W. 3d 633, 645 (Tex. Cr. App. 1999).

The testimony and physical evidence admitted by the State were an attempt to prove murder but depended more on sympathy for the deceased (State's exhibit 1) than upon any witnesses' statements or facts to establish what actually happened.

The trial court's allowing State to enter a search warrant into evidence, early on labeling what happened as "murder," prejudiced the jury against Mr. Felder and his theory of self-defense.

The error was harmful.

"Almost 80 years ago, the court of criminal appeals remarked that 'it was the subject of wonder' that trial courts so frequently committed the error of admitting warrants and supporting affidavits into evidence. Yet, the erroneous admission of warrants and supporting affidavits continues to occur." *Hamilton v State*, 48 S.W. 2d 1005, 1006 (Tex. Cr. App. 1932); *Garza v State*, No. 05-10-00229-CR (Tex. App.—Dallas [5th Dist.] 2011) (mem. op. not designated for publication).

The judge abused his discretion by admitting the search warrant

into evidence. It was a harmful error and Appellant's case should be reversed and remanded.

ISSUE IV.

THE COURT ABUSED ITS DISCRETION BY OVERRULING THE DEFENSE OBJECTION TO AND MOTION FOR MISTRIAL ON THE STATE'S COMMENTING ON THE APPELLANT'S RIGHT TO REMAIN SILENT.

The court erred in overruling the defense objection and motion for mistrial on the prosecutor's comments regarding Mr. Felder's right to remain silent. These comments violated Article 1, section 10 of the Texas Constitution and the 5th Amendment to the United States Constitution.

Appellant complains of the following questions by the State's attorney Ms. Davis and the answers of Texas City Police Department detective Jeff Winstead: (T. III., 63, 64, 65)

Question: Were you aware when you started your investigation that the defendant had been transported to the hospital?

Answer: Yes, ma'am. He wasn't there when I arrived.

Question: During your investigation did you make attempts to contact the defendant?

Answer: Numerous times.

Question: Where were you trying to contact him at?

Answer: At the hospital.

Question: *Were you ever able to speak to him?*

Answer: *I would speak to him; but he wouldn't speak to me, no.*

Mr. Bennett: Objection, your honor. Can we approach?

The Court: Yes.

(Whereupon, the following is a bench conference outside the hearing of the jury.)

Mr. Bennett: I object. That is a comment on my client's—I object. It's a comment on my client's right to remain silent. It is a violation of the motion in limine and now impugns his right not to speak to the police.

Mr. Davis: Your honor, pre-silence is admissible. He testified he was trying to contact him at the hospital.

The Court: I'm going to instruct the jury that they're not to take his failure to communicate in any way as evidence against him. This is just

putting together a one, two, three of things.

Mr. Bennett: My objection is overruled?

The Court: Well, I'm giving you part of what you want.

Mr. Bennett: Okay, so it's partially overruled?

The Court: It's partially overruled, yes.

Mr. Bennett: Then I assume a motion for mistrial would also be overruled?

The Court: Yes.

The court then instructed the jury: Folks, the fact that the defendant didn't talk to the officer is not to be taken by you for any purpose against the defendant... (T. III., 63, 64, 65)

When detective Winstead began his interrogation of Mr. Felder, he was flat on his back in a hospital bed being treated for knife wounds and a possible bullet wound to his head. (Defense exhibits 6, 7, 8, 9) Mr. Felder's questioning was by a police detective who saw him as a murder suspect. Mr. Felder was, in effect, placed under an official compulsion to speak. Though incapacitated, even had he been able to leave, he would

have been detained. He was as under arrest as if he had been locked in a police station cell. His silence was post-arrest. His right to be free from compelled self-incrimination under Article 1, section 10 of the Texas Constitution had arisen at the moment his arrest was effectuated. He had an “unqualified right” to remain silent. *Skirlock v State*, 272 S.W. 782 (Tex. Cr. App. 1925); *Sanchez v State*, 707 S.W. 2d 575, 580 (Tex. Crim. App. 1986)

The Due Process Clause of the 5th Amendment to the U.S. Constitution prohibits the State from mentioning a defendant’s decision to remain silent in its case-in-chief. *Malloy v Hogan*, 378 U.S. 1, 84 (1964) This prevents a jury from drawing inferences of guilt for an accused exercising this right.

The standard of review for the trial court’s decision to deny a mistrial to decide if it was “within the zone of reasonable disagreement.” *Griffin v State*, 571 S.W. 3d 404, 416 (Tex. App.—Houston[1st Dist.] 2019, pet. ref’d); *Montgomery v State*, 810 S.W. 2d 372, 391 (Tex. Cr. Crim. App. 1990). In determining whether a trial court abused its discretion by denying a mistrial, three factors are balanced:

(1)The severity of the misconduct (including its prejudicial effect). It is “manifestly wrong” for a prosecutor to ask a question eliciting an answer which will violate an accused’s right to remain silent against him as a circumstance of guilt. *Skirlock*, supra. The prosecutor asking: “Were you ever able to speak to him?” then the detective answering: “I would speak to him; but he wouldn’t speak to me, no,” was manifestly wrong. The jury could take it only as a comment on the defendant’s failure to give some sort of explanation for what happened. George E. Dix and John M. Schmolesky, *Texas Practice Criminal Practice and Procedure* Sec. 45:21 R 1097 (3rd Ed 2011).

(2) The effectiveness of the curative measures taken. The facts of this case—a direct comment on the accused’s right to remain silent, a most serious taint on the trial evidence--suggest the impossibility of withdrawing the impression produced on the minds of the jury. *Hatcher v State*, 65 S.W. 97, 98 (1901) Mr. Felder’s recorded voice saying: “I have been shot,” was published for the jury. (State’s exhibit 2) It was a wounded man speaking. The detective attempting to interrogate Mr. Felder in his hospital bed, saying: “he wouldn’t speak to me, no,” was clearly calculated to rebut what

Mr. Felder had said about being shot and to call attention to his making no denial of the shooting. It was wrong and could only inflame the minds of the jury against him. *Harris v State*, 375 S.W. 2d 310 (Tx. Cr. App.1964)

Impressions made on the minds of the jurors can no more be erased by an instruction than the memory of a curse or a blessing can be torn out and thrust away by an effort of the will. *McIntosh v State*, 85 S.W. 2d 417 (Tx. Cr. App.1919); *Waldo v State*, 746 S.W. 2d 750 (Tx. Cr. App.1988)

(3) The certainty of conviction absent the misconduct. The evidence in this case was anything but overwhelming. Mr. Felder being wounded and immediately hospitalized created reasonable doubt whether he was shot by the deceased. Faced with such ambiguous evidence, the Court itself went so far as to instruct the jury on self-defense, The conviction of Mr. Felder was anything but certain. So the prosecutorial misconduct of commenting on his right to remain silent was extremely harmful. *Verdine v State*, No. 01-18-00884-CR, 2020 WL 1584468 at *9 (Tex. App.—Houston[1st Dist.] April 2, 2020, pet. ref'd); *Hawkins v State*, 135 S.W. 3d 72, 77 (Tex. Crim. App. 2004)

The Court's decision to deny a mistrial was not “within the zone of

reasonable disagreement.” *Griffin v State*, 571 S.W. 3d 404, 416 (Tex. App.—Houston[1st Dist.] 2019, pet. ref’d). The Court made a constitutional error in overruling the defense objection to the prosecutor’s comments regarding Appellant’s right to remain silent then denying his motion for mistrial. The error was not cured by the court’s instruction to the jury. The case should therefore be reversed and remanded.

V.

THE TRIAL COURT ERRED IN FAILING TO INCLUDE A PROPERLY REQUESTED INSTRUCTION OF DEFENSE OF PROPERTY.

The defense of protection of property is defined by Section 9.41 and 9.42 of the Texas Penal Code. It provides that a person in lawful possession of land is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to prevent the other’s trespass to the land. A person is justified in using deadly force against another to protect property (1) if he would be justified in using force against another under Texas Penal Code, Sec. 941; and (2) he reasonably believes the deadly force is immediately necessary to prevent the other’s imminent

commission of criminal mischief during the nighttime; and (3) he reasonably believes that the property cannot be protected by any other means. Texas Penal Code, Sec. 941.

Earlier in the evening a “drunk and crazy” Amy Brown kicked open the door (T. III, 86, 88) and busted out a large window in Mr. Felder’s room. (State’s exhibit 53) (T. III, 90, 91) Just before the 2:15 a.m. shooting, Ms. Brown was “in a closet on the floor. She had knocked down all the clothes that were on like a rack in the closet.”(T. IV, 88)

The defense specifically requested an instruction under 9.41, stating that he was entitled to it and citing the specific instance in evidence of Ms. Brown “ripping clothes,” which raised the issue. (T. V., 108)

The defense stated: “He has a right to use force to stop her from destroying his property. So to prevent and explain the State’s expected argument, I think we’re entitled to that instruction.” (T. V., 108) “The State is going to argue that Mr. Felder was abusing Ms. Brown and causing these other injuries.” (T. V, 109, 110)

The defense request for this instruction encompassed both 9.41 and 9.42., (T. V, 109, 110) but the judge denied it. (T. V, 110, 111)

At 12:15 a.m. Mr. Felder was taking what actions were immediately necessary to prevent Ms. Brown from continuing her commission of criminal mischief. He was in imminent danger and protected his property, himself and the children in the house.

The Court has consistently held that when properly requested, a defendant is entitled to a charge on every defensive theory raised by the evidence.

Smith v State, 676 S.W. 2d 584, 586 (Tex. Cr. App. 1984); *Johnson v State*, 715 S.W. 2d 402, 405 (Tex.App.—Houston [1st Dist.] 1986), *pet. ref'd* in 738 S.W. 2d 287 (Tex. Cr. App. 1987); *Moon v State*, 607 S.W. 2d 569 (Tex. Crim. App. 1980); *Garcia v State*, 605 S.W. 2d 565, 566 (Tex. Cr. App. 1980); *Esparza v State*, 520 S.W. 2d 891, 892 (Tex. Cr. App. 1979).

In determining whether evidence raises the issue of a defensive charge, the Court must consider all of the evidence raised at trial, regardless of the strength of the evidence or whether it is controverted. *Boothe v State*, 679 S.W. 2d 498, 500 (Tex. Crim. App. 1984); *Lerma v State*, 807 S.W. 2d 599, 601 (Tex. App.—Houston [14th Dist.] 1991, no. pet.). This is true regardless of whether such evidence is strong or weak, unimpeached or contradicted,

and regardless of what the trial court may or may not think about the credibility of this evidence. *Warren v State*, 565 S.W. 2d 931, 933-4 (Tex. Cr. App. 1978); *Carter v State*, 515 S.W. 2d 668 (Tex. Cr. App. 1974); *Shaw v State*, 510 S.W. 2d 926 (Tex. Cr. App. 1974). It is well settled that a defendant's testimony alone is sufficient to raise a defensive issue requiring an instruction in the jury charge. *Simpkins v State*, 590 S.W. 2d 129, 132 (Tex. Cr. App. 1979); *Day v State*, 532 S.W. 2d 302, 306 (Tex. Cr. App. 1976); *Warren v State*, supra, at 933-934. This is particularly true when, as is the case here, Appellant made a proper and timely request for such a charge. *Barton v State*, 361S.W. 2d 716 (1962); *Warren v State*, supra, at 934.

Ms. Brown was "in a closet on the floor and had knocked down all the clothes that were on like a rack." (T. IV, 88) This evidence was heard by the jury at trial, unimpeached and in no way contradicted. Regardless of what the trial court may have thought about its strength or credibility, the defense made a proper and timely request for a charge on it which lawfully should have been granted.

Whether Mr. Felder used more force than necessary to defend his property under the circumstances was a fact question for the jury to decide.

Rodriguez v State, 544 S.W. 2d 382 (Tex. Cr. App. 1976). By denying Appellant's request charges on the use of force and deadly force the judge denied the jury the opportunity to decide the issue.

The Court erred in failing to charge correctly the jury and its error caused harm. *Almanza v State*, 686 S.W. 2d 157 (Tex. Cr. App. 1985). If the error was properly preserved at trial *any* harm, regardless of degree, is sufficient to require reversal of the conviction. *Arline v State*, 721 S.W. 2d 348, 352 (Tex. Cr. App. 1984).

Cases involving preserved charging errors will be affirmed only if *no* harm has occurred. *Almanza*, supra at 171, Appellant was harmed under the 4th, 5th, and 8th Amendments of the U.S. Constitution and the Texas Constitution. Appellant requests a reversal of his conviction and that his case be remanded for a new trial.

CONCLUSION

Appellant Clint Vernon Felder respectfully requests that this Court reverse the judgment entered against him on the grounds of the cases and statutes cited; on grounds that the number of errors committed, even if harmless when separately considered, were harmful in their cumulative effect and rendered his trial fundamentally unfair; and because of the State's violations of the 4th, 5th, 6th and 14th Amendments of the United States Constitution as well as of the Texas Constitution.

He asks that his case be remanded to the District Court with instructions to hold a new trial.

CERTIFICATE OF PROOF OF SERVICE AS PER TEX.R.APP.PROC. 9.5

I certify that a true and correct copy of the foregoing Appellant's Brief has been furnished through E-mail to rebecca.klaren@galvestontx.gov at the Office of the Galveston Criminal District Attorney, 600 59th Street, No. 1001, Galveston, Tx 77551, (409) 766-2355 on or before April 28, 2025.

Valid signature as per Tex.R.App.Proc. 9.1(c):

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